IN PRAISE OF REBELLION: CONSTITUENT POWER, DEMOCRACY, AND THE AMERICAN REVOLUTION

by

Márcio Ferreira Rodrigues Pereira

A thesis submitted to the
Faculty of Law
in conformity with the requirements
for the degree of Doctor of Philosophy

Queen’s University
Kingston, Ontario, Canada
January 2018

Copyright © Márcio Ferreira Rodrigues Pereira, 2018
Abstract

There seems to be a consensus today that representative democracy is facing a period of severe crisis. Contemporary scholars and popular commentators from the most diverse backgrounds and political leanings seem to agree with this diagnosis. Voting, party membership, trust in politicians, and interest in mainstream politics, the most celebrated indicators of political scientists to measure representative democracy’s “health,” are all under great stress in several countries. However, a closer look at the history of what we today call “representative democracy” would reveal that the current crisis (although perhaps one of the most severe) is not really original. On the contrary, representative politics has been time and again plagued by the explosion of crisis. To address this vexing question, this dissertation adopts the following strategy. Initially, it situates its analysis within the context of the American Revolution. Since the American Revolution represents one of the most important events for the emergence of the project of “representative democracy,” the examination of aspects of this episode can provide insight for understanding the frequent crises of representative politics more generally. In addition, this dissertation examines the dispute over the concept of constituent power (and democracy) that erupted throughout the American Revolution between the Federalists and the dissident strands of the Revolution. The investigation of this dispute has two main goals. The first is to present an alternative path for the dominant view on constituent power (and democracy). The second is to provide insights for the reflections on the limits of representative democracy. On this latter point, I argue that the alternative perspective of constituent power can function as a potent tool to address the recurrent crisis of democracy.
Acknowledgements

I could not have make it to this point without the help and support from a great many people. I would like to begin by warmly thanking both of my supervisors – Christopher Essert (Queen’s University) and Homero Santiago (University of São Paulo) – for their outstanding support. Their assistance, guidance and generosity throughout the entire doctoral period were decisive to make it to this final stage. Thank you so much!

Likewise, I am very indebted to the staff and professors of Queen’s and of University of São Paulo. Without their assistance, I would never have been able to arrange and conclude the cotutelle agreement between the two Universities. Here, in addition to my supervisors, I am especially grateful to Michael Pratt, Regina Celi Sant Ana, Sandra den Otter, Brenda Brouwer, Sharry Aiken, Phyllis Reid, Gary Wilson, and Dianne Flint.

Additionally, I am thankful to the members of my thesis committee, especially to Stacy Douglas (my external examiner), for accepting the invitation to participate in the committee, reading my thesis so carefully, and providing me with several insights. I am also grateful to Jon Miller who accepted to participate in my qualifying examination committee and made valuable suggestions to my work.

I am also indebted to The Social Sciences and Humanities Research Council of Canada (SSHRC) – for granting me a doctoral award – and to the staff of the Federal University of Ceará (Brazil) – for conceding me a leave permit. Both the award and permit, were essential to make the conduction of my research possible.

Finally, I am very grateful to my family and friends. In respect to my family, I owe an especial thanks to my mother, Iara Pereira, for her constant support and encouragement. In
respect to my friends, I am especially grateful to Dilton Ribeiro and Christopher Peters for their assistance, encouragement, and laughs! Thanks!
Statement of Originality

I hereby certify that all of the work described within this thesis is the original work of the author. Any published (or unpublished) ideas and/or techniques from the work of others are fully acknowledged in accordance with the standard referencing practices.

(Márcio Ferreira Rodrigues Pereira)

(January, 2018)
Table of Contents

Abstract......................................................................................................................... ii

Acknowledgements................................................................................................. iii

Statement of Originality........................................................................................... v

Chapter 1 Introduction............................................................................................... 1

Chapter 2 Against “Public Passions:” Constituent Power and Hegemony in the American Revolution................................................................. 12

  2.1 Constituent Power’s Disputed Genealogy......................................................... 15

  2.2 Against a “Long Train of Abuses:” The American Revolution....................... 27

  2.3 *The Federalist Papers*: Constituent Power and Constitutional Machinery...... 40

  2.4 The Federalists’ Hegemony.............................................................................. 57

Chapter 3 Out of Doors’ Politics: Constituent Power and Dissent in the American Revolution................................................................. 60

  3.1 Another Story for America’s Constituent Power?.......................................... 60

  3.2 A “revolution in the Revolution:” Pennsylvania’s Out of Doors’ Politics....... 66

  3.3 Taming Constituent Power and the Replacement of the 1776 Constitution..... 117

Chapter 4 “A Democracy Without Qualifiers:” Elements for an Alternative Perspective of Constituent Power............................................................. 122

  4.1 Constituent Power, Democracy, and Crisis..................................................... 123

  4.2 Elements for an Alternative Perspective of Constituent Power..................... 145

Chapter 5 Conclusion: Which Democracy? .............................................................. 178

Bibliography............................................................................................................... 183

vi
Chapter 1

Introduction

“Representative democracy” might appear today as a pleonasm. But it was initially an oxymoron.

Jacques Rancière

There seems to be a consensus today that representative democracy is facing a period of severe crisis. Contemporary scholars and popular commentators from the most diverse backgrounds and political leanings seem to agree with this diagnosis. They may diverge on the causes of and solutions for the ongoing crisis, but very few deny that there is something fundamentally wrong with today’s functioning of representative politics. There is a crisis, above all, of legitimacy, they argue. Voting, party membership, trust in politicians, and interest in mainstream politics, the most celebrated indicators of political scientists to measure representative democracy’s “health,” are all under great stress in several countries.

The most obvious and powerful indicator of the current crisis, however, is to be found in the streets. The massive protests that took place in many cities around the globe in the past years — *Occupy Wall Street* (United States, 2011), “*Indignados*” (Spain, 2011), *June Protests* (Brazil, 2013), and *Gezi Park Protests* (Turkey, 2013), to name only a few — were an undeniable indicator of the existence of a deep crisis of the institutions of representation. Parliaments were surrounded, public buildings occupied, squares taken by thousands (sometimes millions) of citizens chanting slogans such as “*No nos representan!*” (“They don’t represent us!”). Actually, the very practices and forms of organization of these movements (horizontal, leaderless, and
based on processes of collective decision-making) epitomized a clear rejection of what has passed for representative politics.

Likewise, the recent popularity of openly reactionary candidatures observed in some countries, especially from 2016 onwards, can also be interpreted as a sign of rejection of the traditional functioning of the system of representation. Although in this case the response to disaffection toward representative politics is “less democracy rather than more,” even so, the popularity of these campaigns is, too, a clear indication of the crisis of the conventional institutions of representation. From that, it follows that the anti-establishment sentiment can assume the most different of forms.

However, a closer look at the history of what we today call “representative democracy” would reveal that the current crisis (although perhaps one of the most severe) is not really original. On the contrary, representative politics has been time and again plagued by the eruption of crisis. Put differently, the recurrent attempts to reduce democracy to schemas of representation have often been accompanied by an intense resistance on the part of the multitudes.

In the face of these repeated crises, one might ask: Is there something inherently problematic with this form of government? Why has representative politics been time and again throughout its history accompanied by the outbreak of a crisis? To address this vexing question, this dissertation adopts the following strategy. First, it situates its analysis within the context of the American Revolution. But why, specifically, the American Revolution?

Although the English and French Revolutions were also pivotal events for the emergence of representative democracy, it was during the American Revolution that this project arose in
distinct form.¹ For instance, the project of a centralized representative government ruling over a vast territory and supported by a formal constitution – an apparatus so common in most countries today – is a distinct product of the American Revolution (or, more precisely, of the Federalists’ genius).² In this sense, more than any other revolutionary episode, the American Revolution (particularly the Federalists’ discourse related to it) is the event that most clearly initiated the features of today’s dominant system of government. Thus, examining aspects of this episode can provide insights for understanding the frequent crises faced by representative politics more generally. Moreover, when investigating the American Revolution and the rise of representative democracy in this dissertation, one should keep in mind the following question: So that “representative democracy” could emerge as a hegemonic political project, what (if any) political strand would of necessity have been silenced (or repressed) in the context of the revolution? The answer to this question, which will form a significant part of this thesis, will also enhance our understanding of the recurrent crises of the institutions of representation.

Another strategy that this dissertation adopts to address the repeated crises of representative politics is to concentrate on the concept of constituent power. Although a detailed development of this notion will form a central part of my dissertation, it may be useful to introduce the idea as follows. By “constituent power,” I mean the power of the multitude to create from below new democratic arrangements of social organization, including, but not limited to, its constitutional forms.

¹ Also acknowledging the importance of the American Revolution for the emergence of representative democracy are: Bernard Manin, The Principles of Representative Government (Cambridge: Cambridge University Press, 1997), 1; and Nadia Urbinati, Representative Democracy: Principles and Genealogy (Chicago: University of Chicago Press, 2006), 1. These same authors can be consulted for an in-depth genealogy of representative democracy.

² In similar terms, see Michael Hardt and Antonio Negri, Multitude: War and Democracy in the Age of Empire (New York: Penguin Press, 2004), 237-246.
But how can the examination of the concept of constituent power assist us in understanding the repeated crises of representative democracy? First of all, one should note that the notions of constituent power and democracy are, in fact, deeply intertwined. Throughout the eighteenth century, for instance, the concept of constituent power was practically indistinguishable from the notion of democracy (although at that time democracy was often dubbed republicanism). The connection between the two terms is so intense that some authors argue (correctly, in my view) that “to speak of constituent power is to speak of democracy.”

Because of the profound connection between these two notions, the concept of constituent power can function as a potent tool to address the repeated crises of representative democracy. As Andreas Kalyvas perceptively notes, “constituent power answers the need for democratic legitimacy and allows for a rethinking of the problem of the legitimation deficit that unavoidably plagues the normal politics of all modern constitutional, representative democracies.”

In other words, and as this thesis shows, constituent power enables us to challenge the theoretical mystifications and inconsistencies of representative politics.

Furthermore, it is worth remembering that the American Revolution was not only a battle between colonists and Britons over the question of home rule. It was also, and equally important, a struggle between Americans over who would rule at home. On this latter aspect, at least two perspectives of constituent power (and of democracy and government) clashed with one another.

In sum, one perspective, mainly represented by the authors of The Federalist Papers (Alexander Hamilton, James Madison, and John Jay), worked for the neutralization and dissolution of constituent power within constituted power (or, more precisely, within the institutional

---


machinery of the U.S. Constitution). First, according to this view, the exercise of constituent power should be linked to political representation. In fact, here, constituent power seems only to validly operate if exercised through representatives. I call this view’s attempt to necessarily couple representation with constituent power “delegation.” In addition, for this perspective, the constituted order should have primacy over constituent power. As a result, this view held, on the one side, that constituted power should be the natural and continuous source of political innovation and historical movement while, on the other side, constituent power should be corralled to the legitimating principle of constitutional authority. I use the term “ephemerality” (or “confinement”) to refer to this project’s attempt to corral constituent power to a brief episode.

The other perspective, mainly represented by Pennsylvania’s revolutionaries, worked to establish, especially between 1776 and 1790, a more untameable and “open” version of constituent power. Despite its internal limits and contradictions (mostly related to gender, race, and economic status), this view advocated for a much more democratic and leveling form of government than the Federalists. In fact, one of this project’s major concerns was to foster constituent power. In this sense, instead of corralling this power to an ephemeral episode (such as the enactment of a formal constitution), this perspective sought to promote the indefinite continuation of the constituent process on the surface of the social terrain. Likewise, by nourishing means for the multitude to express constituent power directly, this view challenged the “necessary” delegation of constituent power to political representatives. In this respect, when this project was not able to bypass representation, this mechanism was confined to a secondary role, keeping it, in any case, under intense democratic control.

The Federalists’ perspective, as is known, would become hegemonic and, with it, its influential project of representative government. From that moment on, democracy and
representation would become increasingly intertwined, to the point of indistinguishability. As Jacques Rancière (the author cited in the epigraph of this introduction) provocatively asserts, what was initially an *oxymoron* became a *pleonasm*. By this assertion, Rancière means that, while in the eighteenth century the notions of democracy and representation stood at odds with one another, over time, the hegemonic discourse and practice altered this perception to the point that for many today, democracy and representation practically mean the same thing. For instance, currently, one of the most important criteria for certifying the democratic bonafides of a country is the existence of representative institutions.

But this is only part of the story. The project of constituent power and democracy of the dissenting strand of the American Revolution, although defeated, would never cease to reappear in the new country and elsewhere, too. Time and again, the multitudes would resist attempts to reduce democracy to schemas of representation. The examination of this project not only offers us a potent set of tools for addressing the recurrent crises of representative politics. It also throws light on some central aspects of the complex relationship between constituent and constituted power. For instance, the investigation of the alternative perspective of constituent power makes more visible the “true nature” of this relationship. Although *constituted power* is traditionally viewed as the primary locus of political innovation and historical movement, this thesis suggests otherwise. It argues that, even in times of institutional stability, political creativity and historical movement lie much more on the side of *constituent power* than on constituted power. In other terms, constituent power, even in normal periods, constantly animates the movement of rebellion.

---

and political innovation that emerges within and against established powers. By contrast, constituted power is usually a conservative and reactive power. It moves usually to fall back on, contain, or recuperate the past political actions of constituent power. In effect, it tends to maintain a “continual repetition of the same social divisions and hierarchies.”

Besides, the investigation of the alternative perspective of constituent power that emerged during the American Revolution challenges the common assumption that this power is, somehow, predestined to materialize in a formal constitution and then wither away. Traditionally, the constitution is seen as the culmination and truth of the constituent moment. For the alternative perspective, the constitution is only a beginning of the constituent process, not its end. For this view, the constitution is never allowed to consolidate into a rigid constituted power. On the contrary, this perspective invites us to think of the constitution in constant line with the desires, needs, and composition of the multitude.

In addition, the alternative perspective of constituent power provides a platform for thinking about institutions of constituent power. Here, I should note that this dissertation maintains that in order to effectively address the frequent crises of representative democracy, it is necessary to develop institutions of constituent power. By this expression, I do not mean the institutionalization of constituent power – an idea that would contradict the line of argument developed in this thesis. Constituent power, as I contend, is irreducible to (any) institutional arrangement. In addition, by institutions of constituent power, I do not mean a somehow more progressive version of the liberal tradition of representation (i.e. a more participative form of government that maintains, nonetheless, the centrality of representation in the political system).

---

Rather, I mean, first, institutions that allow the direct action of the multitude in government. This direct engagement of the multitude, though, does not imply a complete dismissal of political representation. In certain situations, representation is not only useful but, in fact, inescapable. It implies then that representation should become secondary or, more to the point, that it should only be used when necessary (in specific situations, for precise tasks, and revocable at any time). Second, the idea of institutions of constituent power also mandates the invention of structures of governance that remain “open to further social interventions of antagonism and innovation.”

Finally, such institutions are certainly not to be conceived out of an ivory tower. That is, they should not be the product of an abstract meditation detached from the social terrain, but rather the very fruit of the constituent struggles.

Lastly, I should note that this dissertation touches on a fundamental theme of political theory: whether or not the multitude is capable of governing itself. This theme can be posed in more detailed terms as follows. If one holds that the multitude is not capable of governing itself, then “pure democracy” is impossible and some sort of transcendent apparatus – be it an elected minority, a fixed set of institutions, a rigid constituted power – will have to stand above the multitude and rule. But if one holds that the multitude is capable of governing itself “with no master and forming a constituent power, then democracy would finally be possible and all forms of constituted power could be subordinated to the rule of the multitude.” This dissertation follows the line of thought which holds that the multitude is capable of democratic self-government, implying thus that all institutions can be subordinated to its rule. However, this position is not so simple. The ability for democratic self-governement is not spontaneous (an ingrained characteristic in people), but, on the contrary, requires intense training. And, here, the

---

8 Hardt, foreword to Insurgencies, viii.
analysis of the alternative perspective of constituent power reveals once again its importance. As I contend, constituent power can work as an effective training tool for democratic self-rule. By participating in a constituent process (that is, by directly engaging in activities of governance, such as public welfare, policing, and the like) people can develop the skills for democratic self-rule.

With that said, the abovementioned themes are analysed in this dissertation as follows. Chapter Two provides a brief genealogy of the concept of constituent power. This genealogy allows us to grasp the specific circumstances from which the notion of constituent power sprang. Secondly, this chapter offers a brief contextualization of the American Revolution which prepares the terrain for examining the contrasting perspectives of constituent power (and democracy) that emerged from that event. Finally, and most important, the chapter investigates the view of constituent power developed by the authors of *The Federalist Papers* (Hamilton, Madison, and Jay). Among other things, this investigation shows not only that their conception of constituent power is deeply marked by ideas such as delegation (i.e. the attempt to necessarily couple constituent power and representation) and ephemerality (i.e. the attempt to corral constituent power to a brief episode). It also demonstrates that their view of constituent power still animates much contemporary political discourse and practice.

By drawing on one of the most potent dissenting political lines of the American Revolution, namely revolutionary Pennsylvania, Chapter Three investigates the alternative perspective of constituent power that emerged during that revolutionary event. The main theme of this chapter examines the aspects of this perspective which were silenced (or repressed) so that the Federalists’ view of constituent power could emerge as a hegemonic discourse. More specifically, this chapter shows that, instead of coralling constituent power to an ephemeral
episode (such as the enactment of a formal constitution), the view that emerged in revolutionary Pennsylvania sought, to some extent, to promote the indefinite continuation of the constituent process on the surface of the social terrain. Additionally, this chapter demonstrates that, by nourishing ways for the multitude to express constituent power directly, the alternative view of constituent power significantly challenged the “necessary” delegation of this power to political representatives.

Utilizing the perspective of constituent power that arose in revolutionary Pennsylvania as a platform, Chapter Four interprets and develops this perspective. Among other things, it makes more visible the “true nature” of the complex relationship between constituent and constituted power. More to the point, it shows that, whereas constituent power constantly animates historical movement, constituted power moves mainly to fall back on, contain, or recuperate past political innovations. In addition, this chapter challenges the assumption that constituent power is predestined to materialize and then exhaust in a formal constitution. On the contrary, it holds that, if a constitution is to be enacted, this instrument should be only the beginning of the constituent process. On the other hand, the development of the notion of constituent power in this chapter does not aim to produce, of course, a definitive conception of this power, a decisive account on this theme. In fact, it aims to produce a potent theoretical tool to contribute to the contemporary debate on the limits of representative democracy and to address the recurring crises of legitimacy of this form of government. On this latter point, this chapter maintains that, in order to effectively address such crises, it is necessary to develop institutions of constituent power – which, in short, mean institutions that allow the direct action of the multitude in government and that remain open to further social innovation.
The Conclusion of this dissertation provides some further insights to the debate on the limits of representative politics. Among other things, it argues that, although we are currently experiencing a period of severe crisis of representative politics, we are, at the same time, living in an epoch in which ideas and practices of real democracy abound around the globe. Experiments in local autonomy – such as occupying and self-managing abandoned buildings, creating citizens’ platforms, forming neighborhood assemblies, and so forth – are presently occurring in cities as varied as Madrid, Sao Paulo, San Francisco, and Istanbul. And experiments of this kind provide us with ideas of how a real democracy could take effect. Given this scenario of experimentation in real democracy, the conclusion of this dissertation holds that it is not the case that we should be mourning the contemporary crisis of institutions of representation. Rather, we should be attentive to the potential of the present. There are several openings in the social terrain that, if well articulated, can produce much more democratic, participatory, and sustainable forms of governance.
Chapter 2

Against “Public Passions:” Constituent Power and Hegemony in the American Revolution

It was the Constitution itself, this great achievement of the American people, which eventually cheated them of their proudest possession [their revolutionary spirit].

Hannah Arendt

This chapter examines the perspective of constituent power developed by the authors of The Federalist Papers (Alexander Hamilton, James Madison, and John Jay). Although the specific term “constituent power” is never mentioned in the Papers, the idea is undeniably present.

What my investigation mainly shows is that the Federalists’ political project is aimed at neutralizing and dissolving constituent power within the constituted order. In this sense, this chapter demonstrates that their conception of constituent power is pervaded by two fundamental ideas: “delegation” and “ephemerality.” By “delegation,” I mean that this view bounds constituent power to representation. Be it an elected assembly, a “commission of notables,” or a body of “extraordinary representatives,” the exercise of constituent power, in order to operate validly, must be transferred. Thus, the people themselves, according to this vision, should not exercise constituent power in a direct fashion. By “ephemerality” (or “confinement”), I mean that, in the Federalists’ view, constituent power should be confined to an ephemeral episode, such as the promulgation of a formal constitution. Once a constitution is enacted and the new political order established, constituent power should then wither away. As a consequence, this
conception, on the one side, holds constituted power as the natural and continuous source of political innovation and historical movement (constituted power is the norm), and, on the other side, maintains constituent power as a brief disruption of the institutional reality (constituent power is the exception).

On the other hand, and as already noted, the notions of constituent power and democracy are deeply intertwined. Constituent power, as Kalyvas asserts, “answers the need for democratic legitimacy and allows for a rethinking of the problem of the legitimation deficit” that unavoidably plagues representative politics. Hence, since the notions of constituent power and democracy are profoundly connected, the investigation of the Federalists’ view of constituent power can contribute to the debate on the limits of representative democracy (a debate that I will develop in greater detail in Chapter Four). More to the point, their conception can assist us in understanding some core tenets of representative politics and, as a result, in grasping the meaning of the recurrent crises of this system.

However, before beginning my examination of the notion of constituent power advocated by the Federalists, I will present a very brief genealogy of the concept itself as well as a short contextualization of the American Revolution. This genealogy will enrich the existing literature on constituent power, providing us with some historical elements related to the emergence of this concept. The contextualization of the American Revolution, on the other hand, prepares the terrain for examining the contrasting perspectives of constituent power (and of democracy and government) that emerged from that revolutionary event.

As noted earlier, although the English and French Revolutions are key events for the emergence of representative democracy, it is during the American Revolution that this form of...
government arose in distinct form.\textsuperscript{11} For instance, the project of a centralized representative government ruling over a vast territory and supported by a formal constitution – an apparatus so common in most countries today – is a distinctly American product.\textsuperscript{12} In this sense, more than any other revolutionary episode, the American Revolution (and the Federalists’ discourse in particular) is the event that most resonates with today’s dominant system of government. Thus, the examination of aspects of this episode can provide insights for understanding the frequent crises of representative politics more generally.

But when investigating the American Revolution and the rise of representative democracy, one should keep in mind the following question: So that representative democracy could emerge as a hegemonic political project, what (if any) political line would have been silenced (or repressed) in the context of the revolution? The answer to this question, which will be the main theme of Chapter Three, will also enhance our understanding of the recurrent crises of the institutions of representation.

\textsuperscript{11} Thinking in similar terms are Hardt and Negri, Multitude, 237-246. For a detailed genealogy of the project of representative democracy, see Manin, The Principles of Representative Government; and Urbinati, Representative Democracy.

\textsuperscript{12} Hardt and Negri, Multitude, 237-246.
2.1 Constituent Power’s Disputed Genealogy

The origins of the notion of constituent power can be traced all the way back to ancient Rome. As Andreas Kalyvas notes, in Roman Public Law, the verb *constitūere* (to constitute) referred to a very specific kind of legislative practice. This legislative practice, which pertained to certain commissions (such as the office of the dictator), “was regarded as superior to ordinary legislation, that is, extraordinary acts of establishing or altering the fundamental laws and institutions of the Republic.” In short, it meant the power to initiate “radical legal changes.” Similarly, the title of *cōnstitūtor* meant “he who establishes, the one who orders, the founder who exercises the power and authority to reform and transform.”

Despite its ancient roots, the idea of constituent power emerged in distinct form only during the sociopolitical processes of formation of the modern state. Having as one of its primary functions the specification of the ultimate source of authority in the state, the language of constituent power is typically modern or, more precisely, is the language of the modern revolutions. “It is during this critical period,” Kalyvas observes, “that the concept became widely

---


14 Kalyvas, “Constituent Power,” 5. According to this same author, etymologically, ‘to constitute’ “comes from the Latin word *constitūere*, which is a combination of the prefix *con*- and the verb *statūere*. The prefix *con*- has several grammatical meanings, the most important of which is “with” or “together.” The verb *statūere*, on the other hand, derives from *stātūo*, which means, “to cause to stand,” “to set up,” “to construct,” “to place,” “to erect,” “to establish,” “to create.” The word *constitūere*, therefore, literally denotes the act of founding together, creating jointly, or co-establishing.”

diffused, was sharpened, and adapted to very concrete and tense political situations.”16 Actually, modernity forged an idea of constituent power that, to a great extent, accompanies us to this day: constituent power is the people’s power to invent a new political order, including but not limited to its constitutional form.

Moreover, from that moment on, Kalyvas continues, the distinction between constituent and constituted (or legislative) power attains its fundamental place in constitutional thought, “setting the foundation for the superiority of constitutional law over ordinary legislation.” In this sense, while, on the one side, “the delegated power to legislate is conditionally exercised by an elected representative assembly within prescribed limits,” on the other side, “the power to constitute, that is, to form, alter, or dissolve the government, is absolute, vested in the entire community and in the people acting outside the parliament.”17

However, in the modern age, authors dispute the first clear appearance of the notion of constituent power. Law scholars, for instance, often affirm that the decisive emergence of the concept occurred during the French Revolution, and that the celebrated Emmanuel-Joseph Sieyès formulated it.18 Actually, this assertion should come as no surprise since Sieyès, himself, often claimed to have originated the concept.19

---

19 In the first Thermidorian discourse, Sieyès stated: “a correct and useful principle was established in 1788: it refers to the distinction between constituent power and constituted power. This principle will enter the hall of discoveries which makes science advances; this discovery was made by the French.” Here Sieyès is obviously claiming the paternity of the concept. See Sieyès, E. J. Opinion de Sieyes sur plusieurs articles des titres IV et V du projet de Constitution, prononcée à la Convention le 2 thermidor de l’an III (1795), 796 cited in Marco Goldoni, La dottrina costituzionale di Sieyès [The Constitutional Doctrine of Sieyès] (Firenze: Firenze University Press, 2009), 98.
Ascribing the concept to Sieyès is, however, erroneous. The idea of constituent power, as demonstrated below, emerged in distinct form before Sieyès and the French Revolution. In any event, the abbé’s contributions to the theory of constituent power (or better, to the hegemonic discourse about it) is undeniable. For instance, in a text from 1789, he presents his idea of constituent power in a clear fashion: “the constituent power can do everything in relationship to constitutional making. It is not subordinated to a previous constitution. The nation that exercises the greatest, the most important of its powers, must be, while carrying this function, free from all constraints, from any form, except the one that it deems better to adopt.”

An aspect to be noted about Sieyès’ conception, is that, for him, constituent power belongs to the nation alone. By “nation,” he meant solely the Third Estate – which, in opposition to the parasitical clergy and nobility (First and Second Estates, respectively), produced all the wealth of France. “The Third Estate is a Complete Nation,” Sieyès affirms in his famous *What is the Third Estate?* written at the dawn of the French Revolution in 1789. The nation, he continues, much like an individual in a state of nature, has a “right to change.” That is, it has the liberty to alter its constitution “as soon as [societal interest] requires.”

One of the greatest novelties of Sieyès’ thought is to articulate the theme of labor (or production) to the concept of constituent power. By connecting the theme of labor to

---


constituent power, the abbé sought to claim the power to create a new constitution for those who in fact produced the wealth of France (the Third Order or, as he says, the nation) and, at the same time, he attempted to exclude what he regarded as the parasitical elements of France: the clergy and nobility.

However, I should note an aspect on Sieyès’ perspective of constituent power. Although he affirms that constituent power belongs to the nation alone (that is, solely to the productive workers of France), when one examines who, in fact, was to exercise that power, the picture changes significantly. In short, for the abbé, constituent power should be exercised only by the wealthy of the Third Estate. The affluent members of this Order should elect among themselves a special body (the body of “extraordinary citizens,” as he dubbed it) to exercise the nation’s constituent power and create a new constitution for France. The millions of working poor (such as peasants and artisans) were not to directly vote for or be elected to this special body and, as a result, should not participate in France’s constitution making.

The reason for this exclusion is, to say the least, intriguing. For Sieyès, since the working poor of the Third Order were heavily engaged in the production of wealth, as well as in its own material subsistence, they did not possess the necessary time (leisure) to get involved in government matters.

---

25 Although Sieyès could never determine an exact criterion for those who had a right to have political rights, he attempted time and again to exclude the “machines de travail” (as he scornfully dubbed the mass of workers of the Third Estate) from those rights. Sewell, A Rhetoric of the Bourgeois Revolution, 145–184, 163–164.
26 Sieyès, “What is the Third Estate?,” 110. See also Sewell, A Rhetoric of the Bourgeois Revolution, 151-152, 163-165.
“extraordinary representatives” is blatantly contradictory because it restores something that the abbé seemed to oppose: the right of the idle to rule over the industrious.27

In this sense, it seems correct to say that Sieyès’s constituent power becomes the power used by the affluent classes of the Third Estate to confer on themselves the right to create a new constitution. Here, constituent power is an influential rhetorical device employed to justify the exchange of one transcendent apparatus (the monarch) for another (the body of representatives), without actually having to invest the multitude in that power.

On the other hand, for historian Willi Paul Adams, “constituent power” was born on the other side of the Atlantic, during the American Revolution. As he asserts, “Americans invented not only the thing but also the name for it.”28 According to Adams, after the Continental Congress advised the thirteen colonies to reorganize their governments on the principle of the authority of the people, the notion of “constituent power” explicitly appeared during the debates related to the making of the first state constitutions.

For instance, supporting the “Vermonters’ right to adopt a constitution without any outside interference,” Thomas Young, one of Pennsylvania’s revolutionaries, introduced the notion of constituent power in an open letter from 1777. In the letter, Young establishes a distinction between the “supreme constituent power” of the settlers and the “supreme delegated power” of the representatives. In Young’s own words: “[the settlers] are the supreme constituent power, and of course their immediate Representatives are the supreme delegate power; and as soon as the delegate power gets too far out of the hands of the constituent power, a tyranny is in

some degree established.”

According to Kalyvas, “for the first time . . . constituent power was finally actualized and given political form in the revolutionary conventions, established outside the colonial legal framework, as irregular bodies with an authority superior to the ordinary legislatures. Starting with Virginia, North Carolina, Pennsylvania, and Massachusetts, conventions sprang up throughout North America with the special task of drafting the new constitutions.” Transforming the colonies into independent states, these new constitutions, “superseded royal charters, were often elected by free men, and fell back on the town hall meetings for consultation and legitimacy.”

But a genealogy of constituent power does not really begin in revolutionary America. Law scholar Martin Loughlin argues that “the concept of constituent power was explicitly expressed during the revolutionary debates of [the] mid-seventeenth century” in the context of the English Revolution – more than a century therefore before the American and French Revolutions. As he asserts, in the context of the dispute over sovereignty between King Charles I and parliament in the 1640s, the movement called the Levellers introduced the notion of constituent power. In short, in the quarrel over the body politic between the King and parliament, “popular sovereignty” became a strategic idea for the contending political actors. By astutely arrogating popular sovereignty, parliament managed to increase its own governmental power. Henry Parker, for example, “a lawyer who promoted the parliamentary case throughout

---

32 The Levellers were a social movement that achieved a significant importance during the English Civil War. During the English constitutional conflict, one of the main issues that the Levellers addressed was popular sovereignty. “Although ultimately unsuccessful, Leveller ideas—owing mainly to their influence within the army—formed a powerful strain of political discourse during the revolutionary period.” Loughlin, “Constituent Power Subverted,” 35.
the 1640s… located the source of governmental power in the people, and assumed that that power was located in the parliament.”

To confront the parliamentarian arrogation of popular sovereignty, the Levellers explicitly posed the concept of constituent power. For instance, as Leveller Richard Overton argued in a text from 1646, all government involved a power delegated by the people “for their several weals, safeties and freedoms and no otherwise.” That is, since “the sovereign or legislative power is only from the represented to the representers, and cannot possibly legally further extend, the power of the king cannot be legislative but only executive.”

By expressing the concept of constituent power, the Levellers sought not only to question the legitimacy of parliament’s power, but also to examine how the people could express their own authority outside institutions. According to Laughlin, “Here we see the drawing of a clear distinction between the ‘constituting power’ of the people and the ‘constituted powers’ of government.” And, he continues, “contrary to parliamentarians like Parker, the Levellers did not equate parliament with the people. If government derives its authority from the people, they asked, how is the people to express its will and to control and direct a government that purports to act in its name?”

These are very significant passages. Each one of them certainly demarcates a distinct appearance of the idea of constituent power. Nevertheless, Michael Hardt and Antonio Negri aptly propose an alternative landmark for the first emergence of this concept. For them, even if the term is not expressly stated, the notion of constituent power debuted at the dawn of

---

modernity, during the humanist revolution of the Renaissance, in what Hardt and Negri call “the revolutionary discovery of the plane of immanence.”\(^{36}\)

First, I should clarify that, by “discovery of the plane of immanence,” the authors, in short, mean that humans re-appropriated the powers of creation (in science, philosophy, and politics) that had been usurped during the medieval period. According to them, “the powers of creation that had previously been consigned exclusively to the heavens [were] brought down to earth.”\(^{37}\)

The Renaissance is often depicted as a process of secularization that rejected celestial and transcendent authority over worldly affairs. Although this process was certainly important, what Hardt and Negri stress about this development is that it was really only a symptom of the primary event of this period: “the affirmation of the powers of this world.” As the authors explain, “In Europe, between 1200 and 1600, across distances that only merchants and armies could travel and only the invention of the printing press would later bring together, something extraordinary happened. Humans declared themselves masters of their own lives, producers of cities and history, and inventors of heavens.” And the authors continue, “They inherited a dualistic consciousness, a hierarchical vision of society, and a metaphysical idea of science; but they handed down to future generations an experimental idea of science, a constituent conception of history and cities, and they posed being as an immanent terrain of knowledge and action.”\(^{38}\)

In political terms, the discovery of the plane of immanence meant, in sum, a process of refoundation of authority “on the basis of a human universal and through the action of a


\(^{37}\) Hardt and Negri, *Empire*, 73.

\(^{38}\) Hardt and Negri, *Empire*, 70-71.
multitude of singularities.”39 And it was within this discovery that, according to Hardt and Negri, the concept of constituent power made its first distinct appearance.

At least two thinkers of the period presented the idea of constituent power in a distinct fashion: Italian philosopher Marsilius of Padua, in early fourteenth century, and, approximately two centuries later, the famous Florentine secretary Niccolò Machiavelli. Both were “looking for an immanent principle of causality of political phaenomena, rather than accepting a divine and transcendent principle of explanation.”40

Starting with Marsilius, it is worth noting the following. In Marsilius’ epoch, the turbulent conflict between Louis IV, the Holy Roman Emperor, and Pope John XXII over the ultimate locus of sovereignty, produced a temporary breakdown of legitimacy in the empire. As a solution to this conflict, Marsilius, in his celebrated Defensor Pacis (completed in 1324), introduced the idea of constituent power (even if the term is not expressly stated). After siding with the Emperor against the Pope (and, therefore, defending the secular against divine authority), he claimed that none of them had the authority to settle the quarrel. For him, in extreme situations like this, “there is always a final authority that decides the matter: it is the multitude . . . that possesses the right to appoint its secular and spiritual rulers, that is, to authorize them to rule.”41 In Marsilius’ own words: “The efficient power to establish or elect the ruler belongs to the legislator or the whole body of the citizens . . . And to the legislator similarly belongs the power to make any correction of the ruler and even to depose him, if this is

39 Hardt and Negri, Empire, 73.
expedient for the common benefit. For this is one of the more important matters in the polity; and such matters pertain to the entire multitude of the citizens."\(^{42}\)

But Marsilius went further. He recognized the multitude not only as the true subject with the supreme authority to appoint their commanders, but he also expanded its scope “to include the formation of government, the establishment of its fundamental laws, and the creation of public offices.”\(^{43}\) In Marsilius’ terms, “it pertains to the whole body of the citizens to generate the form, that is, the law, according to which all civil acts must be regulated, it will be seen that it pertains to the same whole body to determine this form’s matter, that is, the ruler, whose function is to order, according to this form, the civil acts of men… For to whomever pertains to generate some form, it also pertains to determine the subject of that form.”\(^{44}\) On the other side, addressing the political tensions and complexities of his time, Machiavelli, especially in his *Discourses on Livy* (written in 1517 and published posthumously in 1531), also introduces the notion of constituent power in distinct fashion (although, as with Marsilius, the term was not explicitly expressed).\(^{45}\)

In the *Discourses*, by examining and interpreting the history of ancient Rome, Machiavelli provides insights for the political malaises of the Italian city-states, which he sees as too susceptible to ruin and corruption. More specifically, he intends to offer an enduring and vibrant model of republicanism to the political actors of the time. As he inquiries at the

\(^{42}\) Marsilius of Padua, *Defensor Pacis* (Toronto: University of Toronto Press, 1956), 61
\(^{44}\) Marsilius of Padua, *Defensor Pacis*, 62, 64-65
beginning of the book: “what made possible the dominant position to which that republic [Rome] rose” or, in other words, “What enabled Rome to attain its unparalleled greatness and power.”

It is within this theoretical framework that the idea of constituent power distinctly emerges in Machiavelli’s *Discourses*. For instance, examining the vexing question whether the tumults and conflicts between the plebs and the senate were a destabilizing or enduring factor for the Roman republic (*Discourses* I, 4), he puts forward a revolutionary position. According to him, these tumults should not be feared because they were, actually, the first cause of Rome’s greatness and freedom. As Filippo Del Lucchese notes, for Machiavelli, “social and political conflict are not destabilizing political factors, but rather the grounding and animating force of free republics.” More fundamentally, tumults are “the real moving and constituent force of power itself.” In Machiavelli’s own terms,

> Those who damn the tumults between the nobles and the plebs blame those things that were the first cause of keeping Rome free, and that they consider the noises and the cries that would arise in such tumults more than the good effects that they engendered. They do not consider that in every republic are two diverse humors, that of the people and that of the great, and that all the laws that are made in favor of freedom arise from their disunion, as can easily be seen to have occurred in Rome.

Machiavelli’s praise of conflict is not a rhetorical appeal or simple provocation. Instead, it can be viewed as a serious attempt to avoid the dissolution of constituent power within the constituted order. It is an attempt to keep the “conflictual force of the free multitude” (or really

---

47 Del Lucchese, “Machiavelli,” 11.
constituent power)” alive in the republic.⁴⁹ According to Negri, “Machiavelli’s problem will never be that of closing down the revolution: the constitution for him is always the opening of the revolutionary process of the multitude.”⁵⁰

Similarly, Machiavelli’s idea of a “return to the beginning” (Discourses III.1) both confirms his praise of tumults and attests (once again) to the emergence of the idea of constituent power. Being aware of the corrupting and eroding effect of time on governmental institutions, Machiavelli contends that, if one wishes a republic to endure, “it is necessary to draw it back often toward its beginning.”⁵¹ By that, he means a constant re-encounter with the partisan and conflictual dimension of the founding moment of a free republic or really, in language closer to our mentality, the periodic reopening of the constituent process. According to Del Lucchese, Machiavelli’s return to the beginning “consists of a quasi-paradoxical movement, an advancement, by way of a return to the beginning: going ahead, living and resisting corruption is only possible by going back to the original orders and to the principles that inspired them.” It means “keeping open the initial wound whereby politics and law started marching together. It is the concrete reactivation of the initial conflict, not through the homogenisation of different political forces or pacification of conflict, but rather through its endless reiteration.”⁵²

Let me now present a very short contextualization of the American Revolution. This contextualization will prepare the terrain for examining the contrasting perspectives on constituent power (and on democracy and government) that emerged from that revolutionary event.

⁵⁰ Negri, Insurgencies, 81.
⁵¹ Machiavelli, Discourses, 663.
2.2 Against a “Long Train of Abuses:” The American Revolution

During the mid-1760s and 1770s, the sentiment that England was politically and economically oppressing American colonies became increasingly strong among colonists. England’s ever-increasing taxation on Americans combined with the practically inexistent political power that the latter exerted on the former’s Parliament was among the causes for this sentiment of oppression. In this sense, political speeches, newspaper editorials, church sermons, and private writings time and again condemned Britain “for driving the colonies into poverty and stripping Americans of their independence.”

Here, the controversy involving the *Stamp Act* illustrates well this sentiment of oppression. Passed by British Parliament in 1765, the *Stamp Act* was a direct tax imposed on Americans “on a seemingly endless list of items including newspapers, wills, deeds, contracts, diplomas, almanacs, playing cards, even dice.” Many Americans considered this law a violation of their “rights as Englishmen” not to be taxed without their prior consent. In sum, many colonists argued that because they did not have the right to elect representatives to British Parliament this institution could not impose on them this (or any other) tax law. “No taxation without representation!” as many Americans protested.

---


In response to this claim, British authorities contended that, although Americans did not vote any representatives to the House of Commons, the colonists were being “virtually represented” in Parliament. By “virtual representation,” the Britons meant that each member of parliament represented the whole British nation (including America), and not just the particular locality he came from. Moreover, British authorities argued that Americans were being virtually represented just like “nine-tenths of the people of Britain” whom did not have the right to vote.

Conversely, many Americans desired a more explicit form of consent. Instead of “virtual representation,” they demanded “actual representation.” By the latter, they meant that, in order for the English government to tax or pass any law affecting Americans, it was necessary that, first, the colonists have the right to elect representatives in British Parliament. Additionally, many Americans claimed that “[i]f the people were to be properly represented in a legislature . . . they not only had to vote directly for the members of the legislature but had to be represented by members whose numbers were proportionate to the size of the population they spoke for.”

Because of the colonists’ intense resistance to the Stamp Act (for instance, they organized a strong boycott of English products in several colonies), British Parliament wound up annulling the Act in 1766. Nevertheless, this episode illustrates well the controversial spiral in which Americans and Britons were getting more and more entangled. Moreover, the Stamp Act’s grievance marks an important moment in the American Revolution. For the first time, colonists formed an organized and broad resistance to the English government—a resistance that in the years to come would unfold in America’s independence.

However, the Stamp Act’s annulment in 1766 did not mean that the British government was willing to give up taxation; nor that it was willing to grant political voice to Americans in

---

British Parliament. Actually, after the *Stamp Act* episode, a “long train of abuses” against the American colonies, as Thomas Jefferson would later describe them in the Declaration of Independence of 1776, would take place. This “long train of abuses” included the imposition of several new tax laws on the colonists; the adoption of many mechanisms to enforce these laws; and the containment of colonial resistance through military force, among others.57

The British government’s harsh measures were met, however, by a growing resistance among the colonists. Organizing committees, creating militias, rioting, boycotting British products, ignoring the motherland’s laws, many Americans started to effectively engage in an ever-increasing opposition to England’s policies.58 And in this context of intense dispute, independence became a more and more persuasive idea among colonists.59

By 1776, with the escalation of open armed conflict between Britons and Americans, independence became an irresistible idea for many colonists. In this sense, on May 10, 1776, the Continental Congress – a convention of delegates of the colonies created in 1774 to coordinate resistance against England – voted to suppress all forms of crown authority, to be replaced by a locally created authority. Moreover, the Continental Congress was explicit that the new state governments should be created under popular rule. Based on the idea of popular rule, the activity of constitution-making would soon start in several states. And later in that same year (on July 4), the Continental Congress adopted Thomas Jefferson’s *Declaration of Independence*, declaring

---

58 Bouton, *Taming Democracy*, 31-60.
59 As Robert J. Allison asserts, Tom Paine’s *Common Sense* set on fire the idea of independence. Published in January 1776, Paine’s pamphlet “forcefully argued that the united colonies should break with the British crown. Americans had nothing to gain, and everything to lose, by remaining in the British Empire... Independence was not only possible, the pamphlet argued, but necessary... By March [1776], 120,000 copies of Common Sense had been sold; half a million copies were in print by year’s end.” Robert J. Allison, *The American Revolution: A Very Short Introduction* (Oxford: Oxford University Press, 2015), 33-34.
itself a new nation, the United States of America. The war for independence would continue until at least 1782 when the colonists, now counting on France’s military support, launched a siege on Yorktown and captured more than 8,000 British soldiers. With the signature of the Treaty of Paris in 1783, the war was formally over, and England officially recognized the sovereignty of United States.

However, if, on the one hand, the war for independence had come to an end, on the other, the American Revolution was far from drawing to a close. The American Revolution, as is known, was not only a battle between colonists and Britons over home rule, but also, and equally important, “a struggle between Americans who would rule at home.” In fact, especially during the founding decade of 1776–1786, the very meaning of the Revolution was under intense dispute. In this sense, there were at least two political projects (two perspectives on constituent power, democracy, and government) caught up in an intense struggle with each other. Although a detailed analysis of these political projects will form an important part of my dissertation, it may be useful to introduce them as follows.

_Two Americas, Two Constituent Powers_

One political project, advocated mainly by the authors of _The Federalist Papers_ (Hamilton, Madison, and Jay), and whose ideas will soon be examined in this chapter, was essentially marked by the idea of containment of the multitude’s constituent power. That is, by means of a complex institutional machinery (i.e. the U.S. Constitution), this project sought to

---

60 France, eager for revenge after its defeat in the Seven Years’ War, signed an alliance with United States in 1778. Historians usually consider this alliance decisive to America’s independence. See for instance Allison, _American Revolution_, 55-56.

corral the multitude’s constituent power. In a word, the Federalists’ project held the primacy of constituted order over constituent power. The expression “power-to-command” is a key term here.

This political project could recognize, to a certain point, the social benefits of a constituent moment, such as the overthrow of a tyrannical regime, but this same project also considered such moments dangerous if allowed to continue. As Michael Hardt notes, for this perspective, “every constitutional assembly must eventually be dismissed, every process of social experimentation must be closed down in a new constitutional order, every revolution must be followed by a Thermidor in order to hold off the threat of social disorder and chaos.” Here, constituent power is somewhat predetermined to materialize and then be exhausted in a formal constitution. There is thus a necessary end or telos to this power.

As a result, the Federalists’ political project maintains, on the one hand, that constituted power should be the natural and continuous source of political innovation and historical movement while, on the other, it corrals constituent power to the legitimating principle of the institutional order, to the ante-room of constitutional authority. In sum, in the view of this project, in terms of historical movement and political innovation, constituted power should be the norm and constituent power the exception. I use the term “ephemerality” (or “confinement”) to refer to this project’s attempt to corral constituent power to a brief episode.

The idea of “constituted power being the norm” possibly explains at least two aspects of this tradition: its intense focus on themes related to the institutional machinery (such as separation of powers, checks and balances, and the like) and its tendency to venerate formal constitutions. The latter, I should add, is a veneration that usually produces a situation in which,

---

62 Hardt, foreword to Insurgencies, viii
paradoxically, the creature (the constitutional machinery) rules over the creator (the people), and not the other way around.

Additionally, the Federalists’ project largely connects the exercise of constituent power to political representation. Here, constituent power seems only to validly operate if exercised through representatives. In this respect, one should note that representation is not a second-best to impractical direct democracy but, conversely, is the instrument best suited for the exercise of constituent power. In a word, according to this perspective, constituent power is a representative power (and democracy, I should add, is a government by representatives—and not by the multitude’s direct action). I call this view’s attempt to necessarily couple representation with constituent power “delegation.”

The fusion between constituent power and representation is aimed at, among other things, circumventing the direct exercise of that power by the multitude or, in other terms, at obliterating the democratic self-government of the many. In fact, representation was a chief apparatus resorted by the Federalists to connect and, at the same time, separate the multitude from the organs of power.

As noted earlier, the U.S. Constitution of 1787 is one of the most exemplary expressions of this political project. Especially after the ratification of this document, this political project became hegemonic – a hegemony, one should note, not circumscribed to the context of the American Revolution, for still today this vision of constituent power remains largely operative in political discourses and practices.

Moreover, this political project had a profound impact on a model of democracy that, with time, would become globally predominant: representative democracy. This impact is actually expected. That is because, as noted elsewhere, since the notions of constituent power
and democracy are deeply intertwined, the prevailing view of constituent power in a certain society has a decisive impact on the model of democracy experienced by that same community (and vice versa). In this sense, one can say, for instance, that the prominence of representation in today’s democracies is a result of the aforementioned idea of constituent power’s delegation. Likewise, the confined role assigned to constituent power in contemporaneous systems is a consequence of the notion of ephemerality.

The other political project struggling for “rule at home” comprised several dissenting political lines, including but not limited to the so-called Anti-Federalists. These dissenting lines, one should note, did not form a cohesive group but consisted of several different strands that at times acted together. I call these dissenting lines “American revolutionaries” or simply “revolutionaries.” By “revolutionaries,” I mean here all those who not only favored independence but, equally important, were committed to inventing, from below, new democratic forms of social organization.

Particularly strong in Pennsylvania, this project represents, in many ways, an inversion of the Federalists’ vision of constituent power. Essentially marked by the multitude’s common desire for liberation, they advocated for a much more democratic and leveling form of government than the Federalists. Despite its internal limits and contradictions, this project’s major concern was to foster the multitude’s constituent power. In a word, for this political strand, constituent power had primacy over the constituted order. Here, the expression “power-to-create” can be taken as a key term.

In this light, instead of corralling constituent power to a brief episode (such as the enactment of a formal constitution), they sought to promote the indefinite continuation of the constituent process – a vision that explicitly confronted the Federalists’ idea of “ephemerality.”

Furthermore, by fostering ways for the multitude to express constituent power directly, the dissenting line challenged the traditional idea of delegation. In this respect, when this political project was not able to bypass representation, this mechanism was confined to a secondary role, keeping it, in any case, under intense democratic control.

*The Articles of Confederation and The Spirit of ’76*

Throughout the founding decade, one of the main themes under dispute by the abovementioned contrasting projects gravitated to the ratification of the U.S. Federal Constitution. More specifically, the quarrel centered on replacing the loose-knit type of association of the Articles of Confederation with the strong centralized government of the Federal Constitution. Although the Federalists and the dissenting lines generally agreed that the Articles needed changing, they strongly diverged over the newly drafted alternative to it.64

On the one hand, the Federalists urged the ratification of the Constitution. For them, it was a choice between “stability” and what they perceived as “anarchy.” In Hamilton’s terms, it was a choice between the “adoption of a new Constitution or a dismemberment of the Union.”65

---

At a more fundamental level, as Benjamin Popp-Madsen perceptively notes, this was really a Hobbesian choice between security and freedom.  

On the other hand, the dissenting lines seeking to deepen democracy and autonomy in the new states believed that the change proposed by the Federalists would cause “a lack of local democracy and direct participation and the dismantling of a vibrant public sphere.” More precisely, they feared that that the newly drafted Constitution would subject the states and the people as a whole “to taxation without adequate representation, to being ruled by an unrepresentative House of Representatives, an aloof and aristocratic Senate, and a surrogate king called the president, tyrannized by an unelected federal judiciary, and threatened by a ‘standing army’ of professional soldiers.” In order to better understand the debate on the ratification of the Constitution, it seems useful to introduce a few words on the Articles of Confederation.

Reflecting the colonists’ profound distrust of distant centralized forms of government and their exposure to the radical republican ideas of the period, the Articles of Confederation of 1781 was a legal document that gave support to the independent league style of association of the states. Under the Articles, America was no more than a loose confederation of thirteen sovereign and independent states. According to its article 2: “Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by the

---

66 According to Jay, “Among the many objects to which a wise and a free people find it necessary to direct their attention, that of providing for their safety seems to be the first.” Jay, Federalist No. 3, 36. Popp-Madsen, “Anti-Federalism,” 30.


68 Ball, introduction to The Federalist, xix.

69 Ball, introduction to The Federalist, xiv. Wood asserts that many influent colonists extensively read and imitated the English radical literature of the first half of eighteen century (radical Whigs like John Trenchard and Thomas Gordon e.g.). Above all, this radical literature, whether political polemics or belles lettres, attacked the inflated powers of the crown. Wood, “The American Revolution,” 604-605.
Confederation expressly delegated to the United States in Congress assembled.”

Within the framework of the Articles, Isaac Kramnick affirms that

[The states acted] like the sovereign and independent entities they assumed they were. Seven of the thirteen states, for example, printed their own money. Many passed tariff laws against neighboring states. Nine of the thirteen had their own navies, which often seized ships of other states. The states continually argued over their boundaries and their claims to land in the western territories. Even the terms of the peace treaty with Britain in 1783 were held to be binding on the individual states only if they chose to accept them.

In this sense, the Article’s political arrangement was marked by several distinct features: power was concentrated on the periphery (in the individual states); there was no “executive branch” provided for the central government; and the only integrative institution created at the center was the Continental Congress. On the latter, Kramnick asserts that, since “no aristocratic second chamber would be tolerated by the spirit of ’76,” the Congress consisted of only one legislative house. And he continues, “in the Congress, each state had one vote. Each state legislature had the power to decide how to appoint at least two and no more than seven delegates from that state to the single-chamber Congress. Each delegate served a one-year term . . . Compensation for the delegates while they sat in Congress was provided by the state they represented.”

The Articles provided thus considerable autonomy to the states. The population of each state had considerable freedom to create the political system that seemed most appropriate to

---

71 Kramnick, introduction to The Federalist, 21.
72 Kramnick, introduction to The Federalist, 20.
them. It occurred that, by making use of this autonomy and taken by the democratic and levelling spirit of ‘76, states like Pennsylvania (as Chapter Three shows) created significantly democratic political systems, especially for the period. American revolutionaries, when they did not themselves make the fundamental political decisions of the polity (through extra-constitutional committees, for example), invented institutions in which they could establish the closest possible connection to their representatives. Ultimately, they were seeking ways to, to some extent, keep the constituent process alive in the political system.

One of the institutions created (or really recreated) by the American revolutionaries was the state assemblies. Many states, created large and transparent unicameral legislatures under intense democratic check. This check consisted of, for instance, annual elections, limited terms, and publication of all votes and debates. However, the most important check on the legislature’s activities was the people themselves. For instance, in some states, such as Pennsylvania, the revolutionaries provided a check from below, which, in short, meant that all bills passed by the assembly, except those dealing with emergencies, had to be approved and printed for public consideration, “and then reapproved by the next session of the assembly before becoming law.”

In many states, after the people at large, the state assemblies were the most powerful source of authority. Although the new constitutions of the states generally recognized the “separation of powers,” in practice, the legislatures often dominated all the other powers

---

73 “Americans in 1776 meant to apply what they had learned from political science and to institute reforms in their new state constitutions that British radicals had been talking about for decades—broadening the suffrage, increasing the size of the legislatures, equalising the representation, establishing annual elections for most officers of government including the governors, and more.” Wood, The American Revolution, 606.

74 As Kramnick writes, “virtually every state constitution during the Articles period required annual elections for their legislators. Rhode Island and Connecticut required half-yearly elections! The state constitutions also mandated rigorous rotation schemes, setting out quite strictly how long one individual could hold any office.” Kramnick, introduction to The Federalist Papers, 23.

(judiciary and executive). The prominence of the assembly in relation to the other constituted powers produced sometimes polemical results (especially now that we are so accustomed to the judiciary having the final word in most situations). New Hampshire laws, for example, between 1784–1792, were “replete with entries showing that... the state legislature freely vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases, and even determined the merits of disputes.”

Moreover, a noteworthy aspect of post-independence America was the presence of men of modest means (e.g., moderate and small sized farmers) in the states’ legislatures. Although women, non-whites, and the very poor remained unjustifiably excluded from the political system (a theme that I will address in Chapter Three), the opening of the system was, for the epoch, unprecedented. As wealth and property requirements were reduced for holding office in most states, the presence of humble men in the legislatures increased significantly. After 1776, it was these new men who, roused and politicized by the revolutionary event, came to rule many of the states’ legislatures.

The most remarkable aspect of post-independence America, though, was not the state legislatures (nor any other official institution), but out of doors’ politics. That is, the political activity of the people themselves that, by taking place outside of formal institutions and by maintaining with the latter constant interactions (sometimes conflictual and sometimes reinforcing) produced from below new democratic forms of social organization. The engagement

76 E. S. Corwin, “The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of Philadelphia Convention,” American Historical Review 30 (1925): 520. And in another passage, Corwin provides a few more examples of the legislatures’ extensive powers: “Fines had been remitted, judicially established claims disallowed, verdicts of juries set aside, the property of one given to another, defective titles secured, marriages dissolved, particular persons held in execution of debt released.” Corwin, “Constitutional Theory,” 520.
77 Kramnick, introduction to The Federalist, 18.
in the struggle for independence and in the new governmental institutions created a new and politicized subjectivity. American revolutionaries, as Gordon S. Wood notes, had come to believe that “they were the real legislators in the society and that they could take back at any time the power they had given to their representatives… [and this] led to the fullest and most equal participation of the people in the process of government that modern history had yet seen.”\(^78\) In this context, the very mechanism of representation was at stake. People had come to believe that they could never be entirely embodied or represented by any government institution.

However, at the same time the revolutionaries were showing a remarkable capacity to invent, from below, new democratic forms of organization, several influential figures (the authors of *The Federalist*, above all) were engaged in a sharp critique against this capacity, which they viewed as an “excess of democracy.”\(^79\) In fact, the Federalists were determined, as the next topic shows, to obliterate and dissolve constituent power in the constitutional machinery.


2.3 *The Federalist Papers*: Constituent Power and Constitutional Machinery

Written between October 1787 and May 1788 by Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* achieved a remarkable recognition in its own time. Thomas Jefferson, for instance, regarded it as “the best commentary on the principles of government which was ever written.” Comparing it with Locke’s *Two Treatises of Government*, he affirms, “Locke’s little book on government is perfect as far as it goes. Descending from theory to practice there is no better book than the Federalist.” Indeed, Jefferson wisely captures one of the book’s most distinctive characteristics: its practical approach.

Although the authors of *The Federalist* held at times divergent political views, their aim was unison. The eighty-five newspaper editorials aimed at ensuring the ratification of the newly drafted United States Constitution with its strong schema of representation. Writing separately but under the same pseudonym of “Publius,” the three authors particularly addressed themselves

---


82 As Ball observes: “*The Federalist* flies fairly close to the ground, rarely soaring into the stratosphere of philosophical abstraction.” Ball, introduction to *The Federalist*, xvii.
to “the People of the State of New York,” where a special elected convention was to meet in 1787 to decide upon the confirmation of the Constitution.\(^{83}\)

Against the Democratic Tide

The Federalists intensely criticized the democratic tide (or constituent activity) of the states and the institutions that this tide created, such as the assemblies. They regarded this democratic upsurge as an excessive “zeal for liberty.” By this expression, they meant that the spirit of liberty, once so necessary to overcome the British, was now an exaggeration. According to them, rather than a “zeal for liberty,” what was now imperative for the Confederation was a steady and strong government. For instance, in a speech to the New York ratifying convention in 1788, Hamilton states:

In the commencement of a revolution which received its birth from the usurpations of tyranny, nothing was more natural than that the public mind should be influenced by an extreme spirit of jealousy. To resist these encroachments, and to nourish this spirit, was the great object of all our public and private institutions. The zeal for liberty became predominant and excessive. In forming our Confederation this passion alone seemed to actuate us, and we appear to have had no other view than to secure ourselves from despotism. The object certainly was a valuable one, and deserved our utmost attention; but Sir, there is another object, equally important, and which our enthusiasm rendered us little capable of regarding. I mean a principle of strength and stability in the organisation of our government, and vigor in its operations.  \(^{84}\)

---

\(^{83}\) According to Ball: “Hamilton took the name from the legendary Roman consul Publius Valerius, a founder and hero of the early Roman republic.” Ball, introduction to The Federalist, xiv.

More precisely, the Federalists’ critique of the democratic tide of the states was anchored in at least three points: the external security of the union; the internal conflicts produced by the type of association found of the Articles; and what they saw as the possibility of the tyranny of majority rule. I briefly examine these critiques below.

By putting forward security over freedom as the primary political value, the Federalists believed that the centrifugal configuration of the Articles was inadequate to protect Americans from the external dangers of other nations. For them, a “standing army” of professional soldiers subordinated to a strong unified government (i.e. the U.S. Constitution) was necessary to guarantee the security of the new country. As Hamilton famously writes, “Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates... To be more safe, they at length become willing to run the risk of being less free.”\textsuperscript{85}

Likewise, in the Federalists’ view, the Articles were also inappropriate to protect the new country from internal conflict and sedition. As Popp-Madsen asserts, for the Federalists, “just as nations are in a state of nature with each other, so would the confederate states be without” a strong centralized government. In Hamilton’s words, “to look for continuation of harmony between a number of independent, unconnected sovereignties situated in the same neighbourhood would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages.”\textsuperscript{86}

Moreover, according to the Federalists, the Articles could not avoid what they saw as one of the main problems of the states’ democratic upsurge: the “tyranny” of majority rule. Although I will address this theme in depth in Chapter Four, a few points should be introduced here.

\textsuperscript{85} Hamilton, \textit{Federalist} No. 3, 61-62. See also Jay, \textit{Federalist} No. 2-5.  
\textsuperscript{86} Hamilton, \textit{Federalist} No. 6, 48. See also Hamilton, \textit{Federalist} No. 7-9.
Madison is one of the best-known commentators on the topic. He specifies at least two cases, one economic and one religious, in which he believes that majority rule can become tyrannical. In the economic example, he claims, in the famous Federalist 10, that the affluent minority faction can suffer the rule of the poor majority, thus threatening the former’s economic privileges.\(^{87}\) In the religious example, he, in short, argues that, in a system in which the majority rules, if a dominant sect assumes government, there will be no mechanism to protect religious minorities.\(^{88}\)

Madison’s ingenious solution to contain the rule of the majority was the creation of a strong system of representation (that is, the U.S. Constitution) that would connect and, at the same time, separate the multitude from government. According to him, the virtue of this new system of representative government is that it makes popular rule possible within vast territories while ensuring “the total exclusion of the people, in their collective capacity, from any share [in the government].”\(^{89}\) Representation would separate the government from the voters and their will. In Madison’s view, an “enlightened” and “virtuous” group of individuals, selected through a strong schema of representation, was necessary to guard economic and religious minorities against the “deluded multitude.”\(^{90}\) In a word, the group of representatives would be able to outvote the will of the majority.

Thus, Madison did not question the notion that the people were the source of legitimacy – “as the people,” he states, “are the only legitimate fountain of power” – but rather he asked

\(^{87}\) Madison, Federalist No. 10, 74.


\(^{89}\) Madison, Federalist No. 63, 385.

whether they were able to practice real democracy and rule themselves. 91 Ultimately, Madison’s solution to majority rule is aimed at neutralizing the direct action of the multitude in government, or, in reality, dissolving their constituent activity within the constituted order.

Likewise, from that moment on, the discourse in favor of representative government was anchored in two fundamental promises: to make “democracy” viable across vast territories and to protect minorities from tyrannical majorities. These promises would become so influential that they are still used today to justify the hegemony of representative politics. However, as the third chapter shows, it is highly questionable whether we can today, having passed through more than 200 years of the hegemony of representation, go on saying that representative democracy indeed fulfills these promises.

_The Federalists, the Right to Revolt, and Constituent Power_

I now examine a topic addressed by the Federalists’ (especially Madison) that directly touches on the theme of constituent power: the right to revolt. This examination will deepen our understanding of the Federalists’ view of constituent power.

In the United States, the right to revolt, also dubbed by contemporary scholars as the “right to alter or abolish,” first appeared in the Declaration of Independence of 1776 and, later, in several of the state constitutions. As the Declaration famously states, “whenever any form of government becomes destructive of these ends [life, liberty, and the pursuit of happiness], it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem

---

most likely to effect their safety and happiness.”

The right to revolt can be seen as one of the most distinctive expressions of constituent power. The articulation between the two is so evident and intense that some authors denote the right of revolt as “the right to the expression of constituent power.” But what exactly meant the right to revolt in the context of revolutionary America?

First, it certainly involved, in a Lockean sense, a right to resist against a tyrannical government. That is, a right to rebel against extremely dire circumstances imposed by rulers. However, in revolutionary America, due to the primacy acquired by the people out of doors over institutions, the right to revolt was not only a mechanism of resistance. It was also an instrument of creation, enabling people to invent from below new democratic forms of social organization whenever they wished. Breaking loose “from its traditional moorings of resistance to oppression,” the American right to revolt, as a constitutional principle, did not require a last-ditch effort of a desperate people. As Akhil Reed Amar observes, “the people could properly amend whenever they deemed the status quo outdated or imperfect.”

With that said, I now examine Madison’s view on the right to revolt. At first glance, Madison seems to admit in full the right to revolt. For instance, in *Federalist* No. 40, quoting the text of the Declaration of Independence, he explicitly invokes “the precious right of the people to

---

93 Negri, *Insurgencies*, 149.
‘abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.’”

However, a more careful look at his work reveals a somewhat different story.

One of the issues that Madison addresses is whether the Philadelphia Convention (May 25 to September 17, 1787) could exceed the mandate granted to it by the Annapolis Convention of 1786 and the Congressional Act of 1787. The two documents had authorized the Philadelphia Convention for the sole and express purpose of revising the Articles of Confederation.

However, many influential actors, including Madison, were determined to (and in fact did) exceed the powers granted to the Philadelphia Convention. Their intention, as is now known, was to create a radical new government – the one projected by the new Constitution. Nevertheless, for the approval of the new Constitution, the Federalists needed to obtain the ratification of the legislatures of every state, a procedure required by the existing Articles of Confederation. In substitution to this ratification procedure, the Federalists adopted two interesting maneuvers at the Philadelphia Convention. First, they bypassed the requirement for the ratification of states’ legislatures. Instead, they convoked smaller state ratifying conventions

---

98 Madison, *Federalist* No. 40, 249. Similarly, Hamilton, in *Federalist* No. 33, 199, states that, “If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify.”

99 The Philadelphia Convention was the famous gathering that drafted the U.S. Constitution and projected a radical new form of government.


101 The final provision of the Article 13 of the Articles of Confederation reads, “And the Articles of this confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislatures of every state.” “Articles of Confederation: March 1, 1781,” http://avalon.law.yale.edu/18th_century/artconf.asp (accessed February 1, 2017).
convened specifically for this purpose. Secondly, they required the consent of only nine state conventions for successful ratification.102

What is interesting here is one of Madison’s arguments in favor of the legitimacy of the Philadelphia Convention. He uses “the right to revolt” to defend the authority of the Convention. In his words,

They [the members of the Philadelphia Convention] must have reflected, that in all great changes of established governments, forms ought to give way to substance; that a rigid adherence in such cases to the former, would render nominal and nugatory the transcendent and precious right of the people to “abolish or alter their governments as to them shall seem most likely to effect their safety and happiness,” since it is impossible for the people spontaneously and universally to move in concert towards their object; and it is therefore essential that such changes be instituted by some informal and unauthorized propositions, made by some patriotic and respectable citizen or number of citizens.103

By inscribing Madison’s discourse in its own context, we can obtain important features of his view about the right to revolution and, as a result, about constituent power. A closer look at the composition and functioning of the Philadelphia Convention gives a more precise idea of Madison’s conception of constituent power.

On the composition of the Convention, it is worth noting that from the seventy-four delegates that were named by the legislatures of twelve states, only fifty-five showed up in Philadelphia – “an indication of either how unimportant some contemporaries regarded the

102 In this sense, Article 9 of the newly drafted Constitution stated that: “The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States, ratifying the same.” “U.S. Constitution: Article VII,” http://avalon.law.yale.edu/18th_century/art7.asp
103 Madison, Federalist No. 40, 249 (emphasis in original). Similarly, in Federalist No. 43, 276, defending the new ratification procedure created by the Philadelphia Convention, Madison declares, “to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.”
meetings or how opposed some were to changing the Articles.”

Of the fifty-five delegates present, nearly 60 percent had attended college. Law was the largest profession represented, followed by merchants and planters. Thus, the composition of the Convention was very different from that commonly found in states’ legislatures. Instead of the legislatures’ class pluralism (small farmers, merchants, lawyers, and the like), at the Convention, there was a strong predominance of the wealthy.

It is also important to consider the functioning of the Philadelphia Convention. Working in total secrecy and keeping no record of its voting sessions, the Convention managed to circumvent the popular participation seen, for instance, in the states’ legislatures. Moreover, “votes were taken by state delegations, and seven votes were necessary for the passage of any issue.” As Kramnick asserts,

No official record was kept of who voted yea or nay on any issue. This lifted any barriers to delegates changing their minds, since they had not been recorded in any firm position. No reports of the summer’s deliberations were allowed outside the convention until its conclusion. Holding the daily sessions in total secrecy, it was felt, allowed the delegates to be candid with each other and also encouraged the changing of minds in a spirit of compromise. It also served, of course, to insulate the delegates from the pressure of public opinion. It was agreed to allow any delegate at any point to move the reconsideration of any issue or any previous vote. This again allowed delegates the chance to change their minds and to be open to compromise, since there was little pressure that every vote would decide the matter at hand once and for all... Since the deliberations were secret, it is fair to ask how posterity would know some of the verbatim speeches and votes. The answer is the tireless

104 Kramnick, introduction to The Federalist, 28. For instance, Rhode Island’s legislature sent no delegation. “Controlled by a radical agrarian party..., [Rhode Island’s legislature was] wary lest there emerge from the convention a requirement that debts be paid in species.” Kramnick, introduction to The Federalist, 28.
105 Kramnick, introduction to The Federalist, 28.
106 Kramnick, introduction to The Federalist, 29.
Madison. His exhaustive notes, taken at each session, provided history with the running account of the convention’s proceedings.107

After this brief contextualization of the Convention’s composition and functioning, we can better comprehend what Madison had in mind when he invoked the right to revolt in *Federalist* No. 40.

Although Madison recognizes that the right to revolt (or really, the right to express constituent power) rests ultimately in the “the people,” the people themselves are not to exercise this right directly.108 Here, the exercise of constituent power is a matter of a few specialists. The fifty-five well-educated delegates of the Philadelphia Convention, the men of superior talent and wisdom, are, according to Madison, in better condition to exercise constituent power and, as a result, to create a new government.109 As Gottfried Dietze writes, for Madison, “it is much safer... to have confidence in the good judgment of the rulers than in the passions of an excited and dissatisfied people.”110

The idea of delegation – meaning an inexorable transfer of the exercise of the multitude’s constituent power to a transcendent apparatus of rule – is thus a fundamental element of the Federalists’ view of constituent power. In this sense, it seems that constituent power only operates validly if it is exercised through political representation.

---

107 Kramnick, introduction to *The Federalist*, 29.
108 Madison, *Federalist* No. 49, 310.
109 Madison’s defense of a constituent power exercised by specialists can be confirmed in his other writings. For instance, in his critique to the popular character of the states’ legislatures (Federalist No. 47); and especially in his critique to the composition of these assemblies. In the latter case, Madison, in 1788, writes that the state legislatures were filled with “men without reading, experience, or principle.” Cited in Kramnick, introduction to *The Federalist*, 24.
In fact, for Madison, it is not only the exercise of constituent power that is a matter of specialists. In his view, the very idea of representation should be intensely connected to the notion of specialization. Throughout his work, he repeatedly speaks about the necessity of applying “filters” in political representation in order to generate specialized representatives. This assertion would become known as the “filter metaphor.” In his view, the new government – by shifting the power to the center, by creating a national legislature, and by implementing indirect elections of governing officials (such as senators) – would promote the necessary filtration for political representation. In Madison’s terms, the new government would “[refine] the popular appointments by successive filtrations” and, as a result, would “extract from the mass of the society the purest and noblest characters which it contains.” In the famous *Federalist* No. 10, his defense about the “filtering principle” is even stronger:

[Republican government over a large country] would 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. Under such a regulation it may well happen that the public voice pronounced by the representatives of the people

---

111 Madison, *Federalist* Nos. 10, 62, 63.
112 Kramnick, introduction to *The Federalist*, 37.
113 For Madison, *Federalist* No. 62, 349, senators should be appointed by the state legislatures rather than being directly elected by the people. Hamilton went even further. He defended that senators should be appointed for life. “Madison Debates: June 18, 1787,” http://avalon.law.yale.edu/18th_century/debates_618.asp
114 Madison, “Philadelphia Convention on May 31, 1787,” http://avalon.law.yale.edu/18th_century/debates_531.asp; and “Vices of the Political System of the United States,” http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html (accessed June 1, 2017). Hamilton and Jay fully endorsed the filter argument. Jay, in *Federalist* No. 3, 37, argued that: “When once an efficient national government is established, the best men in the country... will generally be appointed to manage it... more general and extensive reputation for talents and other qualifications will be necessary to recommend men to offices under the national government—especially as it will have the widest field for choice, and never experience that want of proper persons which is not uncommon in some of the States.” Similarly, Hamilton, *Federalist* No. 35, 210, declared that rather than the common men observed in states’ legislatures, the filtering process of the Constitution would select men of “acquired endowments” and “superior acquirements.”
will be more consonant to the public good than if pronounced by
the people themselves, convened for the purpose.\textsuperscript{115}

Returning to the theme of the right to revolt (or really of the right to exercise constituent
power), for Madison, this right should not be exercised frequently, not even by specialists.
Constitutional assemblies, such as the Philadelphia Convention, should not occur often, but only
under exceptional circumstances. In Madison’s view, frequent reopening of the constituent
process would disturb “public tranquility” and trigger “public passions” too intensely.\textsuperscript{116} As he
declares in \textit{Federalist} No. 49,

\begin{quote}
The danger of disturbing the public tranquility by interesting too
strongly the \textit{public passions} is a still more serious objection
against a frequent reference of constitutional questions to the
decision of the whole society. Notwithstanding the success
which has attended the revisions of our established forms of
government and which does so much honor to the virtue and
intelligence of the people of America, it must be confessed that
the experiments are of too ticklish a nature to be unnecessarily
multiplied.\textsuperscript{117}
\end{quote}

Hence, resort to constituent power is “admitted only in exceptional” cases and, in truth,
“one is hopeful that it would be not necessary at all under the constitution.”\textsuperscript{118} Constituent power
is here inscribed in a logic of emergency and national security, and not in a rationale of social

\begin{flushright}
\textsuperscript{115} Madison, \textit{Federalist} No. 10, 76. The Anti-Federalists highly opposed the application of this filter rationale to
representation. In place of the Federalist “filter metaphor,” the Anti-Federalists proposed a “mirror metaphor.” In
short, this meant that if a body of representatives was to be selected they should resemble those they represent. As
Kramnick observes, “preferable for many Anti-Federalists was that there be no representatives, that, as Rousseau
had envisioned, the people simply gather in public assembly and give themselves laws, that they simply present
themselves at the assembly. Failing this, the radical democratic reflex was to insist on large legislative assemblies so
that many representatives could reflect the wide diversity of the community at large.” Kramnick, introduction to \textit{The
Federalist}, 39.
\textsuperscript{116} Madison, \textit{Federalist} No. 49, 312.
\textsuperscript{117} Madison, \textit{Federalist} No. 49, 312 (emphasis added).
\textsuperscript{118} Dietze, \textit{The Federalist}, 282.
\end{flushright}
experimentation, collective transformation, and the like.\textsuperscript{119} Rather than configuring an ordinary element of updating the political system (as it had been in the new states), with Madison, constituent power becomes an exceptional instrument (or really, it becomes proscribed from the political system). From that moment on, one can observe the beginning of an incredible operation of inversion in relation to this concept. More and more, the dominant discourse would come to refer to constituent power in a merely rhetorical and mystifying way or, worse, in an openly pejorative fashion – identifying it as a clandestine and inimical element to the political system.

This attempt to proscribe constituent power from the political system produces an intriguing problem to modern constitutionalism. Law scholars often call this problem the “paradox of constitutionalism.”\textsuperscript{120} This paradox, in sum, means the obliteration by the constitution of its ultimate source of legitimacy (the people’s constituent power). As Del Lucchese clearly explains,

Within the constitutional paradigm, the formal constitution is the highest source of authority. Yet, the constitution did not create itself. A constituent power, possibly a ‘people’, created it. Thus, the ground of the highest source of authority lies in something external to it. However, within the legal system, the formal power represented by the constitution must be singular and cannot tolerate any higher source. Hence, by definition, it must obliterate its own source, and the constituent power must be obliterated in the juridical sphere. This is the condition under

\textsuperscript{119} As Madison writes in Federalist No. 49, 312, “We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed do not present any equivalent security against the danger which is apprehended.” See also Hamilton, Federalist No. 33, 199.

\textsuperscript{120} Loughlin and Walker, introduction, 1; Cólon-Ríos, Weak Constitutionalism; and Negri, Insurgencies, Chapter 1.
which constitutional power can be recognised as the only valid source of authority. Thus, the paradox is that constituted power, namely the *creature*, obliterates, overcomes and ultimately nullifies constituent power, namely its *creator*. 121

It follows that, as formal constitutions become older and ever more naturalized, their contradictory nature tends to become intensified and the institutional machinery (e.g., constitutional courts and parliaments), with its usual activity of constitutional actualization from the top, is unable to avoid the intensification of this contradiction. This should not surprise us since the institutional machinery is, in reality, the very motor of this contradiction. In this situation, the reappearance of constituent power is commonly labelled alien and illegal. As Popp-Madsen perceptively asserts, “the achievement of the constituent power – the constitution – will over time alienate itself from its principle source of legitimacy – the people – and thus the split between legitimacy (the constituent power of the people) and legality (the constitution) will render every further appeal to the constituent power illegal.”122

Returning to Madison’s perspective of constituent power, for him, frequent alteration of the constitutional order implied “that the constitution was seriously defective.”123 For him, only on “certain great and extraordinary occasions” should the constitutional text be changed.124 And, in these extraordinary occasions, the constitutional machinery *itself*, with its transcendent apparatuses (like the judiciary and the bicameral legislature), should perform such change.125 For

122 Popp-Madsen, “Anti-Federalism,” 34.
124 Madison, Federalist No. 49, 311.
Madison, the Constitution would benefit from a sort of “veneration, which time bestows on everything” and this veneration would increase the steadiness of the government. 126

At this point, it should be clear that, for the theoretical framework being examined here, constituent power occupies an ephemeral and confined role in the political system. The Federalists may recognize, to a certain extent, the social benefits of a constituent moment, such as the break with the British, but they also consider such moments inadequate and even dangerous if allowed to continue. In fact, as noted earlier, they label the continuation of such moments as an exaggerated “zeal for liberty” or as an “excess of democracy.” According to this perspective, constituent power is to be rapidly neutralized and absorbed within the constitutional machinery.

In this light, there seems to exist a necessary end, or telos, to constituent power: it is somewhat predetermined to materialize and then be exhausted in a formal constitution. Hence, there is a rigid and a priori script for this power: uprising, the taking of power in order to be transformed in a formal constitution, and disappearance. As Illan rua Wall puts it, for this perspective, the constitution is the culmination and truth of the constituent moment. 127

Consequently, the Federalists’ maintain, on the one side, that constituted power is the natural and continuous source of political innovation and historical movement, while, on the other, it corrals constituent power into being the legitimating principle of the institutional order. In terms of historical movement and political innovation, constituted power, in sum, is the norm and constituent power the exception.

126 Madison, Federalist No. 49, 311.
A Constituent Power of the People or of the Men of Superior Wisdom?

Madison makes a strong rhetorical use of the notion of constituent power (or the right to revolt). The idea of constituent power is cunningly invoked to legitimize the maneuvers adopted by the Philadelphia Convention and obtain the ratification of the newly drafted Constitution. Constituent power is eloquently invoked, but its “subject” (the American multitude) is absent.

Ultimately, Madison resorts to the idea of constituent power (as odd as it may sound) to neutralize the constituent process of the newly formed states. As Kramnick perceptively notes, “Madison’s brilliant achievement was the appropriation of a [concept] with unmistakable populist connotations for a governmental structure which, while ultimately based on popular consent, involved a serious diminution of popular participation.”

The project of Madison and the Federalists to tame the democratic tide of the states was persuasive among many influential actors of the time. By reiterating, for example, that the states’ “democratic excesses” were producing an escalating crisis that menaced the Union’s fate, they manage to impress many of their fellow citizens. The Federalists, as Kramnick notes, “talked and wrote of widespread licentiousness and anarchy, of the invasion of property rights, of wicked and unjust legislation, of financial and commercial chaos.” Indeed, the Federalists’ “crisis discourse” combined with some of the local assemblies’ polemical decisions (regarding, for example, tender suspensions and paper money laws) created a sentiment of uneasiness among some creditors and political actors. Nevertheless, a decisive push to the Federalists’ cause came with the so-called Shays’ Rebellion.

---

129 Kramnick, introduction to The Federalist, 41.
130 Kramnick, introduction to The Federalist, 35. See also Madison, Federalist No. 40, 243-251.
131 E. S. Corwin, Constitutional Theory, 533; and Ball, introduction to The Federalist, xiv-xv.
In the summer of 1786, the county courts in western Massachusetts ordered the imprisonment of farmers who could not pay their debts as well as the seizing of their land and property. “The farmers, many of whom [were] veterans of the Revolutionary War – including Daniel Shays, their leader – [organized] an armed resistance to block the courts, protect their property and free their imprisoned [companions] from jail.”\textsuperscript{132} Eventually, over the course of a year, a militia financed by merchants’ contributions crushed and haunted down the rebels and executed their leaders. The Shaysites, as Kramnick writes, did not seek to destroy the Massachusetts government, nor to confiscate property: “Their uprising as well as their treatment, however, fueled the mood of crisis outside Massachusetts in circles calling for constitutional reform.”\textsuperscript{133} Writing on the impact that Shays’ Rebellion caused on the mood of the delegates gathered at Philadelphia, Madison declared himself “deeply and unanimously impressed with the crisis, which had led their country, almost with one voice, to make so singular and solemn an experiment for correcting the errors of a system by which this crisis had been produced.”\textsuperscript{134}

 Especially after Shays’ Rebellion, it had come time, in the Federalists’ view, for an end to the “politics of liberty” and a turn to the “politics of energy.”\textsuperscript{135} That is, it had come time to neutralize and dissolve constituent power within the constitutional machinery. As Madison writes in \textit{Federalist}, No. 10, a central government would “secure the national councils against any danger from… a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project.”\textsuperscript{136}

\textsuperscript{132} Michael Hardt, introduction to \textit{The Declaration of Independence}, by Thomas Jefferson (London: Verso, 2007), xii.
\textsuperscript{133} Kramnick, introduction to \textit{The Federalist}, 27.
\textsuperscript{134} Madison, \textit{Federalist} No. 40, 243.
\textsuperscript{135} Kramnick, introduction to \textit{The Federalist}, 18. See also Hamilton, \textit{Federalist} No. 26, 163-9.
\textsuperscript{136} Madison, \textit{Federalist} No. 10 at 79.
After the ratification of the federal constitution, the shift of power from the periphery to the center would be substantial. The creation of a strong national executive, a powerful Senate and a national judiciary were among the most remarkable expressions of this shift. These transcendent apparatuses, combined with a sophisticated system of checks and balances, introduced a radical new form government. As Kramnick observes, the triumph of the constitution meant “the victory of the center over the periphery and the victory of checks and balances over legislative supremacy.”137 In a sense, it was ironic that Americans, who a decade earlier had so passionately fought against a centralized distant government, were now about to erect a similar type of authority in the new country.138

2.4 The Federalists’ Hegemony

The Federalists’ perspective of constituent power (and of democracy and government) would become hegemonic over time. In this sense, ideas such delegation and ephemerality would appear more and more in political discourses and practices of the new country and elsewhere, too. For instance, during the French Revolution, Sieyès would, time and again, argue in favor of the ideas of delegation and ephemerality.139

Likewise, in the course of time, most countries would organize their governments on the same principles defended by the authors of the Federalist. Transcendent structures of rule such

137 Kramnick, introduction to The Federalist, 27.
138 “A decade earlier no American patriot had even dreamed of such strong central government. The colonists had too much despairing experience with the far-removed governmental power of the British empire to think about erecting a powerful distant government for themselves.” Wood, “The American Revolution,” 617.
139 See my “Machines de travail: Constituent Power and the Order of Labor in Sieyes’s Thought,” Constellations, online version (December 2017).
as a bicameral legislature, a national judiciary, a federal executive, and mechanisms like checks and balances and separation of powers would become ever-more commonplace.

Representation, too, would become a guiding principle. Actually, it would become such a dominant and naturalized idea that it would practically merge with the notion of democracy, forming what we know today by the name of “representative democracy.” Representation, in fact, would become one of the most important indicators of the existence of a democracy. Alternative projects of democracy, such as the one produced by the dissenting strands of the American Revolution, would practically disappear from the dominant discourse, as if they had never existed.

Moreover, with the hegemony of the Federalists’ project, constituent power would be exiled to the underground of the political system. It would no longer be an instrument of continuous updating of the constituted order (as it had been in the American states during the founding decade). On the contrary, in an incredible inversion, the conventional discourse would ever-more refer to this power in one of two ways: it would either refer to constituent power in a merely rhetorical fashion (such as in the preambles of formal constitutions), or it would refer to this power in an overtly pejorative way (when, for example, occurs a real attempt to exercise constituent power). In the latter case, it would become common to see this tradition equating the attempt to exercise constituent power to illegality and disorder.

However, as the next chapter shows, the attempt to proscribe constituent power from the political system would be accompanied, since the beginning, by an intense resistance of the multitudes. Actually, it seems correct to say that the multitudes’ resistance, considering the specificities of each apparition, never ceased challenging this attempt of proscription. The kind
of democracy and freedom discovered by the multitudes in an event like the American Revolution, as an irrepressible desire, would, in different times and places, periodically reappear.
Chapter 3
Out of Doors’ Politics: Constituent Power and Dissent in the American Revolution

Whenever any government shall be found inadequate, or contrary to these purposes, a majority of the community hath, and undubitable, unalienable and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

This, Sir, is the language of democracy

Patrick Henry

3.1 Another Story for America’s Constituent Power?

In the previous chapter, I presented some of the most representative mystifications that the notion of constituent power underwent during the American Revolution. There, I demonstrated that at the same time the multitude’s constituent power was showing its striking force, it was being submitted to a deep process of containment. In this sense, mystified ideas such as delegation (meaning that constituent power can only operate validly if through the institutional machinery) and ephemerality (signifying that constituent power should be confined to an ephemeral episode, such as the promulgation of a formal constitution, and, therefore, should play a secondary role in relation to the constituted order) were strongly defended by influential political actors during the American Revolution. In fact, ideas like delegation and ephemerality would become so prominent that even today they continue to be intensely present in political

---

140 I recently (September, 2017) published a short version of this chapter in article format. Here is the reference for this work: Márcio Pereira, “In Praise of Rebellion: Constituent Power and Dissent in the American Revolution,” Law, Culture and the Humanities (September-28-2017), 1–19. I would like thank the anonymous reviewers, whose criticisms improved this paper and, as a result, some parts of this chapter.
discourses and practices. And this prominent perspective of constituent power, as noted elsewhere, corresponds to a specific project of democracy which is well-known today by the name of representative (or constitutional) democracy. Thus, in a way, one can say that the previous chapter presented the triumph of constituent power’s mystification; or, in other words, that it presented the victorious discourse and practice related to the theme of constituent power.

But is that all of the story? Is the fate of the multitude's power inseparably bound to this net of mystifications? This chapter argues in the opposite direction. By drawing on one of the most potent dissenting political lines from the American Revolution, namely revolutionary Pennsylvania (from the mid-1770s to late 1780s), I not only claim that one can dismantle the net of mystifications entrenched in the notion of constituent power, but also build an alternative path for this concept.141

In order to achieve these aforementioned ends, my investigation concentrates on Pennsylvania’s out of doors’ politics.142 By out of doors’ politics, I mean, in short, the political activity of the people at large that, by taking place outside of formal institutions and by


142 As Carp asserts, “The use of the phrase “out of doors” to refer to extraparliamentary activity probably arose during the middle of the seventeenth century. Before 1640, parliamentary proceedings in England were largely secret, and public opinion had little role in government. Critics of government did find some outlets for raising political awareness such as ribald verses, leaks from politicians, and some limited petitioning. Nevertheless, communication between “indoors” and “outdoors” political actors was limited. English people began speaking and writing even more openly about politics out of doors during the English Civil Wars, as censorship lifted and the production of printed material exploded. Petitions to Parliament and public opinion “without-doors” increasingly became sources of politicians’ fears and concerns. After 1660, people were regularly discussing politics in taverns.” Carp, Rebels Rising, 173. See also Benjamin H. Irving, Clothed in Robes of Sovereignty: The Continental Congress and the People Out of Doors (Oxford: Oxford University Press, 2011), 13-14; and Gordon S. Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill: University of North Carolina Press, 1998), 320-321.
maintaining with the latter constant interactions, sometimes conflictual and sometimes reinforcing, produced from below new democratic forms of social organization. One should note from the start that Pennsylvania’s out of door’s politics was not a linear and unified insurrection directed towards the production of a formal constitution. Actually, the implementation of a constitution was only one moment among others of the multidirectional and heterogeneous processes of out of doors’ politics. Among others, out of doors’ politics in revolutionary Pennsylvania encompassed activities such as “petitioning; expressions of public opinion in speeches and in print; political interactions in places such as the tavern; machinations and negotiations outside [legislature]; [the extraconstitutional committees movement]; and crowd action, from parades to riots.”¹⁴³ This chapter focuses on the following modes of out of doors’ politics: the committee movement and crowd action in the streets (or, as I prefer to call it, the people out of doors). Regarding the latter mode, I am particularly interested in the constitutional devices that were implemented in Pennsylvania's political system due to the intense pressure exerted on institutions by the people out of doors. I call these specific constitutional devices the **people out doors’ rights**. Their ultimate aim, I argue, is nurturing the expression of the multitude’s constituent power.

In effect, by concentrating on Pennsylvania’s out of doors politics, my examination shows that the perspective and practice of constituent power that emerged in this particular polity challenged the aforementioned ideas of delegation and ephemerality. On the one hand, by nurturing ways for the multitude to express constituent power directly, the people out of doors

---

challenged the idea of delegation. In this respect, in their practices, where they were not able to bypass the institute of political representation, they confined this device to a secondary role, keeping it, in any case, under intense popular check. On the other hand, by fostering, to some extent, the indefinite continuation of the constituent process, the people out of doors challenged the idea of ephemerality. In this regard, instead of corralling constituent power to an exceptional episode (such as the promulgation of a formal constitution), they advocated not only for the primacy of constituent power over the institutional order but also for the indefinite continuation of the constituent process.

However, I should note from the start that one should not look at revolutionary Pennsylvania as an expression of a definite concept of constituent power. As this chapter demonstrates, revolutionary Pennsylvania was full of ambiguities and contradictions (as revolutionary events, by nature, usually are). And these ambiguities and contradictions also plagued the notion of constituent power that emerged in this particular polity. Despite that, and borrowing here some of Michael Hardt’s insights, the gaps and contradictions of a revolutionary event like this, in fact, “are often the most interesting and useful points to work with. Sometimes these contradictions can help us identify failures of thought, that is, moments when [a political project or a concept] breaks down and needs to be carried beyond where it was left.” This is indeed frequently the case with Pennsylvania’s constituent power. “What one needs to do is carry [this conception] beyond its own limitations.” Thus, it is not a question of praising or blaming Pennsylvania’s revolutionaries, “but rather a matter of employing the powerful

---

144 By “revolutionaries,” I mean all those who not only favored independence but, equally important, were committed to invent from below new democratic forms of social organization.
conceptual tools they make available.” In this light, I believe that it is more adequate (and fruitful) to look at revolutionary Pennsylvania as a theoretical platform or toolbox rather than an expression of a definite conception of constituent power. As such, it can assist us in building an *alter* constituent power (or, so to speak, a constituent power *beyond* constituent power). Further, this *alter* constituent power, corresponding also to an alternative project of democracy, can provide us, as the final chapter demonstrates, some insights for contemporary reflections on the limits of representative democracy.

Now, going back to what was said at the beginning of this chapter, one can affirm that while the previous chapter presented the triumphant discourse about constituent power in the American Revolution, the present chapter, by contrast, “brings the margins to center;” it gives voice to one of the defeated political lines of this revolutionary event. But, before moving forward, it seems useful to say a few words about the approach developed here (of bringing the margins to center). Usually, the defeated (or dissenting) political lines of the American Revolution (and, generally, of almost all revolutionary events), when accounted by traditional discourse, “serve only as narrative to foils to more important protagonists.” In the case of the American Revolution, these more important protagonists are, of course, the Federalists. In this sense, the defeated political lines are commonly pictured as examples of failure and, as a result, they are often marginalized. It seems that “[t]heir only effect on the nation's history and character

---

145 Hardt, “Jefferson and Democracy,” 43, 76. Similarly, as Hardt and Negri assert, we should view constituent power “not only as act but also as potential—indicating both the power of future actions and the accumulated potential of the past.” Michael Hardt and Antonio Negri, *Assembly* (Oxford: Oxford University Press, 2017) Kindle edition, 135.

146 I took the idea of ‘toolbox’ from Michel Foucault. In an interview, Foucault describes his books as “little tool boxes” encouraging individuals “to use this sentence or that idea as a screwdriver or spanner.” Michel Foucault, “Interview with Roger Pol Droit,” 1975, in *Michel Foucault: Power, Truth, Strategy* (Sydney: Ferral Publications, 1979), 115. In short, what Foucault suggests is that his ideas should be used as a way of approaching a subject rather than as a set of rigid principles. My dissertation suggests an analogous idea. One should view the notions produced in revolutionary Pennsylvania as a way of approaching constituent power rather than as a set of rigid principles.
is to provide an occasion for their betters to shine. ‘Shays’ Rebellion’ led to the Constitution, we are told, and the ‘Whiskey Rebellion’ allowed Washington to assert federal authority. Wise and strong men saved the infant nation from anarchy.”

Nonetheless, the approach developed here suggests otherwise. First, it suggests that, instead of viewing the dissenting political trends of the American Revolution as inferior, imprudent, or even naïve in comparison to wiser political actors, these lines actually had a deep impact on, for instance, the Federalists’ political project. Because the repressed lines carried powerful democratic demands that were supported by large segments of society, the would-be rulers could not entirely ignore them. On the one hand, to completely ignore these demands would only throw more fuel on an already highly flammable sociopolitical context. On the other hand, to fully accept these popular demands would provoke a deep reorganization of society’s power structure. Both of these situations were a risk that the would-be rulers of the period were certainly not willing to take. For the triumphant political trend (the Federalists’ project), the usual solution then was to incorporate only a few of these popular demands (and, even so, usually in a distorted version of their original formulations) and to repress the demands that could provoke root-change in society. In sum, one can say that the solution was to tame and normalize (sometimes violently) the democratic and disruptive forces expressed by the dissenting political lines. In the terms of my investigation, the solution was to tame and normalize the multitudes’ constituent power.

Thus, it was not only “political wisdom,” as asserted in traditional discourse, that assured the victory of one trend over the other. It is worth noting that a substantial amount of force was often deployed to contain the democratic and levelling desires demonstrated by some dissenting

---

political trends. And in this scenario, constituent power was, consequently, also submitted to an intense process of neutralization and mystification. Having that said, let us begin our investigation of Pennsylvania’s constituent power.

3.2 A “revolution in the Revolution:” Pennsylvania’s Out of Doors’ Politics

Why Pennsylvania?

In order to better grasp the alternative notion of constituent power (and of democracy) that emerged in revolutionary Pennsylvania, it seems useful to provide a concise backdrop against which this concept is best seen. But first I should address: Why Pennsylvania? Out of all the other states, why choose Pennsylvania to examine here?

Besides the symbolic importance of this particular state to the American Revolution, several scholars seem to agree that revolutionary Pennsylvania embodied the strongest alternative to the transcendent centralized form of rule that would dominate American political life after the ratification of the U.S. Constitution. Terry Bouton, for instance, notes that Pennsylvania’s revolutionaries set the pattern for democratic innovation and “framed the debates over democracy that followed in the other new states, the vast majority of which refused to go as far...” Similarly, Richard Alan Ryerson observes that, in its revolutionary epoch, “Pennsylvania’s democracy made the commonwealth’s neighboring sovereign states, from

---

Massachusetts to South Carolina, look either gentrified or positively aristocratic.”150 “By late 1776,” Ryerson continues, “the Commonwealth of Pennsylvania was perhaps the most vital participatory democracy in the world.”151 In this light, in the context of the American Revolution, Pennsylvania’s polity can be considered one of the richest democratic laboratories.152 The examination of this democratic experiment, I contend, can provide us some valuable elements to both dismantle the net of mystifications entrenched in the notion of constituent power and build an alternative path for this concept. Having said that, let me now provide a very brief introduction to revolutionary Pennsylvania.153

Although I will address this issue more carefully throughout this chapter, it is useful to introduce the following from the start. Despite its contradictions and limitations (mainly related to gender, race, and economic status), the revolutionary movement that emerged in Pennsylvania during the late 1770s was not a movement of a small faction of radicals. On the contrary, as Terry Bouton observes, the movement (and many of its ideals, such as: an enlargement of the electorate, wealth equality, intense popular participation, and the like) was, by the late 1770s, widely supported “by ordinary people in both the city and the countryside and by large segments


152 Nevertheless, “[t]his is not to say that Pennsylvania was entirely democratic.” As we soon shall see in this chapter, “like the other states, Pennsylvania’s democracy had clear limits, especially in terms of racial and gender restrictions (and wartime loyalty oaths). But, in terms of voting rights and political access, the Revolution brought a version of democracy to Pennsylvania that was unequaled anywhere in the colonies.” Bouton, Taming Democracy, 6.

of the gentry.” Similarly, examining Pennsylvania’s committee movement during the mid-1770s (which, as this chapter shows, gave fundamental contributions to Pennsylvania’s profound political shift), Richard Alan Ryerson indicates at least three aspects that echo this idea. First, he asserts that, from 1774 to 1776, a significant number of Pennsylvanians served on these extraconstitutional committees – approximately 1,300 men – a sum that far outnumbered the total number of officeholders in the state at the time. Second, the composition of these committees was, for the epoch, somewhat diverse. The men that served on the committees came, to some degree, from diverse economic (artisans, small farmers, lawyers, merchants, etc.), ethnic (English, German, and Celtic), and religious (Quaker, Anglican, Presbyterian, e.g.) backgrounds. Third, Ryerson notes that the committees helped to mobilize thousands of persons (men and women) from diverse ethnic-economic-religious backgrounds. However, the most compelling fact in defense of a plural revolutionary movement in Pennsylvania is the following. As noted elsewhere, the out of doors’ politics comprised not only the committeemen activity. More important, it comprised crowd action in the streets, such as discussions and actions that unfolded outside the state assembly. Such crowd action involved not only adult males (committeemen, for instance), but also individuals from several other segments of society, such as women, Native Americans, African Americans, and the working poor. Hence, it seems fair to say that, by the

---

154 As Bouton continues, “Not everyone agreed on how much the political system should be opened, the degree of wealth equality needed to protect liberty, or the virtue (or morality) of using violence to bring political change. But by 1776, there was a general consensus around a broad set of democratic values that most people believed were central to the Revolution.” Bouton, Taming Democracy, 7.


156 Examining, in Philadelphia, the relation between the people out of doors and the Continental Congress, Irving observes that: “in spite of their exclusion from government, these groups and classes of people [women, Native Americans, African Americans, and the working poor] poignantly articulated their approval of, or disdain for, Congress and its vision of a national polity. [For instance], [w]omen actively participated in Congress’s non-importation, non-exportation, and non-consumption campaigns… [In fact], [t]he people out of doors responded to Congress in diverse, unpredictable, and often disobliging ways. Almost invariably, they infused Congress’s material culture and festivity with significances and practices that Congress did not expect or wish.” Irving, Clothed in Robes of Sovereignty, 15.
late 1770s, rather than a small faction of radicals, Pennsylvania’s revolutionary movement actually consisted of a myriad of persons whom, by intensely interacting with each other, formed a transversal social force.\textsuperscript{157} It was a force that, as this chapter demonstrates, expressed “a widespread and multitudinous germination of the desire for freedom and equality.”\textsuperscript{158} A force, in sum, not only capable of overthrowing the old state government but also of inventing from below new constitutional devices and, more important, new democratic forms of social organization.

\textit{Committee Movement and the People Out of Doors in the Late Eighteenth Century}

Although Pennsylvania became an iconic site of the American Revolution, its official engagement in the struggle against Britain took, nonetheless, some time.\textsuperscript{159} Actually, it was only weeks before the signing of the Declaration of Independence in the summer of 1776 that

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{158} Hardt and Negri, \textit{Assembly}, 35.
\item\textsuperscript{159} Being previously the home of several indigenous tribes (such as the Iroquois, Erie, Shawnee, Lenapes, and Susquehannocks), whom later would be either expelled or reduced to remnants as a result of the several interactions and conflicts with the colonizers, Pennsylvania was first colonized by Dutch and Swedish settlers. In 1667, however, after an intense dispute over its territory, the Britons took control over the colony and, in 1681, King Charles II, aiming to pay off a debt with English admiral and politician Sir William Penn, granted Pennsylvania to the son of the latter (also named William Penn). In the same year of 1681, William Penn (the son) established Pennsylvania as a proprietary colony based on religious tolerance, an idea particularly dear to him. Being a Quaker (a dissenting brand of Christianity disfavored by the English government), he knew how difficult it was to live in a community intolerant to religious difference. In fact, the tolerant atmosphere of the new colony attracted not only English Quakers but several other ethnic-religious groups, many of whom fleeing from persecution and religious wars. On the eve of the Revolution, having the second largest population of the American colonies (approximately three hundred and thirty thousand inhabitants), Pennsylvania’s society was a myriad of peoples composed by: Celtic (Welsh, Scots, and Irish, 42.8 percent), German (33.3), English (19.5), African-Americans (2.4), and 2 percent of other ethnicities. For a detailed account on the history of Pennsylvania, see Randall M. Miller and William A. Pencak (eds.) \textit{Pennsylvania: A History of the Commonwealth} (University Park: Penn State University Press, 2002); Joe W. Trotter and Eric Ledell Smith (eds.) \textit{African Americans in Pennsylvania: Shifting Historical Perspectives} (University Park: Penn State University Press, 1997); and Jean R. Soderlund, \textit{Lenape Country: Delaware Valley Society Before William Penn} (University Park: Penn State University Press, 2016). For a summarized account on Pennsylvania’s population in early America, see Robert V. Wells, “Population and family in early America” in Jack P. Greene and J. R. Pole, eds., \textit{A Companion to the American Revolution} (Oxford: Blackwell, 2000), 39-50.
\end{enumerate}
\end{footnotesize}
Pennsylvania officially engaged in the struggle against England.\textsuperscript{160} Below are the main reasons for this deferment.\textsuperscript{161}

In short, throughout the decade preceding the Revolution, Pennsylvania’s government was dominated by a local oligarchy. Its executive, whose head was the governor of Pennsylvania, was controlled by the Penn family. The Penns, by either occupying directly the position of governor or appointing someone to this function, used the executive to protect their own economic interests, which consisted mainly of land transactions. Moreover, it is worth noting that because Pennsylvania was a proprietary colony, the governor, in order to preserve his full governing rights, had to remain loyal to the crown (a rule, I should add, strictly followed by the Penns). As for the legislature, Pennsylvania’s small and malapportioned assembly was dominated by a group of affluent representatives (Quakers, mostly).\textsuperscript{162} The lawmakers’ chief interests lay both in preserving the legislature’s relative autonomy (from the governor and from the crown); and in conserving Pennsylvania’s quiet political life (\textit{i.e.} preventing popular uprisings).

Although these two political actors (governor and lawmakers) formed, for the most part, Pennsylvania’s ruling elite, they were, especially in the years preceding the Revolution, in a

\textsuperscript{160} Nash, “Philadelphia’s Radical Caucus,” 76.
\textsuperscript{161} For a detailed discussion about the reasons of Pennsylvania’s government deferment to engage in the independence campaign, see Ryerson, \textit{The Revolution Is Now Begun}, Chapter 1.
\textsuperscript{162} Forming in seventeenth-century England, the Quakers (or Society of Friends), as briefly noted above, were a brand of Christianity disfavored by the English government. William Penn, who established the colony of Pennsylvania, was a declared Quaker. Quakerism, in sum, was marked by its rejection of rituals and oaths, its simplicity of speech and dress, and its opposition to war. In Pennsylvania, a Quaker elite dominated the provincial assembly for the most part from 1730 until the eve of the Revolution. For an account on Pennsylvania’s Quakers, see, \textit{e.g.}, Barry Levy, \textit{Quakers, the Delaware Valley, and North Midlands Emigration to America}, The William and Mary Quarterly Vol. 48, No. 2 (Apr., 1991), 246-252. And on the composition of Pennsylvania’s provincial government, see, \textit{e.g.}, Ryerson, \textit{The Revolution Is Now Begun}, 7-8.
factional dispute with each other. This dispute can be expressed in simplified terms. On the one hand, the executive and its allies (the so-called proprietary faction), seeking to expand its control over the province’s land (and, consequentially, to increase its own wealth), maneuvered to limit the assembly’s check on the former’s land transactions. On the other hand, the Quaker-dominated assembly and its allies (the Quaker mercantile elite of Philadelphia) counterattacked. Through their agents in London, they attempted to change Pennsylvania’s status: From a proprietary province to a royal province. This alteration, which would pass the province’s government directly into the hands of the crown, would revoke the Penns’ proprietary title over the colony (and their consequent political and economic control), but would not affect (at least that was what lawmakers expected) the assembly’s relative autonomy towards the crown.

Despite their dispute, the executive and the legislature firmly agreed (for different reasons) to remain loyal to the crown. Briefly, in their view, a break with England, by strongly appealing to popular enthusiasm, could unleash an unpredictable popular force – a force which could, in turn, destabilize the elite’s dominance over government institutions and threaten their economic and political interests. It is worth adding that the fact that the assembly was pervaded by a Quaker culture (with its strong opposition to war) also made Pennsylvanians’ engagement in the independence campaign much more difficult.

Hence, especially from 1765 to 1776, Pennsylvania’s governor, lawmakers, and their respective allies constantly sought to suppress both the colonists’ opposition to imperial policies and their engagement in the independence campaign. As Wood notes with respect to the

\[163\] For a detailed account on the conflicting interests between the governor and the assembly during the decade preceding the Revolution, see: Ryerson, *The Revolution Is Now Begun*, 16-23; and Wood, *The Creation of the American Republic*, 83-85.

legislature, “In fact, the Pennsylvania Assembly was so detached from the Revolutionary movement that in the minds of many by 1776 it had become as much an enemy of the people, whom it presumably embodied…” Viewed in this light, Pennsylvania’s revolutionaries were, for some time, not only involved in an external struggle against England but also in an internal struggle against their own government and segments of the local gentry. This inability to engage in the independence campaign and launch a more democratic system of governance in the colony explains, perhaps, why Pennsylvania became so emblematic of the American Revolution. It seems that only an intense revolutionary power (i.e. constituent power) could challenge the abovementioned conservative forces. The eventual release of this power was arguably what transformed Pennsylvania into an iconic site of the Revolution. Here is a more detailed description of the profound shift that took place in Pennsylvania.

The local government’s continual attempts to impede colonial opposition to British policies produced, however, the opposite effect. Many discontented Pennsylvanians began to gradually organize themselves. Among other actions, they began to progressively occupy and politically transform the existing urban extraconstitutional committees. It is worth noting that local ad hoc committees were considerably familiar in British North America for, as Ryerson observes, “several occupational groups had long employed them to petition governing officials both in England and in America, or to place their interests before the public.” In their first significant appearance in Pennsylvania, which occurred in the context of the 1765 Stamp Act

---

crisis, the local committees were directed at boycotting British imported goods.\textsuperscript{167} During the mid-1760s, the local committees had a relatively homogeneous composition with most participants sharing a very similar occupation (merchants, mainly) and political view (moderates, for the most part).\textsuperscript{168} However, as this chapter shows, particularly from 1774 onwards, this scenario experienced a profound modification. The composition of the extraconstitutional committees expanded significantly with many modest workers (artisans, small-scale manufactures, \textit{e.g.}) and liberal professionals (doctors, lawyers, and the like), from diverse political views (progressive, radicals, for instance), entering the movement.

The revolutionaries did not limit themselves, however, to gradually occupying the existing urban committees; they also created new ones (both in the city and countryside). And because of the intense articulation between urban and rural, formal and informal, committees, Pennsylvania became one of the few provinces to form a successful coalition between urban workers and small farmers.\textsuperscript{169} I should note that, in the process of creating new committees, the revolutionaries also formed informal caucuses. Pennsylvania’s most famous informal caucus was the one Thomas Paine was part of, which, formed in Philadelphia in 1775, played a pivotal role

\textsuperscript{167} The Stamp Act Crisis is a crucial event in the context of the American Revolution. Among other things, this event propelled the colonists to organize resistance against Britain. It seems useful to briefly recall the Stamp Act here. Passed by British Parliament in 1765, the Stamp Act was a direct tax imposed on Americans on an extensive list of items including newspapers, contracts, among others. Many Americans considered this law a violation to their "rights as Englishmen" to be taxed without their consent. In sum, many colonists argued that because they did not have the right to elect representatives to British Parliament this institution could not impose on them this – or any other – tax law. Although the English government winded up annulling this Act, it increasingly continued to adopt harsh tax laws against Americans. See Rebecca Starr, “Political Mobilization 1765-1776” in \textit{A Companion to the American Revolution}, eds. Jack P. Greene and J. R. Pole (New Jersey: Wiley-Blackwell, 2003), 223.

\textsuperscript{168} Ryerson, \textit{The Revolution Is Now Begun}, Chapter 2.

in the overthrow of the provincial government. Following Nash, in this dissertation I refer to this group as Philadelphia’s radical caucus. Here is a picture of them:

Never entirely stable, never meeting on a regular schedule, and always jockeying for position with a variety of better-established politicos, this cadre featured people of widely different backgrounds and distinctly different personalities… The caucus had no officers, no constitution, kept no minutes, and held no regular meetings. But writing newspaper essays, broadsides, and petitions; organizing mass meetings; and drawing up slates of candidates for quasi-governmental committees that ruled the street, the caucus strategized adroitly to unseat the elected Pennsylvania legislature, to propel Pennsylvania toward independence, and to help engineer the most radical state constitution written in the thirteen states.

It happened that, especially from 1774 onwards, the revolutionaries began to increasingly transform the extraconstitutional committees (old and new) into a powerful instrument of politicization, radicalization, and intercolonial resistance. In this respect, one of the most important committees was Philadelphia’s Committee of Observation and Inspection, which, besides serving as a boycott enforcement agency against English goods, incorporated, by the late 1770s, several governmental functions such as organizing provincial elections. In effect, drawing on the grievances of many Pennsylvanians against English officials, provincial authorities, and segments of the local gentry, the committees became “the strong right arm… of popular sentiment that was taking control of the streets, setting control on prices of scarce commodities,

170 In addition to Paine, others who were also part of this caucus: James Cannon (a Scottish-born mathematics teacher); Christopher Marshall (an Irish-born modest druggist); Timothy Matlack (an American-born brewer and brawler); Daniel Roberdeau (a Presbyterian merchant); and Thomas Young (an English-born doctor). Nash, “Philadelphia’s Radical Caucus,” 69-70.
172 The names cited in footnote 169 are among those who most contributed to the radicalization of the committee movement. See Nash, “Philadelphia’s Radical Caucus,” 69-70.
and pushing the colony’s legislative assembly to oppose British policies.”

Actually, by the late 1770s, as I will soon demonstrate, the committee movement grew so impressively that it practically became an alternative source of government in Pennsylvania.

In this context, one aspect that definitively contributed to the growth of the extraconstitutional committees was the intense participation of the ‘mechanics’ (modest working men such as artisans and small-scale manufactures) in the movement. Especially from 1774 onwards, many modest workers, most of them previously unknown in the colony’s political arena, began to participate in the committees. The engagement of these new men was initially motivated by their willingness to enforce the boycotts of British products. These boycotts “had advantaged [mechanics] working to gain a market for their locally produced articles.”

Managing to set aside their ethnic-religious differences, the mechanics built a coalition to elect several of their own to serve on the extraconstitutional committees as well as in the state legislature. However, whether in the committee movement or in the assembly, the mechanics not only supported the boycotts against British goods. They also supported independence and, equally important, a more democratic system of governance for Pennsylvania.

But one might wonder: Who could serve on the extraconstitutional committees? Although the composition of committee participants had profoundly expanded by the mid-1770s, the

---

173 Nash, “Philadelphia’s Radical Caucus,” 72. Similarly, Ammerman asserts that, as the crisis deepened, these extraconstitutional committees gradually took upon themselves responsibility for governmental policies such as “collecting taxes for the revolutionary governments and recruiting soldiers. Significantly, these committees acted not under the authority of the Provincial Assemblies or even the Provincial Congresses, but considered themselves enforcement agencies of the Continental Congress… As provincial and local government ceased to function under the authority of King and Parliament, it was essential that some form of authority step into the void. That authority was most often the local Committee of Inspection.” David L. Ammerman, “The Tea Crisis,” 201. See also Ryerson, The Revolution Is Now Begun, 2, 4.

174 For an account on the impact of the mechanics in the committee movement, see, e.g., Ryerson, The Revolution Is Now Begun, Chapter 8.


176 Nash, “Philadelphia’s Radical Caucus,” 69. As Ryerson affirms, “for the first time in Philadelphia’s history, wealthy merchants and elegant lawyers in greatcoats and waistcoats were thrown together with obscure mechanics in shirtsleeves and leather aprons to perform a public service.” Ryerson, The Revolution Is Now Begun, 203.
committee movement, nonetheless, had clear limits. By establishing that only ‘freemen’ \(i.e.,\) white, adult, skilled males) could serve on the committees, the movement hindered several segments of society, such as women, Native Americans, African Americans, and the working poor (porters, stevedores, domestics, apprentices, and the like), from participating.\(^{177}\) Nevertheless, as this chapter shows, these excluded segments, through out of doors’ politics such as crowd action and petition writing, constantly interacted with the committee movement and, more broadly, with the political system. More specifically, they at times acted in coordination with the committee movement and, at other times, challenged and pushed, in different manners, the limits of the committee movement and of the political system. In this light, examining the out of door’s politics in the five most populous cities of eighteenth-century America (among them Philadelphia), Benjamin L. Carp asserts that,

> Slaves could not bear arms or testify in court, nor could they gather in public without their masters’ permission. Women, non-whites, and the poorest of white men could not vote or hold office. Members of minority religious sects were sometimes forced to pay taxes to an established church they did not recognize. Nevertheless, many of these socially and politically disenfranchised people agitated in their own ways—it would be misleading to say that these marginal groups had no access to the political sphere, or that they slavishly relied upon their social betters for such access. Such groups challenged the political establishment from the margins, using the means at their

The disenfranchised, however, did not form a stable organic group. Most of the time, their challenges to the committee movement (and, more broadly, to the political system) were based on the specific interests of each of these groups. Thus, at best, they formed a temporary and unstable coalition. Even so, in their own particular ways, they constantly challenged and pushed the limits of the committee movement and, at a more fundamental level, the constituent process in Pennsylvania itself.

Returning to the analysis of the committee movement, Pennsylvania’s revolutionaries did not organize themselves only in civilian committees. As the revolutionary crisis escalated and war came to Pennsylvania’s doorstep, they decided to organize military committees too. In this respect, on April 25, 1775, after thousands gathered at Philadelphia’s statehouse yard to, among other things, debate the escalating conflict between Americans and Britons, the people out of doors decided to form several neighborhood militia companies. Unauthorized by the

---


179 The news from the battles of Lexington and Concord (Massachusetts, April 19, 1775) deeply influenced Pennsylvania’s revolutionaries’ decision to form militia committees. These battles marked the outbreak of open armed conflict between Britons and Americans. In sum, after the adoption of harsh economic and political measures by England against the province of Massachusetts, the colonial assembly decided to resist. Not only they formed a provisional government, but also created local militia committees. After declaring Massachusetts in state of rebellion, England sent troops to Concord and Lexington, which winded up in an open army conflict between Americans and Britons. After several casualties from both sides, the British troops regained control of Massachusetts and the city of Boston was kept under siege until March, 1776. See, e.g., Ammerman, “The Tea Crisis.”
provincial legislature, they “enlisted most of the city’s able-bodied men, including apprentices
and artisans who lived hand to mouth.” These neighborhood militia companies would later form
the “Committee of Privates,” which elected its own colonels in a “democratic process that today
is unimaginable.” Constituting Pennsylvania’s people in arms, this military committee would
also gradually become an important instrument of politicization and radicalization. According to
Nash, by the end of 1775, the Committee of Privates “had become a school of political
education, much in the manner of Oliver Cromwell’s New Model Army in the mid-seventeenth-
century English Civil War, where soldiers debated the future of the political system.”180

By 1776, the committee movement had gained prominence. Controlling many public
functions (military, commerce, and the like), the movement became, in fact, a rival source of
authority to the colonial government. For instance, and as stated elsewhere, from 1774 to 1776,
approximately 1,300 men had served on the committees, a sum that, during the same period,
greatly outnumbered all officeholders in the province.181

The extraconstitutional committees provide us a platform for thinking about institutions
of constituent power. This dissertation, as noted earlier, holds that, in order to effectively address
the frequent crises of representative democracy, it is necessary to develop institutions of
constituent power. By institutions of constituent power, I do not mean the institutionalization of
constituent power (an idea that would contradict the line of argument developed in this thesis).
Nor do I mean a somehow more progressive version of the liberal tradition of representation (i.e.
a more participative form of government that maintains, nonetheless, the centrality of

180 Nash, “Philadelphia’s Radical Caucus,” 72, 73.
181 In this sense, Ryerson observes that “[b]y the spring of 1775, all provincial commerce was under its [the
committee movement’s] control; by the fall, it was a power in Pennsylvania’s defense establishment. By the spring
of 1776, it had become an alternative source of authority coequal with the established government...” Ryerson, The
Revolution Is Now Begun, 4, 177. See also Irving, Clothed in Robes of Sovereignty, 203.
representation in the political system). Instead, I mean, first, institutions that facilitate the direct action of the multitude in government. In this respect, the committees were institutions that, to some degree, allowed the direct action of several segments of society in activities of governance (security, commerce, communication, and the like). Second, institutions of constituent power also involve structures of government that remain “open to further social interventions of antagonism and innovation.”182 Here, the relationship (sometimes conflictual and sometimes reinforcing) between the committees and the people out of doors seems to fit the idea of an institution that remains open to further social intervention.

Returning now to the importance of the committee movement, I believe that the description of the unfolding of two interconnected events of May 1776 should be enough to provide a decisive account of the political weight acquired by this movement. This description will also provide us an example of coordinated activity between the movement and the people out of doors (included in this latter notion are many persons of the disenfranchised segments of society).

First was the arrival of war in Philadelphia itself. As Carp observes, “In the middle of May 1776, only four colonies of the thirteen in rebellion…had not granted their delegates permission to vote for…independence in the Continental Congress. Though Congress was meeting in Philadelphia, Pennsylvania’s own Assembly had instructed its delegates not to vote for independence.”183 However, as war came to Philadelphia’s doorstep, the situation in the province shifted rapidly. On May 8–9 of 1776, a dozen Pennsylvania row galleys dueled with

182 Hardt, foreword to Insurgencies, viii.
183 Carp, Rebels Rising, 185. It is worth remembering that the Continental Congress was a convention of colonies’ delegates created in 1774 to, among other things, coordinate resistance against England.
two British ships within earshot of the city of Philadelphia.\textsuperscript{184} Despite the British retreat from this duel, Pennsylvanians learned that King George III enlisted tens of thousands Hessian and Hanoverian mercenaries to put down the American rebellion. For most colonists, the impending arrival of mercenaries “could only mean that Britain was determined to subject them to brutal rapine and pillage by soldiers who would have no respect for the most minimal colonial, and human, rights.”\textsuperscript{185} Confronted with this scenario, many began to consider the struggle for independence a matter of personal security. Moreover, it was becoming increasingly difficult for various colonists to imagine themselves as part of the British nation.\textsuperscript{186} Together, these sentiments encouraged many hesitant Pennsylvanians to support the independence campaign.\textsuperscript{187}

Second was the Continental Congress’s anti-monarchy resolution of May 15, 1776. On this date, attempting to, among other things, persuade the recalcitrant colonies to join the struggle for independence, the Continental Congress approved one of its most important resolutions. The resolve of May 15, with an inflammatory preamble written by John Adams, urged all provinces to replace crown authority by local governments based on popular rule.\textsuperscript{188} This instruction had a substantial impact on many colonies, especially Pennsylvania. There, the resolution “was read aloud [before many city dwellers] at the London Coffee House, a popular gathering place [located in Philadelphia].”\textsuperscript{189} More than that, the resolution of May 15 practically

\textsuperscript{184} Nash, “Philadelphia’s Radical Caucus,” 75.
\textsuperscript{185} Ryerson, The Revolution Is Now Begun, 208. Similarly, Irving asserts that “Peeling back legal protections and casting the colonists out of his majesty’s paternal care, the ‘home’ administration rendered it increasingly difficult for Americans to imagine themselves as part of the British nation.” Irving, Clothed in Robes of Sovereignty, 6.
\textsuperscript{186} Irving, Clothed in Robes of Sovereignty, 6, 147.
\textsuperscript{187} Nash, “Philadelphia’s Radical Caucus,” 75.
\textsuperscript{188} The resolution read “the exercise of every kind of authority under the … crown should be totally suppressed.” Quoted by Nash, “Philadelphia’s Radical Caucus,” 76. See also Marc W. Krumen, Between Authority and Liberty: State Constitution Making in Revolutionary America (Chapel Hill: The University of North Carolina Press, 1997), 1; and Ryerson, The Revolution Is Now Begun, 211-212.
\textsuperscript{189} Nash, “Philadelphia’s Radical Caucus,” 76.
summoned Pennsylvanians to overthrow their recalcitrant government and to create from below a new one (which, as we will see next, they in fact did).

Despite the numerous efforts of the provincial government and segments of the local gentry to suppress the revolutionaries’ engagement in the independence campaign and their desire for a more democratic governance, especially after the aforementioned events, the situation became uncontrollable. Confronted with this turbulent scenario, committeemen and the people out of doors, in a moment of intense articulation with each other, decided it was time to take matters in their own hands. More precisely, they decided it was time to, on the one hand, push Pennsylvania decisively into the independence campaign and, on the other, create a more democratic system of governance in the colony. At that point, the way to achieve these ends, they figured, was to dissolve the old government and create from below a new one. And so they did. On May 20, 1776, under a pouring rain at Philadelphia’s statehouse yard, approximately 5,000 people (nearly 15 percent of the city’s population) gathered to demand the dissolution of the old provincial government and to call for a special convention to draft a new constitution for Pennsylvania. In this special convention, the revolutionaries denied any role to

---

190 See Ryerson, The Revolution Is Now Begun, 211-212. In addition, four days after the Congress resolution, “a broadside with the blaring headline ‘The Alarm,’ probably authored by Thomas Paine, and printed also in German, blanketed the city, urging the people to support a move for a provincial conference that would establish a new government “on the authority of the people.”” Nash, “Philadelphia’s Radical Caucus,” 76.

191 Besides the aforementioned events (imminent war and the Congress’ resolution of May 15), other immediate occurrences, such as the publication of Thomas Paine’s Common Sense, on January 9, 1776, in Philadelphia, which “took the city by storm with its pungent calling for independence and more democratic governance in America,” also contributed to Pennsylvania’s decisive political shift. Nash, “Philadelphia’s Radical Caucus,” 73. However, their examination here would exceed the scope of my dissertation. Thus, I opted to indicate above two events which scholars commonly consider among the most important to Pennsylvania’s decisive shift. For a detailed account on other near occurrences that contributed to Pennsylvania’s transformation, see, e.g., Ryerson, The Revolution Is Now Begun, Chapter 9; and Carp, Rebels Rising, Chapter 5.

192 For a rich account on the articulation between the committee movement, Philadelphia’s radical caucus, and the people out of doors to overthrow the provincial government, see Ryerson The Revolution Is Now Begun, 211-213.

the old assembly’s members. As they argued, “the regular assembly had not been elected with a mandate to frame a new constitution and was consequently not authorized to follow the Continental Congress’s recommendation.” Cornered by the coordinated action of the committee movement and the people out of doors, the, by now, weak provincial assembly had no other option than to vote its own dissolution. The resolution of May 20 quickly spread across the province as, almost immediately after the massive gathering of that day, Philadelphia’s committeemen sent circular letters and delegates to the countryside in order to inform rural dwellers about them.

It is important to underline that the achievements of May 20 were deeply indebted to the ability of the committee movement, of the radical caucus, and of the people out of doors to, at times, act together. By creating and expanding ways to act jointly, they formed, as noted elsewhere, a transversal social force in Pennsylvania – a force not only capable of overthrowing the old provincial government (a destituent force) but also, as the next topic demonstrates, capable of creating from below new democratic forms of social organization (a constituent force). In this sense, it is fair to say that their coordinated action was, to a great extent, responsible for the political transformation that catapulted Pennsylvania from a late joiner of the

---

194 According to Lutz, this was perhaps the first innovative feature of Pennsylvania’s 1776 Constitution: “to use a specially elected rather than an already sitting legislature to write a constitution.” Donald S. Lutz, “State constitution-making, through 1781” in Jack P. Greene and J. R. Pole, eds., A Companion to the American Revolution (Oxford: Blackwell, 2000), 272. In this sense, as some Law scholars argue, “[t]his is one of the earliest indications of an understanding of a constitution as distinct from ordinary legislation.” Williams, “The State Constitutions,” 29.


196 Despite being barred from participating in the constitutional convention, the old oligarchy, as the end of this chapter shows, would remain very active in the political arena. For instance, they would time and again attempt to block the radical democratic tide unleashed by Pennsylvania’s revolutionaries.

197 The circular letter to the countryside read: “Liberty and slavery is before you; take, then, your choice... For us, we are determined to be free, and invite you to partake of that freedom which all are entitled to.” Quoted by Nash, “Philadelphia’s Radical Caucus,” 76.

independence campaign to American Revolution’s emblematic site. In a word, this coordinated action significantly contributed to create a ‘revolution in the Revolution’.

Most important for my purpose here though is that the revolutionary activity developed especially by the committee movement and by the people out of doors prepared the terrain for an alternative conception of constituent power (and of democracy). In this sense, the revolutionary activity of the people out of doors and of the committee movement remained intense in Pennsylvania until, at least, the late 1790s – that is, long after the enactment of Pennsylvania's ‘radical’ constitution of 1776 (which I will examine in the next topic).\textsuperscript{199} As I argue, the continuity of this activity challenges, for instance, the idea of ephemerality. In other words, it seems that the revolutionaries contested the idea of confining constituent power to a brief episode, such as the enactment of a constitution (even if it was the enactment of a “radical” constitution, as many considered Pennsylvania’s 1776 Constitution). Thus, one can say that their idea (and practice) of constituent power was that of a continuous power. A power that constantly animates the “activity of resistance and organization, of rebellion and political innovation,” or a “constant motor of political action and historical change.”\textsuperscript{200}

In addition, it can be said that the revolutionary activity of the committees and of the people out of doors represented a profound process of subjectification. That is, the participation in the committee movement and in the massive outdoor gatherings produced a new kind of subjectivity: a desiring and potent one. The common people, now politicized, “no longer felt they needed the sanction of their betters to engage in public debate or to subject the workings of their

\textsuperscript{199} An analysis of Pennsylvanians’ revolutionary activity after the enactment of the Constitution of 1776 would exceed the scope of my dissertation. For an account on this theme, see, e.g., Bouton, \textit{Taming Democracy}, Chapters 7, 9; and Ryerson, “Republican Theory and Partisan Reality,” 127.

\textsuperscript{200} Hardt, foreword to \textit{Insurgencies}, viii, x. See also Negri, \textit{Insurgencies}; and Hardt and Antonio, \textit{Assembly}, Chapter 3.
government to scrutiny.”\textsuperscript{201} At that time, both Thomas Jefferson and Thomas Paine noticed that the experience of participation in this kind of political activity transformed people, nourishing their political imagination and encouraging social ambition. According to Jefferson, the participation in government created people willing to fight against any authority that attempts to take power from them. In his own words: “Where every man is a sharer in the direction of his ward-republic, or of some of the higher ones, and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day; when there shall not be a man in the State who will not be a member of some one of its councils, great or small, he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte.”\textsuperscript{202} Similarly, Paine described the transformation caused by political engagement as follows: “We see with other eyes; we hear with other ears; and think with other thoughts; than those we formerly used.”\textsuperscript{203} Having that said, let us return to the examination of the framing of Pennsylvania’s new constitution.

Now the revolutionaries’ task was to organize the special convention that would be responsible for drafting a new constitution for Pennsylvania. To accomplish it, Philadelphia’s Committee of Inspection and Observation, which by now was the only effective government in the city, took the first step, urging their countryside fellow committeemen to send representatives in order to form a provincial conference.\textsuperscript{204} This conference would be responsible for organizing the election of the constitutional convention.\textsuperscript{205} Responding to the initiative of the Philadelphia

\textsuperscript{204} Adams, \textit{The First American Constitutions}, 75.
\textsuperscript{205} Nash, “Philadelphia’s Radical Caucus,” 76.
Committee, 108 delegates of the county committees met in June 1776, for a week-long “Provincial Conference of Committees of the Province of Pennsylvania.”

Deciding that the city of Philadelphia and each of the province’s seven counties should have eight seats at the constitutional convention, the provincial conference set July 8 as the day for electing the framers of the new constitution. Suffrage for this election was the main issue the provincial conference had to settle. On this question, reproducing the same pattern of the committee movement, the provincial conference disenfranchised several segments of society (such as women, Native Americans, African Americans, and the very poor). But their disenfranchisement did not occur without tension and dispute. For instance, some excluded segments, such as the very poor and youngsters, who were also militiamen, urged that all those (of any age and social status) who were risking their lives for independence should be able to vote for the constitutional convention.

“How,” asks Nash, “could those risking their lives to protect the property of voting citizens be denied to vote?”

Responding to this claim, the provincial conference, he observes, “moderated this unprecedented broadening of voting rights, enjoyed nowhere in the English-speaking world, by extending the ballot to… [every white adult male] twenty-one years and older who had paid some tax, even if it was merely the small poll tax levied on those without so much as a square yard of land to call their own.” “Even with these restrictions,” Nash continues, “the conference enlarged the electorate by at least half in some counties and in others by as much as 90 percent.”

What I wish to underline here, however, is that the militiamens’ demand is an illustrative example of the aforementioned conflict that time and again occurred between the

---

206 Adams, The First American Constitutions, 75. See also Nash, “Philadelphia’s Radical Caucus,” 77-78.
207 Nash, “Philadelphia’s Radical Caucus,” 77.
208 Adams, The First American Constitutions, 75.
209 Nash, The Unknown American Revolution, 274.
210 Nash, “Philadelphia’s Radical Caucus,” 76.
excluded segments of society and the committee movement (in this particular case, embodied in the provincial conference). More to the point, the above example shows that, despite their exclusion, by using the means at their disposal (“participation in open town meetings, writing petitions or publishing polemics, and crowd action”), the disenfranchised constantly challenged the limits of the committee movement and, more broadly, of the political system.\textsuperscript{211} In fact, and as asserted elsewhere, they were responsible for pushing the limits of the very constituent process in Pennsylvania.\textsuperscript{212}

However, the provincial conference did not implement only the abovementioned qualifications (\textit{i.e.} white, adult male, and taxpayer) to vote for the constitutional convention. The conference also required a test of loyalty, an oath from all voters. According to this qualification, which was in place from 1777 to 1786, only those ready to swear loyalty to the independence movement could vote. The main argument of the conference’s members to support the oath test was that only those citizens ready to defend the new constitution should have voice in its creation.\textsuperscript{213} However, as Ryerson critically asserts, the test disenfranchised not only Tories (those

\begin{footnotes}
\item[211] Carp, \textit{Rebels Rising}, 15.
\item[212] The aforementioned idea of the excluded pushing the political system closely relates to Jacques Rancière’s definition of ‘politics’. Departing from a traditional perspective that views ‘politics’ as the mere management of the constituted order to maintain social equilibrium, he claims that politics, actually, destabilizes the existing order, and the destabilization occurs through a demand to equality by someone who has so far not been counted as an equal. In his words: “Political activity is whatever shifts a body from the place assigned to it or changes a place’s destination.” Moreover, for Rancière, we should contrast ‘politics’ to the ‘police’. For him, the ‘police’ is the existing powers that designate certain individuals as equals while excluding others. It entails a hierarchy between those who order and those who are ordered, and between active and passive citizens. Jacques Rancière, \textit{Disagreement: Politics and Philosophy} (Minneapolis: University of Minnesota Press, 1999), 30, 28.
\item[213] According to Nash, “This test of loyalty, along with the widened suffrage, proved crucial in composing the convention’s delegates. By neatly disenfranchising Tories and moderates (those still opposed to an outright declaration of independence), the conference paved the road for a body that was representative not of Pennsylvania’s people in their entirety but of those committed to independence and internal change. Though enraging their opponents, the radicals had a strong argument: if Pennsylvania was to have a new constitution, then those called upon to defend it should have a voice in its creation.” Nash, “Philadelphia’s Radical Caucus,” 78.
\end{footnotes}
who directly opposed America’s independence), but also “neutrals, pacifists, and even dedicated republicans who could not tolerate the imposition of the oaths.”

On July 8, 1776, the constitutional convention was finally elected, consisting of 96 delegates from across Pennsylvania. Nash describes their profile as such: “Most were farmers, a few were merchants and lawyers, and others were artisans, shopkeepers, and schoolteachers. A majority were immigrants or sons of immigrants from Ireland, Scotland, England, and Germany. Many were in their mid-twenties. All but eight represented the rural counties outside Philadelphia. About half had joined up as militiamen… and most of them had been elected officers by the rank and file.” As Nash observes, “[n]owhere in the world had such a plainspoken, largely unschooled group of men with work-toughened hands been charged with such a portentous matter.” The people that voted for these delegates, said a Presbyterian minister of the period, had seemingly decided that “any man, even the most illiterate, is as capable of any office as a person who has had the benefit of education.” Actually, only a few of these delegates had served before in the province’s legislature. Most of these delegates were thus political unknowns before 1776. More precisely, “[t]hese men, their fathers, and the communities in which they have grown to maturity had been firmly excluded from political power.”

But being political outsiders was not their only common trait. As the next topic shows, there was at least one other, perhaps the most important of all. Most of these men shared several

215 Ryerson, “Republican Theory and Partisan Reality,” 108-109. It is worth noting that, among these delegates, was the prominent figure of Benjamin Franklin. Despite the fact that Franklin, later in his life, would join the Federalist project of creating a strong centralized government, he defended Pennsylvania’s constitution until his last days. Nash, “Philadelphia’s Radical Caucus,” 82.
democratic values (such as an enlarged suffrage, wealth equality, intense popular participation, and the like) that were bubbling up from the streets, taverns, and docks of their time. Many of them had participated, or were participating, in the committee movement and/or in other modes of out of doors’ politics.\textsuperscript{219} The constitution that they would produce captured to some extent, therefore, the democratic effervescence of their time.

The constitutional convention met in Philadelphia from July 15 to September 28, 1776. After being approved by over three-quarters of the members, a new constitution was proclaimed on September 28.\textsuperscript{220} As Nash observes, by shifting the center of political gravity downward, the constitution was, on the one hand, a victory for small farmers; urban artisans (many of whom formerly could not vote because they owned no property); and for radical reformers “who dreamed of holding the rich at bay in the interest of a more equitable society.” On the other hand, the document was “a heavy blow to wealthy merchants, large property owners, and assorted conservatives who wanted to retain the old political system, which they feared was slipping from their grasp.” In short, while people of modest means regarded the new constitution “as the dawn of the a new era, conservatives and some moderates, both inside and outside Pennsylvania, looked at it with horror.” \textsuperscript{221}

One of the new constitution’s aspects that most shocked conservatives and some moderates was the enlargement of the electorate.\textsuperscript{222} Accustomed to a small and malapportioned franchise consisting primarily of affluent property owners, they found outrageous the new expanded electorate formed by, among others, numerous propertyless men and small farmers. An

\textsuperscript{219} As Ryerson observes, “these were not merely long-excluded men; they were men with a particular view of the good society and of the proper government for this society. They began to acquire their outlook even before they sought admission to Pennsylvania’s political establishment, and the province’s history in the twenty years before Independence strongly reinforced their early convictions.” Ryerson, “Republican Theory and Partisan Reality,” 103.


\textsuperscript{221} Nash, “Philadelphia’s Radical Caucus,” 81-82.

\textsuperscript{222} Nash, “Philadelphia’s Radical Caucus,” 82.
anonymous Philadelphian captured their sentiment: “The most flourishing commonwealths that ever existed, Athens and Rome were ruined by allowing this right to people without property.”

John Adams, one of the most notorious political thinkers of the epoch, was among those who looked at Pennsylvania’s constitution with horror. He also intensely criticized the extension of the franchise. His view of the constitution reveals a strong incongruity with the perspective of many critics of the document. Adams, who was an avid supporter of American independence, applauded the Philadelphia town meeting of May 20, 1776 that overthrew the old government and brought Pennsylvania into the pro-independence column. But, that much done, Adams (and many critics of the new constitution) “wanted propertyless citizens to disappear from the political stage and surrender it to men of means.” In this sense, they saw “the Revolution as a ‘people’s war,’ but he was unwilling to have a people’s war produce a people’s polity.”

_Pennsylvania’s Constitution of 1776 and the People Out of Doors’ Rights_

Before investigating some provisions of the 1776 Constitution, I should note the following. Instead of viewing the new constitution from the perspective of a certain occupational class (modest workers, wealthy merchants, _e.g._), as Nash does (see above), it is more interesting for the purposes of my dissertation to examine it from the perspective of the people out of doors (or the multitude). From the latter’s standpoint, some of the most impressive devices of the constitution (such as ‘informal ratification’, ‘check from below’, and ‘right to revolt’) epitomize,

---

223 Quoted by Nash, “Philadelphia’s Radical Caucus,” 82.
224 In a letter to Benjamin Rush (also a strong critic of Pennsylvania’s 1776 constitution), Adams would have said: “Good god! The people of Pennsylvania in two years will be glad to petition the crown of Britain for reconciliation in order to be delivered from the tyranny of their Constitution.” Quoted by Nash, “Philadelphia’s Radical Caucus,” 82.
225 Nash, “Philadelphia’s Radical Caucus,” 82.
226 Nash, “Philadelphia’s Radical Caucus,” 82. See also Fritz, _American Sovereigns_, 31.
I argue, an immediate result of Pennsylvania’s out of doors politics. That is, these devices were implemented in the new constitution by the framers due to the intense pressure (or, better, due to the intense democratic force) of the people out of doors on the institutional machinery. In this light, as Carp observes:

The constitution recognized the rights of the people out of doors in a number of ways. First, “the People have a right to Assemble together to consult for their Common good, to instruct their representatives, and to apply to the Legislature for Redress of Grievances by Address Petition or Remonstrance.” Second, “The Doors of the . . . General Assembly, shall be and remain open for the Admission of all persons, who behave decently except only when the welfare of this State may require the doors to be shut.” The Assembly would publish bills before debating on them and proposed amendments; and the Assembly was to publish its votes and proceedings. Thus, Pennsylvania had enshrined many of the mechanisms of mobilization that had brought the province to this point. The constitution gave the people freedom of expression through the press and petitions, allowed input from the politicized masses, and opened up avenues for out-of-door politicking.227

In effect, I call the abovementioned devices the people out of doors’ rights. Their ultimate aim, I claim, was nurturing the expression of the multitude’s constituent power – which, as stated elsewhere, not only is the power of revolting against and overthrowing the constituted order but also of creating from below new democratic forms of social organization.228 Because these rights clearly nourish the expression of the multitude’s constituent power, they can also be called, borrowing here Negri’s expression, rights to the expression of constituent power.229

228 See Negri, Insurgencies.
229 Negri, Insurgencies, 149.
revolutionary period, these rights were not a mere rhetorical flourish lacking practical application. On the contrary, as my investigation shows, the people out of doors had come to believe that they were the real legislators in society and that they could at any time “dissolve political society into its individual, constituent atoms, if they chose, and make their governments anew.”

In addition, the 1776 Constitution reflected, to a great extent, the revolutionaries’ deep suspicion of the idea of delegation of power and, thus, of political representation. The bitter experience of British domination (which subjected them to a centralized, distant, and corrupt form of rule) and their exposure to the radical republican thought of the epoch led many Pennsylvanians to distrust the very idea of representation. In this sense, many of the provisions that they implemented in the constitution (such as annual elections, limited terms, and the like), were attempts to establish the closest possible ties with, if not circumvent, their representatives. Even that was not enough, though, as the revolutionaries pushed the idea that the people themselves should always have the final say on the polity’s most important issues. To this end, instead of the decision-making process being almost fully centralized in the hands of a few representatives, the revolutionaries created channels through which a reasonable part of the people (and, at times, a significant part of them) could directly express their desires. Actually, at a more fundamental level, many Pennsylvanians had come to believe that they could never be

---

230 Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* (Cambridge, Ma: Harvard University Press, 1990), 112. See also Wood “The American Revolution,” 609. Although working with the concept of ‘sovereignty’, a notion that, as the next chapter shows, I consider problematic, Fritz also notes that, during the revolutionary period, the idea (and practice) that the people out of doors had prominence over their governments was very influential. In his words, “The idea that the people collectively were the sovereign – not a monarch or people serving in government positions – gave life and authority to the governments Americans created after Independence. It also implied that the new American sovereign – the people – retained power over the governments it created, including the ability to destroy that creation.” Fritz, *American Sovereigns*, 21.

completely embodied or represented in any government institution.\textsuperscript{232} Echoing this idea, Thomas Tudor Tucker, a politician at the time, asserted that political representation of the people could never be full and inclusive: “It is a vain and weak argument that, the legislature being the representatives of the people, the act of the former is therefore always to be considered as the act of the latter. They are the representatives of the people for certain purposes only, not to all intents and purposes whatever.”\textsuperscript{233} This is not to say, of course, that the revolutionaries banned political representation from Pennsylvania’s political system. However, representatives had come to play a role more and more secondary in the decision-making process. Representatives became merely “the people’s suspected agents [or servants].”\textsuperscript{234} In a context like this, the prominence that the institution of political representation often enjoys in political systems (as, for example, in today’s systems) was being seriously challenged. In a way, it seems fair to say that the revolutionaries sought to replace the prominence of representation by the people themselves.

Although I will examine some core features of the 1776 Constitution (suffrage, assembly, executive, judiciary, and council of censors), the devices I am most interested in, as mentioned above, are precisely the people out of doors’ rights (‘ratification’, ‘check from below’, and ‘right to revolt’).\textsuperscript{235} Challenging ideas such as delegation and ephemerality, the examination of these latter devices will assist us in dismantling the net of mystifications entrenched within the notion of constituent power and build an alternative path for this concept.

\textsuperscript{232} Wood “The American Revolution,” 609.
\textsuperscript{233} Quoted by Wood, The Creation, 384.
\textsuperscript{234} Wood, The Creation, 385.
a. (Informal) Ratification. After completing its work, the constitutional convention ordered on September 5, 1776 the distribution of 400 copies of the new constitution for a two-week period of public consideration and debate. The consideration of the new constitution was “resumed by the convention on September 16, and the Constitution was adopted on September 28.” As Nash notes, “[t]his in itself was a radical innovation—to send back to the people the fruit of their elected delegates so they could endorse or reject it.” However, “[t]he process was left vague… so the invitation was more of an informal public opinion poll than a request for formal ratification.”

Despite its ‘informality’, I consider the provision of ‘ratification’ a people out of doors’ right. That is because this type of instrument nourishes the expression of the multitude’s constituent power. More to the point, by conferring the opportunity (even if informal) to the people out of doors to discuss and, ultimately, endorse or reject the new constitution, this device nurtured an elementary multitude’s power (or right): the power to destroy a constitution. Equally, by nourishing the multitude’s constituent power, provisions like ratification challenges (or demystifies) the traditional idea of ‘ephemerality’. That is, ratification confronts the confinement of constituent power to a brief episode, such as the enactment of a constitution (even if it is the enactment of a ‘radical’ constitution). In fact, devices like ratification nurtured the continuation of constituent power.

One should note another aspect related to ratification. This device indicates that, in revolutionary Pennsylvania, the people sought to maintain a relation, if not of prominence, of

---

238 On the idea that American revolutionaries founded a system in which constituent power could be continuously expressed, see, e.g., Hannah Arendt, *On Revolution* (London: Penguin, 1990), 126.
intense control over the institutional machinery (or, in the particular case, over the constitutional authority). That is because the people seemed to frequently retain the final say on the polity’s most important issues. In a word, “the people controlled the constitution and not the other way around.”

Likewise, provisions as ratification, by conferring on the people the final say on the polity’s most important issues, suggest that the revolutionaries rejected the central position that representation often enjoys in political systems. As stated above, instead of the decision-making process being almost fully centralized in the hands of a few representatives, the framers created channels, such as ratification, through which a reasonable part of the people (and, at times, a significant part of them) could directly express their desires. Consequently, the idea of delegation is challenged (or demystified). That is, devices such as ratification confront the traditional idea that constituent power could only operate validly if through political representatives.

Equally, because a device such as ratification fostered the primacy of the people over institutions, it allowed constituent power to remain relatively active on the surface of Pennsylvania’s political system. Put differently, instead of proscribing constituent power to the subterranean of the political system (as constitutional devices traditionally do), provisions such as ratification, by contrast, nurtured constituent power to operate on the surface of the system.

Similarly, it seems fair to say that devices like ratification contributed to the creation of a political system in which the constituent power’s creative primacy over the established order became more visible. Although I will explore this theme more thoroughly in the last chapter, it is useful to introduce the idea here. As noted elsewhere, although the traditional discourse on

---

240 The above statement is similar to Arendt’s. Interpreting the American Revolution, she asserts that: “The central idea of [the American] revolution... is the foundation of freedom, that is, the foundation of a body politic that guarantees the space where freedom can appear.” Hannah Arendt, *On Revolution* (London: Penguin, 1990), 125.
constituent/constituted power presents, on the one hand, the latter as the natural source of political innovation and, on the other, the former as a brief disruption of the institutional reality, this perspective, in fact, mystifies the true nature of the relation between constituent and constituted power. In fact, the primary “locus of social creativity, political innovation and historical movement,” as revolutionary episodes such as Pennsylvania shows, lies not in the fixity of the constituted order but in the multitude’s constituent power.\textsuperscript{241} Being a fundamental motor of political novelty and social transformation, it is thus through constituent power that democratic forces develop and processes of social experimentation occur. In a word, the multitude is the continuous and direct force for change. In this light, devices like ratification, by conferring the final say to the people out of doors, contributed to making constituent power’s creative primacy over the established order more visible. Consequently, they assist us in demystifying the traditional discourse on constituent/constituted power. I will return to this point in more detail in the next chapter.

b. Suffrage. The 1776 Pennsylvania Constitution practically removed the property requirement for voting. Formerly, one had to own 50 acres of land or £50 of property in order to vote. After the 1776 Constitution, all one needed was: to be a 21 year old male; pay any state or local tax or live with a parent who paid any tax; and reside in Pennsylvania for a year.\textsuperscript{242} The lower requirements to vote “allowed approximately 90 percent of the adult male population to qualify—a steep increase over the 50–75 percent who had qualified in the past.”\textsuperscript{243} It is also important to note that, after the 1776 Constitution, Pennsylvania became one of the few states

\textsuperscript{241} Hardt, foreword to \textit{Insurgencies}, viii.
\textsuperscript{243} Bouton, \textit{Taming Democracy}, 53.
that gave voting rights to free African-American males. The opening of Pennsylvania's political system was indeed unprecedented. Common people (poor white men mostly) were granted access to political power as never before. In a word, the Constitution of 1776 created “the most liberal franchise known in the Western world to that date”.

Pennsylvania’s political opening also represented a rupture with traditional ways of thinking about voting and citizenship. In the past, following the British hegemonic discourse around the theme, governments imposed a heavy restriction on the right to vote: only adult men who owned sufficient property could do so. Influential political actors defended the notion that only those with a certain amount of property could be genuinely ‘independent’ citizens. In this sense, governments had prohibited from voting propertyless ‘dependents’, whom it was thought “would vote as their landlords, employers, or creditors directed. It was said that preventing dependents from voting would keep wealthy men from corrupting the political system.”

However, during the revolutionary period, this traditional discourse suffered a significant shift. Men who held little or no property were, for the first time, given the right to vote. The idea was that a numerous electorate would shield against corruption better “because, with so many voters, there would be too many people to buy off.” At the same time, it was thought that opening the political system to common people would give them power to access credit and land, nourishing, in turn, independent citizens. “With property in many hands, it would be even harder for the affluent to control political life.”

---

Despite this significant political opening, Pennsylvania's system still had clear limits. For instance, women and slaves were prohibited from voting.\(^{248}\) In respect to Native Americans, according to Bouton, it is “uncertain whether the small communities of Native Americans, mostly Christian converts, were able to vote.”\(^{249}\) Also, due to the tax-paying stipulation for voting, the very poor, who were exempt of paying taxes, were also exempt from the franchise. In addition, as noted earlier, from 1777 to 1786, those who did not take an oath of loyalty to the new Constitution/government were prohibited from voting.\(^{250}\) Finally, there were restrictions, too, concerning who was eligible to serve in office. The 1776 Constitution required that “before he takes his seat,” each assemblyman must “declare a belief in God and acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration.”\(^{251}\) This, in practice, meant only Christians could serve.\(^{252}\)

However, as noted elsewhere, it would be misleading to think that these excluded segments of society had no access to the political sphere, “or that they slavishly relied upon their social betters for such access.”\(^{253}\) As occurred in relation to the committee movement, the disenfranchised, through intense out of doors politics, such as crowd action and petition writing, constantly challenged and pushed the limits of the political system and, at a more fundamental level, of the constituent process in Pennsylvania. And here it seems worth remembering the

\(^{248}\) Concerning the prohibition of voting rights to women, with the brief exception of New Jersey, they were also prohibited to vote in the other states. Bouton, Taming Democracy, 53.

\(^{249}\) Bouton, Taming Democracy, 55.

\(^{250}\) Bouton, Taming Democracy, 56.

\(^{251}\) Bouton, Taming Democracy, 56.

\(^{252}\) These restrictions, as this chapter shows, were in part responsible for the collapse of Pennsylvania’s 1776 Constitution. The exclusion of some segments of society from political rights made Pennsylvania’s ‘radical’ government more vulnerable to the attacks of the local gentry. In short, the exclusion of these persons produced in them a sentiment of detachment towards official institutions (including the Constitution). Hence, when the Constitution began to be more and more attacked by the local gentry during the 1780s, the kind of popular force required to confront these attacks was not sufficient. Although the Constitution, as noted above, had a large support from ordinary white men, this support was simply not enough to confront the intensity of the attacks of the affluent classes on that document. I will return to this point.

\(^{253}\) Carp, Rebels Rising, 15. See also Nash, The Unknown American Revolution.
example of the very poor and the youngsters (both excluded from political rights in revolutionary Pennsylvania).\textsuperscript{254} In 1776, during the selection of delegates for the constitutional convention, the very poor and the youngsters, aligned with militiamen, attempted to push the limits of Pennsylvania’s political system. They demanded that all those (of any age and social status) who were risking their lives for independence should enjoy voting rights. Although their demand did not pass, some scholars affirm that this kind of request (or intense pressure) from the excluded was fundamental in winning a significant, \textit{for the epoch}, openness to the political system.\textsuperscript{255}

c. Assembly. Composed of seventy-two elected representatives, the state assembly is considered by many scholars as one of the most remarkable devices of Pennsylvania’s political system. The first feature to note about this legislature is its unicameral organization. Instead of a divided assembly – such as a House of Commons (supposedly representing ‘the people’) and a Senate (mostly representing aristocracy or the affluent classes) – the 1776 Constitution provided a unicameral house.\textsuperscript{256} The framers of the constitution believed that a divided legislature, especially if it included an upper chamber, like the British Parliament did, rather than promoting democracy was actually a check on it. For them, if the lower house of a legislature was supposed to give voice to ‘the people’, “then any check on [this] house—such as a senate or a governor


\textsuperscript{255} Nash “Philadelphia’s Radical Caucus,” 76-78. See also Nash, \textit{The Unknown American Revolution}.

\textsuperscript{256} Although unicameralism was not new in Pennsylvania—the province, as Ryerson notes, had been unicameral since 1701—the 1776 Constitution’s unicameralism carried a fundamental novelty: its dynamism. By dynamism, I mean that the unicameral assembly adopted an intense rotation of representatives in office; and that the people out of doors kept the assembly under a strong check. This theme will soon be examined in detail. Ryerson, “Republican Theory and Partisan Reality,” 111 and footnote 24.
with a veto—was a check on the will of the people by the rich and well-born.”

The unicameral house was thus directed to avoid one of the things that Pennsylvania’s revolutionaries most abhorred: “the aristocratic elements of society.” This expression fundamentally meant any political apparatus, such as a second chamber or a powerful executive, that, through vetoing e.g., could limit the political participation of ordinary people.

The unicameral legislature also reflected an influential idea of the epoch: government’s simplicity. Thomas Paine was among the prominent figures that defended a simple republican government operated by a unicameral legislature. For him and for many other revolutionaries, instead of a complex system of checks and balances – that, in their view, would ultimately produce a check on democracy – they advocated for a simple, transparent, and close to the ground model of government.

Similarly, imbued with a profound distrust of distant centralized forms of rule (as experienced during the period of the British domination), the framers provided some important features for the unicameral assembly. They are: annual elections for every representative, limited terms to four out of every seven years, assembly’s open doors to the public, and publication of a detailed record of all votes and debates. By implementing annual elections for every representative, the framers mainly sought to rotate the largest number of people in and out of

---


258 As Williams affirms, the framers “called for a people's government, unencumbered by interference from what they saw as the "aristocratic" elements of society that would be represented by either a second house of the legislature or a powerful executive, and that would seek to limit the political participation of ordinary people.” Williams, “The State Constitutions,” 29.

259 In Paine's own terms: “I draw my idea of the form of government from a principle in nature which no art can overturn, viz. that the more simple any thing is, the less liable it is to be disordered, and the easier repaired when disordered...” Thomas Paine, “Common Sense” in *Collected Writings* (New York: Penguin, 1984), 9.

260 Pa. Const. of 1776, Section 8. It is worth noting that Rhode Island and Connecticut required half-yearly elections. See Kramnick, introduction to *The Federalist*, 23.
office, encouraging thus the participation of ordinary people in government.\textsuperscript{261} By setting term limits, they tried to avoid “career politicians who might develop interests apart from their communities.”\textsuperscript{262} As an anonymous writer of the epoch (‘The Considerate Freeman’) noted, after four years, representatives would return to citizenry to “mix with the mass of the people and feel at their leisure the effects of the laws which they have made.”\textsuperscript{263} Finally, "by keeping the doors of the assembly open to the public and by publishing a detailed record of votes and debates so people could read what their legislators had said and see how they had voted,” the framers not only wished to make the procedures of the unicameral legislature as transparent as possible but also sought to increase the people’s chance to hold their representatives accountable.\textsuperscript{264} It seems correct to say that all the aforementioned provisions sought to establish the closest possible ties between constituents and their political representatives.\textsuperscript{265} In a word, the aim of these provisions was accountability.

d. Check from Below. Pennsylvania’s revolutionaries suspected that any representational schema – even a unicameral house fueled by devices that sought to hold representatives accountable to their constituents (such as annual elections, limited terms, and the like) – was susceptible to deviance and corruption. As noted elsewhere, the bitter experience under the British domination (which subjected them to a centralized, distant, and corrupt form of rule) and

\begin{flushright}
\textsuperscript{261} As Nash observes, “This rotation of legislative seats jibed with the idea that many citizens were capable of performing well in public office.” Nash, “Philadelphia’s Radical Caucus,” 81.
\textsuperscript{262} Bouton, \textit{Taming Democracy}, 55.
\textsuperscript{263} Quoted by Kruman, \textit{Between Liberty and Authority}, 150.
\textsuperscript{264} Bouton, \textit{Taming Democracy}, 55.
\textsuperscript{265} Bouton, \textit{Taming Democracy}, 55; and Gordon S. Wood, \textit{Representation in the American Revolution} (Charlottesville: University of Virginia Press, 1969), 25. In this sense, as Paine warned, “It always did happen, and always will be the consequence, that when one class of men gains an ascendency, in the legislative authority in any state, they make use of their power, as members of the legislative body, to promote their own interests, as individuals; and incline the laws to establish their power, and interests, at the expence of every other man in the state.” Quoted by Steven Rosswurm, \textit{Arms, Country, and Class: The Philadelphia Militia and “Lower Sort” during the American Revolution, 1775–1783} (New Brunswick: Rutgers University Press, 1987), 87–88.
\end{flushright}
their exposure to radical republican thought led many Pennsylvanians to deeply distrust the very idea of political representation. With that in mind, they sought through the peoples’ participation to “check it from below–with more democracy–rather than from above, with less.”

Here is how this idea of a ‘check from below’ reads in the 1776 Constitution: “all-bills… 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…”

In simplified terms, all bills passed by the unicameral assembly, except those dealing with ‘emergencies’, had to be approved and printed for public consideration, “and then reapproved by the next session of the assembly before becoming law.”

Explaining this provision, Andrew Shankman observes that the constitution allowed the legislature to propose bills, but prevented those bills from becoming law unless they received majority support in the next legislature (seated after the annual election). In the interim, before the next election, prospective legislators had to take a stand on the bills, which were printed and widely distributed. Thus, voters could decide which bills would become law by choosing to vote for candidates who supported that legislation.

Shankman’s explanation, however, seems partial. It only considers the role of voters’ (i.e. white adult male taxpayers) in the process of ‘public consideration’. It would be misleading to think, however, that the disenfranchised (whom, together with the voters, formed what I have been naming in this dissertation ‘the people out of doors’) did not participate in this process. As

---


267 Pa. Const. of 1776, Section 15.


noted elsewhere, using the means at their disposal, such as “participation in open town meetings, writing petitions or publishing polemics, and crowd action” and acting not as an organic stable group but as a contingent ever-changing collective, women, non-whites, and the poorest of white men also played an important role in the process of publicly considering bills.\textsuperscript{270} In this sense, as Wood affirms, “The orthodox conviction that it was impossible to convene the people of a large state in the aggregate was… being proved wrong by the Americans. The people themselves in their mobbings, in their district committees and conventions, and in their explicit directions to their elected deputies seemed in fact to be replacing their representatives in the legislatures as the deliberative bodies for the states.”\textsuperscript{271}

Now, I should note some aspects about the check from below. First, I consider this device a people out of doors’ right (one of the most important). That is because the check from below nourished the expression of the multitude’s constituent power. More to the point, to place into the hands of the people the power to decide what becomes and what does not become law, fostered the people’s creative powers, one of constituent power’s dimensions. Although it was not the people themselves who created the bills, the device of a check from below conferred the people the possibility to say what laws representatives could pass and, therefore, what could be ‘created’ in the polity by the latter. This is no small thing. In fact, it seems fair to say that the check from below somewhat incorporated the people out of doors into the legislative process as a sort of \textit{second branch}. Actually, William Hooper, one shocked Continental Congress delegate from North Carolina, affirmed this at the time. In his words, “The Mob made a second branch of

\textsuperscript{270} Carp, \textit{Rebels Rising}, 15.
Legislation—Laws subjected to their revisal in order to refine them a washing in ordure by way of purification. Taverns and dram shops are the councils to which the laws of this State are to be referred for approbation before they possess a binding influence."272 Also noting the incorporation of the people in the legislative process due to check from below, historian Staughton Lynd correctly coined this provision as “bicameralism from below.”273

Secondly, provisions such as check from below indicates, once again, that in revolutionary Pennsylvania the people sought to retain the final say on the polity’s most important issues. For them, it was not enough to establish the closest possible ties with their representatives through the aforementioned mechanisms such as annual elections, limited terms, assembly’s open doors to the public, and the like. In their view, the people themselves should have the final say in the legislative process. As Wood asserts, the idea behind this provision of a check from below was the following: “If law made by a legislature was not really a reflection of the will of the people, not the command of a superior sovereign, but only the act of the people’s suspected agents, then some sanction other than consent would have to be emphasized in order to make law obligatory.”274 At a more fundamental level, provisions as ‘check from below’ suggest that the revolutionaries had come to believe that they could never be completely embodied or represented in any government institution.275 Many had come to believe, as Wood observes, that “they were the real legislators in the society and that they could take back at any time the power

272 Quoted by Kruman, Between Liberty and Authority, 150. For a discussion of the critics of this device, see Kruman, Between Liberty and Authority, 150-151.
273 According to Lynd, “The democratic movement in the American Revolution has usually been associated with the demand for single-chamber legislatures. What the ad hoc bodies of the Revolution signified, however, was the additional insistence that the best of legislatures be continually checked and guided by ‘the people out of doors,’ acting through new institutions of their own devising. This was a demand not simply for an end to conventional bicameralism, but for what might perhaps be termed “bicameralism from below.” Staughton Lynd, Intellectual Origins of American Radicalism (New York: Pantheon, 1968), 171.
they had given to their representatives..."276 The ideas of delegation and ephemerality seem, once again, challenged. Through devices such as check from below, not only did the revolutionaries contest the ‘inexorable’ transfer of constituent power to a transcendent apparatus of rule, they also confronted the confinement of this power to an ephemeral episode.

Similarly, the check from below also indicates that the prominence often enjoyed by that the institute of political representation in political systems (as, for example, occurs in today's systems) was being seriously questioned. In a way, it seems correct to say that the revolutionaries sought to replace the prominence of representation by the people themselves. Although not proscribed from Pennsylvania’s political system, representation became ever more secondary and, equally important, scrutinized by the people. In this context, representatives were viewed, as mentioned earlier, as “the people’s suspected agents.”277 And here it seems useful to introduce one last idea about political representation in revolutionary Pennsylvania.

Pennsylvania’s revolutionaries sought more than simply the replacement of the often-enjoyed centrality of representation by the people themselves. In a way, it seems correct to say that they sought to reinvent the very institute of political representation. Some of the provisions examined so far – such as a large unicameral assembly, annual elections, limited terms, legislature’s open doors to the public, publication of a detailed record of all votes and debates, and check from below – seem to point in this direction. Instead of a distant small group of representatives elected by the affluent classes alone and serving long terms in office, the revolutionaries created a large transparent legislature, with representatives serving short terms and under the intense democratic control of the people. In this scenario, it was becoming

276 Wood, “The American Revolution,” 609. Also noting the prominence of the people out of doors over representatives is Fritz, American Sovereigns, 18-19.
increasingly difficult to make a ‘career’ out of politics. The alterations in political representation were so profound that, as I claim, the revolutionaries really remodeled this device. It was not just that political representation became secondary in the political system. Equally important, it became much more responsive, accountable and, more fundamentally, permeable to the people out of doors’ constituent power.

e. Executive. Rejecting one of the most honorable elements of traditional republican thought, an independent executive with extensive power, the 1776 Constitution intentionally provided a collective and weak executive branch. Instead of centralizing its functioning in one powerful person (such as a state governor), Pennsylvania's executive branch had a plural structure. An elected twelve-member council, one from each county, served three-year terms, making them ineligible for reelection until four years after their terms ended. Headed by a ‘president’, called the ‘president of Pennsylvania’ and chosen annually by the assembly, the executive branch, interestingly, did not have a veto power. Rather, the ‘president of Pennsylvania’ could do “little more than advise the legislature and enforce laws.”\(^{278}\) Hence, “its duty was to implement the laws passed by the legislature, not to amend or veto them.”\(^{279}\) The reason for this provision (absence of a veto power) followed the same principle noted earlier: Pennsylvania’s revolutionaries viewed a strong executive branch with veto power as a check on the voice of the people and, at a more fundamental level, a check on democracy and on constituent power.

f. Judiciary. Instead of a distant, powerful, and life tenure judiciary, the 1776 Constitution provided a judicial system under significant democratic control. For instance, Supreme Court judges – whom were appointed by the president of the executive council with the consent of the

\(^{278}\) Bouton, *Taming Democracy*, 55.
\(^{279}\) Nash, “Philadelphia’s Radical Caucus,” 87.
council for a seven-year term at a fixed salary – could be removed by the assembly at any time for ‘misbehavior’ (a vague term that ultimately could comprise many situations).280 Equally, county ‘justices of the peace’ – whom were directly elected by the people in their localities for a seven-year term – could also be removed by the legislature at any time for ‘misbehavior’.281

In the particular case of the justices of the peace, the possibility of removal for ‘misbehavior’ created a curious scenario. The justices of the peace who followed unpopular state orders too diligently could find themselves voted out of office. “As a result, … justices faced pressure to put their constituents’ interests above unpopular state [orders].”282 This judicial system led to a situation where, as one state official put it, “people literally think that every justice of the peace is a justice of the people.”283 Here is one example. During and after the war for independence, many Pennsylvanians became severely indebted. Without having a basic income during the conflict, many families took loans in local banks and with individuals, which, for many, resulted in a situation of severe indebtedness.284 In this situation, many Pennsylvanians considered it unfair to prosecute those who had been economically hurt by the independence war and that now were facing intense difficulties to pay their debts. Confronted with this scenario (and due to the people’s influence over judges), many of the justices refused to prosecute delinquent taxpayers and collectors.285

280 Pa. Const. of 1776, § 20, 23, and 19, respectively.
282 According to Woody Holton, “The economic slump of the 1780s had many sources. During the American Revolution, as in most wars, soldiers destroyed massive quantities of property. But what they did caused less harm to the economy than what they did not do: their normal jobs. During the war the nation’s economic output plummeted. True, most farm families also drastically reduced expenditures—the virtual cessation of transatlantic trade left them little choice. But few households were able to scrimp enough to make up for what they lost when their young men exchanged wheat and tobacco fields for battlefields. Many plunged deep into debt.” Woody Holton, Unruly Americans and the Origins of the Constitution (New York: Hill and Wang, 2007), 27-28. See also Bouton, Taming Democracy, 152.
283 Quoted by Bouton, Taming Democracy, 152.
284 Bouton, Taming Democracy, 14.
285 Bouton, Taming Democracy, 152.
Additionally, it is worth noting that the assembly’s authority over the judiciary went sometimes beyond the power of removing judges for misbehavior. At times, the legislature simply overruled the judiciary’s decisions. As E. S. Corwin notes on the New Hampshire assembly (which in this respect was similar to Pennsylvania’s legislature), the assembly “freely vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases, and even determined the merits of disputes.”

Despite the many difficulties and inconveniences faced by a judicial system like this, it seems fair to say that the assembly’s power to remove the members of the judiciary for ‘misbehavior’ and, more importantly, the direct election of the ‘justices of the peace’ reveal, once again, the revolutionaries’ attempt to create political institutions under democratic control. In a way, they sought to invent a political system in which the voice of ‘the many’ could have a chance to prevail over judicial decisions.

g. Council of Censors. This was another interesting feature provided by the framers of the 1776 Constitution. Modeled after an old republican precept (the Roman Censors), the Council of Censors was a sort of autonomous grand jury, with two members from each county, twenty-four in total, elected septennially by the people. Sitting for one year, the Council had two main functions (examined more thoroughly below): to review the constitutionality of laws passed over the previous seven years; and, if it deemed strictly necessary, to recommend amendments to the Constitution. It was thought that the Council, a separate popularly-elected organ, was one of the means to avoid the occurrence of the revolutionaries’ greatest concern: government departing

---

from its democratic foundation (or from “the constitution’s first principles”). As the 1776
Constitution stated, the Council would meet so “that the freedom of the commonwealth may be
preserved inviolate forever.” In this light, the Council seemed to reflect “an early awareness
of the potential for abuse by a powerful legislature.” In fact, “[t]he authors of the early
constitutions were fully aware that unconstitutional laws might well win the approval of the
legislature.” By providing a popularly-elected temporary grand jury (the Council), they
sought, though, to periodically review the acts of the legislature. Let us now briefly investigate
the two main functions of the Council.

Constitutional Review. One main function of the Council of Censors was to inquire into
violations of the constitution by the government. Although it had no power of enforcement, it
could recommend to the assembly the rejection of an unconstitutional state action. For instance,
if the Council judged a law unconstitutional, it could recommend its repeal to the legislature.
One noteworthy aspect is that the framers did not assign to the judiciary the task of reviewing the
constitutionality of state actions. Their preference for a system like the Council of Censors
(instead of a system of judicial review, e.g.) lay possibly in their desire to produce a more
democratic mode of government (or, in the case, of constitutional review). Usually, in a system
of judicial review, not only is the authorized body composed of lifetime-appointed judges
(Supreme Court Justices, for instance), but, also, its verdicts are definitive. The Council of
Censors, by contrast, not only was popularly-elected but also did not proclaim definite verdicts.
On the contrary, the Council, as noted above, could solely recommend the repeal of an

287 On the Council of Censors, see: Pa. Const. of 1776 Section 47; Krumen, Between Authority and Liberty, 55, 57-
58; Lutz, Popular Consent and Popular Control, 129-49; Adams, The First American Constitutions, 137, 268; and
288 Pa. Const. of 1776 Section 47.
289 Williams, “The State Constitutions,” 46.
290 Adams, The First American Constitutions, 268.
unconstitutional state action to the legislature. Here one might pose the following question: Why did the framers implement this latter feature? Or even: Why did the Council forward its recommendations specifically to the assembly (and not to another state institution)? In order to answer this, it is worth remembering that not only was the assembly the strongest of official institutions, but it was also by far the most democratic of them. As noted above, provisions such as annual elections, limited terms, check from below, etc. were designed to place the assembly under intense democratic control. Therefore, the forwarding of Council recommendations to the assembly instead of another state organ sought to provide a more democratic decision on the constitutionality of governmental acts. In the assembly, the decision on the constitutionality of state acts, so the revolutionaries hoped, would tend to be more democratic than in any other government institution. As Saul Cornell affirms, “The Pennsylvania Council of Censors… reflected the deep suspicion… toward judicial review. By placing his faith in an elected body to review the constitutionality of laws, An Old Whig [an anonymous Anti-Federalist] displayed a distinctive hostility to the authority of judges and lauded the role of juries. ‘Judges’ he wrote, ‘unincumbered by juries, have been ever found much better friends to government than to the people.’ An Old Whig shared the middling democratic view of the jury as an authentic voice of the will of the community.”

Constitutional Amendment. This was another main function of the Council of Censors. If by two-thirds of its members the Council deemed that amendments or additions to the constitution were strictly necessary, it could call a constitutional convention to meet within two years. This latter convention, in turn, should also be popularly-elected. A first aspect to note is that the legislature had no power to alter the constitution in any way. “If the legislature [could]

---

alter the constitution,” one writer of the epoch observed, “they [could] give themselves what bounds they please.”292 In this sense, as Kruman affirms, by establishing a Council of Censor, Pennsylvania’s plan of government “divorced constitutional revision from ordinary government. Unlike a legislature, which had permanent institutional interests, the council was a temporary body composed of non-office holders. The councilors’ powers expired one year after the date of their election.”293 In addition, any proposed changes by the Council were to be “promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject.”294

During its period of existence, the Council faced innumerous conflicts and difficulties, including being torn by partisan conflict.295 Nevertheless, I wish to underline here that provisions like the Council of Censors attest to the revolutionaries’ desire to bring the people closer to some of the most important institutional activities. At a more fundamental level, it demonstrated the desire to found a political system in which, when the people themselves did not have the final say on the polity’s matters, at least they could keep the institutions that did under intense democratic control. And by doing so, they were, in a way, trying to keep Pennsylvania’s constituent process open.

292 Quoted by Kruman, Between Authority and Liberty, 55.
293 Kruman, Between Authority and Liberty, 57.
h. Right to revolt. Following the Declaration of Independence (ratified on July 4, 1776), the framers of the 1776 Constitution also provided a right to revolt (or to revolution). I consider this device the most important of the people out of doors’ rights. That is because, as this topic shows, the right to revolt (more than any other people out of doors’ rights) openly nourished the expression of the multitude’s constituent power. Actually, authors like Negri argue that the articulation between the right to revolt and constituent power is so intense that they call the former “the right to the expression of constituent power.” But, one might ask, what exactly meant the right to revolt in the context of revolutionary Pennsylvania?

First, it certainly implied, in a Lockean sense, a right to resist against a tyrannical government. That is, a right to rebel against extremely dire circumstances imposed by rulers. In fact, in revolutionary Pennsylvania, one can say that the right to revolt corresponded, above all, to a right to resist government’s deviation from its democratic foundation to an aristocratic mode of rule. But not only. Given the prominence of the people out of doors over the institutional machinery, the right to revolt was not only a mechanism of resistance but also, and equally important, a device of creation, enabling the people to invent from below new

---

296 “… government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or soft of men, who are a part only of that community, and that the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.” Pa. Const. of 1776, Bill of Rights, Sec. V.

297 Antonio Negri, Insurgencies, 149.

298 In Locke’s own terms: “whenever the Legislators endeavor to take away, and destroy the Property of the People, or to reduce them to Slavery under Arbitrary Power, they put themselves into a state of War with the People, who are thereupon absolved from any farther Obedience, and are left to the common Refuge, which God hath provided for all Men, against Force and Violence. Whencesoever therefore the Legislative shall transgress this fundamental Rule of Society; and either by Ambition, Fear, Folly or Corruption, endeavor to grasp themselves, or put into the hands of any other an Absolute Power over the Lives, Liberties, and Estates of the People; By this breach of Trust they forfeit the Power, the People had put into their hands, for quite contrary ends, and it devolves to the People, who have a Right to resume their original Liberty.” John Locke, Two Treatises of Government (New York: Hafner Press), 233. For an account on Locke’s right to resist, see, e.g., John Dunn, The Political Thought of John Locke: An Historical Account of the Argument of the ‘Two Treatises of Government’ (Cambridge: Cambridge University Press, 1969), 165-186.
democratic forms of social organization whenever they wished. And, as a constitutional principle, it did not require a last-ditch effort of a desperate people: “The people could properly amend whenever they deemed the status quo outdated or imperfect.” In this sense, as Fritz observes:

Increasingly, as Americans included it in their constitutions, the right of revolution came to be seen as a constitutional principle permitting the people as the sovereign to control government and revise their constitutions without limit. In this way, the right broke loose from its traditional moorings of resistance to oppression... The people could “alter, or abolish” government in Pennsylvania’s 1776 constitution in any manner “judged most conducive” to the public welfare. Some of these provisions justified the people’s acting outside governmental institutions. The people could alter written constitutions whenever and however they wished, even without strict compliance with existing procedures for change in the constitution.

This new meaning given by the American revolutionaries to the right to revolt is deeply interwoven with the process of achieving independence from England. In this light, when Americans finally decided to break with England, they precisely evoked the right to revolt in its primary resistance dimension (see, for instance, the list of abuses attributed to the King by the Declaration of Independence). However, as the rupture with England evolved, the revolutionaries “assumed that the people themselves were the new and rightful sovereign, rather than a monarch. They would neither return to the colonial fold nor surrender their recently acquired sovereignty.” Thus, “in creating governments to replace those established under the

299 Negri, Insurgencies; and Fritz, American Sovereigns, 28.
301 Fritz, American Sovereigns, 25, 24, respectively.
authority of the king, Americans saw themselves as the sovereign.” This new understanding produced a qualitative leap in the right to revolt.

In addition, it is important to underline that this right was not a rhetorical flourish lacking practical application. As several scholars observe, from the revolutionary period until the Civil War, there was a widespread sentiment among people that they were the real legislators in society and that they could at any time dissolve the political system and make their governments anew. For instance, the so-called ‘Whiskey Rebellion’ (Pennsylvania, 1791-1794) is one of the many examples illustrating this sentiment. Although an analysis of this rich episode would exceed the scope of my dissertation, I wish to underline the following. Starting as a tax protest by small farmers, the Whiskey Rebellion dramatically escalated into a movement of thousands of Pennsylvanians for independence from the newly formed federal government. The movement was eventually quelled by federal forces – which, determined to make an example out of Pennsylvania to the rest of the country, sent a federal troop of approximately 13,000 men to march on the state.

But what does the adoption of the right to revolt in the 1776 Constitution tell us about the relation between constituent power and the institutional machinery in revolutionary Pennsylvania? More to the point, what does this right say about the relation of constituent/constituted power in Pennsylvania? First, the right to revolt seems, once again, to attest to the primacy of constituent power over the constituted order in revolutionary Pennsylvania. Instead of adopting a rigid institutional machinery, in which legislators and judges

---

303 As Fritz notes, Americans did not discover the people’s sovereignty. They inherited this idea mainly from English radical thought. What was notable then in American Revolution is that revolutionaries actually put this idea into practice. Fritz, American Sovereigns, 14.
305 For an account of the ‘Whiskey Rebellion’ and for other episodes in which the right to revolt was put into practice between the American Revolution and the Civil War, see, e.g., Bouton, Taming Democracy, Chapter 10; and Fritz, American Sovereigns, Chapters 5, 6, 7.
hold almost exclusively the monopoly to alter the political system and its constitution, the revolutionaries sought to create a permeable aspect of constituent power’s creative forces. In a way, they desired a system constantly opened to the people out of doors’ creative forces or, to borrow Hardt’s expression, a polity continually moving from rebellion to democracy and from democracy to rebellion. Hence, in revolutionary Pennsylvania, it does not seem an exaggeration to say that the term *constitution* was much more a verb than a noun. Equally, by nourishing the multitude’s constituent power, the right to revolt challenges (or really demystifies) the idea of ‘ephemerality’. That is, this device confronts the confinement of constituent power to a brief episode, such as the enactment of a constitution. On the contrary, devices like right to revolt suggests constituent power as a continuous power.

Finally, it is worth noting the similarities between Thomas Jefferson’s idea of a ‘right to change’ and Pennsylvania’s right to revolt. Jefferson, in some of his letters, supported a right to change, which, in sum, meant the right to periodically review or abolish the political system and its constitution. Criticizing the excessive reverence in which people usually hold formal constitutions, Jefferson believed that future generations should not be bound to the intentions of the founders of a constitution. In his words: “We might as well require a man to wear still the coat that fitted him when a boy.” The dead “are nothing,” he affirms. They have no right. The earth belongs to the living. “Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right.” Both Jefferson’s right to change and Pennsylvania’s right to revolt, by supporting the openness of the political

---

306 Hardt, introduction to *The Declaration of Independence*, xxi, xxii.
307 Hardt, foreword to *Insurgencies*, viii.
308 Respectively: Thomas Jefferson to Samuel Kercheval, July 12, 1816; and Thomas Jefferson to James Madison, September 6, 1789, in *The Declaration of Independence* (London: Verso, 2007), 73, 57.
system, seem to share the fundamental idea that a constitution should not block future generations from inventing their governments anew.

As this topic showed, the revolutionaries invented several devices (the people out of door’s rights) to foster the multitude’s constituent power. However, for them, the nourishment of Pennsylvania’s constituent process was deeply tied to the promotion of wealth equality. Although an investigation of the economic measures adopted by the revolutionaries would surpass the aim of my dissertation, I should note the following.

In the revolutionaries’ view, a relatively equal distribution of wealth was fundamental to produce ‘independent citizens’, that is, people free from excruciating economic conditions (free from ‘masters’) and, therefore, with some time to engage directly in political life. In this sense, the revolutionaries created several mechanisms to economically empower ordinary people. One of them was the provision of a public loan system. This provision allowed, for instance, ordinary farmers to access low-cost credit through a government-run land bank. Since, at that time, Pennsylvania was mainly an agrarian society, this mechanism was fundamental to many ordinary people. It assured that ordinary folk could achieve and sustain their economic (and, as a result, political) independence.

However, the revolutionaries’ project to promote wealth equality not only sought to empower ordinary folk, but also to attack wealth concentration. In this respect, many Pennsylvanians were convinced that an exaggerated concentration of wealth produced a system in which a few affluent men transformed government into a vehicle to enrich themselves – creating, as a result, a vicious cycle and a corrupted polity. Hence, in the view of many

---

309 Similarly, see, e.g., Bouton, *Taming Democracy*, 6.
310 For an account on this public loan system, see Bouton, *Taming Democracy*, 36-38.
Pennsylvanians, the political system should hinder the emergence of a situation like this. As the 1776 Constitution reads “… government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or soft of men, who are a part only of that community.” One example of the revolutionaries’ attempt to avoid the concentration of wealth was the provision of a new tax code. According to Bouton, they provided “the most progressive tax code in any of the new states – featuring taxes on speculator’s holdings.” Another example, now from the framers of the 1776 Constitution, also illustrates the revolutionaries’ attack on wealth concentration. Many of the framers of the 1776 Constitution wanted to include a clause allowing the state to ensure equality by confiscating agricultural land or urban property from extremely wealthy people. This proposed clause (some argue it was authored by Benjamin Franklin) declared that: “an enormous proportion of property vested in a few individuals is dangerous to the rights and destructive of the common happiness of mankind; and therefore every free state hath a right by its laws to discourage the possession of such property.” The constitutional convention, however, did not endorse this bold idea. “Instead, they believed that government should equalize wealth through less coercive means—although

---

311 The perception that wealth concentration corrupted the polity derived from two main precepts. First, it derived from the republican ideology of the epoch. It is worth recalling here that one influential republican trend of the period argued that societies with great disparities of wealth were unlikely to flourish because the affluent classes would use their economic power to dominate the political system. The second reason that led many Pennsylvanians to believe that wealth concentration corrupted the polity derived from their practical experience with the Britons. Here it is worth noting that, during the economic hardship caused by British policies in the 1760s and 1770s (the Stamp Act, for instance), many Pennsylvanians were convinced that England was undermining the people’s liberties by placing too much economic power in the hands of a few affluent men (both English and American), who, in turn, used the government’s institutions to enrich themselves. See Terry Bouton, Taming Democracy, 6, 31, 34.

312 Pa. Const. of 1776, Bill of Rights, Sec. V.


the constitution remained silent on what those means should be.” In any event, I believe that the aforementioned examples give us an idea of how, for the revolutionaries, the constituent process was deeply tied to the promotion of economic equality.

3.3 Taming Constituent Power and the Replacement of the 1776 Constitution

The Constitution of 1776 lasted until 1790. During its fourteen years of existence, the Constitution was subject to several attacks. By 1776, as noted elsewhere, there was a certain consensus among ordinary people and segments of the gentry in Pennsylvania about some core democratic values, such as wealth equality, the idea of a responsive government, and the like. In fact, this consensus was what provided the formation of a transversal social force in Pennsylvania. During the war, however, this consensus shattered. “[M]uch of the gentry changed their minds about democracy and began an effort to scale back its meaning and practice—in effect, attempting to tame democracy.” Actually, “they abandoned their commitment to wealth equality and a democratized political system. Instead, they redefined a ‘good government’ as one that enriched the affluent and refashioned ‘liberty’ as a word that meant the freedom to amass as much property as one desired and to use that property as one saw fit.”

And within this new conception of ‘good government’, the 1776 Constitution (and, more broadly, the people out of doors’ constituent power) had no place. The democratic control provided by this document hindered the gentry's plan to turn government’s institutions into an instrument for its own benefit. Hence, in this scenario, the constitution began to be seen as an obstacle to be overcome.

316 Bouton, Taming Democracy, 53.
317 For an account on the efforts to replace the 1776 Constitution, see, e.g., Bouton, Taming Democracy, 61-87, 171-196; and Ryerson, "Republican Theory and Partisan Reality," 122-130.
318 Bouton, Taming Democracy, 7.
Ironically, as Bouton observes, “the postwar period was essentially a replay of the 1760s and 1770s, with the revolutionary gentry playing the role of the Britain.”

To avoid contradiction, I should observe the following. As I argued elsewhere, Pennsylvania’s revolutionaries attempted to build a political system permeable to political innovation or, more precisely, to constituent power. They did not sanctify their Constitution and saw it as an eternal document. Hence, one could say that the replacement of the Constitution of 1776, pushed mainly by the local gentry, was an act inscribed in this very logic of political innovation. It is important to highlight, however, that the gentry’s attack on the 1776 Constitution was precisely aimed at the permeability of Pennsylvania’s political system. In other words, their attack aimed to shield the political system or, more precisely, to close the constituent process. That is why, in my view, the gentry’s attack on the Constitution is not an act that can be properly inscribed in the logic of political innovation (as a sort of ‘natural’ development of the kind of system created in Pennsylvania). On the contrary, it was an act that attempted to close all innovation.

Whatever its difficulties, the Constitution of 1776 did, however, survive tremendous opposition for fourteen years. For Ryerson, two main factors explain why the it survived as long as it did. First, “it enjoyed the steady and zealous support of a large part of the population.” For instance, in 1779 “over eighteen thousand Pennsylvanians petitioned the assembly to cancel the convention called [by conservatives] to amend the constitution.” The second critical factor, according to Ryerson, was the tenacity of the Constitution’s defenders. Their determination to defend the democratic government that they had invented remained firm until the end. Although they could not stop the enactment, for instance, of the Federal Constitution, they tried: by “filling

---

the newspapers with Antifederalists essays, [by] abruptly withdrawing from the assembly in September 1787 in an abortive attempt to prevent quorum in favor of calling a ratifying convention, and [by] vigorously debating every point in that convention.”

I should add a third factor, perhaps the most important of all, to Ryerson’s explication of why the Constitution of 1776 endured for more than a decade. Not only did many Pennsylvanians appeal to institutions to defend the constitution (and the democratic ideals it carried), they also adopted several extra-institutional forms of resistance. In this sense, thousands of Pennsylvanians, from different classes and occupations, engaged in waves of protests that swept the countryside. “The protests were as varied as they were ubiquitous, spanning a range of strategies from civil disobedience to armed resistance. Some were aimed at stopping foreclosures for unpaid private debts; most were directed at halting tax collection.”

At a more fundamental level, these protests were a symptom of the new subjectivities that emerged during the revolution. The thousands of protesters really believed that they were the ultimate authority of the polity; they assumed that the Constitution entitled (actually demanded) them to block policies that hurt the common good.

Although the demonstrations in support of the 1776 Constitution were indeed strong, the exclusion of some segments from political rights by the framers weakened the revolutionaries’ struggle for that document. In fact, those exclusions, I argue, were in part responsible for the collapse of Pennsylvania’s 1776 Constitution. In short, the disenfranchisement of some segments of society produced in them a sentiment of detachment towards official institutions (including the constitution). Hence, when the Constitution began to be more and more attacked by the local gentry during the 1780s, the kind of popular force required to confront these attacks was simply insufficient. Although the constitution enjoyed large support from ordinary white men, this

321 Bouton, Taming Democracy, 145.
support was just not enough to confront the intensity of the attacks of the affluent classes. At a more fundamental level, the exclusion of some segments from political rights represents the very limit of Pennsylvania’s constituent process.

After the revolutionaries’ failure to prevent the ratification of the Federal Constitution (which occurred on June 21, 1788), they were in a very delicate position to defend their own frame of government. The state legislature (whose majority by now belonged to assemblymen aligned with the interests of the gentry), after circumventing the Council of Censors, called themselves for a convention to create a new constitution. In 1790, Pennsylvania’s 1776 Constitution was finally replaced by a much more conservative frame of government. The new 1790 Constitution “ripped out some of the original’s most democratic features.” For instance, the new Constitution “installed a strong governor with extensive patronage privileges and a veto power over legislation. Scrapping a unicameral legislature, the constitution sanctioned a two-house assembly with the upper-house members serving for four years.”

However, even after the replacement of the 1776 Constitution, the people out of doors, time and again, sought to defend their project of democracy and, thus, the reopening of the constituent process in Pennsylvania. Here, the aforementioned Whiskey Rebellion (1791-1794) is one of the most potent examples. Although mass uprisings such as the Whiskey Rebellion were eventually quelled by the new government forces, these events show well how another project of constituent power and of democracy had become strongly ingrained in the subjectivity of many Americans. In fact, it seems fair to affirm that this alter project of constituent power, like a specter, would continue to periodically haunt the established powers of the new country.

---

323 Nash, “Philadelphia’s Radical Caucus,” 84. See also: Bouton, Taming Democracy, 195.
and elsewhere too. Even more, it can be said that this particular view of constituent power and of democracy, considering the specificities of each apparition, would never cease to reappear. In this sense, by using Pennsylvania’s constituent power as a platform (or as a toolbox), the next chapter develops the examination of this *alter* project of constituent power. This analysis can provide insights for contemporary reflections on the limits of today’s dominant system of democracy.

---

324 For instance, a similar perspective of constituent power and democracy would reappear on the other side of the Atlantic in 1871 during the Paris Commune. In this respect, see Marx, *Civil War in France*, 59, 65; Arendt, *On Revolution*, 248-250, 256-258; and Gluckstein, *The Paris Commune*.

325 For instance, in the present decade, it seems fair to say that this notion of constituent power is experiencing a moment of strength. In this sense, the Spanish *15M* movement (Spanish “Indignados”) and the Occupy Wall Street movement are two examples that illustrate this claim. For an account on constituent power in the Spanish *15M* and in the *Occupy Wall Street*, see, e.g., Raul Sanchez Cedillo and Antonio Negri, *La démocratie aujourd’hui est sauvage et constituante: L’exemple espagnol [Today’s Democracy is Savage and Constituent: The Spanish Example]*, 59 Multitudes 17, 21 (2015); Raul Sanchez Cedillo, *15M: Something Constituent This Way Comes*, 111 The South Atlantic Quarterly 573, 584 (2012); Marina Sitrin and Dario Azzellini, ‘They Can't Represent Us!’: *Reinventing Democracy From Greece To Occupy* (London: Verso, 2014); and Paolo Gerbaudo, *The Mask and the Flag: Populism, Citizenism, and Global Protest* (Oxford: Oxford University Press, 2017).
Chapter 4
“A Democracy Without Qualifiers:” Elements for an Alternative Perspective of Constituent Power

The way to renovate them [constitutions]… is to reduce them to their starting-points.

Niccolò Machiavelli

In the previous chapter, by drawing on one of the most potent dissenting political lines of the American Revolution, namely revolutionary Pennsylvania, I began to present an alternative path for the notion of constituent power. This presentation, among other things, challenged mystified ideas entrenched in the notion of constituent power such as ephemerality and delegation.

This chapter performs two main actions. It interprets and develops some core aspects of Pennsylvania’s constituent power and, by doing so, it provides insights for contemporary reflection on the limits of representative democracy. This last point can be presented in the form of a question: What can we learn from the alternative perspective of constituent power? Or, put differently, what insights can this vision of constituent power provide to the contemporary predicament involving representative politics?

The expected outcome of this chapter will not be, of course, a definitive conception of constituent power, a decisive account on this theme. The notion presented here continues to be not only open to debate but, equally important, permeable to the ever-changing nature of the
social terrain. The expected outcome is thus solely the production of a potent theoretical tool.\textsuperscript{326} But a tool for what purpose? Above all, it should be a tool contributing to the debate on the limits of representative democracy. Or, in other terms, a tool that might assist us to “restore or reinvent the concept of democracy, recognizing again what democracy is and what it could be.”\textsuperscript{327}

However, before developing Pennsylvania’s constituent power, it seems useful to address two questions. First: Why is the examination of constituent power relevant to the contemporary debate on the limits of representative democracy? Or, more directly, what does constituent power have to do with democracy in the first place? And second: What are the main aspects of the current predicament involving representative democracy? Addressing these questions will both assist us in better understanding the current political terrain on which we are standing and in thinking about alternatives to this terrain.

4.1 Constituent Power, Democracy, and Crisis

Constituent Power and Democracy

In relation to the first question above (“Why is the examination of constituent power relevant to the contemporary debate on the limits of representative democracy?”), one should note that the notions of constituent power and democracy are in fact deeply intertwined. For instance, throughout the eighteenth century, the concept of democracy (although at that time often dubbed republicanism) was practically indistinguishable from the idea of constituent

\textsuperscript{326} Or, as Illan rua Wall puts, the expected outcome of this chapter can be seen as a “series of ‘strategic hypotheses’ which might structure action, rather than a collection of ‘models’ that would have to be applied faithfully to the world.” Illan rua Wall, “Notes on an ‘Open’ Constituent Power,” Law, Culture, and the Humanities 11, no. 3 (2015): 378. See also Michael Hardt and Antonio Negri, Multitude: War and Democracy in the Age of Empire (New York: Penguin Press, 2004), 328.

\textsuperscript{327} Hardt, “Jefferson and Democracy,” 41.
power. For instance, Pennsylvanian revolutionary Thomas Young in an open letter from 1777 in support to the Vermonters’ right to adopt a constitution, used the term constituent power in line with the idea of democracy. In Young’s words: “They [the inhabitants of Vermont] are the supreme constituent power and, of course, their immediate representatives are the supreme delegate power; and as soon as their delegate power gets too far out of the hands of the constituent power, a tyranny is in some degree established.” In this light, as Negri rightly observes, “to speak of constituent power is to speak of democracy. In the modern age the two concepts have often been related, and as part of a process that has intensified during the twentieth century, they have become more and more superimposed.” In fact, due to the intense connection between the two notions, one might as well define constituent power as democracy in

---

328 Throughout the eighteenth century, the word democracy was seldom used in a positive sense. Despite that, as Hardt observes, not only the concept of democracy was undeniably present in the thought of many of revolutionaries of the period but also “the concept is stronger there than it is in much of subsequent U.S. political thought, even when the term becomes ubiquitous.” Hardt, “Jefferson and Democracy,” 73. In Thomas Jefferson, for instance, we can often read democracy when he uses the term republicanism. Defining this latter term, Jefferson writes: “Were I to assign to this term [republic] a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority; and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens.” Thomas Jefferson to John Taylor, May 28, 1816, in The Declaration of Independence, ed. Michael Hardt (London: Verso, 2007), xv.


its “pure state,” as “real democracy” (paying tribute to the Spanish “Indignados” movement), or even as “democracy in motion.”

Because of the profound connection between these two notions, constituent power can function as a potent tool to address today’s predicament involving representative democracy. More fundamentally, constituent power can question the very idea of “representative democracy.” As Andreas Kalyvas perceptively notes, “constituent power answers the need for democratic legitimacy and allows for a rethinking of the problem of the legitimation deficit that unavoidably plagues the normal politics of all modern constitutional, representative democracies.” In other terms, constituent power can expose the tensions produced by the attempts to reduce democracy to schemas of representation and, as a result, it can unveil the apparent naturalness of the idea of “representative democracy.”

Representative Democracy and Crisis

I now address the second abovementioned question: “What are the main aspects of the current predicament involving representative democracy?” As noted earlier, addressing this

---

331 These adjectives, however, interestingly reveal that the idea of representation became an ingrained characteristic in the contemporary notion of democracy. Put differently, today, when writing on democratic theory, it seems necessary to adjectivize the term democracy, e.g. “radical democracy,” every time one wishes to distance herself from the dominant view of democracy, that is from representative democracy. In this sense, writing on “radical democracy,” Lincoln Dahlberg notes that “radical democratic theorists have added ‘radical’ as a supplementary term to ‘democracy’ so as to draw out of [the root conditions of democracy]. This supplement would be unnecessary if democracy was understood and practice according to these root conditions: ‘radical democracy’ would be a tautology. As a supplement, ‘radical’ does not just add to, but, as intended by the second meaning, problematises current understandings and practices of democracy.” Lincoln Dahlberg, “Radical Democracy,” in The Edinburgh Companion to the History of Democracy, eds. Benjamin Isakhan and Stephen Stockwell (Edinburgh: Edinburgh University Press, 2015), 491.

question will both help us to better understand the political terrain on which we are currently standing and to recognize lines of flight from this terrain.

To provide a detailed account of the present quandary involving the system of representative democracy would certainly exceed the scope of my dissertation. The focus, therefore, will be on offering a broad outline of representative democracy’s current predicament.

Several scholars and popular commentators from the most diverse backgrounds and political leanings seem to agree that the institutions of representation of contemporary democracies are experiencing a period of “severe crisis” – a crisis, above all, they claim, of legitimacy. These authors may diverge on the causes and solutions for the ongoing crisis, but very few deny that there is something fundamentally wrong in the functioning of today’s representative politics.

---


334 As Tormey notes, “there has never been a period in the evolution of representative democracy when someone somewhere has not declared democracy to be in crisis. What is unusual in the current conjuncture is the degree of consensus underpinning the analysis… A minor publishing industry has sprung up to examine the contours and direction of the crisis. Texts already pick over the entrails of the “dead” democratic body and our “post-democratic” future. Nor is the sense of crisis confined to those with a particular political leaning. Liberals, conservatives, and Marxists agree that at some level representative democracy is in the doldrums. Where they disagree is what to do about it.” Tormey, “Contemporary Crisis,” 104-105.
mainstream politics – the most celebrated indicators of political scientists to measure representative democracy’s “health” – are all under great strain in several countries.335

Providing an insightful overview of the current crisis of representative democracy, Sonia Alonso, John Keane, and Wolfgang Merkel assert that

The mechanisms of representation that lie at the heart of existing democracies are under severe stress, and are triggering public concerns about the future of representative democracy itself. In democratic systems as different as the United States, India, Australia, Germany, Great Britain and Argentina, these analysts point to evidence of a creeping malaise – to signs that the core institutions of representation are either being trumped by increasing concentration of power in the executive branch of government; or sidelined by unaccountable bodies; or suspected or rejected outright by citizens and unelected representatives who cannot identify with these core institutions.336

More precisely, and in view of my purposes here, the present crisis can be explained (at least politically) as follows. On one side, representative politics deeply restrains citizens from participating in the process of decision-making. In other words, this system hinders the multitude’s abilities for democratic self-rule (or, simply put, it corrals constituent power). Most fundamental decisions, like the defining priority areas for public investment, are often taken by small circles of representatives and “specialists.” Consequently, today’s system is marked by a strong division between those who govern and those who are governed. There is a substantial (and intended) gap separating citizens from the organs of power. Besides voting (normally, only every 2, 4, or 6 years), it is not common to see other forms of participation available to citizens

---

335 Tormey, Representative Politics; and Ercan and Gagnon, “Crisis.”

336 Alonso, Keane, and Merkel, introduction to The Future of Representative Democracy, 8.
in contemporary political systems.\textsuperscript{337} As Bernard Manin observes, although “the people” is certainly a much larger and plural entity today than in the eighteenth century, the way we select representatives and the instruments at our disposal to influence their decisions once in office have not significantly changed in two hundred years.\textsuperscript{338} Thus, democracy today practically comes down to voting, a field which is itself seeing an intense reversal of participation rates. Since its “golden age” in the 1960s, when voting turnouts were somewhat expressive, voting has experienced a fairly steady decline in several countries.\textsuperscript{339} Eventually, referendums and public consultations are held, but, even so, they operate intermittently and within well-defined limits.\textsuperscript{340}

Additionally, one should not forget that the ever-higher costs of electoral campaigns make it practically impossible for ordinary citizens to participate in representative politics as a candidate without to, some extent, risking corruption of themselves or abetting the corruption of others.\textsuperscript{341} As a result, the conventional institutions of representation tends to produce alienated citizens or,

\begin{footnotesize}
\textsuperscript{337} “In most electoral systems, for example, the choice or control that the represented exert is limited primarily in temporal terms, since the represented exercise their connection only every two or four or six years. Between elections representatives act relatively independently without the instruction or consultation of the represented... Voting seems often to be nothing more than the obligation to choose an unwanted candidate, the lesser of two evils, to misrepresent us for two or four or six years.” Hardt and Negri, \textit{Multitude}, 246, 270.

\textsuperscript{338} Manin, \textit{The Principles of Representative Government}, 236.

\textsuperscript{339} Colin Hay, \textit{Why We Hate Politics} (Cambridge: Polity, 2007); Tormey, “Contemporary Crisis,” 105, and \textit{Representative Politics}, 10-11; and Ercan and Gagnon, “Crisis.”

\textsuperscript{340} On the democratic potential of contemporary referendums, Ercan and Gagnon argue that “there are good reasons to be cautious about the democratizing potential of referendums. They tend to drive out the deliberative element in policy making, reduce the complex issues to “yes or no” questions easily... They privilege the weight of numbers underpinned by an aggregative logic, rather than the weight of arguments.” Ercan and Gagnon, “Crisis,” 6.

\end{footnotesize}
as Hardt and Negri dub them, the depoliticized figures known as the “represented.”

One can say that the traditional institutions actually train citizens to be passive and subservient.

On the other side, today’s structures of representation favor an ever-increasing concentration of economic-political power. The causes for this concentration can be briefly described as follows. Corporate lobbyists and other powerful economic groups often finance ever-more costly electoral campaigns in exchange for policies that favor their interests. This situation creates a vicious circle in which the institutions of representation function as a vehicle to further enrich the same affluent groups. In fact, many representatives tend to act as if they were a mere delegate (or agent) of corporate interests. Inspired by one of the influential slogans of the *Occupy* movement, one could say that today’s democracy has practically become a government “of the one percent, by the one percent, and for the one percent.”

Here, Lawrence Lessig’s description of the approval of a bill by the U.S. Congress illustrates well the abovementioned motto. According to Lessig, in 1998, the U.S. Congress passed the *Sonny Bono Copyright Term Extension Act*, which, by extending the term of existing and future copyrights by twenty years, increased the total period of protection for cultural products to ninety-five years. On one side, by significantly expanding the regime of private property to cultural products, the law clearly favored the entertainment industry’s interests. The industry would see an extension of the time frame in which it had the exclusive right to economically exploit protected cultural products. On the other side, the *Sonny Bono Act* had a

---

342 “The represented is allowed only a passive and generic political role… [It has] no access to effective political action. If it does not rouse its vital senses and awaken its appetite for democracy, it will become a pure product of power, the empty shell of a mechanism of governance that no longer makes reference to the citizen-worker… The represented recognizes the collapse of the structures of representation but sees no alternative and is thrust back into fear. From this fear arise populist or charismatic forms of a politics emptied of even the pretense of representation.” Hardt and Negri, *Declaration*, 27, 29-30.

damaging impact for the public domain (or, as some call it, the *commonwealth*). People would have to wait another two decades to freely access, transform, and share protected content. Many scholars contest (correctly, in my view) these extensions of copyright law. According to them, since all cultural products derive, inexorably, from our common cultural heritage, no one (especially the entertainment industry) should be granted such a “thick” copyright. That said, what is important to note here is that, as Lessig shows, the *Sonny Bono Act* was implemented thanks to the strong influence of corporate lobbyists on the U.S. Congress. As Lessig asserts,

Ten of the thirteen original sponsors of the act in the House received the maximum contribution from Disney’s political action committee; in the Senate, eight of the twelve sponsors received contributions. The RIAA [Recording Industry Association of America] and the MPAA [Motion Picture Association of America] are estimated to have spent over $1.5 million lobbying in the 1998 election cycle. They paid out more than $200,000 in campaign contributions. Disney is estimated to have contributed more than $800,000 to reelection campaigns in the 1998 cycle.

The enactment of the *Sonny Bono Act* is one of many examples demonstrating that the institutions of representation are commonly used as a vehicle for the concentration of wealth and power against the interests of the majority of the population. Although this episode took place in the U.S. Congress, it in fact describes a common situation in several other legislatures around the world.

---

Additionally, the crisis of legitimacy of representative politics is aggravated, as Frank Vibert observes, by the “rise of the unelected.” That is, the increasing power of actors without electoral accountability, such as central banks, transnational institutions, and regulatory bodies.\footnote{Frank Vibert, \textit{The Rise of the Unelected} (Cambridge: Cambridge University Press, 2007). See also Hardt and Negri, \textit{Empire}; Runciman, \textit{Confidence Trap}; and Ercan and Gagnon, “The Crisis of Democracy,” 1.} On this phenomenon, Hardt and Negri perceptively observe that,

Today... even if we were to believe the modern myths of representation and accept it as a vehicle of democracy, the political context that makes it possible has radically diminished. Since systems of representation were constructed primarily on the national level, the emergence of a global power structure dramatically undermines them. The emerging global institutions make little pretense to represent the will of populations. Policy accords are agreed on and business contracts are signed and guaranteed within the structures of global governance, outside of any representative capacity of the nation states... [T]he function of representation that, in a mystified way, pretended to put the people in power is surely no longer effective in this global terrain.\footnote{Hardt and Negri, \textit{Declaration}, 28-29; and \textit{Empire}. Similarly, Tormey affirms that “[t]he image of the autarchic self-governing community at the heart of a certain image of democracy is fading. It is not just a matter of territorial or geographical interdependence, but the nature of global capitalism that for a large part operates beyond and outside the jurisdiction of discrete states. This is not the same as saying that states are unimportant or powerless. What it means is that the fate of ordinary citizens is much less dependent on the decisions of national politicians and much more dependent on the decisions of a welter of transnational corporations, money markets, derivatives traders, international agencies, and so on. All of these agencies exercise power. They all have an impact on what it is that states can and must do under threat of sanction.” Tormey, “Contemporary Crisis,” 107-108.}

In this light, if in the twentieth century citizens still had, during a short period, some avenues for political action through the (often corporatist) representative institutions of the state and civil society (such as political parties), it seems that these traditional avenues are now closed. That is, the structures of participation are almost invisible and, equally disturbing, often controlled by powerful lobbies and unelected transnational arrangements of governance.
Given this scenario, it is not surprising that the level of disaffection and revolt of citizens toward the conventional system of representation is skyrocketing. In many countries, there is actually an intense (and, in my view, legitimate) anti-establishment sentiment cutting across society. Citizens from diverse social classes and political leanings see representative politics as ever-more corrupt, inefficient, and harmful to society. The response, however, that people give to this powerful anti-establishment sentiment is not unidirectional. It can take very different routes, ranging from radically democratic to overtly authoritarian.

Amid the crisis of the traditional system of representation, some politicians, businesspersons, and groups of individuals, often deploying a populist strategy, have sought to benefit from the moment. Taking advantage of the powerful pervading anti-establishment sentiment, these actors present themselves as outsiders, as the “new,” as, in short, the bearers of a “solution” to the crisis of conventional representative politics.349 These “solutions” (or discourses), however, represent in many cases not only the reestablishment of hierarchical and transcendent structures of command. Worse, they sometimes represent reactionary, when not overtly authoritarian, “solutions” for the present political and economic crisis. For example, in a kind of bizarre historical déjà vu, some of these discourses have been reissuing the odious idea of

“enemies of the people” in an attempt to blame migrants, refugees, and the poor, among other groups, for the current crisis.  

Many wind up adhering to this type of discourse, which essentially amounts to hate speech. Proof of this has been the popularity of openly reactionary candidatures in some countries in recent years. The popularity of these campaigns should be interpreted as a sign of rejection to the traditional functioning of the system of representation. Although in this case the response to disaffection toward representative politics is “less democracy rather than more,” even so, the popularity of these campaigns is a clear indication of the crisis of the conventional institutions of representation. Here, one sees a sad mutation taking place: a legitimate indignation against representative politics turns into xenophobia, racism, prejudice, and so forth. This type of discourse, obviously, has nothing to do with the perspective of constituent power, democracy, and multitude developed in this dissertation.

The reason(s) people today adhere to this kind of discourse is certainly a complex and pressing theme, requiring a profound and detailed analysis. To engage here in this topic would surpass the scope of my dissertation. However, I wish to underline the following. The adhesion of part of the population to this type of discourse should not surprise us. First, because, within the paradigm of representation, citizens are practically trained to be subservient and

---


passive. In other words, they are trained so that an individual or group governs them, decides for them, and therefore “solves crises” for them. Faced with this situation, when a crisis occurs (such as that prevailing at present), if someone presents herself or himself eloquently enough as “anti-establishment” and offers an “energetic solution” (even if an authoritarian one) for the crisis, it is not very surprising that she eventually obtains some (or even a lot) popular support.

Second, one can say that the adhesion of part of the population to reactionary populist forms is also the result of political impotence. Traditional progressive political actors, parties, and groups, whether when in power or outside of it, have not been able to produce and sustain strong institutions of training for democracy (or institutions of constituent power). On the contrary, these actors, especially when in power, reproduced to a considerable extent (when they did not intensify) the same practices of their supposed political adversaries. That is, many of these “progressive” actors wound up consolidating their position inside the establishment. Thus, in the eyes of the citizens, progressive and conservative actors began to appear more and more alike. Their rotation in power, in many cases, has become a mere façade. This scenario, as expected, opened opportunities for outsiders of all kinds, including the reactionary ones.

But that, fortunately, is only part of the story. The anti-establishment sentiment is not inevitably doomed to turn toward “hate speech,” nor to culminate in the election of reactionary forms of populism. (In fact, these outcomes can be seen as a form of corruption, in a broad sense, of a legitimate indignation against the system of representation). Let me then briefly examine another possible route for anti-establishment sentiment.

Recently, the so-called “movement of the squares” – *Occupy Wall Street* (United States, 2011), “*Indignados*” (Spain, 2011), *June Protests* (Brazil, 2013), and *Gezi Park Protests* (Turkey, 2013), to name only a few – was a clear expression of the anti-establishment sentiment
that pervades contemporary societies.\textsuperscript{352} The encirclement of parliaments, the occupation of public buildings and squares by thousands (sometimes millions) of citizens were unambiguous gestures of indignation toward the political establishment. However, instead of advocating for a reactionary or authoritarian “solution” for the present crisis, the movement of the squares presented a potent democratic path for anti-establishment sentiment. Simply put, it sought to address the present crisis of representation with more democracy rather than less. (Actually, to do justice to the movement, it sought to address the crisis not with more but with real democracy). Consider, for instance, some of the practices and forms of organization of the movement of the squares: horizontal, leaderless, based on processes of collective decision-making, and the use of Information and Communications Technologies (ICTs) and social media to enhance people’s participation in the movements’ assemblies. These practices provided hints of a democratic alternative to the traditional system of representation. One can say that, through democratic and innovative practices, this movement was (is) seeking to move beyond the paradigm of representative politics.\textsuperscript{353}

Returning now to the theme of today’s crisis of representation, I should add the following. Confronted with the intense malaises of representative politics, some scholars go even further and argue that what we are witnessing today is not properly a “severe crisis of


\textsuperscript{353} As Tormey notes, “In place of a politics based on a practice of speaking and acting for others, we now find a plethora of forms and styles of what might be called immediate or non-mediated politics: direct action, flash protests, Twitter-led mobilizations, pinging, hacking, squatting, boycotting, buy-cotting, occupying and other interventions of a direct, practical kind.” Tormey, \textit{End of Representative Politics}, 1. See also: Gerbaudo, \textit{The Mask and the Flag}; Sitrin and Azzellini, ‘\textit{They Can't Represent Us!}’; and Hardt and Negri, \textit{Declaration} and \textit{Assembly}.
representative democracy” but a complete transformation of this system in a “simulacrum of democracy,” in an “empty performance,” or, as some say, in a “post-democracy.” Looking at today’s system, it becomes “difficult to pronounce the word democracy,” Hardt, for instance, laments: “It feels uncomfortable in the mouth. It tastes like ashes, as if the beautiful dreams it once contained have been burnt out by political reaction and cynicism.”

Indeed, the crisis of the structures of representation seems so explicit and profound that one might feel tempted to say that what we are watching (analogously to what once occurred with the Ancien Régime) is the final decline of the two-hundred-year paradigm of representative democracy. In this sense, one could say that today we are experiencing a painful period of transition where, as Gramsci famously wrote, “the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear.” Among the numerous “morbid symptoms” appearing today, one should mention the contemporary upsurge of populist forms of a politics “emptied of even the pretense of representation.”

Even in the face of one of its deepest crises of legitimacy, it would be misleading, though, to assume that the system of representative politics is doomed to collapse on its own. One of the “virtues” of representative democracy, as Simon Tormey rightly points out, “is, paradoxically,  

354 As for the term post-democracy, Crouch affirms that: “A post-democratic society is one that continues to have and to use all the institutions of democracy, but in which they increasingly become a formal shell. The energy and innovative drive pass away from the democratic arena and into small circles of a politico-economic elite” Crouch, “Five Minutes with Collin Crouch,” http://blogs.lse.ac.uk/politicsandpolicy/five-minutes-with-colin-crouch/. (accessed June 1, 2017). Similarly, Brown argues that, in contemporary representative democracies, the “basic principles of constitutionalism, legal equality, political and civil liberty, political autonomy, and universal inclusion” have been displaced by "market criteria of cost/benefit ratios, efficiency, profitability, and efficacy.” In this scenario, “the state is forthrightly reconfigured from an embodiment of popular rule to an operation of business management.” See Wendy Brown, “We are all democrats now...” in Democracy in What State?, ed. Amy Allen (New York: Columbia Press, 2011), 47.  
356 Hardt and Negri, Declaration, 44; and Tormey, Representative Politics, 4.  
358 Hardt and Negri, Declaration, 27. See also Judis, Populist Explosion.
that it barely needs us, the demos, at all. Whether 80 percent, 60 percent, or 10 percent of citizens vote does not affect the capacity of the system to reproduce itself.\textsuperscript{359} Crises like those of the present can actually make the system of representation stronger. That is because, in such periods, the citizens’ apathy and disaffection towards institutions tend to increase. And deeply apathetic citizens, Tormey continues, are citizens who usually “pose little threat to elites but rather who can be watched, governed, taxed, and pushed around with impunity.”\textsuperscript{360} Furthermore, as observed in the case of the Sonny Bono Act, today’s institutions of representation often operate in line with and are supported by a global network of powers (such as transnational corporations and financial market actors). This is another reason why citizens’ disaffection toward representative politics, alone, does not pose a threat to the system’s reproduction. Hence, without a real alternative to the current system of representation and, equally important, without a substantial democratic force capable of realizing this alternative, we are more likely to witness the indefinite reproduction of the “morbid symptoms” of representative democracy’s “terminal phase.”\textsuperscript{361}

However, a closer look at the history of what we today call “representative democracy” would reveal that the current crisis (although one of the most severe) is not really original. On the contrary, the history of representative democracy is time and again plagued by the outbreak of a crisis. Put differently, the recurrent attempts to reduce democracy to schemas of representation have often been accompanied by an intense resistance of the multitudes. Here, one should not forget that the very core of the American Revolution (one of the most important

\textsuperscript{359} Tormey, “Contemporary Crisis,” 106.
\textsuperscript{360} Tormey, “Contemporary Crisis,” 106.
\textsuperscript{361} In other terms, “unless we reconstruct political institutions along lines that permit a much greater input into the political process by ordinary people, then the trend towards disengagement will continue. We, the people, will be cut adrift by the emerging technocrats.” Tormey, Representative Politics, 2.
events for the emergence of the project of representative democracy) is traversed by the multitudes’ strong resistance to representative politics. The dissenting lines of the American Revolution, for instance, by inventing instruments for the active and direct participation of the people in government, clearly challenged the emerging paradigm of representative politics. In fact, it seems correct to say that the multitude’s resistance, considering the specificities of each apparition, never ceased challenging the institutions of representation of the new country – and those elsewhere too.\footnote{Although an analysis of these various episodes of resistance would exceed the scope of my dissertation, it is useful to mention a few of them in order to illustrate my argument. For instance, in the context of the newly formed United States, consider the challenge to the federal institutions of representation posed by the participants of the “Shay’s Rebellion” (1786-1787) and “Whiskey Rebellion” (1791-1794). Less than a century later, on the other side of the Atlantic, consider, for example, the resistance to representative politics performed by the Communards of the Paris Commune (1871). In short, by fostering active participation and local autonomy, the Communards sought to establish a democratic alternative to the emerging form of parliamentary representation. See Marx, \textit{Civil War in France}, 59, 65; Arendt, \textit{On Revolution}, 248-250, 256-258; Gluckstein, \textit{The Paris Commune}; and Hardt, introduction to \textit{The Declaration of Independence}, xviii-xix.} Put another way, the kind of democracy and freedom discovered by the multitudes in modern age revolutions, as an irrepressible desire, would, in different times and places, periodically reappear.\footnote{“One can read the history of modern revolutions as a halting and uneven but nonetheless real progression toward the realization of the absolute concept of democracy. It is a North Star that continues to guide our political desires and practices.” Michael Hardt and Antonio Negri, \textit{Multitude: War and Democracy in the Age of Empire} (New York: Penguin Press, 2004), 241.} Presently, for instance, this desire for democracy (or, alternatively, the resistance of the multitudes to representation) is experiencing a period of strength. As noted earlier, some of the “movements of the squares” (\textit{Occupy}, “\textit{Indignados},” for instance), addressed in their protests and practices the reduction of democracy to schemas of representation. These movements, in short, clearly expressed a desire for democracy, true democracy.\footnote{Gerbaudo, \textit{The Mask and the Flag}; Sitrin and Azzellini, ‘\textit{They Can't Represent Us}’; Hardt and Negri, \textit{Declaration and Assembly}; and Tormey, \textit{Representative Politics}.}

These recurrent “crises of legitimacy” of representative democracy should make us pause for a moment. What do these frequent crises suggest? Put differently, what does the repeated
resistance of the multitudes to the attempts of limiting democracy to schemas of representation
tell us? Here, a brief investigation of the very concept of political representation might assist in
understanding these recurrent crises. But first, what is political representation? Let us examine
this theme in the next topic.

**Political Representation**

The history of the concept of political representation is complex. Traversed by the most
varied of fields (theatre, painting, and law, for instance), the notion of political representation
stretches all the way back to ancient Greece (although, at that time, the term *representation* did
not exist). Among the various contemporary definitions of representation, one of the most
celebrated was formulated by Hannah Pitkin in her *The Concept of Representation* (1967).
According to her, political representation “is the acting in the interest of the represented, in a
manner responsive to them.” For my purposes here, however, it may be more interesting to use
the notion of representation (although not so famous but also influential) formulated by jurist
Carl Schmitt. For him, “to represent means to make an invisible being visible and present
through a publicly present one. The dialectic of the concept is that the invisible is presupposed as
absent and nevertheless is simultaneously made present.” Schmitt’s definition highlights a
fundamental aspect about representation (an aspect that Pitkin’s notion only touches slightly): the
absence of the represented or, really, the absence of the multitude.

366 As Vieira and Runciman note, “many of the important functions of Athenian democracy were performed by individuals or small groups acting in the name of the Athenian people, having either been elected or selected by lot for that purpose... But the language of representation simply did not exist to describe these roles: ancient Greek had no equivalent term.” Vieira and Runciman, *Representation*, 6.
This fundamental aspect, which some call the *paradox of presence* (or of representation), has been often neglected by contemporary scholars in favor of a reading of representation focused on aspects such as elections and accountability. Following David Runciman, this paradox can be described in this way: “‘re-presentation’ implies that something must be present in order to be ‘re-presented’ but also absent in order to be ‘re-presented’. Since things cannot be present and absent at the same time, there appears to be at the very least a tension built into the idea of representation, and possibly a fundamental incoherence.”

It was precisely this aspect of representation (the absence of the represented) that led eighteenth-century revolutionaries (Pennsylvania’s, for instance) to vehemently oppose democracy to representative politics. For them, democracy and representation stood at odds with one another. It was either democracy (with the presence of the multitude in government) or representation (with its absence); there was no middle-ground. Put another way, it was either the rule of everyone by everyone (i.e. “a democracy without qualifiers, without ifs or buts”) or the rule of an elected few, standing separate from and above society (i.e. representative democracy). Although Jean-Jacques Rousseau’s notion of representative politics ends up being somewhat ambiguous, on this particular point he captured well the sentiment: “the will

---


370 Runciman, “Paradox,” 93 (emphasis in original). See also Hannah Pitkin, “Commentary: The Paradox of Representation,” in *Nomos X: Representation*, ed. Roland J. Pennock and John W. Chapman (New York: Atherton, 1968), 38–42. According to her, the paradox of presence arises out of a shift in the sense of the Latin term “*repraesentare,*” which in its origins meant to grant something a literal presence (e.g. to present a new Pope before a crowd). In the modern conception of the term, however, it is fundamental that the granting of a literal presence to something is not involved. That is, persons and things represented are not actually present but must “be made present in some sense while not being present literally or fully in fact.” Pitkin, “Commentary,” 41.

does not admit of being represented. Either it is the same or it is different; there is no middle ground.”

Although the argument of the revolutionaries may appear, in the eyes of some, exaggerated or even innocent, it contains a kernel of truth. One should not forget that the Federalists’ (Madison’s, for instance) advocacy for the Constitution’s strong system of representation aimed to, among other things, curb “pure democracy.” Put differently, on one side, the idea that the legitimacy of government comes solely from the people’s consent had, at that time, become increasingly influential. For many, this had become one of the “self-evident truths” of the epoch. On the other side, accepting this idea to its full extension would entail recognizing the rule of everyone by everyone (i.e. “pure democracy”) – something that Madison was certainly not willing to accept. The ingenious solution proposed by him to contain “pure democracy” was the creation of a complex apparatus of representation (that is, the U.S. Constitution) that would, simultaneously, connect and separate the multitude from government. According to Madison, the virtue of this new system of representative government is that it makes popular rule possible within vast territories, while ensuring “the total exclusion of the people, in their collective capacity, from any share [in the government].” In this respect, as Hardt asserts, “Madison’s advocacy for the Constitution is based centrally on its being a bulwark against the rule of the majority [or, really, against “pure democracy”]… [T]he arrangements of representation designated by the Constitution are crafted to separate the government from the voters and their will. Both the averaging effect of a large electorate and the period between

373 James Madison, Federalist No. 63 in The Federalist Papers, ed. Clinton Rossiter (New York: Signet Classics, 2003), 385. Hereinafter, I will cite The Federalist as follows: Author’s last name, Federalist number, and page number.
elections...give the representatives a relative distance and independence from the will of the population.”

Perhaps now it is more clear why eighteenth-century revolutionaries opposed democracy to representation so vehemently.

At this point, it should also be clear why the concept of political representation can assist us in understanding the repeated crises of legitimacy faced by representative democracy. Although the mechanism of representation establishes a connection between the population and the organs of power, this connection also implicates a separation. Hardt, for instance, calls this simultaneous connection and separation performed by representation a “disjunctive synthesis.”

Thus, even if representation worked perfectly and transparently, it is, by definition, a mechanism that separates rulers from ruled, that separates the multitude from the structures of power – a separation that, as already noted, has time and again been contested by the multitudes.

As a result, a political system anchored in the centrality of representation (such as most contemporary systems) is one deeply plagued by this separation. Likewise, the more “imperfect” and “opaque” representation functions in a representative system, the more explicit becomes this separation. In fact, the contemporary crisis can be seen precisely through this angle: an epoch of extreme “imperfection” and “opacity” of representation and, as a result, a period of extreme separation (or alienation) of the multitude from the organs of power. Periods like today seem to make clear that “to represent” means nothing more than “to make present an absence or, really, a no one.”

---

374 Hardt, “Jefferson and Democracy,” 68.
375 In his words, representation “is a disjunctive synthesis that simultaneously creates both a connection and a gap at the heart of power.” Hardt, “Jefferson and Democracy,” 68.
376 “When the eighteenth century republican constitutions were drafted and representation was configured as the center of the rising political order..., it was already clear that political representation did not function through an effective participation of the population, even those white male subjects who were designated as “the people.” It was rather conceived as a “relative” democracy, in the sense that representation functioned, at once, to connect the people to and separate them from the structures of power.” Hardt and Negri, Declaration, 27-28.
377 Hardt and Negri, Declaration, 28.
In light of this, instead of looking at representation as a “vehicle for democracy,” we should perhaps view it (following the perspective of the eighteenth-century revolutionaries) as an obstacle to the realization of democracy, or even as a form of corruption of democracy. Representation is an obstacle to democracy “to the extent that it reestablishes and enforces a separation between the rulers and the ruled.” 378 It naturalizes the division of social functions. 379

Likewise, we should not feel too nostalgic about the current decay of representative institutions. As noted earlier, although these institutions (political parties, for instance) were, to some extent, and during a short period of the twentieth century, avenues for the citizen’s political action, they were also mechanisms that separated the multitude from the organs of power. They were mechanisms, in the last instance, to contain democracy, not foster it. Furthermore, we are living in an epoch in which ideas and practices of “real democracy” proliferate around the globe. Innumerable experiments in local autonomy are presently occurring in locations as varied as Madrid, Sao Paulo, Chiapas, San Francisco, Istanbul, and so forth. 380 If, on the one hand, citizens are showing less and less interest in mainstream or electoral politics, on the other, they are increasingly engaging in democratic experiments, such as occupying and self-managing abandoned buildings, creating citizens’ platforms, forming neighborhood assemblies, and so forth. These protesters “do not accept the idea of living in a world defined for so many by fear,

380 “Increasingly, politically engaged citizens don’t vote, they act. They don’t join mass parties contesting power; they create their own initiatives, ‘micro-parties’, networks, affinity groups, deliberative assemblies, participatory experiments. They don’t wait for elections; they seek to make their views, anger, displeasure, known immediately, now. They don’t read the media, they (to quote Indymedia) are the media.” Tormey, Representative Politics, 1. See also Gerbaudo, The Mask and the Flag; and Ramón A. Feenstra et. al. Refiguring Democracy: The Spanish Political Laboratory (London: Routledge, 2017).
injustice, poverty, and unfreedom.” In this sense, what prevails today is a severe crisis of the mainstream kind of politics. “[U]nofficial, non-mainstream, street politics,” as Tormey points out, “is very much alive and kicking.” And, he adds, “the claim that the contemporary world is marked by depoliticization needs to be properly contextualized so that it doesn’t imply an absence of contestation, resistance, invention, experimentation, amongst ordinary citizens.”

Thus, all the more reason to not feel too nostalgic about the current deterioration of representative politics.

Moreover, although I will return to the theme of political representation later in this chapter, it might be useful to anticipate the following. This chapter does not hold (nor do the authors with whom this chapter engages seem to hold) an a priori and complete dismissal of the instrument of political representation. In certain situations, this mechanism is not only useful but, in fact, inescapable. What this chapter questions is the centrality that representation has often enjoyed in political systems. This centrality, as noted above, produces not only a substantial separation between the multitude and the organs of power but, equally prejudicial, it often produces political castes that govern virtually detached from the desires and needs of the majority of the population. In light of this, this chapter maintains that representation should become secondary in political systems (or, as some say, it should be reduced to a “tactical use”). In addition to making representation secondary, this chapter also advocates for a profound reformulation of this instrument – a reformulation to, above all, reduce as much as possible the gap between rulers and ruled.

381 Hardt and Negri, Multitude, 312.
382 Tormey, Representative Politics, 2.
383 Hardt and Negri, Assembly, Chapter 2.
4.2 Elements for an Alternative Perspective of Constituent Power

With the abovementioned ideas in mind – i.e. acknowledging the deep connection between constituent power and democracy, and also the main political aspects of representative politics’ current predicament – let us now interpret and build on Pennsylvania’s constituent power. This interpretation of Pennsylvania’s constituent power aims not only to deepen the alternative route for the conception of this power but also to provide insights for contemporary reflection on the limits of representative democracy. Keep in mind the following question throughout this topic: What can we learn from the alternative perspective of constituent power?

Creative Primacy

A first aspect to note about Pennsylvania’s constituent power is that the revolutionaries created a political context in which the true nature of the relationship between constituent and constituted power became more visible. In other words, the revolutionaries shed light on the often-complex theme of the relationship between constituent power and the established order.

Here it should be remembered that the hegemonic discourse holds, on the one hand, constituted power as the natural and continuous source of political innovation and historical movement, while, on the other, it considers constituent power as a brief disruption of the institutional reality. This tradition may recognize, to a certain point, the benefits of a constituent moment, such as the overthrow of a tyrannical regime and the implementation of certain political rights. However, this same tradition considers such constituent moments inadequate and even dangerous if allowed to continue. As a result, this perspective corrals constituent power to the legitimating principle of the institutional order. For this view, then, in terms of historical
movement and political innovation, constituted power should be the *norm* and constituent power the *exception*.\(^{384}\)

Furthermore, this idea of “constituted power being the norm” is one of the reasons that possibly explains at least two aspects: (1) the intense focus of this perspective on themes related to the institutional machinery (such as separation of powers, checks and balances, and the like); and (2) this view’s tendency to venerate formal constitutions.

However, the revolutionary movement that erupted in Pennsylvania seems to challenge the traditional understanding of the relationship between constituent/constituted power. In fact, Pennsylvania’s revolutionaries demystify this view. By developing a political system and political culture in which the people out of doors had prominence over the institutional machinery, they made more visible the true nature of the relationship between constituent/constituted power. More to the point, they shed light on the fact that political creativity lies much more on the side of constituent power than on the side of constituted power.

Consider the very formation and political inventiveness of the committee movement and some of the constitutional devices implemented by the revolutionaries (the check from below and right to revolt, e.g.). These examples, among other things, indicate that the main “locus of social creativity, political innovation and historical movement” lies not in the fixity of the constituted order (not even in Pennsylvania’s “enlarged” legislature of 1776) but in the constituent power of the people out of doors. In a word, Pennsylvania’s revolutionaries managed

\(^{384}\) Negri, *Insurgencies*, Chapters 1, 7. See also Hardt, foreword to *Insurgencies*. 

146
to expose that the people out of doors’ constituent power is the primary motor of political novelty and social transformation.\textsuperscript{385}

I should add that constituent power has creative primacy over the established order not only in periods of revolutionary activity (such as the American and the French Revolution) but also in periods of apparent institutional stability. In times of stability, although not so visible, constituent power “animates the constant activity of resistance and organization, of rebellion and political innovation that arises within and against the constituted order.”\textsuperscript{386}

The resistance in Pennsylvania during the Stamp Act crisis in the 1760s illustrates this argument. Despite the atmosphere of apparent institutional stability, hundreds of ordinary Pennsylvanians were organizing themselves and boycotting British goods.\textsuperscript{387} In this light, “it may appear… that [in normal periods] constituent power is exhausted or extinguished in each revolutionary process, but really it is only temporarily blocked and mystified by the constitutionalism of the new ruling order.”\textsuperscript{388} In this sense, one can say that “constituent power has an open sense of temporality. There is [never really a] closure of the constituent moment.”\textsuperscript{389}

\textsuperscript{385} Hardt, foreword to \textit{Insurgencies}, viii. According to Negri, we should invert the frame in which thinkers and politicians “give us the definition of constituent power... It does not come after the political, as in a tormented sociological pause or in a suspension of institutional reality, nor can it be reduced to an extemporaneous \textit{blitz} of the collective will in such a way that they would have to guarantee the limitation of its effects in the constitution of the political. No, constituent power comes first, it is the definition itself of the political, and where it is repressed and excluded, the political is reduced to pure mechanical nature, to being an enemy, and a despotic power. A political power without constituent power is like an enterprise without profit, without the living labor of innovation and the enrichment of productivity. The political without constituent power is like an old property, not only languishing but also ruinous, for the workers as well as for its own owners.” Negri, \textit{Insurgencies}, 335.

\textsuperscript{386} Hardt, foreword to \textit{Insurgencies}, viii. See also Negri, \textit{Insurgencies}, Chapter 1, 7; and Michael Hardt and Antonio Negri, \textit{Assembly} (Oxford: Oxford University Press, 2017) Kindle edition, 36-37.


\textsuperscript{388} Hardt, foreword to \textit{Insurgencies}, viii.

\textsuperscript{389} rua Wall, “Notes,” 385.
At this point, it should be clear that I am challenging, once again, the idea of ephemerality. Rather than a brief interruption of institutional reality, constituent power, even in periods of apparent stability, constantly animates the movement of rebellion and political innovation that emerge within and against the established powers.

Actually, in times of stability, constituent power operates in a sort of subterranean (or low-frequency) mode. And even when operating in this subterranean mode, constituent power accumulates upon past struggles, “like a battery storing up an electric charge in wait for its next release.” This process of accumulating upon past struggles eventually produces a revolutionary outbreak, a moment in which constituent power clearly emerges to the social terrain’s surface, becoming then much more visible. This emergence can be called “constituent power’s high-frequency mode.”

In fact, in times of revolutionary outbreak, constituent power can be compared, as Hardt and Negri observe, to a thunderstorm. In revolutionary periods, constituent power constitutes events like “electrical charges that accumulate in the atmosphere until the moment when their tension is so extreme that they crash down on earth in a lightning bolt.”

The massive demonstration of May 20, 1776 in Philadelphia – where, as noted earlier, over 5,000 people demanded the dissolution of the old provincial government and called for a special convention to draft a new constitution – can, for instance, be understood within this allegory of a lightning bolt. After a period of organizing resistance and accumulating upon

---

390 On the low frequency mode of constituent power in the context of contemporary struggles, see Hardt and Negri, *Declaration*, 4, 5.
391 In this sense, as Hardt and Negri assert, “Constituent power is expressed not only as act but also as potential—indicating both the power of future actions and the accumulated potential of the past.” Hardt and Negri, *Assembly*, 36.
392 Hardt, foreword to *Insurgencies*, viii, xii. See also Hardt and Negri, *Assembly*, 36.
393 On the event of May 20, 1776 in Philadelphia, see the topic *Committee Movement and The People Out of Doors in the Late Eighteenth Century*, in Chapter Three.
past struggles (such as the Stamp Act crisis), the people out of doors’ power, like a thunderstorm, clearly emerged to the surface of the social terrain. The disruptive event of May 20 revealed what had been accumulated in the preceding period.394

But if constituent power, as argued above, is the primary locus of social creativity and political innovation (even in periods of stability) what is then left to constituted power? As the deep suspicion of Pennsylvania’s revolutionaries towards the institutional machinery suggests, constituted power can be usually understood as a conservative and reactive force. More specifically, constituted power tends to a “continual repetition of the same social divisions and hierarchies.” Thus, in a way, constituted power is “empty” in relation to the creative forces of constituent power. It moves forward almost only to fall back on, contain, and recuperate the political actions of constituent power.395

One can read Pennsylvania’s 1790 Constitution (and the institutional machinery created by it) within this framework.396 The newly constituted order pushed by the local gentry sought mainly to fall back on, contain, and recuperate the constituent forces of the preceding period. Hence, the 1790 constitution can be seen as an attempt to reinstate in Pennsylvania several of the social divisions and hierarchies of the pre-revolutionary period. In a word, the newly constituted order sought to tame Pennsylvania’s constituent power.

394 Hardt and Negri, Assembly, 36.
395 Hardt, foreword to Insurgencies, viii. In this sense, authors like Hardt and Negri, and Jacques Rancière provoke affirming that what it is usually considered the field of politics – ‘the management of the established order to maintain social equilibrium’ or, to be more direct, ‘the everyday intrigues of Westminster or Washington’ – is, actually, not politics at all. Rancière, for instance, simply calls the constituted order ‘police’. For him, the ‘police’ is the existing powers that designates certain individuals as equals while excluding others from this. It entails a hierarchy between those who order and those who are ordered, and between active and passive citizens. In Rancière’s words, the ‘police’ is the ‘set of procedures whereby the aggregation and consent of collectivities is achieved, the organisation of powers, the distribution of places and roles, and the system for legitimizing this distribution.’ Jacques Rancière, Disagreement: Politics and Philosophy (Minneapolis: University of Minnesota Press, 1999), 28. See also rua Wall, “Notes,” 382.
396 See the topic Taming Constituent Power and the Replacement of the 1776 Constitution from Chapter Three.
I wish to note one final aspect about constituent power’s creative primacy. Although my argument, in many aspects, draws on Negri’s theory of constituent power, on the particular topic of creative primacy, there seems to be a divergence between the two of us (at least when considering his early work on the theme). Negri’s earliest and most in-depth work on constituent power – *Insurgencies: Constituent Power and the Modern State* (first published in Italy in 1992) – tends to draw a rigid division between constituent and constituted power. There are practically no points of interpenetration between these two instances of power. As a result, for Negri, constituent power has an absolute creative primacy over the institutional order. In terms of political innovation and historical movement, constituent power is thus an absolute power. Likewise, within this theoretical framework, constituted power is completely empty. It moves forward only to fall back on, contain, and recuperate the political innovations of constituent power. The following passage, in which Negri holds constituent power as omnipotent, seems apt to illustrate these ideas. Constituent power, he states, is “an absolute process.” It is “all-powerful and expansive, unlimited and unfinalized… Constituent power is this force that, on the absence of finalities, is projected out as an all-powerful and always more expansive tendency.”

For my part, I maintain a more nuanced perspective about constituent power’s creative primacy (and, consequently, about the relationship between constituent and constituted power more generally). Although I, too, recognize constituent power’s creative primacy over the constituted order, this primacy is not absolute as Negri seems to indicate in his early work. In my view, the institutional machinery can, at times, function as a locus of political innovation and historical movement. Consider, for instance, the following situation. In the traditional schema of representative politics, if a progressive group or party secures the majority of the government, it

---

is possible that this group will adopt measures that, to some extent, innovate in the field of politics. The extension of this political innovation is, of course, always limited by the very schema of representation – a schema that, even if it worked perfectly, always produces a gap between rulers and ruled (a theme to which I will return shortly). Nonetheless, in the given example, it is undeniable that the constituted order is capable of producing some (limited and unsatisfactory) degree of political innovation.

Non-Predetermination: Constituent Power and Constitution

Closely related to the idea of ephemerality, the conventional perspective about constituent power maintains that this power is somewhat predetermined to materialize and then exhaust in a formal constitution. Here, constituent power seems destined to obey the following script: uprising, the taking of power in order to be transformed in a formal constitution, and disappearance. For this tradition, there is thus a necessary end or telos to constituent power or, alternatively, the constitution is the culmination and truth of the constituent moment.398

The idea of predetermination is (not coincidentally) often accompanied by a sentiment of veneration towards formal constitutions. Once constituent power accomplishes its ultimate task (the creation of a constitution) it is time to, according to this sentiment, revere (preferably endlessly) the work of its creation. And this veneration, I should add, usually produces a situation in which, paradoxically, the creature ends up ruling over and restricting the political action of its creators.

Furthermore, the idea of predetermination seems closely connected to a perception of constituent power as a purely political or constitutional concept/device. This perception tends to

398 rua Wall, “Notes,” 386.
isolate constituent power’s dynamics from social and economical needs and translate them into jurisdictional power of a formal constitution. The result, as rua Wall asserts, is a conception of constituent power as a “closed, meaning-giving moment, which originates and determines the constitutional structure.” Or, simply put, the result is a view of constituent power as a purely political concept.

Pennsylvania’s constituent power not only challenges the idea of predetermination (and its abovementioned correlates ideas) but also provides powerful insights on the relationship between constituent power and constitution. Keep in mind that these insights are also useful to think about two central points of today’s crisis of legitimacy representative democracies, namely, the deep separation between the multitude from the governing apparatuses and the growing tendency for concentration of power by these same apparatuses.

By keeping alive the collaborative and conflictual dynamic between the people and the institutional machinery implemented by the 1776 constitution, the revolutionaries kept the constituent process active long after the enactment of the constitution. This continuity of the constituent process did not occur subterraneously, but rather on the very surface of the social terrain. Thus, it seems correct to affirm that the revolutionaries did not exhaust constituent power in a formal constitution (not even in a constitution considered by many as “radical”). Here, 

---

399 Hardt and Negri, Assembly, 32-33. Negri, Insurgencies, Chapter 4.
400 Wall, “Notes,” 379. Hannah Arendt, for instance, tends to overestimate the political character of constituent power in On Revolution (London: Penguin, 1990). For a critique on constituent power as a pure political concept, see, e.g., Negri, Insurgencies, Chapters 1, 4, 5. Moreover, according to Hardt and Negri, in the contemporary context of capitalist globalization, it is ever more implausible to conceive constituent power strictly as a political power/concept. In their words: “The construction of the global market has weakened the powers of nation-states and lessened their constitutional autonomy. Nation-states retain important legal, economic, and administrative powers, of course, but increasingly these are subordinated to, on one hand, structures and institutions of global governance and, on the other, the demands of the capitalist world market. The national space can thus no longer serve, as it did most often in the modern tradition, as the theater of constituent power. Furthermore, the economic structures of global capital tend to condition—and increasingly absorb—legal and administrative apparatuses. Society as a whole is being subsumed within the circuits of neoliberal rationality and capitalist command, primarily through the workings of finance capital and the power of money. The conception of an autonomous political realm in which constituent power could act is thus ever more implausible.” Hardt and Negri, Assembly, 33.

152
constituent power is not predestined to materialize in a constitution and then wither away. The constitution is only a beginning for the constituent process, not its end.

Likewise, the implementation of a provision that granted the people the right to abolish the constitution whenever they wished (i.e. the right to revolt) confronts the conventional idea that this document is “the culmination and truth” of the constituent moment. That is because, since the right to revolt fostered the continuation of constituent power, there is never an act (or moment) of “culmination and truth” of that power (not even in the enactment of a “radical” constitution).

Similarly, the excessive veneration usually attached to formal constitutions is discarded. In a context in which the constitution can be abolished whenever people deem the status quo outdated or imperfect, the sentiment of veneration certainly loses its appeal. Actually, it seems fair to say that in revolutionary Pennsylvania, the constitution was seen much more as an (an important but not the sole) instrument at the service of the multitude’s creative forces than the coronation of a truth to be venerated endlessly. In a way, the term constitution here is much more a verb than a noun.⁴⁰¹

Additionally, the revolutionaries did not seem to perceive constituent power as a purely political concept, which would thus empty this power of all its economic and social dimensions. Consider the attempts to promote wealth equality in revolutionary Pennsylvania, such as the system of access to land through a public low-cost credit bank. This example shows a perception of the constituent process intertwined with the economic empowerment of the population. Here, the political and the social seem deeply interwoven or are, in fact, one and the same thing. That is, the instruments of political and economic power coincided. For this reason, rather than a

⁴⁰¹ Hardt, foreword to Insurgencies, viii.
purely political concept, Pennsylvania’s constituent power is perhaps best seen as an *ontological device*.

The above ideas invite us to rethink the relationship between constituent power and constitutions. Among other things, they offer us a potent perspective about this relation in which the constitution does not function primarily as an instrument to block constituent power and separate those who command from those who are commanded. On the contrary, this perspective invites us to think of the constitution in a constant line with the current desires and composition of the multitude. The constitution is never allowed to consolidate in a rigid constituted power. This is not to say that, for this perspective, the idea of a formal constitution is *a priori* discarded. However, it seems that the only desirable constitution is the one that maintains itself permanently open to the multitude’s creative forces.\(^\text{402}\) Put differently, if a formal constitution is to be enacted, it needs thus not to tame constituent power but, on the contrary, to foster the expression of it – which includes, let us not forget, implementing direct means for the very dissolution of the constitutional order.

### Confinement and Reinvention of Political Representation

One of the strongest points of the theory and practice of constituent power that emerged in revolutionary Pennsylvania is the challenge that it poses to the device of political representation. In this respect, Pennsylvania’s constituent power not only questions the idea of delegation but also provides insights for contemporary reflection on the limits of representative democracy. However, before examining the challenge posed by this perspective of constituent

\(^{402}\text{This perspective is close to Joel I. Côlon-Ríos’ contention for a weak constitutionalism, meaning by this a constitutional regime that provides “an opening, a means of egress, for constituent power to manifest from time to time.” Joel I. Côlon-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (London: Routledge, 2012), 103}
power to representation, it seems useful to briefly recall the dominant discourse on representation.

First, the conventional view maintains an almost inseparability between the exercise of constituent power and political representation. For this view, constituent power seems only to operate validly if exercised through representatives. The idea of a multitude exercising its power directly is either unimaginable or, if imaginable, summarily blocked. Here constituent power is in fact a representative power. Representation occupies thus a central role in this perspective’s political project. According to this tradition, representation should intensely pervade the entire political system. And here I should clarify: it is not that the schema of representation is the second best after “impractical direct democracy,” rather it is the schema thought to be best suited for the administration of government.

Pennsylvania’s revolutionaries, by contrast, provided an alternative path for this discourse. By nurturing ways for the multitude to express that power directly, they broke away from the notion that there was an inseparability between constituent power and representation, and at the same time displaced the prominence of the latter. Consider three examples. First, the extraconstitutional committees: Although not all could serve in these committees, these institutions fostered the direct participation in government of a significant number of people. Second, the device of a check from below conferred on the people at large the final say on the polity’s most important issues. Third, the device of a right to revolt granted people the possibility of exercising constituent power directly whenever they wished. These examples, in different ways, not only challenge the idea of a necessary transfer of constituent power to a few specialists (i.e. delegation) but also displace the centrality that representation often enjoys in political systems.
Political representation was, of course, not banned from Pennsylvania’s political system. However, it seems fair to say that it became secondary in the daily community decision-making process and, equally important, intensely scrutinized by the people at large. Where the revolutionaries were not able to circumvent representation, they confined this instrument to a secondary role, keeping it, in any case, under intense democratic control.

In fact, the devices created by the revolutionaries to keep representation under check – such as the enlarged unicameral assembly, annual elections, and check from below – were so potent that it seems possible to affirm that Pennsylvanians reinvented the instrument of representation. Instead of a distant small group of elected representatives serving long terms in a bicameral “aristocratic” schema, the revolutionaries implemented a large transparent unicameral legislature, with representatives serving short terms and under the intense democratic control of the people at large. In a system like this, it was becoming increasingly difficult to make a “career” out of politics. In effect, the idea was to establish the closest possible ties with representatives (or the “servants of the public,” as they were really viewed). And even that was not enough. The revolutionaries constantly sought to place the final say of the polity’s most important issues in the hands of the people at large. Representation became much more responsive, accountable, and, more fundamentally, permeable to the people out of doors’ constituent power. People controlled institutions and not the other way around.

Moreover, at the base of the confinement of representation in Pennsylvania lies the people’s rejection of the project of limiting democracy to schemas of representation (and its pernicious consequences, such as the emergence of political castes that govern from and above society). The secondary role assigned to representatives (accompanied by the direct engagement of people in government activities) clearly indicates a refusal of the project of “representative
democracy” at its very dawn. Instead of a project intensely pervaded by structures of representation and hierarchy, people were arguing for and seeking to practice a more substantial project of democracy – one, above all, permeable to constituent power.

The revolutionaries’ perspective of political representation provides insights to the present crisis of legitimacy of representative democracy. As observed earlier, one of the main causes of the current crisis is the strong division between rulers and ruled generated by the centrality of representation. This strong division tends to place the polity’s most fundamental decisions in the hands of the same group of actors, producing in turn an ever-increasing concentration of economic-political power.

The first idea provided by Pennsylvania’s revolutionaries to address the abovementioned situation is the development of instruments that allow the direct participation of the multitude in the processes of decision-making. Put another way, one possible approach to crises like the present is to find ways to displace representation into a less central position in the political system. In this sense, instruments like the extraconstitutional committees and devices such as the “check from below” offer a hint of what’s required to address today’s gulf separating rulers from ruled.

However, to develop instruments that allow the direct participation of the multitude in the process of decision-making does not seem sufficient to address today’s substantial gap separating the commanders from commanded. It seems necessary to remodel the very mechanism of political representation, placing this instrument under intense democratic control. On this point,
Pennsylvania’s political system can also offer some insights. Many of the provisions created by the revolutionaries sought to establish the smallest gap possible between rulers and ruled.\footnote{403} The recent constituent struggles have also offered potent mechanisms for addressing the contemporary crisis of representative democracy. In fact, these struggles were a prolific laboratory for the production of democratic instruments, though it would surpass the aim of my thesis to examine them in detail here.\footnote{404} However, to illustrate my argument, it is useful to note the following. Consider the use made by some of these struggles of Information and Communications Technologies (ICTs) and social media to enhance people’s participation in the movement’s assemblies.\footnote{405} The use of new social media technologies by the movement of the squares opens many possibilities for democracy. By expanding the circuits of political decision making across the social terrain, such use may enhance the participation of the multitude in government in unprecedented ways. Ultimately, this kind of practice can be seen as an experimentation of “democratic and multitudinary governance.”\footnote{406} With these ideas in mind, I will now move to examine more thoroughly the theme of institutions of constituent power.

\footnote{403}{Following Hardt, one can say provisions like these “aim to make representation complete, absolute (in linking the multitude to power) and thereby destroy representation (as a mechanism of separation). When the connective function of representation is pushed to its extreme, it undermines representation’s function of separation.” Hardt, “Jefferson and Democracy,” 70.}

\footnote{404}{For an account on these struggles, see Gerbaudo, The Mask and the Flag; Sitrin and Azzellini, ‘They Can’t Represent Us!’; Hardt and Negri, Declaration and Assembly; and Tormey, Representative Politics.}

\footnote{405}{Gerbaudo, The Mask and the Flag, Chapter 5.}

\footnote{406}{Hardt and Negri, Declaration, 60. Examining this theme, Tormey affirms that “what is becoming evident is that the progressive ease of organizing and connecting to others is taking us well beyond a piecemeal style of activism that is content at influencing what representatives do or say, usually termed “participation” in the political science literature. Recent events in the Middle East, Spain, Turkey, Iceland, and Brazil reinforces the sense that we are beginning to see the emergence of styles of activism that are insurgent, as well as reforming or participatory. Indeed this “connective” logic now allows for an almost constituting energy to emerge in which citizens act collectively to overhaul their own systems of governance, to bring power closer to the populace, and to combat opaqueness in decision-making.” Tormey, “Contemporary Crisis,” 108-109.}
In order to effectively address the frequent crises of representative democracy, I argue that it is necessary to develop institutions of constituent power. Adjustments here and there in the institutions of representation promoting, for instance, more accountability and transparency (while positive measures in themselves) are not sufficient to make them truly democratic. There always exists a limit to this kind of reformist discourse. This limit, as noted earlier, lies in the very instrument of political representation. Even if representation functioned in a perfect and transparent way, it is, by definition, a mechanism that separates rulers from ruled, the multitude from the structures of power. Thus, a political system based on the centrality of representation, like representative democracy, is one plagued by the pernicious consequences that accompany this separation, such as the production of a political caste that governs virtually detached from the desires and needs of the majority of the population. Hence, mere attempts to make this system of government more responsive are not likely to overcome this fundamental issue. It is necessary, therefore, to develop institutions of constituent power.

As expressed earlier, this does not mean institutionalizing constituent power. Constituent power, as I contend, is irreducible to (any) institutional arrangement. It always exceeds the institutional reality. Again, nor would such institutions of constituent power imply more progressive versions of the liberal tradition of representation. Participation, while a positive measure in itself, is too weak an expression. Instead, the idea of institutions of constituent power involves two fundamental aspects.

First, it involves the constant direct action of the multitude in government. This engagement of the multitude does not imply, however, a complete dismissal of political representation. As noted earlier, in certain situations, representation is not only useful but, in
fact, inescapable. The direct action of the multitude in government implies then that representation should become secondary, relied on only when necessary (in specific situations, for precise tasks, and revocable at any time). Second, the idea of institutions of constituent power involves the need to invent structures of government that remain “open to further social interventions of antagonism and innovation.”407 But what would these institutions look like in reality?

Revolutionary Pennsylvania provides an initial platform for visualizing them. Despite their limitations, the extraconstitutional committees are a sort of prototype of an institution of constituent power. First, the committees allowed, to some degree, the direct action of several segments of society in governmental activities, like security, commerce, communication, and so forth. Second, the relationship (sometimes conflictual and sometimes reinforcing) between the people out of doors and the extraconstitutional committees fits the idea of an institution that remains open (at least, to some extent) to further social intervention.

The movements of the squares also provides a prolific platform to envision how institutions of constituent power might look in practice. Although an investigation of this movement’s political innovations would surpass the scope of my thesis, I wish to underline the following.408 First, the use of Information and Communications Technologies (ICTs) and social media to enhance people’s participation in the movements’ assemblies is an example of experimentation with democratic and multitudinary governance (or, really, an example of experimentation with institutions of constituent power). Among other things, the innovations brought by these assemblies show that it is possible to significantly expand the circuits of

---

407 Hardt, foreword to *Insurgencies*, viii.
408 For an account of this movement’s political innovations, see Gerbaudo, *The Mask and the Flag*; Sitrin and Azzellini, ‘They Can’t Represent Us!'; and Hardt and Negri, *Declaration.*
political decision-making throughout the social terrain. In other words, these innovations can provide means for the direct action of the multitude in government.

Nevertheless, it can be deterring to try to envisage how these institutions could function, for instance, on a national scale. The question of scale is one of the most common arguments that skeptics and theorists of representation use to advocate for representative politics. By contrast, I contend that a more effective response to the question of scale can be found in the constituent struggles themselves, such as the movements of the squares. In this sense, Paolo Gerbaudo shows that, in most of these constituent struggles (the Spanish Indignados, for instance), the movements were able to create a structure of governance that covered and connected several locations. In Gerbaudo’s words, from Spain to the U.S. and later France, most of these movements adopted a structure that “encompassed popular assemblies, large plenary meetings open to all citizens, as well as a panoply of smaller committees and working groups: a self-organised movement bureaucracy responsible for more specific and practical issues… such as kitchen labour, sanitation, outreach, assembly facilitation, direct action, and so forth.” Moreover, “these movements,” Gerbaudo explains, “also created hundreds of smaller assemblies in urban neighbourhoods or towns, many of which survived after the evictions of the main protest camps, thus making the gatherings accessible to people who could not visit the larger occupations.”

This kind of structure, by covering and connecting several locations, provides ideas on how to address the issue of scale. More fundamentally, this type of structure also supplies clues as to how institutions of constituent power (and real democracy more generally) might actually look and function.

---

Finally, while it may seem paradoxical, I wish to add that a good starting point for addressing the issue of scale is thinking and acting locally. Starting from the local context (from the street, the neighborhood, the municipality, and the like), and articulating it with other localities (as, for example, did the participants in the movements of the squares and, way before them, Pennsylvania’s committee movement and Thomas Jefferson’s proposal of “little republics”) is a possibly potent strategy for addressing the question of scale. In sum, the organization and articulation of local contexts, if effectively done, can produce a structure of governance capable of covering national territories.

Constituent Power as a Training Process for Democracy

From another angle, the abovementioned confinement of representation performed by Pennsylvania’s revolutionaries can also be seen as a process of appropriation by the multitude of its capacities for democratic self-rule. Traditionally kept as a de-potentialized and passive “subject” by an overarching apparatus of command, traditionally separated from what it can do (i.e. from its abilities for democratic relations), the multitude in revolutionary Pennsylvania appropriates, to a significant degree, its skills for democratic self-government.

And here we touch on a classic and fundamental theme from political theory: whether or not the multitude is capable of governing itself. As Hardt recalls, “this is the dividing line that any theory of democracy must face.” On the one hand, if one holds that the multitude is not capable of governing itself, then “real democracy” is impossible and some sort of transcendent apparatus – “be it an elected minority, a fixed set of institutions, a constituted power” – will have to stand above the multitude and rule. On the other hand, if one holds that the multitude is capable of governing itself “with no master and forming a constituent power, then democracy
would finally be possible and all forms of constituted power could be subordinated to the rule of the multitude.\textsuperscript{411}

In this dissertation, as must be clear at this point, my argument is in line with those who maintain that the multitude is capable of democratic self-government, implying that all forms of institution can be subordinated to the rule of the people. However, I should clarify one aspect of this claim. Here, the thought of Thomas Jefferson on the unfolding of the revolutionary processes of his time will assist me in the task. Jefferson is among the political thinkers who believe that the multitude is indeed capable of governing itself, though, as he rightly points out, the abilities for democracy are not spontaneous; they require training. In his words, “the qualifications for self-government in society are not innate. They are the result of habit and long training, and for these they will require time and probably much suffering.”\textsuperscript{412} In this light, the overthrow of a political order does not create overnight a people capable of ruling themselves. Similarly, if people are trained to be passive and subservient, it is improbable that overnight they will be able to sustain democratic self-government.

Jefferson’s view on the theme is interesting because, among other aspects, it breaks from two common assumptions. First, it departs from the idea that human nature carries an innate and spontaneous ability for democracy – thus, once the ruling powers are overthrown, people are immediately ready for democratic self-rule. Second, it disagrees with the notion that human nature is now, and will always be, incapable of democratic self-government. Instead, Jefferson seems to develop a third path. By arguing that the multitude’s abilities for democratic self-rule can (and must) be trained, he winds up affirming one essential aspect (possibly the only true one)

\textsuperscript{411} Hardt, “Jefferson and Democracy,” 72-73.
about “human nature:” that it can be changed. In this light, Jefferson offers a potent contribution to the old and, in a way, sterile political debate on human nature, which, by viewing human beings in a static and essentialist way, tend to depict them as naturally evil or good.\footnote{This debate gained prominence especially with: Thomas Hobbes, *Leviathan* (London: Penguin, 1968); Jean-Jacques Rousseau, “On the Social Contract,” in *The Collected Writings of Rousseau*, (Hanover: University Press of New England, 1994); and John Locke, *Two Treatises of Government* (New York: Hafner Press, 1947).} In this respect, Hardt, commenting on Jefferson’s contribution to this debate, asserts that: “[W]e can see how absurd are all those debates about humans being naturally good or naturally evil. (They are, by the way, neither). The relevant fact for politics is that human nature is susceptible to change, that humans can become different.”\footnote{Hardt, introduction to *The Declaration of Independence*, xxiii.} In this sense, for Jefferson, the “only truth” of human nature is that it can (and must) be transformed.

But one might wonder: How to perform this transformation? Or, as Jefferson puts it, how can “men… be trusted to govern themselves without a master”?\footnote{Thomas Jefferson to David Hartley, July 2, 1787, https://founders.archives.gov/documents/Jefferson/01-11-02-0441 (accessed June 1, 2017).} A first important step, as he observes, is the development of a program of popular education. Schools and libraries are considered essential for building the capacity for democratic self-government.\footnote{Hardt, introduction to *The Declaration of Independence*, xviii.} A strong system of education, though, is insufficient for democracy to become an ingrained characteristic in people. It is also essential – as Jefferson, for instance, emphasizes through his proposal of a
“ward system” – that people directly participate in government. In order to develop their skills for democratic self-rule, people need to actively engage in activities such as the administration of justice, policing, public welfare, and the like and gradually assume control over the organs of power. For Jefferson, people learn democracy by practicing it. And in this process of learning democracy, I should finally add, there is no great instructor that teaches people the necessary lessons. The learning process for democracy is “a self-training in the capacities of self-rule.” Through practice, people “develop the skills, knowledges, and habits necessary for self-government and, in the process, a new humanity is created.”

Revolutionary Pennsylvania is an illustrative example of a self-training process that developed the people’s capacities of governing themselves. Consider Pennsylvania’s committee movement. By involving hundreds of Pennsylvanians (from both urban and rural areas), the committees functioned as powerful sites of practice in local autonomy. Through the committees, the people themselves took on most functions of government, such as oversight of the military, commerce, communication, and so forth. The experience in local autonomy was so potent that, by the late 1770s, the committee system became a rival source of authority in Pennsylvania. In

417 Jefferson presented the idea of ward system in a letter to Sam Kercheval in July, 1816. See Thomas Jefferson: Political Writings, (New York: Cambridge University Press, 1999), 212. In these years, Jefferson constantly criticized the lack of democracy in U.S. political life and its Constitution. The ward system was thus his antidote to the lack of democracy in the new country. In summary, the idea of a ward system consisted of dividing “each county into wards of such a size that every citizen can participate in political deliberations actively and in person. These little republics would have full autonomy to decide all local issues, controlling issues of justice, police, public welfare, and so forth. Furthermore, Jefferson proposes that the wards send delegates to compose the next highest body of government, the county, which in turn would send delegates to the state level, which, finally, would send delegates to the national government.” Hardt, introduction to The Declaration of Independence, xviii. See also: Hardt, “Jefferson and Democracy,”; Arendt, On Revolution, 248-250, 256-258; Ari Helo, “Jefferson’s Conception of Republican Government,” in The Cambridge Companion to Thomas Jefferson, ed. Frank Shuffelton (Cambridge: Cambridge University Press, 2009), 35-46; and Gary Hart, Restoration of the Republic: The Jeffersonian Ideal in the 21st Century (Oxford: Oxford University Press, 2002), 81-162.
418 Hardt, introduction to The Declaration of Independence, viii.
419 Hardt, introduction to The Declaration of Independence, xx.
this scenario, the committees represented, to a significant extent, a device for training people to rule themselves.

Furthermore, one of the outcomes of a training process (or really a subjectification process) for democracy is, as Jefferson observes, the production of an active citizenry – the creation of a people who will fight against any form of authority that attempts to take power from them. In Jefferson’s words: “Where every man is a sharer in the direction of his ward-republic, or of some of the higher ones, and feels that he is a participator in the government of affairs not merely at an election, one day in the year, but every day; when there shall not be a man in the State who will not be a member of some one of its councils, great or small, he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte.”

On the production of an active citizenry as a result of the training for democracy, the popular support given to Pennsylvania’s “radical” constitution of 1776 should be considered. One of the main reasons for the survival of the constitution amid the attacks of the local gentry was the broad popular support the document enjoyed, which only prevailed due to the intense process of training for democracy people underwent throughout the 1770s. This training process for democracy produced a people eager to fight for the 1776 constitution and, more fundamentally, to fight for an alternative project of democracy in Pennsylvania.

Here, it is important to address another fundamental theme regarding the self-government of the multitude: the so-called “tyranny of the majority.” The question here is: Does the rule of the multitude (or, in other terms, does “real democracy”) inevitably produce situations in which

the power of the majority becomes tyrannical against minorities? If so, then is representative politics the only antidote to protect them?

Madison is considered one of the most essential authors with regard to this theme. Both in the *Federalists Papers* and in his private correspondence, he uses the argument of the tyranny of the majority to advocate for the U.S. Constitution and its strong system of representation. He specifies two cases, one economic and one religious, in which “pure democracy” and its majority rationale can become tyrannical. Let us begin with an examination of Madison’s religious argument, which I should note, can serve to illustrate several related situations in which the rule of the majority may pose a danger to minorities (such as: ethnic, racial, and so forth).

In a letter to Jefferson (who, through his ward system, supported the rule of the majority), Madison expresses fear that, in a system in which the majority rules, if a dominant sect assumes government, there will be no mechanism to protect religious minorities. He thus defends the U.S. Constitution’s schema of representation in order to separate the government from the voters and their will. According to Madison, an “enlightened” and “virtuous” group of individuals, selected through a strong system of representation, was necessary to guard religious minorities against the “deluded multitude.”

The group of representatives could outvote the will of the majority whenever this will revealed itself as tyrannical. Hence, “the democratic multitude itself, in Madison’s view, has no mechanism of intelligence, prudence, or virtue that could organize differences: differences are immediately and inevitably expressed as conflict and oppression.”

Although Madison’s concern with religious minorities is certainly praiseworthy and legitimate, the antidote he offers to this issue (a strong system of representation) is questionable.

---

In fact, the history of representative politics shows that at times not only the institutions of representation have left minorities unprotected but, worse, in some cases have themselves attacked them. In this sense, one can say that Madison’s remedy has proven ineffective. More than that, his antidote has proven to be, so to speak, “poisonous.” It has led to the development of another (and well-known today) kind of tyranny: the tyranny of the minority of the wealthy, or, simply put, “the government of, by, and for the one percent.” Hence, Madison’s remedy winds up exchanging the fear of an eventual tyranny of the majority with the realization of a tyranny of the minority of the wealthy. And this tyranny of the wealthy, I should emphasize, is by no means a greater guarantee of protection for minorities (religious, racial, and so forth) than is majority rule.

It must be stated clearly: There is no infallible formula for the problem of the tyranny of the majority. There is always a risk that minorities can be tyrannized by majority rule, just as they can by the rule of a wealthy minority. Additionally, as Hardt and Negri correctly observe, “deciding which minorities to protect in which instances, of course, requires an ethical and political choice. Not all minorities in all instances deserve to be shielded from the majority’s decisions. Indeed, most minorities in most cases should be outvoted. Otherwise, majority rule would be meaningless.”423 To illustrate a situation in which a minority does not deserve special protection, consider Madison’s economic argument against “pure democracy.” This argument is mainly presented in the famous Federalist No. 10. He foresees here the possibility that the affluent minority faction will suffer the rule of the majority poor, menacing their economic privilege. In his terms: “The most common and durable sources of faction have been the various

---

423 Hardt and Negri, Declaration, 62.
and unequal distribution of property.” And the guarantee of property, he emphasizes, is the main object of government. Madison’s economic argument clearly does not represent a case in which a group needs or deserves special protection as a minority beyond the basic protection enjoyed by all. “Their wealth,” as Hardt and Negri claim, “already gives them enormous, disproportionate power over the majority.” Hence, there is no plausible reason that the “minority” of the wealthy should be shielded against the will of the majority “in public decision-making over economic and social policy.” To allow the minority to outvote the majority in a situation like this is counter-intuitive. In fact, Hardt and Negri continue, “it is bizarre… that Madison’s argument… puts religious minorities and minorities of powerful, wealthy property holders and creditors on the same level.” Madison’s economic argument clearly illustrates a situation in which a small group does not need to be guarded from the rule of the majority beyond the basic protection enjoyed by all.

That said, one might pose the following question: If Madison’s system of representation is not the best instrument for dealing with the problem of the tyranny of the majority, what is? In my view, the best bet against the perils posed by majority rule is the training process for democracy indicated at the beginning of this topic. In fact, it is no coincidence that I chose to address the issue of the tyranny of the majority in the present topic (“Constituent Power as a Training Process for Democracy”). Developing the skills, knowledge, and habits of the multitude for democratic self-government is the best way to avoid majority rule becoming tyrannical. If people are trained to value difference and alterity, it is unlikely that the rule of the majority will deteriorate into tyranny. Thus, an important first step is the creation of a strong system of popular education that not only fosters, in theory, democratic values, such as plurality,

424 Madison, Federalist No. 10, 74.
425 Hardt and Negri, Declaration, 63.
inclusion, autonomy, and the like, but, equally important, practices these same values. By “practices,” I mean that an educational system for democracy needs to be an open, participatory, and collective process of learning. In short, the educational institutions themselves need to be places of practice in local autonomy.

However, a strong system of popular education alone is not a sufficient training process to prevent majority rule from becoming tyrannical. It is also necessary for people to participate directly and actively in government. By developing the skills, knowledge, and habits necessary to sustain democratic relations, this engagement tends to produce subjectivities more permeable to difference and alterity, and therefore more aware of the need to respect minorities. In situations involving minority issues, the processes of decision-making will tend to be more deliberative, considerate, and inclusive – rather than simply following a mathematical rationale of majority rule.

More fundamentally, the type of community produced through the training for democracy does not tend to purity, homogeneity, or a fixed identity (as is at times the case with the notions of “nation” and “the people”). On the contrary, the development of the skills for democracy produces a kind of community more prone to hybridization, heterogeneity, and plurality. The relationship between majority and minority is thus not merely “formal” and “static,” serving only, in the last analysis, to reproduce (and sometimes even to strengthen) the respective identities of the majority and minority. In fact, the relationship tends to be more “substantial” and “dynamic.” It goes more in the direction of constantly “dissolving” and “transforming” all identities (including the majority’s identity), in a continuous process of producing a “Third” or a hybrid “Other.”
Examining the decision-making process of the movement of the squares, Hardt and Negri provide us a clue as to how this relationship between majority and minority can produce a hybrid “Other.” According to them,

At different occupations…, in assembly discussions from one hundred to five thousand people, [the participants] do not expect or seek unanimity but instead are constituted by a plural process that is open to conflicts and contradictions. The work of the Assembly… is to find ways to link different views and different desires such that they can fit together in contingent ways. The majority, then, becomes not a homogeneous unit or even a body of agreement but a concatenation of differences. Minorities are protected, therefore, not by being separated but by being empowered to participate in the process… The functioning of such dynamic… transforms the conventional conception of tolerance. Tolerance has often been understood to imply the social separation of minorities and blindness to their difference…[For instance], you are tolerant by allowing [someone] to live with others like him, separate from the dominant society. The rule of the majority, however, does not require that minorities be protected either through indifference or by making them an exception and socially separating them. Tolerance must instead give everyone the power to participate as different and to work actively with others. This tolerance is an essential feature of the internal multiplicity of the ruling majority.426

In my view, the concept that encapsulates this level, or type, of community is the concept of multitude. But before presenting this notion in detail, it is necessary to outline what the multitude is not. This procedure will assist us in avoiding some common misunderstandings associated with this notion.

Multitude, as a concept, is not a random agglomeration of people. This latter scenario would perhaps be closer to the notions of mass or crowd, which are usually associated with ideas such as spontaneity, passiveness, and of being liable to the manipulation of others. The masses,

426 Hardt and Negri, Declaration, 63-64.
the argument goes, being passive and amorphous, need to be led, directed. None of these ideas have anything to do with the concept of multitude. Actually, as I will show in brief, the notion of multitude opposes them.

Likewise, the multitude is opposed to the notions of “the people” and “the nation.” Both of these latter ideas are usually marked by a logic of unity, homogeneity, and, as a result, exclusion. The term “the American people,” for instance, was time and again used to designate white male subjects. The notions of “the people” or “the nation” are thus often homogenizing and potentially authoritarian.

Finally, one should distinguish the multitude from the concept of “working class.” The latter has come to be used as a restrictive notion, not only differentiating the workers from the owners who do not need to work to support themselves, “but also separating the working class from others who work.” As Hardt and Negri affirm, “in its most narrow usage the concept is employed to refer only to industrial workers, separating them from workers in agriculture, services, and other sectors; at its most broad, working class refers to all waged workers, separating them from the poor, unpaid domestic laborers, and all others who do not receive a wage.” The notion of working class is pervaded by a strong economic logic and, therefore, intensely intertwined to the production of material goods. This notion tends to exclude other modes of production, such as social production (i.e. “the production of communications, relationships, and forms of life”).\(^\text{427}\) That said, what then is the multitude?

From a certain perspective, the multitude can be defined as an open multiplicity (or network) of singularities, impossible to be represented, without a center or border, that compose productive relations among themselves in an incessant process of mutation. Hardt and Negri are

the authors who have dedicated themselves most to developing this concept. Opposing the multitude to the people, they argue, for instance, in their work *Empire* (2000) that:

> The multitude is a multiplicity, a plane of singularities, an open set of relations, which is not homogeneous or identical with itself and bears an indistinct, inclusive relation to those outside of it. The people, in contrast, tends toward identity and homogeneity internally while posing its difference from and excluding what remains outside of it. Whereas the multitude is an inconclusive constituent relation, the people is a constituted synthesis that is prepared for sovereignty. The people provides a single will and action that is independent of and often in conflict with the various wills and actions of the multitude.\(^{428}\)

Moreover, it is important to note that the multitude is not something already given. It needs to be formed (or, better, it needs to form itself). Likewise, there is no “finish line” in the formation process of the multitude.\(^ {429}\) Rather, it is a constant process of becoming animated by the desires of the multiple singularities in network. In addition, I should note that the constituent struggles are usually the planes on which the formation of the multitude takes place with greater evidence. One can say that the multitude is forged in these constituent struggles. For the concept not to be too abstract, it might be useful to examine a clue given by Hardt and Negri of its materialization. Examining the so-called *anti-globalization movement* of the 1990s and early 2000s – a series of massive protests against the hegemonic rationale of globalization that took place in cities like Seattle, Prague, and Genoa – they observe the following:

> The magic of Seattle was to show that these many grievances [of the movement] were not just a random, haphazard collection, a cacophony of different voices, but a chorus that spoke in common against the global system. This model is already

\(^{428}\) Hardt and Negri, *Empire*, 103.

\(^{429}\) Homero Santiago, *O irrepresentável* [The Irrepresentable], *Caderno IHU Ideias* 15, no. 240 (2016), 7.
suggested by the organizing techniques of the protesters: the various affinity groups come together or converge not to unite into one large centralized group; they remain different and independent but link together in a network structure. The network defines both their singularity and their commonality. Seattle demonstrated, from a subjective standpoint, from the perspective of the protesters, the coherence of the lists of grievances against the global system. This is the primary message that was heard around the globe and inspired so many others. Anyone who travels to different parts of the world and meets the various groups involved in the protests can easily recognize the common elements that link them in an enormous open network.\footnote{Hardt and Negri, \textit{Multitude}, 288.}

Today, the “laboratories of multitudes” are also running with intensity. The recent constituent struggles (such as \textit{Occupy Wall Street} and \textit{Indignados}) also give us an idea of the formation process of the multitude. (And, as a result, they provide us an idea of the concept of multitude). For instance, the form of organization of these struggles – horizontal, inclusive, and network-based – indicates several characteristics of the notion of the multitude.

Finally, because the notion of multitude is traversed by ideas such as inclusiveness and plurality, I claim that it is a more sophisticated tool to address the abovementioned relationship between majority and minority. In a way, one can say that the majority rule of the multitude (inclusive and heterogeneous) represents a \textit{qualitative leap} in relation to the majority rule of “the people” (usually exclusionary and homogeneous). Examining this issue, Hardt and Negri point out that “the challenge posed by the concept of multitude is for a social multiplicity to manage to communicate and act in common \textit{while remaining internally different}.”\footnote{Hardt and Negri, \textit{Multitude}, xiv (emphasis added).} More fundamentally, I claim that the multitude is the concept that is at the level of the perspectives of constituent power and democracy examined in this chapter. It incarnates the idea of an open, immanent, and plural
democratic process of becoming. In this sense, one can say that the multitude is the adequate “subject” for constituent power. Or, alternatively, one can define constituent power as the power of the multitude.

Constituent Power and (once again) Democracy

With the ideas developed throughout this chapter in mind, it seems useful now to reexamine the relationship between constituent power and democracy in a way that expands our understanding of both.

At the beginning of this chapter, I briefly defined constituent power as “real democracy in motion,” but this definition requires further elaboration. Borrowing Hardt’s ideas, one can say that constituent power is an open and unending sociopolitical process of becoming in which democracy is the means and end. Democracy is the goal of constituent power “and, paradoxically, democracy is also the means of achieving it.” One might object at this point, as Hardt notes (although referring more broadly to the concept of revolutionary transition), that such a notion of constituent power is paradoxical “insofar as it collapses means and ends; pretending to achieve democracy through democracy it merely stands in place. To resolve this paradox,” he continues, “we simply have to recognize that means and end are not identical but neither are they entirely separate. The democracy aimed for always exceeds the democracy practiced, and thus… [constituent power] is recast as a process of infinite becoming.” In fact, in the realm of the constituent process, one can say that “the relationship between means and end is, in fact, something like a spiral. The democracy aimed for always exceeds the democracy practiced, such that as the democracy practiced expands through the process of self-training, so
too expands the democracy aimed for, the horizon of self-rule. Training in practice, in other words, constantly nourishes too the powers of political imagination and desire.”

At this point, it should be clear that a conception of constituent power worthy of the name is indissociable from democratic practices (or means). More than that, democracy must not only be the final realization of the constituent process (as a promise to be fulfilled only after, for example, a revolutionary process of transition is over). In fact, democracy must also, and equally important, be the very means of the constituent activity. In this light, if not coupled with democratic means and end, the overthrow and creation of a new political order cannot, I argue, be called “constituent power.” In such situations, it is more likely that one is facing a coup d'etat, a seizure of power by an oligarchy or another social class. In similar terms, Kalyvas asserts that “[s]hould a person or group appropriate the power to constitute a legal order at the exclusion of all those who will be its addressees, the ensuing constitutional document should be regarded as invalid, unauthorized, the result of an arbitrary act of usurpation that violates the normative prescription of the constituent act.”

Correspondingly, one can affirm that a notion of democracy worthy of the name does not corral constituent power to the legitimating principle of the institutional order. It does not proscribe constituent power, after the creation of a formal constitution, to the subterranean of the social terrain. (In this sense, the paradox of constitutionalism which, as noted in Chapter Two, means the obliteration by the constitution of its ultimate source of legitimacy – the people’s power – it is not properly a paradox, but an act of proscription of constituent power). By contrast, a notion of democracy – true democracy – fosters constituent power’s operation on the very surface of the social terrain. It supports constituent activity in, so to speak, high-frequency mode.

432 Hardt, introduction to The Declaration of Independence, xxi.
Democracy requires thus a government that allows for and promotes the primacy of constituent power over the established order. Or even further, it is a project to invent ever better forms to allow the multitude to rule itself autonomously.\(^{434}\)

Chapter 5

Conclusion: Which Democracy?

Eu não espero pelo dia em que todos os homens concordem. Apenas sei de diversas harmonias bonitas possíveis sem juízo final.

[I don’t wait for the day when all men agree. I know of many beautiful harmonies possible without final judgment.]

Caetano Veloso, “Fora da ordem” [“Out of Order”]

This dissertation had two main goals. The first was to present an alternative path for the concept of constituent power (and democracy). The second was to provide insights for the reflections on the limits of representative democracy. In the Conclusion of this work, I wish to concentrate a bit more on this latter point.

Throughout the modern age, the discourse related to “representative democracy” (although at that time this expression was seldom used) has been anchored in two fundamental promises. The first was that representation made democracy viable across vast territories. The second was that representative politics protected minorities from the possible tyranny of majority rule. Over time, such promises became so influential and naturalized that democracy and representation came to be seen as practically inseparable. For instance, today, some of the most important criteria for measuring the “democratic quality” of a country are the existence of representative institutions and the occurrence of periodic elections for these institutions. In short, *representation* became one of the most important indicators of the existence of a *democracy*.

Today, however, after more than 200 years of the paradigm of representative democracy (and a history of crises of this form of government), it seems reasonable to argue that the main
promises of representative politics have failed. That is, this system has not been able to bring
democracy, real democracy, to vast territories and it has also not been able to effectively protect
minorities. On the first promise, it should be added that even to relatively small territories, this
system has not been able to provide real democracy. On the second promise, it should be added
that the protection of minorities against the tyranny of the majority not only failed but, worse,
produced another kind of tyranny: that of a wealthy minority over the majority of the population
or, as it became recently known, government of and for the 1%. Faced with this scenario, it
seems that today few would concede to the once influential idea that representative politics
constitutes a “vehicle for democracy.”

In this sense, it may no longer be the case to insist, as some theorists of representation do,
that, with some adjustments here and there, the institutions of representation would eventually
become aligned with the desires and composition of the multitude. More accountability and
transparency, while positive measures in themselves, do not seem enough to make these
institutions truly democratic. In fact, there seems to exist always a limit to this reformist
discourse. This limit lies in the very mechanism of political representation. Let us briefly
remember this limit here. Even if representation functioned in a perfect and transparent way, it is,
by definition, an instrument that separates rulers from ruled, that separates the multitude from the
structures of power. Thus, a political system based on the centrality of representative politics
(like “representative democracy”) is a political system pervaded by this kind of separation.
Therefore, mere attempts to make this system of government more responsive do not seem able
to overcome this fundamental issue.

Perhaps it is more useful to recognize, as some authors do, that we are witnessing the end
(or transition) of the paradigm of representative democracy. Facing the situation in this way
liberates our energies to invent the new (instead of using them to mostly enhance the old). In other words, it allows us to concentrate on the invention of a new type of institution, a type of institution marked by the direct action of citizens in government.

In fact, it was precisely this issue (the invention of new institutions) that mobilized the central theme of this dissertation: an alternative conception of constituent power. The *alter* constituent power, as observed throughout Chapters Three and Four, provides ideas for thinking of another kind of institution, another type of democracy. By nourishing the direct and continual engagement of citizens in government, this perspective challenges the traditional institutions of representation. It undermines the substantial separation between rulers and ruled produced by representative politics. In this sense, this conception fosters the substitution of the institutions of representation by the institutions of constituent power. In the theoretical framework developed here, *constituted power* is never allowed to be a consolidated machinery that stands separate from and above society. On the contrary, *constituted power* is thought of as a structure that must be in line with the current desires, needs, and composition of the multitude.

Likewise, recognizing the exhaustion of the “era of representation” also sets us free to see the potentialities of the present. But which potentialities? As noted in Chapter Four, in many countries, the current sociopolitical terrain is marked by an intense anti-establishment sentiment. Innumerous surveys indicate high levels of citizen disaffection toward the conventional system of representation. This (more than legitimate) sentiment of disenchantment can, however, take very different paths.

As recently observed in some countries, the anti-establishment sentiment can, for instance, take a reactionary or authoritarian direction. The reasons that lead people to take this route are indeed complex and thus deserving a separate study. Notwithstanding, I wish to note
the following. Here, the response to the anti-establishment sentiment (or really to the crisis of representation) is (even) *less democracy rather than more*. In many cases, we see then a sad mutation taking place: a legitimate indignation against representative politics turns into intolerance, xenophobia, racism, and so forth.

However, the anti-establishment sentiment can take a totally different path. It can, for instance, respond to the crisis of representation with *more democracy rather than less*. This was the case of the recent movement of the squares. This movement not only proposed several ideas to democratize the system of representation. Actually, its very form of organization – horizontal, leaderless, and based on processes of collective decision-making – provide us hints of a potent democratic alternative to the conventional schema of representation. Consider, for example, the movement’s adoption of ICTs and social media as vehicles of experimentation with democratic and multitudinarity governance. Practices of this kind give us insights on how to expand the circuits of political decision-making throughout the social terrain. At a more fundamental level, they provide us with ideas of how a real democracy could take effect. I consider this movement’s ideas and practices a field of potentialities for true democracy. But there is more.

As briefly noted in Chapter Four, we are living in an epoch in which ideas and practices of real democracy abound around the globe. Experiments in local autonomy are presently occurring in cities as varied as Madrid, Sao Paulo, San Francisco, and Istanbul. If, on one side, citizens are showing less and less interest in electoral politics, on the other side, they are increasingly engaging in democratic experiments, such as occupying and self-managing abandoned buildings, creating citizens’ platforms, forming neighborhood assemblies, and so forth.
It seems correct to affirm that several of these new experiments are the direct result of the movement of the squares. Said differently, they are the result of the intense process of subjectification (or training for democracy) that this movement ignited. New subjectivities emerged from the occupied squares. And these subjectivities have been demonstrating a strong capacity for democratic self-rule and therefore to deal with the various issues related to the activity of self-government, such as the participants’ safety, collective decision-making, and the like.

It is true that in the many countries where the movement of the squares occurred the creation of large constituent institutions has not yet been seen. However, we think that taking this fact to affirm that the movement of the squares has failed is a mistake. The very fact that, today, we are witnessing the flowering of countless experiments in local autonomy around the world seems to us enough to reject the discourse of failure.

Given this scenario, we think that it is not the case that we should be mourning the “end” of the movement of the squares, the rise of populist politics, or, even less, the contemporary crisis of representation. Rather, we should be attentive to the potential of the present. There are several openings in the social terrain that, if well articulated, can produce more democratic, participatory, and sustainable forms of governance. The alter conception of constituent power developed in this dissertation also wishes to contribute to the ongoing debate on more democratic forms of governance. The time is thus of potentialities, and there is a lot that can be done.
Bibliography


Pereira, Márcio. “Machines de travail: Constituent Power and the Order of Labor in Sieyes’s Thought,” Constellations, online version (December 2017).


Sitrin, Marina and Dario Azzellini. ‘They can't represent us!’: *Reinventing Democracy from Greece to Occupy* (London: Verso, 2014).


Documents


