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THE SCEPTER OF REASON

Public Discussion and Political Radicalism in the Origins of Constitutionalism

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"In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter of reason"
James Madison, The Federalist, n. 55

"I am sorry [that the Federal Convention] began their deliberations by so abominable a precedent as that of tying up the tongues of their members. Nothing can justify this example but the innocence of their intentions, & the ignorance of the value of public discussions"
Thomas Jefferson, letter to John Adams, 1787

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PREFACE AND ACKNOWLEDGEMENTS

I began to write this book at the University of Chicago, where I had the opportunity to discuss some of the arguments here presented. I owe a special debt to Jon Elster, Abner Greene, Bernard Manin, Adam Przeworski, and Cass Sunstein, who kindly read and commented parts of this work. In addition, I would like to acknowledge the generous support of different institutions. They include the University of Chicago; the David Library of the American Revolution; the Universidad Torcuato Di Tella, de Buenos Aires; the Universidad Pompeu Fabra, de Barcelona; and the University of Oslo. My friends and family helped me with their warm solidarity during all these years of research. My greatest debt is to Carlos Nino, brilliant professor and friend. To his memory I dedicate this book.

INTRODUCTION

It is not unusual that formal and informal discussions about the political system, its virtues, and its many defects, conclude in a discussion about impartiality. In fact, we all discuss impartiality when we talk about the best way to equally consider all viewpoints. We show our concerns with impartiality when, facing a particular problem, we try to figure out the best solution for all of us, given our conflicting interests. Thus, the quest for impartiality tends to be a common objective for most of us, although we normally disagree on its particular contents.

Generally, these formal and informal discussions about impartiality conclude in a dispute between different "epistemic" conceptions. That is to say, simply, that in these situations we begin to disagree about best procedure to define the more neutral, impartial solution for all of us.[1] Basically, trying to answer this question we tend to fluctuate between two opposite positions. According to some, the best way to know which is the more impartial solution is to resort to a process of collective reflection: in those situations we have to consider the opinions of all those who are possibly affected. If we did not proceed in this way, they affirm, we would run the enormous risk of losing neutrality, basically, by misunderstanding or directly ignoring certain viewpoints. However, according to others, the process of collective reflection is highly inadequate method for finding the most impartial solution in a specific case. As an alternative procedure they suggest, for example, allowing the more experienced, talented, or insightful people to decide, in the name of the rest, the right solution for all.

In this work, I will explore the evolution of this debate (a debate between a radical and a conservative tradition), in modern Anglo-American history. In particular, I will analyze how the latter tradition became dominant, and the specific institutional arrangements defended by the representatives of this conservative view. In this sense, I will be interested in showing that these institutions were modeled under a strong bias against collective discussion, a bias that I will suggest still tends to affect present institutional designs.

CONSERVATISM AND ELITISM

Frequently, those who oppose the idea of having a "collective debate" for achieving impartiality justify their position through one (or both) of these two arguments: i) an elitist argument according to which only a few -say, the "enlightened few"- have the necessary intellectual capacities for discerning what is right; or ii) a not-necessarily

[1] In this work I will use the ideas of "impartial," "just," "adequate," "neutral," "right," or "best" solution as synonyms.

elitist argument according to which a collective process does not provide the minimum reasonable conditions for deciding what is right (e.g., because of the confusion, excitement, or disorder, that would tend to characterize public assemblies and make a "sedate reflection" impossible or simply due to the dominant role that manipulators would tend to play within these contexts).

John Locke, who was always interested in questions of institutional design, is a good example of those who favored the isolated reflection of a few people as a way of recognizing what was best for all. In his "First Treatise of Government," he demonstrated a clear epistemic view: first, he maintained that there existed certain "moral truths," attained by reason but also, second, he suggested that not all men were equally able to recognize these truths. Not surprisingly, both of these assumptions achieved enormous influence, not only in England, but also in the United States when the respective political elite began to think about how to reorganize the political system.

Edmund Burke -a politician and a theorist who also exercised great influence in the Anglo-American world, showed his epistemic view unambiguously. Burke is an even clearer example than Locke of the rejection of collective deliberation as a result of a profound distrust in the majorities' epistemic capacities. Assuming that all political and moral questions had "right answers," Burke affirmed that only the most distinguished people, the "virtuous few," were able to recognize the proper content of these right answers. The common people were instead likely to misunderstand their real interests: "the will of the many, and their interests must very often differ." That was how he justified a strong government, concentrated in the hands of the (so-called) best characters of the country, that would be exercised with as much independence as possible from the will of the majority.

Another method of preventing majority intervention in local or national political debates was through the idea that most people, because of their lack of property, had no commitment to the "permanent interests" of the community. This argument made it possible to avoid more explicit affirmations about the people's poor intellectual capacity -their epistemic inability- although its political implications were as extreme if not more so than in the former case. The idea of the "permanent interests" of the community was used in the famous "Putney Debates," during the 17th Century, where conservative military officers tried to answer the challenge of a small but influential radical group (a group that was linked to the organization of the so-called Levelers). Later on, William Blackstone would resort to similar arguments to assess that the non-property-owner had no "will of their own" for making autonomous decisions. The idea was that a person without property had a "purchasable will." He affirmed, in this sense, that the political system should secure that "one will give his

vote freely, and without influence of any kind."[2]

In the United States, during the Framing period, some influential politicians like Alexander Hamilton, followed John Locke's assumptions about the existence of certain "primary truths," and the inability of the majority to recognise the content of these truths. Usually, the idea was that a person or a group could have problems distinguishing the primary truths because of defects such as passions and prejudices, two problems which, as we will see, were normally associated with majoritarian deliberations.[3] Likewise, during the Federal Convention, many people defended Burkean-type elitist arguments. For example, they distinguished among people according to their social condition, and associated wealth with a greater intellectual capacity.[4] Some of their assumptions, in this respect, were explicitly formulated in their defense of the Senate, although they also appeared in other situations. Typically, the Framers[5] viewed the Senate as the institution that would make it possible to associate "wealth and abilities,"[6] "an absolute aristocracy, representing large property combined with distinguished talents."[7] With these types of beliefs in mind, the Framers objected to the possibility of having collective debates, assuming that the majoritarian participation in these debates would impair rather than enrich the final decisions. As a serious institutional derivation of this principle, some Framers proposed strict property qualifications as a precondition for having political rights. By doing this, they directly continued the old conservative British tradition that referred to the people as lacking "a will of their own." Ultimately, this dire conservative proposal was rejected in the Federal Convention, although -as we will see- the assumptions that gave ground to that proposal maintained their force and influence throughout all of the debates.

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[2] He also added that "since [it] can hardly be expected in persons of indigent fortunes, or such as are under the immediate domination of others, (whose suffrages therefore are not so properly their own, as those of their superiors, on whom they depend;) all popular states have therefore been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded from voting," Blackstone (1844).

[3] In The Federalist n. 31, Hamilton wrote that "[i]n disquisitions of every kind, there are certain primary truths, or first principles, upon which all subsequent reasoning must depend. These contain an internal evidence, which, antecedent to all reflection or combination, commands the assent of the mind. Where it produces not this effect, it must proceed either from some disorder in the organ of perception, or from the influence of some strange interest, or passion, or prejudice."

[4] See Wood (1969).

[5] In this work, I will use the idea of the "Framers" or the "Founding Fathers" to refer, basically, to the creators or main defenders of the North American Constitution. Sometimes I will be more specific and distinguish between the "Federalists" and the "Antifederalists." The Federalist group will represent those who signed the Constitution, and the Antifederalists those who refused to sign the Constitution. Later on, I will make some additional clarifications with regard to the Antifederalists, in particular, because people with completely opposite basic ideass are normally included within this group (as if they shared the same assumptions).

[6] According to the delegate Mercer, in Farrand (1937), vol. 2, pp. 284-5.

[7] According to Governour Morris. ibid., vol. 3, p. 416.

Other representatives among the so-called Founding Fathers adopted a different position in their criticisms against collective deliberation. It is not clear whether they did so solely as a result of deep political conviction, or merely as an attempt to avoid additional popular resistance against the Constitution. In any case, their criticisms were not openly elitist, but apparently grounded in a different basis. Mainly, they asserted that the prevailing social conditions in local communities made the option of sedate reflection impossible. First, within this context the people tended to defend only local and partial interests, and pay no attention to the needs of the nation. Also most members of the community tended to behave myopically, focusing their attention just on immediate, short run advantages: what seemed to dominate the debates, in most cases, were the urgent needs of every day life. In this sense -the Framers affirmed- the irresponsible clamor of demagogues -and not the best reasons- tended to become controlling. In addition, the massive meetings that were usually organized by the different local communities, for example, the famous "town meetings," seemed to leave no room for a reasoned discussion. There the people tend to exclude those who have different views, and to make "hasty" decisions with a strenuous unanimity. According to these Framers, massive meetings were promptly transformed into "factious" meetings every time that a significant state interest was at stake.

The Framers' combined their skeptical view of the capacities of collective bodies, with more confident views regarding the virtues of isolated, monological reflection. One clear statement of this conception was advanced by Hamilton in the Federalist n. 76, where he defended the Executive's capacities by saying that this single person would not be distracted by the "diversity of views, feelings and interests" that tend to distract collective bodies. That is, Hamilton recognized this diversity of viewpoints not as a possibility for improving the final decision, but as a threat to its required virtue.

In the end, the Framers' negative view of the collective experiences that were taking place in their country was transformed into a more rigorous opinion. In fact, I would suggest that from their personal experiences the Framers inferred a more complete theory about human behavior and, in particular, about the behavior of "the majorities." The idea, as it was formulated, said, "**in all very numerous assemblies, of whatever character composed, passion never fails to wrest the scepter of reason.**"[8] This strong epistemic claim was particularly well formulated and defended by James Madison, and transformed into a powerful ideological device against collective deliberation. As he wrote

> in democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their magistrates, tyranny may well be

[8] According to Madison. ibid., vol. 1, pp. 134-135, emphasis mine.

apprehended on some favorable emergency, to start up in the same quarter.[9]

Madison made recurrent use of these epistemic claims in order to reject the claims of some opponents of the Constitution and to support some of the specific devices incorporated into the document. In particular, Madison developed his theoretical view through his political and intellectual crusade against "factions." Following him, albeit more loosely or less coherently, most other members of the Federal Convention began to formulate similar views.

The aforementioned epistemic view that favored a monological reflection and considered that collective debates constituted a very inadequate process for recognizing or defining impartial solutions, distinguishes what I will name a "conservative tradition." This tradition, as we have seen, contained a more elitist faction, which claimed that only a few, naturally privileged people could recognize what is right, and a non (at least not necessarily) elitist faction.

As we will see, during the North American Framing period the conservative tradition managed to succeed and advance its own view, which was finally incorporated into the institutional design that was shaped by the 1786 Constitution. Through this document, in particular, we may come to recognize some of the institutional implications of the conservative view. Among those that I will examine, are the following: i) a specific defense of the representative system, according to which representation was promoted not as a mere "necessary evil," but as a desired option to "refine" and improve the will of the majority; ii) a system of "checks and balances," mainly designed to restrict the "more democratic" branch of the Legislature, under the assumption that it constituted the source of most political evils; iii) a deliberate attempt to provide the representatives with as much autonomy as possible, meant to isolate the political class from the claims of the electors; iv) an -also conscious- attempt to discourage massive assemblies, town meetings, and other open forums where the public tended to express their opinions collectively.

RADICALISM

To explain the growth and development of the conservative tradition it is convenient to first examine an opposing tradition, which I will call a "radical" epistemic view, according to which impartiality required, as a necessary previous condition, actually consulting the viewpoints of all those possibly affected. A radical, in my opinion, is not necessarily committed to the idea that the only way to achieve impartial decisions is through a process of collective reflection. However, in this case, the process of collective reflection does represent a particularly appropriate way for adopting

[9] Madison, in The Federalist, n. 48.

impartial decisions.

These very basic beliefs alone show us the profound distance that separated the radical epistemic view from the alternative conceptions that we examined before. First and foremost, by defending their position, the radicals rejected the elitist view that linked impartial decisions with those of a particular group of wise or privileged people. In the same way, the radical position implied a challenge to the conservative belief that any process of collective reflection could not be trusted to achieve impartial solutions. Although I will make some references to these questions, in what follows I will not be especially interested in the radicals' ontological assumptions: some of them believed or seemed to believe in the existence of certain general "moral truths," and others did not. However, in general, the point is that they tended to recognize that any society should collectively discuss and decide how to organize itself, what institutions to choose, and how to treat its members. These types of basic social decisions should not be left to the authority of traditions, to the authority of any king, or to the opinions of a particular group of wise men or experts. These decisions had to be left in the hands of the people at large. Their confidence in "the people" was such that they tended to believe that the more just or impartial political systems were those that allowed and encouraged greater popular intervention in the decision-making process.

This broad radical conception is justifiable, especially in terms of our need for information, which is satisfied through the suggested process of consulting "all those potentially affected." In a society commited to the principle of impartiality, the idea of consulting "all those affected" may be important in order to know the particular needs and difficulties faced by the people. Second - a radical would suggest- when facing a particular problem, we need to consult those potentially affected, in order to define what will be our most adequate answers. Obviously, if no one is seriously hurt or affected by this problem, we may not have any reason to devote our energies to solving the difficulty at stake. Similarly, if only a small portion of the population is being seriously affected, we may orient our resources, above all, to help them before any other action is taken. If we did not carry out this consultation -someone could reasonably say- we could miss some essential information. For example (one that was enormously important during early North American history), a radical would suggest that, if we want to evaluate whether the emission of paper money constitutes a reasonable and just decision, we need to ask to all those potentially affected by this decision. In particular, the creditors and the debtors should be consulted, and then the decision made according to the majority opinion. If, in this example, we did not consult the opinion of the debtors, then we would have enormous problems recognizing their needs and values.

Moreover, we need to consult the potentially affected to recognize certain possible solutions that, without consulting them, we could overlook. In addition, once we have defined a certain proposal to solve the problem at stake, we need to openly

discuss its value. Clearly, again, the specific proposal may be based on erroneous assumptions or inadequate information. We may think, for example, that most people share our view, when this is not true; or we may assume that our proposal favors most people, negatively affects them; or we may believe that this is the best proposal, given our mistaken assumptions about what the others prefer. That is, it may happen regularly that we ignore or misunderstand certain basic information with regard to others' opinions. Finally, to consult all of the potentially affected may have an additional positive consequence, which I will call its "motivational" implication. The idea is the following: even if we knew perfectly the preferences of the others, we may have no motivation to take these preferences into account. In this sense, consulting all of the affected may help impartiality by forcing us to attend or respond to other people's claims. The "others" will be "there" to defend their position, and to push us to respect them.

The aforementioned criteria do not imply that it is impossible to "put oneself in the place of others." What I am trying to say is that even when we are well motivated with respect to the others' interests, we may have (and actually, we usually have) difficulties knowing, interpreting, judging, and defending certain interests that are not our own. These problems, then, may jeopardize the whole enterprise of impartiality.

Similarly, the criteria mentioned above do not necessarily imply that one is "the best judge" of his or her own interests, as John Mill affirmed. Clearly, we all need others' opinions, even in personal or private matters, to have a better chance to understand, clarify, and properly balance our interests. However, it seems also clear that we normally are in an absolutely unique position to recognize the immense diversity of factors that ultimately define our views: who else is going to know as much as about our memories and previous experiences, about our inner feelings and ingrained principles, and also about the amount of weight that we give to them? Because of these factors, it seems unreasonable to leave the final decision about abortion to just a small group of men, even if these men are well disposed to put themselves in women's place. In the same way, we can say that to properly understand the interests at stake the decision about whether or not to permit a Nazi demonstration in a Jewish neighborhood requires us to consult all those who could be affected in this particular case. This process of consultation, of course, does not solve all of our initial problems. However, it may decisively reduce our chances of not adequately respecting all the viewpoints at stake.

In addition, the radical epistemic view that I am presenting here does not imply that the only way to achieve impartial decisions is through collective reflection. We may recognize that sometimes, through our individual reflection, we may arrive at the same conclusions as a collective body after a fair and well-informed debate. Here, I

am simply affirming that, according to this radical view, collective discussion improves our chances to decide impartially. Collective discussion, thus, should not be seen as the exclusive means for deciding impartially, but only as the best guarantee for securing that aim.

In order to examine the radical tradition in this work, I will first analyze some of its earlier roots within the English context. There, a significant group of political activists and intellectuals established the grounds for a different epistemic conception based on the idea that all people were born equal. The idea of a basic equality was adopted as a fundamental principle of natural law, and used as a tool against the conservative defense of restricted political rights. In the so-called "Putney Debates" of 1647, members of the radical group, the "Levelers," had the opportunity to present these ideas against the conservative leaders of the Army. During the following century, better organized and more active radical groups, like the "Society of the Supporters of the Bill of Rights," the "Constitutional Society," or the "Rational Dissenters," defended this alternative epistemic conception in a more articulated way. Typically, they rejected the belief that the common people were subject to irrationalities, or that the "select few" were the only ones capable of making right decisions. Contrary to the conservative creed, the radicals shared the assumption that people had a capacity for reason. Similarly, and based on these grounds, the radicals demanded an immediate extension of political rights. In a statement that Thomas Jefferson would later quote, Joseph Priestley, a member of the "Radical Dissenters," stated that if people chose improper representatives, they would then "learn by experience to make a better choice on a future occasion."[10] Another "Radical Dissenter," Richard Price, adopted the idea of natural intellectual equality for defending a strong principle of "self government." The principle of self-government acquired enormous importance during that time as a way to counteract an opposing principle, defended by most conservatives and by Edmund Burke: the principle of the primacy of traditions.

One of the radicals who wrote extensively about the idea that all were endowed with similar capacities was Thomas Paine. Adopting what I will call a "radical epistemic position," Paine defended the idea that any person could recognize the fundamental truths. During his life, Paine became the main intellectual challenge to the conservative view, by then represented by Edmund Burke. Against the latter, he ratified Price's defense of self-government, objected to the value of traditions, and attacked the institution of hereditary succession. In this sense, he affirmed that it was "impossible to make wisdom hereditary," and that there did not exist a "monopoly of wisdom." In his famous book "Common Sense," he also defended the common people's natural wisdom, opposing the supposition that the king could be "wiser" than the rest of the humans. He affirmed: "[T]he kings were totally ignorant of the world

[10] Priestley (1791), p. 255.

they governed."[11] Paine's institutional advice was coherent with these criteria, and always based on the idea that people were born equal, and were equally endowed with reason. For example, while the conservatives defended the idea of a mixed Constitution, aimed at empowering the different classes or "social orders," Paine fought for a simpler Constitution, which ignored the aforementioned orders: given that the people are equal, he affirmed, these distinctions among different interests were totally inadequate.[12] Also, he suggested the adoption of institutional mechanisms that always gave the people or their direct representatives the "last say."

Curiously, Thomas Paine and other radical activists had much less success in their own country, England, than in the U.S. In effect, the North American people were anxious to listen to the radicals' criticisms against the British government and its representative system in general. For example, Thomas Jefferson, always in close contact with Thomas Paine, adopted some of these radical ideas. In particular, he defended the belief that each person was, by nature, endowed with reason. In fact, he directly incorporated this principle into the U.S. Declaration of Independence. The idea of a basic general equality seemed fundamental for people like Jefferson, and came to constitute the main basis of his epistemic view. According to him, these general equal capacities implied that, if a representative had to withdraw from his position, "many others entirely equal [will be ready] to fill his place with as good abilities." These conditions -he thought- would make it possible to have "a government by its citizens in mass, acting directly and personally, according to the rules established by the majority."[13] It is worth noting that the radicals' belief in equal capacities came to also imply a strong confidence in the virtue of collective bodies. That is, the very profound distrust showed by the conservatives to numerous assemblies was turned upside down in the radical conception. Clearly, the radicals recognized and confronted the conservative view. As Jefferson put it: "in general, I believe that the decisions of the people, in a body, will be more honest and disinterested than those of the wealthy men."[14]

The radicals' epistemic view was also incorporated in some of the so-called early radical Constitutions of 1776, in the U.S. A typical example, in this respect, was the Constitution of Pennsylvania which, surprisingly, was written under Thomas Paine's scrutiny. In these radical Constitutions we find, in general, a defense of massive local meetings, and a commitment to a strong majoritarian principle, which normally implied the rejection of the idea of checks and balances. These Constitutions

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[11] See, for example, Claeys (1989), p. 43.

[12] In this respect, he affirmed that the English "balanced" Constitution included the "remains of two ancient tyrannies the remains of monarchical tyranny in the person of the King [and t]he remains of aristocratical tyranny in the persons of the Peers." See Paine (1989), p. 6.

[13] See Thomas Jefferson, "Jefferson to John Taylor," May 28th, 1816, Jefferson (1984), p. 1392.

[14] "Jefferson to Edmund Pendleton," ibid., August 26, 1776, p. 752.

also included, in most cases, a restrictive view of representation, with implied short mandates, mandatory rotation, the right to instruct and recall the representatives, etc.

In the Federal Convention, as we will see, the radical view was basically absent. Very exceptionally, some Antifederalists tried to fortify their opposition to the Constitution using some radical arguments. For example, Mason's objections to the entire Federalist view on representation, stating that the delegates of the people, in the future government "ought to mix with the people, think as they think, feel as they feel, [they] ought to be perfectly amenable to them, and thoroughly acquainted with their interest and conditions."[15]

POPULISM

The previously mentioned radical Constitutions were, in part, the product of a radical way of thinking and, among other things, they helped to promote what I will call a "populist" political practice and a "populist" political conception. Although it is not always easy to clearly distinguish a "radical" from a "populist" position, I will try to separate these two views. The populist view, as I will characterize it, may be seen as a particular and more extreme version of radicalism. According to this view, the majoritarian expression does not simply contribute to our recognition of what is impartial, but actually constitutes the only possible way to recognize impartial solutions. Normally, this populist epistemic view comes with a stronger ontological conception that says that the collective debate directly defines what is impartial. Thus, by consulting the majority opinion we would satisfy the necessary and sufficient conditions for establishing what is impartial.

According to the populists, every time that we face a political problem, we need to resort to the will of the majority if we want to solve this conflict adequately. The only way to determine the right and indisputable solution for our political problems is to appeal to the "voice of the people." Although I will not dedicate time to his position in this paper, I should say that probably the clearest example of the type of populism I am referring to was that of Jean Jacques Rousseau. For him, typically, a correct decision was the one decided by the "general will." Clearly, Rousseau did not identify the general will with the will of all: each majority decision may be opposed by some. However, according to him, what actually explained those disagreements were the mistakes or misunderstandings of certain minorities.

Adopting a typical populist position, Rousseau appeared to defend the idea

[15] G. Mason, "Speech in Virginia Ratifying Convention," June 4, 1788. A similar idea was expressed in his speech of May 31st, where he stated that the House of Commons "ought to know & sympathize with every part of the community." Farrand (1937), vol. 1, p. 48. Mason reaffirmed these principles on June 6th at the Federal Convention. ibid., vol. 1, pp. 133-134. See, also, Mee (1987); Collier and Collier (1986).

that the individuals' will was pre-determined. Supposedly, individuals had nothing to discuss between and nothing to learn from the other. Because of these assumptions, Rousseau considered attempts to change the others' positions as mere rhetorical exercises. Moreover, he affirmed that those groups that tried to persuade the others' about the validity of their own viewpoint were, in a certain way, "corrupting" the general will: "if the general will is to be able to express itself...there should be no partial society within the State, and...each citizen should think only his own thoughts."[16] As Bernard Manin stated, the citizens in the Rousseaunian republic did not deliberate even amongst themselves. In the collective process of the "general will" formation depicted by Rousseau, the idea of deliberation is equated with that of decision, and communication between different citizens is rigorously excluded.[17]

The problems of the populist position are many. We may begin with our common sense intuition that tells us that majorities many times fail in their judgments: sometimes because of a lack of time, sometimes because of the presence of wrong information or the absence of crucial data. Quite simply, majorities are not infallible. The idea, more precisely, is that the opinion of the whole citizenry may constitute a necessary, but still insufficient condition for achieving impartiality, in spite of what the populists tend to assume. Also, as a practical matter, the situation of minority groups seems to be particularly worrisome within a populist scheme. There, their opinions are not only disadvantaged, but also considered wrong. What reasons would a member of the majority have to pay attention to what the minority says? What reasons would they have to respect the rights of the minorities? To end this brief analysis I will mention an obvious logical problem that also appears to affect the populist position. The problem emerges from the fact that in a populist society, what was directly wrong in a certain moment, may become absolutely right later, if the then minority group became a majority. This amazing fact casts some additional doubts on the coherence and plausibility of the populist view.

In spite of the theoretical problems that seem to affect the populist view, in modern history we may find some examples of the attraction exercised by this epistemic conception, and also of its institutional implications. Typically, many among the revolutionaries in France seemed to assume Rousseaunian ideas in their defense of particular political devices. First of all, the revolutionaries tended to accept that the source of all power was in the citizenry, and that all the citizens had the right to participate in the formation of the law. As the deputy Jerome Petion de Villeneuve affirmed, to achieve the maximum degree of political perfection it was necessary to directly consult the preferences of the people, every time it was possible. To oppose

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[16]He added that "when factions arise, and partial associations are formed at the expense of the great association, the will of each of these associations becomes general in relation to its members, while it remains particular in relation to the State." See, Jean Jacques Rousseau (1947), chap. 3, p. 23.

[17] Manin (1987), pp. 338-368.

this possibility -he said- would constitute a "crime." This very belief turned the conservatives' assumption on its head. According to the latter, the representative system was seen as a necessary device for improving the majoritarian will. According to the former, the representative system instead constituted, in the best scenario, a necessary evil acceptable only because of the difficulties of other alternatives. Thus, the populists recommended resorting directly to the people at large, every time this was possible.

Second, the "populists" tended to reject any type of restrictions on the people's will. Thus, they normally defended systems of "strict separation of power," and not of "checks and balances." To accept a division within the Legislative branch, for example, would imply dividing, and thus frustrating the "general will." Also, to accept other types of checks (e.g., to accept the possibility that a particular branch of power could object to the decisions of a different branch), would imply accepting undue intrusions on the law making process. In coherence with these assumptions, the three first constitutional models that were advanced in France, right after the revolution, secured the strictest separation of powers and a dominant role for the National Assembly. With slight differences these initiatives were included in the Constitutions of 1791, 1793, and 1795. In the first of these documents, which was also the last remaining one of the previous regime, the Executive was still allowed a Executive veto over the Legislature. Strongly criticized by influential activists like E. Sieyes, the Executive veto disappeared by the Constitution of 1793. This latter document, followed by the dramatic period of political "Terror," was replaced in 1795 by a new Constitution, slightly more open to the possibility of including certain institutional restraints, but still basically committed to the same general principles that modeled the previous Constitutions.[18]

Additionally, and following these criteria, many populists tended to look at the Judiciary as the most significant menace to the majority will. In this sense, for example, an early report presented by the deputy Bergasse, in 1789, affirmed that the Judiciary should not be allowed even to interpret the law. Soon after his presentation, the French created the institution of the "referee legislatif" -promptly incorporated in the Constitution of 1791- designed to obligate the Judge to resort to the Legislature every time that he found a difficulty in the interpretation of the law.

Similarly, in the United States, many political activists seemed to follow certain populist criteria. Normally, they approached populism by adopting Rousseaunian ideas, and/or by following the principles and institutional suggestions that came from the British radicals. They usually resorted to both the Rousseaunian

[18] This Constitution included, for example, a division of the Legislature into two Chambers: the Chamber of the Ancients, and the Chamber of "the Five Hundred." The members of each of these Chambers were only different, in the end, with regard to their age, but not with regard to their social origins, as it was attempted in the U.S.

attacks on the representative system and to the British radicals' principle of self-government. That these ideas in favor of (what we could call) pure direct democracy found fertile ground in the U.S. was not surprising, after a period in which the entire country opposed the English representative system, in which the will of the Americans was misrepresented. One way to summarize the North American radicals' view is through their common idea according to which "the people's voice" was equated to "the voice of God." The assumption of these types of beliefs, during a period of economic crisis and profound social distress resulted in an explosive combination. In this respect, I will analyze the populists' behavior through two types of conflicts that would come to distinguish the crucial post-Independence and pre-Constitutional period.

The first type of conflict took the form of popular rebellions. The most significant among these rebellions were the ones led first by Samuel Ely first and later by Luke Day in Northampton, and also the one led by Daniel Shays. These popular rebellions dramatically signaled the people's distrust of the dominant political class, the way the latter as handling the economic crisis, and the "debt" problem, in particular. The popular movements achieved a notable effect, during that time, as is shown in the thousands of letters and articles in the newspapers.

In this work, however, I will not focus so much on the popular turmoils just mentioned but, instead, I will pay more attention to a different type of conflict, also typical during the analyzed period. I am referring to (what we might call) the institutional rebellions that followed the popular uprisings. In effect, the legislatures, in many different states, decided to satisfy the claims of the affected majority, enacting the (debt) laws that they were claiming. These laws were first and promptly approved in Pennsylvania, but immediately after in many other states: North and South Carolina, Georgia, New York, New Jersey, Rhode Island. If these laws were sanctioned, it was - at least, in many cases- partly the result of an institutional framework that allowed a very close relationship between the representatives and their constituency. Not surprisingly, the first state in promoting these laws was Pennsylvania, a state that was particularly distinguished by its radical Constitution.

THE FEDERAL CONVENTION AND THE U.S. CONSTITUTION

If the main national political leaders were already concerned with popular rebellions, they became even more so after the severe legislative measures that occurred in the 1780s (such as paper money emissions and other laws favoring the majority debtor group). Through these recently enacted laws the majority was obtaining its preferred outcome not through illicit acts but through perfectly legal and legitimate means. It is worth noting that these fundamental historical events took place right before the Federal Convention, that is to say, in one of the most significant periods of North

American history. This means that an important part of the political class took part in the U.S. Constitutional debates with a dramatic picture of what the idea of the "will of the majority" implied. According to this picture, nothing seemed worse than having an institutional system overtly dependent on the people. The people seemed uncontrolled, passionate, and very easy to manipulate: what could be expected from them? What would be the result of an institutional system that merely tended to reproduce the peoples' desires? Not surprisingly, then, most of the members of the Federal Convention began to share a profound counter-majoritarian bias, which came to distinguish their basic epistemic view.[19]

The Framers' epistemic view, as we will analyze, may be described as a view rooted in the English conservative tradition, and modeled and developed (at least partly) in reaction to the populist experiments that according to the Framers were taking place in most North American states were driving the country to its ruin). The Framers view became distinguished, thus, by a profound distrust of collective deliberations and their institutional expression: the deliberations of the representatives within the most democratic branch of government, the Legislative. This counter-majoritarian bias was clearly linked with another assumption according to which the individual, isolated, through monological reflection, provided the best guarantees for achieving appropriate, impartial decisions.

These epistemic assumptions were visible almost every time that the Framers of the U.S. Constitution defended a particular institutional tool. As a good example of this view, in the Federalist n. 76 Hamilton defended the Executive's capacity to appoint public officers by stating the following: "I proceed to lay it down as a rule, that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal, or perhaps even of superior discernment." In the Federalist Papers n. 70 and n. 76, Hamilton completed this idea by comparing the epistemic virtues of individual, independent reflection with the usual epistemic problems that distinguished the deliberations of collective bodies. In this sense, for example, he stated that the single Executive would not be distracted by the "diversity of views, feelings and interests" which, in his opinion, used to affect the adequate functioning of large assemblies, in general, and the Legislative, in particular. As Madison put it, in the Federalist n. 58, the Framers took as a rule the idea that "the more numerous any assembly may be the greater is known to be the ascendancy of passion over reason the larger the number, the greater the proportion of members of

[19] In fact, it is sometimes said that at least a certain portion of the Convention's members, those who refused to sign the proposed Constitution (the so-called Antifederalists) opposed the majority of the members of the Convention on quite radical grounds (e.g., claiming a more decentralized government, more direct democracy, etc.). However, the truth is that even the Antifederalists -at least, those who participated in the Federal Convention- shared a completely identical epistemic view with the defenders of the Constitution, based on a profound distrust of democracy and the people's collective capacities, and a clear confidence in the individual, isolated reflection of a selected group.

limited information and of weak capacities." That is, the Framers defended an epistemic view that turned the radicals' epistemic view upside down.

Clearly, to illustrate this counter-majoritarian bias we do not need to limit ourselves to the examples mentioned. As we will see, it is possible to find hundreds of additional illustrations by reading the records of the Federal Convention or the Federalist Papers. It is advisable, in this sense, to read how the Framers justified most of the institutional solutions adopted: the Senate, the Judiciary, indirect elections, large districts, lengthy terms, etc. Also, it may be interesting to examine not only the arguments that the Framers presented, in defense of particular institutions, but also the arguments that they offered, for objecting to the radicals' preferred solutions: town meetings, a decentralized government, a dominant Legislative power, mandatory rotation in public offices, a right to recall the representatives, etc.

A FEW FINAL OBSERVATIONS

The subject of the following pages is only partially linked with constitutional history. Clearly, I admit the importance of revising a fundamental historical period, and in so doing, trying to clarify certain positions: historical facts are usually taken into account to justify present decisions, both by the political branches of government and by the Judiciary. However, the main purpose of this work will be to contribute to our present reflections on constitutional issues and questions of institutional design by examining the philosophical foundations of the representative system.

By examining some of the foundations of the representative system I am not assuming that we are somehow "trapped" by a certain institutional framework. Obviously, we may reform this framework, and we may even try to develop it independently from its roots and the specific justifications that creaed. However, in the same way that the belief in a certain "institutional paralysis" seems unreasonable, it also seems unreasonable not to recognize the profound influence of the discussions and achievements of the Framing period in the development of our present ideas, institutions, and in our possibilities of reforming them. Usually, if we want to explain the enormous "distance" that we tend to recognize (I will assume this claim) between the representatives and the constituency, we should not merely refer to (say) a particularly "corrupt" class of representatives: we need to recognize that the institutional system was explicitly oriented to foster the autonomy of the representatives, to make them independent from the citizenry. Another, and probably clearer, example of this situation is that of judicial review. The U.S. Constitution did not include, at least explicitly, the institution of judicial review. Actually, judicial review came to be recognized a century after the approval of the document. However, this particular -and extraordinary- institutional development was completely coherent within the U.S. institutional framework: the whole framework was prepared to receive

this institution. To state this, again, does not imply that the North Americans could not opt (or will not be able to opt in the future) for a different system in order to control the validity of the laws. However, what is clear is that the existent institutional system fostered certain changes and made the adoption of other reforms more difficult.[20]

A final note with regard to potential reforms to the present institutional system. Maybe curiously, maybe not so much, some of the most important challenges to the present political organization seem to be rooted in the populist tradition. This fact is -I would suggest- particularly disappointing, not only because of the strength of these forces, but also because of the way in which these ideas impair other -I would suggest- more reasonable institutional reforms. In all the cases I am thinking, the populist claims represent a "blind" attack against the whole representative system, made without direction, under undesirable assumptions, and "in the name of the majority." Always, what these proposals lack is not only a clear orientation but, most of all, a reasonable and indispensable confidence in the virtues of an open and public discussion. As a response to the described situation, this work is based on a belief in the value of public discussion, and tries to make a contribution in its favor.

THE STRUCTURE OF THE ARGUMENT

Herein, I will study the evolution and institutional impact of the conservative "bias" against collective deliberation in the following way. First of all, I will examine the development of a dispute between the aforementioned conservative and radical traditions in England. As I said, the conservative tradition normally considered that, in order to favor the adoption of impartial political decisions, the institutional system had to secure the autonomous and isolated reflection of certain particular individuals or small groups. The radical tradition, on the contrary, normally affirmed that impartially was best secured through a process of collective reflection. The British radicals, organized through a multiplicity of associations (e.g., the society of the "Radical Dissenters," the "Society of the Supporters of the Bill of Rights," the "Constitutional Society," etc.), defended this ideal and also pursued its main institutional consequences: a broader extension of political rights; more direct intervention of the people in politics; strict ways to secure the responsibility of the political leaders; etc.

I will illustrate this debate by presenting the direct and indirect debates held between the conservative Edmund Burke and the radical Thomas Paine, regarding political institutions and their philosophical foundations.

Next, I will explore the continuity of this dispute between radical and conservative ideas in the North American context, during a very peculiar period: the

[20] For example, the practice of judicial review was accepted in France, but only very recently and after extremely arduous efforts: their institutional system, in a certain way, was not clearly prepared for receiving this institution.

period from the Independence Revolution to the Federal (Constitutional) Convention. To proceed with my study, I will first analyze the evolution of the radical tradition in the U.S. As we will see, the evolution of this tradition was rather "natural," within the American context. In effect, during the disputes between the Americans and the British ruling class, one of the main claims presented by the North-Americans was "radical" in its very essence: the North-Americans affirmed that the British Parliament was unable to secure impartiality with regard to the Americans, because the former did not actually consult and weigh the viewpoints of the Americans. This radical belief was then encouraged during the war of Independence by the very dynamic of the revolutionary process, and also by the main leaders of the war in most of their speeches and writings. In addition, some British radicals, politically unsuccessful in their countries and unsatisfied with their own government, moved to the U.S., and contributed to the promotion of radical ideas there. Within this context, the British radical ideas found the conditions they required to evolve and to achieve a significant institutional impact.

To study North American radicalism, I will focus my attention on two main events, crucial in the history of this conception. First, I will study the immediate post-revolutionary period, distinguished by strong local governments and, in some cases, by the curious and attractive phenomenon of "town meetings." I will illustrate this period, in particular, analyzing the political evolution of the state of Pennsylvania. This case is especially interesting for different reasons. For instance, the "radical" politics they developed were, at least in part, influenced by the British radical Thomas Paine. Also, the example of Pennsylvania was significant given its decisive role in triggering a period of "radical Constitutionalism" in various states throughout the U.S.

In the second place, I will study the history of the radicals in North America by examining the critical pre-Constitutional period. During that time, the political and economic crisis that had exploded after Independence reached its highest point. Within the context of this crisis, as we will see, many radical activists became politically successful, and many radical demands were implemented.

After this presentation of the history and the main ideas of the radicals in the U.S., I will explore the evolution of the conservative reaction against its opposing tradition. I will proceed in this way because the development of conservative principles in the U.S. cannot be properly understood without the previous understanding of the development of radical principles. As I will show, most of the general principles, and the specific institutional model defended by the conservatives in North America were directly shaped by the conservatives debate with their intellectual enemies. In particular, the conservatives were affected by the populist elements that they perceived as essentially connected with the political experiments that the radicals were developing.

Thus, I will expose how the evolution of this confrontation with the radicals theories and the radical "political practice" lead some conservatives to defend a very peculiar notion of "factions," and to suggest an institutional design distinguished by the idea of "checks and balances," and the lack of incentive for (what I will call) public deliberation. In this sense, my main interest will be to expose the absolute dominance of these conservative ideas within the U.S. Federal Convention and their clear institutional translation through the North American Constitution.

In the final part of my work, I will suggest that the institutional framework designed in the Federal Convention (in spite of its evolution, our present, different ideological believes, etc.) still affects the organization of an open, adequate model of (what some theorists presently call) "deliberative democracy." I will defend, in this respect, two main claims. First, that (some of) the Framers of the North American Constitution defended, in the best case (what I will call) a restrictive deliberative model, which is still very difficult to defend at the theoretical level. Second, I will affirm that, even if we disregard the history behind the U.S. Constitution, and the prevailing arguments that were behind the justification of its main institutions, the defenders of public deliberation would still have good reasons to object to the "core" mechanisms incorporated in the U.S. Constitution. Although the main objective of my work will be to provide criticisms of the present institutional system and its philosophical foundations, I will try to present and examine alternative ideas whenever possible. In most cases, some of these ideas will be rooted in the previously described radical tradition.

CHAPTER 1

RADICALISM AND CONSERVATISM IN ENGLAND

INTRODUCTION

In this section, I will examine the evolution of two different political traditions: one more conservative, the other more radical, that existed in England since the 18th Century. The conservative tradition, as I already mentioned, assumed that, to be able to adopt proper political measures, the political system had to take into account the real "interests" of the majority, but not necessarily the opinions of its members. The interests of the people and their will -as Edmund Burke defended- very often differed. The conservative tradition usually accompanied these assumptions with a bias against collective discussion. Among other things, this bias explains why they did not want to extend political rights to the majority of the people or why they were so sceptical of popular intervention in politics. The radical tradition, as I said, tended to defend opposite values. Typically, the British radicals believed that most people could and should have a more decisive role in politics; that the dominant political organisation was (not only corrupt but also) too restrictive; that the existent decision-making process, concentrated in the hands of an elite, had to be replaced by a more open process of collective reflection.

Although I will examine the evolution of these two different conceptions during the 18th century -when the discussion about the issues mentioned became clearer and precise- I will first refer to a few significant antecedents of this debate. In particular, I will make reference to the disputes promoted by a radical Leveller group against an authoritarian and conservative government, distinguished by its religious intolerance. This confrontation, as we will see, touched on some of the main issues that would continue to characterise the dispute between radicals and conservatives.

THE AUTHORITY OF THE PEOPLE OUTSIDE THE PARLIAMENT

For a long time, the Parliament and the Crown acted separately and argued with each other. By the mid-17th century, instead, the Presbyterians who controlled the "Long Parliament" reaffirmed the monarch's religious fanaticism in most of their acts.[1] The principal political conflicts, then, came to be the conflicts between the government and people outside the government, who did not share the religious

[1] By that time, for example, the government had made attendance at religious services mandatory, they deprived the existing religious groups of their freedom of conscience rights; even forbidding these groups to meet or preach. For an account of this issue, see Frank (1955), chaps.1-4.

beliefs of the ruling class.[2]

This contention forced the radical and conservative forces to clarify their own positions.[3] The different positions at stake found a pristine expression, for example, in the "Putney Debates," where representatives of both sides had the opportunity to present and defend their arguments. The "Putney Debates," held at the Putney Church from October 28 to November 11, 1647, were promoted by an important segment within the Army, and strongly influenced by the Levellers.[4] This group, among other things, questioned the authority of the monarchical government and demanded freedom of religion and equality before the law.[5]

From the beginning of the "Putney Debates," the radicals showed their commitment to a principle which said that every person must have an equal say in the election of political representatives. The radicals defended that principle, for example, by showing their confidence in the intellectual capacities of the majority, and also by invoking the principles of "natural law," which -they affirmed- were available to all rational beings. Maximilian Petty, for example, referred to the idea that all inhabitants had to have "an equal voice in the elections"; and Thomas

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[2] See, for example, Aylmer, (1975). Most of those who would later give shape to the Leveler group, like John Lilburne, Richard Overton, William Walwyn, and John Wildman, had themselves suffered the effects of religious intolerance. Reacting against this intolerance, people like them began to write pamphlets and organize demonstrations demanding their religious rights. After a short time, however, these claims began to be focused on the activity and the legitimacy of the Parliament. Organized as a group, the Levelers expressed their dissatisfaction with existing institutions. Lilburne's pamphlet, "London's Liberty in Chains" included, for the first time, a commitment to manhood suffrage. His "Englands Birth-Right Justified" (October 1645) proposed a broad variety of parliamentary reforms, against the increasing "influence" that the Crown had over the representatives. In "Englands Lamentable Slaverie" (October 1645), Walwyn supported Lilburne's previous demands. In "Appeale from the Degenerate Representative Body . . . to . . . The Free People . . . of England" (July 1647), Richard Overton was particularly emphatic in his opposition to the Long Parliament

[3] E. Aylmer summarizes the main claims of the Levelers, scattered throughout many documents, stressing some of the following: "a purge of the present Parliament and a fixed term for its existence; elections for future parliaments on a new basis . . . fuller protection for all men at law, against the state and against over-mighty groups; drastic reform of the legal system; equal legal rights and liabilities for all, regardless of birth, wealth or influence; the abolition of all monopolies . . . protection of all dissenting Puritan sects against the intolerance of the Presbyterians." See Aylmer (1975) p. 25.

[4] That the Army constituted an important place for the expression of social dissatisfaction should not be surprising. First of all, the Army played this leading role as a result of its peculiar social composition. The Army (and, in particular, the so-called "New Model Army," which was built up to fight against King Charles), was composed of a mixture of conscripts and volunteers who belonged, in most cases, to the lower social classes. There were few places other than the Army where the lower classes could express their discontent. Second, many members of the Army (and, in particular, its lower ranks) had frequent contact with the leaders of the Levelers group. In fact, many Levelers began to channel their activities through the armed forces. For instance, some among the Levelers worked within the forces, organizing its structures and instructing its members. One of their most interesting innovations was a sort of democratization of the military group, including the formation of a soldiers' council with two elected representatives from each of the existing (sixteen) regiments.

[5] Within the radical group, Colonel Rainsborough and Edward Sexby appeared as the main figures. Within the generals' group, Henry Ireton, the Commissary-General of Horse in the New Model Army, appeared as the main orator. Lieutenant-General Oliver Cromwell also participated in the debates, but it was Ireton who took the main role in the discussions.

Rainsborough affirmed that "the people of England [should not be] bound by laws in which they have no voice at all."[6] Proposing an extension of political rights, the radicals defended the idea that the people, outside of the Parliament, constituted the main source of all political authority.

The conservatives rejected most of these claims. First of all, they attacked (what they perceived as) the unrestrained demands of the radicals, and affirmed that the suggestions of the latter would lead the country to turmoil and anarchy.[7] In addition, the conservatives defended restricted political rights affirming that only those who had a "permanent interest" in the affairs of the community -that is, those who had property- had a right to participate in politics. According to this idea, it was not morally right to take part in the local affairs of the community (basically, it was not morally right to have political rights) if one was not fully integrated into it.[8] This separation between property and persons, used for justifying restrictions on the right to vote, became one of the strongest intellectual tools that the conservatives used in their arguments.[9] Finally, and coherent with the previously mentioned arguments, the conservatives disputed the radicals' view of the Parliament, according to which there existed a profound breach between the people and the legislative power. Contrary to the radicals' belief, the conservatives affirmed that the people were incorporated into the Parliament after each election and that, as a result of this fact, the majority had no right to defy the authority of their representatives, once the latter became elected.

The Putney debates, in the end, were highly unsatisfactory for the radical cause. Although their arguments appeared to be superior to those presented by the generals during the debates, the document that was written at the end of the discussions only reflected the conservative position.[10] However, the Levellers

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[6] Rainsborough also wondered "why any man that is born in England ought not to have his voice" in the elections. See Aylmer (1975), pp. 102-106.

[7] In particular, Ireton affirmed that the claim for natural rights (besides being contrary to "civil rights") was politically inadmissible. He stated that: "by the same right of nature . . . by which you can say, a man hath an equal right with another to the choosing of him that shall govern him, by the same right of nature, he hath the same in any goods he sees: meat, drink, clothes, to take and use them for his sustenance, he hath a freedom to the land, the ground, to exercise it, till it."[7]

[8] "I think that no person hath a right to an interest or share in the disposing affairs of the kingdom, and in determining or choosing those that shall determine what laws we shall be ruled by here, no person hath a right to this that hath not a permanent fixed interest in this kingdom, and those persons together are properly the represented of this kingdom." Henry Ireton, October 1647, quoted in Aylmer (1975), p. 100.

[9] Ireton's arguments appeared to have serious flaws, and the Levelers adequately addressed some of them. During the debates, for example, the radicals challenged the idea that only the property holders had a permanent interest in the affairs of the community. Also, they addressed an even more problematic question related to the very nature of the rights of property and the fairness of its distribution. Brockway (1980). An even more radical position with regard to property was defended by the so-called "Diggers" (or the self-styled "true Levelers"). This group, basically composed of urban and rural laborers and peasants, also had influence during the period. Led by an outstanding political leader, Gerard Winstanley, they defended the idea that the land was the property of the people who had fought and suffered for it in the civil wars. See, Brockway (1980), part 3.

[10] Ibid., p. 52.

continued to defend their own position, and wrote their own separate proposals which demanded, among other things, the abolition of all property qualifications; shorter mandates for the representatives; the prohibition of re-election; religious tolerance; equality before the law; and a popular, local control of justice, the Church, and the army.

THE CRISIS OF POLITICAL REPRESENTATION

The political and philosophical disputes between the conservative and the radical tradition appears much more intense and refined after events such as the Putney debates. By that time, for example, James Harrington had published his enormously influential book "Oceana," where he tried to combine a strong defense of property with more egalitarian claims based on the idea of natural law. Later on, people like William Beckford recalled the old discussions on representation and, in particular, Harrington's arguments, to present serious objections to the prevalent political procedures. Beckford's main concern was that the wealthiest city of the kingdom, London, did not have enough influence in the national decision-making process. Although strongly biased by his own personal position (he was one of the richest and most influential political leaders of his time), Beckford contributed by adding the prevalent concept of political representation to the question. Further efforts in the same direction were made by Obadiah Hulme who, in his "Essay on the English Constitution," written in 1771, objected to the lack of representation of the Parliament. Hulme contrasted the existing system of representation with an apparent "lost paradise" that would have existed in the era prior to the Norman Conquest. Stating that the political situation had been dramatically impaired in recent years (through initiatives like the Triennial Act of 1764, the Land Qualification Act of 1711, and the Septennial Act of 1716, which undermined the popular control of Parliament, regained after the Revolution of 1688) he emphasised the need for a stronger popular representation, annual elections, and secret ballots. [11]

All these events and isolated efforts obtained a clearer and much coherent expression after the "Wilkes affair," which took place in the mid-18th century. In fact, after this event, it was much easier to distinguish between i) those who believed that the community had to solve its political problems through an open and inclusive process of collective reflection; and ii) those who believed that no process of collective reflection could favour the adoption of adequate political answers, thus defended a more controlled and exclusive political debate.

Before directly examining the Wilkes affair and its aftermath it is worth mentioning that the 1760s were years of economic distress in Great Britain, mainly because of the deep crisis that followed the Seven Year's War. A period of bad harvests made the situation even worse and, as a result, the government appeared the target of increasing social resentment. Also by this time, the political institutions had lost most of the popular confidence that they had achieved a few years earlier. In

[11] Examining these antecedents see, for example, Fothergill (1979); Blitzer (1960); Cone (1968).

particular, the practice of "influencing" Parliament from within through the action of aristocratic and self-interested groups strongly affected the people's respect toward the representative system. It is within this context that the Wilkes affair appeared.

In 1764, John Wilkes was expelled from the House of Commons, as a result of some articles that appeared in his journal, "The North Briton." The journal was characterised by its attacks on the peace treaties that followed the war and on Lord Bute, the minister who negotiated those agreements. Wilkes was found guilty of libel because of material published in no. 45 of the journal, but he refused to go to court to be sentenced and instead fled to Paris. After four years in Paris, with a disastrous economic situation, he decided to move back to his country. There, his only possibility of avoiding imprisonment was to obtain immunity from prosecution by once again being elected a representative. Already in England, he participated in London's elections on March 16th, without an opportunity to prepare a political organisation, and finished last in a list of six candidates. However, the London election put him again before the public and gave him an opportunity to recover his popularity as a champion of individual liberty. Animated by this fact, he immediately took part in the Middlesex elections and obtained an expected triumph, with a majority of 465 over his closest contender.

Although normally insignificant, this Middlesex election became one of the most important events in eighteenth-century British history. Significant demonstrations of popular support followed the election and Wilkes appeared as the symbol of the people's will against an authoritarian government ("a patriot by accident," as he himself admitted). The importance of this event, however, was due less to the election itself than to the incidents that came immediately after it, which would eventually put the reliability of the whole representative system under consideration.

First of all, Wilkes' new attack on the government -in December 1768 in the "St. James' Chronicle"- was answered with a new expulsion from the House of Commons. This episode was followed by two new elections, which Wilkes won, and two new disqualifications by the Parliament. In April 1769, the Parliament disqualified Wilkes for the third time and, through an additional resolution, Henry Lawes Luttrell was recognised as the lawful new member of the House.

Not surprisingly, these facts cast doubts upon the very nature of representation: How was it possible to distort the popular will as in the Middlesex elections? How was it possible to accept the obstinate decisions of the Parliament? Where did political sovereignty reside, in the people's will or in an autonomous Parliament?[12]

At the beginning of the Middlesex events, the radical movement for parliamentary reform that emerged from the crisis found an ally in the conservative

[12] See Cannon (1973), pp. 60-61, and in general chap.3.

party. For the radicals, the formation of this alliance seemed appropriate, given their relative lack of influence within the Parliament. For the conservatives, this strategy also seemed adequate, given the loss of influence in the government that they had suffered at the time.[13] Thus, most of the Rockingham party's leaders joined the Wilkites in their demands for reducing the influence of the crown. However, the conservatives were not willing to accept the kind of parliamentary reform that the Wilkites proposed. In this sense, nobody summarized the Rockinghams' position better than Edmund Burke.[14] Burke directed strong criticism at the lack of political independence of the Parliament (or, more specifically, at its dependence on the King's desires), but he remained suspicious of the radicals' political proposals. The fragility of this coalition between conservatives and radicals was apparent after a very short period. In fact, in the very first action that the radicals and the conservatives took together, their latent differences surfaced. The Wilkites organized a protest movement against the decision of the Commons that consisted, first of all, in a bundle of petitions. In these petitions, the Wilkites demanded, for example, free elections, the renunciation of the ministry, and even the dissolution of Parliament. The adoption of this strategy was significant from the radicals' viewpoint: first, it encouraged people to be involved in politics; second, and more substantially, it implied a recognition of the importance of the "people's will." The conservative Whigs realized these implications and began to express their aversion to populist politics. Lord George Sackville, for example, stated that "these appeals to the people are dangerous and may have false consequences, when once the mob and the middling people lose their respect for Parliament there is an end of all government and subordination." Lord Temple opposed the petition movement in Buckinghamshire, asserting that even freeholders were "in general totally ignorant of the question." Sir Anthony Abdy adopted a similar attitude in Surrey, rejecting the "wild and warm proceedings of [the radicals] the generality of whose opinions and ideas I cannot agree or subscribe to." Richard Rigby, a severe opponent of Wilkes, declared that petitions had been promoted by "factious" people, and that most of the signers conformed to something "no better than an ignorant multitude whom it is absurd in the highest degree to suppose capable of deciding" public questions. He added that if "popular clamor" controlled the proceeding of the House, then "we must bid adieu to all government by law."[15]

These expressions constitute just a few illustrations of the conservatives' general attitude. It was common for them, during this period, to make explicit references to the "ignorant multitude" and to the "dangerous consequences" (popular agitation, riots) that would follow from the petition movement that the

[13] Indeed, the (conservative) Marquees of Rockingham had become George III's fourth Prime Minister in 1765 but, by this time, he and other Whig ministers had been replaced. Out of government, the "Rockingham Whigs" began to pressure for their return and, with them, for the return of the idea of government by party, which had been displaced for that of personal rule (popularized by William Pitt).

[14] Burke had become a member of the Parliament from the borough of Wendover during Rockingham's administration, and from there he became the intellectual mentor of the very influential Rockingham faction of the Whig party. His famous "Thoughts on the Causes of the Present Discontents" was a remarkable synthesis of the conservative approach to the political situation during this period.

[15] Cone (1968), p. 44.

radicals were trying to encourage. Reacting against these expressions, the radicals reaffirmed their claims favoring a much stronger political intervention of the people, as the only way to provide definite solutions to the emergent crisis. In this sense, we may say that the Wilkes affair forced the two groups to clarify and develop their opposite philosophical and political convictions.

THE "RADICAL SOCIETIES" IN ENGLAND

In confronting the powerful and well-organised conservatives' groups, many radical figures sought to co-ordinate their efforts through common associations. Herein, I will make reference to some of the most important and influential of those groups.

In the first place, it is worth mentioning the "Society of the Supporters of the Bill of Rights." The Wilkes' partisans formed this Society after the Middlesex crisis, in order to provide financial support for John Wilkes (given Wilkes' accumulated debts and electoral expenses). However, while Wilkes was in prison (he had been sentenced to 22 months), the Society broadened its initial objectives and pursued more concrete radical projects. In doing so, the Society of Supporters of the Bill of Rights followed William Beckford, who had instructed his adherents in London to press not only for the Wilkes cause, but also for other issues like shorter Parliaments, secret ballot, or measures against bribery. It was not strange, then, to recognise some of the Society's members transformed into leaders of the radical's political movement. Among these activists we could mention, for example, John Sawbridge (brother of the remarkable radical historian, Catherine Macaulay), Joseph Mawbey, James Townsend, and John Glynn. Its leader for a while was the Rev. Parson John Horne (Horne Took), who would come to be a central radical figure during the 1790s.

The Society's increasing autonomy was transformed into a direct rupture with Wilkes after his release from prison in April 1770. At least two of the reasons for this fracture are worth mentioning: one is Wilkes' reluctance to accept the wider political claims of the Society, and the other is his refusal to use part of the Society's funds to assist the printers in their struggle over the public reporting of parliamentary debates.[16] Remarkably, this breach would foster the radicalisation both of the remaining members of the Society of the Supporters of the Bill of Rights, and of the newly constituted Constitutional Society. The former approved, in spite of Wilkes' own desires, an eleven-point program which mainly demanded: the need of a full and equal representation of the people in Parliament; a law requiring candidates to take an oath against bribery; annual elections; the prohibition by law of pensions and places; the impeachment of ministers who had advised the violation of the rights of Middlesex electors; an inquiry into the conduct of judges toward juries; an inquiry into the expenditure of public money; the expungement of the Commons' resolution for imprisoning the London magistrates in the printers' case; and the restoration to America of the "essential right of taxation."

[16] See, for example, Bowles (1886), chap. 6.

The new Constitutional Society, meanwhile, initiated an obstinate campaign for annual parliaments that they would continue, unsuccessfully, for many years. The Rockinghams who, by this time, had put some distance between themselves and the radicals no longer shared the above mentioned claims.

Another significant radical group was that of the "Rational Dissenters" -a group of religious people who rejected Calvinism and defended, instead, Unitarianism and an unrestricted freedom of speculation. The "Dissenters" were particularly concerned with education and, as a result of this commitment, they built their own academies, where they taught diverse and modern subjects. Notably, the radicals' academies contributed to the birth of a new and very significant generation of radical intellectuals. For example, Joseph Priestley, Richard Price, and William Godwin, all very well instructed radical thinkers, received their education in these institutions.

Since the assumption of George III, the Dissenters appeared more clearly involved in politics, demanding equal civil rights and objecting to the authorities' lack of religious tolerance. Thus, although by the 1770s most of the English dissenters (as the descendants of the seventeenth century's nonconformist sects) had already immigrated to America, the small group that remained in the country (just 7% of the population) would become decisive in changing "aristocratic England and its traditional values".[17]

THE RADICALS' EPISTEMIC VIEW, AND THEIR EGALITARIANISM

During the XVIIIth century, one of the radicals' main beliefs had to do with the existence of natural rights. Clearly, this belief contributed to strengthen their egalitarian premises, which they normally grounded in strict individualism: every person, not just a few, had reason and had natural rights.[18] In fact, the assumption of natural rights constituted the main foundation of the radicals' egalitarianism. As Granville Sharp described it, all people were equally entitled by the law of nature to the rights that flowed from the natural order of the universe.[19] In addition, these assumptions constituted the basis of the radicals' epistemic views. In this sense, it was clear that, according to the radicals, people had basically the same intellectual capacities: it was not true (as many during this period wanted to maintain) that there existed a particular class of men, especially endowed with "reason." No group -they believed- had the right to direct the lives of others.

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[17] Kramnick (1977), p. 13.

[18] However, other authors have characterized the "Radical Dissenters" as early Utilitarians. For example, in one of his most famous passages, Joseph Priestley asserted that the object of the government was the "good and happiness of the members, that is, of the majority of the members, of any state." In fact, and with regard to his "Utilitarism," the philosopher Jeremy Bentham recognized the above passage as having influenced him in the development of this conception. Others have also seen Priestley as one of the first defenders of the modern conception of a neutral state.

[19] See Bonwick (1977), p. 16.

The assumption that all persons were endowed with reason helped to foster the radicals' confidence in the people's choices. For example -in a statement that Thomas Jefferson would later quote- Joseph Priestley stated that if people chose improper representatives, they would then "learn by experience to make a better choice on a future occasion."[20] This conclusion was coherent with the radicals' general doctrine, which affirmed that no one lacked the capacity to participate in politics. In any case, as Thomas Paine would later remark, what was required was to provide the people with the information and education necessary to free them from ignorance -a condition of ignorance that, according to Paine, had been imposed on the people.

As a result of this confidence in the capacities of the people, it was not strange that the radicals founded a society such as the Society of Constitutional Information, directly aimed at fulfilling educational proposals. People like John Cartwright, John Jebb, Brand Hollis, and Richard Sheridan, all significant radical activists, founded the Society, considered one of the most remarkable initiatives ever carried out by the radicals. Shortly after that decision, many other activists, former leaders of the Wilkite campaign like Sawbridge, Granville Sharp, and Townsend, followed the Society's founders. Thomas Paine also took part in the Society as an honorary member, soon after he came back from North America. As I already suggested, the main proposals of the Society were to reinforce the educational and propagandist activity of the radicals, after a period in which most of the political initiatives they had adopted proved to be fruitless. The Society tried, in this respect, to reinitiate the fight for radical ideals by printing and distributing books and pamphlets related to the causes of social and institutional reforms.

In connection with these beliefs, the radicals defended a principle of self-government, a principle that would play an extraordinary role in the radicals' rhetoric. Among the "Rational Dissenters," Richard Price was the one who most clearly exposed his adherence to this idea. According to Price's opinion, "all the different kinds of liberty run up into the general idea of self-government." Self-government -he also affirmed- could be undermined by two different forces, one external and the other internal, which he called internal and external "slavery." External slavery was the less frequent of these forces and appeared whenever a state acquired sovereignty over another, exercising "the power of making its laws and disposing its property." Internal slavery, instead, was the "most prevalent" of the two tendencies, and appeared whenever a whole community was governed by a part of it, either in the form of an absolute monarchy or in the form of an aristocracy. To be compatible with self-government, then, a representative system had to fulfil certain conditions: (1) representation had to be complete (something which would not happen if only one part of the state had its own representatives); (2) the representatives had to be freely chosen; (3) the representatives had to be themselves free (that is, no higher will could direct their resolutions); (4) representatives had to be chosen for short terms and, in all their acts, be accountable to their constituents. Only by fulfilling these conditions -he believed- would self-government have a

[20] Priestley (1791), p. 255.

chance to prevail and thus, only then would every person have a chance to become "his own legislator."[21]

As a result of their commitment to the idea of self-government, many radicals accepted political representation only in a very restricted way. Frequently, they affirmed that the representatives had to strictly follow the will of the community. Also, and as a result of the same convictions, they defended a "frequent intercourse" between the representatives and their electors. This was the only way the representatives could "catch their spirit, and enter into their views." According to Joseph Priestly, only in this way would the representatives be "refrained by a sense of shame from proposing, or consenting to, anything that they know their electors would not approve".[22]

Finally, I should mention that the radicals' distrust of representation moved them to support different forms of "extra-Parliamentary" politics. This attitude contributed to the emergence of a powerful and very influential "Associational Movement" in England during the 1780s. The movement, which took as a starting point the idea that the source of political authority resided in the people, put into question traditional assumptions about representation.[23] Its members, for example, challenged the parliament's authority, demanded legislative reforms, and organised committees of correspondence designed to exercise pressure on the political authorities through a petitioning movement. Although petitions were not unusual at this time, the associational movement differentiated itself by addressing the petitions to Parliament and not to the King, as was usually done. However, what distinguished this movement from any other antecedent was the "associational" idea itself. Never before had the people gathered together in similar associations to voice their political complaints. These grass-roots organizations were depicted as "perhaps the most curious device in extra-parliamentary organization that our history has ever known."[24] The "Associational Movement" constituted, also, an additional source of

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[21] See, for example, Peach (1979). The original formulation of the principle that "every man is his own legislator" appeared in Price's "Observations on Civil Liberty". See, Peach (1979), pp. 63-124.

[22] Priestley (1791), p. 257.

[23] The beginning of the Associational Movement may be registered on November 25, 1779, with the appearance of the so-called "Yorkshire Movement." Organized through county meetings, a few people from Yorkshire, led by the Reverend Christopher Wyvill, began to protest against public expenditures and, more subtly, began to demand Parliamentary reforms. As an immediate step, the outdoors movement promoted the formation of similar leagues outside Yorkshire. Similar leagues initiated their activities at Hampshire, Middlesex, and York. In a few months, a total of 26 counties and 11 cities had taken similar initiatives. See Cannon (1973), p. 76.

[24] Goodwin (1979), p. 60. In March 1780, a convention of county associations was held. The forty delegates that attended agreed, basically, on two main principles. First, they all believed that a "real" independence of the Commons had to be achieved. Second, they all believed that the links between the people at large and their representatives had to be strengthened. Although most radicals agreed on these assumptions, a few of them thought that they were still too moderate. In particular, C. Wyvill began to receive criticism for his leadership of the extra-Parliamentary movement. These criticisms gave rise to the most radical associational group, which organized itself as the Westminster Committee, directed by the fickle Charles James Fox. Most of the metropolitan radicals had previously been members of the Society of Supporters of the Bill of Rights. Among the participants in this group were John Cartwright, John Jebb, James Townsead, and Thomas Hollis. See Goodwin (1979), pp. 58-59; or Cannon (1973),

conflicts in the relationship between radicals and conservatives. According to the latter, the radicals were wrong in defending the idea that the people's authority was superior to that of the Parliament. More drastically, the conservatives promptly made clear their profound distrust of the ideas of associations and committees. If these organisations were not illegal, they affirmed, they were exceedingly dangerous.[25]

THE RADICALS' INSTITUTIONAL PROPOSALS

Among the radical activists, one of the main ideologists engaged in proposing and justifying institutional changes was James Burgh. A former conservative and aristocrat, Burgh had begun to sympathise with more radical demands during the mid-eighteenth century. The Middlesex election had convinced him that the old and valuable constitutional order had been completely subverted. In 1774, Burgh wrote his famous "Political Disquisitions," whose main proposal was to defend the need to "restore the spirit of the constitution" by securing three important alterations: annual parliaments with rotating membership, the exclusion of placemen and pensioners from the Commons, and adequate parliamentary representation.[26] In the end, all these claims were directed against the Parliament's lack of political independence.[27]

Another demand that always appeared in Burgh's writings had to do with franchise reform. In fact, Burgh's main contribution to the radical theory of representation was his demand for the extension of the franchise to all taxpayers.[28]

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chap. 4. The members of the Westminster Committee were particularly dissatisfied with the petition method promoted by Wyvill. According to them, the representatives tended to ignore the petitions and, because of that, more radical measures had to be pursued. The Westminster group began to advocate a national association of all the counties of England. The general association would have enough legitimacy, they thought, to assume the representation of the people, declare the House of Commons dissolved, and propose constitutional reforms.

[25] At the beginning of the "associational movement," the conservative opposition in the Parliament (led by the Marquis of Rockingham and assisted by Burke) had serious doubts about what attitude to take. On the one hand, they knew that this movement could decisively help the economic plan they were trying to promote. On the other hand, they strongly feared a foreseeable radicalisation of the movement. Finally, the conservatives accepted the invitation of the Yorkshire movement, but their activity within the movement proved to be more than ephemeral. In particular, Rockingham's constituents showed their immediate reluctance to all the ideas of parliamentary reform that the outdoors movement promptly began to raise. The conservatives felt that, although some of the political issues the radicals were advancing had some merit, the complete attention of the movement had to be concentrated on the claim for economic reforms.

[26] See Carla H. Hay (1979), p. 91 and, in particular, chap.6.

[27] In effect, by this time most of the members of the House of Commons were nothing more than political clients of the nation's wealthiest people. The seats in the House were virtually owned by certain people, who sold them at their convenience, or only used them to appoint their allies. Burke -just to mention one remarkable case- entered the House of Commons as a member of the borough of Wenover in Buckinghamshire. His seat was given to him through his relative William Burke, who was a close friend of one of the richest and most influential people in Buckinghamshire, Lord Verney.

[28] Burgh believed that, in this way, the poor would be able to vote. By proposing this measure, he also broadened his earlier approach on this issue, when he recommended that all males who paid certain taxes (the window tax) should be permitted to vote. Proportional representation and the use of secret ballot were two additional instruments he advocated.

Although this idea still did not mean universal suffrage, it signified an exceptional breach with the Blackstonian assumption that only the "free agents" could vote. According to Burgh, maintaining this restriction would imply that "an immense multitude of the people [would be deprived] of all power in determining who shall be the protectors of their lives, their personal liberty, their little property."[29] His warning against the possibility that "the many" become "enslaved" by the few also depicted (what would come to be) a common statement during this period. According to him, if the consent of the people were not guaranteed "as far as it [could] be obtained," the people would become "enslaved to the one, or the few, who frame the laws for them."

As an additional measure oriented toward improving the representative character of the system, James Burgh proposed mandatory rotation for most representative positions. The idea of rotation offered at least two benefits: first, it opened the House to greater numbers of people; and second, it helped stop what the radical's perceived as one of the worst evils in the present institutional system, that of bribery and court influence.[30]

Finally, Burgh defended the people's right to write instructions to their delegates. The claim for this right was normally accompanied by a very strong assumption that the representatives were, basically, the people's attorney, advocates, or servants. Joseph Priestley and Richard Price shared Burgh´s enthusiasm with regard to this instrument. Thus, in his "General Introduction and Supplement to the Two Tracts on Civil Liberty, the War in America, and the Finances of the Kingdom," Price wrote that "civil governments are only public servants and their power, by being delegated, is by its nature limited." Shortly thereafter, in his "Additional Observations in the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America," he reaffirmed the idea that the representatives should be "accountable to their constituents" in "all their acts."[31]

Burgh's proposals greatly influenced the radicals. Some of them, like John Cartwright (one of the founders of the Society of Constitutional Information and one of the radicals' central figures during the 1780s), adopted these proposals as their catechism, and spent part of their life working for the diffusion of these ideas. In his work, "Take Your Choice," Cartwright developed some of the ideas that Burgh had already proposed. This work, in fact, appeared as one of the most advanced political programs of his time. In addition to the demands for annual elections and manhood suffrage, he added those of the secret ballot, salaries for the Commons, and the abolition of slavery.[32] Cartwright also became well-known because he wrote (along

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[29] See Goodwin (1979), p. 52.

[30] Burgh first proposed that most members be ineligible for reelection for seven years. Then he recommended the annual exclusion of two-thirds of the members, who would be barred from reelection for three years. See, for example, Hay (1979), p. 92.

[31] Peach (1979), pp. 48 and 138

[32] Cone (1968), chap.3.

with J. Jebb and T. Hollis) the main document of the Westminster Committee, which called for -among other things- manhood suffrage, annual Parliaments, secret ballot, the abolition of property qualifications, and equal electoral areas.

THE CONSERVATIVE CHALLENGE

The conservative group confronted each of the assumptions and proposals shared by the radicals. Above all, they developed an elitist epistemic view that directly turned the radicals' presumptions upside down on this issue. The conservatives emphasised that the majority of the people were not capable of valuable participating in the decision-making process. According to their view, it was perfectly possible to achieve an impartial political decision without consulting most of those who would be affected by that decision. In most cases the conservatives went even further, affirming that the participation of "all those affected" in the creation of the laws actually impaired the fairness of the political process.

Adam Ferguson's political ideas represent an excellent illustration of this elitist epistemic position. Ferguson spent some time criticising the "Radical Dissenters," in particular, Richard Price because of their confidence in the people's will. Trying to reject Prince's principle according to which "every man is his own legislator," Ferguson stated that "in most free states the populace has as much need to be guarded against the effect of their own folly and errors as against the usurpation of any other person whatever. And the essence of political liberty is such an establishment as gives power to the wise and safety to all." Then Ferguson elaborated the institutional consequences of his thoughts, recommending "some mixture of aristocratical power" to check "the caprice of the people."[33]

The most important advocate of this elitist view, however, was not Adam Ferguson but Edmund Burke, a famous conservative intellectual, an incisive writer, and an influential politician. Burke clarified his own epistemic conception through a very well known distinction between the "opinions" of the people, and their real "interests," between the mere "will" of "the many," and the "judgements" of "the few." In this respect, he affirmed that "the will of the many, and their interest, must very often differ." Depicted this way, the "opinions" of the people were obviously equated with irrationality. In fact, as Pitkin put it, for Burke, popular opinions tended to be "hasty, passionate, prejudiced, [and] subject to violent [and] short-lived fluctuations."[34]

Burke's position represented a direct and violent reaction against most of the radicals' main concerns and, in particular, against the principle of self-government, usually defended by the most salient radicals. In this respect, it is worth noting that one of Burke's sharpest intellectual battles was against Richard Price's defence of the aforementioned principle of self-government. First of all, Burke

[33] Adam Ferguson, "Remarks on a Pamphlet Lately Published by Dr. Price," included in Peach (1979), pp. 253-260.
[34] See Hanna Pitkin (1967), p. 181.

confronted Price's vindication of liberty, pointing out that Price's defense of self-government implied a conception that was "destructive to all authority"[35] (an accusation that was immediately rejected by Price).[36] Against Price's view, Burke defended and developed the idea of "prescription" (a core concept in his conservative theory), which meant natural reverence for any institution or practice that has existed through the ages and continued to persist.

The polemic between Burke and Price reached its highest point after Price's "Discourse on the Love of our Country," a sermon that he presented at the London Revolutionary Society on November 4, 1789. In this speech, Price reaffirmed most of his earlier thoughts, but he also tried to vindicate the revolutionary principles that were defended in France at that time. Price defended, thus, three fundamental rights: (1) the right to freedom of conscience in religious matters; (2) the right to resist power when abused; and (3) the right to choose the governors, to "cashier them for misconduct"; and to frame an "own government."[37]

In an attempt to answer Price's speech, Burke wrote his "Reflections on the Revolution in France."[38] With regard to the principles that Price had enumerated and supported in his sermon, Burke stated that they constituted mere excesses originated in the idea of self-government. Against those principles he stressed the importance of the people having "a power out of themselves" and the necessity of re-establishing a respect of hierarchy. He stated, "never, never more shall we behold that generous loyalty to rank and sex, that proud submission, that dignified obedience, that subordination of the heart." The ignorance of these criteria -he affirmed- would transform the people into "little, shrivelled, meagre, hopping, though loud and troublesome, insects of the hour."[39]

Following the idea that the people were not capable of properly discerning their own interests, Burke affirmed that the representatives, as their political duty, were obliged to pursue the people's "real interests" (even against the actual

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[35] E. Burke, "A Letter to John Farr and John Harris" (1777). See Mansfield (1984).

[36] Price explicitly replied to Burke in his "General Introduction and Supplement to the Two Tracts on Civil Liberty, the War with America, and the Finances of the Kingdom." He asserted that he was not against all authority and that he was only trying to say that "a legitimate government, as opposed to oppression and tyranny, consists in the dominion of equal laws made with common consent, or of men over themselves, and not in the dominion of communities over communities, or of any men over other men." Both Burke's and Price's texts are included in Peach (1979), pp. 273 and 50.

[37] See, for example, Goodwin (1979), p. 108.

[38] Although the context of this debate was different from the one present during the Wilkes affair, the principles in dispute were basically the same. In his speech (prepared to commemorate a new anniversary of England's revolution of 1688), Price reaffirmed his individualistic principles (stating that the rights of each person, in whatever country he lived, had more significance than the interest of any particular country, defined in purely geographical terms), and defended the idea of a parliamentary reform. Reacting against these beliefs, Burke was more severe than ever before. In his "Reflections," Burke stated that "if you are desirous of knowing the spirit of our constitution, and the policy which predominated in that great period which has secured it to this hour, pray look for both in our histories, in our records, in our acts of Parliament and journals of Parliament, and not in the sermons of the Old Jewry, and the after-dinner toasts of the Revolution Society . . ." See Burke (1960), p. 294.

[39] See, e.g., Kramnick (1977), pp. 27-38.

preferences of the majority's will). If the rulers did not act this way -he added- society would be condemned to catastrophe.[40] "Your representative owes you, not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion . . . [because] government and legislation are matters of reason and judgement, and not of inclination."[41]

To clarify his beliefs on representation, Burke resorted to a clear metaphor. He affirmed that "the people are the masters [but t]hey have only to express their wants at large and in gross [. The people] are the sufferers, they tell the symptoms of the complaint." However, only the representatives could tell "the exact seat of the disease, and how to apply the remedy."[42] Not surprisingly, then, Burke referred to popular elections as a "mighty evil" very difficult to cure,[43] and affirmed that society had to be ruled by a small minority of the virtuous and the wise[44] -what he considered the natural ruling class of society.[45]

According to Burke, to favour the adoption of adequate political decisions, it was only necessary to secure that the main interests of the country were present in the Parliament through "virtuous" representatives, properly separated from the passionate claims of the majority.[46] This latter belief in the separation between the

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[40] Thus, Burke asserted that "when that Cry [of the common people] is once raised, and raised it infallibly will be, if not prevented, the puny Voice of reason will not be heard." See "Letter to the Marquees of Rockingham," from August 1775, in Mansfield (1984), pp. 234-235.

[41] See Ross (1949), p. 115. Also, see Freeman (1980),p. 124; and Cone (1957), pp. 274-275 It is worth saying that, having subscribed to the above mentioned assumptions, Burke felt forced to defend the principle of "virtual representation" or "implied consent" as a way to motivate and justify the obedience of the people to representatives that they had not been able to elect. He claimed that the people were presumed to consent to "whatever the legislator ordains for their benefit," even if they "did not clearly see into the property of the means." To justify this assertion, he merely added that the people were obliged to behave that way "as an act of homage and just deference to a reason, which the necessity of government has made superior to their own." Explaining this notion, see Freeman 1980, ch.6. At the end -he stressed- virtual representation tended to be "in many cases even better than the actual, [because it has] most of its advantages, and [it is] free from many of its inconveniences." Ross (1949), pp. 494-5.

[42] This statement is quoted and analysed in Freeman (1980), p. 124.

[43] Regarding elections, the most important solution he found was "to prevent their return too frequently." See Burke (1960), p. 218. In defending this idea, he always assumed that it was necessary, within an adequate political system, to postpone "the judgment of those who [were] numero plures, to those who 'were' virtute et honore majores." (See Burke, 1960 p. 398). He also went on to describe the characteristics that would be proper for the natural aristocracy. Thus, among many others, he referred to those who were "taught to respect one's self; stand upon such elevated ground as to be enabled to take a large view of the wide-spread and infinitely diversified combinations of men and affairs in a large society; [had] leisure to read, to reflect, to converse; [were] enabled to draw the court and attention of the wise and learned, wherever they are to be found; [were] taught to despise danger in the pursuit of honor and duty (ibid., p. 398).

[44] See, for example, Freeman (1980), p. 124.

[45] According to Freeman, Burke's conception of the ruling class was theoretically based on three components: 1) certain character traits considered necessary for good government, such as broad vision, or capacity to command; 2) certain social conditions considered conducive to the production of these traits, like high social status; and 3) certain occupations presumed to create these conditions. Freeman (1980), chap. 6.

[46] In his "Thoughts on the Cause of the Present Discontents," Burke made reference to the occupations that "deserved" representation in the Commons, and defended a representation of interests and not of persons. He affirmed that the Commons should indispensably include "a great official, a great professional, a great military and naval interest, all necessarily comprehending many people of the first

representatives and the electors, played a fundamental role within the conservative tradition: the representatives' independence -they affirmed- had to be defended "against the people themselves misguided and inflamed by faction and self-interest."[47] Implied in this principle was the idea that the people's intervention in politics would only contaminate the rational deliberations of the representatives. The representatives, thus, had to substitute, rather than to interpret or follow, the will of their constituents.[48]

In order to secure the isolation of the representatives, the conservatives presented many different solutions. The most extreme among these measures was directly oriented to restrict political rights, preventing the majority of the people from taking part in the political elections. In order to secure this aim, for example, they established property qualifications as a prerequisite to vote. Trying to justify this requirement, the conservatives affirmed that i) to be able to make autonomous decisions, the electors had to have "a will of their own," and ii) that to achieve this independent will a person had to be a property owner. Clearly, their idea was that a person without property had a purchasable will. Without property, they believed, the people tended to make heteronomous decisions.

The principal defender of this position, with regard to property, was William Blackstone. According to him, the political system should provide that "one will give his vote freely, and without influence of any kind." Then, he stressed that "since [it] can hardly be expected in persons of indigent fortunes, or such as are under the immediate domination of others, (whose suffrages therefore are not so properly their own, as those of their superiors, on whom they depend;) all popular states have therefore been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded from voting." [49]

Another conservative proposal at separating the representatives from the electors, was that of extending the political mandates.[50] In addition, they supported

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weight, ability, wealth, and spirit." For an analysis of this topic, see Pole, (1966), pp. 443-444. Also, the philosopher William Paley referred to the adequate composition of the Parliament as being constituted by landlords and merchants: the "heads of the army, the navy, and the law" (This assumption, and the best historical analysis of this issue of "interest representation" theory, may be found in Pole (1966), pp. 442-457). Moreover, he explicitly dismissed any concern for how these representatives had been chosen, stating that the only important thing was that the most appropriate persons were, in fact, elected.

[47] Quoted in Reid (1989), p. 75.

[48] Ibid., pp. 70, 71. Additional arguments concerned the difficulty of recognizing the true interests of the people and the inconveniences that would follow trying (ibid., p. 86).

[49] Blackstone (1844).

[50] For example, the Septennial Act, enacted in 1716, was one of the high points in their fight to make the representatives less accountable to the people. The defenders of the Act argued that frequent elections would cause agitation and unrest, and that the government would become dependent on the whims of the multitude. Probably the clearest justifications of the Act came from a ministerial speaker who explained that "members of Parliament must be as independent of their electors as of the Crown, otherwise they will be under an influence that may be prejudicial to the general good of the nation, for the desires of a Corporation may thwart the good of the whole, and contending particular interests would be an eternal discord to measures of Parliament. Septennial Parliaments in great measure prevent that influence, for he who is not to return under an obligation to ask the favor of his voters to be speedily chosen again will act more freely for the general good than if he is, and the common people will not ride

the model of the mixed Constitution, which secured fixed and ample portions of political power to the upper social classes. The main idea behind the mixed Constitution was that political power had to be divided among the main parts of society: the Constitution, thus, had to make room to "monarchy," "aristocracy," and "democracy." Defending this initiative, for example, in his "Reflections on the Revolution in France," Burke affirmed that "these opposed and conflicting interests, which you considered as so great a blemish in your old and in our present constitution, interpose a salutary check to all precipitate resolutions . . . Through that diversity of members and interests, general liberty has as many securities as there were separable views in the several orders."[51]

WHEN THOMAS PAINE CONFRONTED EDMUND BURKE

One of the main radical reactions against the conservative position (and against Burke´s position, in particular) came from the influential Thomas Paine. Within the context of this work, Paine´s contribution to the radical cause was especially interesting: Paine defended a radical epistemic position; he directly supported the radical creed before the attacks it received (thus, for example, he defended Richard Price against Burke´s criticisms); and he also presented the radical view in a more clear and systematic way than his predecessors. In addition, the case of Thomas Paine is interesting given the enormous influence of his work within the United States, where he appeared as one of the main intellectual figures behind the emergence of political radicalism, after the independence. In fact, Paine developed most of his intellectual and political activity in the United States, decisively contributing there to the diffusion of the radical ideology.

Like most of the radicals of his time, Paine appealed to the notion of natural rights, and to the principle that "all men are born equal and with equal natural rights."[52] As B. Kuklick commented, Paine believed that "fundamental truths, could be arrived at by anyone, with the perseverance to examine the world carefully and to cogitate on his experience".[53] From the belief that all people were equally endowed with reason, Paine inferred the principle that political decisions, to be adequate, had to reflect the will of the majority. By stating these beliefs, Paine was also confronting Burke´s position. In this respect, he explicitly affirmed that Burke was only "laboring to stop the progress of knowledge," by putting barriers between the common people and their representatives. [54] According to Burke -he said - God, kings, parliaments, magistrates, priests, the nobility were all "gates

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the gentry." See J. Pole (1966), pp. 411-412. Justified this way, the Septennial Act was approved by the Parliament a short time after the war against France ended. The Act joined other measures adopted by Parliament as means for increasing its own powers. Among these measures, the most interesting were the augmentation of the property requirements needed for political rights and a ratification of the Congressional right to have secret debates.

[51] See Panagopoulos (1985), pp. 192-193.

[52] See, for example, Paine (1989), p. 5.

[53] Ibid., Introduction, p. x.

[54] Ibid., pp. 120-121.

through which [a person] is to pass by tickets from one to another".[55]

Paine also rejected Burke's epistemic elitism, and his charge against the passions of the multitude.[56] In his opinion, the majority of the people were not ignorant per se. Ignorance was only the absence of knowledge, and "though man may be kept ignorant, he cannot be made ignorant."

Similarly, Paine dedicated part of his intellectual energies to defend Richard Price's positions against Burke's attacks. Burke -he affirmed- "not sufficiently content with abusing the national assembly, a great part of his work is taken up with abusing Dr. Price (one of the best-hearted men that exists)."[57] His strong defense of Price was not surprising: by defending him, Paine was also defending the notion of self-government, properly supported by the latter. He himself dedicated part of his two main books ("Common Sense," and "The Rights of Man") to the defense of the same principle.

Paine's defense of self-government moved him to attack another central belief within the conservative creed: the idea that tradition, previous generations, or certain specific documents could have authority upon the present generations. Paine dedicated almost all of "The Rights of Man" to attacking this conception and its political implications. Again, the main intellectual target of his attacks was Edmund Burke.

Paine seemed particularly irritated by Burke's arbitrary references to the past, and to the normative force that Burke attached to it. According to Paine, Burke's defense of the past was merely whimsical, because, he asserted, "if antiquity is to be authority a thousand such authorities may be produced, successively contradicting each other."[58]

In his writings, Paine placed the "right of the living" before "the authority of the dead",[59] and maintained that "every generation is equal in rights to the generations which preceded it, by the same rule that every individual is born equal in rights with its contemporary." He concluded his reasoning by affirming that "every age and generation must be as free to act for itself, in all cases, as the ages and generations that preceded it."[60]

Also, and coherent with the former assumptions, Paine confronted some of

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[55] Ibid., p. 78. Paine added that people like Burke were only "laboring to stop the progress of knowledge," by putting barriers between the common people and their representatives.

[56] In fact, Paine replied to Burke's charge by stating that the conservative leader, rather than the majority of the people, was the one who seemed to be driven by mere passions "Mr. Burke exclaims against outrage, yet the greatest is that which he has committed. His book is a volume of outrage, not apologized for by the impulse of a moment, but cherished through a space of ten months." ibid., p. 69.

[57] Ibid., p. 72

[58] Ibid., p. 76.

[59] Ibid., p. 56.

[60] Ibid., p. 76. To analyze this and related debates more precisely, see Holmes (1988), pp. 195-240.

the main conservative political expressions of the time, among them, the institution of hereditary succession, and the mixed or balanced Constitution. Against the first institution, Paine affirmed that it was "impossible to make wisdom hereditary" and that there did not exist a "monopoly of wisdom". He also criticized Burke, in this respect, stating that the latter had not shown where the wisdom originally came from, and by what authority it first began to act.[61] Most of his arguments in "Common Sense," instead, were dedicated to objecting to the idea of a mixed Constitution. As B. Bailyn stated, in effect, the "intellectual core" of "Common Sense" was "its attack on the traditional concept of balance as a prerequisite for liberty." [62] Clearly, given that he considered that all people were equal, these distinctions among different interests were inadequate. Paine suggested, in this respect, that the English "balanced" constitution included the "remains of two ancient tyrannies . . . the remains of monarchical tyranny in the person of the King [and t]he remains of aristocratical tyranny in the persons of the Peers."[63]

[61] Paine (1989), pp. 118-120. In his "Common Sense," Paine had already stressed this belief within the context of his egalitarian epistemological view. Paine affirmed that kings were totally ignorant of the world they governed, and he also attacked the mistaken supposition that "the king is wiser than [the people]". See, for example, Claeys (1989), p. 43. From Paine's Common Sense, see, for example, Paine (1989), p. 7

[62] Bailyn (1992), p. 285.

[63] Paine (1989), p. 6.

CHAPTER 2

RADICALISM AND POPULISM IN THE U.S.

INTRODUCTION

In the previous chapter I examined some significant debates held in England between radical and conservative groups, regarding how to organize political institutions. In the following chapters I will examine the continuity of this debate during the Framing period in the U.S. I will begin this study by analyzing certain radical political experiences that I will describe as "populist regimes." To examine these regimes seems particularly important given that the U.S. Constitution, as well as most of the political arguments presented by its authors during the Founding period represented, at least in part, a direct reaction against (what the Framers perceived as) the increasing and threatening influence of populist forces within the U.S.

My analysis of this radical/populist position will be focused on two very significant historical moments: one that came right after the North American Independence Revolution, and another that came right before the drafting of the national Constitution. During this period, the defenders of strong popular governments were in extraordinary situation: most people were actively integrated into the national political life; the different local communities had developed highly participatory political systems (this historical moment was known, in fact, as the period of "radical constitutionalism"); and even the national and local leaders appeared to be openly committed to the general principles of communal self-government. The second historical period that I will study, will be the one that took place during the mid-1780s, the period that John Fiske considered the most "critical period of American History."[1] At this time, most state governments faced dramatic institutional conflicts. In some cases, these conflicts took the form of popular rebellions and, in other cases, the conflicts surfaced as intense popular pressures upon the state's political institutions.

Although I will analyze the general features that distinguished these two periods, I will concentrate my attention, in particular, on two examples, one corresponding to each of the periods mentioned. As a specific example of the populist regimes that followed the North American revolution, I will examine the Pennsylvanian political regime. In particular, I will examine the main features that distinguished the (enormously influential) radical Constitution of Pennsylvania,

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[1] Fiske (1916).

1776, and some of the legislative decisions that grew out of this framework. Also, and as a specific example of the "critical period of American history," I will examine the events that took place in Rhode Island, when -for the first time in U.S. history- the radicals took direct control of the state government.

It seems clear that both of these periods where characterized by an intense radicalism. This is the case, at least, if we link the idea of "radicalism" with a defense of collective assemblies as the best means for guaranteeing appropriate political decisions and a general rejection of government by an enlightened, privileged, or somehow superior elite.[2] It seems less clear, however, that these periods were "populist" periods, dominated by populist politicians. This is true, at least, if we link the idea of "populism" with a defense of omnipotent, basically unlimited, majoritarian governments, as the only means for adopting adequate political decisions. However, the Framers usually perceived and described these strong movements as (what we called) populist movements, and associated them with political turmoils and despotic government. Obviously, the Framers depicted their political enemies in the most unattractive fashion, possible, as a way to secure broader support for their proposals. Clearly, the opposite was also true, and the critics of the Federalists presented the latter as a group of self-interested aristocrats, who wanted to secure an unacceptable hierarchical order, where the richest would govern.

Let me begin, then, by presenting some general reasons that may help us to understand why radicalism (and, more specifically, populism) emerged in North America. After this initial approach, I will explore in more detail the post-revolutionary, pre-constitutional context.

A GOVERNMENT FOR THE MAJORITY

Since the colonial period, the North Americans have had to organize by themselves and to develop their own institutional mechanisms, given the decreasing control exercised by the British over its American colony. Thus, the Americans began to build an imperfect but complex system of "local democracy". Also, the independence war forced the population in the different states to improve their "self-organization," in order to be adequately prepared for overcoming the requirements of the time.

In this sense, it is worth noting that during the revolutionary period one of the most important demands of the Americans had to do with the notion of "self-government," a notion that (as we examined) had played a central role within British radicalism. In the U.S., it was common to attach to this demand the claim that the Americans needed better representation within British institutions, in order to

[2] See, for example, Wood (1992).

properly express, defend, and carry out their interests.[3] We may properly affirm that this claim was "radical" given that, in its very foundations, the idea appeared that all those who could be potentially affected by certain particular political decisions had to be actually consulted before the adoption and enforcement of these decisions.

It is important to note, in addition, that from the beginning of the Revolution, most political leaders had encouraged and supported popular participation in politics. Most people seemed to agreed with this demand, and they wanted to reaffirm it even after the Revolution. However, when the Revolution was over, most revolutionary politicians began to obstruct, in practice, the broad participation that they had previously promoted through their speeches and writings.[4] As a result of this breach between discourse and practice, it was not surprising that the people began to "turn against their teachers the doctrines which were inculcated in order to effect the late revolution."[5] This strong popular commitment to the idea of self-government and popular political protagonism, I think, remained as a profound characteristic of the North American's political culture.

In addition, since the end of the war, a majority of people had to confront a very difficult economic situation. Most of them had huge debts to pay and no resources to discharge their obligations. Clearly, this situation dramatically frustrated the expectations that they had acquired during the independence period, and which had been nourished by the political leaders of the revolution. As Oscar and Lilian Handlin said, "Americans expected that government would be an instrument to serve the citizens' purposes. [However], between 1774 and 1783 little came of that certitude...Again and again expectations proved delusive."[6] Thus, and as a result of this situation, most people began to press the political authorities, trying to force them to fulfill the promises that they had made during the war time.

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[3] In this sense, recall the typical claim of the Americans against the British: "no taxation without representation" (a claim that has to be understood as attached to a strong idea of imperative mandates).

[4] To (at least partially) support this statement, it might be interesting to contrast the attitudes of the main political actors of the period before and after the revolution. If we take, for example, the cases of James Otis, Richard Lee, Alexander Hamilton, and John Adams, we could ratify this remarkable difference between what they said before the revolution and the institutional arrangements they defended once the battle was won. Before 1776, all these influential politicians defended actual representation as a synonym of strong popular intervention in politics, and very egalitarian social arrangements. Remarkably, the conservative Adams even supported what he called public mobs, as justifiable means for expressing political opinions. When the Revolution concluded, they all began to support rather conservative political arrangements. Most notably, some of them (i.e., Lee) even returned to the idea of virtual representation, defending property qualifications in the new revolutionary order. See Richard Henry Lee's letter to Mrs. Hannah Corbin, in Ballagh (1911), pp. 392-394; Coulton, (1929), chap.2; Maier, (1980), p. 183; Galvin, (1976), pp. 43,94; Wood (1969), p. 182; Alexander Hamilton "Hamilton to John Jay," Dec. 31, 1775; "Hamilton to the Provincial Congress of the Colony of New York," May, 1776; "The Farmer Refuted," 1775; in Syrett, ed. (1961), vol. 1; Koch and Peden (1946), vol. 1, pp.51-52; Walsh (1969), chap.2; Howe (1966), chaps. 1 and 6; Nedelsky (1989), vol.1, n.1, p. 16.

[5] See, for example Wood (1969), pp. 397-398.

[6] Handlin (1982), p. 215.

The situations mentioned help us to explain the development of strong citizen self-confidence in their political capacities as well as their strong beliefs in the value of implementing the majority will. Radicalism, then, found excellent ground in these bases. In this sense, it was not surprising that many English radicals who had not been particularly "successful" -politically speaking- in their own countries, became celebrities in the United States. The most remarkable case, in this respect, is the one of Thomas Paine, who basically developed his whole political life in America. More significantly, his radical ideas achieved enormous popularity during that time, and influenced some very important political leaders both at the local and at the national level. Clearly, the Americans were eager to consume literature that explained the decadence of the British hereditary government, and which showed the impossibility of justifying such types of regimes.

Similarly, the Americans were seduced, directly or indirectly, by Rousseaunian ideas. In effect, many among the early radical Americans embraced the type of radicalism that affirmed ideas such as "every law that the people have not ratified in person, is void."[7] This Rousseaunian influence, for example, may be evinced by the fact that many populists, like Rousseau, were more interested in the final majority decisions, than in any previous "deliberative" process; or by the fact that most of these activists seemed to assume that the people had a "predetermined will," which (simply) had to be disclosed and implemented, in order to organize a fair political system.

In coherence with these types of beliefs the radicals in America began to develop a (not clearly articulated but still significant) political doctrine that included considerations like the following.

First, they shared with people like Paine the idea that "all men are born equal and with equal natural rights". Political leaders like Thomas Jefferson (actually, a good friend of Paine) adopted these types of beliefs and contributed to their diffusion. In an interesting exchange of letters with the radical Priestley, Jefferson defended this principle of "equal capacities." Taking this principle as an assumption he affirmed, for example, that in the case that a representative abandoned his position "many others entirely equal, [will be] ready to fill his place with as good abilities." These conditions, he thought, constituted the basis that allowed the "experiment of self-government" to take place in North America.[8] In fact, these beliefs were the ones that inspired Jefferson when he wrote the draft of the Declaration of Independence .[9]

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[7] See "A Newport Man," "What does history teach? (Part II)", in Borden (1965), pp. 48-51.

[8] See Thomas Jefferson, "Jefferson to Dr. Joseph Priestley," Washington, June 19, 1802, in Lipscomb (1905), p. 324. See, also, White (1978).

[9] Among Jefferson's intellectual influences for these positions, Locke and Burlamaqui were particularly relevant. It is interesting to note that Jefferson read Locke in a very peculiar way, very different by the way in which most Federalists read the British philosopher. Jefferson, for example, focused on Locke's concern with equality (and the idea that all men were born equal by nature), especially on Locke's Second Treatise, in which Locke showed less concern with his theory of knowledge (and the distinctions among people according to their different capacities for "perceiving" moral truths). In this sense,

In agreement with these egalitarian beliefs about the capacities of the people, political thinkers like Jefferson dedicated particular attention to the idea of having an "enlightened people," and recommended, for example, to open "all the avenues to truth" to them.[10] "Preach a crusade against ignorance," he asserted, "establish and improve the law for educating the common people. . . . I think by far the most important bill in our whole code is that of the diffusion of knowledge among the people."[11]

These epistemic assumptions, according to which the people were equal in their intellectual capacities,[12] had significant institutional implications. They implied, typically, that in order to define adequate political decisions, it was necessary to actually take into account the opinions of all those potentially affected. They also implied that there did not exist a "class" of political leaders, different from the rest of humans, and especially capable of discerning the "real interests of the nation." According to the radicals, the only legitimate source of power was the citizenry.

As a result of the examined criteria, the radicals tended to distrust any delegation of power to a group of representatives.[13] It was clear to most of them that "as soon as the delegate power gets too far out of the hands of the constituent power, a tyranny is in some degree established."[14] In this sense, and following Rousseaunian criteria, Jefferson stated:

> All the powers of government, legislative, executive, and judiciary, result to the legislative body...concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive

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Jefferson had a much more "egalitarian" approach to Locke than most of the Federalists. Seemingly, Burlamaqui's doctrine of moral sense strengthened this egalitarian reading of Locke. Burlamaqui, for example, affirmed that common sense could play a fundamental role in the evaluation of moral questions. This path of access to moral knowledge -according to Burlamaqui- implied a "quick and lively kind of faculty, which has no necessity to wait for the speculations of the mind." According to White, a conception like this attributed "a power of perception to persons who lacked many of the ideas contained in Locke's self-evident principles," thus allowing people like Jefferson to "make their theory much more democratic than the moral rationalism they were trying to escape." See White (1981), pp. 110, and 129-131.

[10] See T. Jefferson's letter to Judge John Tyler, June 28, 1804, Jefferson (1984), p. 1147.

[11] See T. Jefferson's letter to George White, August 13, 1786. ibid., p. 859.

[12] For example, Jefferson believed that the people could "safely be trusted to hear everything true and false, and to form a correct judgment between them." "Jefferson to Judge John Tyler," in Jefferson (1984), p. 1147.

[13] "You fought, conquered and gained your liberty - then keep it . . . Trust it not out of your own hands; be assured, if you do, you will never more regain it." See, "A Farmer and Planter," in Borden (1965), p. 72.

[14] Thomas Young, from Vermont. Included in Sherman (1991), p. 190. The radicals feared the proposed national government, and considered it as the source of future oppressions. They predicted that "all the power [would] fall in the hands of the few and the great." Melancton Smith, "Speech at the Constitutional Convention," June 21, 1788, included in Storing (1981), vol. 6.

> as one...As little ill it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for.[15]

Not surprisingly, many of these activists perceived the efforts to organize a central national government as a mere aristocratic enterprise, which threatened to deprive the people from their legitimate right of self-government.[16] However, in the end, most of them recognized the need for a representative system because of the obvious problems of implementing direct democracy. In any case, given their belief that power "often convert[ed] a good man in private life to a tyrant in office," they suggested not delegating the "power for making laws...to any man for a longer time than one year."[17]. Coherent with these ideas, then, they viewed the representative system only as a "second best," as an undesired option

On the other side of the coin, the radicals showed profound confidence in the virtues of collective debates. As a characeristic expression of this commitment, the radicals of Pennsylvania affirmed that "in Pennsylvania, every opportunity should be taken to connect, blend and intermix the people, who vary so greatly in their origin, language, and manners."[18] Actually, in many cases, this confidence in the people was the foundation for what I named "epistemic populism," an idea according to which the only way to achieve adequate political answers was by consulting the opinion of the majority. This belief was reflected, for example, in the then common idea that said that "the voice of the people" had to be followed as if it were "the voice of God". These types of assumptions scared the conservative political elite, who thought that these beliefs came to justify unprincipled governments, directed by the "passionate" and unconstrained will of the majority. Not surprisingly, then, some of the leading conservative thinkers began to attack

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[15] Jefferson, "Notes on Virginia," reprinted Ford (1894), pp. 223-24

[16] "Centinel," a characteristic anti-Federalist, foresaw "a government that w[ould] give full scope to the magnificent designs of the well-born." In an article in "The Boston Gazette," over the signature of "A Federalist," an anonymous anti-Federalist showed his belief that the Constitution was written by a group self-serving aristocrats (see Borden, 1965, pp. 1-2). A pamphlet written by "A Farmer and a Planter" stated that "aristocracy, or government in the hands of a very few nobles, or RICH MEN, is therein concealed in the most artful wrote plan that ever was formed to entrap a free people" (ibid., p. 70, emphasis in the original). Similar concerns about the "low-born" were expressed by "Montezuma" (ibid., pp. 20-23) and John Humble (ibid., p. 73). "Aristocratis" wrote a satirical anti-aristocratic pamphlet objecting to the national Constitution, where "a few [were designed] to rule, and many to obey" (ibid., p. 144). According to John Mercer, an anti-Federalist from Maryland, the anti-Federalist creed was based on a distrust of representative government in general and aristocratic government (as the one created) in particular (ibid., p. 175). "Philadelphiensis" objected that the federal Constitution would create a "despotic monarchy," given that the "president general will be a king to all intents and purposes, and one of the most dangerous kind too — a king elected to command a standing army . . . [a] tyrant" (ibid., p. 212). Likewise Cato: "The mode in which [the representatives] are appointed and their duration, will lead to the establishment of an aristocracy" (Cato, in the New York Journal, 1787, included in Allen and Gordon, 1985.). Other examples of the same ideas appear in G. Mason, (Objections to the Constitution of Government formed by the Convention, 1787); Lee, Richard (Oct, 10, 1787); the Letters of Centinel (Oct.5, 1787); "John De Witt" (Nov 5, 1787); "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania" (Dec 18, 1787); etc (All included in Allen and Gordon, 1985).

[17] See, "Demophilus" (1776), p. 5.

[18] Pennsylvania Packet, Sept. 20, 1783.

what they perceived as the "core" of the populist creed: the identification between direct democracy and correct decisions. In this sense, for example, Hamilton stated that "the voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact."[19] Similarly, the Federalist Fisher Ames[20] objected to the "democrats" who thought "nothing so sacred than their voice, which is the voice of God. In the influential and well-know paper "The Essex Result," Theophilus Parsons directly objected the ambitions and dire optimism of those who he also described as the "democrats." He affirmed, in this sense, that "all democrats maintain that the people have an inherent, unalienable right to power; there is nothing so fixed that they may not change it; nothing [as sacred as] their voice."[21]

It is interesting to note, in this respect, the completely opposite views that separated the conservatives' from the radicals' political conceptions: while the conservatives feared the then common town meetings and popular assemblies, the radicals usually showed their complete confidence in these open, massive popular meetings. An interesting illustration of this contrast appears, for example, in a letter by the "Federal Farmer" where he affirmed that, while the conservatives considered the popular meetings as a "tumultuous and a mere mob," he -as a representative of the more radical political opposition- believed that "the most respectable assemblies we have any knowledge of and the wisest, have been those, each of which consisted of several hundred members."[22] Actually, the "Federal Farmer" seemed to defend a general principle about the virtues of massive collective bodies, which would completely turn the conservatives' convictions upside down, in this respect. According to the "Federal Farmer," in effect, "[the] more numerous state assemblies and conventions have universally discovered more wisdom, and as much order, as the less numerous ones."[23]

The opinions of the "Federal Farmer" do not represent isolated testimonies of the radicals' beliefs. On the contrary, his position reproduced the one that Thomas Paine had presented before, in defense of large assemblies, when he asserted that "the variety prevents combination, and the number excludes corruption."[24] Thomas Jefferson also seemed confident in the virtues of popular bodies. For instance, Jefferson defended an institutional system which gave more power to the citizenry,

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[19] See Farrand (1937) vol.1, p. 299.

[20] Ames (1969), vol.2.

[21] He continued by stating that " [they believe] that it is not only true that no king, or parliament, or generation past, can bind the people, but they cannot even bind themselves." Theophilus Parson, "The Essex Result," included in Hoffman and Albert (1981), p. 213.

[22] See H. Storing (1981), vol.2, p. 369. Also, while the Federalists attributed a tendency toward irrationality to the common people, many anti-Federalists responded that the "disordered passions" criticized by the Federalists actually belonged to the will of "wicked and ambitious men." They affirmed that "tyrants have always made use of this plea [about a chaotic situation]; but nothing in our circumstances can justify it." See an essay by "Brutus Junior," in Borden (1965), p. 102.

[23] Letter from the Federal Farmer, included in Storing (1981), vol. 2, p. 284.

[24] See, Paine, Thomas, in Pennsylvania Packet, Dec. 5, 1778.

stating that "in general, I believe that the decisions of the people, in a body, will be more honest and more disinterested than those of the wealthy men."[25]

As a direct expression of these epistemic assumptions, and political commitments, the radicals began to defend enlarging the number of representatives as a way to improve the political representation of the people. They wanted the representative system to portray a "picture" of the people: an adequate government - they assumed- should possess the same interests, feelings, opinions, and views as the people themselves.[26] According to the principle embodied in this proposition, any increase on the number of representatives implied the possibility of improving the quality of the decision -making process.[27]

In addition, the radicals' "blind confidence" in the people helps us to understand their skepticism with regard to any mechanism oriented towards restraining the majority will -any system of "checks and balances." This attitude was especially clear during the constitutional process of the 1770s. During that period, several states modified their Constitutions and adopted somewhat radical documents for their political organization. These constitutions, which would differ greatly from the federal Constitution of 1786, also differed from one another. However, "they all adhered to the doctrine of the separation of powers, and they all rejected, to a greater or a lesser degree, the concept of checks and balances."[28] The radicals, thus, tended to link the system of checks and balances to the conservative constitutional experiments that they knew from the British example.[29]

Against these models, the radicals, as we will see, defended institutional mechanisms aimed at securing a more direct intervention of the majorities in the decision-making process. The radical constitutions of the 1770s reflected most of these populist viewpoints. They included, for example, a unicameral legislature (Constitutions of Pennsylvania, Vermont, Georgia); an executive elected by the legislature (nine of the eighteen earliest constitutions of the independent states); no veto power conceded to the executive; a popularly elected council to evaluate the proper functioning of the Constitution (Pennsylvania, Vermont); popular election for the candidates of most government offices; a directly elected Senate (all except Maryland); rotation of the senators (New York, Delaware, Virginia); rotation of most of the important government officers, e.g., sheriffs, coroners, and governors

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[25] See Jefferson (1984), "Jefferson to Edmund Pendleton," August 26, 1776, p. 752

[26] See the "Federal Farmer", in Storing (1981), vol. 2, p. 230.

[27] See the letters of the Federal Farmer on representation in Borden (1965), pp. 158-173. In the same volume see, for example, the essay of "A Georgian", 157. Additionally, see the opinions of Gerry and Mason, at the Federal Convention (Farrand, vol. 1, p. 569). At the Convention, also, see the opinions of Williamson (ibid., vol. 2, p. 511), King and Carrol (ibid., vol. 2, p. 644). Summarizing similar objections to the Constitution, presented by the Pennsylvania's radicals, see Brunhouse (1942), p. 294.

[28] Vile (1967), p. 133.

[29] Ibid., p. 136.

(Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Georgia); and a bill of rights (as they were adopted in most of the States' Constitutions).[30]

TOWN MEETING AND COUNTY CONVENTIONS

To achieve a better understanding of what I called populism, it is important to analyze the popular activism that distinguished the pre-constitutional period in the U.S. This activism took place at the local level, and was mainly oriented to confront the political and economic crisis that followed the Independence period. To examine this phenomenon, I will focus my attention on the town meetings that functioned in many North American states at the time of the revolution.

In spite of the criticisms to which local political organizations were subject there is more certainty every day about the extended participation that, in relative terms, characterized these early regimes. At least with regard to voting, local communities tended to be rather permissive. The restrictions normally imposed on voting both in local and national matters were usually ignored in the former case. The idea is that "in the actual meetings participated many people who did not meet the proper requirements, but who were known and established inhabitants of the town";[31] and that "when concerned with local matters, seldom counted the contents of a man's pocket before it counted his vote."[32] This way, almost all white men took part in the community activities which represented, within the context of very restrictive political regimes, a significant fact.[33]

The most basic sphere of participation at the local level was, in many cases, the aforementioned town meetings, where the people got together to discuss all

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[30] See, for example, Lutz (1988), pp. 104-5. The famous anti-Federalist "Centinel" criticized the federal Constitution and praised the radical models of organization as providing better tools for assuring the responsibility of the representatives. He suggested imitating "the constitution of Pennsylvania, [by vesting] all the legislative power in one body of men . . . elected for a short period." "Letter of Centinel, published in the [Philadelphia] Independent Gazetteer." See Borden (1965), p. 134.

[31] See Brown (1970), p. 5.

[32] See Starkey (1955), p. 10. According to the studies of C. Grant, since at least the 1720s "towns tended to ignore the complex legal distinctions" that differentiated between classes of inhabitants, and established restrictions in the suffrage. "Thus, in nearly all Connecticut towns after 1740, all adult males were allowed to vote" at the local level. See Grant (1961), pp. 128-30.

[33] However, it is also true that the towns were rather severe with those they called "strangers" (people who did not belong to the community), who were normally denied any part in the administration of local affairs. Additionally, Zuckerman emphasizes the importance of the practice of "warning out," which permitted towns to exclude from the community certain "undesirable" people, and which allowed the communities to preserve a very homogeneous population. See Zuckerman (1968) Similarly, Jane Mansbridge presented a skeptical approach with regard to the openness and fairness of the political procedures within the town meetings. According to her, the average attendance at the meetings was quite low, in spite of the fines that were established to motivate popular participation. She supported her statement with some figures. For example, it seems that in eighteenth-century Dorchester, attendance averaged 38 percent; while in Concord attendance averaged about 46 percent; 49 percent in Andover (1708); 26 percent in Barnstable (1715); 28 percent in Dedham (1731); 37 percent in Manchester (1737); and 50 percent in Watertown (1736). She recognized, however, that later on the number of the participants tended to be higher. See Mansbridge (1983), chap. 11.

kinds of community affairs. Originally, the town meetings were simple meetings of proprietors, aimed at discussing the organization of the land. However, as these matters were settled, the proprietors began to play a less significant role in the daily administration of local problems.[34]

From the end of the seventeenth century, the role of the town meetings began to change, through a notable increase in the importance and diversity of local activities. From one or two annual meetings, normally held to elect local authorities, the sessions evolved into four to eight sessions per year by the end of the century. Prior to this time, almost all the relevant tasks were carried out by the most important town officer, the "selectman," who called the town meetings and appointed the other local officers. By the beginning of the eighteenth century, however, this officer had lost most of his prior functions. Ad hoc committees, popularly elected, began to take care of the administrative problems of the towns, while the frequent rotation of officers became a central characteristic of the local administrative positions.[35] The practice of periodically supplanting the selectmen also became more common. Previously, this agent tended to keep his office for very extended periods. The only important function retained by the selectmen, then, was the control over the agenda of the town meetings. Finally, it is also worth mentioning that, as the communities became more complex, the increasing tasks of the towns allowed more common people to hold public offices. In Northampton, for example, of the "fifty-eight offices in the town, twenty-seven were occupied by men who were not town proprietors and did not have a share in the common lands." [36]

The popular participation in these assemblies depended mainly on the particular towns where the meetings took place. For example, in Boston, normal participation varied from 250 to 450 people. In most cities, the number of participants in the local meetings was normally fewer than that of Boston, while in other, more exceptional cases, more than a thousand people took part in the debates.[37] Another decisive factor for defining the number of the participants in the meetings had to do, obviously, with the particular problems that were discussed. It is clear, for example, that local participation increased during crucial moments such as the revolutionary period.

Gathered together, the community had the opportunity to openly discuss the evolution of local affairs. A moderator chosen by the people conducted the meetings, which were normally regulated by a strict set of rules. Nobody could speak without permission of the moderator, and if someone spoke while someone else was speaking, severe fines were to be applied. The discussions focused only on

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[34] See, for example, Pole (1966), p. 54. See also, Bonomi (1971), pp. 26-39.

[35] See, for example, Lockridge and Kreider (1960), pp. 556-62. Also, see Lockridge (1970).

[36] See, Brown (1955), p. 98. According to Bridenbaugh, as most of the officers had to serve without salary, "many of the gentry refused [to take office], preferring to pay the fines exacted for this relief, with the result that tradesmen of the middle rank exacter performed most of the work." Brindenbaugh (1955), p. 6.

[37] See, for example, Bridenbaugh (1955), p. 6; and Hoerder (1977), p. 323.

the specific items contained in the meeting's agenda, and any ten people could propose an item for inclusion.[38] After the discussions, the people were permitted to vote, and decisions were made according to the majority proposals.[39] However, it was a normal practice to reach unanimous consent, which suggests that a combination of both discussion and rejection of dissent were at work.[40]

Then, to coordinate their efforts and policies, elected representatives from the different towns came together in what they called county conventions. Like the decisions of the town meetings, the decisions of these conventions were not binding on the participants, but merely advisory.

The conventions followed the model of the town meetings in their organization.[41] The county conventions were open and were frequently attended by hundreds of people, but the number of participants, as in the case of the town meetings, was closely connected to the decisions at stake. In a letter of Samuel Adams, for example, it was stated that "5000, some say 6000 men, consisting of the respectable inhabitants of this and adjacent towns" were assembled in the Old-South meeting-house.[42] During the revolutionary period, these types of committees changed their nature and function "from ad hoc to long-term, from advisory to executive," and with the name of Committees of Correspondence, Committees of Safety, Inspection, etc., they became "increasingly independent from their parent body, the town meeting." [43] In any case, the existence of these conventions resulted in the involvement of numerous people in everyday politics. The town meetings and popular conventions encouraged political participation and made the administration of local affairs by the common people possible, something that was far from true at the national level.[44]

THE CONSTITUTION OF PENNSYLVANIA: THE EXPERIMENT OF "UNCHECKED MAJORITIES"

Within the described context of strong popular activism, the state of Pennsylvania distinguished itself by the development of a Constitution clearly inspired by radical ideas. In fact, the Pennsylvanian Constitution of 1776 may be deemed the most

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[38] See Brown (1955), pp. 78-9.

[39] In the election of officers, for example, it was not unusual for people to cross out names or even to write in others that did not appear on the ballot. See, e.g., Lovejoy, (1958), p. 24.

[40] See, for example, Lockridge (1970), chap.3.

[41] Thus, "moderators were elected, committees and subcommittees were chosen to report, and them, after deliberation, the convention voted resolves." See, Brown (1970), p. 213.

[42] See Samuel Adams, "Adams to Arthur Lee," Dec. 31st, 1773, in Cushing (1968), p. 74.

[43] See Hoerder (1977), p. 321. Thus, the committees played an essential role, organizing and mobilizing people during the revolutionary fight. In fact, the Continental Congress of 1774 was nothing more than the result of the joint activity of these committees. On the activity of the committees as a second-level stage of local participation, see, also, Ryerson (1978), (1978); Poythress (1975); or Reed (1988).

[44] According to Pole, through the town meetings "even the humblest members of the town felt that their interests, involved with those of their town, were included in its representation." See, Pole (1966) p. 54. Warden characterized the town meeting system as flexible, sensible to popular demands, as well as unstable and inefficient. See Warden, in Greene and Maier (1976), p. 81.

radical Constitution in the early North American history. It is worth mentioning, also, that given its importance and influence, this document decisively contributed to nourish the period of radical constitutionalism in North American political life -a period that began immediately after the Americans won their independence, and which was characterized by the emergence of many state Constitutions oriented to secure the dominance of "the majority will." In the following pages, I will examine the development of the Pennsylvanian "radical experiment," and the way in which it fostered the development of (what some people considered) a populist political regime.

The first interesting note about the Constitution of Pennsylvania of 1776 is that the English radical Thomas Paine constituted the main intellectual influence behind it. Actually, Paine developed nearly all his intellectual life in Pennsylvania, where he arrived in 1774, with the help of Benjamin Franklin, after many different frustrating experiences in his own country. In fact, in the United States -where he arrived at age 37- Paine wrote more than 4,000 titles, most of them political, while in England he had written almost no political documents, but poetry and satiric papers. The achievements of Paine's intellectual activity could not have been greater: under his influence, Pennsylvania not only adopted its most radical Constitution, but also took decisive steps toward the abolition of slavery.

The 1776 Constitution included many remarkable innovations among its clauses, and most of them showed their commitment to a radical ideology. For example, trying to guarantee a very close connection between the people and their representatives, the Constitution secured the right of the people to instruct their representatives, and to "apply to the legislature for redress of grievances" (art. XVI of its bill of rights). Also, it instituted the principle of annual elections (section 9), under the widespread belief that long mandates would imply something like a renunciation to the ideal of popular sovereignty. In section 14, the Constitution established the principle of mandatory rotation of the representatives; and as another significant innovation, it designed a popularly elected council to evaluate the proper functioning of the Constitution. For many Pennsylvanian intellectuals of the period, like "Demophilus," the ideal was that of promoting radical democracies in small communities and the introduction of representatives highly dependent on their constituents, was assumed to be the best means for obtaining the desired objective.[45] All of the constitutional clauses mentioned, in a certain way, were aimed to securing this goal of a strong popular government.

Probably the most surprising of all the originalities included in the new Constitution under Paine's inspiration, was the unicameral legislature. The radical Pennsylvanians did not perceive this creation, however, as a provocation to their opponents, or merely as an attractive novelty, but as a required instrument for securing the people's self-government. According to Paine, the bicameral system, at

[45] See Demophilus (1977). This author defended the idea of a radical democracy as presumably practiced in early England by the "Saxons""

least as it was usually implemented, represented a real evil for any proposed majority government. A bicameral system, he affirmed, "always admit of the possibility, and is often the case in practice, that the minority governs the majority".[46] These fears with regard to the bicameral system came from the radicals' fear of the institution of the Senate. Paine, as many Pennsylvanian radicals, associated the introduction of this branch with the creation of a new aristocracy, and the Senators with people who "having once obtained [the power], used it as their own property."[47] Even the influential Benjamin Franklin recognized that "it had always being his opinion that the legislative body should consist of one house only."[48]

Clearly, there may be good reasons to justify the creation of a Senate. The introduction of a Senate may help to promote a better legislative discussion; it may be also useful as a "cooling" device.[49] However, the radical Pennsylvanians considered -not without reason, as we will see- that these arguments were mere "facades" that concealed the actual reasons that normally inspired the defenders of the Senate. The Senate was designed mainly to secure the presence of "the minority of the rich" (the property-owners), within the structure of government. In an article published in the "Pennsylvania Packet," Eudoxus affirmed that the defenders of the bicameral system proposed the Senate as a mere means for "setting up distinctions...and jarring interests."[50]

Thomas Paine's unicameral system faced repeated criticism. Most of the system's critics believed that unicameralism facilitated the enactment of improperly elaborated laws, undiscussed norms which merely reflected the sudden impulses of the majority. For example, among many other authors, the influential Theophilus Parsons affirmed that the unicameral legislatures were "frequently influenced by the vices, follies, passions, and prejudices of an individual".[51] Based on the above mentioned convictions, however, Paine suggested a lucid mechanism to reform his constitutional project. In effect, Paine affirmed that it was possible to encourage better legislative discussion and more sedate reflections, without abandoning the ideal of unicameralism. He suggested, then "to have but one representation...To divide the representation, by lot, into two or three parts [. To debate the bills] in those parts, by succession, that they become hearers of each other, but without taking any vote. After which the whole representation to assemble, for a general

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[46] Forner (1945), p. 389.

[47] See Eudoxus, Pennsylvania Packet, April 22, 1976.

[48] This opinion was expressed in a conversation between Franklin and Noah Webster. See Rollins (1989), p. 148.

[49] In his "Amnesty Lecture" of 1993, Jon Elster remembered the old story that presented George Washington as a defender of these types of reasons. The story goes like this. Jefferson asked Washington why it was necessary to establish a Senate. Washington replied by asking "Why do you pour coffee into your saucer?". And Jefferson answered: "To cool it". "Well -Washington continued- we pour legislation into the Senatorial saucer to cool it". See Elster (1993), p. 21.

[50] Eudoxus, Pennsylvania Packet, April 22, 1776. He also affirmed that those who opposed unicameralism were those who feared "agrarian law[s from a] democratic power."

[51] See Theophilus Parsons, "The Essex Result," in Hyneman and Lutz. (1983), p. 500.

debate and determination, by vote".[52] That is, nothing like the proposed Senate was necessary, if the sincere aim of his critics was that of improving the legislative decision-making process, there were other, more democratic or less elitist devices available to achieve the same aims that his opponents claimed to pursue.

The authors of the Pennsylvania Constitution were also criticized for their proposed Council of Censors, an institution which was in charge of ensuring that the Constitution was properly respected. The Council was objected to, among other things, because of its composition. Madison, for example, in the Federalist n. 50, criticized this body because its current members had previously taken part in the political life of the state, something that -according to him- affected the impartiality of their decisions and prevented them from carrying out adequate deliberations. However, the Council was primarily accused of being ineffective. Madison, in this sense, affirmed that "the decisions of the council on constitutional questions, whether rightly or erroneously formed, have [not] had any effect in varying the practice" of the political branches. Curiously, the model of the Council was also used in post-revolutionary France, as an example of what should not be done, to protect the Constitution. Above all, the French revolutionaries used this example in order to reject the system of judicial review as an appropriate alternative, and thus to reaffirm the predominance of the National Assembly.

In spite of these general observations, the fact is that the Pennsylvanians made important efforts so as to not be accused of the "sins" for which they were accused finally. For example, trying to put an end to the repeated criticism that the Constitution would merely encourage the adoption of "hasty measures" and precipitate legislation, the Pennsylvanians entirely rewrote the section of the Magna Carta referring to the creation of laws. The famous section 15 of the document, in particular, was designed to secure, as much as possible, appropriate legislative discussions before the enactment of any law. Thus, it stated that

> to the end that laws before they are enacted may be more maturely considered, and the inconvenience of hasty determinations as much as possible prevented, all bills of public nature shall be printed for the consideration of the people, before they are read in general assembly the last time for debate and amendment; and, except on occasions of sudden necessity, shall not be passed into laws until the next session of assembly; and for the more perfect satisfaction of the public, the reasons and motives for making such laws shall be fully and clearly expressed in the preambles.[53]

Moreover, adopting a decision that, at the moment, was rather revolutionary, the radicals of Pennsylvania ordered, through section 14 of the Constitution, that the legislative sessions to be open to the public, in order to allow a more adequate participation of the citizenry in the legislative matters of the state.

It is worth mentioning, too, that an earlier version of the Constitution of 1776 finally adopted even demanded that each bill be read three times, on three

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[52] See Forner (1945), pp. 389-390.
[53] See "Pennsylvania Constitution of 1776", in Blaustein and Sigler (1988), pp. 29-30.

different days, before referral to the next session. However, in the end, given the securities already included in the Constitution, the framers of the Constitution considered these additional guarantees excessive.[54] With all of these initiatives, the radicals from Pennsylvania tried to show that they were sincerely committed to organizing a reasonable and open decision-making process.

The impact of the Pennsylvanian Constitution was enormous. First of all, the Constitution of 1776 had direct influence at the state level. At that time, in effect, most states followed with close attention the evolution of the constitutional process in Pennsylvania and, in many cases, included in their own documents some of the institutions that had already been adopted in that earlier radical experiment. In addition, the Constitution of Pennsylvania had an indirect and important impact on what would be the U.S. national Constitution. As we will see, most politicians and constitutional theorists had the Pennsylvanian model in mind during the framing period, and viewed it as the example to be abandoned, in order to create an appropiate Constitution. In fact, the emphasis on institutional "checks" that would characterize the national document would be, in part, a result of the Framers' rejection of (what they understood as) the Pennsylvanian constitutional model.

In spite of the amount of reflection that accompanied the Pennsylvanian constitutional-making process, and the attention that some of its institutional originalities received, the truth is that the Pennsylvania system was never capable of recovering from the negative image that was associated with it. Distinguished thinkers of the time qualified the system as inadequate and incapable of producing neutral, impartial legislation. To put it in the terms that I am using in this work, we could say that the Pennsylvania political system was seen as a populist regime. That is, its system was seen as a regime where the will of the people instantaneously acquired the authority of the law, a system where the sudden passions of the people became the law.

I do not think that these accusations were well founded. However, one thing became very clear once the institutional system was set into motion: the Pennsylvania legislature adopted extremely serious and frequently radical measures, on many different levels, and in quite a short period of time. Undoubtedly, then, the critics of the system turned their attention to the core of Pennsylvania's institutional system as the key element to explain such surprising radicalism. In this respect, the opponents of the Constitution affirmed that the radical decisions that were being adopted represented "hasty" and unreflective measures only passed because the Constitution lacked any significant mechanism of "checks and balances." Although I will dispute some of these claims, I think that at this moment it is better to analyze those radical measures that, in the end, received so much criticism.

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[54] See Shaeffer (1974), pp. 420-1.

THE CONSTITUTION OF PENNSYLVANIA IN MOTION

Herein, I will present a few of the most important examples, that might help us to understand why so many people began to see this system as an example of what I have called a populist regime.

One of the most significant decisions ever passed by the radicals in the Pennsylvanian unicameral system was a law directed at the abolition of slavery. This initiative, however significant and even obvious for our time, was not so clearly accepted by the more conservative leaders during the post-independent period.[55] The radicals of Pennsylvania openly defended this measure during a long period, but they only managed to carry it out when they achieved the complete control of the unicameral assembly (something which happened between 1779 and 1780). Significantly, the "Preamble to the Act Passed by the Pennsylvania Assembly in March 1, 1780", was written by Thomas Paine, and constituted the first legislative measure for the emancipation of Negro slaves in America. In his Preamble, Paine affirmed that the Pennsylvanians were thus adding "one more step to universal civilization [by abandoning] those narrow prejudices and partialities we had imbibed."[56] The adoption of this decision came to have a clear impact during the time and, although the approved initiative had all the "earmarks of a compromise measure," it struck many as the mere product of unreflected desires.[57] In fact, Pennsylvania's legislature was recognizing, discussing, and deciding on an issue that all the other state legislatures were reluctant even to consider.

Undoubtedly, however, the main contentious measures adopted by the legislature had to do with economic matters. First of all, it is worth mentioning the issue of confiscation. In this respect, we have to consider that, after the revolution, the new governments had to decide what to do with regard to the property previously held by the British. The issue of confiscation was extremely delicate, and it was the source of conflicts in many states. In Pennsylvania, the legislature was rather cautious in its approach to the issue of confiscation, but the debates on the topic were still always surrounded by strong popular agitation.[58] Surely, the crucial

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[55] See for example James Madison's ideas on the subject. According to him, the consequences of abolishing slavery to national unity provided more than enough reasons to suspend the adoption of such a decision. Thus, he stated: "[g]reat as the evil [of slavery] is, a dismemberment of the union would be worse." Madison, "Slave Trade and Slaveholders' Rights," June 17th, 1788, in Rachal (1975), vol. 11, pp. 150-1. Noah Webster's opinion on the subject was also that a prompt abolition of slavery would "bring ruin upon the whites, and misery upon the blacks". See "Examination of the Constitution of the United States", in Ford (1788), p. 54.

[56] See Forner (1945), pp. 21-2.

[57] See Brunhouse (1942), pp. 80-81.

[58] In a study on this issue, Ousterhout emphasized that "as for confiscation, laws authorizing such seizures were passed slowly, and, once passed, the government seemed reluctant to enforce them . . . Not only was the amount of land involved relatively small, but the number of people affected was equally so." Ousterhout (1978), pp. 328-43.

decision in Pennsylvania with regard to confiscation had to do with the land that used to belong to William Penn (the former owner of the province). Most conservatives in the state feared the forthcoming legislative decision, expecting the worst from the unicameral system.[59] The final decisions adopted by the Congress were rather moderate but, for the conservative opposition, the whole process was difficult to accept, for them, again, the legislative branch appeared to be a mere instrument of popular pressures.

The system's bad reputation, however, mostly came from the significant, but very unsuccessful, economic measures adopted by the legislature. From the beginning of their government, trying to satisfy intense popular claims, the radicals promoted both tender laws and popular regulation of prices. The measures achieved a broad popular consent, but the opposition saw them as merely passionate attempts to satisfy myopic popular claims.[60] In fact, most authors recognize that the radicals' plan failed in its main objectives. Both the price controls and the emissions that they promoted were, in the end, quite ineffective, something which seemed to confirm the conservatives' criticisms.[61] Paper emissions, however, continued under the radical administration, with strong criticisisms from both Pennsylvanian's conservatives and the national authorities.[62]

The conservatives also rejected the very procedures adopted by the radicals in order to carry out their economic measures. Those procedures, they believed, were unnecessarily open to the public. For example, at the beginning of their government, the radicals appointed a committee of 26 men to deal with the issue of price regulation. However (and this is what the conservatives rejected), given that the committee met with opposition to the initial measures it proposed, the radicals called a mass meeting in order to secure broader support for their economic plan. In addition, the radicals developed similar initiatives outside the city of Philadelphia, trying to secure price controls through popular action. The conservatives considered

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[59] According to Brunhouse, who wrote an excellent critical work on post-revolutionary Pennsylvania, "for more than eight months the question [about what to do with Penn's properties] was before the assembly at one time or another. In March, 1779, the case for and against the proprietors was heard by the assembly . . . The divesting act was surprisingly liberal." Brunhouse (1942), pp. 79-80. He added that the act "provided that all rights to the soil and arrears of purchase money devolved on the Commonwealth, and it completely abolished the collection of quit rents. In return of their loss the Penns were allowed to retain their personal estates and were granted one hundred thirty thousands pounds of sterling to be paid after the end of the war" (ibid.). See, also, the reports presented at the Assembly in Pa. Packet, May 15, 1779.

[60] It must be noted, also, that at the end of the 1770s most people were suffering from the effects of prices artificially raised by monopolizers. This situation moved some authors to justify the radicals' economic plan. See a justification of the radical plan as a move against the existing monopolistic pressures in the Pa. Packet, May 27, 1779. See also Pa. Packet, July 1, 1779, an "Address of the Committee of the City and Liberties of Philadelphia, to their Fellow Citizens."

[61] However, we must also recognize that the inefficiency of the plan resulted, at least in part, from a permanent boycott promoted by the conservatives, who tried to prevent the circulation of paper money. The periodicals affirmed, by that time, that "[the free circulation of the paper is impeded] by the machinations of interested individuals, and the artifices of false patriots" (Pa. Packet, July 22, 1785).

[62] See the arguments against the emissions in Pa. Packet, Feb. 24th; March 1, 1785. See, also, the opposition of the national Congress, in a document signed by John Jay, and published in the Pa. Packet, May 29, 1779.

these procedures unacceptable and very difficult to justify. One small incident that took place in Philadelphia, during an open assembly, came to support their objections. On that occasion, some people interrupted the conservative John Cadwalader while he was speaking, and prevented him from presenting his position. The conservatives, who represented the minority in that meeting, abandoned the assembly and denounced the event as a violation of free speech. Since then, they mentioned this and similar cases in order to generally question the worth and the fairness of the open meetings.

A final but very important contentious issue, resolved by the unicameral legislature and objected to by the conservatives, was related to the functions of the Bank of North America. The radicals regarded this institution as a powerful corporation used by the conservatives in their exclusive interest. In fact, the Bank contributed to seriously damaging the paper money initiatives, adopted by the radicals, by refusing to give credit to new emissions of paper. As a result of these types of decisions, the institution was denounced in numerous petitions, which made reference to its monopolistic features. For example, many people complained, through local newspapers, about "the unequal or partial distribution" of benefits originated by the Bank. The institution was described as "the source of influence, destructive to the freedom of the state, and tending to the creation of the most ruinous and baneful aristocracy."[63] The radicals proposed shutting down the institution, and discussed this proposal with their opponents. Clearly, however, they did so within the context of a favorable assembly, something that irritated their opponents who considered the radicals' initiative abusive.[64]

These measures, among others, affected the image of the Pennsylvanian political system.[65] What is not clear is whether the criticisms of the conservatives were reasonable or not. At least at first glance, the decisions promoted by the unicameral legislative appeared to be discussed as much as other laws in most other states during that period. In this sense, it would be difficult to conclude that the Pennsylvanian institutional system was as imperfect or as inherently unfair as the conservatives depicted. What is difficult to deny, however, is that (both in its organization and in its actual functioning) there existed certain significant differences that separated the Pennsylvanian political system from the political systems that were present in other states. For example, the Pennsylvania legislature was clearly very active and (at least in relative terms) notoriously open to the public. In addition, and more importantly, the radicals managed to promote significant laws

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[63] Pa. Packet, March 31, 1785. See also a petition published in the Freeman's Journal, Feb. 23, 1785.

[64] See the arguments on behalf of the Bank in Pa. Packet, March 29 and March 31, 1785.

[65] The proposition to transform the College of Pennsylvania into the University of the State of Pennsylvania was another controversial decision carried out by the radicals. The polemic emerged because of the political overtones of the case, given that College was a symbol of the previous regime. Again in this case, the radicals achieved their objectives after intense debates in the legislature. Another disputed issue had to do with the radicals' decision to investigate past economic abuses. The radicals appointed two committees, to do so. One of these committees was to investigate several charges against Robert Morris, the most influential and powerful man in the state. Morris, actually guilty of most of the accusations against him, did not appear before the legislative committee when he was called to defend his position.

in many difficult areas, confronting problems that most other states decided to preserve untouched. Moreover, on many occasions, the radicals solved these serious issues (confiscation, slavery) in agreement with the majority will. As a result of these types of facts, the opponents of the Pennsylvanian system accused it of being unable to arrive at reflective, cautious decisions. According to the opinions of these critics, the unicameral legislative was merely implementing the hasty decisions preferred by the majority. Not surprisingly, then, many political figures of the period began to consider the political system of Pennsylvania as the best example of what I called a populist regime. It was against this image, as we will see, that the Framers of the North American national Constitution reacted: they did not want the country to have an institutional system that reproduced that of Pennsylvania. They wanted political institutions that, in fact, secured the institutional checks and balances that the Pennsylvanian constitutional system seemed to deny.

THE "CRITICAL PERIOD" OF AMERICAN HISTORY

In this section, I will present some additional illustrations of what we might call populist movements within the early North American history. First of all, I will refer to the popular rebellions that took place during the "paper money" crisis of the mid-1780s. These rebellions, which appeared right before the constitutional convention, served to strengthen an idea that many political leaders already had in their minds: that most states' institutional systems were unable to secure the reasonable resolution of conflicts. In this sense, it is possible to affirm that these popular turmoils played a significant role in the constitutional history of the United States.

Secondly, I will examine the notable political events that took place in Rhode Island directly after this period of popular rebellions. As we will see, until 1786, many state Legislatures suffered from fervent popular pressure, demanding relief from their heavy debts. However, that a group of radical politicians achieved complete political control of the state's government, as happened in Rhode Island, was unprecedented. In this sense, the evolution of Rhode Island's political history also played an important role in the North American constitutional development. Among other things, the Framers learned from this experience that an adequate institutional system should be able to prevent the types of things that the Rhode Island's system had allowed (e.g., the absolute preponderance of the majority group). Let me, then, elaborate on these events and the context in which they appeared.

THE CONTEXT OF THE CRISIS

When the independence war was over, the North American merchants found themselves severely prejudiced by two economic facts. On the one hand, the British merchants denied them additional credit and also demanded that debtors pay their

obligations in hard currency. On the other hand, the British closed West Indian trade to the Americans, which until then had allowed the latter to obtain important gains.[66]

These events had severe and immediate effects in North America. First of all, we should mention that, lacking enough resources to compensate the British, the American merchants began to press their own debtors for hard cash. The group of debtors, basically composed of farmers, had no way to pay their creditors: the specie was so scarce that the debtors had no real way of fulfilling their obligations, even when they wanted to do so. We have to consider, in this respect, that up until that time the farmers had paid their obligations in goods. At the same time, it is worth noting that most local governments began to increase taxes after the war, as a way to pay the huge national debts resulting from it, while also lessening the quantity of circulating currency generated by the previous emissions of paper money.[67]

In Massachusetts (where the famous Shays' rebellion would take place), the legislature enacted different types of new taxes. The first of these measures was an excise tax that burdened all those who imported goods, and which already provoked certain popular resistance. The most intense social problems, however, came right after this law, when the legislature decide to enact two additional taxes. The first of these two measures was a poll tax which dramatically impaired the condition of the farmers. According to them, the poll tax was not only unjust, but also impossible to pay, given their unfortunate economic situation. On the other hand, the legislature approved a stamp tax which triggered an even stronger resistance, given its similarities to the imposts previously demanded by the British.[68]

Since within this context most debtors could not afford their obligations, the creditors tried to force them to pay by taking the debtors to the courts. Obviously, this situation deeply aggravated the already existent social distress. Court costs and lawyers' fees increased their debts by as much as 40% or 50%. For most debtors, the choice between bankrupcy or imprisonment was unacceptable, especially considering the sacrifices that they had already tolerated during the war.

Confronting this situation, the impoverished debtors saw only two possible solutions to their problems: one, to force the local institutions to find a relief for their debts; and two (when the local representatives precluded this alternative) to organized an extra-institutional, armed defense of their rights.

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[66] See David Szatmary, "Shays' Rebellion in Springfield," included in Kaufman (1987). See, also, Walker (1912), chap.1; and McDonald (1965), chap.5.

[67] See, for example, Bolles (1969), p. 191.

[68] See, for example, McDonald (1965), pp. 138-9.

THE DEMAND FOR PAPER MONEY AND COUNTER-INSTITUTIONAL REACTIONS

When the debtors decided to press the government for relief, one of their main claims was that of making personal property legal tender in order to cancel their obligations. This solution, although popular, was not very attractive for the debtors, because it implied the loss of their principal means of subsistence. More dramatically, those who actually decided to sell their properties in order to fulfill their obligations found that no one in the neighborhood was likely to have hard currency with which to buy the offered lands.[69]

Very frequently, then, the popular protests became civil challenges to the constituted authorities. The most striking case, in this respect, was that of Massachusetts. In this state, most debtors had been insistently demanding the suspension of civil actions until the scarcity of specie was remedied. The situation in this community had become critical between 1784 and 1786. In Hampshire County alone, 2,977 debt cases were prosecuted, representing a 262% increase over a similar period between 1770 and 1772. Even worse, in Worcester, 4,000 suits for debt were presented during 1785.

Through their town convention, the people petitioned the legislature and proposed reforms to find a solution to their economic problems. Receiving only negative responses to these demands, the debtors tried to carry out their objectives by themselves. Following the practices that they had learned during the revolution, they tried to force the judges to suspend or adjourn the judicial processes until the following term. Most debtors found this alternative appropriate, at a moment in which private suits for debt were at roughly four times the level they had been in the pre-war period.[70]

Mobilizations to prevent the sitting of the courts multiplied everywhere. One of the most remarkable leaders of this popular movement against the courts was Samuel Ely, who was arrested after an attempt to stop the judicial sessions at Northampton. Captured as a result of his illegal acts, he stated that he had not broken any law: the Constitution had already been broken. Another remarkable case was that of Luke Day who, leading 1,500 men, tried to stop the courts in Northampton in 1786. Other comparable attempts were carried out in Taunton, in Concord, and in Great Barrington. Undoubtedly, however, the most significant of all these popular insurrections were those promoted by Daniel Shays and a thousand men. Shays' rebellions were the object of serious concern and most of the so-called "Founding Fathers," as we will see, referred to them in their public writings and private correspondence.

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[69] See Feer, in Kaufman, ed. (1987), pp. 60-1.
[70] See, for example, Taylor (1954), pp. 110-1.

As with other cases mentioned, Shays and his followers also tried to prevent the sitting of the court. The first of Shays' revolts took place in Worcester. Shortly after this attempt, however, Shays repeated the operation in Springfield.[71] In this case, the popular mobilization provoked a national commotion, as a result of a very significant fact: the United States' arsenal was situated in Springfield. Shays explictly announced that he had no intention of attacking the arsenal. However, the national authorities did not trust the promise of the rebel and Congress prepared a strong response against him. Governor Bowdoin from Massachusetts, called out the militia of Eastern Massachusetts, commanded by General Benjamin Lincoln, in order to repress the insurrection.[72]

Other reasons contributed to the conservatives' concern about Shays. Many of them, for example, depicted him as an enemy of property. Some others assumed that Shays' rebels were aimed to "[make property common,] annihilate all debts public and private, and have agrarian laws."[73] The main political leaders of the country depicted Shays as a "genuinely American democratic despot."[74]

At the end, Lincoln's troops confronted the insurgent's armed forces and dispersed them without major problems. Most of Shays' rebels managed to escape, and looked for refuge in other states. In most cases, they found refuge in Rhode Island -a state whose name had already became synonymous with rebellion.[75]

Although the national authorities had few problems confronting this and the previous rebellions, and imposing their supremacy, this period of popular insubordination forced the dominant political elite to revise their former beliefs about the adequate political organization for society. On the one hand, they recognized that the existent political institutions had been unable to solve the main social conflicts of the period, which ended in something like the Shays' rebellion. On the other hand, they began to think that the very political organization of the states had been at least partially responsible for the dramatic events of the time. In fact, some of the most important existent local institutions -they believed- tended to encourage too strong an involvement of the people in the community's political

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[71] See, for example, Kaufman, ed. (1987), pp. 80-104.

[72] It is interesting to note the illegality of the repression of the Shays' rebellion. That is, Governor Bowdoin called out the militia before the legislature declared a state of rebellion. See Nevins (1927), p. 536.

[73] Henry Knox, in a letter to Washington, in October 23, 1786. He also stated that "the people who are the insurgents have never paid any or but very little taxes . . . Their creed is that the property of the United States has been protected from the confiscations of Britain by joint exertions of all, and therefore ought to be the common property of all." See Callahan (1858), p. 246. See, also, Sparks (1853). Additionally, see Young (1967), chap.3.

[74] See Onuf (1983), p. 177; McLaughlin (1962), p. 166. However, it was also true that Shays was welcomed "by many of the best citizens of the State and by the people of nearly all the neighboring States." See Egleston (1898), p. 330.

[75] See, for example, Walker (1912), chap.1. See, also, Taylor (1951), chaps. 6 and 7; and Morgan (1977), chap.9.

affairs. According to the conservative view, then, the Shays rebellions appeared as the natural, foreseeable consequence of a too participatory system, that operated at the lowest local level.

INSTITUTIONAL RESPONSES TO THE MAJORITY CLAIMS

The profound economic crisis that distinguished the mid-1780s ended, in many cases (as we already examined) with popular rebellions that mobilized thousands of people. However, on most occasions, the institutional responses that followed the insurrections were politically more significant than the rebellions themselves. In effect, as we will see, many different state legislatures, trying to prevent new rebellions, decided to accept and to carry out some of the most important majority demands. The case of Rhode Island, in this respect, resulted the most interesting given that in this state, for the first time, the majority debtor group gained complete control of the political system.

To achieve a better understanding of the development of the crisis in Rhode Island, it is important to refer, in the first place, to the more general "paper-money" crisis that characterized the period.[76] The claim for "paper-money" had constituted one of rebel's most important demands during the mid-1780s. To a certain extent, the state legislatures' decision not to issue paper money as a means to alleviate the situation of the debtors, was one of the main causes of events such as Shays revolt. The trials against the debtors, in fact, appeared right after this reluctant attitude of the local legislatures. As we will also see, the claim for paper-money re-emerged in different states as an attempt to prevent new massive popular demonstrations.

Paper-money emissions have a long tradition in the U.S. If we concentrate our attention only on the postwar period, we may recognize three "waves" of emissions before the enactment of the new national Constitution. The "first wave" of emissions, set by the revolutionary states, extended from 1775 and 1777 (although, by this time, against the opposition of the Continental Congress).[77] The first issue of paper money authorized by a revolutionary government came in 1775, in Massachusetts. This act was followed by similar decisions in all the other states except North Carolina.

Checked after 1777, the states returned to their emissions of paper in a "second wave" that began in 1780. This new period resulted from the war crisis and extended until 1781, and it constituted the preamble to the critical "third wave" (mid-1780s) of paper bills' emissions, which was the most intense and criticized one. Analyzing this situation, Allan Nevins affirmed that, if "the paper money doctrine was endemic, [it became] epidemic and virulent" in 1785.[78] It seemed almost impossible for any State to avoid these emissions, since they had to maintain

[76] See for example, Bolles (1969), chap. 13.
[77] See, for example, Schuckers (1978), p. 23.
[78] See Nevins (1927), p. 518. See also McLaughlin (1905), chap.9.

their troops, repel foreign attacks, maintain their own administrations, and respond to the permanent requirements that the nation made upon them. Thus, the new emissions of 1785 came as a result of both long-standing traditions and a critical economic period. The new emissions were also grounded in the belief that the previous ones had not been totally unsuccessful. Even James Madison admitted, as an objection to his criticisms against paper bills, that paper money had been, at least, "good before war."[79]

It is also important to note that at both the national and the state level, the respective governments made serious efforts to find more effective alternative measures. At the national level, Congress frequently appealed to other measures: popular loans (as suggested by Franklin, who always opposed paper money emissions); loans from foreign countries; a lottery; and, more important, requisitions upon the states.[80] None of these attempts was particularly successful. Congress found it very difficult to collect money from the states, which were on the eve of their deepest economic crisis.[81]

At the state level, the search for plausible alternatives was even more difficult. In fact, to borrow money from an impoverished population was almost impossible; to borrow money from foreign states was a much more arduous task for the states than for the nation; and taxes, as we will see, were very difficult to collect. The only certain relief that the states found for improving their economic situation was the use of the properties confiscated from the Tories.[82]

It is also worth considering that the debtors' claim for paper-money did not imply a refusal to meet their obligations. On the contrary, the legislation that they suggested was aimed "to permit people to retain the property which they already owned and to enable people to pay their debts within the existing framework of the creditor-debtor relationship."[83] Even the emissions of paper money were based on the idea that debts had to be paid, although it was impossible to do so in gold or silver.[84] Typically, the governor of South Carolina, in a message to both houses of assembly demanding the adoption of relief measures, recognized that "willing has

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[79] Madison employed three rather weak arguments to attack the emissions. He affirmed that the previous emissions had been issued during a time of high confidence, which no longer existed. He then stated that the "principles" of paper money were not rightly understood at the time of the earlier emissions. Finally (and this was his strongest argument), he asserted that the emissions had provoked undesirable effects in New England, Virginia, and Maryland. See "Notes for Speech Opposing Paper Money," Nov., 1st, 1786, Rutland and Rachal (1975), vol.9, pp. 158-9. Also, see, "Outline for Speech Opposing Paper Money," ibid., pp. 156-7.

[80] See, Nevins (1927), chap.11.

[81] See, for example, Schuckers (1978), pp. 48-50. Robert Morris, who had been appointed Minister of Finance in 1781, resigned his position after unsuccessful efforts to enlarge the resources the nation was receiving from the states. See, for example, Ferguson (1961), chap.8; and Henderson (1974), chap.12.

[82] See, Nevins (1927), pp. 500-8.

[83] The quotation is from Feer (1988), p. 510.

[84] See, for example, Bates (1967), p. 130.

the debtor been to give up a part of his possessions, and in doing of it to make a considerable sacrifice, that he might comply with the demand of his creditor."[85]

THE PAPER-MONEY CRISIS IN RHODE ISLAND

In Rhode Island, the assembly refused to take any relief measures during the early 1780s, despite an extremely critical situation. However, after 1785, the situation began to change as a result of particularly intense pressure from the people at large. By the winter of 1786, Jonathan Hazard, the leader of the debtors' group, had amassed strong popular consent for his program of relief measures.[86]

Obtaining important support at the polls, Hazard's group immediately tried to respond to the will of their constituents.[87] An issue of paper money was promptly authorized by the new legislature in order to compensate for the scarcity of hard money. This measure was severely criticized, from the beginning, by the creditors' party. It must be said, however, that behind the legislative decisions that favored the debtors was the persistent work of town meetings discussing the issue[88] and raising petitions to their representatives.[89] In addition to this direct pressure upon the state legislature, the towns also embraced a more long-term project for obtaining wide support of their claims. They launched an "educational campaign" aimed at clarifying the reasons for their petitions and defending the adequacy of the relief measures they were demanding.[90]

The creditors' main objection, however, had to do with another clause, according to which if a creditor refused to receive paper money, the debtor could discharge the debt by depositing the paper with one of the judges of the county court. In this case, the judge had to give public notice to the creditor that he had to present himself before the court and receive the money. If the creditor failed to appear, then the debt was considered canceled.

Additional measures for enforcing the circulation of paper were also adopted. For example, the assembly imposed fines on those who refused to accept paper money or tried to depreciate it. As a result of these laws, Rhode Island began to experience a period of intense difficulties. Many merchants closed their stores rather than be forced to accept the paper, a fact that deeply impressed James

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[85] See this message in Pa. Packet, Nov., 3, 1785.

[86] See, for example, Sidney (1975), p. 367. Among the seventy members elected to the new legislature, forty-five had not been present in the previous Assembly. The governor and the deputy governor had also been replaced. See Bates (1967), p. 123.

[87] Only after a period of popular distress and outdoor activity did the Legislature begin to respond to public demands. To the active citizenry, this legislative reaction meant that they were choosing the best means for carrying out their aims. See, for example, Gilje (1987), p. 74.

[88] Newspapers of the time reflected that the proposals for issuing paper money had "brought on a very warm and interesting Debate," and made explicit the different arguments that both the Senate and the House of Representatives had discussed. "Boston American Herald," 15 May 1786.

[89] See J. A. Cohen (1967), pp. 147-78. See, also, Ferguson (1961), pp. 243-47.

[90] See Conley (1977), p. 83.

Madison, as we will see below. On the other side, many farmers refused to sell their goods (cheese, oats, etc.) to the merchants if they did not accept the paper money.[91]

The climax of this dispute came after the state's assembly enacted new penal statutes to enforce the circulation of the paper. The first of these statutes, establishing new penalties for refusing to accept the paper money, proved to be completely ineffective. So a second, more severe, statute was enacted. The aim of this second scheme was to set up a more rapid process of law, in order to give weight to the paper money, and to avoid its continuing depreciation. According to this statute, if the courts were not in session when a paper money case arose, a special court could be convened. Additionally, either in the regular or the special processes, the previous decision of a jury was not required. Although this particular measure was not the most alarming of those adopted during the 1780s, it probably was the most easily objectionable decision. In their campaign for rejection of the debtor's plan for enforcing the paper money scheme, the conservatives found an appropriate target in this bill.[92]

The opportunity to attack the law came after the Trevett vs. Weeden case. John Trevett was suing John Weeden, a butcher who had refused to accept paper money on par with specie. James Varnum, a well-know conservative lawyer, defended Weeden, stating that the Court should not follow Trevett's complaint because the act on which it was based on was not a legal one.[93] He attacked the suppression of the trial by jury, and stressed the idea that the only way to eliminate the existence of this right was through a change in the Constitution, and not by a common legislative act.[94] He asserted, at the end, that the Judiciary should not "admit any act of the Legislative as law, which is against the Constitution."[95]

Accepting part of the argument presented by Varnum, the court declared that it lacked jurisdiction over Trevett's complaint and, as a result of this fact,

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[91] See, for example, Fiske (1916), p. 177.

[92] See, for example, Polishook (1969), pp. 128-9.

[93] To support this idea, Varnum mentioned three main objections to the act. First, he affirmed that the act had expired ten days after the rising of the assembly. Second, he said that special trials had been instituted, and that this violated the highest authority of the court. Finally, and most importantly, he referred to the unconstitutional suppression of trial by jury. The right to be judged by a jury, he alleged, had a long tradition in Rhode Island and had been always included in the constitutional documents of the State. See Varnum (1787), p. 26.

[94] The arguments presented by James Varnum would become one of the most important antecedents in the discussion about judicial review during the Convention of 1787. See, for example, Corwin (1979).

[95] Addressing the fundamental question of the limits of legislative power, he asserted that "as the Legislative is the supreme power in government, who is to judge whether they have violated the constitutional rights of the people? I answer . . . when they . . . merely . . . enact what they may call laws, and refer those to the Judiciary Courts for determination, . . . the Judges can, and we trust your honors will, decide upon them." See Varnum (1787), p. 26.

decided to dismiss it. They could not enforce the penal statute -they affirmed- because it failed to offer the accused the benefit of a trial by jury.[96]

In any case, the major criticisms motivated by the case were related to the events that came right after the judicial decision. The legislature of Rhode Island, taking into account the opinion of the court, decided to call the members of the tribunal before them "to give their immediate attendance on the assembly to assign the reasons and grounds of their [decision]."[97]

After this call, only three of the judges appeared before the Assembly and explained the reasons for their decisions.[98] Contrary to what most people expected, the assembly did not take any measure against the judges or their dictum, but excused the magistrates.[99] In fact, the legislators considered a motion for dismissing the judges, but they finally refused to adopt it. This decision was made after consulting the three lawyers present at the Assembly, who affirmed that the justices could not be removed without due process.[100] The radicals, in the end, decided to commit themselves to the rules of the system, even when an important majority at the Assembly demanded the adoption of formal sanctions against the judges, something which was, apparently, also supported by most people outside the legislative.[101]

The main national authorities, however, did not pay attention to what finally happened after the "Trevett v. Weeden" controversy. They did not really care about the absence of formal sanctions against the judges. For them, the very legislative decision of calling the judges before them represented an unacceptable

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[96] See, for example, Conley (1977), chap.4. The decision of the court was unanimous, although one of its five members (Chief Justice Paul Mumford) failed to vote, probably because of his bad health — although the singular character of the case might have motivated him to abstain.

[97] In the first draft of the bill, the legislative reprove was even stronger. It stated that they were calling the judges "in order that this assembly on proper information may adopt such measures as may establish the supremacy of the legislative authority." This text, however, was changed by the Senate. See Bates (1967), pp. 134-35.

[98] During the hearing, Judge Howell affirmed that judicial power was not dependent on the legislative branch. He stated that the judges were accountable only to God and their consciences, and tried to defend that in the specific case put into question, the decision of the legislature had been contrary to the constitutional order. Judge Tillinghast reaffirmed his belief in the independence of the judiciary, and Judge Hazard claimed that he had signed the decision because of his devotion to truth, and in spite of his "well known sentiments" in favor of paper money. See Bates (1967), pp. 137-38.

[99] It must be considered, however, that Rhode Island's original charter of 1663 already authorized the legislative to "appoint, order, and direct" the courts. Then, according to a law of 1678, the general assembly was authorized to intervene, either judging or reversing decisions of the general court of trial, in "capital or criminal cases, or mults of fines." After 1781, it was decided that "if either plaintiff or defendant be aggraviated," they could appeal to the next general assembly for relief. See Lutz (1987), p. 75.

[100] The Assembly, however, asserted that the judges had presented "no satisfactory reasons" for their decision. See Polishook (1969), pp. 133-42; and Bates (1967), pp. 137-41.

[101] The radicals, however, had clear motives not to trust the impartiality of the judiciary. An interesting example was provided by the fact that James Varnum, who had defended the creditor's position in the Trevett vs. Weeden case, served as a counselor of the judges of the Supreme Court when they made their presentation before the Assembly. See, Polishook (1969), p. 140.

expression of a populist system. In their opinion, Rhode Island's political system was so biased in favor of the majority, that the representatives even dared to interfere with the judicial power. The system was so abusive that the majority did all that they could to impose their unrestrained will on (what they recognized as) the rights of the minority. The "Trevet v. Weeden" event, in the end, seemed to represent nothing more than an additional illustration of the arbitrariness which tended to characterize all majority systems.[102]

The conservatives' opinion, and their worst fears, appeared to be confirmed as a result of what happened in other states. In effect, the events that took place in Rhode Island seemed to provoke similar reactions in other states. In different places, since then, the legislative and the judiciary powers confronted one another, as if they represented completely different, opposite interests. In North Carolina, for example, a legislative commission accused the judiciary of disregarding the authority of a particular law (the law under scrutiny attempted to equalize the value of the legislative acts and the constitutional mandates). The legislative accusation proceeded but, finally, the representatives decided not to sanction the judges, something that most people thought would happen (in fact, the same legislators had initially threatened to do so). Also, New Hampshire's legislature attempted to sanction some members of the judiciary after the judges attacked the validity of one of their approved statutes. Again, the legislature formed a commission in charge of examining the case and the behavior of the Judiciary. However, the commission found the judges guilty of no fault and decided, as in the previous case, to exonerate the magistrates. In the state of New York, instead, the legislative did manage to accuse and condemn the Judiciary, although its delegates decided, in the end, not to replace the members of the judiciary.[103]

All the dramatic cases mentioned contributed to ratifying and strengthening the Framers initial intuitions. The new institutional system (to be created) had to secure, on the one hand, a proper system of checks and balances that provided each branch of power with "defensive tools." Also, on the other hand, the new system had to secure a proper separation between the legislature and the people at large, a degree of autonomy or independence which seemed not to exist in the typical (so-considered) populist regimes.

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[102] Another interesting test for the majority coalition occurred at the moment of the greatest popularity of the paper money bills and when the debtor's group attained the strongest support within and outside the Assembly. In October 1786, a bill was proposed that required all persons to take an oath pledging acceptance of the new currency. The proposal established severe penalties for those who, having taken the oath, later refused to accept the money. Among these penalties was that of becoming ineligible to hold public office in the state or to vote in any election. Perceived as an attempt to disenfranchise the opposition, the project was widely discussed and rejected in most popular assemblies. In the end, only three towns supported it and when it was discussed in the state assembly, only six deputies defied public judgment and tried to have it approved; their proposal was defeated. However, the conservatives criticized these events, saying that they represented an additional showing of the populist character of the regime. According to their opinion, the Rhode Island's political system appeared again as being compatible with the violation of minority rights. See Polishook (1969), pp. 145-47.

[103] See, for example, Berger (1969), pp. 42-3.

THE CRITICS OF RADICALISM/POPULISM

The emergence of what appeared to be a populist style of politics at the end of the XVIIIth century, had an enormous impact in North America's institutional life. This consequence was not surprising if we recognize that this phenomenon took place in one of the most critical moments of North American history: the post-revolutionary and pre-Constitutional period. In this sense, the emergence of these populist regimes helps to explain not only the increasing demands for a profound re-organization of the national political institutions, but also the ideological orientation that came to distinguish this reformist movement.

Even if we cannot be completely certain that cases like those of Pennsylvania or Rhode Island during the mid-1780s represented clear examples of what I called populist regimes, the truth is that both types of institutional systems were normally perceived as excessively majoritarian (and, in this sense, as populist regimes). Seemingly, these institutional models did not provide the minority groups with adequate safeguards, and means to defeat the majority desires. Because of this reason, among others, the Framers of the North American Constitution considered the populist political models of states like Pennsylvania and Rhode Island as ill founded and ultimately inappropriate for adoption at the national level. Moreover, they took these cases as examples of what they should avoid in the new national Constitution. Then, and in order to achieve a better understanding of the Constitutional model that the Framers defended, it is interesting to examine i) the specific criticisms that they directed against these populist political models, and ii) the peculiar institutional proposals that they began to defend, as a way to avoid the objections that those earlier models (apparently) deserved. As we will see, both through their criticisms and their proposals, the Framers disclosed their assumed epistemic views.

A very good example with which to start has to do with the Framers' critical views about Pennsylvania. As we will see, they did not criticize the political system in Pennsylvania under the assumption that it was not democratic enough but, instead, they criticized it under the assumption that it was too democratic. To defend this view, the Framers even objected to the main egalitarian foundation of the system: the idea that all people are born equal. Most of Thomas Paine's critics, for example, objected to that assumption as a way to object to Paine's whole philosophical view and political project. Evidencing his elitist bias, for example, Fisher Ames stated

> Mr. Thomas Paine's writings abound with this sort of specious falsehoods and perverted truths. Of all his doctrines, none perhaps has created more agitation and alarm than that which proclaims to all men that they are free and equal [. The people] believed that by making their own and other men's passions sovereign, they should invest man with immediate perfectibility; and breathe into their regenerated liberty an

> ethereal spirit that would never die . . .With opinions so wild, and passions so fierce, the spirit of democracy has been sublimated to extravagance.[104]

This defense of epistemic elitism appeared, also, in the proposals that were suggested to replace the unicameral system -an institutional creation that Paine always supported. These counter-proposals were not directed at enhancing the democratic aspects of the unicameral legislative, but rather at lessening them. Thus, the critics of the unicameral system stated, on the one hand, that, as a result of this mechanism "[the] common farmers, unread in history, laws, and politics" were directly governing. On the other hand, these commentators required, as an alternative to that proposal, the creation of a council of "educated and well-read men to correct their errors."[105] "The great Body of the people" -affirmed Rufus King in a letter to Theodore Sedgwick- "are, without Virtue, and not governed by any internal restraints of Conscience." For this reason, King urged the conservatives to check "the madness of Democracy."

To John Adams, also, the worst aspect of the unicameral project defended by Thomas Paine was that it was "too democratic."[106] According to Adams, the unicameral system was an example of "simple democracy," the latter being -according to him- the most factious and corrupt form of government.[107]

More generally, these critics shared a very skeptical view of Pennsylvania's institutional system. In a letter to Charles Lee, for example, Benjamin Rush wrote "poor Pennsylvania! . . . They call this a democracy — a mobocracy in my opinion would be more proper. All our laws breathe the spirit of town meetings and porter shops."[108] Similarly, Fisher Ames reasoned that "democracy is a volcano which conceals the fiery materials of its own destruction. These would produce an eruption, and carry desolation in their way."[109] Also, the conservative Noah Webster criticized the Pennsylvanian Constitution, pointing out the demands of "publicity" which were included in the text.[110] According to him, the requirement that "a bill shall be published for the consideration of the people, before it is enacted into a law . . . annihilates the legislature, and reduces it to an advisory body." He considered as a problem the fact that "[the requirement of publicity] carrie[d] the spirit of discussion into all quarters...[and]...the warmth of different opinions . . . through the

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[104] See F. Ames, "Equality," in Ames, ed. (1969), vol. 2, pp. 208-9.
[105] For a survey of these debates, see Shaeffer (1974).
[106] See, for example, Baylin, (1992), pp. 290-93.
[107] See, for example, Walsh (1969), chap. 5; Koch and Peden (1946), pp. 77-114. See also Knight, ed. (1989).
[108] "Letter to Charles Lee, October 24, 1779," in Butterfield, ed. (1951), p. 244.
[109] Bernhard (1965), p. 59. Butterfield, ed. (1951).
[110] For example, the Constitution established that "the doors of the house in which the representatives of the freemen of this state shall sit in general assembly, shall be and remain open for the admission of all persons who behave decently, except only when the welfare of this state requires the doors to be shut."

state of Pennsylvania." In this way, he asserted, the "seeds of dissension are sown in the constitution."[111]

Clearly, the criticisms against Pennsylvania and its unicameral system simply represented an illustration of the more general conservative attitude toward local democracy and its egalitarian foundations. All around the country, in effect, conservative politicians opposed the practice of town meetings and local conventions which (no matter what they "really" were) represented a symbol of a majority, popularly based, decision-making process. In this sense, many distinguished conservative leaders criticized the meetings and supported every possible way of discouraging them. According to James Madison, for example, the town meetings tended to end with "tumult" and provoked "distress."[112] More significantly, after their appointment to the high court in New York, the influential Federalists John Jay and Robert Livingston launched an explicit campaign against all those bills that recognized "the existence and the power of the committee system."[113] Also, and following similar lines, the chief justice of the Supreme Judicial Court in Worcester assessed that the conventions were totally repugnant to the Constitution. By that time, most conservatives agreed on the idea that "[having a state Constitution], Committees and Conventions of the people were [no more] lawful."[114]

To begin reorganizing the political system, the conservatives proposed replacing the town meetings with corporate governments. In this respect, a contemporary historian, M. Jensen, affirmed that "conservative-minded men sought to avoid further unpleasantness by doing away with town government, substituting for it a corporate form whereby the towns could be governed by majors and councils."[115] Another scholar, Stephen Patterson, stated that, by the mid-1780s, an "intense and massive" reaction "against conventions" began, that ended in a campaign for "replac[ing] the traditional town meeting . . . with a major and a representative council."[116] By 1785, most of these incorporation movements

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[111] Webster (1787-1788), pp. 34-35. He also linked the existence of factions in Pennsylvania with its unicameral system. He affirmed that "no state, except Rhode Island, is so distracted by factions" (pp. 34, 47).

[112] "Madison to Ambrose Madison," Aug.7th, 1786, in Rutland and Rachal (1975), v.9, p. 89. In their private complaints, the conservatives normally asserted that the practice of communal assemblies had only served to the "creatures of the populace" enthrone and "the lowest sort of people."[112] However, in their public arguments they tended to defend their initiatives saying that they were based "on the need of better municipal administration." See, R. Brunhouse (1942), pp. 153.

[113] See Countryman (1981), p. 184. See, also, Rakove (1979), chap. XII. It is worth comparing the conservative view with the idea that town meetings always promoted "the peaceful and legal settlement of disputes." In fact, most scholars agree on the idea that local meetings tended to lessen the proportion and intensity of social conflicts. See, for example, Douglass (1971), pp. 141-2; or Richard Brown (1970), p. 214.

[114] See a synthesis and an analysis of these types of opinions in Brooke (1989), pp. 199-200.

[115] Jensen, M.(1967), pp. 118-21.

[116] See Patterson (1981), pp50-52. Also, according to historian R. Taylor, state leaders and conservatives everywhere adopted the idea that "conventions were needless and even illegal." He also quotes a typical

achieved their objectives, although in cities like Boston and Philadelphia the defenders of the town meetings model managed (at least) to delay the reformist's attempts. The defenders of the old political practices denounced the undemocratic principles that seemed to distinguish the conservatives' proposals.[117] The newspapers, for example, were filled with complaints against the incorporation attempts. Also, the new measures were denounced as "aristocratic polic[ies]...in a manner repugnant to the genius and spirit of our constitution."[118] By 1789, however, most states had definitely abandoned their earlier form of communal organization.[119]

The same reasons that nourished the attacks against the popular assemblies moved the conservatives to criticize Rhode Island's political evolution. As we already examined, Rhode Island came to symbolize the case of a government subordinated to the "passionate" will of the majority. According to the conservatives' view, in this state the people were obtaining through constitutional means what they had been unsuccessfully claiming by extra-constitutional methods. The historian F. Bates described this paradoxical situation as following

> beginning in meetings in the towns and in instructions and petitions, the [paper-money] movement gained such power as to make it possible to seize power by constitutional means, whereas in Massachusetts [where Shays' rebellion took place] the lack of a majority on the part of the opposition drove them to arms.[120]

Clearly, although the Framers feared and rejected the popular rebellions, they considered that these "institutional rebellions" were, politically speaking, much more dangerous.[121]

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pamphlet of the period, which criticized those who tried to "disturb the tranquillity of the State, by proposing the unnecessary measure of meeting by counties." See Taylor (1954), pp. 122-23.

[117] See, Brunhouse (1942), pp. 153, 220-21.

[118] Pennsylvania Packet, August 23, 1786. It was also stated that "the incorporation is unnecessary, because the legislature, in which the several gentlemen from the city are a part, will always be possessed of sufficient information with respect to the provisions necessary to be made for the convenience and order of the city, the periods of assembling sufficiently frequent to accommodate the laws to any incidental matters, and to vary as situations alters." In an article that appeared on Sept. 20, 1783, it was also asserted that "the inhabitants of Philadelphia can expect no advantage from being vested with corporate powers." The "mayor, recorder and aldermen" who were expected to appear, were referred to as "men prepared to take all advantages, that wealth, influence, or policy could accomplish."

[119] According to Brunhouse, "times had changed. Men of wealth, social prestige, and respectability were coming to the front." Brunhouse (1942), pp. 153, 220-221.

[120] See Bates (1967), p.118.

[121] James Madison provides us with a good example of how the Federalists reacted to the popular rebellions. For instance, in November 1786, Madison wrote to his father about the recent events in Massachusetts, and revealed his concerns about the insurrection. He affirmed that "[although the rebels] profess[ed] to aim only at a reform of their Consti[tu]tion and of certain abuses in the public administration [, what they really wanted was] an abolition of debts public & private, and a new division of property." ("Madison to James Madison, Sr.," Nov. 1st, 1786, Rutland and Rachal (1975), pp. 153-5). In almost all the letters he wrote during this period, he made specific references to the rebellion in Massachusetts, and gave the utmost importance to these circumstances. It is interesting to remark, however, that his reflections came at a time when the violence had been already controlled by Lincoln's troops. First of all, Madison appeared very concerned about the possibility of having similar tumultuous events extended to other states. He affirmed that "the spirit of insurrection was [not] subdued," and that other "popular commotions" were to be expected (ibid., v.9, pp. 275-9). However, his main concern was that the rebels achieved their aims through legal constitutional means. Due to these fears, Madison

Gordon Wood, in a brilliant analysis of these events, remarked that "the people's will as expressed in their representative legislatures and so much trusted throughout the colonial period suddenly seemed capricious and arbitrary."[122] According to his opinion, "the confiscation of property, the paper money schemes, the tender laws, and the various devices suspending the ordinary means for the recovery of debts . . . were not the decrees of a tyrannical and irresponsible magistracy, but laws enacted by legislatures which were probably as equally and fairly representative of the people as any legislatures in history." [123] Clearly, then, for most conservative leaders of the time, it appeared that the "mobs" had finally come to control the state governments.

With this criteria in mind, Hamilton denounced the "treasonable usurpation[s]" of power from the legislature, and cautioned against the possibility of having the representatives erected into "perpetual dictators." He affirmed that he had been witnessing "the despotism of the Legislature,"[124] a fact that confirmed to him that "there was no more oppressive tyranny" than that which emanated from "a victorious and overbearing majority."[125] George Washington saw "prejudices," "unreasonable jealousies, and local interests" in the attitudes of the Legislature[126] According to one of the most observant conservatives of the period, Theodore Sedgwick, "a very large party in both branches of the legislature filled with a spirit of republican frenzy are now attempting the same objects by legislation, which their

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began to support in his letters initiatives for disarming and disfranchising the insurgents (See, for example, "Madison to Washington," Feb.21st, 1787, ibid., v.9, pp. 285-6. Similar comments pervaded all his correspondence during that period. See, for example, "Madison to George Muter," Jan.7th, ibid., v.9, pp. 230-1; "Madison to James Madison, Sr.," Feb.25, 1787, ibid., v.9, pp. 296-7; "Madison to James Monroe," Feb., 25th, 1787, ibid., v.9, p. 298; "Madison to Edmund Randolph," Feb.15th, 1787, ibid., v.9, pp. 270-1; "Madison to Edmund Randolph," March 11th, 1787, ibid., v.9, pp. 307-8; "Madison to George Washington," March 18th, 1787, ibid., v.9, pp. 314-6). The fact that Shays' sympathizers won the elections in Massachusetts strongly reinforced his apprehension about forthcoming political events. He affirmed that the "new elections in Massts. have shifted the Legislative power into the hands of the discontented party, and it is much feared that a grievous abuse of it will characterize the new administration" ("Madison to James Monroe," ibid., April 30th, 1787, v.9, p. 408). Now, according to him, the situation promised to be very different. As in Rhode Island, legal decisions, rather than social violence, would be the source of the evils he feared. Shays' rebellion paled before the threats represented by the legal institutions themselves. Moreover, the legislatures that were enacting these laws were not unrepresentative ones but, on the contrary, legislatures that seemed to be strongly representative of the popular will at that time. Precisely as Gordon Wood affirmed "not only [Shays'] rebellion itself but the eventual victory of the rebels at the polls brought the contradictions of American politics to a head, dramatically clarifying what was taking place in nearly all the states. Urging the people to obey the laws of their state governments as a cure for the anarchical excesses of the period seemed to be backfiring, resulting in evils even worse than licentiousness" (Wood, 1969, pp. 465 and 412).

[122] "Paradoxical as it seemed," Wood adds, "it was the very force of the laws of the states, not anarchy or the absence of law, that was vitiating the new republics." See Wood (1969), 405-6.

[123] Ibid.

[124] "Hamilton to Livingston," April 25, 1785, in Syrett (1962), v.3, p. 605.

[125] See this opinion in Cooke (1967), p. 158.

[126] "George Washington to J. Madison," Nov. 5, 1786, Rutland and Rachal (1979), v.9, pp. 161-2.

more manly threaten last winter would have procured by arms."[127] The legislatures were associated, thus, with "a general decay and loss of social virtues,"[128] and their democratic power judged as an "instrument of tyranny and oppression."[129] Also, James Madison was explicit in affirming that, although the Revolution was facing numerous problems, "at the head [of all them] is to be put the general rage for paper money."[130] Showing his special concerns with regard to the situation in Rhode Island, he wrote a letter to his brother Ambrose, stating that "in Rhode Island a large sum has been struck and made a tender, and coin. The consequence is that provisions are withheld from the Market, the Shops shut up - a general distress ad tumultuous meetings."[131]

[127] For this opinion and other examples of the conservative thought of the period, see the very interesting article by R. East, in Morris (1971).
[128] New Jersey Gazette, March, 17, 1779.
[129] See Polishook (1969), p. 132.
[130] "Madison to Thomas Jefferson," Aug., 12, 1786, Rutland and Rachal (1979), v.9, pp. 93-99. In an earlier letter to James Monroe, Madison had already expressed that the "advocates for paper money are making the most of Th.[e scarcity of money]. I begin to fear that no efforts will be sufficient to parry this evil" ("Madison to James Monroe," June 4th, 1786, ibid., v. 9, pp. 73-4.
[131] "Madison to Ambrose Madison," Aug.7th, 1786, Rutland and Rachal (1979), v.9, p. 89.

CHAPTER 3

THE CONSERVATIVE REACTION. JAMES MADISON: INSTITUTIONAL REFORMS AGAINST THE POWER OF FACTIONS

INTRODUCTION

Among the critics of radicalism/populism, James Madison was the most brilliant and sophisticated. In fact, as a result of the difficulties that characterised this "critical period", Madison began to formulate his own institutional theory: a theory that contributed both to explaining the surprising events of the time, and to providing an alternative to the present political system. The basis of Madison's theory was a particular conception of majority behaviour, grounded in a certain view of human nature. In this section, I will mainly focus my attention on Madison's efforts to reject what I called "epistemic populism."

Madison, as we will see, developed and justified a strong bias against "the will of the majority," as a result of the information he received about the majority actions in public assemblies and state legislatures. Actually, he began to affirm an idea according to which any large group of people, acting together, tended to arrive at (what we could call) "irrational" decisions. In all these meetings, passions tended to take the place of reason. Asserting these criteria, Madison was just turning the most important radicals assumption on its head: while radical activists tended to equate majority decisions with just decisions, Madison began to affirm the opposite.

THE EVOLUTION OF MADISON'S IDEAS OF FACTION. EARLIER APPROACHES

Through many articles and in many speeches, Madison repeatedly affirmed the idea that large assemblies tended to behave irrationally. Let me briefly present the way in which Madison developed this view.

Motivated by the intense political events of the period, Madison promptly began to state his fears of majority rule. One of the first times he expressed these fears was in a "memorial" addressed to the General Assembly of Virginia, in 1785. There, he emphasised the obvious but significant idea that the majority had to be respected, but without assuming that it would always make the right decisions. He asserted that "true it is, that no other rule exists, by which any question may divide a Society, can be ultimately determined, but the will of the majority; but it is also true

that a majority may trespass on the rights of the minority."[1]

Then, in a letter to Caleb Wallace (who asked for his advice on questions of institutional design), Madison reflected more extensively on the usual behaviour of the legislative majority. In this case, he stated that the House *tended* to act irrationally. He affirmed that "not a single Session passes without instances of sudden resolutions by [the House of Delegates] of which they repent in time to intercede privately with the Senate for their Negative."[2]

By the mid-1780s, Madison had begun to qualify more seriously the validity of the majority rule. Although he still agreed with the republican principle which said that governments had to rest "on the sense of the majority," he affirmed that this principle did not "necessarily suppose power and right always to be on the same side."[3] Madison was concerned with the activity of the (newly elected) State legislatures, which appeared to be too dependent on the will of the majorities.[4] He criticised, then, this situation, which implied "the aggressions of interested majorities on the rights of minorities and of individuals."[5]

By October 1786, Madison's distrust of majority rule had achieved its highest point. He affirmed that "there is no maxim in my opinion which is more liable to be misapplied, and which therefore more needs elucidation that the current one that the interest of the majority is the political standard of right and wrong." His empirical assumptions about the tendencies of the legislature moved him to affirm that "it would be the interest of the majority in every community to despoil and enslave the minority of individuals; and in a federal community to make a similar sacrifice of the minority of the component of the States."[6]

DEFINING THE "VICES OF THE POLITICAL SYSTEM"

The "Vices of the Political System" represents Madison´s most organised theoretical work about institutional design before the beginning of the Federal Convention. In this article Madison examines the main defects of the political institutions that prevailed in different states during the 1780s. Among these "vices," he mentioned the following: failure of the states to comply with their constitutional requisitions; encroachments by the states on federal authority; violations of the law of nations and

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[1] "To the Honorable the General Assembly of the Commonwealth of Virginia. A Memorial and Remonstrance," June 20th, 1785, Rutland and Rachal (1975), vol.8, p. 299.

[2] "Madison to Caleb Wallace," Aug.23rd, 1785, Rutland and Rachal (1975), vol.8, pp. 350-57.

[3] "Notes on Debates," Feb. 19th-April 26th, ibid., vol.9, pp. 275-9. For a similar opinion see the criticisms by Fisher Ames of the belief that "the will of the majority is not only law, but right, having an unlimited right to act as they please, whatever they please to act is a rule." Ames (1969), vol.2, p. 213.

[4] This attitude was motivated by an important change that began to take place in the state legislatures, which were often unable to resist popular pressure for change. Other reasons have also been advanced to explain this change. Ser Main, in Greene (1968), pp. 328-9. See, also, Main (1966), vol. XXIII, p. 400; and Young (1967), p. 41.

[5] "Madison to George Washington," April 16th, 1787, Rutland and Rachal (1975), vol.9, pp. 382-7.

[6] "Madison to James Monroe, Oct., 5th, 1786, ibid., vol.9, pp. 140-2.

of treaties; trespasses of the states on the rights of each other (basically, through the emission of paper money); want of concert in matters where common interest requires it; want of guaranty to the states of their constitution and laws against internal violence; want of sanction to the laws, and of coercion in the government of the confederacy; want of ratification by the people of the Articles of Confederation; and the impotence of the laws of the states (Madison could not complete his manuscript, and ended it with the mention of this latter "vice"). In spite of this long enumeration, Madison paid particular attention to only a few of these problems or "vices": multiplicity of laws in several states; mutability of the laws of the states; and the injustice of the laws of the states.

Most of all, Madison focused his attention on what he called the injustice of the laws. Trying to examine this problem, he took, as a starting point the empirical claim according to which there existed an irresistible tendency in the majorities to oppress the minorities, whenever they found the opportunity to do so. In this respect, he affirmed that, the same people would carry out certain actions that different individuals would refuse to pursue by themselves, if they got together in a "popular assembly." As he mentioned to Jefferson, in a letter of October 24, 1787, one should not expect the majorities to restrain themselves, neither as a result of a "prudent regard of their own good," nor as a result of "respect for character" or for religious principles. Then, he used the example of Rhode Island to show the overriding factious influence of the majorities within the legislature.[7]

When he arrived at the Federal Convention, Madison already had a clear idea of what he considered the major evils of the political system. At the Convention, he missed no occasion to present the conception of factions and the majorities, which he had developed in his earlier writings. For example, on June 4th, Madison made reference to the "danger of oppression from an unjust and interested majority".[8] On June 6th, he referred, in more explicit terms, to his conception of factions. He affirmed the need to secure the "republican liberty" against the "abuses" practised "in some of the States [were] faction and oppression [prevailed]." "What has been the source of those unjust laws complained of among ourselves? -he wondered. "Has it not been the real or supposed interest of the major number?" His answer was that "where a majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure".[9]

On June 26, Madison referred again to his conception of factions. He did so by mentioning the "sudden impulses" that tempted the "major interest" to "commit injustice on the minority." He mentioned that those factious activities that had affected the nation were part of a "levelling spirit" in search of "agrarian" laws. As he assumed that these tendencies would always find a place in the House, he began to suggest the need to establish a "fence" against these factions.[10] As usual, his main

[7] "Vices of the Political System of the United States," April, 1787, ibid., vol.9, pp. 345-58.
[8] Farrand (1937), vol.1, p. 108.
[9] Ibid., pp. 135-6.
[10] Ibid., pp. 421-3.

assumption was that

> the people by reason of their number [can] not act in concert; [and are] liable to fall into factions among themselves...The more the representatives of the people therefore were multiplied, the more they partook of the infirmities of their constituents, the more liable they became to be divided among themselves either from their own indiscretions or the artifices of the opposite factions, and of course the less capable of fulfilling their trust.[11]

On July 25, also at the Convention, Madison repeated the idea that "public bodies are always apt to be thrown into contentions [and particularly if having to choose a Chief magistrate]."[12] On October 24, 1787, he sent a highly significant letter to Thomas Jefferson. In this letter, Madison expanded the main lines of the political conception that he had developed in the Federalist n. 10. Madison affirmed that the more "serious evil" to be prevented was the "mutability of the laws of the States." This -he explained- had been the main motivation behind the proposed Constitution. According to his opinion, the mentioned evil (the mutability of the laws) had "prepared the public mind for a general reform, [more than the evils] accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects." In this letter to Jefferson, also, he returned to the principle according to which "a majority [that had] a common interest, or fe[lt] any common passion" would tend to oppress the minority."[13] Additionally, he defended the existence of a connection between "small spheres" of government and the prevalence of factious interests ("in too small a sphere oppressive combinations may be too easily formed agst. the weaker party"). He also reaffirmed the idea that neither religion nor prudence or "respect for character" would be enough to restrain those majority factious tendencies.[14]

Finally, in the crucial papers that we know as the Federalist n. 10, 41, 51,

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[11] Ibid., pp.151-152.

[12] Ibid., vol.2, p.109.

[13] Responding to Patrick Henry, Madison asserted that "turbulence, violence and abuse of power by the majority trampling on the rights of the minority, have produced factions and commotions, which, in republics, have more frequently than any other cause, produced despotism" (See "General Defense of the Constitution," June 6th, 1788, Rutland and Rachal, vol.11, p 79). He clarified this position on two other important occasions, and showed the relevance of his fears of majority rule for his constitutional proposals. In a letter to Jefferson, he affirmed that "wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Governments contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents" ("Madison to Thomas Jefferson," Oct.,17, 1788, ibid., vol.11, p. 298). In another letter written in 1803, he was even more explicit, affirming that "the abuses committed within the individual States previous to the present Constitution, by interested or misguided majorities, were among the prominent causes of its adoption, and particularly led to the provision contained in it which prohibits paper emissions and the violations of contracts, and which gives an appellate supremacy to the judicial department of the U.S" (Ibid., vol. 4, p. 86. See, also, Rakove (1979), pp. 392,396).

[14] "Madison to Thomas Jefferson," Oct., 24th, 1787, Rutland and Rachal (1975), vol.10, pp. 205-20. At this time, the central Madisonian belief was the necessity of "moderating the fury" of the majority. "Madison to George Washington," Dec. 24th, 1786, ibid., vol.9, pp. 224-5.

and 58, Madison repeated the essential features of his thoughts about factions and majorities. The clearest exposition of his theory of factions was obviously presented in the Federalist n. 10, which I will examine in the following pages.

ANALYSING THE MADISONIAN DEFINITION OF FACTIONS

In the most important of the Federalist papers, n. 10, Madison presented a detailed definition of factions, and explained their causes and possible remedies.[15] In this case, Madison defined factions as "a number of citizen, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."

Madison's first move in defining factions was to distinguish between the dangers of majority and minority oppression.[16] The first thing to say, in this respect, is that according to Madison the risk of having majoritarian oppressions was much more serious than that of having minority oppressions. In fact, Madison basically neglected this latter possibility. To justify this distinction, Madison asserted that "if a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote." In addition, he affirmed that the minorities were "unable to execute and mask [their] violence under the forms of the Constitution". As a result of these expressions, we could share Robert Dahl's idea according to which "neither at the Constitutional Convention nor in the "Federalist Papers" is much anxiety displayed over the dangers arising from minority tyranny; by comparison, the danger of majority tyranny appears to be a source of acute fear." [17]

What happened, then, when the source of the factional oppression came from a majority group? According to Madison, "when a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the right of the other citizens." The real danger to be prevented, then, was the one derived from majority oppression.[18]

At this point, one should note that the absence of real concerns about minority oppressions was somehow worrisome. This is particularly true if we take into account a problem that, by the time of the Federal Convention, was one of the

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[15] The Federalist (1988).

[16] A different approach to the one I present here may be found in Wiecek,, included in Levy and Mahoney (1987), pp. 187-8. In the same edition, see M. Zuchert, "A System Without Precedent: Federalism in the American Constitution." Also, see the idea that "the legislature is the natural representative of majority faction," in Erler, "The Constitution and the Separation of Powers," ibid.

[17] See Dahl (1956), p. 9.

[18] Miller affirms that "for Madison . . . the defining problem for republics is coping with the danger that a majority faction among the people would gain control of the government and proceed to abuse other citizens." See Miller (1991), p. 218.

main social problems in the United States: the problem of slavery. In this case, clearly, we have a minority of people violating the rights of many others. However, Madison did not consider this situation in his analysis of factions. Actually, this particular problem was excluded from his definition of factions. In effect, factions are defined as a group of "citizens" violating the rights of other "citizens," something that, among other things, excludes the consideration of slaves who are not "citizens." In the Federalist papers, Madison explicitly refers to slaves as "persons" and not as citizens.[19]

Disregarding the risk of minority oppressions, Madison also chose not to pay attention to another extremely dangerous possibility: the possibility of having a minority group, outside the legislative, controlling the legislatures' main decisions. Reasonably, someone could complain about Madison's lack of concern for this option, taking into account what the main analysts of this period affirmed: that a particular minority, ("the mercantile-creditor [minority]") had a "firm grip on the government."[20] That is, he did not take the possibility of having the political system controlled by small but powerful interest groups situated outside the government seriously.

By simply taking into account the risk of majority oppressions, and basically neglecting the risk of minority despotism, Madison defined factions in a very curious way. In effect, his approach turns what seems to be the common understanding of factions, according to contemporary political theory on its head. In modern political theory, in effect, the idea of factions is normally associated with private interest groups, or private pressure groups, and not mainly –as in Madison's view- with majority groups. This contemporary idea of factions, thus, refers to minority groups that try, through their power of influence upon the government, to supplant the will of the majority as expressed through the democratic process. As Cass Sunstein puts it, factions would be the interest groups which try to "dominate the legislative or executive process and subvert the bargaining and compromise" that characterises a democratic form of government.[21]

To recognise these two very different concepts of factions is very significant. Clearly, one thing is to organise the Constitution in order to prevent the action of interest groups (this being the contemporary approach to "factions") and another, completely different thing is to organise the Constitution in order to restrict the authority of majority assemblies (this being Madison's approach to "factions"). Both approaches may finally be justified but, at least, we should not confuse them. This confusion, I think, has played a very significant role in contemporary studies. Illustrating this confusion, and just to mention two significant examples, Alexander Bickel directly equated the notion of faction with that of interest groups. He made reference, thus, to "what Madison foresaw as "faction," what Mr. Truman calls

[19] See, Epstein (1984).
[20] See Jensen (1967), pp. 308-9.
[21] See Sunstein (1985). See, also, Sunstein (1988).

"groups," and what in popular parlance has always been deprecated as the "interests" or the "pressure groups."[22] Similarly, and using both the mentioned terms as synonyms, John Ely affirms that: "in the national government no faction or interest group [should] constitute a majority capable of exercising control."[23] In addition, I point out this confusion because sometimes, I suspect, we tend to praise the Madisonian constitutional conception, or the U.S. Constitution, in general, taking into account the contemporary definition of factions, and not the one which was dominant during the Founding period.

REPRESENTATION

In the Federalists papers, Madison used the notion of factions, first of all, to justify his view of the representative system (or, as he called it, the republican system). Madison did not defend representation as a "second best option" or as a necessary evil. On the contrary, he defended representation as the preferred option. In this sense, as we will see, his defence of a representative system was always grounded, in the end, in his epistemic elitism.

One of Madison's main arguments in favour of the representative system was a negative one, which consisted of a rejection of direct or pure democracy.[24] According to his opinion reflected in the Federalist n. 10, direct democracy was an unacceptable possibility for a system aimed at preventing factionalist oppressions. The democratic systems -he asserted- "admit[ted] of no cure for the mischiefs of faction." Direct democracy, in this sense, constituted an undesirable system because it did not establish enough checks for restraining the presence and the threats of factions.

Compared with pure democratic systems, the representative systems appeared to have many advantages. The main one of these advantages was "the delegation of the Government to a small number of citizens." But, why was this an advantage? Madison answered this question clarifying, also, his own epistemic view. He affirmed:

> The effect of [representation] is to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.[25]

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[22] Bickel, A. (1962), p.18.

[23] Ely (1980), p. 80.

[24] In The Federalist n. 10, Madison defined "pure" democracy as "a Society, consisting of a small number of citizens, who assemble and administer the Government in person."

[25] In the above quoted and fundamental paragraph, Madison demonstrated his political ability, establishing a dialogue with two different audiences at the same time: Madison played with the ambiguity of the idea of "a chosen body of people" to assert, on the one hand, that the representatives would be elected by the people but, on the other hand that his conservatives allies had nothing to be afraid of: the final political decisions

By stating this, Madison made it clear that he did not view representation as a "necessary evil" or as a mere "second best" option, but as his preferred alternative. According to him, in order to obtain adequate political decisions, it was not necessary to resort to direct democracy or to public discussion. On the contrary, as he stated one line below, "[in a representative system] it may well happen that the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose." In this way, Madison made use of the same argument that Burke used in England: the "will" of the many and their "interests" many often differ. Or, to put it other way: in order to promote the interests of the majority it was not at all necessary to resort to the majority itself.

At this point, it is also interesting to note that the Madisonian arguments in favour of representation suffered from different weaknesses. First of all, Madison defended his position presenting an inescapable option between two peculiar alternatives: an unchecked system of direct democracy and a representative system with very autonomous representatives. However, the option that he presented was not exhaustive (why not think, for example, about mixed systems that combined a certain degree of representation and direct democracy) and, also, the two opposing alternatives that he offered were not adequately depicted.

On the one hand, direct democracy does not necessarily imply the absence of institutional controls. We may perfectly well have, for example, a system of direct democracy with "exogenous" or "endogenous" controls that oblige the majorities to make their decisions more carefully. Madison, however, did not recognise this possibility. According to what he wrote in the Federalist n. 10, in a system of pure democracy "there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual." Also, it is important to remark that Madison criticised different systems of direct democracy, like the one supposedly dominant in Ancient Greece, having in mind the "town meetings-political model" that was developed in the U.S.[26] If this was the case, then, his message was confusing and most of all, inadequate: the fact that a political system lacked certain specific checks, or had imperfect checks (as probably happened in the early radical experiments in the U.S.), did not necessarily imply that the system constituted an "unchecked" system, or that a reasonable possibility of instituting better political controls did not exist.

On the other hand, Madison depicted the "republican" system in a very peculiar way, as if political representation necessarily implied the particular representative system that he preferred: a system that left no room for direct democracy, and which created very autonomous representatives (by eliminating

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would not be made by anybody, but by the "chosen," the "best souls" of society, "people who are distinct and different" from the other citizens. See Manin (1995), p. 153.

[26] He seemed to do so, for example, in the Federalist n. 10, when he affirmed that "such [pure] Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property."

most of the controlling mechanisms incorporated into the early radical ccnstitutions).

Madison recognised that the particular model of representation that he defended was open to significant problems. For example, in the Federalist n. 10 he acknowledged that in his suggested representative model "men of factious tempers, of local prejudices, or of sinister designs" could manage to become elected, "by corruption or by other means." However, even recognising this possibility, Madison did not accept the alternative of securing more "external," popular controls. On the contrary, he used this potential criticism of representation just to provide an additional defence of the system. He did so, basically, by ignoring the obvious question of accountability (why not increase the people's capacity of control over the representatives, if we recognise that "men of sinister designs" could manage to become elected?), and by just focusing only on the question of how to secure the election of "proper guardians of the public." The question "is whether small Republics are most favourable to the election of proper guardians of the public weal." He answered that the choice was clearly decided in favour of the representative system (that is, the only system that seemed capable to work in "extended republics").

The representative system seemed better for two reasons. First, because it would "present a greater option" of "fit characters." Second, because in large republics "it will be more difficult for unworthy candidates to practise with success the vicious arts, by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre on men who posses the most attractive merit, and the most diffusive and established characters."

One could present many different reasons that argue against these assumptions. For example, he did not take into account the fact that a large republic would also present a "greater option" of bad characters; he did not properly clarify a "fit character" (why not think, for example, that for a character to be fit it was necessary that this person be perfectly acquainted with the community needs); he did not acknowledge that, in large republics, the "unworthy candidates" could practice many other "vicious arts," in order to be elected (this might occur, for example, thanks to the fact that the people have less access to them and have less possibility to control their behaviour). Moreover, Madison did not recognise that the possibility of making an appropriate choice in a large republic could be affected by the (foreseeable) low level of acquaintance between the candidates and the electors. All of these reasons, I believe, cast doubts on the peculiar model of representation defended by Madison.

Having examined some of the main features of the Madisonian view on representation, I will now examine other features of his political conception, also linked to his central idea of factions.

MINORITIES

As we examined above, one of the main purposes of the North American Constitution was to prevent the influence of factions in the decision-making process. At least, this principle may be inferred from the Federalist n. 10, an article that is normally recognised as the most significant and influential piece ever written in order to justify the U.S. Constitution.

However, when we examined the concept of factions, we found that its fundamental meaning was associated with the oppressive actions of legislative majorities. The idea was that legislative majorities had a marked tendency to make despotic decisions. As a result of this reasoning, then, we could arrive at the following worrisome conclusion: if the Constitution was mainly intended to prevent the oppressive actions of factions (and by factions we basically mean legislative majorities), then we have, as a conclusion, the notion that the Constitution was basically oriented at preventing the oppressive tendencies of the legislative majorities. The outcome of this reasoning seems curious because (I assume) we presently tend to think that the Constitution is (and ought to be) aimed at promoting rather than restricting the will of majorities. In fact, I think, if we actually had a Constitution that systematically hindered the expressions of the majorities, we would have good reason to consider this document unacceptable.

However, even accepting my previous analysis, the defenders of the U.S. Constitution could resort to a different argument to maintain their support for that original document. They could rightly affirm that an essential aim of any democratic Constitution should be that of protecting the minorities. Then the fact that the U.S. Constitution was specifically aimed at protecting minorities (against sudden "majority passions") should not be seen as a defect but as one of the main virtues of the document.

This alternative way of defending the Constitution ("the Constitution is mainly directed to protect the minorities") seems more reasonable but, of course, the acceptability of this alternative depends on the way in which we define the idea of "minorities."

To understand how the Framers defined the concept of minorities, it may be important to think about different possible definitions of minorities.

The first definition of minorities that I will suggest is associated with the way in which we presently tend to define the term. According to this approach, a minority would include all those people who, sharing certain common demands, do not receive particular attention from the majority decision-making process. This definition of the concept is indifferent to the "number" of members of the minority group. For example, we might refer to the group of the women as a minority group,

even if there were more women than men in society; or we might refer to the black community as a minority group, even if they constituted the majority of the population; or we might refer to the poor as a minority, even if they represented two thirds of the population at large.

A second definition of minorities would characterise them more strictly, with regard to the number of their members. In this case, those people who share certain features that are not shared by the majority of the people at large would represent a minority. For example, a group of immigrants would be a minority within a specific nation; a group of homosexuals would be a minority if the majority of the people are heterosexuals; a group of Mormons would be a minority within a Catholic country; a group of anarchists would be a minority within a political spectrum mainly divided between republicans and democrats.

The Framers, however, did not resort to any of the previous and more common definitions in their approach to the idea of a "minority group." They referred to "the minority," instead, basically thinking about one single and particular group which was the group of the "property holders." They resorted to this definition without considering, for example, about the relative power of this group within society. In effect, the Framers associated the concept of the minority with that of "the few," and the idea of the few with that of "the rich and the well-born." Hamilton was very clear in this respect and Madison also resorted to the same terminology.[27] Madison's approach, in particular, became apparent in some of his references to the Senate and its members. Thus, for example, he affirmed that the Senate was an institution that aimed to "protect the minority of the opulent against the majority."[28] This statement did not constitute an isolated opinion within the Madisonian conception of politics. On the contrary, it represented a characteristic expression of Madison's point of view.

Typically, Madison employed "the rich", "the creditors", the "property owners", and "the minority" as related and exchangeable terms In the same way, he used as synonyms the ideas of "the poor", "the debtors", "those who are without property", and the concept of "the majority." There are good illustrations, in this respect, in the Federalist n. 10, in his fundamental paper "Vices of the Political System,"[29] as well as in many other speeches at the federal convention,[30] and in the letters that he wrote during and after the convention.[31]

Robert Dahl supports this view of Madison's approach to minorities in the

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[27] He adopted this notion during his participation in the Constitutional Convention. See Farrand (1966), vol.1, p. 299.
[28] Ibid., vol.1, p. 431.
[29] "Vices of the Political System of the United States," April 1787, Rutland and Rachal (1975), vol. 9, p. 355.
[30] See, for example, his speeches of June 4th and June 6th, 1787. ibid.
[31] See, for example, "Madison to Thomas Jefferson, Oct., 24th, 1787, ibid., vol.10, p. 213; and "Madison to Thomas Jefferson," Oct. 15th, 1788, ibid., vol. 11, p. 287.

analysis of what he calls "Madisonian democracy." According to Dahl, "the Madisonian style of argument provided a satisfying, persuasive, and protective ideology for the minorities of wealth, status, and power who distrusted and feared their bitter enemies- the artisans and farmers of inferior wealth, status, and power, who they thought constituted the "popular majority."[32]

Thus defined, the conceptions of both minorities and majorities outlined above seem to conflict with some of the intuitions that we presently share. Our present conception of a minority seems to be broader and more flexible than the one that was apparently defended by the Framers. It is interesting, in this sense, to trace the evolution of the concept of minorities since its "invention" in the eighteenth century. A concept that was seemingly designed to protect the "selected few" became a major conceptual tool used by the powerless to demand special protection.

Having analysed some of Madison's main assumptions, we are already prepared to get into the "core" of the North American Constitution. Now we know what the Framers (and Madison, in particular) thought about the majorities, and what they expected from them. We also know the way in which they approached the idea of the minorities. With these ideas in mind, we may study the specific political procedure that they created in order to obtain impartial political decisions: the mechanism of checks and balances.

As we will see, the apparently simple idea of "checks and balances" was based on a plurality of complex and non obvious assumptions: that society was divided into two opposite, fixed groups (the creditors and the debtors, the rich and the poor, the minority and the majority);[33] that these groups were internally homogeneous; that the main source of human motivation was self-interest; that the popular majorities (partly as a result of their self-interest, partly as a result of their sudden passions) had an irresistible tendency to oppress the minority;[34] that the idea of the "minority" meant "the few;"[35] that the fundamental aim of the government was that of "secur[ing] the main interests of the country";[36] that, in order to secure these interests, it was necessary to avoid the risk of mutual oppressions;[37] that one way to avoid these mutual oppressions was that of providing each group with a "defensive share" of power within the political system;[38] that it was actually possible

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[32] See Dahl (1963), p. 31. Stephen Holmes and Samuel Beer strongly disagreed with this statement. Beer affirmed that Madison "did not think of this elite [that composed the republican government] as a social order or economic class and specified no qualifications of birth, property, or social standing for membership in it. It was identified by no other external criterion than the choice of the people." See Beer (1993), p. 281. Contrary to Beer, I would say that mechanisms such as indirect elections (during the 18th century) were widely assumed to secure the election of a certain wealthy social class and the exclusion of other, poorer groups.

[33] See, for example, Madison, Farrand (1937), vol. 1, pp. 422-3.

[34] Madison, ibid., vol. 2, p.110.

[35] Madison, ibid., vol..2, p. 431.

[36] Ibid., p.431.

[37] Ibid.

[38] "Madison to Jefferson," Oct.,15th, 1788, Rutland and Rachal (1975), vol. 11, p. 287.

to guarantee each of these groups an equal share of power; etc. Given the complexity and, most of all, the importance of the mechanism of checks and balances within the Federalists' whole institutional project, herein I will concentrate my attention on its description and on the critical analysis of its supposed virtues.

CHECKS AND BALANCES

The system of checks and balances is one of the most important intellectual creations of the founding fathers. The basic idea behind this system consisted in having different branches of power, partially separated between them, and mutually able to control each other. The way to achieve this latter objective was by providing each branch (the executive, the legislative, and the judiciary) with means for restraining possible excesses of the others (through the executive veto, the ability of each house to veto the other's decisions and to override the presidential veto, and judicial review).

The very idea of having a system of "checks and balances" implied a reaction against the most common idea of a "strict separation of powers," defended by radical thinkers both in the United States and in France. Clearly, the radicals assumed that the will of the people -say, the "general will"- was one, indivisible, and sovereign. Therefore, the institutional system had to allow the open expression of the majority will, and to prevent any intrusions into it. The system of strict separation of powers, defended by the radicals, constituted a reflection of these principles: through their defended institutions, the radicals attempted to avoid any kind of check over the will of the people, assumedly reflected in the Legislature or the National Assembly.

The Federalists did not trust the radicals' institutional proposals: the recent U.S. history had demonstrated them the risks of adopting an unchecked majority model. In this sense, the system of "checks and balances" promised to solve both the social conflicts and institutional chaos that they were facing at that moment.

To properly understand this claim, one has to recognise the "social" implications of the mechanism of checks and balances. In effect, the system tried to promote social stability -a social equilibrium- by incorporating the different existing social groups into the government, and by providing them with defensive tools. The idea that the institutional system could be used to reflect and re-organise the "different orders of society" was actually an old idea, which had a significant antecedent: the British mixed Constitution, which attempted to reflect in the document the (assumed) aristocratic, monarchical, and democratic parts of society. The Framers of the U.S. Constitution, however, did not think about three different parts of society, but mainly about two opposing and fixed groups: the so-called majority and minority or, as we examined, the debtors and creditors, or the many and the few. Madison, in particular, emphasised this point in all his primary works. In "Vices of the Political System" he affirmed the idea (also repeated in the Federalist n. 10) that society was divided between "those who hold, and those who

are without property...those who are creditors, and those who are debtors".[39] Also, he reaffirmed these criteria in many letters he wrote before, during, and after the Convention, where he referred to an existing social distinction between "debtors and creditors"; or "proprietors and not proprietors".[40] His speeches at the Constitutional Convention were particularly telling, in this regard. In June 26, 1787, he answered a speech made by Charles Pinkney the day before, where he analysed the U.S. society, as a society divided into three classes: the professional, the commercial, and the landed interests. Madison agreed with the idea that society was divided in many different groups (he mentioned the "creditors & debtors, farmers, merchts. & manufacturers"), but he emphasised "that [t]here will be particularly the distinction of rich & poor."[41] He then asserted that they -as the representatives of the nation- were called upon to frame "a system [which was supposed] to last for ages," and that, for that reason, they should not "lose sight of the changes which ages will produce": according to his opinion, the increase of population would deepen the already existent twofold division of society even more, increasing the risks of power "slid[ing] into the hands of [those who will labour under all the hardships of life]". Alexander Hamilton, among others, shared this belief with Madison. According to him, "in each community where industry is encouraged, there will be a division of it into the few & the many. Hence separate interests will arise."[42]

In addition, the North American Founding Fathers assumed -as I tried to demonstrate- that the majority always tended to behave irrationally: collective meetings, they thought, tended to be controlled by passions instead of reason. As a result of these assumptions, the Framers concluded that, under a majority government, the rights of the minority would always be under the most severe risks. Their proposed solution, facing this situation, was not directed to reverse this picture, and to give -in practical terms- the entire institutional power to the minority, as some of them actually suggested.[43] Clearly, they rejected this possibility because

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[39] The Federalist, n. 10. The Madisonian theory of political representation was not a dynamic, but a static conception of group representation. The representative system -according to his opinion- had to reproduce society, but the society in question appeared to have a "fixed" social structure. As stated by Madison, the idea was the following: "In framing a system which we wish to last for ages, we shd. not lose sight of the changes which ages will produce. An increase of population will of necessity increase the proportion of those who will labor 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 . . . How is this danger in all cases of interested co-alitions to oppress the minority to be guarded agst.?" [Farrand, 1937, vol. 1, pp. 422-3] "Our government ought to secure the permanent interests of the country against innovation [ibid., p. 431, Yates version].

[40] See, for example, his speeches of June 4th and June 6th, 1787. Also, see his letters to Thomas Jefferson, Oct. 24th, 1787, and Oct. 15th, 1788.

[41] Madison, in Farrand (1937), vol. 1, pp. 421-23. While his opponents believed that "every order of men" (or every relevant group) had to have a share in the political system, Madison believed that just these two main groups had to have a share of power. He strongly suggested that next to the majoritarian presence of the debtors in the Lower House, the "landholders ought to have a share in the government, to support the . . . invaluable interests [of the land] and to balance and check the other" (Ibid., p. 431).

[42] Hamilton, ibid., vol. 1, p. 288.

[43] Thus, for example, the case of the Federalists that proposed to strictly restrict the rights of the majority through the use of property qualifications. I will come back to this point below.

of two reasons. On the one hand, and more obviously, this attempt would prevent them from achieving the desired political stability, and would transform the Constitution in a mere piece of paper. On the other hand, they assumed that if they gave all the political power to the minority, the minority -also driven by self-interest- would try to oppress the majority.

As a result of these beliefs, the Framers began to think about the possibility of providing both groups (the majority and the minority) with equal shares of political power. Their objective was to avoid the possibility of tyranny (either the typical, most feared, majority tyranny, or the minority tyranny). Preventing mutual oppressions would make it possible to have a stable and reasonable government. In the Federal Convention, Alexander Hamilton presented the best and clearest exposition of this view. He stated: "[g]ive all the power to the many, they will oppress the few. Give all the power to the few, they will oppress the many. Both therefore ought to have power, that each may defend itself agst. the other".[44] Madison stressed exactly the same point, stating that "[the] landholders ought to have a share in the government, to support the...invaluable interests [of property] and to balance and check the other [group]".[45]

At this point, however, we have to note that the aim of obtaining a "social equilibrium" through the institutional system was enormously difficult: what does it actually mean to give each of the main social groups an equal share of power? What does it imply? The Framers, however, seemed to have clear answers to these questions. According to them, it was actually easy to incorporate both the majority and the minority into the institutional system. Mainly, they assumed that mechanisms such as direct and indirect elections were capable of securing their desired objective (although they also appealed to other institutional mechanisms, like that of establishing large districts, in order to achieve the same goal).[46] Direct

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[44] Hamilton, ibid., vol. 1, p. 288, my emphasis.

[45] Madison, ibid., p. 431. Those who opposed the proposed Constitution, the Antifederalists, disputed most of the assumptions shared by the Federalists -the delegates that defended the Constitution. Mainly, the Antifederalists believed that the institutions that were being created would not adequately reflect the whole society. As a result of this, many Antifederalists proposed, for example, an enlargement of the number of representatives as a way to improve the political representation of the people: the institutional system had to possess the same interests, feelings, opinions, and views as the people themselves. Also, and as a result of these belief, they objected to the proposed Constitution affirming that it would concentrate the political power in just a few hands. According to their view, the government that was being created would be clearly "aristocratic". See, for example, the opinions of "A Federalist", "Montezuma", John Humble, "Aristocratis", John Mercer, "Philadelphiensis", "A Farmer and a Planter", in Borden (1965). See, also, the opinions of G. Mason, R. Lee, "Centinel", "John De Witt", etc., in Storing (1981). Also, Storing (1985), and Allen and Gordon (1985).

[46] According to Madison, for example, large districts would be "manifestly favorable to the election of persons of general respectability, and of probable attachment to the rights of property, over competitors depending on the personal solicitations practicable on a contracted theater" (see Farrand, 1937, vol. 3, p. 454). The adoption of large districts was clearly established to favor the presence of "the minorities" within the political system. The idea that "large districts tended to favor natural aristocracy" seemed to have a clear confirmation in political practice (thus, according to Bernard Manin, 1995, pp. 163-4). Again, Madison was very explicit in this sense: "Should experience or public opinion require an equal and universal suffrage for each branch of the government, such as prevails generally in the U.S., a

elections would facilitate the integration of the "majority" into the government; and indirect elections would allow the same for the "minority". In this regard, for example, Madison assumed that indirect elections would "render the choice[s] more judicious",[47] avoiding the selection of "demagogues" or populists, like those who tended to seduce the majority. The Antifederalist E. Gerry was also explicit in this respect, showing existing connections between the direct and indirect character of elections and the selection of particular interests. He affirmed, for instance, that indirect elections would "refine" the electoral process, guaranteeing the representation of minority interests in society.[48] Rutledge also affirmed that indirect elections would make the "proper characters" (those of the "the minority") "preferred".[49] In general terms, the Framers assumed that the House of Representatives would become the expression of the interests of the majority, while the interests of the minority would be expressed and protected through the Executive power, the Senate, and the Judiciary (the members of which would be elected through indirect means).[50]

In addition, the Framers assumed an important degree of "internal homogeneity," within the minority and majority groups. Clearly, if this had not been the case, it would have been impossible to conceive of any type of social equilibrium: what kind of social equilibrium would we have if the majority and minority members present in the government did not clearly represent the majority and the minority "outside" the political institutions? Again, the Framers did not seem to be troubled by this possibility: they had no doubts about the basic internal homogeneity of both sections of society. Surely, they recognised that the different states or the different regions would have particular claims. Nevertheless, they understood that the majorities and minorities in each of these states possessed, internally, the same basic interests. Madison, for example, stated "[w]e cannot...be regarded even at this time, as one homogeneous mass, in which every thing that affects a part will affect in the same manner the whole."[51] Society was divided between debtors and creditors (the majority and the minority), and the institutional system had to give voice to these two main groups (and not necessarily to other possible minor interests) in order to secure the desired political stability. Resorting to Burkean criteria, in the Federalist n. 56 he affirmed that "a few representatives...from each state may bring with them a due knowledge of their own state". The idea was that the institutional system had to give voice to, say, the debtors and creditors of Virginia, the creditors and debtors of Maryland, etc.; but not necessary, say, to the merchants, the professionals, the manufacturers, the militia, and the farmers of each of these states. Having representatives from the debtors and

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resource favorable to the rights of landed and other property, **when its possessors become the minority**, may be found in an enlargement of the election districts for one branch of the legislature, and an extension of its period of service" (ibid., my emphasis).

[47] Madison, in Farrand (1937), vol. 3, p. 330.

[48] Gerry, ibid., vol. 1, p. 152.

[49] Ibid., p. 359.

[50] Pinckney, ibid. vol. 1, p. 155; Madison, ibid., vol. 3, p. 330 and p. 617; etc.

[51] Madison, ibid., vol. 1, p. 422.

the creditors of the whole country would mean having the whole country adequately represented.[52]

These assumptions make it possible to understand the Framers' confidence in the system of checks and balances. As Madison clearly explained it -in the crucial Federalist n. 51, their proposed device would provide the members of the different branches of power -and, thus, the representatives of the minority and majority groups within society- with the "necessary constitutional means, and personal motives" to resist the oppressive attempts of the others. This solution -as he affirmed- was based on a "reflection on human nature." Because it was impossible to discount the people's self-interest, the political system had to be prepared to counteract its consequences. As Madison put it, "ambition must be made to counteract ambition." Organised in this way, the political institutions would allow them not only to secure their desired social equilibrium, but also to prevent their most feared nightmare: the possibility of having an unchecked majority trying to implement its will through legal means.

THE PROBLEMS OF THE SYSTEM OF CHECKS AND BALANCES

The system of checks and balances, as it was organised, received and could still receive many criticisms. Clearly, one of the main assumptions behind its organisation was a particular epistemic view according to which collective reflection was not a good means of producing impartial decisions. The presence of this epistemic conception may be easily recognised by examining the very peculiar way in which the Founding Fathers organised this "balance" between the majority and the minority: all the decisions that, in their opinion, had the utmost importance, were transferred to the sections of power supposedly controlled by the minority. Thus, for example, the choice of new Judges; the selection of the foreign representatives of the country; the administration of the foreign affairs; etc. I will return to this point below.

During the time of its creation, the system of checks and balances received some other still very significant, objections. Some people thought, for example, that the adoption of the system implied relying too much on "endogenous" controls, and too little on "exogenous" ones. The "exogenous" controls would be those controls that resorted to "the people at large" in order to "repair" significant institutional difficulties. The defenders of a radical epistemic conception were usually more confident in these types of controls, aimed at giving to the citizenry ("the only

[52] The degree of assumed homogeneity was, in fact, greater than what I suggested; the Framers assumed that the creditors ("the few") would always defend the interests of the creditors ("the few") no matter where they came from, and that the debtors ("the many") would always defend the interests of the debtors ("the many") no matter where they came from. Because of this, the Framers' main institutional concern was to "give an equal voice" to representatives of both the debtors and the creditors, in general. Then, the representation of creditors and debtors from different states appeared as an additional guarantee to secure the protection of more particular interests (and to avoid the common criticism of there being an overly centralized government), but it was not the Founding Fathers' priority.

legitimate fountain of power") the "last say" in cases of institutional crisis.

In this sense, for example, and showing his fears about the types of conducts that the system of checks and balances seemed to foster, Samuel Williams of Vermont affirmed that "the security of the people is derived not from the nice ideal application of checks and balances, and mechanical powers, among the different parts of the government, but from the responsibility, and dependence of each part of the government, over the people."[53] For the people who shared this view, the basic idea was that "the branches of power should be separate from each other, and each answerable directly to the people, not to the other branches."[54] Thus, not surprisingly, all the early radical Constitutions of 1776-77 rejected the idea of checks and balances, and replaced it with a different model, oriented to securing that the representatives were clearly accountable to the people.[55]

One of the most interesting debates on the subject was that held between Thomas Jefferson and James Madison. In his "Notes on the state of Virginia," Thomas Jefferson defended the "exogenous" controls suggesting, among other things, that every time it was necessary to "correct [breaches]" of the Constitution, "a convention [should] be called" for that purpose. Concerned about the possible implication of Jefferson's view, James Madison promptly reacted against this suggestion, clarifying, at the same time, the profoundly different epistemic view that he defended.

Madison dedicated the whole Federalist paper n. 49 to replying to the author of the "Notes." His criticisms were many, although always basically related to his own epistemic conception. According to him, the appeal to the people was inconvenient because of the "danger of disturbing the public tranquillity by interesting too strongly the public passions." Also, he thought, the "appeal to the people would carry an implication of some defect in the government," depriving it of its necessary "veneration." Finally, he suggested that this way of solving the inter-branch difficulties would be too favourable to and, thus, improperly biased in favour of the Legislative. The legislators had "connections of blood, of friendship and of acquaintance" with the people at large.

The Madisonian defence of the system of checks and balances did not fully convince the critics of the Constitution. In fact, these critics had some other reasons for arguing against the Framers' proposal of a balanced government. For example, they affirmed that the strategy of giving "defensive tools" to each department would promote a situation of political stalemate or, in the worst cases, a state of "war" between different branches of power. Nathaliel Chipman, for example, foresaw a state of permanent tension between the different interests at stake, as a result of the

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[53] Quoted in Vile, "The Separation of Powers," 678, in Greene, J. Pole, J. R., (1991).
[54] Ibid., p. 678.
[55] Contrary to this position, Beer presents a critical analysis of the idea of separation of powers (basically, in Montesquieu), and a defense of the Madisonian approach to this issue. See Beer (1993), chap.7.

proposed system of checks and balances. Chipman depicted this situation as one of "perpetual war of each [interest] against the other, or at best, an armed truce, attended with constant negotiations, and shifting combinations, as if to prevent mutual destruction; each party in its turn uniting with its enemy against a more powerful enemy."[56]

In addition to the problems mentioned, there were other assumptions, also defended by the Framers, which were (and still are) very difficult to defend. For example, it is not easy to agree with the assumption that society is mainly divided in two groups; or to affirm that these two groups are internally homogeneous; or to share the Framers' "static" view of society (according to which this main existing social division had to be preserved); or to share their definition of the minority; or to believe, as they did, that it was actually possible to incorporate all the different existing groups within the political system. I will come back to some of these problems later. At the moment, I want to focus my attention on a different problem, which I think represents the most significant of the difficulties that the system of checks and balances confronts: I am referring to the normative criteria upon which the whole system is constructed.

I think that (even if we assume that the Framers defined the notion of minorities approximately in the way we presently do), the idea of giving an "equal share" of power to both the majority and the minority is perplexing and very difficult to accept. In effect, even if we take a very simple and restricted concept of democracy as a starting point, it would be hard not to relate democracy to the idea that, somehow, the will of the many has to prevail. Given that we are not willing to defend an unconstrained majority government, but a Constitutional system that somehow secured the rights of the minorities, we would certainly support an institutional design specially oriented to provide them with special protection. However, if this protection required us to equate the majorities and the minorities in their power, then, we would find ourselves in a very difficult position: would it be right to make that type of decision, if we wanted also wanted to keep our commitment to the idea of having a democratic government? What kind of democratic system would we have, after we reduced the power of the majority to the same level as the power of the minority? If we accepted organising the political system in this way, I believe, the "checks and balance remedy" -supposedly adopted to improve the position of the minority- would be worse than the illness. We would have seriously injured democracy in order to secure stability. We would have drastically violated the legitimate rights of the majority in order to prevent possible violations of the rights of the minority.

In spite of what I just said, one could still defend the system of checks and balances, and its implicit normative conception, through some alternative arguments. One could say, for example, that the Framers organised this balanced system, in effect, trying to secure adequate checks over the majority but, at the same

[56] See Chipman, (1833), p. 171.

time, trying to maintain (and not to suppress) the political superiority of the Congress (of the majority). Actually, Madison, in his very defence of the balanced system (in the Federalist, n. 51) affirmed that "[i]t is not possible to give each department an equal power of self defence. In republican government the legislative authority, necessarily, predominates." Does this claim mean that, in the end, the system of checks and balances tried to respect the principle of popular sovereignty (the principle of majority supremacy)? The same Madison answered this question, one line later, and in the negative. There, he described that situation as an "inconvenienc[e]" that had a simple remedy: to divide Congress into different branches. In the end, then, the possibility of having the strongest authority in Congress was totally diluted: its most democratic branch, the House of Representatives, came under the strict control of the Senate, the Executive and its veto power, and the Judiciary and its capacity to review legislation. Thus (even taking into account the Representatives' capacity to insist on their projects), it seemed unreasonable to maintain the idea that the majority would be capable of imposing its own will.

Another possible way to defend the system of checks and balances as it was created, is by saying that this was the only alternative available to protect the minorities (or, at least, that this was the most economic alternative available). This line of defence seems interesting, but is obviously open to empirical objections. Intuitively, I think that it is reasonable to believe that there are alternative mechanisms available (besides the system of checks and balances), in order to protect the minority interests. However, facing this challenge, I would suggest the following: even if it were actually the case that the only available alternative to secure full protection of the minorities were that of providing them with an "equal share" of power, then we should balance the possible benefits of this option with its dramatic costs. That is, we should see whether the potential benefits of this option outweigh the certain losses that it promises. In the end, we should decide whether we are ready to give up even our traditional commitments to certain (minimum, very basic) democratic ideals. However, the truth is that we are not facing this tragic choice: the system of checks and balances does not represent (and actually has not represented) either the exclusive or the better option of protecting the interests of the minority. In this sense, I think, we should be more careful before accepting an option that implies sacrificing or eroding the main virtues of democracy.

CHAPTER 4

THE CONSERVATIVE REACTION II. DEFENDING THE NEW INSTITUTIONS IN THE FEDERAL CONVENTION

INTRODUCTION

In the previous section, we analyzed James Madison's main ideas with regard to national political organization. We examined some of the arguments that he presented, and some of his particular institutional proposals. In this section, I will focus my attention on the views advanced by some of his colleagues at the Federal Convention. Among other things, this analysis will help us to recognize that these representatives shared Madison's epistemic view. More generally, this analysis will show us that most of the so-called Founding Fathers shared a common conception about politics. To develop this study, I will first present the main assumptions of the two major groups that took part in the Convention (the Antifederalists and the Federalists), and then I will examine the different institutions that the Convention finally proposed.

THE "CONSERVATIVE" ANTIFEDERALISTS

To make reference to (something like) the Founding Fathers' "unified" view may be somehow surprising. In the end, we know that at least part of the members of the Federal Convention, the Antifederalists, refused to sign the proposed Constitution. However, the Antifederalists' attitude toward the Convention's final document should not confuse us. The truth is that the two groups that participated in the Convention, the Federalists and the Antifederalists, shared a common political perspective (and, in particular, they adopted the same epistemic view), in spite of certain significant differences with regard to the peculiar institutions that each of them preferred. I will maintain, in fact, that the Antifederalists that participated in the Convention were not at all a group of (what here I named) "radicals," as many scholars tend to assume. The Antifederalists, as I will show, accepted none of the most basic principles of radicalism. This assertion means that basically all the members of the Convention agreed on common conservative assumptions.

The radicals' view remained confined to small political groups and isolated figures, and was expressed through articles in local newspapers or political documents. In the Federal Convention, nobody adopted this view, although in some particular cases, the Antifederalists' claims overlapped with the radicals' demands. Typically, the Antifederalists were (like most radicals, in this respect) defenders of states' rights, and thus enemies of the "centralist" tendencies that (according to them) distinguished the Federalist project. Thus, for example, the Antifederalists objected to the Federal

Constitution stating that it would promote "the total abolition and destruction of all state governments."[1] However, in adopting this position, these Antifederalists did not embrace any of the democratic beliefs that animated the radical thinkers. Most significantly, they did not assume the common epistemic view that most radicals assumed; they rejected the radicals' commitment to open assemblies and political publicity, and they opposed the radicals' beliefs with regard to collective self-government. Contrary to the criteria mentioned, most of the Antifederalists assumed that the people were basically incapable of "ruling by themselves," and unable to properly distinguish their own good. Not surprisingly, most of the Antifederalists tended to see democracy as the source of all political difficulties, and not (as many scholars assume) as a desirable, although utopian, ideal.

From the beginning of the Federal Convention, these conservative Antifederalists exposed their epistemic view and clarified the institutional implications of their assumptions. Gerry opined that the evils the nation was suffering derived from the excesses of democracy.[2] Like most of his allies, he also complained about "the turbulence and follies of democracy" and referred to democracy as "the worst of all political evils."[3] Randolph shared these opinions adding that the "democratic parts of [the existing] Constitutions" represented the most serious danger to any proper political system.[4] Mason also presented his strongest objections against democracy and its institutional expression.[5] In addition, for example, and for the same reasons, Martin opposed the idea of consulting the people of the states directly, warning against "the danger of commotions from a resort to the people."[6]

Typically, the conservative Antifederalists defended the interests of their states regardless of the particular interests of the inhabitants of those states. According

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[1] "Luther Martin to the Citizens of Maryland." See, for example, in Kenyon (1985), p. 169. Martin continued the letter, stating that the Federalists pretended "the erection on [the ruin of the state governments] of one great and extensive empire, calculated to aggrandize and elevate its rulers and chief officers far above the common herd of mankind, to enrich them with wealth, and to encircle them with honors and glory, and which . . . must inevitably be attended with the most humiliating and abject slavery of their fellow citizens" (ibid., pp. 169-170). Similar concerns were present in George Mason's objections to the Constitution. According to him, the whole political system was an attack on the rights the people were enjoying in their states. He contended that the House of Representatives was "but the shadow only of representation; which can never produce proper information in the legislature, or inspire confidence in the people"; the President would "generally be directed by minions and favorites"; the judiciary was "so constructed and extended, as to absorb and destroy the judiciaries of the several states"; the Senate, as "a constant existing body" would be enabled to arrogate "the rights and liberties of the people." See G. Mason, in his "Objections to the Proposed Federal Constitution." Also, commenting these objections, see Kenyon (1985), pp. 194-195.

[2] Farrand (1937), vol.1 , p. 48.

[3] These statements were affirmed by Edmund Randolph and Elbridge Gerry. An analysis of these positions may be found in Hofstader, "The Founding Fathers: An Age of Realism,"" in Horwitz (1979), p. 74. Gerry also affirmed that he was against popular elections because the people were "uninformed and would be misled by a few designing men" (Farrand, 1937, vol 2, p. 57). In these assumptions, he was always followed by that other notorious anti-Federalist, Edmund Randolph, also present at the Convention (e.g.: ibid., p. 89).

[4] Ibid., vol.. 1, p. 27.

[5] Ibid., vol. 2, p. 78.

[6] Ibid., p. 476.

to them, it was true that the will of the state had to prevail, but it was also true that only the representatives (not the common people) were able to discern that will. Martin, for example, was explicit about this, asserting that "the people have no right to [govern by themselves] without the consent of those to whom they have delegated their power for State purposes; through their tongue only they can speak, through their ears, only, can hear."[7] It is interesting to note, in this respect, that in adopting this position, the conservatives reproduced at the state level the same Federalist defects they objected to on the national level. That is, they assumed the same "aristocratic" or elitist attitude, within their states, that they attributed to their opponents.

The Antifederalists appeared, in general, situated in an uncomfortable position, under fire from two very different opponents. In effect, on the one hand, the Antifederalists had to confront the Federalists' strong and consistent position, which finally dominated the Federal Convention. However, at the state level, the Antifederalists had to deal with many radical' demands, which pushed them in an opposite direction. The Antifederalists, in general, rejected both ideals: they did not accept the centralist features that seemed to distinguish the Federalists' proposed Constitution, and they also opposed the town-meetings model which many radicals adopted. These permanent confrontations moved them to take the side of one of their opponents at times, in order to find broader support for their particular criticisms. This situation produced paradoxical results. For example, sometimes, the same politicians who complained about "the turbulence and follies of democracy" began to defend more direct contact with the people. Randolph, for example, supported the idea that "the people of each State ought to retain the perfect right of adopting from time to time such forms of republican Governments as to them may seem best".[8] George Mason, who had defended the secret character of the Convention, stating that this was "a necessary precaution to prevent misrepresentations of mistakes,"[9] finally opposed the Constitution, affirming that it "had been formed without knowledge or idea of the people."[10]

In spite of these ambiguities, however, the Antifederalists ratified their epistemic elitism during the discussion of each of the institutional mechanisms proposed at the Federal Convention. We will examine these proposals below. First, however, we will analyze the main features of the Federalist position.

THE FEDERALISTS

With regard to the Federalists that participated in the Federal Convention, it is possible to find at least two different positions: one more clearly conservative, the other more moderate. The more conservative Federalists could be distinguished by their stronger and more open epistemic elitism. Like most of their counterparts, these conservative Federalists thought that popular political intervention was unnecessary to achieve

[7] Ibid., vol. 1, p. 437.
[8] Ibid., vol. 3, p. 56.
[9] Ibid., vol. 3, p. 33.
[10] Ibid., vol. 2, p. 632.

impartiality. However, these conservative politicians proposed to go one step further, and suggested that the majority of the people had to actually be excluded from any significant intervention in politics.

One of the main mechanisms proposed by the conservatives, to achieve their announced goal, was the establishment of strict property qualifications as a necessary condition for obtaining political rights. This initiative was vehemently discussed during the Convention. Surprisingly, most of the delegates agreed on the subject, but in the end dismissed the most restrictive proposals, thinking that they would find insurmountable opposition in society. During the debates, one of the strongest defenders of property qualifications was John Dickinson, who stated that the freeholders were "the best guardians of liberty; and the restriction of the [political rights] to them . . . a necessary defense agst. the dangerous influence of those multitudes without property & without principle."[11] Governour Morris also defended this principle against those who contended that the idea of a freeholder would not only be unpopular but also very difficult to define in practice. "The ignorant & the dependent, he affirmed, can [not be trusted] with the public interest."[12] John Mercer, from Maryland, supported these proposals based on his belief that "the people can not know & judge of the characters of the Candidates."[13]

Probably, the clearest expositions of the most conservative view were presented during the debates about the composition and role of the Senate. Discussing this issue some of the representatives resorted to the same elitist arguments that the British conservatives had used, many years before them: the people who have no propriety should not participate in politics, they affirmed, because they lacked "a will of their own."[14] Similarly, some other Federalists defended restricted political rights assuming an association between wealth and wisdom, richness and virtue. Governour Morris, for example, affirmed that the Senate had to be rendered "an absolute aristocracy, representing large property combined with distinguished talents."[15] Mercer also suggested that "wealth and abilities" had to be secured within this branch of the legislature.[16] Even Madison, normally distinguished by his political moderation, showed his commitment with similar assumptions. Thus, for example, he affirmed that "symptoms of a leveling spirit, as we have understood, have sufficiently appeared . . . to give notice of the future danger. How is this danger to be guarded against on republican principles? . . . Among other means by the establishment of a body in the Government sufficiently respectable for its wisdom and virtue, to aid on such emergencies . . . Such [is] the object of the second branch [of government]."[17]

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[11] Ibid., vol., p. 202.
[12] Ibid., vol. 2, p. 203.
[13] Ibid., v. 2, p. 205.
[14] Ibid., v. 2, pp. 220, 221, 248.
[15] Ibid., v. 3, p. 416. He reaffirmed these types of belief by stating that the Senate "ought to be composed of men of great and established property." See, ibid., v. 1, pp. 517-518.
[16] Ibid., v. 2, pp. 284-285.
[17] Ibid., v. 1, p. 423.

In the end, the Framers of the U.S. Constitution decided not to incorporate into the document some of the most restrictive demands that appeared during the debates. They recognized that the adoption of such extreme measures (e.g., strict property qualifications) would increase (instead of decrease) the existing social conflicts, and would hinder their chances of securing support for the proposed Constitution. In this exercise of political transformation (from strict conservatism to more moderate positions), James Madison was probably the key figure. More than anyone else, Madison was attentive to the claims of the opposition, and recognized the need to incorporate some of their demands (or reject some of the Federalists' more desired proposals) in order to guarantee the ratification of the Constitution.

However, although it is true that the final document somehow represented the product of a compromise, it is also true that its main clauses revealed the Framers' peculiar epistemic assumptions. Among these assumptions we could mention, for example, i) a strong bias against collective discussions, and ii) a strong confidence in the virtues of an independent, isolated, monological reflection.

THE NORTH AMERICAN CONSTITUTION AND EPISTEMIC ELITISM

Herein, I will present some important examples, trying to illustrate the peculiar epistemic bias which was shared by most of the members of the Convention, and the influence of this bias on the creation and justification of peculiar political institutions.

About Popular Assemblies and the House of Representatives

The Founding Fathers showed, before, during, and after the Federal Convention, a strong bias against popular assemblies. One of the clearest expositions of their beliefs, in this sense, was presented by Madison who affirmed -as a general principle- that "in all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter of reason."[18] Most of the Framers expressed similar belief in their reflections about collective bodies. For example, Alexander Hamilton presented his own position on the subject, in the Federalist no. 6, where he asked:

> are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities? Is it not well known that their determinations are often governed by a few individuals, in whom they place confidence, and are of course liable to be tinctured by the passions and views of those individuals?[19]

Similarly, Ghorum made reference to the "the insensibility to character

[18] The Federalist, n.55.

[19] In The Federalist n. 5, Hamilton asked the following question: "Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals?" He answered himself, stating that "the contrary of this has been inferred by all accurate observers of the conduct of mankind." Also, in The Federalist n. 76 he affirmed that "the people collectively from their number and from their dispersed situation cannot be regulated in their movements by that systematic spirit of cabal and intrigue."

produced by a participation of numbers, in dishonorable measures, and of the length to which a public body may carry wickedness & cabal." According to his opinion, "public bodies feel no personal responsibility and give full play to intrigue & cabal."[20] In a related way, Gerry affirmed the "great number of bad men of various descriptions" who commonly characterized popular bodies.[21] For him, the people at large, in their elections, were usually "uninformed" and "misled by a few designing men."[22]

The Framers' general objections against popular assemblies were later clearly specified in their references to the House of Representatives -an institution which was normally considered "the most democratic branch of government." In their opinion, there were many reasons for being concerned about this part of the government: first of all, its composition (they believed that the House would be filled by men without much virtue); also, the large number of members; the pressures that these members usually received from their constituency; or the need felt by the Representatives to resolve multiple and urgent problems. Taking into account these types of facts, the Framers' agreed on a significant conclusion. They affirmed that the House would normally be unable to develop reasonable political discussions and, thus, to adopt impartial decisions. This conclusion moved them to see this part of the Congress as the most threatening section of the political system. The House of Representatives –as Madison put it- constituted the main source of the "vices of the political system." It had an unavoidable tendency to produce numerous, mutable and unjust norms. Clearly, most of these premises, as well as the Federalists' conclusion, were far from obvious. In any case, these expressions were significant because they reflect (what we could call) the Framers' counter-majoritarian bias.

Following the Madisonian view about the "vices of the political system," Governour Morris stated "the public liberty [is] in greater danger from Legislative usurpations [and bad laws] than from any other source."[23] "However the legislative power may be formed," he claimed, "it will if disposed be able to ruin the Country."[24] According to Morris, the first branch had to be checked because of its "precipitation, changeableness, and excesses."[25] The House, he believed, had "a propensity . . . to legislate too much to run into projects of paper money & similar expedients."[26] James Wilson and Rufus King also resorted to exactly the same types of principles.[27]

This view with regard to the permanent and dangerous tendencies of the legislature were not monopolized by the Federalists. Even the critics of the Constitution, the Antifederalists, resorted to similar ideas. Randolph, for example,

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[20] Farrand, vol. 2, p. 42.
[21] Ibid., vol. 1, p. 181.
[22] Ibid., vol. 2, p. 57.
[23] Ibid., vol. 2, p. 76.
[24] Ibid., vol. 2, p. 307.
[25] Ibid., vol. 1, p. 512.
[26] Ibid., vol. 2, p. 52. Also, see David, ibid., vol. 1, p. 498.
[27] See Wilson, ibid., pp. 300-301, and Rufus King, ibid., p. 198.

wished to prevent "the passionate proceedings to which numerous assemblies are liable."[28] He criticized the powers of the House of Representatives, objecting to the "democratic parts of [the existing] Constitutions." Mason also defended very similar criteria, pointing out the dangerous tendencies that distinguished the functioning of the House. He emphasized that "it must be expected frequently to pass unjust and pernicious laws."[29] In agreement with the criteria mentioned, Gerry affirmed that the legislature "might ruin the Country [by exercising its power] partially, raising one and depressing another part of it."[30]

The Framers truly believed that the problems that they associated with the House were not occasional products, but the necessary results of these types of collective bodies. However, they did not base these conclusions on proper theoretical or empirical grounds. Moreover, as we will see, the Framers did not take into account the possibility of improving the deliberative character of these assemblies: they simply suggested organizing additional institutions, oriented at compensating the (for them expected) irrational actions of the House.

Some Basic Tools

Given their peculiar view of popular assemblies and the House of Representatives, in particular, the Framers decided to orient the whole institutional system, basically, to prevent the evils that emerged from majority politics. Clearly, they recognized that it was politically impossible to organize a government that did not secure significant room for "the majority." Thus, they created a specific branch of government, the House of Representatives, to directly embody the majority spirit. The House would be composed of numerous members, directly elected by the people. The inclusion of all these representatives was justified for "the purposes of safety, of local information, and of diffusive sympathy with the whole society."[31]

However, and as a result of their epistemic assumptions, the Framers did not think that they could leave the enactment of legislation in the exclusive hands of the majority bodies: collective reflection –they assumed- did not favor impartiality. On the contrary, they believed that the representatives in the House would be moved by passions and mere local interests. As a result, it was necessary to create adequate institutional checks, capable of securing the national interest and the rights of the minorities. Let me explain, then, the mechanisms they designed in order to introduce "rationality" in the political system.

The Framers tried to counterbalance the passionate decisions that they expected from the House with the "more sedate reflection" of the "best characters" of the country in the Senate. To secure the incorporation of these "characters" in the government, and to provide them the best conditions for a proper deliberation, the

[28] Ibid., vol. 1, p.51.
[29] Ibid., vol. 2, p. 78.
[30] Farrand, vol. 2, p. 307.
[31] Madison, in The Federalist n. 58.

Framers resorted to different institutional means: longer terms of mandates; smaller-sized bodies; indirect elections; and large districts.

First of all, they assumed that the long terms in office could serve a diversity of important purposes, for example, to provide "firmness and independence to a certain official or body of representatives";[32] to prevent a tendency toward permanent "fluctuations" in opinions (fluctuations that they linked with representatives highly dependent on the electorate);[33] and to motivate people "of the first weight" to participate in the government.[34] Thanks to all these factors, they believed, there would be more chances to control the "amazing violence & turbulence of the democratic spirit" that they attached to the House of Representatives.[35] Given all the decisive effects they attributed to the duration of mandates, it was not surprising that Hamilton affirmed that "the highest toned propositions [he had made in the Convention], were for a President, Senate and Judges during good behavior."[36]

In a similar way, the Framers established indirect elections for the main public places, proposed under the assumption that intermediate bodies would be composed of chosen (virtuous) people: indirect elections –they assumed- "render[ed] the choice[s] more judicious."[37] Moreover, the members of the Convention believed that indirect elections would be "more likely to correspond with the sense of the community" than elections conducted by the people themselves.[38] Not surprisingly, the Framers considered that, in order to increase the chances of selecting the best public officers, it was necessary to decrease the influence of "the people" in the electoral process. Taking into account this general principle, Hamilton even suggested the adoption of tertiary elections (an "election to be made by electors chosen by electors chosen by the people") for electing the Executive.[39]

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[32] For example, Morris claimed that a long tenure would allow the Senate to achieve independence and firmness. (Farrand, vol. 1, p. 512).

[33] According to Hamilton, if the Senators held their office "for a considerable period," "fluctuations and cabals" would be avoided (ibid., vol.3, p. 337).

[34] For example, Madison affirmed that a long period in office would induce "gentlemen of the first weight to engage in [office]" (ibid., vol. 1, p. 220).

[35] Hamilton, ibid., vol.1, p. 289. He added that through a long tenure it would be possible to restrain the "popular passions" that tended to "spread like fire and become irresistible" (Hamilton, ibid., p. 289).

[36] Hamilton to Timothy Pickering, ibid., vol. 3, p. 397.

[37] Madison, ibid., vol. 3, p. 330. Gerry also rejected direct elections for choosing the executive, because the people, he affirmed, "are uninformed, and would be misled by a few designing men" (ibid., vol. 2, p. 57). He also favored the idea of appointing the Senators through the individual legislatures. Through this "refinement," he thought, the elections "will be most likely to provide some check in favor of the commercial interest agst. the landed; without which oppression will take place, and no free Govt. can last long when that is the case" (ibid., vol. 1, p. 152). Pinckney advised appointing the Senators through indirect elections, to give the second branch more permanency and independence (ibid., p.155). Opposing these beliefs, Wilson replied that "the difference between a mediate and immediate election was immense [because] the Legislatures [have also] an official sentiment opposed to that of the Genl. Govt. and perhaps to that of the people themselves" (ibid., vol.1, p. 359).

[38] According to Rutledge "an election by the Legislature would be more refined than an election immediately by the people: and would be more likely to correspond with the sense of the whole community. If this Convention had been chosen by the people in districts it is not to be supposed that such proper characters would have been preferred" (ibid., vol. 1, p. 359).

[39] Ibid., vol. 3, p. 617.

The Framers also established a correlation between the size of the institutions and the quality of its discussions. Typically, they considered that a "small size" represented a necessary condition for providing "more coolness," "more system," and "more wisdom" to the political debates[40] In contrast, as we saw, they believed that large numbers made it impossible to have a reasonable debate. Majority debates –they assumed- always came together with violence and disorder: they represented demagogues and agitators. There were additional practical reasons that worked against these assemblies. For example, large assemblies were difficult to organize and, when organized, excessively time consuming.

Finally, the Framers' preference for "large districts" was similarly associated with their belief that large districts would prevent the emergence of factions.[41] Their defense of this belief also confirms that elitist assumptions were taken into account. In this sense, for example, Madison explicitly stated that "large districts are manifestly favorable to the election of persons of general respectability, and of probable attachments to the rights of property, over competitors depending on the personal solicitations practicable on a contracted theater."[42] As Bernard Manin explained, in his analysis of the U.S. Constitutional debates, the North Americans inferred from experience that large electoral districts would favor the selection of the so-called "natural aristocracy."[43]

The Framers' defense of these particular mechanisms left many questions open. At the moment, I only want to call the attention to some of them. For example, the Framers did not analyze the possibility that indirect elections made the representatives (less dependent on the people but) dependent on the secondary bodies that chose them (something that should have worried them given that they accepted the representatives' right to be re-elected); they did not show any significant concern with the foreseeable negative consequences of proposals such as long terms of mandates and elections in large districts (the creation of an autonomous elite of politicians; a low level of acquaintance between the representatives and the people; a decrease in the people's commitment to the political system; etc.); they did not show particular concerns about the "standing passions" that could affect the representatives, even in small bodies.[44] I will examine some of the mentioned problems below.

The Executive

The design of the Executive position probably represents one of the best illustrations of the Framer's general view of impartiality. As we have already analyzed, most of the delegates shared a particular epistemic view, according to which the monological reflection of an individual, or the isolated reflection of a small group of people

[40] Madison, in Farrand, vol. 1, p. 151.
[41] The Federalist, n.10; Farrand, vol.1, p. 136.
[42] Madison, "Note to his Speech on the Right of Suffrage," ibid., vol..3, p. 454.
[43] Bernard Manin (1995), p. 163.
[44] See, in this sense, Jon Elster (1993), p. 163.

guaranteed the best conditions for making impartial decisions. In their opinion, the plurality of views that characterized large bodies represented a problem to avoid - rather than a benefit to pursue in order to enrich the collective's decisions. From these assumptions, it was not strange that the Framers considered the Executive as a central piece within the general framework they were designing.

In effect, the Framers viewed the president as especially well situated to acknowledge all the different interests existing within the community. Also, they thought that the unique position of the chief of the nation would allow him to decide impartially among these different claims. In one of the clearest expositions of this view, Hamilton affirmed that "**a single well directed man by a single understanding, cannot be distracted by that diversity of views, feelings and interests, which frequently distract and warp the resolutions of a collective body**."[45] Here, again, the main idea was that the diversity of viewpoints that distinguished collective bodies constituted a difficulty that affected the possibility of achieving adequate decisions. Diversity hindered the chances of careful reasoning. Diversity made it more difficult to think about the interests of the nation: it forced the public officers to defend mere partial interests, at the expense of the common good.

Taking into account these criteria, the Framers affirmed, first of all, that the Executive's position had to be vested in a single individual. This way, "he would be responsible to the whole, and would be impartial to its interests."[46] Resorting to similar assumptions, the Antifederalist Gerry affirmed that "standing alone [the Executive] would be more impartial."

The way in which they organized the election of the president resulted from the same general beliefs. The Framers organized the election of the Executive through an "Electoral College," as a way to secure "circumstances favorable to deliberation." In defending this mechanism for choosing the president, the Framers emphasized three considerations. First, that the election would not be conducted by the people themselves, but through an intermediate body. Second, that this intermediate body would be composed of a reduced number of selected people. Third, that this reduced group of people would not belong to a pre-established body but, on the contrary, it would be created for the special purpose of electing the president. In their opinion, the College would have the capacity to decide impartially, a capacity that the people acting collectively, as well as most collective bodies, would lack. In this sense, for example, and rejecting the possibility of electing the president through the legislature, Hamilton claimed that "in every exercise of the power of appointing to offices by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly." [47] The members of the college, instead, were

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[45] The Federalist, n. 76, my emphasis. Similarly, Rutledge thought that the Executive, as ""a single man would feel the greatest responsibility and administer the public affairs best." See Rutledge, Farrand (1937), vol.1, p. 65.

[46] Butler, in Farrand (1937), vol. 1, p. 88.

[47] Similarly, Butler rejected the idea of appointing the Executive through the Legislature, because

supposed to have "the information and discernment requisite to [the] complicated . . . investigation [that the election of the Executive demands]."[48]

Elected this way, and placed in such a privileged position, the Executive appeared well prepared to carry out some of the most important tasks within the government. The Executive, in effect, came to symbolize the image of the "impartial decision-maker." The strength of this belief may be easily proven, examining almost any of their references to the Executive power.

Above all, the Executive was seen as a "guardian" of the people's interests: a person who was capable of giving the people the "time and opportunity for more cool and sedate reflection" against "every sudden breeze of passion."[49] The confidence that they had in the Executives' virtues, in fact, moved some of the delegates to suggest that the president should keep his position for life or during good behavior.[50]

Also, and based on identical reasons, the delegates deposited in the Executive's hands normally, in association with the Senate- the power to appoint the most important public officers (e.g., Judges, ambassadors). Alexander Hamilton, like most of the delegates, was clearly convinced of the epistemic advantages of the appointment mechanism that they were preparing. The isolated reflection of this "single man," by himself or with the coopertion of a "select" assembly, would secure adequate choices –something that they could not expect from collective bodies, whose decisions were normally associated with "intrigues and partialities."[51]

Defending the virtues of monological reflection, in the Federalist n. 76 Hamilton stated that "the sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them. He will have fewer personal attachments to gratify than a body of men, who may each be supposed to have an equal number, and will be so much the less liable to be misled by the sentiments of friendship and of affection." Clearly, this approach to impartiality was shared by most of the members of the Convention. Governour Morris, for example, affirmed that "the Executive in the necessary intercourse with every part of the U.S. required by the nature of his administration, will or may have the best possible information."[52]

"cabal, faction & violence would be sure to prevail" (ibid, vol. 2, p. 501).

[48] The Federalist, n. 68.

[49] The Federalist, n. 71. According to him, many times, the "courage and magnanimity" of great men saved their communities from terrible perils.

[50] See, for example, Farrand (1937), vol. 3, p. 397; vol. 1, p. 292; vol. 3, n. 33.

[51] According to Hamilton, the power of appointment "ought either to be vested in a single man -or in a select assembly of a moderate number- or in a single man with the concurrence of such an assembly" (The Federalist, n. 76). Also, Wilson suggested that the appointments should be made by "a single, responsible person" (the executive), who would not be driven by the partialities that would give the former" (Farrand, 1937, vol. 1, p. 119).

[52] Ibid., vol. 2, p. 82.

Curiously, in defending the Executive's privileged position, and his assumed epistemic capacities, the Framers did not properly evaluate the obvious problems of their view. One could reasonably think, for example, that the Executive, as a single individual in control of so much power, would attract to him or herself the intense pressures from different interest groups. In addition, one could reasonably believe that, as a single individual, the Executive would be less capable than a group of individuals to resist partial, interested pressures. Moreover, the Framers' dismissal of collective bodies as means for achieving impartiality, was, at least, too quick. Someone could reasonably associate these bodies with certain virtues (i.e., their capacity to achieve a better picture and better understanding of the people's viewpoints) that the Framers did not want to recognize and, thus, did not properly analyze.

Before concluding this presentation about the Executive power, it is worth mentioning the way in which the Framers defended two other Executive capacities: veto power, and the power of pardon.

The Executive's capacity to veto laws was justified for two main reasons: first, the Framers said that they wanted to create "an additional security against the enactment of improper laws;"[53] and second, they wanted to provide "a shield to the executive"[54] against possible encroachments from the legislative. As Governour Morris put it, "the most virtuous Citizens will often as members of a legislative body concur in measures which afterwards in their private capacity they will be ashamed of. Encroachments of the popular branch of the Government ought to be guarded against."[55] The same ideas contributed to their justification of the power of pardon. In their opinion, the Executive would be able to avoid the pressures and partial interests that, they assumed, would unavoidably motivate the legislative decision. Rufus King maintained, in this respect, that the Executive should concentrate the prerogative of giving powers because such power, in the hands of the legislature, would be "governed too much by the passions of the moment." Again, one should wonder why the Framers did not give weight to the contrary argument: that, given its isolated and powerful position, the Executive would attract and suffer permanent pressures from partial interests.

However, the Framers had (and used) a more reasonable argument to defend the privileged powers they were vesting in the Executive: the Executive was too exposed to the people to make merely a "partial" decision.[56] This seems to be a good argument in the defense of the Executive's prerogatives, but it does not constitute a definitive argument against alternative institutional arrangements. For example, those who wanted to put such prerogatives in the hands of the legislature also had good arguments at hand to reply to potential critics. They could affirm, for example, that any Representative that wanted to appoint (say) a friend as a Judge, or wanted to promote

[53] The Federalist, n. 73.
[54] The Federalist, n. 73.
[55] See G. Morris in Farrand (1937), vol. 2, p. 299.
[56] See, for example, Hamilton's position in the Federalist n. 73.

an undue pardon, would first need to convince the majority of the body about the virtues of the proposed measure. Thus, they could logically conclude that this process would normally imply sufficient checks, capable of securing a reasonably impartial decision. Clearly, by following this process we do not completely eradicate the risks of "intrigues and partialities," but it is difficult to affirm that this is what actually happens when we deposit the powers mentioned in the hands of the Executive. The Framers' defense of the Executive's capacities, in the end, was grounded in their confidence on the virtues of isolated, monological reflection

The Senate

During the constitutional debates, probably no other political institution received as much attention as the Senate. The delegates placed many expectations on it, as the main check to the House of Representatives. As we will see, such confidence was based on their general epistemic view: a view according to which the isolated reflection of some "virtuous" people –and not, for example, a process of collective reflection- provided the best guarantees for achieving impartial decisions.

The scope of this epistemic view was apparent from the beginning. Typically, the Framers did not defend bicameralism as a way to prevent potential "mistakes" in any of the two legislative chambers. That is, the delegates did not assume -as many scholars presently assume- that both chambers were subject to promote "partial" laws, or to defend specific interest instead of the national interest. On the contrary, they were convinced that these evil tendencies would basically distinguish only the decisions of the House of Representatives. The opposite alternative (the House correcting the Senate) was theoretically possible, but hardly conceivable in practice. In this sense, the Framers viewed the Senate as "a temperate and respectable body of citizens,"[57] namely, as an institution that would "illuminate" and restrain the passionate decisions that would normally be made by the House. The Senators –according to their view- constituted "a portion of enlightened citizens" whose virtues "might seasonably interpose against impetuous councils."[58]

The Framers confirmed this particular view in numerous opportunities. For example, according to Rufus King, the Senate was intended to "check the fist branch [and] to give more wisdom, system, and stability to the Government."[59] Madison viewed the Senate as a "necessary fence" against the "fickleness and passion" of the House of Representatives.[60] Hamilton also claimed that "the main object of the Convention, in forming the Senate, was to prevent fluctuations and cabals."[61] Randolph maintained that "the object of [the Senate was] to control the democratic branch of the Ntl. Legislature."[62] Morris affirmed that the object of the Senate was to

[57] Madison, in The Federalist n. 63,
[58] See Madison, in Farrand (1937), vol. 1, p. 422.
[59] See Rufus King, ibid., vol. 2, pp. 6-7.
[60] See Madison, ibid., vol. 1, p. 422.
[61] Ibid., vol. 3, p. 337.
[62] "If it be not a firm body," he added, "the other branch being more numerous, and coming immediately

check the "precipitation, changeableness, and excesses."[63]

This mentioned task –to check the House of Representatives- appeared as the main task of the Senate. However, this organ was also supposed to fulfill other significant duties. For example, the Senate was seen as the best ally of the Executive, in the decisive mission of appointing the right public officers. The Senators –assumed the delegates- would be "best informed characters," and merely driven by the national interests.[64]

Third, the Framers deposited in the Senate the responsibility of becoming judges in any impeachment process. The members of the Upper House -it was assumed- would "preserve unawed and uninfluenced the necessary impartiality" during the impeachment.[65] The Senators, Hamilton stressed, "will be most inclined to allow due weight to the arguments which may be supposed to have produced [the impeachment]." In defending this decision, the Framers both contrasted the characters of the Senators with the partialities and ambitions that they attributed to the Deputies,[66] and disregarded potential vices of Senatorial decisions.[67] In their opinion, "the responsibility [of the Senators] and the interest they will have in the respectable and prosperous administration of affairs, will inspire a sufficient disposition [to act rightly]."[68]

Finally, the Founding Fathers concentrated some of the most fundamental decisions with regard to foreign affairs in the Senate. To defend this option, they had to justify, among other things, why they were excluding the legislature from this significant process. Again, the main justification had to do with the special capacities they attributed to the Senators.[69] Hamilton was particularly explicit in this sense,

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from the people, will overwhelm it" (ibid., vol. 1, p. 218).

[63] Ibid., vol. 1, p. 512. He feared the legislative tendency to "abuse of lawful powers [given its] propensity to legislate too much [and] to run into projects of paper money & similar expedients" (ibid., vol. 2, p. 52). He stated that "every man of observation had seen in the democratic branches of the State Legislatures, precipitation, . . . changeableness, . . . excesses agst. personal liberty, private property & personal safety" (ibid., vol. 1, p. 512).

[64] See, for example, Martin and Sherman, ibid., vol. 2, pp. 41 and 43.

[65] The Federalist, n. 65.

[66] See, for example, Randolph, in Farrand (1937), vol. 2, p. 67; Pinckney and Williamson, ibid., vol. 2, p. 551.

[67] In fact, in The Federalist n.66, Hamilton recognized that the Senators had many motives to act partially, such as the fact that they would have to impeach agents that they themselves appointed, or the fact that they were united with the Executive in many different tasks, like that of making treaties. He stated. "[a]fter having combined with the executive in betraying the interests of the nation in a ruinous treaty, what prospect, it is asked, would be there be of their being made to suffer the punishment, they would deserve, when they were themselves to decide upon the accusation brought against them for the treachery of which they had been guilty?"

[68] The Federalist, n. 66.

[69] Hamilton, in The Federalist n. 75, presented some very weak reasons for justifying the Framers' choice. He affirmed that "the greater the frequency of the calls upon the house of representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be the source of so great inconvenience and expense, as alone ought to condemn the project."

attributing to the Senators (and the Executive) an "accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character, decision, secrecy and dispatch; [virtuous that are] incompatible with the genius of a body so variable and so numerous [as the House of Representatives]."[70]

In addition to these general observations, the Framers confirmed and clarified their epistemic view in each of their more specific discussions about the Senate. In this sense, it is worth examining the way in which they justified the small size of the body; the establishment of indirect elections for becoming a Senator; their preference for long mandates; or even the requirements that they demanded as conditions for becoming a Senator. Let me briefly refer to the arguments they used, on each occasion, and to some of the problems that affected these arguments.

First of all, the Framers believed that indirect election in this case, as in most cases, secured the selection of worthy candidates, and benefited the representatives, during their mandates. Supposedly, indirect elections allowed a more sedate reflection on the part of the electors: they would have better conditions to deliberate about whom to choose. Charles Pinckney, for example, affirmed that "by receiving their appointment from the State Legislatures [the Senators] would avoid the rivalships and discontents incidents to the election by districts."[71] Similarly, John Dickinson asserted that "the sense of the States would be better collected through their Governments; than immediately from the people at large."[72] In addition, the Framers assumed that, elected this way, the representatives would have more chances to decide impartially, given that they would not be under the permanent pressures of the majorities.

Second, the delegates believed that, through their long tenure, the Senators would not acquire only more experience, "firmness & independence." They also believed that these long mandates would secure more stability and permanency to the government.[73] In this sense, for example, Hamilton affirmed that the Senate had been created for preventing the "fluctuations and cabals" of the House of Representatives, and that this goal required a small body that "exist[ed] for a considerable period."[74] Moreover, he proposed that the Senators hold office for life.[75] Third, and most significantly, the creators of the Constitution presumed that the small size of the body would favor the development of reasoned discussions. This condition, they believed,

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[70] The Federalist, n. 75.

[71] Farrand (1937), vol. 1, p. 155.

[72] Ibid., p. 150.

[73] Randolph, ibid., vol. 1, p. 218. According to Madison, "[t]he longer the Senators remain in office" - concluded Madison- "the better it will be for the stability and permanency of the government" (ibid., vol. 3, p. 414). He also stated that a seven-year period for the Senators was "by no means too long," given the need to provide stability to the Senate. On the contrary, his fear was that "the popular branch would still be too great an overmatch for it" (ibid., vol. 1, p. 218).The Antifederalist Mason, also, affirmed that the Senate had to have enough "weight and firmness" to protect property. To achieve these ends, he added, "considerable duration in office was . . . necessary" (ibid., p. 428).

[74] Ibid., vol. 3, p. 337.

[75] Ibid., vol. 3, p. 498.

was necessary in order to favor the adoption of wise and impartial determinations.[76] According to Madison, a large body of Senators would not be able to proceed "with more coolness, with more system, & with more wisdom, than the popular branch." He added, "[E]nlarge the [size of the Senate] and you [will] communicate to them the vices they are meant to correct."[77] Notably, even the Antifederalists showed their agreement in this respect. Mason, for example, stressed the "danger of making the Senate too numerous."[78] Randolph also maintained that the second branch had to be "much smaller than the first," in order to be "exempt from the passionate proceeding to which numerous assemblies are liable."[79]

Finally, the delegates dedicated a long time to discussing what conditions to require for someone to become a Senator. The delegates believed that, for example, the demand of age requirements would favor the presence of more "mature" representatives, and assumed that this very difference would secure a "greater extent of information and stability of character" in the representatives.[80]

In advancing these arguments, however, the Framers tended to go too quickly, and also to dismiss alternative arguments without major considerations. Each of their proposals, in fact, seemed to be open to serious objections. For example, someone could affirm that, because of the small size of the body, the Senate would have problems fulfilling its representative function. Clearly, this body –which was supposed to constitute the main forum for expressing the local demands- was actually capable of representing only a small part of each State. This objection becomes stronger when we recognize the particular composition that the Framers tried to secure within this body. In effect, the Framers made significant (and, at least during their time, quite successful) efforts to guarantee the presence of the proprietors or creditors within the Senate. Then, one has to admit that most of the population, within each State, tended to remain drastically underrepresented within the Upper Chamber. The Senate, thus organized, lost the possibility of having more diverse viewpoints, and the communities missed the chance of having a clear expression of their voice. In addition,

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[76] Madison, ibid. vol. 1, p. 427.

[77] Ibid., vol. 1, p. 151.

[78] Ibid., vol. 4, p. 15.

[79] Ibid., vol. 1, p. 51.

[80] The Federalist, n. 62. Although the Framers dedicated a long time discussing the qualifications for becoming a Senator, and the possibility of including property requirements, they finally rejected the idea. They assumed that a certain age requirement and a few years of citizenry represented enough requisites for this office. However, it seems clearly true that the Framers directly assumed that the Senators would belong to the richest part of society and, thus, that they would represent "the wealth of the Nation," and secure "the rights of property." Their opinions in this respect were rather unanimous, both among the Federalists and the Antifederalists, and probably grounded in the assumed effects of indirect elections. See, for example, Davie, in Farrand (1937), vol. 1, p. 542; Baldwin, ibid., p. 470: Pinckney, ibid., vol. 3, p. 110; Madison, at the Constitutional Convention, June 4th, in Brenton (1986), p. 444. Madison maintained that the Senate had as one of its primary objects "the guardiandship of property, according to the whole number, including slaves" (Farrand, 1937, vol. 1, p. 562). Hamilton agreed with the idea that the Senate was designed for "protecting the rights of property against the spirit of democracy" (ibid., vol. 3, p. 498). Some Antifederalists also concurred, affirming, for example, that one of the most important objects of the Senaate was that of "secur[ing] the rights of property" (see Mason, ibid., vol. 1, p. 428).

one could reasonably argue that long term mandates damaged the representative system more than they benefited it. Long tenures, for example, favored separation between the representatives and the people, and allowed the former to become more interested in their own interests than in the interests of the State. The Antifederalists, in this sense, had good reasons to fear the "dark side" of this proposal: long mandates could foster the development of an autonomous and isolated elite –a class with viewpoints completely different from those of the citizenry. In addition, one could reasonably object to the possibility of having the representatives more dependent on the will of the State legislators (the people who chose them and who could facilitate their re-election), than on the citizenry itself.

Surely, none of the arguments mentioned was able to refute the Framer's whole view on the topic by itself. However, I believe, the sum of these problems could drive many to distrust –and, thus, to lose confidence- in the defended political system.

The Judiciary

Since the time of the Federal Convention, the Judiciary has symbolized the ideal of impartiality: no other institution was so directly and specially prepared for deciding impartially. The importance of having a Judiciary capable of deciding impartially was obvious; the whole point of the Judiciary was to solve conflicts: not only in cases of conflicts between individuals, but also (in the case of the Supreme Court) in cases of conflicts between individuals and a state, or conflicts between the states, or conflicts in which the Nation was involved. The role of the Courts was also the most significant during these situations: this institution was supposed to present the final solution for each of these conflicts.

Given these circumstances, it is particularly interesting to examine the way in which the Judiciary was organized: how did the Framers' organize and justify the Judiciary in order to secure the impartiality of its decisions? Most of all, given their peculiar epistemic view, according to which impartiality was linked to monological reasoning, the Framers wanted to guarantee, in this case more than in any other, the conditions for independent, isolated reflection. First of all, in order to achieve this objective, the Framers tried to place the Judges as far as possible from the majority pressures and the majority debates. Madison, in the Federalist n. 49, affirmed that the proposed Constitution would contribute to this objective, given that, in the new institutional system, the magistrates would be situated "far removed from the people to share much in their prepossessions."

The Framers, as usual, defended their position affirming that the main alternatives to their proposal were totally unacceptable. In particular, the Framers defended a complete isolated Judiciary, by pointing out the obvious: that the Judiciary could not be completely dependent on the people's will (clearly, if the Judges were completely dependent on the majority view, the very idea of having a Judicial system would seem quite ridiculous). However, the truth is that the rejection of this populist alternative did not necessarily imply a good argument in favor of their proposed

solution –a totally isolated Judiciary, in charge of solving the most significant social and political conflicts, and in charge of the fundamental task of interpreting the Constitution.

Later on, some influential and more radical politicians, like Thomas Jefferson, tried to show the Framers that their particular choice had been neither obvious nor necessary. In this sense, for example, Jefferson affirmed that the idea of having a completely independent judiciary was basically justifiable when the king was the main political authority in society. However, when this was not the case, the absolute independence of the judges from the people was much less acceptable. In his opinion, "[a] judiciary independent of a king or executive alone, is a good thing; but independence of the will of the nation is a solecism, at least in a republican government."[81] John Taylor completely agreed with the Jeffersonian opinion, stating that "a judicial sovereignty over constitution and law, without responsibility to the national sovereignty [was] an unprincipled and novel anomaly, unknown to any political theory, and fitted too become an instrument of usurpation."[82]

Similar complaints came also from "Brutus" (seemingly, Robert Yates, a former delegate at the Convention, who left it annoyed with the direction that it was taking), who affirmed that "the supreme court under this constitution would be exalted above all other power in the government, and subject to no control."[83] Brutus published his view as newspaper letters and, apparently, it was his view that triggered Hamilton's famous defense of the role of the Judiciary in the Federalist n. 78.

The Framers managed to organize the Judiciary in agreement with their restrictive epistemic view. To achieve this objective -that is, to isolate the Judges from politics- they used different institutional tools. The most important, in this case, was that of appointing the Judges for life, as long as they maintained good behavior. Clearly, the option of life tenure tended to free the Judges from the urgencies and enthusiasms of everyday politics. The obvious cost of this choice -recognized by its critics, although neglected by the Framers- was that it gave an extraordinary freedom to the Judges, to basically decide as they wished. Thinking about this possibility, Jefferson presented additional criticisms of the Judiciary, accusing its members of being dependent on nobody but themselves: this almost absolute freedom -he affirmed- contradicted the principles of a republican government and made this branch of power "seriously anti-republican."[84]

In addition to life tenure, the Framers tried to secure the total independence of the Judges through other means, like their economic independence and their selection through indirect elections. The selection process, in particular, was the object of a long debate within the Convention. In particular, the delegates discussed the importance of

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[81] See Thomas Jefferson, "Jefferson to Thomas Ritchie," December 25, 1820, in Jefferson (1984), p. 1446.
[82] See Taylor (1814), p. 217.
[83] Letter of Brutus n. XV, March 20, 1788, in Kenyon (1966), p. 350.
[84] See Thomas Jefferson, letter to S. Kercheval and to John Taylor, both in Jefferson (1994).

allowing the Senators to participate in this selection, and the problems associated with allowing "numerous bodies" to take part in this process. According to Madison, for example, the appointment of judges "should be made by the Senate, which as a less numerous & more select body, would be more competent [for this task]."[85] He also rejected the possibility of making these appointments through the legislature because that way the nominations would become vitiated by "intrigue and partiality."[86]

The conditions mentioned (indirect elections, life tenure) tried to secure the independence of the Judges. However, the Framers wanted to guarantee, also, that the Judges had the best conditions for deliberation. Because of this, and driven by their epistemic assumptions, they avoided the option of having "numerous" judicial bodies: the Judges -they believed- had to decide in isolation, and either individually or through strictly reduced groups, in order to be able to decide impartially.

[85] Farrand (1937), vol. 1, p. 120.

[86] Ibid. See, also, ibid., vol. 1, pp. 232; and 233. Ghorum affirmed that even the Senate was "too numerous" to "ensure a good choice" (ibid., vol. 2, p. 41). In spite of his earlier criticisms of the Senate, Wilson also thought that the Senate was "too numerous a body for making appointments to office" (ibid., vol. 2, p. 523). He emphasized that the appointments made by large bodies were subjected to "intrigue, partiality, and concealment" (ibid., vol. 1, p. 119).

CHAPTER 5

THE CONSERVATIVE MODEL OF DELIBERATION

INTRODUCTION

Both in England and in the United States, the dominant conservative tradition managed to organize a decision-making process based on a peculiar epistemic assumption: the idea that monological reflection represented the best device for defining impartial decisions. From a radical point of view, this very assumption affected the whole structure of the decision-making process. In their opinion, the search for impartiality required just the opposite: a process of collective, common deliberation. How can impartiality be achieved -the radicals wondered- if you restrict (instead of encouraging), the people's chances to get together and express their views? The conservatives seemed to have clear answers to these types of questions. Defending their view, for example, they tended to affirm things like the following: "You cannot claim to be defending impartiality if the system that you defend is ready to transform 'hasty,' 'passionate' decisions into law. We were concerned about this risk, and tried to prevent it. Mainly because of this concern, we tried to create institutions that secured a "more sedate" reflection, a more reasoned discussion. In the end, the institutional system that we supported favored the achievement of impartiality, by encouraging a more adequate process of political deliberation."

This peculiar answer, which ties impartiality to political deliberation, and political deliberation to the present political system, is still significant in contemporary debates. Herein, I will critically analyze this possible defense of the conservative institutional model. To achieve this goal, I will proceed as follows. Above all, I will show why it is, in fact, important to organize a deliberative political system. I will defend that, in effect, there is an important connection between deliberation and impartiality. However, I will then defend two claims that run contrary to the Framers' project. First, I will affirm that the peculiar deliberative system defended by (at least some of) the Framers did not represent a plausible institutional alternative, regarding the goal of achieving impartiality. Then, I will affirm that, no matter what the actual political model defended by the Framers was, the particular institutions that we presently have –which, in one way or another, derive from their creation-, are not organized onto an acceptable deliberative system.

WHY DELIBERATION? WHAT KIND OF DELIBERATION?

Is it possible to affirm that deliberation favors impartiality? Is it possible to affirm, as some people would want to affirm, that deliberation is actually a necessary condition for achieving impartiality? What reasons do we have to attach such a value to political

deliberation?

Generally speaking, there are many reasons that may help us to recognize the importance of political deliberation. Let me mention some of them. First, we may say that deliberation helps us to discover factual and logical mistakes in the reasoning of those who participate in a discussion. In effect, within a deliberative system, each of us must present his or her preferences to others. This simple fact forces us to organize our ideas in the best possible way, and gives the others the possibility to "check" our arguments, to detect our contradictions, to point out our mistakes. Through this system, for example, anyone will be able to show us that some of our proposals conflict with some other values that we also defend; or that these proposals have consequences that we would not be willing to defend; or that we are falling into logical inaccuracies.[1]

Deliberation may be important not only because of this (say) "negative" function of preventing mistakes, or "laundering" our arguments, but also because of its "positive" function of providing information and expanding the panorama of available alternatives. Clearly, any of us may fail to recognize the importance of certain arguments or certain information about particular facts. In this sense, deliberation may be very helpful: being forced to listen to different viewpoints may help us to resolve this problem of restricted knowledge.

Deliberation may also have a more substantive and significant consequence of favoring the impartiality of political decisions. In effect, it may be argued that decisions are often partial because of our ignorance about the actual interests or preferences of others.[2] Obviously, partial decisions are not always the product of egoism or self-interest: sometimes, our lack of impartiality (our incapacity to properly weigh the viewpoints of others) has, as its main cause, a misunderstanding about the way in which other people evaluate certain options. Typically, we may fail to recognize that most people actually find unacceptable those proposals that we assume as the most convenient for the general good. Deliberation, in this sense may have an enormous importance: through public discussion, others may have the opportunity to show us how our preferred options fail to serve the general interest. Taking into account this possible virtue of deliberation, someone might reasonably affirm that deliberation constitutes a necessary (although not sufficient) condition for achieving impartiality.

Another important way in which deliberation may contribute to impartiality is the following: a deliberative system may force each person to modify his or her favored arguments in order to make them acceptable to others. In effect, the mere desire to convince others of the plausibility of our preferred choices (a somehow "natural" desire within a deliberative political system) tends to force us, for example, to filter out merely self-interested arguments.[3] Proposals that have their final foundation

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[1] An excellent analysis of this and other positive effects of deliberations, as well as a general analysis of the notion of deliberation, may be found in Nino, (1997).

[2] Ibid.

[3] See, for example, Elster (1989); and Goodin (1989). See, also, Sunstein (1993b).

in proper names ("this should be done because it benefits Mary") or particular interests ("this should be done because it benefits the proprietors of this house") or merely partial reasons ("this should be done because I like it") are not likely to prevail in any genuinely deliberative assembly. By promoting this effect deliberation, again, may favor the impartiality of the collective decisions.

Other important benefits of deliberations derive from their educational character. In effect, the very process of deliberation by which people exchange opinions by listening to others' arguments, gives people a unique opportunity to "educate themselves,"[4] to improve their ability to reason and their capacity to live together with others.[5] All these reasons point to the continuing importance of actual political thought in a "deliberative democracy."[6]

Having said this, we should then recognize the following: although deliberation seems a very significant political value, to make a proper evaluation of its worth requires us to examine the type of deliberation that is actually defended. In effect, there are many different approaches to political deliberation, and not all of them seem to deserve the same appreciation. Because of this, we need to clarify to what we are referring when we refer to the idea of deliberation.

For example, someone may want to say that, in order to have a deliberative political system, we just need the representatives to discuss among themselves before making any political choice. The system would be considered a "deliberative" system, even if it were the case that the representatives always adopted their decisions in isolation, with complete independence from the people's specific claims.

Someone else may want to affirm that this mentioned model should not be considered an adequate deliberative model. This critic, for example, might affirm that a proper deliberative system is one in which the representatives are forced to discuss with the people at large before adopting any significant political decision. Still another person could object to both these approaches, and affirm that the only valuable deliberative system is the one that forces the citizenry to discuss. According to this claim, the adoption of any significant political measure should be preceded by a broad popular discussion, in order to improve the quality of its content, or to guarantee its impartial character.[7]

Recognizing these possibilities, we should consider questions like the following: did the main "creators" of the representative system actually defend a deliberative system? If so, what type of deliberative system did they defend? And,

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[4] See B. Manin, (1987), p. 354. See, also, W. Nelson (1980).

[5] See, also, C. Pateman (1970), pp. 42-44; Barber (1984); J. Cohen (1989). However, I should clarify that, although deliberations are likely to produce these benefits, they are not at all necessary products of deliberation.

[6] An interesting and related argument, in A. Gutman and D. Thomson, (1990), pp. 64-68 J. Cohen (1989b), pp. 25-51; 26-38; J. Raz (1989), pp. 761-786; C. Sunstein (1993).

[7] Similarly, Jane Mansbridge distinguishes between three levels of deliberations: "among elites, between elites and the rank and file, and among the rank and file." See, for example, Mansbridge (1995).

finally, was this a valuable deliberative system?

THE ELITIST CHARACTER OF THE CONSERVATIVE MODEL OF DELIBERATION

In this section, I will maintain that many of the most significant conservative political thinkers, both in England and in the U.S., defended a deliberative institutional organization. I will add, however, that the deliberative model that they proposed was essentially "elitist" (and, in this sense, related to the first deliberative alternative that I described above). According to these conservative authors, political deliberation constituted a very important goal, which had to be carried out exclusively by the representatives, with (the almost complete) exclusion of the people at large. The conservative leaders, both in England and in the U.S., assumed that any direct intervention of the people within the representatives' debates would "contaminate," and thus impair, the discussion of the former. In order to examine their claims, let me separate the questions to consider, first, their defense of deliberation, and second, the restrictive conditions that they tried to impose on it.

First of all, we have to consider that (both in England and in the U.S.), many conservative political leaders stressed the importance of political deliberation. Frequently, they explicitly affirmed that the representatives of the people should have the opportunity to freely discuss different policies, and to freely "change their minds," whenever they found better arguments. In stating this, they opposed an alternative political model where the representatives appeared as mere advocates of "crude" interests (I will return to this point below).[8]

In what came to be the most famous exposition of the conservative position on deliberation, Edmund Burke stated that

> Parliament is not a congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a deliberative assembly of one nation, with one interest, that of the whole -where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member, indeed; but when you have chosen him he is not a member of Bristol, but he is a member of Parliament.[9]

In North America, the Federalists advanced a similar view, rejecting the role of (what they called) local factions and emphasizing the importance of deliberation as the main feature of an adequate political system. As one of them affirmed, in the decision-making process "much deliberation [was] requisite." According to this claim, without such deliberation "no act should be adopted."[10] The influential Hamilton, for example, maintained that "the differences of opinion, and the jarrings of parties in the department of government, though they may sometimes obstruct salutary plans, yet

[8] For a different, more contemporary approach to the idea of "interest groups" participating in politics see Schumpeter (1976); Dahl (1963); Downs, (1957).
[9] See Ross et al (1949), p. 116.
[10] Farrand, vol.3, p. 110.

often promote deliberation and circumspection; and serve to check excesses in the majority."[11]

In both the English and the North American contexts, however, political deliberation was basically reserved for a few people. This restrictive view, as we will see, was primarily -but not exclusively- justified through epistemic reasons: the people –it was assumed- were not capable enough to reach impartial decisions, acting collectively. Moreover, as we examined, these very collective processes tended to impair, rather to improve, the chances of adopting an impartial decision. Typically, political thinkers like Burke assumed that only a virtuous group of people could rightly deliberate, and make adequate decisions afterwards. The deliberations of the people, instead, were characterized as "hasty, passionate, prejudiced, [and] subject to violent . . . fluctuations."[12] Considering these facts, Burke suggested organizing the political system in such a way as to secure the election of the "naturally superior" group of people. As Hanna Pitkin stated, according to Burke "representation mean[t] government by a true elite, and elections [represented] a means for finding that elite."[13]

To defend his position, as we examined above, Burke distinguished between the rational deliberations of the representatives within Parliament and the "more slow and irrational" deliberations of the people. Also, according to him, the people would almost always come to agree, albeit slowly, with the principles adopted by the representatives after their discussions. That is, he believed that after a certain time, the decisions of the representatives and those of the people would tend to converge.

Defending similar beliefs to those of the English conservatives, the Federalists also subscribed to a model of restricted deliberation, in which only a small group of representatives were allowed to deliberate and to make political decisions.[14] The Federalists explicitly admitted that the representative system that they designed was based on "the total exclusion of the people in their collective capacity."[15]

The reasons for this "total exclusion of the people" were clear. Assumedly,

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[11] The Federalist, n.70.

[12] See H. Pitkin, (1967), p. 181.

[13] Ibid., p. 171.

[14] As J. Fishkin stated, from the Madisonian republican model, "we get some deliberation among political elites in representative institutions." Madison, according to Fishkin, "speculates that the deliberations of such political leaders may represent a higher kind of democracy -not what the people happen to think given their passions and lack of information, but 'the public voice' in some more thoughtful sense." See Fishkin, p. 44.

[15] The Federalist, n. 63. Samuel Beer denies the elitist character of this quotation. According to Beer, in stating this, Madison was not "taking sides with aristocracy or the rule of the virtuous few. Quite the contrary. In the Madisonian model that "will" entered the deliberative process in the form of the various interests asserted by the electorate of the extended republic and emerged in the governments' determinations of the public interest. While direct democracy was excluded, the process of deliberation included the represented as well as the representatives." See Beer (1993), p. 280. However, in spite of this very strong statement, I find it difficult to see how Beer supports his beliefs against the overwhelming evidence affirming the contrary. In fact, Beer has to recognize that Madison "show[s] his sympathy with government by discussion" only in "occasional comments and the implications of what he said and wrote" (ibid., p. 275).

the people were not able to elaborate adequate political discussions.[16] In fact, they used to affirm that large groups of people, in public assemblies, were unavoidably driven by passions and not by reason. In this sense, for example, Madison described democracy, in the Federalist n. 48, as a system that gave power to "a multitude of people [incapable of] regular deliberation and concerted measures." Hamilton, who had defended deliberation among selected representatives, provided some reasons to support his view. According to him, a "spirit of faction [tended to] mingle its poison in the deliberations of all bodies of men, [and would] often hurry the persons of whom they are composed into improprieties and excesses, for which they would blush in a private capacity."[17]

The Federalists were certain that "only those who r[o]se above the ambition, bias, prejudice, partial interest, and immediate interest of ordinary men will be in a position to see . . . the true interests of the community."[18] Thus (as in the Burkean metaphor of sufferers and scientists), the Federalists affirmed that "the extent of the representative's duty to his constituents is only that he be acquainted with their interests and therefore at least take them into consideration when he engages in deliberation."[19] These features defined what was called Publius' political elitism.[20]

WHY RESTRICTED DELIBERATION?

In the aforementioned cases, the model of restricted deliberation was mainly defended as a result of elitist epistemic assumption. Anyhow, it is also true that both during that time and at the present time, the proposed model of restricted deliberation won support through other, more attractive, arguments. Let me analyze some of them.

Typically, one could defend restricted deliberation as a result of some

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[16] This theoretical assumption was based on an empirical assumption, according to which virtue was normally associated with wealth and property (See G. Wood, 1969, pp. 214-21).

[17] Moreover, it was stressed that "those who have been conversant in the proceedings of popular assemblies; . . . have seen how difficult it often is, when there is no exterior pressure of circumstances, to bring them to harmonious resolutions on important points" (The Federalist, n. 15).

[18] See M. White (1987), p. 216.

[19] See Miller (1983), p. 53; H. Pitkin (1967), chap.8. According to Miller, in fact, the notion of representation present in The Federalist papers was essentially similar to that proposed by Burke. The only significant difference between the two traditions, he stresses, is that Burke "had little faith in the English people's ability to choose wise leaders, and he wanted to restrict even further a franchise that was more limited than the American one" (See, Miller, 1983, p. 53).

[20] See M. White (1987), p. 213. White supports his reference to the political elitism of Publius, stating that Publius "thought the people were subject to momentary passions which could lead them to make grave political mistakes; that rational, wise, and virtuous leaders could refine the people's passions and speak more effectively for them than they could for themselves; that could flatter the people while leading them into subjugation; that the people tend to focus on the immediate, short-term advantages of certain courses of action; that the people tend to be influenced by local, partial interests while disregarding the interests of the community as a whole; that discerning leaders would be better able than the people themselves to see what the people's true interests were; and last, but not least, that the people might not see the truth, much less the self-evidence or possibility to demonstrate the truths which served as the major moral premises of arguments advanced for the adoption of the Constitution." "This is only part of the political elitism which is blatantly present in The Federalist," he adds, "in spite of the many genuflections that are made in the direction of the people" (ibid., p. 213).

obvious practical arguments. First, there are the obvious reasons of space and time that seem to provide clear support to the defender of a restricted discussion. Clearly, it seems impossible, for example, to assemble the whole society to discuss all political issues. As Madison put it, direct ("pure") democracy appears to be basically reserved for very small communities. If not, where should we assemble the whole society? When should we discuss all the issues that are worth discussing? In this sense, it is possible to say that one does not need to be an elitist to oppose the proposals of massive meetings and populous discussions, saying that they constitute ideals which are impossible to realize.

In addition, the defender of restricted political deliberation may easily appeal (like Stephen Holmes) to a "division of work" argument, saying something like the following: "it is reasonable to leave to the politicians the discussion and the resolution of most political issues, as a way of facilitating other people's life." In connection with this argument, someone could also resort to a motivational argument, which says that, normally, people are not very willing to spend so much time discussing political issues. Reasonably, we all want to relax, to spend time with relatives and friends, to do our own things.

Moreover, as the North American Framers also argued, the desire to have reasonable deliberation may require some (significant) degree of separation between the representatives, who deliberate about politics, and the constituency, who choose their representatives. If the representatives were not properly separated from the electors, one could argue, deliberation might end up being frustrated. Imagine, for example, a situation in which the representatives are subordinated to the people. In this context, the representatives might find it very difficult to change their minds, even when they found a decisive argument on the side of their rivals: a change of opinion could force him or her to abandon the compromises that he or she established with the constituency. Given this fact the different representatives might even refrain from offering good arguments to their opponents: why "play the game" of giving and listening to reasons if nobody is going to change his or her mind? In addition, the representative might feel forced to conceal or reject certain arguments simply in order to maintain popularity. Or, just to refer to the other side of the same coin, the representative might feel tempted to resort to very "popular" arguments, thus becoming a demagogue, simply to be re-elected in the next election (even at the risk of promoting bad or inefficient policies). Therefore, opening all the discussion to "the public" and allowing an active intervention of "the people" in politics might impair, rather than foster, proper deliberation.

It is worth noting that when deliberation is deprived of one of its constitutive elements -the disposition of the participants to change their minds when they recognize a better argument- deliberation tends to disappear. Thus, the alternative of having the representatives too attached to the people, making them too responsible to their electors, might promote an undesirable model of politics: a model distinguished by the fight between different states or different interests.

We have an excellent illustration to recognize the differences that separated

the conservatives from the radicals with regard to this point (deliberation, and the proper degree of separation between the representatives and the people). The example comes from an exceptional public debate held between a conservative candidate, Edmund Burke, and a radical one, Henry Cruger (a debate which was held during a period where political debates were completely unusual). The debate was held just before a crucial election in Bristol, in 1774, and was mainly focused on the correct relationship between the candidate and the electors. More particularly, the candidates discussed the value of restricting the candidates' liberty through specific "instructions," written by the people.[21]

In this debate, Cruger defended the people's right to instruct their representatives, stating that the latter had to be the "servants" and not the "master[s]" of the people. Moreover, he continued, the former were to remain, during their whole mandate, "subservient to the [people's] Will, not superior to it."[22] Refuting Cruger, Burke presented his famous statement according to which the Parliament had to be a "deliberative assembly of [the] nation, with one interest, that of the whole." According to him, Cruger's option would result in the predominance of "local purposes [and] prejudices."[23]

It is worth noting, at this point, that the model of restricted deliberation does not need to rely on politically irresponsible representatives in order to become a "feasible" alternative. On the contrary, this model seems compatible with the alternative of having politically responsible representatives while, at the same time, it appears to be based on a realistic motivational conception. Think, for example, of the mechanism of periodical elections. According to the defender of the restricted model, this simple mechanism somehow makes the representatives politically responsible and, at the same time, motivates them to act impartially. Both of these effects would be the result of (what has been called) the "retrospective character of elections." The representatives –according to this position- have an "incentive to anticipate the **retrospective judgment** of the electors" with regard to the different decisions that they promote. Given that rulers want to be reelected, they will try to "avoid provoking, by their present decisions, future rejections by voters."[24] The very self-interest of the representatives, in this case, would move them to act impartially.

All of the reasons mentioned, I believe, moved many distinguished scholars to defend the Anglo-American political tradition as a deliberative tradition. Some of them, for example, describe the political system that emerged during the XVIIIth century in the U.S., as a system which was basically oriented to promote (an adequate type of) political deliberation. Some others defend this model saying, instead, that it has become a reasonable deliberative system, in spite of certain imperfections, and even in spite of the actual intentions of some of its creators.[25]

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[21] See, for example, Underdown (1958), pp. 14-34.
[22] See these statements, for example, quoted in Cone (1957), chap. X.
[23] See Ross et al (1949), p. 116.
[24] See, for example, Bernard Manin (1995), p. 228.
[25] Just to mention a few of the numerous examples, see Ketcham (1977), p. 577; Diamond (1968), p. 514.

RADICALISM AND PUBLIC DELIBERATION

Clearly, radical theorists also tend to recognize deliberation as a significant political value. However, according to their main beliefs, the radicals tend to distrust the deliberative model defended by some conservatives (the restrictive option depicted above) and, instead, propose a different model of deliberation: a model that allows the citizenry to participate in actual political deliberation and, thus, to take a more significant role in the creation of political decisions.

For example, many among the critics of the proposed U.S. Constitution, the Antifederalists, expressed their explicit support for a different model of open, public deliberation. The Antifederalists had the opportunity to defend this model on many different occasions. For example, they did so during their defense of the old model of town meetings and popular conventions; in their opposition to centralized government; or in their defense of "open" –rather than secret- legislative meetings.[26]

Among the Antifederalists' writings, we may find significant expressions in favor of public deliberation. For example, according to "Brutus" it was necessary to guarantee that "the people can conveniently assemble, be able to debate, understand the subject submitted to them, and declare their opinion concerning it."[27] A similar criterion was upheld in an opinion of the minority of the Pennsylvania House of Representatives, which expressed that: "We are persuaded that a free and candid discussion of any subject tends greatly to the improvement of knowledge."[28] However, there is an even clearer example, in order to distinguish between the radical and the conservative view on deliberation. I am referring to their dispute about the "open" or "secret" character of the Federal Convention.

Typically, the conservatives defended the idea of "closing the doors" of the Convention, under the assumption that the influence of the public would "contaminate" and deteriorate the value of the representatives' discussions. They defended this

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[26] As I mentioned before, however, one should not assume that all or the most important among the opponents of the Constitution supported similar claims. In particular, the Antifederalists that took part in the Federal Convention tended to share the Federalists' restrictive epistemic conception. Because of this, I would suggest that it is better not to generalize in this statement, to affirm that the Antifederalists, as a compact group, were committed to a "face-to-face process of deliberation and debate." This generalization, however, is usually affirmed by legal scholars, and taken as one of the main differences between the Antifederalists and the Federalists. See, for example, G. Stone; L. Seidman; C. Sunstein; and M. Tushnet (1991), pp. 5-6.

[27] See Storing (1981), vol.2, p. 369. A similar opinion about the importance of a "step-by-step" approach to truth may be found in William Penn, who thought that "whether it was given to man to reach the source of the great fountain of truth, from which all true principles are derived, as rivers flows from the sea, it is not in my power to determine. We ought at least, with cautious and diffident steps, to approach it as nearly as we can, and treasure up and secure to ourselves and our posterity, the advantage of those partial truths, which the human mind is allowed to discover."

[28] Ibid., vol.3, p. 14.

position by opposing it to (what they considered) the populist alternative, which they depicted as one in which the representatives were bound by imperative mandates. In order to defend the secret character of the Convention, the Federalists resorted to various related beliefs: i) the belief that, by opening the doors of the Convention, they would allow "the spirit of faction" to hinder the debates; ii) the belief that the Convention was already formed by "virtuous people"; and iii) the belief that a "chosen body" of delegates could define adequate political solutions for the whole community, better than the community itself. More than anything, this latter belief moved them to reject a disclosure of the debates' notes, even when the sessions were over.[29]

Probably Jared Sparks presented the best summary of this perspective. Sparks voiced his opinions after a visit to James Madison, with whom he discussed this issue. In his notes, Sparks justified the secrecy of the debates because

> Had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument. Mr. Madison thinks no Constitution would be ever adopted by the convention if the debates had been public.[30]

Madison's opinion on this issue was also clear. He emphasized, as most Federalists did, the importance of secret deliberation, and deemed that the majority will could only "vitiate" the discussions by transmitting the passions and prejudices characteristic of local politics to them. He explicitly defended the secrecy of the debates in these terms, in The Federalist no. 37. There, he affirmed that the debates "had enjoyed in a very singular degree, an exemption from the pestilent influence of party animosities; the diseases most incident to deliberative bodies, and most apt to contaminate their proceedings." Rufus King went even further and suggested destroying the Journals of the Convention.[31]

People like Thomas Jefferson typically represented the more radical position. He strongly opposed the conservatives' position, according to which it was not necessary to allow the citizenry to somehow participate in the debates of the Convention. In a letter that he wrote to John Adams, in 1787, he said: "I am sorry [that the Federal Convention] began their deliberations by so abominable a precedent as that of tying up the tongues of their members. Nothing can justify this example but the innocence of their intentions, & ignorance of the value of public discussions."

Within the Federal Convention, there were practically no voices defending the openness of the sessions. Among the very few exceptions, for example, James

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[29] See, for example, Hamilton affirming that "'[had] the deliberation been open going on, the clamors of faction would have prevented any satisfactory result. Had they been afterwards disclosed, much food would have been afforded to inflammatory declamation. Propositions, made without due reflection, and perhaps abandoned by the proponents themselves on more mature reflection, would have been handless for a profusion of ill-natured accusation." (Alexander Hamilton: Reply to Anonymous Charges, Farrand, 1937, vol. 3, p. 368).

[30] Ibid., vol. 3, p. 479.

[31] Ibid., vol. 2, p. 648.

Wilson opposed the right of the representatives to conceal information whenever they deemed it necessary, stating that "the people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings."[32] Other delegates, like Martin, strongly attacked the secret procedures stating that they "preclu[ded] even the members themselves from the necessary means of information and deliberation on the important business in which they were engaged."[33] However, the truth is that even people like Martin (who made one of the strongest attacks against secrecy) did not defend their position under the assumption that the citizenry had to be called to participate in the debates. Rather, these types of criteria were always vitiated by elitist assumptions. Typically, Martin, through his claim, was primarily defending his right to talk and write to his friends outside the Convention.[34]

WHY PUBLIC DELIBERATION?

There are many reasons that may help us to justify the adoption of this political method of "public deliberation," defended by some radicals, as well as to criticize the model of "restricted deliberation" depicted above. Among them, I would mention the following:

Above all, one could make reference to the implausible character of the conservatives' epistemic assumptions. In fact, as we have seen, many radicals adopted this starting point in their critique of their opponents. Typically, they affirmed that the people were basically equal in their intellectual capacities, and that a privileged group of people capable of deciding impartially in the name of all the others did not exist. According to the radicals, if we want to achieve impartiality, the best thing we can do is promote a collective discussion that includes all those potentially affected. If not, we would impair the possibilities of obtaining impartial outcomes by only resorting to the independent, isolated reflection of any group of people.

The radicals, as we have seen, seem to have good reasons for defending their main beliefs. First, if we did not actually consult all those potentially affected, we would run the risk of losing significant information. According to the radicals, we should not assume that just by making an effort to put ourselves in the place of others, we can recognize and understand the others' claims. By acting this way, we would run the serious risk of misunderstanding some of the others' preferences, of considering important something that the others do not really value; of disregarding as unimportant what is actually significant for them. Also, in their criticism, the radicals might resort to a motivational argument. They could affirm that, without the actual presence of all those possibly affected, we would not be able to defend their viewpoints with the required intensity and the required commitment.

In addition, the idea of evaluating the opinion of all those potentially affected

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[32] Ibid., vol. 2, p. 260. However, it is also true that he admitted exception to this general principle (i.e., see ibid., vol. 1, p. 70).
[33] Martin before the Legislature of the State of Maryland, November 29th, 1787. Ibid., vol. 3, p. 191.
[34] Ibid., vol. 3, p.173.

seems to match some of our most basic intuitions about justice. Our common sense opinions about justice, in fact, say that even the most heartless criminals have a right to present their opinions in the judicial process. Their opinions have to be taken into account because they may have something important to say, in order to justify -or at least to make less disputable- their acts. Because of this belief, we recognize the importance of paying close attention to the reasons that the accused may present. We even allow him to change his defender, if this change were necessary to secure our better understanding of his opinion.

Reasonably, the radicals may also disregard most of the practical concerns advanced by their opponents. For example, although the image of a gigantic assembly is obviously threatening, the radicals do not need to defend something like this in order to satisfy or come closer to their deliberative ideal. Also, to advance their views, the radicals do not need to commit themselves to the idea of discussing in public and open meetings all the political decisions: radicalism is not incompatible with an adequate division of labor between "politicians" and "the rest of the people." A radical thinker, in this sense, may propose a political scene with multiple and decentralized forums, activated or self-activated to discuss the most significant political topics (normally leaving the decision about what to consider a significant problem to these different groups).

Also, the radicals may view as a virtue of their defended system (and not as a problem, as their enemies would like to affirm) the fact that public discussion forces the representatives to put aside or reject certain arguments that they would have otherwise advanced (in secret or more reserved sessions). As we have seen, this consequence may be considered a foreseeable and desirable outcome of public deliberation. We do not want to run the risk of having representatives that merely resort to self-interest, in order to justify the adoption of a certain measure. Moreover, the fact that the representatives felt forced to examine the public impact of their preferred decisions should not be considered as something worrisome. The North American Framers, for example, were generally reluctant to publicly present arguments for limiting political rights through property qualifications or arguments that reflected sympathies with the old monarchical British order. However, a few of them advanced those types of arguments in the Federal Convention, protected as they were by the secrecy of the sessions. In this sense, one could reasonably conclude that the political rights of a great majority were at tremendous risk just because of the lack of publicity of the political debates. In the end, if these types of measures were not adopted, this was due to rather occasional and quite fortunate circumstances. These cases, I think, help us to recognize that "political shame" (the shame of advancing certain arguments in public) could be welcome.[35] There are good reasons to believe that higher or lower levels of publicity come together with higher or lower levels of impartiality. Typically, when the decision-making process is more open to the public, the public has more possibilities to check the representatives' arguments, and the representatives feel more pressure to restrain their own self-interest. The opposite

[35] Clearly, to state this does not mean that one should ignore the possibility that the representatives simply "masked" their self-interested argument through a more attractive public presentation of it.

seems to happen, instead, when the political discussions start "closing the doors" to the "public eye."[36]

Similarly, we should not see it as a bad thing that the representatives felt forced to think about the majority preferences when they deliberated about what legislative project to promote. In this sense, public deliberation may be defended as a useful means to obligate the representatives to talk and to listen to their constituency. Without an active "presence" of the public -one could argue- the representatives would not feel so obliged to consider the electors' desires. In addition, the claim for the actual presence of the "potentially affected" in the political deliberations is meaningful as a means to secure better informed and more precise decisions. Let's take as an example, again, the North American case: during the Founding period the Founding Fathers decided to attach a Bill of Rights to the proposed Constitution without an adequate discussion, on the national level, of the different states' claims. Basically, the Framers shaped the Constitution according to their own preferences, and then opened it to the public in the different states. The states had a lot to say about the Constitution, as well as many reforms to propose. However, the inclusion of some of these demands in the final text of the Constitution did not come as a result of an open discussion at the national level but, rather, as a concession to the states' pressure, moved by the Framers' fears of not getting the Constitution approved. As Hamilton made clear in the Federalist n. 84, he -like most of the Framers- was against the idea of having a Bill of Rights. Because of this conviction, the Framers did not discuss the rights that they later incorporated in the text, at the Federal Convention. That is to say, one of the most significant parts of the Constitution, the Bill of Rights, was not properly discussed. Given the tremendous importance of these rights, their meaning, their scope, their limits, this situation is worrisome. One could reasonably imagine that this would not have happened if the critics of the Constitution had had a clear opportunity to present and defend their views. On the contrary, the discussion of particular rights would have been much more intense and detailed if the Framers had opened the doors of the Convention in order to recognize the actual content and weigh of the majority claims.

In addition, the radicals do not need to be as concerned about the possibility of transforming the representatives into mere "mouthpieces" of the people. The decision to closely follow the representatives' actions, and even the decision to force them to make certain particular choices does not preclude deliberation: a strong control over the representatives is not incompatible with the possibility of having open discussions, or representatives who change their initial thoughts. This seems to be true even if we consider the strongest mechanisms of control, used in the early North American history: instructions and the right to recall. In effect, if one analyzes the history of instructions, it is possible to affirm that instructions were set only with regard to crucial circumstances, and basically to secure certain essential principles. The instructions came to support the representative system and were a way to improve it. Normally, instructions were not seen as a challenge to the whole political system.[37] As R. Buel put it,

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[36] See, for example, Elster (1991).

[37] See Buel (1968). See, also, R. Brown, (1983), p. 24; and E. Douglas, (1971), p. 85.

> Instruction tended to be viewed in the same light as the franchise, as a means to an end but not to be confused with the end itself. They were not considered as the commands of the people with which the representative was bound to comply, but as an aid preserving a harmony or unity of interests between representative and constituent. If the problem of diverging interests had never arisen, instructions would have been unnecessary. Through instruction the people were able to inform their representatives what their sense of the common interest was in extraordinary circumstances.

Against some common opinions, we could even say that instructions may favor deliberation, as a by-product, in at least two ways. First, instructions could promote discussion between the representatives and the public. For example, if a representative want to be reelected, and has an explicit set of instructions that he is not willing to follow, then –we could reasonably assume-, he will be motivated to persuade his constituents about the need to change their viewpoint. R. Buel commented, in this respect, that: "[t]he representative was equally at liberty to persuade his constituents that their sense of the common interests was wrong, in fact it was his duty to do so if he really thought the people were misled in their judgment."[38] Second, instructions might serve to promote discussion among the people "outdoors," that is, extra-parliamentary discussion. For example, in early North American history, this effect was derived from a common practice: that of publishing the instructions in order to publicize them. The side effect of this measure was that the newspapers were filled with articles in favor and against the established instructions.[39] Thus, instructions were a relevant component of political discussions and served to reconnect the people with their representatives. Instructions constituted, thus, a mechanism oriented to attacking the common conservative understanding of deliberation, according to which deliberation had to be held by the representatives among themselves, in isolation, and with no particular regard for the will of the people.[40]

The proposals favoring a wider space for direct democracy (or, more generally, those aimed at securing much closer connections between the representatives and the people) promise, in addition, some significant and valuable effects. First, they help us to avoid the extremely dangerous risk of having merely self-interested representatives. The North American Founding Fathers, in this respect, not only (reasonably) assumed the presence of human self-interest but also (probably unreasonably) allowed this motivation to play a crucial role within their created political machinery. This was what Madison demanded, in fact, when he proposed to counteract "ambition" with "ambition." Actually, we could conclude, that this scheme came to constitute the "motivational basis" of the U.S. representative system. Experience taught us, however, that we have reasons to reduce or restrict (every time it is possible) and not to foster (in any case) the representatives' self-interest. It is not clear why Madison thought that the sum of two evils (ambition plus ambition) would obviously produce a desirable outcome and not, say, a double evil. In this respect, if

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[38] Buel (1968), pp. 144-45.

[39] See, for example, Countryman (1981), p. 232.

[40] The conservative conception was clear: "after we are chosen," the conservatives affirmed, "and have our seats in this House, we have no longer any dependence on our electors so far as regards our behavior here. Their whole power is then devolved upon us, to regard only the public good in general." Discourse of John Willes in the British Parliament, in 1734. Quoted in Morgan (1988), p. 215.

the radicals defended the adoption of more "exogenous" controls, it was because they feared the possibility of self-interested agreements (even) between the members of different branches. Also, if the radicals tended to support a close connection between the public and the political branches, this was because they acknowledged that the alternative solution -a strong separation between them-, might affect the legitimacy of the whole institutional system.[41]

Finally, I should say something about what was, in my opinion, the best conservative defense against the mentioned radical challenges. The conservatives may argue that all the radicals' concerns have basically no reasonable foundation, given what we called the "retrospective character of elections." That is, the conservatives may affirm that periodical elections provide the representative system with the degree of popular expression, control, and legitimacy that an adequate representative system seems to require. In spite of the initial appeal of this argument, I would say that it is actually a very weak one. To show why the argument is misleading, I would refer to the following reasons. First (and in the best case), what the "retrospective judgment" argument proves is that the representatives will try to be loyal to the interests of a majority -not necessary to the "whole" community. In most cases, however, what it actually happens is that, because the political representatives have such long term mandates and so few possibilities to be controlled by the public (in between elections), the representatives tend to feel free to act as they wish during most of their term. In addition, the periodical right to vote does not give the people the possibility of adequately discriminating between good and bad acts of their representatives. Thus, it may easily happen that we want to sanction a certain representative because of a certain act, and to congratulate her because of some other acts, but we can not find the institutional mechanisms to do so: we have to vote either in favor or against her. Also, it may happen that, after some years of the representative's mandate, we forget about her initial faults or about the seriousness of these faults. Again, periodical elections do not help us, in this respect. In addition, both the large number of representatives and the lack of publicity of most of their acts, give the representatives a remarkable degree of anonymity, behind which they can "hide themselves," if they decide to do so. Moreover –one could argue- the political system favors the adoption of this type of conduct, allowing the elected to reserve their energy for the internal struggles within their political parties. This may be enough for some representatives to achieve re-election and to consolidate their political careers. Considering these facts, the repeated character of elections neither guarantees proper checks upon the representatives' behavior nor contributes to the proper expression of the constituency. Because of these reasons, the critics of the U.S. Constitution opposed the way in which this Magna Carta organized political representation, and the amount of weight it put on the electoral system, as the main controlling mechanism. For example, John Taylor objected to the "insufficiency of election...to secure political liberty." Moreover, Taylor deemed that this means, the only protection that remained in the people's hands, was diluted, in the

[41] Against the arguments mentioned, the conservatives may want to resort to the already mentioned idea of the retrospective character of elections. However, as I will explain below, this argument is too weak to sustain the conservatives' creed.

end, by the existence of long terms in office.[42]

[42] To counteract this, he proposed a return to the old Anglo-Saxon principle according to which "tyranny begins when annual election ends." He stated that "the reversal of this maxim in the tenure of the president and senators of the United States, may possibly be . . . mortal to our policy." See Taylor (1814), pp. 170, 226.

APPENDIX

CONTEMPORARY POLITICAL INSTITUTIONS AND DELIBERATION

INTRODUCTION

Even if we accept the presented objections to the conservative model of deliberation, we may still try to defend its essence. We might say, for example, that in spite of the arguments that were originally presented to justify the representative system, the existent representative institutions actually obtained a certain degree of legitimacy and secured a significant degree of political deliberation.

This intellectual perspective suggests that we concentrate our attention on the actual functioning of the system, and not on the justifications that originally created the system. Is it reasonable, however, to put most of the Framers' arguments in parenthesis? Maybe it is. It would be possible to affirm, for example, that although the representative system still maintains some of its basic characteristics (bicameralism, a unitary Executive, the general mechanisms of checks and balances), it has evolved significantly, since its creation. Given this fundamental and profound evolution -we might say- we should try to examine the present functioning of the institutional system, and its present value, instead of focusing so much on some of the reasons upon which the original framework was based.

This claim seems reasonable, at least in part, when we acknowledge some of the significant developments of the original framework. Clearly, some of the mechanisms created during the eighteenth century lost their effectiveness and new ones appeared. Obviously, the actual functioning of the system disproved many of the Framers' initial assumptions. For example, the extraordinary development of the system of judicial review, which was not foreseen by most of the Framers, implied a significant reorganization of the representative system. Similarly, the mechanism of indirect elections was either eliminated, in some cases, or lost its primary original meaning. In addition, at least in the U.S., the idea that the President would represent only the "wellborn and the few" has changed radically since the so-called Jacksonian era. Also, the House of Representatives became enormously influenced by the direct pressure of private interest groups, something that was not so clearly expected during the framing period. Moreover, since its creation, the state regulatory apparatus expanded its scope to a remarkable degree (something that affected the whole institutional system) and began to act, in many cases, with complete independence from popular control.

Given these facts, it seems difficult to deny that the present representative system has dramatically evolved since its creation. However, and in spite of this, one could also reasonably maintain the following: "Yes, the system has greatly evolved, but in total coherence with its main conservative foundations." In effect, the charges mentioned did not appear within an "institutional vacuum." On the contrary, these changes took place within a strong institutional frame that normally set the limits and scope of these transformations. For example, someone could reasonably argue that even the most spectacular institutional changes that occurred –e.g., the development of "lobbying" practices, or the development of judicial review-, were coherent developments of the general framework designed during the 1780s. According to this hypothesis, for example, the fact that, presently, private interests exercise so much influence on the representatives is something that can be perfectly explained as a "natural" result of the Framers´ preferred institutional design. According to this explanation, this outcome is simply an additional consequence of the Framers´ promoted and defended "breach" between the representatives and the people. Similarly, the extraordinary evolution of the system of judicial review could be seen as a "natural expansion" of the Framers' general institutional conception.[1] Judicial review, we could state, is profoundly consistent with the elitist epistemic conception defended by the Framers, according to which the institutional system should not leave substantive decisions to collective debates.

As a result of the criteria mentioned, I would suggest that it is not reasonable to try to "emancipate" the Constitution from its philosophical foundations. However, in the following pages I will not pursue this claim, trying to examine a particular defense of the Constitution that is basically focused on its present functioning.

THE POSSIBILITY OF DELIBERATION

Herein, I will critically examine an idea, defended by many contemporary authors, according to which the present institutional framework actually enables public discussion, in spite of its imperfections and its need for improvement. The scholars that defend this position, ground their convictions on some specific observations with regard to the system of "checks and balances." According to them, this balanced mechanism, designed under the guidance of James Madison, became an exceptional tool for the task of promoting public discussion.[2]

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[1] In effect, the presently obvious function of "judicial review" was not clearly incorporated in the text of the U.S. Constitution. At the Federal Convention, the explicit attempts to establish mechanisms of judicial review of the laws (specifically through a Council of Revision) were defeated. Nevertheless, some of the most influential members of the Convention seemed to have clear ideas about the powers that had been transferred to the judiciary. According to Charles Beard, for example, 25 of the most active members of the Convention made it somehow clear that they favored a system of Judiciary control over the Legislature. In particular, Hamilton showed a quite clear view on the topic in the famous paper we presently know as the Federalist n. 78. Anyhow, the original ambiguities were finally eliminated in 1803, in the case "Marbury v. Madison" (5 U.S Cranch, 137, 1803) where it was established that it was "the province and duty of the judicial department to say what the law is." This situation, in a certain way, modified the original distribution of powers, and its seeming equilibrium. Since then, the Supreme Court won the power of having the "final say" in constitutional matters.

[2] See Lutz (1987), pp. 87-93.

According to Bruce Ackerman, for example, the U.S. Constitution established a deliberative framework intended to "ameliorate the unavoidable evils of normal politics" and gave incentives to the representatives to engage in "public-spirited deliberation, despite the proliferation of faction."[3] For Cass Sunstein, also, the Federalist project of the 1780s was essentially intended to "promote deliberation and to limit the risk that public officials would be mouthpieces for constituent interests." According to Sunstein, the Federalist commitment to this deliberative project helps to explain most of the institutional devices promoted during the convention. These ideals would explain why

> the Senate and the President were to be chosen by deliberative representatives rather than directly elected by the people; why the Electoral College was, at the inception, to be a deliberative body, one that would discuss who ought to be President, rather than simply register votes; why the framers favored long length of service and large election districts.[4]

Even some other contemporary authors present the Constitution as the starting point of an ongoing process of public deliberation. According to these authors, the Constitution should be analyzed as an institutional framework oriented to enabling society to openly discuss its problems –a framework aimed at helping the people to solve their own problems through their preferred means. According to Holmes, "the American Constitution was an instrument of government, not an obstacle to government; it was not disabling, but enabling." The main object of the Constitution, some people add, was that of "securing the conditions of public debate."[5] In addition to this claim, Samuel Beer strongly stated that the Madisonian system established a "process of rational deliberation in which the initial preferences of participants are changed, as their diversities are reconciled with one another."[6] Similarly, Stephen Macedo shares the idea that the Founding period

> must be seen not as a completed act of liberal statecraft, but as the initiation of an ongoing project of publicly interpreting, questioning, debating, and reshaping, not just the details but (at least occasionally) the fundamentals of constitutional government. The task of liberal citizenship is not only to enjoy private rights, but to struggle to complete the unfinished business of liberal construction.[7]

At this point, then, we should wonder: is it reasonable to see a continuity between the present representative system -a system like the one organized in the U.S. Constitution- and the political model of public deliberation? I think that we have good reasons to answer this question negatively. As I will try to show, the present representative system does not constitute a particularly adequate framework for the promotion of public deliberation. Within this framework, in fact, the "public" is usually relegated to a secondary role, and "deliberation" is not especially encouraged. On the contrary, I will suggest, the system appears to ordinarily replace deliberation with a self-interested bargaining process. By defending this claim, I do not mean to say that the political system does not make room for public participation in politics: I will just

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[3] See B. Ackerman (1991), pp. 184 and 198; and also Ackerman (1988)
[4] See C. Sunstein, (1993), chap.1.; Sunstein (1988); and Sunstein (1990), chap. 1
[5] See S. Holmes (1988), pp. 215, 237.
[6] See Beer, (1993), p. 381.
[7] Macedo (1990), p. 76.

affirm that it tends to discourage it. Similarly, my conclusion will not imply that within the representative framework there is no room for political deliberation, but rather that deliberation is not especially vitalized through it.

THE JUDICIARY AND PUBLIC DIALOGUE

Let me, then, analyze the "dialogic" character of the institutional system, "piece by piece." In this respect I will say, first of all, that the so-called public dialogue is particularly at odds with regard to the Judiciary supposedly, one of its main actors. Many important scholars seem to have the opposite idea, according to which "[t]he Court often provokes consideration of the most intricate issues of principle by the other branches, engaging them in dialogue."[8] Their idea is that "the Court provok[es] or continue[s] debates, not cut them off."[9]

The whole image of the dialogue seems somehow curious, however, when we analyze the particular role assumed by the Judiciary, within the representative government.[10] The invoked dialogue seems peculiar, first of all, because the Supreme Court -the branch of power with the poorest democratic credentials- has the authority to have the "last word," with regard to constitutional issues. Even if we consider that the other branches may obstinately insist with their own criteria; even if we consider that, sometimes, the Court reverses its own past decisions taking into account the other branches' pressure,[11] it still is undeniable that the Court's decisions appear with the authority of the "final say." Then, to describe this situation as a "dialogue" (or, even worse, as a public dialogue) seems somehow improper: the judges have the opportunity to successfully insist on their own decisions, no matter how much the Congress insists on an opposite solution. The idea of dialogue, instead, seems to normally imply something different. Normally, in effect, the notion of "dialogue" refers to a certain type of equality that here seems absent: in a normal, adequate dialogue, your arguments and my arguments should have equal chances to prevail, as long as they are good ones. Here, the dialogue seems tilted and, what is more worrisome, it seems unbalanced towards the wrong side: in actual, everyday life, it is not the people but the least democratic branch that has the ultimate constitutional authority. As Jeremy Waldron put it: "You may write to the newspaper and get up a petition and organize a pressure group to lobby Parliament. But even if you succeed, beyond your wildest dreams, and orchestrate the support of a large number of like-minded men and women, and manage to prevail in the legislature, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges' view."[12]

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[8] Bickel (1962)., p. 261.

[9] Stephen Macedo (1990), p. 144.

[10] Herein, I will be referring mainly to the Supreme Court.

[11] In this respect, for example, see Dworkin (1977).

[12] Waldron, (1993), p. 51. In a certain way, this is like calling an unequal family situation in which, after an initial exchange of opinions, the husband stands up and tells his wife "this is what I think, and this is what we do," a dialogue. Then, you may say that the husband sometimes listen to some reasons, you may even find that he actually changes his opinions after a while, but the truth is that he normally imposes his authority, until he himself decides that he wants to change.

If the political system allowed the Judiciary to exercise such huge power, and to play such a fundamental role, it was because of the epistemic elitism that distinguished it: the Founding Fathers did not believe that the most difficult problems in constitutional law had to be solved collectively. Some of them assumed, on the contrary, that each problem had certain specific answers, and that these answers were not available to everyone.[13] Or, to state it differently, many among the Founding Fathers assumed (as the English conservatives, like Burke, had assumed) that there existed certain right, objective answers, and that the majority debate did not constitute a good way to recognize these answers.

Again, we may leave the original discussions behind and focus only on the present functioning of the Judiciary. In this sense, I will point out another fact that casts doubts on the dialogical character of the system. In a normal dialogue, we expect a certain disposition among the participants. We want them to be ready to change their opinions whenever it is necessary. However, in this case, we find that the Judiciary does not only have the "last constitutional say," but also a tendency not to modify its own decisions. In fact, it is so difficult to overturn the Court's decisions that many people may reasonably feel discouraged fighting them.

This combination of circumstances (the Courts' final say, plus the enormous difficulty in changing its decisions) is particularly worrisome: for some people, the decisions of the Court may come to represent a burden that will affect them during their whole life. Currently, horrendous judicial decisions like "Bowers v. Hardwick"[14] (restraining homosexual rights) or "Buckley v. Valeo"[15] (which made it almost impossible to control the influence of wealth in politics) have proven to be very difficult to change, even with the resistance that they have generated at different social levels. Because of these types of facts, any analysis of the value of judicial review should take into consideration this stability that tends to characterize most judicial decisions. Someone could affirm, for example, that this stability runs against some of the values that should distinguish an adequate democratic organization. Maybe, in effect, a democratic process should be more open to changes. Maybe, in effect, the democratic decisions should be more clearly open to revision.

Some authors dismiss the objections mentioned and stress, instead, the importance of the judicial role in the promotion of a "public dialogue." Stephen Macedo, for example, says that (even) decisions like "Dredd Scott" v. Sandford"[16] - where the Supreme Court defended the supremacy of the white race, and supported the institution of slavery-, were socially useful, because they "provoked an instructive

[13] Over this question, more than any other, the Founding Fathers diferred substantially. In particular, there was a significant dispute between Hamilton and Madison over the role of the Judiciary, with respect to the other branches. Hamilton, in this sense, appeared to defend a position according to which the Judiciary may come to have a prevailing role, something that was disputed by Madison, who wanted the latter to be similarly situated with respect to the political branches. See, Burt (1992).
[14] 106 S. Ct. 2841 (1986).
[15] 472 U.S. 1 (1976).
[16] 19 How. 393 (1857).

exchange."[17] However, I find this statement very difficult to defend: What kind of "exchange" is this? Is this "exchange" acceptable? What instruments do we have to force a change in the judicial opinion? What chances do we have to promote a successful reply to these opinions? Is it reasonable for common citizens to take part in this peculiar kind of "debate"? Clearly, I am not affirming that we should only participate in a dialogue if we have the certainty that we are going to impose our view in it. On the contrary, the idea is to defend a fair dialogue, where both my rival and I will expose our views, will listen to the others' opinions, and will have relatively equal chances to make our own view prevail. This ideal appears to be contradicted instead in the above examples, where the Judiciary is placed (intentionally or not) in a dominant position. In my opinion, in effect, the Judiciary *might* play an important role in our process of democratic dialogue but, given its present capacities (the difficulty of rejecting judicial decisions; the difficulties we have to modify these decisions; etc.), it may threaten to hinder -instead of promote- a valuable public dialogue.

At this point, however, one could recommend that we look at things from the opposite side, and recognize the importance of having an independent and strong Judiciary, as a way to improve the democratic "dialogue." The Judiciary –some could say- is able to make significant contributions to our public dialogue, contributions that no other power is in condition to make. In effect, given its peculiar position, the Judiciary may help us to include within our democratic dialogue certain ignored voices, certain arguments that were not recognized by the majority and by the political authorities. Clearly, the main role of the judges is that of receiving the complaints of all those directly affected by the laws. In this sense, it seems, a defender of radicalism should defend –instead of attack- the judicial role, given the objective of actually taking into account the viewpoints of all these potentially affected by the democratic decisions. Who, if not the judges, would help us know about all those voices that are ignored or merely dismissed by the majority process? Second, in contemporary societies the legislative decisions tend to be too influenced by interest group pressures. In this sense, the Judiciary may also play an extraordinary role, helping us to avoid the risk of enacting merely partial (non-neutral) legislation. Third, we have to recognize that, even in those (rare) cases where "all the affected" are actually taken into account by the decision makers, it may perfectly well happen that the final decision is inadequate, given the absence of certain information, or the presence of some misunderstandings. Again, in this sense, the Judiciary may help all us to correct our collective and involuntary mistakes. Presented this way, the Judicial function seems worth defending, in order to have a proper democratic discussion: the judges may decisively help us to correct our undesired mistakes, and to avoid improperly partial decisions.

In spite of its attraction, we should try to resist, at least in part, this traditional line of defense for judicial review. There are many things to say against this view. First of all, it may seem that having an external control of the majority decisions is an excellent idea, but this idea will only be excellent depending on the way we design this

[17] Macedo (1990), p. 146.

control. For example, although it seems important to have an institution oriented to "help" the majority, it seems more worrisome to guarantee this institution that its opinions will always prevail upon the opinions of the majority branches. It is one thing to help the political branches consider their decisions twice, and another to actually prevent the majorities from insisting on their own views, when –after thinking and rethinking them- they still find these initiatives valuable. It is one thing to allow someone else to correct or improve our decisions (as "We the people") and a very different thing to allow that person to take our place and to tell us what is right.

The importance of not giving the "final institutional say" to this particular "corrective" body becomes apparent when we recognize the following fact. The Judiciary does not receive complains only from discriminated and disadvantaged groups. Many times, those who present their claims before the Judiciary are the representatives of interest groups and powerful interests who want to block properly discussed majority decisions. Clearly, these groups, as any other group, should have the right to complain. But we should be careful not to reintroduce this type of "minority veto" through the back door. In the end, if we want a democratic system it is because we think that most collective conflicts should be decided collectively. And if we accept majority rule -instead of always demanding unanimous consent- it is because we do not want the minority view to block the normal life of a democratic society. The abhorrent "Lochner era" provides us with a good illustration of this situation: during that time (a few years, and millions of people affected) a very conservative Judiciary obstinately blocked the majority preference for a more regulated market. By acting this way, the Judiciary favored the economic choices of a few powerful groups, and prevented the majority from democratically developing its own basic view about how to organize the economy of the country.[18] This situation also helps us to see that even the Judiciary (and not only the Congress) may be accused of being too sensitive to the demands of interest groups.

From a radical viewpoint, the possibilities of having a meaningful democratic dialogue is distorted when, in practice, the final authority with regard to law is not in the hands of the majorities and their collective deliberation. This collective discussion requires, obviously, external help, and corrective devices. However, as presently organized, the institutional system seems to hinder, rather than to favor, an adequate dialogic process distinguished by the possibility of mutual corrections. If we want, in the end, this kind of system –an institutional system directed to organize a more adequate deliberative process- we have reasons to object to the presently dominant

[18] To defend this position, we do not need to resort just to the most obviously "hateful" cases of the North American judicial history. We may defend the same principles even if we take into account cases like the remarkable "Brown vs. Board of Education," where the Court opposed the racist views of a certain state's majority. The Court may be well positioned to attack the majority decision, and to command the majority to discuss a certain law again, and to provoke a "public scandal" by showing the national public the indignity of certain state's authorities. However, even in these cases, we may say, the majority, and not an elite-group, should take the responsibility of deciding what principles to apply to the case at stake. Obviously, this attitude may leave the door open to undesirable situations, but the same would happen with any other alternative institutional option. The question is, then, what institutional choice is better justified to deal with these difficult cases.

Hamiltonian view, which implicitly situates the Supreme Court at the highest point of our institutional organization.[19]

How should we organize the Supreme Court, then, if we want it to play the role of a corrective institution, limited to calling our attention, for example, to instances when we ignore or improperly dismiss a certain view from our collective discussions, or when we are about to make decisions that will affect the democratic discussion process itself? Probably the first thing we should do is to define much more strictly the scope of the Supreme Court's function. Presently, there are many interesting proposals suggesting how to reorganize its tasks and re-orient its efforts.[20] However, not all these proposals seem properly oriented. Take into account, for example, some of the following suggestions.

Imagine that we want the Judges to orient their efforts, say, mainly to protecting minority groups and/or to guaranteeing that democratic procedures are properly honored. Clearly, to implement these proposals it would not be enough just to tell the Judges: "Well, beginning tomorrow, you should re-orient your decisions in the following way." If we wanted the Judges, say, to be particularly sensitive to the needs of the minorities -if we wanted them to be prepared to recognize, understand, and properly weigh the claims of oppressed groups- we cannot merely appeal to their good will and good faith. Rather we would need, for example, to provide them with the motives and constitutional mechanisms that were necessary to facilitate the development of their new functions.

In fact, we always tend to see the importance of these suggestions, although we approach them in an extremely informal way. Typically, we recognize the importance of having, say, certain members of minority groups among the Supreme Court judges (women, Afro-Americans), even though we recognize that the Supreme Court is not a representative body. We want some members of these disadvantaged groups to be present, even in the Supreme Court, not because we believe that they, and only they, may understand the claims of the oppressed or disadvantaged groups but, instead, because we believe that their absence would threaten our possibilities of properly evaluating the claims of these groups.[21]

During the Framing period, Madison -probably the most salient institutional theorist in all North American history- understood perfectly the need for providing the different public officers with particular motives, according to their task. Actually, it was this Madisonian conception -as we saw- that became reflected in the final draft of the Constitution. Then, and partially as a result of that view, for example, the Judiciary was provided with particular incentives designed to secure the special protection of certain specific minority groups. Presently, we might object to these particular incentives but, I believe, we would have problems denying their existence. The idea implied something like this:

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[19] See, in this sense, the Federalist, n. 78.
[20] See, for example, Ely (1980); or Nino (1997).
[21] In this sense, see Phillips (1995); Kymlicka (1995).

The Founding Fathers wanted to secure the rights of the minority. However, as we examined, they defined "the minority" in a very peculiar way: they equated this idea with the idea of "the few," or "the creditors," that is, with a group that actually constituted a minority during that time, although, of course, a very particular one (the minority of the most advantaged). Assuming this view, they had no problems affirming that the judges would be especially well motivated to protect the interests of the minority. In fact, given that

i) the judges would be elected indirectly;
ii) indirect elections (seemingly) guaranteed the election of members of the "minority" sector (the creditors, the property owners);
iii) the minority (like the majority) constituted an internally homogeneous group; and
iv) the members of the minority (like the members of the majority) group would be motivated by self-interest; then, they concluded that
v) the minority would be protected by the Judiciary, because the judges (members of the minority group) would be particularly interested in protecting the rights of the group to which they belong.

This reasoning shows us at least two things. First, it tells us about the enormous importance that the Framers attached to the motivational factors within the institutional system that they were creating. Second, it shows us the difficulties that we presently have maintaining something like the mentioned organization of "motives and constitutional means." At the present time, in effect, if we wanted to secure that the Judges are especially motivated to defend the different existing minority groups, we would need to radically re-organize the existing structure of incentives. In a certain way, the present informal efforts to secure the inclusion of minority members even within the Judiciary, represent a reaction against the failure of the old structure of incentives. This attitude, at the same time, seems to be a modern reflection of the Founding Fathers' reasoning: if we want the judges to be especially sensitive to the claims of particular minorities, and especially motivated to protect the interests of these groups, we need them to be more directly related to these minorities. Of course, given that –at least, presently- most groups tend to be internally heterogeneous, this solution is far from adequate: there are no guarantees at all that a woman judge, or a judge of color will adequately protect the interests of the minority groups that they appear to represent. In addition, it would be ridiculous, if not directly impossible, to try to incorporate representatives of "all different minority groups" into the Supreme Court. However, the difficulties we find in designing a new and valuable institutional arrangement should not obscure the importance of this challenge. The significance of these efforts is also confirmed when we recognize the assumptions and the implications of the opposite alternative: an elitist system based on the idea that certain persons can adequately recognize and understand, through their own monological reflection, the viewpoints of everyone else.[22] The implicit suggestion of this challenge

[22] See, for example, Phillips (1995), stressing our difficulties in understanding or representing others' needs - to "jump the barriers of experience" - "no matter how careful or honest" we are. Stating this should not be understood as subscribing to the opposite idea according to which we are incapable of "putting ourselves in

is that we should seek to create additional institutional devices that make the Supreme Court (and/or organs similar to it), more open and sensitive to the viewpoints of the many different minorities.[23] This way, the Judiciary could help us so that we do not improperly affect any minority group through the decisions of our collective dialogue.[24]

In conclusion, it is possible to affirm that the present organization of the Judiciary, its composition, the scope of its tasks, and its prominent role within the structure of government, do not set the best conditions for contributing to a fair, valuable public dialogue. This situation, I believe, is quite evident nowadays, and was foreseeable during the Founding period.[25]

THE POLITICAL BRANCHES OF GOVERNMENT AND DELIBERATION

The present organization of the political branches of government does not seem to be particularly helpful eithr for promoting political deliberation. Again, it seems somehow

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others' shoes". Anne Phillips also makes this point, recognizing that it is not necessary to be a member of a certain group to understand its interests (ibid.).

[23] In this sense, for example, see Nedelsky, who suggests the idea of "a tribunal one-third of which would be composed of representatives of disadvantaged groups". See Nedelsky (1994). Commenting on the famous Rodney King case, Amy Gutman connects this problem of representation and the idea of deliberation. She states that "[cases such as that of Rodney King] reinforce the criterion whereby the multiculturalism of those who argue results, habitually, in an indispensable aid in promoting an adequate deliberation". See Gutman (1993).

[24] Some people would resist these types of efforts, by affirming that is not necessary to make any institutional reforms in order to strengthen the connection between the Judges and the minorities. In many cases, however, the confidence in the already existent institutional arrangements seems misleading. For example, many people seem to believe that, because the institutional system is, somehow, a majority system (given that it is based on the majority rule), the minorities will be "naturally" defended by a non-majority institution, like the Judiciary. This argument fails for different reasons but, most of all, for assuming a completely misguided symmetry: here it is assumed that, in the same way that a majority institution (the Legislature) is motivated to defend the viewpoints the majorities, a non-majoritarian institution (the Judiciary) will be motivated to defend the viewpoints of all the different existing minorities. A different way to defend the same argument says that the judiciary will defend the minorities because the Constitution secures the rights of the minorities, and the judges' mission is that of protecting the Constitution. The argument fails, however, in assuming that the Constitution has one and basically one obvious meaning. Clearly, if this were the case, and the judges always took their mission to defend the Constitution seriously, then the minorities would be relatively safe, within a so-called majority system. The sad news, however, is that the meaning of the Constitution is far from clear. Because of this, one can understand the presence of atrocious decisions (like that of "Bowers v. Hardwick") even in spite of specific constitutional clauses designed to protect the life and choices of the minorities. Similarly, in this respect, Waldron (1993).

[25] During early North American history, many politicians pointed out the risks of organizing the Judiciary in the way it was being organized. Jefferson, in particular, repeated his criticisms against the judiciary faculties in many of his writings. He feared that "the Constitution [became] a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please." See T. Jefferson (1984), p. 1426, "Jefferson to Judge Spencer Roane," September 6, 1819. The dire Jeffersonian approach to the Judiciary was undoubtedly based on his own unfortunate experiences with this branch of power. But his negative experiences reflected foreseeable problems inherent in the dynamic of the judiciary. The independence of the Supreme Court and its relative superior power gave the Court few incentives to persuade the members of the other branches: the judges knew that, under normal circumstances, their voice would prevail, no matter how persuasive the arguments against them were. The costs to reverse a firm opinion of the Court were and are enormous.

odd to characterize as a "dialogue" -as a reasonable exchange of reasons- the peculiar relationship that is normally established between these departments. As we will see, it is even more difficult to make reference to a "public dialogue," when the "public" has a severely restricted role in this whole process. Let's proceed step by step.

First of all, let me examine the structure of incentives organized by the Framers, in this respect. Above all, the Framers assumed that the main motivational force within any political system would always be self-interest. Curiously, however, they assumed that it was sensible to expect positive, reasonable outcomes, from a process of permanent confrontation among the self-interested members of the different political branches. Indeed, the Framers encouraged this process of continuous clashes between opposite political forces, through the institutional means that they created: this is what Madison meant to say with the idea that "ambition must be made to counteract ambition." Contrary to this proposal, however, we should wonder what reasons we have to share the Framers' conclusions: Why should we expect reasonable, impartial decisions from the confrontation of self-interested actors? With their conclusions, in fact, the Framers surprisingly contradicted a more reasonable inference, according to which, from the sum of different evils, a greater evil (rather than any particular benefit) would ensue.

What should we actually expect, then, if i) we maintain the assumption that self-interest tends to play a significant motivational role in the representatives' practical reasoning; ii) we recognize, also, that there are not significant "exogenous" -popular- controls upon them; and iii) we also accept that the we should not expect the Courts to challenge "partial" legislative decisions, except in rather outrageous cases? I believe that from that structure of incentives we may reasonably expect one of the following outcomes. First, we may expect that all or most of these politicians will get together and, instead of launching an irrational process of attacks among themselves, will try to reach certain general agreements, convenient for all of them (arrangements that will not necessarily be convenient for the people at large). In fact, there are certain additional circumstances that contribute to promote this type of outcome: the political class constitutes a relatively small group; its members are all linked by similar interests and similar ambitions; they spend a lot of time together; they normally control an extraordinary amount of different resources (money, opportunities, privileges). These types of situations seem ratified in many contemporary societies.[26] A different foreseeable situation would be represented by a political system within which there is no group capable of obtaining a consistent majority. Here -we could reasonably assume- the different existing political groups will "negotiate" and "exchange" specific support for specific projects, and thus create a stable situation of successive agreements. The "guiding rule," within that type of context, would be one like the following: "if you help me to approve this project, I will then help you to approve this other one." Finally, it may also happen that the different political groups find it

[26] Actually, in certain countries, like in modern Colombia or Venezuela, these types of pacts were reflected in open, written agreements where the main political elites organized the way in which they would distribute power among themselves, and explicitly excluded certain parties (typically, the left) from those arrangements.

impossible to secure even those stable agreements. Then, what we will probably find is an undesirable situation of critical stalemate or a situation of "warfare" among the different groups. These outcomes represent what Nathaniel Chipman, during early North American history, foresaw as the natural product of the adoption of the checks and balances system. As he anticipated, this would be a situation of "perpetual war of each [interest] against the other, or at best, an armed truce, attended with constant negotiations to prevent mutual destruction."[27]

The possibilities mentioned, I believe, represent the foreseeable outcomes of the system of checks and balances, organized in the way I have described. What is interesting about this analysis is that the single outcome that does not appear (and which does not seem reasonable to expect) is exactly the one that many scholars would want to infer from the system of checks and balances: a public exchange of reasons. In effect, we have no reason to expect a situation in which different groups try to offer reasons, one to the other, and try to convince each other of the importance of shifting their respective views, from the described political mechanisms. Similarly, we also have no reason to expect an attitude of openness with regard to their rivals, or a predisposition to change their minds as a result of the force of the opponents' arguments, from the self-interested, "ambitious" actors. Actually, we could affirm that "the argument[s] that [they] eventually [reached would] reflect bargaining power, not the force of argument."[28]

Significant contemporary writers expressed similar skepticism with regard to the present representative system and the idea of having a deliberative type of democracy as its result. For example, Carl Schmitt explicitly affirmed that

> great political and economic decisions on which the fate of mankind rests no longer result today (if they ever did) from balancing opinions in public debate and counterdebate . . . Small and exclusive committees of parties or of party coalitions make their decisions behind closed doors, and what representatives of the big capitalist interest groups agree to in the smallest committees is more important for the fate of millions of people, perhaps, than any political decision.[29]

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[27] Chipman (1833), p. 171.

[28] See Jon Elster (1991).

[29] See C. Schmitt (1992). Other scholars, recognizing most of the facts depicted by Schmitt, have tried to show that interest groups may also foster certain type of deliberation within the political process. In particular, Mansbridge has taken the position that "interest groups play a central role in the deliberative political process. They provide much of the information and insight that changes the preferences of the public and their elected representatives. They also provide the institutions through which another set of representatives, the interest group elites, deliberates and decides upon the best interests of their constituents and of the polity as a whole. To a lesser degree they also provide institutions through which members of the interest group can deliberate with another and with their representatives." However, Mansbridge has to recognize that, in any case, this situation represents nothing but a "corporatist deliberation." See Jane Mansbridge (1992), p. 53. Mansbridge does not normatively support this situation; she proposes, like Schmitter, to allow "all sort of interest groups to take on semipublic status" that would be "publicly financed" (p. 41). She also has to recognize, however, the serious obstacles presented by the type of reform she advises (pp. 51-53).

WE THE PEOPLE AND INTERBRANCH DIALOGUE

According to some contemporary scholars, a picture like the one I presented would not constitute a complete picture of the present institutional system. My description, they could affirm, does not seem to seriously take into account the role and the impact of popular intervention, within the political structure. Herein, I will present two different forms of this criticism.

The first response that I will analyze is defended, among others, by Stephen Holmes. Holmes maintains, I think, a more "classical" conception about the potential virtues of the system of checks and balances, and the relationship that is established between it and the people at large. According to Holmes, the "balanced" system incorporated into the U.S. Constitution makes it very easy to influence the system "from the outside." He affirms: "A constitutionally imposed equilibrium -he affirms- may make the government as a whole resemble a barometer, more sensitive to fluctuations in public opinion than any single-branch regime would be." "In this sense," he concludes, "checks and balances may contribute directly to popular sovereignty."[30]

The main idea in the presented view seems to be the following: the system of checks and balances depends, at least in part, on significant external controls that change the whole functioning of the political structure. It is true that the "engine" of the system is self-interest, but there are good reasons to believe that self-interest (as Madison suggested) may ultimately promote a valuable political dynamic. Why? Mainly, because different political elites will want to mobilize the citizenry for their support: in this sense, and to gain popular support, they will be ready to denounce the incompetence of their opponents, and will try to present alternative and more attractive political proposals. Holmes describes this situation in an interesting way:

> This divide-and-rule strategy may prove democratically useful because the public at large is likely to be preoccupied with nonpolitical affairs and is, in any case, a highly diffuse body, difficult to keep mobilized and focused for any length of time. To compensate for its own inability to subject public officials to ongoing scrutiny, the democratic electorate creates divided government...The underlying idea [of the divided government] is that public officials will act more consistently in the interest of the public if they believe they are being scrutinized by rival politicians who, in turn, have clear incentives to alert otherwise distracted voters to gross public malfeasance and ineptitude...the separation of powers is potentially democratic in this simple sense...Under favorable conditions, constitutionalism may help avoid tyranny by creating a system in which institutionally autonomous representatives of the people monitor each other and publicly report their findings, thus increasing the chances that rulers will be held accountable by the ruled.[31]

Summarized in this way, the picture that Holmes presents seems very different from the one that I presented. Basically, our different descriptions and expectations come from the different way in which we perceive the influence of "We the people" within the institutional system. Holmes recognizes the importance of self-

[30] Stephen Holmes (1995), p.166.
[31] Ibid., p. 271.

interest within the political system, as well as the existing distance between the representatives and the electors, and the fact that most political decisions, in the end, are made by the first and not by the second (the second being a majority mostly occupied in non-political affairs, and basically unconcerned about politics). In spite of that, Holmes defends the representative system because he assumes that the delegates themselves feel seriously threatened by the people's changes of humor. This very fact alters the complete picture because it incorporates a whole new set of incentives: given their objective to achieve political power, different political groups are then motivated to exploit the sympathies and angers of "We the people," one against the other. Thus, as a result of this situation, all benefit: each group starts controlling the rivals' behavior, and politics starts moving closer to the people's preferences.

I have already presented some reasons that undermine these types of claims, and the idea that the people are actually able to play such a significant role. However, for the sake of argument, let us assume that the representatives are, indeed, as concerned about the people's opinion, as Holmes assumes. Conceding this point, then, has Holmes reason to arrive at the conclusions that he does? Let me explain why I disagree.[32]

First of all, and in the best case, the described functioning of the representative system does not seem particularly attractive: what actually seems to happen there is that the representatives use the people as a mere means to satisfy their own ambitions. This is, in fact, what Holmes' description assumes: the representatives appeal to the people just to preserve their position in power or to take someone else's position; to improve his or her image, and to damage someone else's image. As a proposal for a democratic government, the described situation is quite frightening. However, one could argue that, in the end, the only important thing is that the people tend to achieve their most preferred outcomes. Why not to put the process in a black box and just focus on its outcome? The people would tend to get what they want, even though they would obtain it as a mere by-product of (what we could call) an exploitative situation. But, is it reasonable to believe this? Again, I think that the answer has to be negative.

To arrive at a negative conclusion we do not need to take into account much more than the very facts that Holmes assumes. We only need to recognize that the representatives tend to act in a self-interested way, that the institutional system makes room for that motivation, and that the people are quite distant from the political elites (although they preserved the power to somehow punish the representatives). But by taking into account only these basic facts, we can arrive at conclusions that differ greatly from the ones presented by Holmes.

First, it does not seem reasonable to deduce, from the structure of incentives mentioned, that the representatives will, in the end, promote most of the people's demands. Given their isolation from the people and their self-interest, they will

[32] See, in particular, the conclusions of his book.

economize their efforts, and will probably pick a few, among the different popular demands (also, it may perfectly well be the case that these demands are relatively unimportant for most people, although important enough to challenge the position of the political opposition). Moreover, it may be the case that the representatives do not even pay attention to the majority claims, but just to those claims that belong to the most influential groups in society. Why care, for example, about relatively powerless minority groups, which are normally even reluctant to promote judicial demands?

Moreover, the fact that the representatives tend to appeal to certain popular demands does not imply that these demands will be satisfied. It may perfectly well happen that the representatives decide to appeal to the people just to obtain their support before certain specific situations but abandon most of their expressed popular commitments once they obtain what they want (e.g., when they come to power). In order to keep their obtained benefits, it may be enough for them to satisfy very specific demands (e.g., the demands of the most powerful interest groups) or to launch brutal attacks against their rivals (even attacks against the private lives of the rivals) or to gain the public's attention through periodical "political fireworks." Sad as it is, this picture does not seem completely foreign to contemporary politics.

Such a picture does not imply to assume that the people are too easy to deceive. Most people may simply just lack the energy, resources, political means, or the patience to assume a different –more active- role within the described system. They may be more or less resigned to their situation, as a result of the lack of institutional channels for expressing their protests.

Bruce Ackerman presents an alternative, more provocative view with regard to the role of "We the People" within the contemporary institutional system. According to his description, the people do not participate in politics only indirectly, influencing the representatives through their periodical votes. On the contrary, Ackerman shows that, normally, the people play a significant and direct role in politics: they have their own voice and an adequate institutional system should be prepared to interpret and respect it.

According to this argument, some of the problems that I attributed to the present political system (the isolation of the representatives; the risk of self-interested measures; the dominance of "bargaining" strategies) appear to be rather obvious and unproblematic. Clearly, we have no guarantees that "the constitutional machine will invariably produce tolerable results." We will always face "the danger that normal government will be captured by partisans of narrow special interests."[33] Self-interested decisions are usual or at least foreseeable products of normal politics. Moreover, one should not consider the fact that the people do not always decide to "stand up" and directly adopt or enforce the measures they most prefer as a political catastrophe. According to Ackerman's opinion, we have to respect the people's decision to limit to their engagement in public life. We have to understand that "public-regarding virtue is

[33] Bruce Ackerman (1988), p. 171.

in short supply."

Facing such a situation, we simply have to "create a structure of government that will permit us to make the most of what virtue we have."[34] Also, considering that the people only engage in politics in very extraordinary moments, we have to be particularly prepared to recognize and give adequate weight to "those rare occasions when American people after sustained debate and struggle hammer out new principles to guide public life."[35] That is, we have to ensure that our institutions will respect and preserve these extraordinary moments that Ackerman calls "constitutional moments."

We should wonder, however, whether or not the attitude that Ackerman recommends is too complacent with the political status quo. In effect, if it is true -as I tried to demonstrate- that the institutional system was organized out of a strong bias against collective deliberations, then conceptions like the one defended by Ackerman are hardly acceptable. In effect, it seems implausible to defend the citizens' usual "apathy," when the institutional system was in part designed to discourage public intervention in politics. The U.S. institutional system, in this respect, was (also) the product of a reaction against a radical model of political organization. Most of the mechanisms that it adopted, like most of the mechanisms that it rejected, were the result of an explicit choice: a choice against the model of popular political activism that dominated many North American communities, in the decade that preceded the Federal Convention. The model that the Framers' preferred, in this respect, was created -as we analyzed- in opposition to the political mechanisms and practices that distinguished this era: collective petitions to the authorities; very short term mandates; the right to instruct the representatives; the right to recall elected politicians; mandatory rotation for most public positions, etc.

Once we recognize the importance of the Framers' choice against a politically active citizenry, then, we cannot value the subsequent political passiveness of "we the people" as the conscious and preferred choice of "the people." One has to admit that, at least in part, political apathy is the product of the political framework within which those people live, and the particular incentives that the framework creates. To state this, of course, does not mean to imply that our political choices are merely a result of the institutional framework of our society, or that we are completely "imprisoned" within a particular political design. Rather, I am interested in pointing out a much more modest but -I think- still significant claim: that we cannot forget how strongly the institutional system affects our current political motivations.

FINAL NOTES

In the very foundations of the representative system, as in most of the institutions that still distinguish it, I have argued that we find a clear bias against collective discussions. When we recognize this bias we have a better chance of understanding some of the

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[34] Ibid., p. 173.
[35] Ibid., pp. 182-183.

problems and some of the features that still characterize the political system: the enormous distance that tend to separate the representatives from the people at large; the development of the system of judicial review; some of the virtues and defects of the system of checks and balances; the absence of clear incentives for promoting the intervention of the people in politics. In the previous pages, I tried to critically examine the evolution of this counter-majoritarian bias. I presented some of the historical facts that explained its origins, and some of the reasons that were used to support it.

Clearly, the presence of this "bias against public discussion," during the Founding period (in particular, I am thinking about the U.S. Founding period), does not imply the impossibility of reforming the political system to reach a more "deliberative system." Certainly not. In fact, we may easily recognize that the political organization of society has changed quite substantially since its creation. Just to mention a few examples, we could say that we do not presently have, as we used to, so many groups openly discriminated against in political life; or that the rights of free expression and free association have never seemed more robust.

However, in the same way that it seems wrong to believe that we are "trapped" within an elitist and static regime, it seems also wrong and unreasonable to think the opposite: that the political system is capable of evolving with complete independence from its original orientation; that we can re-organize the system more or less as we please; that institutions grow within a "political vacuum." In fact, as I tried to demonstrate, the evolution of the institutional system seems completely coherent with its ancient roots. As a result of this, among other things, we still have a political system that tends to be more sensitive to the pressures of interest groups than to popular pressures. In addition, none of the significant changes that affected the system (e.g., the evolution of the practice of judicial review) appeared as a fundamental rupture with the past, but rather as a clear expression of the continuity of its main trajectories.

The previous pages may be useful to those still committed to a radical political model, in order to identify at least two of the main problems that still distinguish modern democracies. Above all, present decision-making processes still seem unattractive given their difficulties in i) promoting political deliberation, and ii) securing a reasonable representation of all the potentially affected agents. In part, these problems constitute the foreseeable effects of the "original" ideas that organized the representative system: a profound distrust in the practice of town meetings and the ideal of public deliberation; the theoretical preference for individual rather than collective reflection; the assumption that not all individuals are equally endowed with reason; the idea that the interests of the people and their will "very often differ."

Obviously, it is not clear what reforms a radical activist should pursue in order to improve both the deliberative and the representative character of the representative system. In fact, one should not face these problems with the assumption that there is a solution available for each of the problems that we confront. However, it is always better to have a more profound understanding of the sources and scope of

these problems. In this sense, for example, it seems important to recognize that Congress has a structural incapacity to "embody" the whole society, an ideal that the Framers somehow thought was possible to achieve. We should also recognize and accept that "politics" transcends the doors of Congress: like the old English radicals, we should recognize the importance of extra-Parliamentary politics. As the old U.S. radicals did, we should also point out the limitations of the system of checks and balances, emphasizing, at the same time, the need for promoting a more active intervention of the people in politics and closer links between the representatives and their constituency. Clearly, this latter claim does not imply the transformation of the representatives in mere "mouthpieces" of the people, but a restoration (or creation) of a stronger sense of responsibility within the political class.

Also, we should take Madison's advice more seriously, with regard to the need of providing public officers with the motives and means to allow them to fulfill their tasks. In particular, we should create incentives to promote and open the political discussions to the people at large. Presently, most people may feel reasonably discouraged from presenting public arguments when there are no clear means to channel those expressions. In addition, I pointed out certain obvious problems with the dominant system of judicial review. As I mentioned, our need to have external controls over the political branches, as well as our need to improve political discussions or to favor the inclusion of the "displaced voices," do not necessarily drive us to the present system of judicial review. There are -as I argued- good reasons to object to the integration, functions, and authority of the Judges, in general, and the Supreme Court, in particular.

Finally, I should clarify that this defense of a system of public deliberation should not be misunderstood: mainly, I am not assuming that a majority has theright to impose its view in all types of questions, even after a fair discussion and "sedate" reflection. This topic -the proper scope and limits of collective deliberation- is extremely complicated, and here I will only present some initial suggestions in this respect. I think that we have good epistemic reasons to prevent any majority from interfering with issues regarding personal morality (e.g., our personal life plan; our religious and ideological convictions; our sexual preferences; even our "modest" options -what books we want to read, what music we want to listen to, what food we want to eat or not to eat). The idea is the following:

First of all, the best model of public deliberation advises us to decide all our common problems through a process of collective reflection -problems related to what we could call inter-personal morality. The most important reasons for suggesting this model were epistemic: if we failed to actually consult all those affected by our decisions, we run the enormous risk of making the wrong decision, that is, we run the risk of misinterpreting or ignoring the needs and interests of those affected. Deliberation, in this respect, appears as a significant epistemic tool for the adoption of impartial decisions, that is, decisions that properly respect our diverse viewpoints. A different procedure (imagine, the individual reflection of the better educated among the people; or the isolated meditation of the oldest, among them) would have probably

resulted in a worse outcome for these people in terms of impartiality. In fact, assuming that, in a certain way, we are the "best judges" of our own viewpoints (that is, assuming that we tend to know better than others what decision we prefer within different contexts), an open process of collective reflection facilitates the exposition of the required information and the mutual correction among all those potentially affected.

However, the same epistemic reasons that support deliberation, in this example, do not seem to support a process of collective deliberation when we talk about issues of personal morality. Why should we put the question of how to develop our personal life projects under public consideration? Why should the people accept the majority preferences with regard to which God to honor, what music to listen to, what book to read, what landscape to observe? Actually, assuming that we are the "best judges" of our own lives, we have no reason to call for the authority of others in personal issues. As far as my decisions do not affect someone in a significant way, we could perfectly well refuse to accept the authority of any majority decision: in personal issues, impartiality is not at stake. Thus, we have no good epistemic reasons to resort to collective deliberation. We would have good reasons, instead, for rejecting the majority decision to impose its own opinion with regard to personal issues as improper perfectionist attempts.

At this point, however, there are many questions left to resolve: how to distinguish between issues of personal or inter-personal morality? Who should carry out this distinction? Who should be in charge of, say, preventing the enforcement of perfectionist legislation (the Judiciary?)? In any case, these comments may be useful, if at all, for recognizing the types of problems to which I am referring, and, thus for highlighting some of the limits and the probable scope of the undeveloped project of public deliberation.

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