Machiavelli and constituent power: The revolutionary foundation of modern political thought

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Abstract
This paper considers Niccolò Machiavelli's contribution to a theory of constituent power. Modern authors who have analysed the concept of constituent power generally agree on its ambiguous, paradoxical and apparently contradictory essence. With few exceptions, Machiavelli is absent from both the historical reconstructions of and the theoretical debates on the origin of constituent power. My argument is built around two main theses: reintroducing Machiavelli to the debate on constituent power offers an original response to the theoretical fallacies and inconsistencies identified by modern scholars. In particular, Machiavelli's philosophy contributes to the comprehension of constituent power as a living force within social order. My second thesis is that by tracing the source of constituent power back to Machiavelli, we can overcome the main theoretical problem implied by this concept, namely the problem of the priority of the factual or the juridical, by providing a vision that emphasises their immanent coexistence.

Keywords
Machiavelli, constituent power, law, conflict, social order

Introduction

Constituent power[1] has been considered, with good reason, a modern juridical concept *par excellence*. Constituent power can be defined as the concept that makes it possible to think of the people's power as the source, origin and foundation of democratic power, including but not limited to its constitutional forms. It is the concept that connects the political origin of the State to its juridical life. One of its earliest appearances as an absolute power from which the constitutional life of a community takes life is in the Abbé Sieyès's works *Qu'est-ce que le Tiers Etat?*, and,

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more generally in the French revolutionary debates.[2] Modern authors who have analysed this concept, especially after Second World War, generally agree on the 'ambiguous' nature of constituent power, its extreme or paradoxical character, as well as its apparently contradictory essence.[3] According to these authors, the constituent power raises questions about the very foundation of the juridical system, because it throws light on the fundamental tension between the factual and political moment of the origin of the State on the one hand, and its normative and legal moment on the other.

Although the concept of constituent power is clear, its nature and concrete functioning are highly contested, and a source of paradoxes for legal theory. 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 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*.

This paradox characterises both the origin of positive law and the relationship between constituent and constituted moment: a relationship at the same time necessary and impossible. It is necessary, because positive law needs an extra-juridical and normative ground for its validity; it is also impossible, to the extent that such a ground is irreducibly factual and thus incapable of performing the normative function it is supposed to perform.

Niccolò Machiavelli is almost absent from both the historical reconstructions of and the theoretical debates on the origin of constituent power. Machiavelli's thought seems to have little to offer for the clarification of constituent power's paradoxes and their historical origins. Likewise, as a theoretical tool, constituent power does not seem a useful concept in interpreting Machiavelli's juridical thought. Either Machiavelli has been dismissed, or he has been considered without grasping his strongest contribution to a theory of constituent power, namely his conflictual theory of politics and law.[4] My aim in this article is to reverse these conclusions by connecting the typically modern problematics of constituent power with Machiavelli's juridical and political thought.

Machiavelli is not a legal philosopher. I will therefore avoid misleadingly representing his work as having a consistent and coherent theory of constituent power. Coherent and consistent elements for building such a theory, though, can be synthesised, if we focus on the right aspects of his historical and philosophical work. These aspects are, in my view, his theory of dictatorship, his medico-juridical theory of 'humours' and the relationship he establishes between laws and orders. I see these three aspects as corresponding to three classic pillars of a theory of constituent power, namely its subject, its temporality and its will. My argument is built around two main theses: the first concerns the theoretical understanding of

constituent power. Reintroducing Machiavelli to the debate on constituent power enables us to challenge the theoretical fallacies, paradoxes and inconsistencies identified by modern scholars. In particular, Machiavelli's philosophy contributes to the comprehension of constituent power as a living force within social order. A force that, by keeping the conflictual dimension of politics open, is able to connect the factual and political moment to the normative and juridical moment.

My second thesis concerns the interpretation of Machiavelli's thought: by sketching a different genealogy of constituent power and tracing its source back to Machiavelli, his work can be seen as a groundbreaking contribution to juridical and political philosophy. Machiavelli develops a revolutionary position, suggesting that social and political conflict are not destabilising political factors, but rather the grounding and animating force of free republics. Machiavelli's praise of conflict is not a rhetorical appeal or simple provocation, but rather the first serious attempt to explain the reciprocal influence of the factual and the juridical without assuming the necessity for the former to be obliterated and overcome by the latter. Machiavelli's thought allows us to overcome the problem of the priority of the factual or the juridical by providing a vision that emphasises their immanent coexistence. The aim of my paper, thus, is twofold: to draw from Machiavelli's thought a better foundation for a theory of constituent power while at the same time drawing on the major problematics involved in the concept of constituent power to shed light on Machiavelli's political theory.

Constituent power and Machiavelli's thought: A missed encounter?

One of the major efforts in understanding constituent power in the anglophone literature of recent years is the collective volume edited by Martin Loughlin and Neil Walker, devoted to constituent power intended as a 'paradox' of constitutionalism.[5] In this volume, John P. McCormick focuses on Machiavelli and, through him, on the relationship between the people and the elites in classic and modern constitutionalism.[6] As with his book on 'Machiavellian democracy', though, McCormick mainly devotes attention to the spirit of institutional reforms inspired by Machiavellian principles. Hence, without directly tackling the problem of constituent power, McCormick's perspective is wholly internalised within the law, thus leaving aside the problematic question of its foundation and the factual events that shape that foundation.

Martin Loughlin has developed his analysis of the concept of constituent power, applying what he calls a 'relationalist method'.[7] Legal relationalism makes it possible to grasp constituent power as a living force that goes beyond the founding moment. Because it avoids the traditional opposition between legal formalism and decisionism, namely the two approaches into which positions have traditionally been polarised, Loughlin's work is one of the most important attempts to understand the centrality of the question of unity and disunity *within* constituent power. Although Loughlin only tangentially evokes Machiavelli, as his focus is mainly on Carl Schmitt and Hermann Heller, he crucially contends that Machiavelli's thesis

of 'political development [...] driven by the struggle between two opposing classes' is one of the most pressing issues today, both politically and theoretically. In so doing, he raises questions that are fundamentally important in grasping one of the theses of this article, namely that the genealogy of constituent power has to be traced back to Machiavelli's political thought.

Machiavelli can be found at the core of Antonio Negri's work on constituent power and the different 'alternatives' within modernity.[8] Along with Spinoza and Marx, in Negri's view, Machiavelli belongs to a metaphysical and political alternative of modern thought grounded on a revolutionary version of constituent power. Whereas these three authors work to establish an absolute and untamable version of constituent power, the authors belonging to the Liberal and constitutional alternative work for its dissolution and obliteration within the constituted power. In the clash between these two traditions, Negri recognises the contradiction and fundamental conflict of modern legal history. Reassessing the revolutionary alternative of modernity is the first step in recognising its limits in historical contexts. It is a necessary step to explain how the mainstream alternative has historically been able to reabsorb constituent power within constituted power (one can speak of living labour and dead labour, as Negri does, borrowing Marx's categories). This prepares the ground for the theoretical emergence of a new absolute subject of constituent power.

Negri's theory has pioneered a new interpretation of Machiavelli and its role in the history of the concept of constituent power, within a Marxian perspective. Yet, his focus on the multitude as an absolute subject and the primacy of its ontological constitution over its historical formation has overshadowed Machiavelli's most original contribution to the theory of constituent power, namely its polemical nature. Conflict, for Negri, is a temporary obstacle to the affirmation of the absolute subject. While Machiavelli grounds constituent power on the conflictual force of the free multitude (or the *popolo libero*), Negri thinks of constituent power as the ontological triumph and final affirmation of the multitude over conflict.

In a thoughtful article, Miguel Vatter criticises Negri's approach.[9] In order to resist the absorption of the constituent within the constituted power, Vatter claims, Negri falls into the opposite fallacy. Turning the relationship upside down, Negri sets constituent power as an absolute force deprived of any relation to any constituted legal form. In Vatter's view, Negri misses the point of a reciprocal and 'internal relation' that links both powers, preferring the 'reassuring' Marxist assumption whereby the State is an illusion destined for extinction. On the contrary, Vatter maintains, constituent and constituted power resist each other. The former's creative and grounding force is not 'absolute', anymore than the latter's resistance to political change and revolution is.

Against the idea of an absolute subjectivity, Vatter suggests considering constituent and constituted power on the same ground in order to de-ontologise the absolute subject of constituent power and to interpret it through the mode of radical contingency. Vatter's aim is to delegitimise Negri's theoretical move, whereby it would be possible to regress from the ossified and sclerotic constituted power towards the expansive vitality of constituent power. For Negri, this is the

ultimate revolutionary move. Echoing Hannah Arendt, Vatter maintains, on the contrary, that the repeated failure of modern revolutions does not point to concrete historical defeats, but rather to the *ontological* impossibility of institutionalisation of revolution. Here, however, Vatter paradoxically converges with Negri in maintaining an absolute impermeability of constituent and constituted power. Political freedom, as constituent power, exists for him only in the necessarily reiterative dimension of the 'event', and never in the institutionalised dimension of the 'form'. For Negri, constituent and constituted power are radically alien. For Vatter as well, they are doomed to miss their encounter: constituent power lives for Vatter only in the contingency of the event, and will never be able to give form to any constituted power.

Vatter attempts to separate Machiavelli from both Negri and Spinoza. Yet, by maintaining that the subject of constituent power is essentially alien to every constituted power, he postulates a separation between factual and normative, or between political and juridical, that falls back into an ontological priority: the priority of the pure event. In other words, Vatter is able to separate Machiavelli from Negri's alternative modernity only by posing constituent power as paradoxically resistant to *every* constitution. Each historical configuration of constituent power would be the loss of the event's purity that Vatter recognises only within the Machiavellian *popolo* and its concept of negative freedom. Vatter rightly suggests the necessity of de-ontologising Negri's constituent power, yet he underestimates the conflictual dimension of constituent power and its polemical nature. Beyond Negri's interpretation, but also beyond Vatter's criticism, my thesis is that, through Machiavelli, we can grasp constituent power as a conflictual power that precedes, drives and exceeds constituted power, not moving beyond law, but rather occupying its centre and transforming its nature.

Scholars who have introduced Machiavelli into the modern genealogy of constituent power have not fully grasped the originality of his thought or the fact that the questions raised within the modern juridical and political theory of constituent power belong within the spectrum of problems opened up by Machiavellian political philosophy. In the next section, I will show how modern authors, without using or quoting Machiavelli, develop questions that belong fully to the philosophical field opened up by Machiavelli. I will also analyse Machiavelli's texts, suggesting that his thought throws new light on the ambiguities and paradoxes encountered by modern constitutional theory.

Machiavelli's contribution: A different genealogy of constituent power

Once Machiavelli is reintroduced into the genealogy of constituent power, the concept can be elaborated within a new perspective, and a less ambiguous image of constituent power emerges. At the same time, through the idea of constituent power, Machiavelli's philosophy appears in a new and more radical light as a conflictual theory of law and politics. I will focus on three fundamental passages of the *Discourses* to highlight Machiavelli's original contribution to the theory of

constituent power: the theory of dictatorship (D I,34), the theory of humours (D I,4) and the dialectic between laws and orders (D I,18).

Dictatorship and the subject of constituent power

In the early 20th century historiography on constituent power, Carl Schmitt refers to Machiavelli in his text on dictatorship. Here, the German philosopher explores the history of the modern concept of 'sovereign dictatorship' and its roots in the classic concept of 'commissarial dictatorship'. Through the latter, the dictator acts within the legal boundaries, and his action is limited by the constitution itself. The dictator acts for the sake of the constitution as well as its principles, whenever they are exposed to an exceptional danger. Through the former, on the contrary, the legal order in force is abolished. The sovereign dictator aims to destroy the constitution in force, break with the previous order and establish a new regime. His action is not grounded in the existing law, but in a future one.[10]

Such a break, according to Schmitt, is rooted in both the factual and the juridical dimensions. The sovereign dictator, in fact, is still 'commissarial', and yet linked to the profoundly modern concept of constituent power, forged for the first time in the 18th century.[11] Thus, the question is not merely factual, but also fully juridical. Sovereign dictatorship presupposes a grounding power that is not structured in a formal constitution, and yet it is strictly linked to such a constitution. Such a link can never been obliterated, not even by the present constitution in force. This is the inner meaning of *pouvoir constituant*.[12]

Machiavelli develops his reading of dictatorship as a Roman republic's constitutional tool that should not be feared. Every republic, sooner or later, has to face exceptional circumstances that, if not appropriately dealt with, might ruin it. Machiavelli addresses here the question of the complex and irregular rhythms characterising the political life of a republic and its development over time. Every republic must be able to accelerate its own vital rhythm and political metabolism if circumstances demand it. Such an acceleration might help the republic to face the forces that constantly work towards its decomposition, attacking it from both the inside and the outside. Laws are there to perform such a function. However, the ordinary course of law might not be up to the task of exceptional circumstances. Law itself, therefore, must foresee the recourse to exceptional tools that will help it face those exceptional events.

Dictatorship is precisely the tool – legal and constitutional – with which the republic recognises its own incapacity to face the extraordinary with ordinary means. It therefore makes preparations and sets mechanisms – legally ordered and determined – for urgent and necessary intervention.[13] Predicting every accidental event is both impossible and necessary. It is necessary, because mutation, sudden and impetuous, is a concrete possibility in the history of republics, and one that puts their life at stake. It is also impossible, because the laws will never be able to offer the appropriate response to every and any event that might threaten freedom and prejudice or even destroy republican institutions. Hence, the extraordinary instrument of dictatorship allows the creation of an *unlimited*

authority that, for a *limited* period of time and with *precise* competencies, might punctually, concretely and effectually respond to those events that could not be foreseen in abstract or in advance. The dictatorship never harmed the republics, because its authority was limited and circumscribed by other powers.[14] In Schmitt's view, this limitation makes Machiavelli dictatorship 'commissarial' rather than 'sovereign'.

If one accepts Schmitt's language, the Roman dictator described by Machiavelli is very far from the idea of constituent power. He exercises, on the contrary, a *relatively absolute* power, limited in time and only established in view of saving and preserving the existing juridical and political order: a still valid and currently in place order facing an extreme danger. The dictatorship is thus an order whose function and limits prevent the creation or the constitution of anything new; rather it merely admits the conservation of what already exists. It is a conservative rather than a revolutionary power.

And yet a link, albeit indirect, as Schmitt has correctly pointed out, can be established between Machiavelli's dictator and the constituent dimension of his thought. At the dusk of the Roman republic, in fact, Caesar is able to 'put an honest face on his tyranny' and subvert the ground of the State precisely through the dictatorial office.[15] The Caesarian dictatorship, though, is an effect, rather than a cause, of this transformation. Machiavelli establishes here a principle of strong realism, by subjugating the law to the fact:

> for it was neither the name nor the rank of dictator that made Rome servile, but it was the authority taken by citizens because of the length of command. If the dictatorial name had been lacking in Rome, they would have taken another; for it is forces that easily acquire names, not names forces.[16]

Schmitt's considerations open up the space for a broader comprehension of the most original aspects of Machiavelli's constituent power. Dictatorship must be interpreted as an instrument for political battle, an ordinary tool among other tools. However, Constituent power is not only, for Schmitt, a *sovereign* feature. It is, more importantly, a *sovereign's* feature, a force the main function of which is the consolidation of power against the conflictual forces that divide society. It is a force that neutralises the explosion of social conflict. For Machiavelli, on the contrary, constituent power is the force that makes this conflict live.

Dictatorship must not be feared in the same way that tumults and conflicts between the plebs and the senate must not be feared because, in Machiavelli's view, they were, in fact, the first cause of Rome's greatness and freedom. Moving beyond Schmitt's interpretation by grasping the original argument in Machiavelli's position, I suggest that Roman dictatorship, *with* Schmitt, does not represent the rising of a constituent power, internal and opposed to the juridical order in force. As such, this dictatorship is not 'sovereign'. *Beyond* Schmitt, though, Machiavelli's dictatorship points to the partisan and conflictual dimension of republican life. This, in Machiavelli's view, is the real moving and constituent force of power itself. A force that modern scholars have obliterated from the idea

of constituent power, focusing instead on the attribute of the will and the homogeneity of the constituent subject.

Thus, as for the conceptualisation of constituent power, the analysis of dictatorship in Machiavelli's thought shows that such a power cannot be envisaged as entirely preceding the constituted moment and hence entirely external and alien to it. Instead, constituent power lives in the institutional politics of the republic. Far from acritically justifying the institutional moment, though, constituent power continuously transforms the actual institutional configuration. Constituent power is the simultaneously ordinary and extraordinary force shaping the irregular rhythms of political life. The analysis of dictatorship also illustrates the originality of Machiavelli's juridical and political thought: avoiding the strict Schmittian alternative between commissarial and sovereign power, Machiavelli's dictator is at the same time a conflictual and an institutional force. The former is not sublimated into the latter. They are two modes and configurations of one and the same reality, considered in these two different but intimately related fields. Through this understanding of the constituent dimension of dictatorship, we can start defining the Machiavellian conception of constituent power that, linked to the conflictual life of society, preceeds, coexists with and goes beyond every constituted power.

Satisfying humours: The temporality of constituent power

The analysis of dictatorship provides the first pillar of a strongly immanent conception of the relationship between law and politics, between constituted and constituent moment. Let us move now towards the second pillar of this conception. Dictatorship is an *ordinary* legal tool, activated in *extraordinary* circumstances. If it can be seen as a form of constituent force, then what is its specific temporality? Is there a determinate temporality of constituent action, beyond the specific point of origin of the state and in the ordinary reciprocal influence of politics and law? Law, jurists maintain, does not fear politics. It is rather constituent power that fears itself, or rather the possible configurations that it might assume in the future. In other words, it is the absolute character of constituent power that reveals the contingency of the values that same power aims to establish. Those values are historically determined within concrete situations, and elaborated *against* different values. What has been absolutely established today can be overthrown tomorrow, likewise absolutely, in the name of future revolutionary novelties or, even worse, in the name of a reactionary appeal to the past. This is what frightens constituent power, this is its doom-filled and inexorable threat.

The chronological or temporal perspective on constituent power points to the Machiavellian problem of mutation, corruption and contingency in history. Being able to consider the origin of power is, for him, insufficient if theory is not also able to imagine a way of transforming it and 'accommodating' it to the diversity of historical situations.[17] Such a transformation, for Machiavelli, always relates to the original *vital* core of every composite body. This dimension is vital both because it refers to the the body's beginnings, and because without maintaining an active connection to this original core, the body's life inevitably declines. This, as I will

show in the conclusion, is the core of Machiavelli's famous idea of a return to the beginning, illustrated in *Discourses* III,1. Before describing this idea of a return to the constituent beginning of a complex body, though, Machiavelli's use of medical language for political purposes must be analysed.

Machiavelli draws on the ancient medical language by speaking of the 'humours' that constitute a mixed body. He makes use of this language in order to demolish the universally shared opinion of historians that condemned the conflictual life of the Roman republic, including his beloved Livy: 'those who damn the tumults between the nobles and the plebs', he writes in *Discourses* I, 4, 'do not consider that in every republic are two diverse humours, 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'.[18]

According to the Hyppocratic and Galenic tradition, the human body is composed of four fundamental humours: black bile, yellow bile, phlegm and blood. Machiavelli is not the first philosopher to make use of this language by transposing it onto a different conceptual field: Marsilius of Padua in the 15th century had already employed medical knowledge as a language for political reasoning. He focused in particular on the conflictual dynamics within the city, comparing the parties to the humours. Like Machiavelli, he was looking for an immanent principle of causality of political phaenomena, rather than accepting a divine and transcendent principle of explanation. However, Marsilius shares a traditional vision grounded on the idea of the right balance of humours, expressing and representing the healthy political body. Machiavelli, on the contrary, makes political use of the medical paradigm of humours by turning it upside down and dramatically redefining its original meaning: not the union and the balance of the humours, but rather their disunion and imbalance is what constitutes a healthy political body.

Men are worried by the clamour produced by tumults, and hence incapable of grasping the good effects conflicts produce. Social conflict is, in fact, the cause of virtuous institutional effects that, like the tribunes of the plebs, are necessary to defend and preserve people's freedom. Thus, Machiavelli claims the necessity of connecting conflict and law, the factual and the juridical moments. In a stable and strong State, one does not overcome the other. Constituent and constituted power permeate each other through a relationship of immanence. More importantly, this immanence points to a revolutionary foundation of the State itself.

How is it possible to imagine a living law that embodies the whole power of the constituent moment, without neutralising or dissipating it? The answer lies, for Machiavelli, in keeping the conflictual root that characterises, by definition, every constituent moment alive. Pace modern theorists, constituent power appears as a plural and polemical dynamics, rather than a linear movement of a single and homogeneous will. Humours belong to the factual and pre-legal dimension. The project of purging the multitude's mixed body of them would be vain and absurd. It would also be absurd, however, to think that they will not be transformed in and through the juridical dimension. Law, the constituted moment, produces worse effects when it tries to hinder this movement rather than favouring it.

Humours *transport* the originally conflictual dimension of constituent power into the constituted power.[19]

Machiavelli speaks about the necessity of satisfying the humours. In language closer to our mentality, this means maintaining the connection between the formal constitution and the spirit that originally guided its grounding principles. Modern authors, such as Böckenförde or the Italian jurist Costantino Mortati, have insisted on this principle. The survival of the original spirit in the constitution, according to Böckenförde, is never *legally* grounded. The community's values can indeed *define* an actual consensus, but they cannot *ground* it. The relationship between natural right and positive right, Mortati claims, cannot be grounded on an abstract evaluation of transcendent principles, but only vis-à-vis a social conscience immersed in a determined historical context. Hence, the constituent power springs from disharmony, i.e. from the conflict among diverging interests and from the struggle for a different social, political and historical order, which also requires a new legal order. Although developed within the harmonic paradigm of modern constitutionalism, Böckenförde's theory, and still more Mortati's, do not sacrifice this principle of realism upon the altar of the teleology of a constitution-making process.

However, the most powerful version of realism is to be found within Machiavelli's theory of humours. Hindering the satisfaction of the humours would not mean saving constituent power from itself, or preserving it from what it might be or become. It would mean, on the contrary, its doom. Constituent power can be maintained as a living power only by accepting its fully conflictual ground within both the political and juridical dimensions, and by renouncing the separation between its genesis and its historical development. It also means renouncing the illusion of a homogeneous will, or the utopia of representation, i.e. the idea that a *part* is constituent only when it can legitimately claim to embody the *whole*, representing it in the sacred unity of the new sovereign order. The *part* is, for Machiavelli, irreducibly *partial* and *partisan*. It is one among many, a humour among other humours.

We can thus reconsider Miguel Vatter's thesis. Vatter claims that, for Machiavelli, the new prince embodies constituent power in the figure of the civil principality described in chapter IX of *The Prince*. The strongest thesis of this chapter is that the prince, lifted to power by the great, should turn his back on them and ground his power on the people, taking the people's side in the natural conflict between the city's two humours. Vatter, on the contrary, reads the civil character of *The Prince* as a mediation, composition and neutralisation of the conflict within a 'civil society'.[20] Vatter claims that Machiavelli is illustrating here a 'pathological' configuration of power, because the civil prince's authority is not grounded on social conflict and, especially, on the people's desire not to be oppressed, which, in the *Discourses,* Machiavelli contrasts to the greats' desire to oppress.[21] Notwithstanding Machiavelli's praise for the civil principality, and in light of a broader logic, beyond chapter IX, Vatter contends that this form of government is doomed to fall into 'license'. Its civil character does not express the necessary conflictual dialectic of political life.

However, for Machiavelli, the 'civil' refers only to the way the prince achieves access to power, that is, by being helped by (some of) his fellow citizens. After that, this prince, like every other prince, cannot and should not extinguish conflict, even if that conflict entails violent or extreme means. Rather, he must take a clear side in this conflict: always and only the side of the people. Thus, humours do not constitute a pre-condition of the physiological balance of the human body. On the contrary, they express its always uncertain and precarious status, its necessary subjection to natural change. In the same way, according to Machiavelli, constituent power does not preceed nor does it ground the harmonic balance of political forces. It rather expresses their relations of power and force, current and future. Although orders, in the civil principality, do not arise from the people's healthy desire for freedom, as Vatter contends, still the prince must nourish that desire and the conflict that springs from it. In this sense, the civil prince makes constituent power live in and through a renewed conflictuality, in favour of the people and against the greats.[22]

Chapter IX of *The Prince* has received a great deal of attention both in classic and more recent scholarship, because of the strategic function it plays not only vis-à-vis the civic form of principality, but to the text as a whole. Although some scholars have recently suggested that its importance in the context of the book be re-appraised,[23] I consider this chapter of paramount importance for the argument on constituent power. Well beyond its discussion of a specific form of taking power by the prince, this chapter develops a radical idea of the fundamental dynamic between the three subjects of politics as defined by classic political theory, i.e. the one, the few and the many.

By arguing that the prince should turn his back on the few and explicitly favour the many, Machiavelli moves here beyond the classic Aristotelian and Polybian suggestion that the strongest form of government is the mixed one, whereby the one, the few and the many converge in a single constitution and share power via a mutual balance and control of each other's power. This idea will rather be developed by acute and yet unfaithful readers of Machiavelli such as Harrington and Montesquieu, and will be hugely influential in the following centuries, contributing to the formation of modern constitutionalism.

My reading of chapter IX, however, moves beyond the recognition of Machiavelli's choice for the people and against the many. The discussion of civil principality is also the occasion for Machiavelli to develop a striking idea of the relationship between the prince and the people, namely the one and the many. I think that Machiavelli is trying to suggest that the individual prince's power is, in fact, much smaller than is usually thought. This power is almost nothing in itself, because it must be grounded on an existing social force, either the many or the few. Whatever the prince's choice is, his own virtue can concretely be actualised, and become power only by and through the support of a social force. The alternative is indeed between virtue and fortune and, unambiguously, the former consists of grounding one's own power on the people, while the latter consists in making the (wrong) choice of favouring the few.

Machiavelli's revolutionary position in chapter IX is that *without* his people, the prince is nothing, while *with and through* his people, the prince is everything. The prince's virtue consists *only* in recognising that the constituent power can be guided and channelled in one direction rather than another. However, such a power cannot be obliterated, nor created ex-nihilo. The prince is nothing more than an idea, a name or a symbol. It can, however, become an extremely powerful idea, and as such have tremendous political effects, if it is matched by and decides to support the right social force.

This is not meant to reduce the importance of the individual figure of the prince in Machiavelli's discourse. On the contrary, his project here is to reshape and give precise and original boundaries to the real possibilities that a prince has in a political world in which new social and economic forces rise to an unprecedented power. Machiavelli's critique of the ancient literature on princes suggests that the prince's individual virtue must be completely reinterpreted. One realistic way for doing this, by the time Machiavelli writes *The Prince* and with the Florentine republican option ruled out at least for a while, is precisely to develop the idea of an individual virtue necessarily grounded on the multiplicity represented by the people. The individual *becomes* this multiplicity, and the prince *becomes* his people.

Machiavelli is developing a revolutionary idea of the relationship between the one and the many. This revolution does not unfold in terms of chronological priority (i.e. who comes first, the prince or the people?) or ontological pre-eminence (i.e. who counts more, the prince or the people?). Machiavelli's insight into the constituent force of the people rather develops this axis between the one and the many on a political ground: different options are open to different subjects. Here, the prince is under scrutiny, and chapter IX presents a sharp alternative available to him. Claiming that the prince is nothing without his people is no different from saying that virtue is nothing without the occasion. This corresponds to Machiavelli's idea of constituent power as a power that constitutes itself *through* the encounter between the virtue and the occasion, between a prince and a people.

Thus, the relationship takes the centre of the stage: through Machiavelli's eyes, we can grasp constituent power not as a *substance*, more or less perfectly balanced depending on the degree of stability of institutions. It is rather a *relationship* that determines that stability, and then only if the people guide the vital movement of the republic. Constituent power, intended in this way, also shows the irreducibly partisan character of Machiavelli, *in favour* of the many, and *against* the few. Thus, humours represent the continuity and the interpenetration of factual and juridical, natural and positive, constituent and constituted moment. Within the positive sphere, moreover, they represent the flexible and dynamic articulation between the time of the foundation and the time of development of juridical and political relationship or, using Machiavelli's language, between 'laws' and 'orders'.

'Laws' and the 'orders': Conflictuality and the will of constituent power

The will of the constituent subject must be embodied in a juridical order and objectified in a formal constitution. However, for its own nature, this will live in

and through the ordinary dimension of law. Theorists and philosophers, since at least the French revolution, have maintained that the will is one of the most important features of constituent power: a unitary will that tends towards the new order. According to Rousseau and Sieyès, for example, constituent power, by definition, *wants* to break with the ancient values and claims a new idea of justice and order.

The modern theorists move along the same line of thought. In his *Verfassungslehre*, Schmitt insists on the preponderant role of constituent power's will, grounded in the last instance on force. Such a will is able to determine the 'global and concrete decision' of the juridical future of the community, insofar as it is indivisible.[24] Böckenförde envisages the subject of constituent power as a group of men whose main feature is the will to legally determine itself, beyond the purely political and factual moment. The will to constitute itself (*Wille zur Verfassung*) is for Böckenförde already the fundamental feature that makes possible the distinction between a mere force and a constituent power. An absolute power, like the constituent one, that would like to remain absolute, cannot be determined through law. This means, for Böckenförde, that it is not a power, but rather an arbitrary force. The *will* of the people, thus, is a tool to understand, define, but also limit the constituent power in and through the constituted and formal mechanism of law. It is true that the question of the material bonds of a constitution cannot be envisaged in terms of a preceding law, insofar as there is nothing *legally* preceding constituent power. It is also true, however, that the idea of a will and a striving towards unity and order preceed constituent power. Without them, Böckenförde claims, there is no power, but only force.

Mortati also claims that the objectivation of the will is a crucial moment in the transition from the factual affirmation of a pure force to the legal affirmation of a power – a constituent one – that gives unity to the different social relationships, subjecting them to shared norms. Mortati's position is particularly interesting from a Machiavellian perspective. For the main authors in modern historiography, the *will* unambiguously points to the unity of the subject of constituent power. Mortati's position, on the contrary, illuminates the conflictual nature of this will and the polemical tension that does not disappear in the process of constitutionalisation.

Constituent power's will, Mortati claims, 'sorts' values and positions, establishing 'relationships of command and obedience'.[25] Democratic process *par excellence*, the transformation of constituent into constituted power does not obliterate the *kratos* that the *demos* intend to impose. The new authority institutes 'relationships of dominion and subjection among the members of the State'. The people and the nation are not, in Mortati's view, undifferentiated entities, but rather more or less broad groups whose dialectic mainly takes the form of force relationships. Mortati repeatedly connects this idea to the medieval concept of *stabilimentum*, to mark the effectual stability of such a juridical order in its relationship to the political and factual origin. However, Machiavelli has once again powerfully established the problem of the relationship between politics and law in terms of flexibility of the order or, more specifically, the adequacy of laws and orders.

Machiavelli's language is semantically complex. The modern distinction between constitutional systems and ordinary legislative measures does not always correspond to the conceptual pairing formed by the terms 'orders' and 'laws'. The pair laws/orders appears quite early, in chapter I,2 of *Discourses on Livy*, when Machiavelli discusses the cardinal distinction between republics that have been ordered 'at a stroke', like Sparta, and those that have had a long and troubled institutional history subject to 'accidents' such as Rome. Both situations are paradigmatic of different constituent dynamics. Whereas Sparta has profited from Lycurgus' legislative genius, Rome has been compelled to fight to slowly carve, throughout the centuries, its own institutions.

Machiavelli's intention is to overturn the traditional accepted claim for the superiority of mixed regimes based on harmony and concord. Although Rome has never had a Lycurgus, it lived free and powerful for 'the disunion of the Plebs and the Senate'. Against the traditional principle of balance of powers and the pacific equilibrium of social forces, Machiavelli intends the mixture as the encounter – a conflictual one – between two rather than three socio-political forces: the people and the great. Rome's constituent moment never corresponds to the exercise of a homogeneous will of those forces converging towards a fully representative constitutional project. On the contrary, the constituent process is, in fact, nothing but the institutional history of the Roman republic itself. Constituent power, once again, emerges from and expresses a conflictual division, transporting this very same conflict to the heart of republican life and making it the pillar of republican freedoms. Not only does Machiavelli reject the Spartan mode, together with the Venetian one, in chapter 37 of the first book of the *Discourses*, but he also offers an incredibly insightful and striking interpretation of Lycurgus's way itself.

Very little historical information is available on the mythical Spartan legislator. Only a few sources insist on the very essence of his constitutional reform. And this reform, as Plutarch in particular explains very clearly, is far from devoid of conflictual elements. By introducing an explicitly economic dimension, Machiavelli reads Lycurgus's reform as a quite explicit support for the people. In fact, Lycurgus is able to remove the causes of tumult on the ground of a partisan order. Machiavelli faithfully records it, with his striking interpretation whereby 'Lycurgus with his laws made more equality of belongings in Sparta and less equality of rank'.[26] The economic dimension of the conflict is extremely important in order to grasp the nature of Machiavelli's revolutionary thinking. It confirms that what Machiavelli has in mind is a symmetrical clash between the people and the great. Although their desires are different (i.e. the people's desire to not be dominated by the great, and the great's desire to dominate the people), their clash does not happen in the abstract realm of political theory, but in the all too concrete realm of social struggle.[27]

The alternative between the one and the many resurfaces in chapter I,9 of the *Discourses*, in which Machiavelli directly tackles the constituent problem of founding or reforming a republic. He focuses here on a typical problem of the debate on the nature of a constituent power, namely the legitimate use of violence that often goes with the creation of a new constitutional entity. Using the historical example

of Romulus, Machiavelli unambiguously claims that violence is often a necessary ingredient of the constituent creation. Romulus killed first his brother, and then his associate Titus Tatius, the Sabine king.[28] Machiavelli's radical conclusion is that one should not *morally* judge the killer or the act of killing itself, but rather *effectually* consider the end that Romulus had in mind and the necessity of his means.

The end is the establishment of a stable republic, while the means is not violence in itself, as might be assumed, but rather the fact of being alone in founding the new entity. The authority required by constituent power must be concentrated in one single individual and exercised by him alone. Eventually, Machiavelli says, this individual must make sure that the many will take care of his creation. Any 'diversity of opinions' marking the constitution itself would be harmful to the constituent moment and would negatively affect it. Thus, the constituent dimension is unitary not because it represents one single and homogeneous will, but rather because it is an individual 'taking of constituent power'. There is an individual and conflictual taking of power both upstream and downstream of the constituent moment. With a conclusion that appears paradoxical only to detractors of social conflict, Machiavelli claims that Romulus had to be alone in occupying the constituent moment, precisely to ensure the future development of a collective and conflictual dimension.

Constituent power, in other words, is alone only when it transits from one conflictual dimension to another: from the pre-legal one, represented by Romulus against his victims, to the legal one, represented by the many who will come to care about and for Romulus's creation. There is no ambiguity, I believe, in the radically partisan character of Machiavelli's conclusion, once again in favour of the people and against the great. Leaving aside Moses, Lycurgus and Solon, he makes use of two notorious usurpers of power in Greek history: Agis and Cleomenes. Usurpers, that is the point, whose reforms, once they got the power, unambiguously support the people against the great, as Machiavelli, remembering Agathocles, will also suggest in chapter VIII of *The Prince*.[29]

The diversity of examples chosen by Machiavelli is also striking. All of them, especially Remus' and Titus Tatius' murders, share the fact of being morally blameworthy, at least according to the standard norms of morality. They seem to point, however, to different temporalities and environments, characterised by different legal situations. Whereas Romulus' murder seems to happen in a pre-legal state, Titus Tatius seems on the contrary killed within a legal state, after a treaty (*foedus*) has been concluded. Following this interpretation, one would then logically question Machiavelli's conception of the use of violence in these two different situations.

Although Remus' and Tatius' examples seem to happen in a very different situation, the assumption that the former takes place in a pre-legal status and the latter in a legal situation should be attenuated. In the case of the first murder, both parties, i.e. Romulus and Remus with their respective supporters, are following the same procedure, namely the consultation of the tutelary deities by means of augury, given the fact that no claim to precedence could be established because they were twins. It is because of different interpretations of the augury that the

quarrel explodes and, in the tumults engendered by it, Remus is killed by Romulus or by his supporters. Although the conflict is *for*, and thus precedes, the foundation of the city, arguably the common decision of consulting the augury takes place in a shared space that is already referring to a certain form of legality or normativity.[30]

In the same way, although Tatius' killing happens after a treaty between the Romans and the Sabines has been agreed to and the war has ended, still the situation is politically fluid and the treaty cannot be considered as the beginning of a legal space following a pre-legal space. The ambiguity is perhaps testified to by the fact that, following the treaty, Rome does not change its name but rather retains it. Moreover, although the Sabines are incorporated in the state and enacting laws together and Romulus and Tatius rule as equals for five years, the latter is not traditionally counted as one of the kings of Rome.[31]

My suggestion is that Machiavelli's reading of these two examples follows, at least implicitly, this ambiguity. Machiavelli, in other words, is not interested in sharply opposing a pre-legal situation to a legal situation. He is not even interested in distinguishing a different role and use of violence in these supposedly distinguished states. On the contrary, his argument is that the boundaries between foundation and re-foundation are blurred, because no civil or legal state will ever see the original violence disappearing in a mythical pre-legal state.

Violence is always a possibility and often an actuality, whether preceding, accompanying or following the foundational moment. Thus, the examples of Remus and Tatius should not be considered as pointing to two different legal and political situations. They should rather be seen as Machiavelli's attempt to show the inconvenient truth that violence is both an ordinary and extraordinary means to accomplish political ends. It has a foundational force that sheds light on the nature of constituent power.

This is also why another fundamental theme in Machiavelli's thought is the necessity of being armed. Savonarola and Soderini were powerless; the former because he could not, the latter because he would not use the violence necessary to maintain the State. Moses, on the contrary, is able to triumph over the malignity of his enemies by killing 'an infinite number of men', and embodying the paradigmatic figure of the armed prophet.[32] The armed prophet, in Machiavelli's view, is prepared to seize the occasion when it comes, overcoming Fortune with his own Virtue. The armed prophet, once again, is alone. Or, as Machiavelli puts it in *The Prince*, he is autonomous, and depends only on himself.[33] Here, Machiavelli offers another perspective on constituent power. In activating the constituent dimension, the armed innovator is violent (when needed) because he has to be autonomous. Being alone, once again, does not mean acting in the void of theory and outside of history. On the contrary, it means acting within a conflict in which the constitutional project is at stake, and the condition to achieve it is a full autonomy that enables resistance against contrary and destructive forces.

What is, however, the real nature of this project? Is there, in other words, a constitutional project that, carried on by a constituent power sufficiently strong and adequately armed, can resist corruption and destruction? Machiavelli's answer to these questions deviates once again from the answers given by modern theorists

of constituent power. Within modern constitutionalism, constituent power must be objectivated in a formal constitution that *legally* defends those who come together to form community against the *factual* oscillations of political life and the future potential manifestations of a new constituent power (a constitution that defends, in other words, the constituent power from itself). Against this idea of permanent stabilisation, Machiavelli sees the conjuncture as the only possible dimension of political life, and 'corruption' is for him the sign of the unavoidable mutation that all republics must endure.

Although Cleomenes and Romulus were violent, Machiavelli claims in chapter I,18 of the *Discourses* that they were successful because the matter upon which they acted was not corrupted. Corruption, here, expresses the tension between laws and orders, or rather between constituent principles embodied in orders, and the juridical and political life of the republic, embodied in laws. Within the modern juridical paradigm, scholars normally think of the subordination of laws to constitution, namely the hierarchy of legal sources whereby the constituent principles prevail on the factual dimension of political life, through the legal dimension of the formal constitution. Outside that paradigm, Machiavelli suggests a different approach to the question of the tension between orders and laws.

Orders and laws established in the beginning of a republic, that is to say in the constituent moment, 'are no longer to the purpose later', when matter is corrupted. Not because laws turn away from orders and from the grounding principles of constituent power, but because orders themselves no longer express the factual moment of political life. Orders become the rigid representation of a political and factual situation that does not exist any more. The question is not, for Machiavelli, the priority of the law's formal dimension over the contingency of politics. The question is conceiving the law *in and through* this contingency rather than in an idealised past that does not exist anymore: 'if laws vary according to the accidents in a city, its orders never vary, or rarely; this makes new laws insufficient because the orders, which remain fixed, corrupt them'.[34]

In modern terms, the problem is not the clash between legal sources, or the adequacy of the constitutional order to the immediate will of the people, expressed by legislative and executive power. It is not, in other words, a problem of modern constitutionalism. Laws are ineffective and incapable of resisting corruption because, shaped within the conflictual contingency of political life, they are now backed by orders that are anchored to the originary constituent situation. Machiavelli's conclusion is that constituent power lives within the ordinary and conflictual dimension of republican life. As a bridge between the juridical and the political, constituent power is not ossified in a formal constitution, but it constantly activates a law able to express the conflicts that inevitably and continuously mark republican life.

The radical character of the concept of constituent power makes this relationship paradoxical for modern theorists, while suggesting the problematic and ambiguous nature of the very same foundation of law. Through Machiavelli's theory, however, it becomes possible to resist the paralysing effects of such a fundamental ambiguity. Machiavelli does not suggest a *hierarchy* of orders and laws,

but rather their immanent co-penetration. Politics must not be locked *in* history, *through* law. Rather, law and politics must be able to respond to change and mutation together. Such a conception of constituent power and its ordinary movement with constituted power also frames Machiavelli's thought in a revolutionary perspective.[35] His engaging analysis of ancient Roman history does not represent a memory to celebrate and keep confined to a mythical past. Rome, its origin and its conflict are rather the common name for the necessary reactivation of the mechanisms of constituent power in order to resist corruption in Machiavelli's own time.

Conclusion

Modern theory of constituent power struggles to imagine the separation of the factual origin of law from its ordinary exercise. The State will survive if it is able, as Böckenförde puts it, to maintain a spiritual link with the constituent power, at the same time limiting its activity and protecting, in a certain sense, the creature from its creator. The origin must be acknowledged and yet maintained at the proper distance. Machiavelli goes in a different direction: 'if one wishes a sect or a republic to live long, it is necessary to draw it back often towards its beginning'.[36]

We have seen the alternative between the republics whose principles imply the possibility/necessity of returning to the beginning, and those which, on the contrary, owe to chance and conjuncture their movement back towards the origin. The regeneration, whatever produces it, is necessary for mixed bodies like republics. It 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. The return to the beginning 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.

Constituent power represents the unavoidable and desirable dimension of conflict, of the struggle for freedom, bringing together the political and the juridical dimensions. Force and law go hand in hand. They are at the same time the origin and the aim of constituent power. Through this conflictual idea of politics, Machiavelli's theory enables a different perspective on constituent power, and constituent power makes possible a different interpretation of Machiavelli: through his gaze, one can not only perceive many features of the contemporary debate on the nature of law but also go beyond the limitation, the paradoxes, the fallacies of those debates and find a ground from which to understand the problematic nature of the relationship between law and conflict.

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Notes

1. A terminological question immediately rises concerning the translation of *pouvoir constituant* or *verfassunggebende Gewalt*. Although translators recently started using the expression 'constituent power', the question is still open. Jeffrey Seitzer translates Carl Schmitt's *verfassunggebende Gewalt* with 'constitution-making power'. See C. Schmitt (2008) *Constitutional Theory* (trans. J. Seitzer). Durham and London: Duke University Press. I believe that 'constituent power' has to be preferred to 'constitution-making power' because the latter binds the *Gewalt* in question to the formal constitution as its outcome. Since the relationship between the factual power and the formal constitution is precisely what is at stake in this debate, the expression 'constitution-making power' forecloses the main theoretical and political problems implied by this concept. *Gewalt* is an ambiguous term that carries on its original polisemy as a theoretical problem as well, perhaps most of all when it is a *verfassunggebende Gewalt*.

2. E. Zweig (1909) *Die Lehre vom Pouvoir Constituant: Ein Beitrag zum Staatsrecht der Französischen Revolution*. Tübingen: J.C.B Mohr.

3. See, for example, Raymond Carré de Malberg (2004) *Contribution à la Théorie Générale de l'Etat*. Genève: Dalloz, Schmitt (2008, in n. 1), Costantino Mortati (1972) *Studi sul Potere Costituente e Sulla Riforma Costituzionale Dello Stato, Raccolta di Scritti*, vol. 1. Milano: Giuffrè, Ernst-Wolfgang Böckenförde (1991) *Die Verfassunggebende Gewalt des Volks: Ein Grenzbegriff des Verfassungsrechts*. Frankfurt am Main: Suhrkamp Verlag, Martin Loughlin and Neil Walker (ed.) (2007) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford: Oxford University Press.

4. See Zweig (1909, in n. 2), and John P. McCormick, 'People and Elites in Republican Constitutions', in Loughlin and Walker (2007, in n. 3), pp. 107–25.

5. Loughlin and Walker (2007, in n. 3). See also Martin Loughlin (2003) *The Idea of Public Law*. Oxford: Oxford University Press.

6. McCormick (in n. 4). See also John P. McCormick (2011) *Machiavellian Democracy*. Cambridge: Cambridge University Press.

7. Martin Loughlin (2013) 'The concept of constituent power', *European Journal of Political Theory*, published online.

8. Antonio Negri (1999) *Insurgencies: Constituent Power and the Modern State*. Minneapolis and London: University of Minnesota Press.

9. Miguel Vatter (2002) 'Resistance and Legality: Arendt and Negri on Constituent Power', *Kairos. Revue de philosophie de l'Université de Toulouse* 20: 191–230.

10. Carl Schmitt (2013) *Dictatorship*. Cambridge: Polity Press, p. 118.

11. Schmitt (2013, in n. 10), p. xliv.

12. Schmitt (2013, in n. 10), p. 120.

13. D I,34. I cite the following translations: Niccolò Machiavelli (1996) *Discourses on Livy* (trans. Harvey C. Mansfield and Nathan Tarcov). Chicago: University of Chicago Press, abbreviated as D; Niccolò Machiavelli (1998) *The Prince* (trans. Harvey C. Mansfield), 2nd ed. Chicago: University of Chicago Press, abbreviated as P; Niccolò Machiavelli (1988) *Florentine Histories* (trans. Laura F. Banfield and Harvey C. Mansfield). Princeton, NJ: Princeton University Press, abbreviated as IF.

14. D I,35.
15. D I,34.
16. D I,34.
17. D III,9.
18. D I,4.
19. For Loughlin, the power's *political* nature points to a paradoxical 'unity' of the people that does not obliterate the 'tension that gives the political domain its open and provisional quality'. Loughlin criticises Negri's approach which, he claims, is 'decisionist' insofar as it reduces constituent power to fact, i.e. to the power of the multitude. Loughlin's appeal to constituent power as 'the expression [...] in some sense at least – of the all (unity)' has strong Rousseauian accents. Paradoxically, its outcome can lead to an even stronger decisionism, implied in Rousseau's definition of the general will as well as in the absolute figure of an Hobbesian sovereign embodying all the subjects, and realising the unity of the people *against* the chaotic disunity of the multitude. Loughlin explicitly makes use of the Hobbesian opposition between the people and the multitude. Loughlin (2013, in n. 7), pp. 14–15.
20. See Vatter (2002, in n. 9).
21. See Miguel Vatter (2014) *Betweeen Form and Event: Machiavelli's Theory of Political Freedom*, 2nd ed. New York: Fordham University Press, afterword.
22. Vatter develops a more complex reading of chapter IX of *The Prince* in 'Republics are a Species of State: Machiavelli and the Genealogy of the Modern State', *Social Research* [forthcoming, 2014].
23. See Romain Descendre (2015) 'Of 'Extravagant' Writing: The Prince, chapter IX', in Filippo Del Lucchese, Fabio Frosini, and Vittorio Morfino (eds.) *Machiavelli's The Prince: Five Centuries of History, Conflict, and Politics*. Leiden: Brill Academic Publisher [forthcoming, 2015].
24. Schmitt (2008, in n. 1), Chapter 8.
25. Mortati (1972, in n. 3), 12.
26. D I,6.
27. This is another point where my thesis parts ways with Miguel Vatter's interpretation. Vatter advocates the centrality of conflict for freedom in Machiavelli's thought. Yet, he sees that conflict is productive only if it is between 'rule and no-rule, rather than between homogeneous desires to rule'. However, in this way Vatter's political aim is to expunge Machiavelli's idea of freedom of any reference to the domination of one part over another part. Vatter contends that an effective check of the state's dominion can only happen through 'the extra-constitutional constituent power of a people desiring isonomy or no-rule'. Vatter's thesis has the invaluable merit of pointing to the people's function of resisting *any* form of state authority. Yet, by grounding this function on the Arendtian idea of isonomy, Vatter underestimates the conflict *within* the state, which is Machiavelli's main concern and, for opposite reasons, also Arendt's concerns. See also Miguel Vatter (2012) 'The quarrel between Populism and Republicanism: Machiavelli and the antinomies of plebeian politics', *Contemporary Political Theory* 11: 242–63.
28. D I,9.
29. See John P. McCormick (2012) 'Subdue the Senate: Machiavelli's 'Way of Freedom' or Path to Tiranny?', *Political Theory* 40: 714–35.
30. Livy I,6-7. See Jan Bremmer, 'Romulus, Remus and the Foundation of Rome' in J. Bremmer and N. Horsfall (eds.) (1987), *Roman Myth and Mythography*. London: University of London, pp. 25–48.

31. See J. Poucet (2000) *Les Rois de Rome. Tradition et Histoire*. Bruxelles: Académie Royale de Belgique.
32. D III, 30.
33. P VI.
34. D I,18.
35. Loughlin interestingly points to the 'mutually constitutive and reciprocally dependent' dimension of politics and law in Hermann Heller's thought. Heller's position, Loughlin maintains, is the theoretical ground for a more productive methodology, namely relationalism, which includes Machiavelli among its forerunners. However, beneath the surface of a common language, which Heller seems to share with Machiavelli, are differences that are more important. Heller's effort to conceptualise conflictuality within the juridical dimension is a powerful attempt to escape the dicotomy between normativism and decisionism. See Hermann Heller (1992) *Staatslehre*, in *Gesammelte Schriften*. Tübingen: Mohr-Siebeck, vol. 3. The homogeneity of the nation as a presupposition, though, moves Heller's thought away from Machiavelli's conflictualism. Heller's people is so homogeneous that conflict becomes for him nothing more than a common foundation for discussion (*gemeinsames Diskussionsgrundlage*), regulated by a sense of *fair play* for one's internal political opponent (*innerpolitischen Gegner*). See Hermann Heller (1992) 'Politische Demokratie und soziale Homogenität', in *Gesammelte Schriften*. Tübingen: Mohr-Siebeck, vol. 2: 421–33.
36. D III,1.