

# Local Roots of Constitutionalism

FILIPPO SABETTI

In this article, I make several arguments. The first is that the local, and not the national or international, community is both logically and practically the starting point of constitutionalism and, correlatively, of self-governance. The second argument is that local roots of constitutionalism in North America, as in Europe, owe their origins to medieval times—that is, constitutionalism predates modernity and industrialization. If so, this has positive implications for much of the contemporary world that is nonindustrialized or rural. The third argument is to pinpoint the factors that help explain the ruptures in what once was a common European political tradition. I do not consider “medieval” a term of abuse or view “feudal” as semantically undesirable, but my overall purpose is neither motivated by antiquarian, anachronistic interests nor intended to lend support to some kind of Whig interpretation of history. The study of the local roots of constitutionalism is enlightening for other reasons.

First, the study of constitutionalism’s local roots supplies demonstrative historical evidence that a constitutional level of analysis can travel across time and space and that the study of constitutional choice need not be confined to national constitutions. With the growth of institutional analysis and development since the 1960s (for example, Buchanan and Tullock 1962; Lutz 1998; E. Ostrom 1989; V. Ostrom 1982), this point has gained considerable currency among political theorists and specialists of American politics, but the constitutional level of analysis remains an almost forgotten tradition, or finds resistance, in much of comparative politics. Second, the local level offers perhaps the richest historical and contemporary data for the study of constitutional choice and design because, as Tocqueville noted, the township is found among all peoples and is coterminous with humanity itself ([1835] 2000, 57). John Stuart Mill and others have

joined Tocqueville in emphasizing local self-governance as a training ground for what is required to create and maintain a democratic, political way of life in a nation as a whole (Elkin 1987). There still remains the challenge of how to understand and frame what relationship exists or can exist between what is universal in humanity and constitutional choice that is subject to time and place contingencies. A third reason follows from the first two: human beings have mostly lived in multi-constitutional worlds, not in single systems. This suggests both a theoretical and an empirical shift in the way we approach the study of many trouble spots in the world, such as the Balkans, parts of Africa, Indonesia, the Middle East, and Northern Ireland, to name some of the obvious. What often passes for international or national ethnic conflict has deep communal roots. The tendency to focus on nation-states, or what Wheare called the “whole system of government of a country” (1964, 1), to understand and possibly solve such conflicts may be misplaced. Practitioners and students of statesmanship need to recognize that “effective and long-lasting constitutions are frequently negotiated at a micro-level rather than at the macro-level of an entire political system” (E. Ostrom 1989, 12).

Because the very use of the term “constitutionalism” often has been a stumbling block in comparative analysis, I begin by considering what constitutional choice means. I then offer analytical and theoretical justifications for the search for local roots of constitutionalism by highlighting what may be called “the civilization of the communes” as an intercivilizational phenomenon cutting across the major world civilizations. I follow with an empirical analysis of medieval and early modern Europe for similarities and differences in constitutionalism, paying special attention to the common underlying principles of constitutional choice and to the factors that help explain how this commonality gave way to variations and, ultimately, to different political trajectories. What this experience implied for the emergence of representative institutions at the provincial and national level is explored briefly. The analysis should

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*Filippo Sabetti is a professor of political science at McGill University in Montreal.*

demonstrate why the history of liberty in the United States sometimes has been viewed as making explicit what the medieval constitutional experience in Europe achieved but failed to sustain (McIlwain 1938, 5–6; Ullmann 1966, 150–51). The analysis also points to another avenue of research that cannot be covered here, meriting an investigation of its own: Why were political solutions such as those devised by the Swiss and the Dutch not possible in places such as Italy and Spain?

If this theme is manageable, it is because a considerable amount of literature and some fine classics address its many aspects. All that needs to be done is to provide persuasive connective links to arguments and data already available separately to specialists in different fields. I seek to provide this synthesis with the help of ongoing research on long-enduring institutions of self-governance (Sabetti 2002).

## CONSTITUTIONALISM

Two works on constitutionalism published in 1962 and one published in 1963 furnish a point of departure for surveying how much the study of constitutionalism has progressed since the early 1960s, why some approaches and concerns persist today, and how much work remains to be done. The first publication was an article by Giovanni Sartori (1962); another was a book by James M. Buchanan and Gordon Tullock (1962); and the 1963 publication was written by Nicola Matteucci (then a young researcher at the University of Ferrara, a small Italian university, and now a distinguished professor of political science at the University of Bologna). Appearing at a time when the “behavioral revolution” in social science was gaining momentum, these separate publications converged to give importance to constitutionalism in the study and practice of politics.

Sartori (1962) took issue with the prevalent practice by comparativists and legal scholars of identifying constitutionalism as the total form of the state and its institutions. If a constitution is defined as any way of giving form to any state, Sartori continued, there is little point in asking, “What is the role of a constitution in a political system?” Either the question cannot be answered, or the answer simply is a rationalization of whoever yields power. For Sartori, constitutionalism properly understood involves specific guarantees for citizens and specific limits on government power. For this reason, every state may have a “constitution,” but only some states may be constitutional (Sartori 1962, 856)—which is not unlike what Hayek said about the American contribution to constitutionalism (1960). Up to this point, it is easy to agree with Sartori, but he did not stop there.

Sartori dated this kind of constitutionalism to the eighteenth century. The Latin word *constitutio* stood for enactment, not for what moderns understand as constitution. When the word “constitution” was picked up in the eighteenth century, it was a term vacant of modern content, and since then it has applied only to the national level. Sartori subtitled the article “a preliminary discussion,” but twenty years later, he still seemed reluctant to go beyond the earlier rendering (1984). More recently, he has treated nation-

al electoral reforms as the main focus of “comparative constitutional engineering” (1994).

Sartori has been criticized for his narrow view of the term “constitutionalism.” Where he sees discontinuity or vacancy, others see continuity from the Greeks to the Romans and beyond (Maddox 1982). Stripped to the bare essentials, the counterargument goes something like this: Before the eighteenth century, people may not have used the term “constitution,” but they did use principles of constitutional choice couched in different linguistic terms to organize themselves into different collective undertakings or body politics. Even those who question Sartori, however, seem to share his view that constitutionalism properly understood stands for a *garantiste* national constitution that may or may not be enforceable (Maddox 1982). Scott Gordon’s more recent work (1999) adds insightful nuances to this line of reasoning. Focusing on polities of different sizes, Gordon seeks to demonstrate how different communities have sought to devise mechanisms for maintaining some control over those who ruled. The difference, however, is that Gordon sees continuity where Sartori sees discontinuity, but Gordon, like Sartori, still tends to equate constitutionalism with controlling the state.

Valuable as they are for clarifying important dimensions of constitutionalism, such interpretations do not carry much weight, for reasons indicated by James M. Buchanan and Gordon Tullock (1962) and by Nicola Matteucci (1963). In the words of Matteucci, the authors suggested that to adequately study what is entailed by constitutional political economy, “we need to free ourselves from the entrenched view of ‘the State’ and frame our analysis of constitutionalism in terms of rules and not of ‘the Government’” (1963, 1088). Even if we put aside linguistic and conceptual reservations as scholastic quibbles and accept the use of the term “State” as nonproblematic, a scholarly concern for controlling the state requires at least three modifications to be an appropriate level of analysis. The first modification is that the sword may not be the only way for the rulers to be ruled; second, the issue of controlling power with power is one of the many issues in a design of constitutional democracy; and third, as a rule, even people in unitary systems live in multi-organizational arrangements—constitutional pluralism applies there as well. The work of Buchanan and Tullock and Matteucci suggests that it is possible to reach a broader, more theoretically satisfying understanding of constitutionalism if we adopt a perspective of collective choice in organization and evaluate how institutions as rules emerge, how they work, and how they change over time. This calls for a constitutional level of analysis (Ostrom 1982) that was almost nowhere to be found in standard perspectives on political science in the early 1960s. Writing as economists, Buchanan and Tullock’s intellectual trespass was not initially noticed or appreciated by political scientists; Matteucci was a political scientist but what he had to say, even if noticed, had little or no impact on the international profession, in part because his analysis excelled more in challenging legal positivism than in showing how an alternative perspective of politics could be fashioned and applied. Fortunately, much has been written since then to

reiterate, amplify, and extend the basic insights about constitutional choice and constitutional democracy that were developed in the early 1960s.

Studies by Russell Hardin (1989), Peter Ordeshook (1993), Vincent Ostrom (1982), Elinor Ostrom (1990), and others associated with the Workshop in Political Theory and Policy Analysis at Indiana University, as well as Buchanan and Tullock's ongoing reflections in journals such as *Public Choice* and *Constitutional Political Economy*, may be taken as illustrative of the progress that has been made in the theoretical and practical knowledge of constitutional choice and self-governance. Supplementing these efforts is research on the colonial origins of American constitutionalism and American political theory by Donald S. Lutz (1988, 1998), and research on the constitution of a good society by Stephen Elkin and others (Elkin and Soltan 1993; Soltan and Elkin 1996). Although driven by different practical questions and at times using divergent linguistic expressions, all of the works share presuppositions and concerns about the study of the art and science of institutional design that is appropriate for self-governing societies, and, thus, they may be viewed as belonging to a common family of theoretical perspectives. They help direct attention to what to consider when fashioning and applying a constitutional level of analysis through time and across linguistic communities:

1. *Where ideas about constitutionalism develop.* Epistemic sources and/or ways of life, thinking, and problem solving that are antecedent to, or form the initial state of, processes of constitutional choice.

2. *How to recognize constitutional rules.* In contrast with other rules, constitutional rules establish the terms and conditions of governance, including who is a member of a political community, what basic rights and duties are conveyed by membership, and how future collective-choice decisions applicable to public, private, and common property goods will be made.

3. *How to recognize who engages in constitutional choice.* Agents of constitutional choice are not confined to rulers, governments, or constituent assemblies; they also include individuals acting in a collective capacity to secure future goods. Self-governance occurs when individuals who participate in an ongoing pattern of relationships can devise some of their own rules to govern those relationships within particular domains. In medieval Latin, this capacity often was recognized as *ius proprium*.

4. *Why use constitutions.* Constitutional choice is purposive and future-oriented. Rules prescribe actions and outcomes that are permitted, required by, or forbidden for individuals so as to (a) distribute political authority—that is, determine who can legitimately do certain things when and how they want; (b) affirm, recognize, and order property rights and various forms of exchange; (c) structure and provide mechanisms for problem solving, adjudicating conflict, enhancing coordination, and, more generally, promoting particular ways of life and life goods; and (d) interpose limits to and enhance accountability for what governments and people legitimately can do. Constitutional rules may be written or unwritten, but they all stand as “the bond of law”

(*vinculum juris*), in Cicero's terms, to give meaning, order, and coherence to organized activity. The value of a written constitution is that the writing itself has declaratory, symbolic, and prescriptive force—or, in the language of a local “pact of the land” drawn up in the vernacular between a Sicilian rural entrepreneur and settlers in 1482, “for precaution, certitude and firmness” (quoted in Garufi 1947, 25).

5. *How to enforce constitutions.* The problem of enforcement involves how to resolve collective-action dilemmas. Different means exist to overcome them within an indeterminate time frame. The standard way used to justify the State as some kind of exogenous force is available, but this is one way among many. The literature on common property regimes suggests that although self-enforcement is extraordinarily difficult, individuals who constitute their own systems and repeatedly interact with one another can self-enforce constitutions. Elinor Ostrom and her colleagues have found that “a group of principals can organize themselves voluntarily to retain the residuals of their own efforts” (Ostrom 1990, 250). Recalling Hobbes's words, covenants can be enforced without a sword, just as self-governance also may be self-enforcing (Ostrom, Walker, and Gardner 1992).

6. *Ubi societas, ibi ius.* Human beings tend to live and order their lives in a world of multiconstitutional arrangements. Processes of constitutional choice can be found and can take place simultaneously and for different reasons at the microlevel and macrolevel of an entire political system. It is conceptually and empirically possible to isolate and separately treat different processes of constitutional choice and the basic rules that emerge in societies other than our own, and even across time and space, if we are prepared to stretch our vistas beyond national constitutionalism.

7. *Creating a record of a constitution.* Processes of constitutional choice and their respective outcomes can be voiced and written down, pace Sartori, using many linguistic expressions. The challenge for the researcher is to discover equivalents across different linguistic usages that convey what rules apply to the organization and conduct of collective undertakings under investigation.

## THE CIVILIZATION OF THE COMMUNES

A case for the importance of local roots of constitutionalism can be made if we turn to what might be called “the civilization of the communes.” Consider what Tocqueville said about the universal existence of community:

It is not by chance that I examine the township first. The township is the sole association that is so much in nature that everywhere men gathered, a township forms by itself. Township society therefore exists among all peoples, whatever their usages and their laws may be; it is man who makes kingdoms and creates republics; the township appears to issue directly from the hands of God.

Tocqueville was quick to add, “But if the township has existed since there have been men, the freedom of a township is a rare and fragile thing” (Tocqueville [1835] 2000, 57).

The movement of ideas during the Italian Risorgimento associated with Carlo Cattaneo, a Lombard republican and

federalist thinker, showed a similar concern for communes across time and space (see also Sabetti 2000, ch. 3). To be sure, Cattaneo's essays on the city as "the only organizing principle that serves to make evident a continuous exposition of thirty centuries of Italian history" focused primarily on the city republics of Northern and Central Italy (Cattaneo [1858] 1957, 383) and on the rupture in Southern civic life brought about by the creation of the medieval Norman kingdom. There is no mistake that Cattaneo looked to the civilization of the communes to exemplify a tradition of self-organizing and self-governing that could be found to varying degrees around the Mediterranean and that was capable of offering an intercivilizational perspective that would allow him to do several things: understand the universality of community problem solving across time and space, challenge the entrenched view of the State in Europe, and reach quite different conclusions about both the constitution of larger political regimes in Italy and elsewhere and what is required for people to be free. In Cattaneo's view, no group of people must necessarily be a predestined, unitary nation-state in order to be modern; patriotism does not require a centralized State; and national independence should not dominate all other considerations, including the issue of freedom. He warned readers of the danger of losing sight of the local roots of constitutional democracy. The result would be despair about what it means to be free as "the mind becomes disoriented in the labyrinth of conquests, factions, and civil wars, and in the frequent structuring and restructuring of states" (Cattaneo [1858] 1957, 383–84).

Echoing Tocqueville and Cattaneo, but using different language, Vincent Ostrom (2000) sees "methodological communalism" as a necessary complement to methodological individualism. He reasons that just as methodological individualism can be understood as calling on one's resources as a human being to gain an understanding of the incentives and aversions that are characteristics of other human beings, so methodological communitarianism enables us to understand what others do and accomplish as a function of living their lives in association with others. As Ostrom suggests, it becomes all the more important, then, to know how people draw on the exigencies experienced in everyday life and in the intergenerational lifecycle of family and kin relationships to establish and maintain complex and, often, long-enduring patterns of association.

The work of Tocqueville, Cattaneo, and Ostrom reminds us that people ordering their lives together may use a variety of linguistic usages or even changing usages of the same language not directly and precisely translatable to other languages. For example, the Latin used by Hobbes is not quite the same as that used by Cicero, Dante, and even Vico; Cicero's *civitas* is not "the state," nor does Thomas Aquinas's *perfectio* mean "perfection," but rather "autonomy," as in *communitas perfecta*. Independent of one another, Paolo Grossi (1998) and Gaines Post (1964) have done much to clarify legal pluralism, the standing of corporate community, representation, and consent, as well as the Latin terminology of medieval thought, drawing attention to the multiple facets of classical Roman law ignored or conve-

niently forgotten by the medieval glossators usually cited by state builders. As Charles McIlwain once suggested,

[T]he true essence of Roman constitutionalism does not lie in those late statements of absolutism to which so much currency has since been given such as the maxim *Quod principi placuit legis vigorem habet*, or Ulpian's assertion, *Princeps legibus solutus est*. It lies in the older, deeper principle that the *populus*—and none but the whole *populus*—can be the ultimate source of legal authority. (1940, 57)

English common law itself cannot be understood without reference to the European common law from which it emerged (see also Calasso 1954; McIlwain 1940, 60–62). Bracton is not the uniquely English phenomenon the nationalist literature would have us believe, for he drew freely on Roman and canonical procedure to extend the principle of *quod omnes tangit ab omnibus tractari et approbari debet* to England.

Just as a focus on the civilization of the communes helps direct attention to local roots of constitutionalism, a broader conception of constitutional political economy makes it possible to explore what kind of links exist or can exist between micro- and macroconstitutional processes and arrangements. This is why the American political experience traced by Tocqueville stands as an important point of departure for inquiries into how and to what extent such processes and arrangements are established and maintained elsewhere. First, "the township is composed of coarser elements"—that is, self-governance may spontaneously emerge but it remains fragile if not nourished over time. Second, the extension of individual self-rule to the community, the state, and a nation as a whole does not automatically follow from affirmations or claims about the sovereignty of the people (Tocqueville [1835] 2000, 57).

The idea that people holding their destiny in their own hands begins at the local level "travels" well beyond the political experiences of Europe and North America. A concern for how people since ancient times have managed to apply principles of governance to common property resources—from pasture to water—has united people from many disciplines working on the same topic, creating the International Association for the Study of Common Property. This conceptual generality has made *Governing the Commons: The Evolution of Institutions for Collective Action* (Ostrom 1990) an exciting and widely recognized work. In turn, Robert McCormack Adams and other archaeologists have discovered that, contrary to the hypothesis advanced by Wittfogel, localized irrigation systems with highly decentralized political control existed before the rise of states. In several cases of early states in Mesopotamia, the Andes, China, and Egypt, state-building elites appear to have incorporated or harnessed these localized systems into their political and economic organizations to increase productivity and stabilize their authority (Adams 2001).

A flourishing stream of scholarship on world history has found self-organizing and self-governing practices in the history of macropolitical orders associated with lordship and bureaucratic autocracies of the past (Muhlberger and Paine 1993). The historical record in Asia and Africa shows that "most people in the world can call on some local tradition on

which to build a modern democracy" (26). The general conclusion is worth quoting at length:

Most human governments have been a matter of councils and assemblies, which often incorporate a large proportion of the community and use a surprising degree of democratic procedure. In other words, humanity possesses a long history of government by discussion, in which groups of people sharing common interests make decisions that affect their lives through debate and consultation, and often enough by voting. By broadening the view of politics to include not simply geographic communities but also religious and voluntary self-help organizations—as de Tocqueville did when evaluating democracy in the early American republic—one finds a world full of quasi democratic institutions. (27)

In short, new and exciting possibilities exist for exploring how people across different time periods and linguistic communities have come to share the civilization of the communes. I will illustrate this possibility with historical evidence.

## HISTORICAL EVIDENCE

In *Law and Revolution* (1983), Harold J. Berman indicated that the basic principles of constitutional government were worked out in the free cities of Italy and Germany long before the Americans confronted the problems of constitutional choice. The basic principles involved covenanting with one another, the rejection of hereditary rule (*principatus perpetuus*), the affirmation of government appointed for limited terms of office (*principatus ad tempus*), and the rule under law. To this day, Venice remains the oldest self-constituted republic (see also Lane 1966, 285–308, 520–39). Its system of checks and balances, devised to reconcile the exercise of political authority with freedom and justice, continues to fascinate modern scholars (Gordon 1999). The constitutional evidence provided by the city republics is not, however, unique or freestanding.

By the thirteenth century, the principle of *ius proprium* or *iura propria*—namely, the practice of (male) self-organization and self-governance, including relations based on contractual relations—extended to almost all forms of known collective activity and undertaking throughout Western Europe. Each collective undertaking was organized as a *universitas*, and what distinguished one *universitas* from another were the tasks that each set for itself, with the result that almost every town (or village, as the study of English villagers in the thirteenth century by George Homans [1941] suggested long ago) had its own multiconstitutional world, albeit organized by male family heads. Each collective undertaking had its own jurisdiction (*jurisdictio*), authority (*gubernaculum*), and the power to regulate itself (*praeceptio*) through a variety of means. Size was not a factor because each entity, whether small or large, possessed constitutional capacity ("right" may be too strong a word), jurisdiction, and internal regulations (Grossi 1998, 198–99). From Sicily to England, multiple political arrangements of different scales emerged, with both egalitarian (horizontal) and hierarchical (vertical) tendencies stacked and nested in together. The arrangements operated simultaneously to varying degrees to affect people's lives. Much of the work

by Susan Reynolds on kingdoms and communities in Western Europe between 900 and 1300 redresses "the tendency to undervalue the horizontal bonds in medieval society" without anachronistically idealizing them (1984, 1; see also Reynolds 1994). Thus, in addition to free cities, the local multiconstitutional world included:

- fraternities and guilds (the oldest, most cohesive, and most universal form of local self-organized venture);
- community of the parish;
- villages (*villa* or, as in England, *communitates villarum*), walled settlements (*castra*), and rural neighborhoods (*vicini* or *vicinia*);
- common property, for example, collective organization and the use of nonarable land, water streams, and local churches;
- royal towns; and
- baronial jurisdictions (or manorial systems) as economic and political enterprises.

On the strength of documentation going back to the ninth century, some historians suggest that local collective undertakings were already fully operational before the Norman conquest in the twelfth century, especially in Italy, where many municipal institutions south of Rome continued to exist after the fall of Rome and even under Byzantine and Moslem rule (Reynolds 1984). It is certain that the experience of the urban commune was not peculiar to the geographical area corresponding to the Italian kingdom of the Frankish-Lombard tradition (Tabacco 1989, 191). Moreover, the "communal movement" of the twelfth century did not introduce new ideas and values of association, as they already were there: "All the collectivities which abound in the sources of the twelfth and thirteenth centuries drew their cohesion from ideas and values which were already deep-rooted" (Reynolds 1984, 1).

We probably never will know what occurred in the organization of most local collective undertakings throughout Europe. It is difficult to reconstruct in each instance who initiated such collective ventures, how many participants were actually involved, and what information they actually had about their own situation. The work of different historians (Reynolds 1984, 137; Tabacco 1989), however, suggests that it is possible to shed light on the subject by focusing on how people acted collectively to obtain or establish local charters and the like. First, "the quite prolific statutes of medieval towns are an inexhaustible reservoir for assessing the virile strength of populist forms of government" (Ullmann 1961, 219). Second, this rich record extends to almost all other aspects of organized activity, including dispute settlements, charters, and chronicles of all sorts, all stimulated by the growth of the public notary and legal professions to the point that civil litigations appear to have been a favored pastime among different strata of society as early as the ninth century (for example, Schupfer 1886, 294–95). Finally, local statutes, chronicles, and other such records often were produced on paper made to last and were kept as documentary proofs by public notaries. Arguably the richest available record comes from the multiform nature of the Italian experience (for example, Baviera Albanese 1980; Casari and Plott 2003; Ryder 1965; Tabacco 1989).

## Processes of Constitutional Choice

Support for Reynolds's affirmation that self-organized municipal institutions existed in Europe and especially in the Italian south before the Norman conquest can be obtained *ex adverso*: they were considered a challenge to royal authority. Like Henry II of England, Emperor Frederick II sought to shore up royal authority in his southern kingdom by easing the accessibility of royal justice to his subjects. Unlike King Henry, however, he also sought to repress the existence of communal independence. His 1231 Constitutions of Melfi (*Liber augustalis*) annulled existing local charters and denied communal aspirations to self-rule, under penalty of death and forced labor (*Liber augustalis*, title L, sec. 61; title CVII, sec. 82). On the issue of justice, securing compliance was not difficult. Royal justiciars continued well after King Henry's death. Securing compliance with the abolition of local autonomy proved more difficult. A century later, Sicilian cities were still vibrant with life as

sites of Roman law courts, municipal night-watch companies, armies of harbor officials, schools, tariff codes, almshouses and hospitals, more tax collectors, taverns, warehouses and urban magistrates endlessly copying, invoking, exercising, and seeking to expand their cities' cherished and obsessively guarded *consuetudines*. Each community followed its own customs but remained opened to outside contact. (Backman 1995, 20)

Communal self-organization and affirmations of communal liberty tell little about how cities actually were run. That there was "an embryonic communal-republican style of government" is undoubted (Backman 1995, 22), but how far it extended is not easy to determine. Even when data suggest that city governments may have remained closer to the spirit and letter of their charters for some centuries, as in Palermo, electoral mechanisms skewed the choice of alternating city magistrates mostly within the upper and middle strata of society with varying degrees of representation from artisans and the guilds, groups that had their own communes within city limits. The situation was not dissimilar from the rest of the Spanish domains in Europe, including the towns of Holland, in this way (for example, Price 1994, 8). The agents of constitutional choice were not the people as such, although those who did exercise such choices considered themselves representatives of the *populus* (see Tabacco 1989, 227). What we have is republican constitutionalism, rather than modern constitutional democracy.

What can we say about Tocqueville's "coarser elements," the people in the countryside? It is the people in the countryside who built enduring forms of collective action, such as irrigation systems in Spain and Italy, and they who made the rural commune work as a far more prevalent institution for collective action. Three broad patterns in the political life of rural communities are clear until the sixteenth century.

One pattern, operating as early as the tenth century, even before the term *universitas* had emerged, took the following form: A group of people, mostly peasants and artisans, organized themselves as a lay association before a notary to purchase from a local bishop (or lord) land they already had cultivated, and they aimed to conduct organized life togeth-

er for themselves and for those yet to come (see also Cas-sandro 1943; Galasso 1971). This does not mean that such associations always succeeded in their aims. Negotiations took time, and we do not know how many negotiations failed. We only have evidence about success, and even this suggests that negotiations lasted from five to twenty years. This situation applies equally to neighbors (*vicini*) in the countryside of northern Italy, as archival research by Giovanni Tabacco makes clear (Tabacco 1989, 202–03).

A second, more prevalent pattern is the emergence of communes from baronial jurisdictions, originally both economic and political enterprises. The practice of contractual arrangements in economic transactions was extended to the constitution of each rural commune, known as pacts or charters of the land. Although no two settlements were constituted and governed in exactly the same way, there was an underlying similarity among them. The charter or constitution of each settlement spelled out essential rights and duties of the baron and the settlers, different types of property rights on the settlement, and the collective organization of village life. There generally were two communal institutions. One, appointed by the baron, was the board of local officials, which varied according to the size of the community. A judge presided over local disputes and jurors dealt with matters of public interest and collected revenue for the royal government, among other things. Most members of the board were appointed for one year, allowing a great deal of rotation among villagers, at least in theory. A second body, the civic council, known at times as the "regular parliament," or general assembly, was comprised of all the male townsmen and was convened by the baron to address matters of importance. Although the entire population did not elect its municipal officials, through the civic council it maintained a watching brief over the conduct of local officials; jurors often had to justify their acts to both the baron and the regular parliament (for example, Alianelli [1875] 1975; Diecidue 1966; Verdirame 1904). However correct this static view may be in capturing the emergence of community organizing, the question still remains: Once the process of constitutional choice produced the institution, how did the institution actually operate?

Archival evidence suggests that the practice of grounding the constitutions of settlements on the consent of the barons and the settlers and, correlatively, the practice of assigning the conduct of communal affairs to local residents acted not only as a constraint to baronial despotism but also as an incentive for the baron and the settlers alike to sustain mutually productive relationships (Genuardi 1911, 43; Verdirame 1905). It was not uncommon for barons and local residents to aid each other in times of distress (Cancila 1974, 15–16). In other instances, barons rescued their tenants by shouldering or canceling the payment of their taxes during bad harvest or drought years (for example, Titone 1961, 35–36, 38–40). The positive aspects of such practices also entered into or produced a kind of cultural superstructure that shaped thought and expectations, strengthened pragmatic concerns over rights and institutions, and became an important feature of the Sicilian political tradition. Still, there also was a tendency by boards of local officials to

become self-perpetuating, often rotating oligarchies operating with immunity from both the local lord and the villagers alike, and this sometimes lasted for an indeterminate number of years (Astarita 1992, ch.4).

The chief problem for researchers is presumptive knowledge: When a practice is found operating at any one point in time, one of two things happens. Either it is assumed by implication that the practice lasts forever, or there is a tendency to project that practice (or failings found in the nineteenth century) back without bothering to investigate subsequent periods. As a result, there has been a tendency to ignore another process of constitutional choice, institutional reform.

This third pattern of constitutional choice involved efforts aimed at reconstituting or repairing the failings of existing communal charters to make communal government more representative of and accountable to the community. The number of in-depth case studies is truly extraordinary, as it includes both cities and rural communes. The literature offers detailed information on specific reform efforts; sometimes it is comparative and longitudinal and at other times it focuses on particular struggles of local residents to recast local institutions with the approval of vice-regal officials (see also Sabetti 2002).

Many years ago, Douglass C. North and Robert Paul Thomas (1971) challenged the conventional wisdom about feudalism, suggesting that baronial jurisdiction—they called it a manorial system—was a “necessary stepping stone” for the rise of the Western world. Their work elicited some strong negative reactions: “Logic, the documents, and the very stones argue for the traditional view and against the proposed alternative” (Fenoltea 1975, 390). The history of baronial jurisdiction in Sicily—often regarded as feudalism’s worst-case scenario—does not deny the empirical validity of the traditional view where it is relevant, but it does suggest that the generalization across time and space is inappropriate. It also suggests, however, that there is more to the argument advanced by North and Thomas than critics were willing to admit. Several distinct and interconnected factors helped the positive transformation of baronial jurisdiction in Sicily, and they include:

1. The liberalization of the feudal land market since the thirteenth century (the *Volentes* law). This provided the opportunity to become a baron—and thus a parliamentary lord—to anyone with sufficient capital to purchase a fief, pay for a royal license to people it, and organize the land under baronial jurisdiction.

2. “Pressures generated by self interest” (Salvioli 1902).

3. The increasing separation between the economic and political nature of baronial jurisdiction and the concomitant growth of communal government.

4. The scarcity of labor resulting from the eviction of Moslems in the thirteenth century, as well as from recurrent plagues.

5. The internal migration of workers in search of more favorable employment opportunities.

6. The growth of the market economy and the increasing use of money as the medium of exchange.

These changes did not always work. Failure “to renounce ruinous lordship and antiquated agrarian economy” brought

many baronial houses into bankruptcy while baronial towns depopulated (Salvioli 1902, 390). By the seventeenth century, however, old and new barons risked enormous amounts of money to reorganize bankrupt fiefs and establish new ones; the colonization of the Sicilian interior, prominently featuring barons as rural capitalists, often has been referred to as “the golden age of baronial jurisdiction.”

Some of the positive results of this rural capitalism had long-term consequences. In the fifteenth and sixteenth centuries, there was considerable expansion in the commercialization of agricultural products. Far from impeding economic development and market relations, baronial jurisdictions as economic enterprises actually facilitated this commercialization. The research by Stephan Epstein found that

both the yield ratios and production for hectares in Sicily up to the eighteenth century seem to have been equivalent or higher than in the most advanced northern European countries (England, Flanders, the Netherlands) and substantially better than in Northern Italy or the Baltic regions. (1992, 164)

### Continuity and Ruptures in the Relationship between Micro- and Macroconstitutionalism

In *The Old Regime and the French Revolution*, Tocqueville succinctly highlighted continuity and ruptures:

Transported overseas from feudal Europe and free to develop in total independence, the rural parish of the Middle Ages became the township of New England. Emancipated from the seigneur, but controlled at every turn by an all-powerful government, it took in France . . . the form of “paternal government.” ([1856] 1956, 48, 51)

The issue is how to explain these developments.

Much of the literature on long-term political changes in Europe—often known as the macrohistorical schools of democratic development—is, unfortunately, not helpful, because of the tendency to ignore what I have taken as a focal point: medieval institutions. Fortunately, since the 1990s, new scholarship has sought to remedy this gap by exploring the relationship between micro and macro level changes, continuity and discontinuity, similarities, and variations in long-term European development (for example, Downing 1992; Ertman 1997; Spruyt 1994; Linz 1973). When the new scholarship is joined with earlier, if more standard, historical literature, it becomes possible to address the question raised by Tocqueville’s quotation with a more robust body of evidence. A brief sketch can be given if we focus on the key variables. The interaction explains the relationships that existed between micro- and macro-constitutionalism at any particular time.

First, there is the long-term, always problematic change from transnational to national kingdoms. This alone does not account for continuity or disruption in microconstitutionalism, but when this factor is joined with others simultaneously or sequentially, it becomes an important explanatory variable.

One intervening factor was the hard constraint of birth and death and what it implied for royal heirs. A second factor involved the rules by which one obtained, inherited, and

had the right of succession to the realm. Another factor concerned what conception of rulership—theocratic, feudal, or some combination of the two—prevailed or ought to prevail. Even when changes in the Salic law of succession are taken into account (as in the case of Britain), these factors posed almost insurmountable problems in dynastic succession throughout Europe and often led to wars, conquest, and empires. The results often were unpredictable for local roots of constitutionalism.

There were other intervening factors, but such factors also acted as independent key factors depending on time, context, and resulting interaction. For the sake of exposition, each can be treated separately.

There was the multidimensional nature of Christianity. Between the thirteenth and seventeenth centuries, this multidimensionality gave rise to several processes involving complex chains of events, including the following: (1) a transnational organization (the Church) struggling to maintain itself as a complex grassroots organization and remain autonomous from secular authority, while also claiming to be the source of divine approbation of rulership in the face of assertions by all sorts of temporal rulers; (2) secular rulers' tendency to empty of content or claim for themselves the symbols and forms of ecclesiastical authority—challenges that applied to the existing Catholic and emerging Protestant churches; and (3) what constituted the correct internal ordering of the church that began in Paris around 1250 and extended, with the Reformation, to give rise to federal theology.

One byproduct of the developments was the reaffirmation of the ascending theme of government itself (Ullmann 1966), most visible in the work of Althusius. The sovereignty of the people operating at the grassroots level could now coexist with the effective authority of the ruler, thereby solving the puzzle of mixed government that had eluded Aquinas, Dante, and Marsilius of Padua. But Althusius did more than theorize; he actually described the Dutch case following the defeat of Spanish rule.

The fourth key factor interacting with the three already discussed is the transformation of small, self-equipped, feudal hosts into increasingly large, centrally financed and supplied armies with expensive weaponry. As Brian M. Downing argues persuasively (1992), military modernization and warfare altered many European governments. Downing's study identifies military-bureaucratic absolutism as the main threat to medieval constitutionalism, independent cities in Italy, and, eventually, a liberal political outcome (1992, 12). The key threat was not modernization or warfare as such, but the mobilization of domestic resources to fund them. How the Dutch republic could experience a protracted warfare without suffering the destruction of a constitutional pattern may be explained by the enormous wealth it had accumulated through commercial activities—something that the republic of Venice could not match by the seventeenth century (Downing 1992, ch. 9). By contrast,

Cromwell left no self-perpetuating institutional apparatus. His intrusions on constitutional government were only enough to instill a popular hostility toward centralization and standing armies, as well as a widespread desire to return to constitutional government. (Downing 1992, 13)

## CONCLUSION

The sovereignty of nation-states has tended to eclipse the importance of the local roots of constitutionalism. In this article, I have sought to emphasize the importance of local roots for constitutionalism and self-governance. The failure of the centralized state in many parts of the developing world may provide the opportunity for individual and community empowerment and productive changes. Associational life is said to be vibrant in African societies and remains an unused resource when it comes to the public realm; we need to know why this is so. Clearly, the civilization of the communes as an intercivilizational perspective on self-government needs more conceptual elaboration, as does the historical origin of microconstitutionalism. For these reasons, the preceding analysis has been a preliminary exploration. The study of human civilization itself must be rethought (Ostrom 1997) as we recast and give new meanings to the practice of local self-organization (or bureaucratic preemption) across time, space, and linguistic uses. In this way, the relationship between political theory and the study of local governance is not only an American or Tocquevillean preoccupation. It also is a universal issue concerning the advancement or retrieval of the science and craft of community association throughout the world.

## NOTE

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