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**THE FUTURE OF MATERIALIST  
CONSTITUTIONALISM**

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## **The Future of Materialist Constitutionalism**

**Robert L. Tsai<sup>†</sup>**

There's no shortage of accounts that decry corruption and misrule in aging nation-states—and for good reason. Across the world, we have seen the rise of populist strongmen and the return of oligarchic rule. In America alone, the country has reached the point where a wealthy person can be elected to the highest office in the land, populate public offices with his cronies, and engage in self-dealing with impunity. Indeed, nearly 74 million voters in 2020 would have returned Donald Trump to the White House despite his refusal to publicly disclose his financial entanglements and having been impeached for seeking foreign interference to win the election. We are a long way from the days when Benjamin Franklin sought public consent to keep a bejeweled snuff box, a gift from France's King.

The laughably anemic responses by contemporary forces responsible for safeguarding civic virtue have surely been part of the problem. After a slow-motion ramp-up toward impeachment, the president's opponents trimmed their complaints to a single accusation of malfeasance. And fairly swiftly, the debate degenerated into arguments over what was said on a telephone call with a foreign leader rather than what the president's persistent pattern of self-interested conduct meant for the political order. To make matters worse, since Trump's acquittal

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we have seen zero effort to build the case for more stringent anti-corruption measures. Doing so, of course, would have required a sharper, more reflective diagnosis of what ails America's democratic experiment.

But perhaps the fault lies less with the players and more with the system in which they must operate. Is it possible that America's descent into a sea of corruption, or at least our inability so far to climb our way out, lies in faulty constitutional design? Camila Vergara, a talented political theorist educated at Columbia and the New School for Social Research, thinks so. She believes that doing better would require grappling with the ineradicable condition of corruption. Her solution, recounted in her book, *Systemic Corruption*, begins with recovering a strand of republican theory—one that “aims at institutionalizing plebeian power as supreme authority within a mixed constitutional structure” and by beating back an “elitist-procedural” version of civic republicanism (pp. 114, 125). Helpfully, Vergara surveys a number of ancient and medieval thinkers, distinguishing “elitist” republicans from “plebeian” ones, according to who are most comfortable with average people exercising formal power in society. Drawing on several modern theorists, including John McCormick, Hannah Arendt, and Rosa Luxemburg, she then offers a number of proposals that might restore this vision of plebeian-directed governance.

Vergara is an ambitious thinker who offers an exhilarating tour of civic republicanism. Along the way, she makes a serious contribution to modern political theory and democratic design. She does so by revisiting medieval republicanism and showing why elevating the populist strain of that tradition is essential over its elitist counterpart, and, secondarily, why republicanism may be superior to other competing philosophies. Vergara also engages profitably with other bodies of knowledge, from Rawlsian liberalism to Unger's critical legal approach in order to build an account of republicanism that can be adapted to the most pressing concern of

the day, to wit: an alarming rise in social and economic inequality and self-interested behavior on the part of public officials. Her primary audience appears to be fellow theorists, but the dogged fashion in which she stalks her quarry and the salience of her subject lends her work to wider reading.

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There is exciting potential, coupled with some slippage, in Vergara's notion of "corruption." She eschews purely juridical or individualistic notions such as bribery or the absence of modesty. Nor is corruption to be solved by merely by investing more into education or by putting the most virtuous citizens in prominent positions so that their goodness will be reflected in the laws. Instead, to Vergara, a "conception of systemic corruption . . . needs to be connected to increasing socioeconomic inequality . . . and the drift into oligarchic democracy," which allows formal power to be exercised to "enable those very citizens' own dispossession and oppression" (p. 39).

That means law is paramount in not just restraining those are tempted to engage in corrupt behavior, but also empowering regular people to reverse such policies and reset the boundaries for virtuous conduct. For Vergara, Machiavelli is, by leaps and bounds, the most important theorist of the bunch. Yet Vergara's Machiavelli is not Pocock's great "civic humanist" preoccupied with maximizing *virtù* so as to reduce the potency and unpredictability of *fortuna*. Nor does he resemble Skinner's proto-liberal sketch, in which Machiavelli winds up in

“virtually the same” place as John Rawls such that “the optimum legal basis for a free polity consists of a republican constitution founded on a bicameral legislature.”<sup>1</sup>

Instead, Machiavelli is praised by Vergara principally for his commitment to the law and institutional design as strategies for discouraging corruption (although he was not above counseling extraordinary measures such as “violence and arms” when a polity becomes too corrupt). He is also worthy of emulation for having actually practice the arts of self-governance by liberating Florence from the grip of oligarchy and defeating Pisa.

Machiavelli was no Marxist precursor, but he did embrace the necessity of social conflict as a condition of political liberty rather than try to exclude it from the realm of public action, as liberals and libertarians are wont to do. From this grounding in the ineradicable nature of social conflict, Vergara builds an account of “equal liberty as nondomination” (p. 109). Still, the main innovation in Vergara’s theory isn’t that hers is systemic and others are not; rather, it is her effort to extend the concept of corruption to the otherwise lawful exercise of power against often-dominated groups. Repeatedly, she points out a structural approach must be attuned to how corruption leads to “racial, religious, and disparities in the application of the law” (p. 107).

That centralized power has been deployed in unequal fashion is impossible to deny as a historical matter. Our records of the past are replete with moments suggesting that when vice increases among a society’s leaders, the suffering of regular citizens also goes up. Yet Vergara’s move introduces a tension between a general problem (domination of the many by the few) and a more specific one (the domination of perennial outcasts).

There are two facets of this difficulty: one historical, one theoretical, though the two are connected. The first concern is that she could be describing only a slice of corruption among

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<sup>1</sup> Quention Skinner, *Visions of Politics II*, 178-79 (2002).

many different forms that have emerged in the past rather than presenting a comprehensive account of corruption. The same possibility is true of inequality—that the link between oligarchic rule and inequality explains some forms of injustice. Before it's possible to appreciate whether her diagnosis of corruption or inequality is merely partial, we would need to know more about what she thinks are the causes and effects between individual conduct, political culture, and institutions.

But even if we are open to structural accounts of inequality, we would still need to know why restraining the few would prevent domination of the downtrodden. There is a tendency among republican theorists to perceive all of society's problems as flowing from one faction governing inappropriately, and then to seek refuge in populist-style solutions. Yet the practices that foster pervasive inequality are complicated and not all are easily solved through a shift in political form: sometimes oppression of outcasts embodies the preferences of the few, while at other times it represents the will of the many—this is one of the insights with which liberalism, for all its shortcomings, has been better attuned than civic republicanism.

Consider, for instance, Trump's desire to profit from his tenure as president, a form of selfish, unrestrained behavior that led many Americans to question whether his administration's policies were ever motivated by public ends. In this case, it's fairly straightforward to point to the interests of the few (his family, business partners, foreign leaders, lobbyists) over the many (what a majority of citizens wanted accomplished on a policy at hand or in how they understood a virtuous legal order to operate).

But what about policies that demonized immigrants, refugees, and Muslims? These are easily described as inegalitarian—even the product of structural forces—but on what account

could this agenda be understood as a problem of the few against the many given the centrality of such policies to Trumpism as a populist movement?

Beyond its structuralist orientation, there are two other aspects of Vergara's theory that drive it from beginning to end: materialism and consequentialism. A striking feature of Vergara's approach is that it is persistently materialist in nature. Consistently and diligently, she demonstrates how key republican thinkers can be read to reach economic inequality. This may be her most controversial gloss, for the material conditions of life don't often seem to be the primary focus of such influential writers as Rousseau or Montesquieu.

Rousseau famously focused on the political relationships created between sovereign and equal subjects before the law, as well as the relationships between equal citizens. For his part, Montesquieu largely assumed that the de facto equality that characterized the lives of most colonists enhanced the chances of success for America's democratic experiment. Otherwise, he found "the spirit of inequality" and "the spirit of extreme equality" equally troubling—leading Judith Shklar to famously characterize this position as a "liberalism of fear." Even Machiavelli himself was not especially committed to ameliorating social inequality as such, though he spoke of the corrupt use of wealth. Indeed, he once observed that "those republics which have been well-ordered have always ensured that the public treasury remains rich while the citizens remain poor."

Another facet of the theory laid out in *Systemic Corruption* is its consequentialism. For Vergara, the ultimate test of good order is whether it is actually useful in restraining oligarchic domination of the people, particularly marginalized segments of society. In discussing liberal constitutionalism, Vergara applauds accounts rooted in historical practice, but fears that liberalism "fails to unveil the cumulative effects" of smaller constituent actions, as well the



possibility that “material possibilities for oppression and emancipation” “could be radically transformed” through judicial interpretation (p. 105).

It is at this moment that Vergara makes a crucial insight: “a relative consequentialism, in which the legitimacy of the norm would hinge on its material effects in preventing and containing oppression, would be an integral part of a materialist analysis of the constitution” (p. 105). The rule of law, or “legality” alone, “should no longer be defended as a marker for equal liberty,” she says (p. 105).

I take her to mean that setting up institutions in which populist politics are permitted freely to roam would not be insufficient; nor would it be enough for judges and elected leaders to apply neutral methods for deciding disputes. The approach won’t hold up over time if it’s set up as a machine expected to run itself. Instead, all who share responsibility for guarding the republican order must labor to ensure this vision remained intact. They can do so, it seems to me, only by adopting a materialist-consequentialist disposition in carrying out their civic responsibilities.

But this, in turn, runs into the age-old problem: whether it is ever possible for constitutional design to actually constrain future politics, much less the ways in which judicial interpretation will unfold—itsself a creative enterprise. Even after the moment of creation, Vergara’s constitution would need potent civic institutions in place to guard against the prospect of people acting in good faith from warping its materialist objectives.

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American readers will be most interested in what Vergara has to say about our own tottering constitutional order: an 18<sup>th</sup> century text that uncertainly reflects the values and needs of the living, and is increasingly kept on life support through the controversial adaptations of the ingenious and the witless alike. Other than Charles Beard's rather reductive economic reading of the Framing of the U.S. Constitution, most believe, with Gordon Wood and Hannah Arendt, that something more than unadulterated economic self-interest motivated revolution, and then, legal recreation. In Vergara's telling, which evokes Beard, the Framers were "not only rich property owners... but also creditors threatened by popular measures advocating debt relief" (p. 85). The Founding generation made an affirmative choice to privilege an elitist reading of the republican tradition, one that kept power out of the direct hands of the people and made it easier for aristocrats to gain control over the levers of government to entrench the interests of the few over that of the many.

Yet this is too simple a story. Their design choices weren't made because the Framers to a man felt that indirect representation would best protect their own economic status. Effective governance drove most of their decisions, even when doing so might not be the most certain method of freezing class advantages. The main reason why virtual representation was originally selected over direct citizen participation was because of impracticability arising from the size of the expected nation-state from the demands of empire-building. They expected greater security in a large republic from both internal and external threats and sought to defend the method of representation on those terms. In this respect, they are perhaps more guilty of being afflicted with grandiosity than selfishness.

And while it is true that the design of the Constitution doesn't go as far as Vergara would prefer to institutionalize plebeian authority, no formal barriers were erected to keep out of office

those who were less well-born, and only two offices are limited to natural-born citizens (this, itself, arose from anti-corruption concerns, even if they appear to be quaint in their modesty to us now). As much as protection of property rights was absolutely essential to dreams of territorial expansion and stabilizing the rule of law generally, the original 1787 Constitution left the bulk of that project to the states, and it was not until the Anti-Federalists push for a Bill of Rights that the entrenchment of material advantage through individual rights truly emerged as a competing foundational approach when it came to the national government.

So the Framers certainly feared domination, but not of marginalized populations and not from the working class alone. Instead, the oppression they worried most about would come principally from an all-powerful central government against less organized ways of life.

It would be anachronistic to imply that the Framers were obsessed with blocking redistributionist policies, though it is true that Publius gives “A rage ... for an abolition of debts [and] for an equal division of labor” as a contemporary illustration of troublesome faction that could destabilize a polity.<sup>2</sup> Nonetheless, Vergara is absolutely correct that more direct forms of civic engagement survived in the colonial meetings. As she astutely points out, differences of opinion, or a clash of traditions, remained to be worked out over time.

She locates the plebeian strain of republicanism in the writings of Thomas Jefferson, especially in the “republic of wards” that he endorsed and the sense that the law itself needs periodic reinvigoration—as well as in the worker’s councils and other assembly-based reforms offered by modern theorists. And, while she may be less willing to cite their examples as authority, this more unruly part of the tradition lives on among armed, right-wing masses as well as the left-wing dreamers who regularly take the streets.

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<sup>2</sup> Federalist No. 10 (Madison).

Still, policies that manifest suspicion of the masses aren't just found in the elite tradition in America, for guardrails against majoritarian rule have been built because plebeian institutions at the state and local levels have been utilized by the majority of whites to dominate marginalized populations.

All of this suggests that what is plebeian isn't necessarily liberationist. Moreover, once again, there remains a nagging tension in Vergara's account between popular sovereignty as a philosophy and the worthy goal of anti-domination. It also tells us that if anti-domination is to be the central focus of anti-corruption efforts, merely formalizing greater participation may not be sufficient. At some point, particularly in societies with a slaveholding and imperial past, substantive protections may have to be institutionalized to protect certain political minorities.

That said, there are places where Vergara's materialist-consequentialist reading of America's past will resonate. She follows Condorcet, who complains that our legal system's complicated machinery, with its focus on "negative" liberty, merely allows "slow and secret abuses' to take hold of institutions" (p. 148). Her approach packs the most punch in helping us to understand that, by the time oligarchic power has been validated by judges, average people have already been rendered institutionally powerless to reverse destructive decisions of the U.S. Supreme Court.

The original Constitution made it far too difficult to amend the Constitution and created no other obvious mechanism to overturn judicial decisions that preserve the power of elites at the expense of the downtrodden. Think, for example, about what happened after rulings such as *Dred Scott* or *Plessy v. Ferguson*, which not only worsened racial conflict but also further stymied popular justice movements for generations.

So, too, the approach illuminates how oligarchic forces today have figured out how to seize and hold power—say, by winning the White House and the Senate, and also thereby gaining control of the federal courts. Lately, Republicans try to exploit the anti-plebeian features of the Constitution to entrench anti-democratic (such as voter suppression laws) and pro-corporate policies (as constitutional rights).

Democrats, for their part, often push unpopular policies aimed at satisfying minorities among their constituency (such as affirmative action), but which may or may not improve the material conditions of working-class people. Thus, the potency of Vergara's critique isn't in revealing the true selfish motivations in the Framing of the Constitution; rather, it lies in showing us how the government they designed, for a wide range of reasons, could so easily be bent in the services of the few against the many.

For Vergara, a revitalized constitution that effectively controls oligarchic power is republican in nature rather than liberal, but whose formal elements mix different institutions so as to give voice to but also contain aristocratic impulses. Critically, the constitution empowers regular people but is not a democracy—which can devolve into a form of “agonistic pluralism” at odds with good republican governance.

A plebeian order also can't mechanistically depend on separation of powers or federalism the way ours has, for, while both principles certainly leave local spaces for participation and dissent, they fail to give the people sufficient collective control over policies made by the U.S. government. We need mechanisms that will not just allow the people to renew their constitutive power—say, by regularly reviewing our constitution and proposing changes—but that also empower them to propose legislation and veto policies or legal judgments rendered by government officials.

Without such measures, as Vergara astutely points out, most citizens are left only with informal modes of resistance that are genuinely expressive, but mostly ineffective in exercising meaningful political power, let alone beating back the forces of oligarchy.

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Whereas Machiavelli was pessimistic that a republic could be reformed once the people themselves had become corrupt—“It will not be enough to use ordinary means, as ordinary means have become corrupt”<sup>3</sup>—Vergara holds out hope that sufficiently bold forms of political reorganization could spark a revival of virtue. Following Machiavelli, constitutional reform must build upon the insight that among nobles one sees “a strong desire to dominate” and in the populace, “merely a desire to not be dominated.” An effective mixed constitution would ensure that “the populace are set up as the protector of liberty” for “they will take better care of it,” while nobles would be afforded some power to manage everyday affairs, which “satisfies the nobles’ aspiration to rule.”<sup>4</sup>

In Vergara’s ideal plebeian republic, a new network of formal institutions and relationships would be established that are capable of maximizing deliberation and enhancing control over the federal government. Local assemblies would be raised that operate alongside, but don’t displace, existing forms of government. A new institution—the Tribunate—would be created, with membership selected from among local assemblies, and charged with “enforcing motions approved by the network of assemblies and fighting political corruption” by bringing charges against public officials (p. 251). In the 17<sup>th</sup> year of a new constitution, and whenever a majority of local assemblies demands it, review of the constitution, along with any proposed

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<sup>3</sup> Machiavelli, *Discourses*, Ch. 18.

<sup>4</sup> Machiavelli, *Discourses*, Ch. 5.

changes, would take place. I won't go through all of the details in the many fascinating proposals toward the end of *Systemic Corruption*, which I invite readers to peruse.

How might the general approach work in the real world? Vergara says that in every city we would see several assemblies. If each assembly contained around 500 people, we would expect to see "about 85,800 assemblies in the entire state [of New York]," and about 1,660 assemblies in New York City alone. This vision is as thrilling as it is improbable. The sheer logistics of running so many assemblies, much less managing the relationships among them, are daunting and replicate the very problems the original design of the U.S. Constitution sought to avoid. Of course, that's the point: to see if we gave up something without giving it a chance. Though she offers measures such as rotating terms and compensation to reduce the heavy lifting that would be involved, I'm not sure how most problems of feasibility would be overcome.

Could there be more modest innovations that implemented some of Vergara's insights? I think so. Creating a national referendum process, for instance, would give the people more direct access to lawmaking. Forcing national leaders to deal with specific priorities, such as securing voting rights or confronting America's healthcare crisis or reforming immigration policy would be easier than trying to get ideologically-aligned candidates elected across the country.

We actually have encouraging recent news that initiatives can harness the power of the people for egalitarian ends. In the fall of 2018, the citizens of Florida used the state's referendum process to amend the state constitution and re-enfranchise 1.4 million individuals who had committed a crime. Felon disenfranchisement has been bound up with this country's oppression of black citizens and continues to fall heavily on people of color and the poor. And just last November, Nevada became the first state to not only erase a constitutional ban on same-sex marriage, but to actually enshrine the institution as a protected right "regardless of gender."

It's possible that such an initiative process could be corrupted by monied or special interests. Yet such problems could be reduced by circumscribing the kinds of things a national referendum would be used to accomplish and by imposing rules on how one is conducted, such as a supermajority threshold or a requirement that a measure be adopted in successive votes separated in time.

Once constitutionally adopted, such a vehicle could also be used to overturn outrageous judicial decisions, veto oppressive national legislation, or enjoin executive policies that harm some out-group. New mechanisms by which the people can circumvent a gridlocked Congress or bureaucracies that are ideologically hostile to equal liberty—today a regular feature of the federal government—can be incredibly valuable in reducing harms to disfavored populations. Such a mechanism could amount to a more potent check on an ideologically ambitious judiciary than impeachment or waiting to elect a new president.

Imagine if it were possible for voters to reverse outrageous policies like family separation of migrants or block President Trump's Muslim ban, or overturn the *Citizens United* ruling, and you can imagine the possibilities for broader civic engagement in the name of equality. Such mechanisms are even more valuable when institutions get out of kilter, such as when a party wins the White House despite losing the popular vote and insists upon implementing minoritarian policies, or when the Supreme Court has become culturally out of step with the sentiments of the living and seek merely to reproduce law useful in a previous age. Just knowing there is a means for citizens to overturn their rulings would give ambitious jurists second thoughts about destroying rights or powers upon which the people have come to depend.

It may also be possible to create new sites of deliberation, particularly temporary forms of intensive political interaction that are at once formal and effective, albeit short of the extensive



model proposed by Vergara. One of the biggest obstacles to social progress and equity-based policies has always been the dearth of spaces for renewal—most visibly illustrated by the Constitution’s demanding process for constitutional amendment. Creating a body that would be responsible for regular review and revision of the U.S. Constitution would ensure government clearly possessed the powers it needs to tackle the nation’s most serious problems while reducing distracting debates over an ever-smaller set of questions, such the proper way for judges to discern the original meaning of a document written over two centuries ago.

Wealth-based restrictions on who can serve in citizen-assemblies, which Vergara considers but ultimately rejects, would certainly help to preserve the plebeian character of such institutions. As she points out, these would be controversial in a liberal order. Even so, they wouldn’t be hard under existing judicial doctrine, which hasn’t to date found wealth classifications problematic. That might change with a consolidated bloc of conservative elites on the Supreme Court, though, which could be tempted to treat such a rule as an impermissible form of discrimination.

But even if such concerns could be met, from a materialist-consequentialist perspective, excluding the wealthy from certain political spaces would not be enough to prevent corruption. In America, at least, the problem is not that too many from among the wealthy wish to serve in government but that they can dictate the substance national policies from afar by buying the loyalty of elected officials, establishing organizations dedicated to thwarting policies that might improve working conditions and public health, and funding disinformation campaigns.

That suggests other kinds of reforms would probably do more good than tinkering with eligibility criteria: laws requiring the public financing of elections, stronger laws limiting wealth-

accumulation both while in office and after one's time in public service, and limiting the capacity of corporations or the wealthy to overwhelm political debate.

Opening up participation to non-citizens, which Vergara also endorses, presents a unique set of difficulties. On the one hand, it's certainly a sovereignty-based solution to the problem of the domination of outcasts. As Aziz Rana [points out](#), there's even historical support for more open terms of membership during the early empire-building phase of America's development. Political justice certainly favors creative solutions in aiding those displaced or harmed by colonization, especially "colonized outsiders."

On the other hand, allowing non-citizens broad participation rights would amount to a major departure from some modern accounts of sovereignty. The frontier has closed, and a sense of abundance no longer obtains. Depending how radical the proposal, it could very well generate the kind of resentment that exacerbates friend-enemy distinctions and produces more efforts to dominate outsiders.

Would plebeian-focused reforms be enough to revive our moribund politics? In the end, we would need some way of measuring proposals to redesign our political systems and ordinary policies according to a materialist-consequentialist ideal. A civic culture would have to arise that was sufficiently potent as to push enforcement decisions and jurisprudential approaches in purposivist and consequentialist directions, or else the gains from wise design choices could be swept away through organic changes, judicial adaptations, or political combinations intended to reduce the impact of popular advances.

None of this is simple, but all of it is worthy. If my reaction is any indication, then reading Vergara's vigorous defense of civic republicanism may be just what it takes to inspire us to try.