



CALL FOR PAPERS

Constitutional Responses to the Crisis of Representation and Oligarchic Democracy

Introduction

This Call for Papers is issued by the Constitution Building Programme of the International Institute for Democracy and Electoral Assistance (International IDEA), as part of a research project on *Constitutional Responses to the Crisis of Representation and Oligarchic Democracy*. The project seeks to examine the problem of ‘oligarchic democracy’ and to consider whether, and how, constitutional design may provide a useful corrective to the oligarchic tendencies in liberal-democracies.

The expectation is that the papers will inspire a focused debate around the issue of oligarchic democracy and anti-oligarchic constitution-making. Selected papers will be synthesized into one report that will be addressed to a mixed audience of academics and reflective practitioners in various fields of constitutional practice, whether as constitutional lawyers, politicians, international advisors, or civil society activists working in constitutional reform, public policy or poverty-reduction fields. It is also intended that the best papers will be selected for inclusion in an edited volume or special edition of an academic journal.

Papers should be written in English. The length of each paper should be between 5000 and 8000 words, including all notes and references. Papers are invited in response to any aspect arising from or connected with any of the five thematic areas outlined in the attached Framing Document. It is expected that there will be a panel of the workshop discussing each of these five thematic areas.

Selected applicants will be invited to present their papers at an Authors’ Workshop to be held in The Netherlands during 2017, with a view to eventual publication on the International IDEA Constitution Building website (www.constitutionnet.org). Full costs of Workshop attendance (including travel, transfers, hotel and *per diems*) will be borne by the organisers. Successful applicants on final submission of an accepted paper will receive an honorarium of €1000.

This is an interdisciplinary project. Applications are welcome from the fields of political theory, political science, public policy, comparative constitutional law, history, sociology, economics and any other relevant discipline. International IDEA is particularly welcoming of submissions by new scholars, PhD candidates and recent PhD graduates. We encourage innovative research methodologies and are open to considering promising papers based on preliminary findings or on research of speculative nature.

Context, Rationale and Overview of Project

In recent decades, constitutional scholars and constitutional designers have – for good reasons – devoted much of their attention to the rights, voice and inclusion of specified minorities, whose interests are deemed to warrant particular constitutional protection. Majorities (with the notable exception of women) have been assumed to be adequately represented by ordinary democratic processes. However, while this may be true for majority communities based on characteristics such as language, religion or ethnicity, it does not necessarily apply to majorities based on wealth. Even in long-established democracies, the non-rich majority tends to be under-represented in the top ranks of politics. For example, in the UK, where millionaires make up only around 1% of the population, two-thirds of the Cabinet in 2012 was worth at least a million pounds (Hope, 2012). Political systems, in terms of their policy outputs, also seem to be much less responsive to the preferences of the non-rich majority than they are to the preferences of the rich majority. A recent study of policy-making in the US showed that median income voters have ‘a

minuscule, near-zero, statistically non-significant impact upon public policy' while 'the economic elites and organised groups representing business interests have substantial independent impacts on US government policy' (Gilens and Page, 2014).

The financial crisis of 2008, and the controversial austerity policies that followed it in many countries, brought the class confrontation between the rich and the non-rich, which had been muted or obscured by other socio-cultural issues in recent decades, back to the centre-stage of political debate. The resulting 'Occupy' movement and other protest movements have popularised the notion of 'the 99%' (the non-rich majority), as distinct from the '1%' (the rich minority), and have argued that the exclusion and marginalisation of non-rich is a persistent and underlying political issue. In terms of their participation in public office and their share in political influence, the 99% can therefore be seen as a marginalised community, whose interests are not well served by existing liberal-democracies.

In parallel with these developments, we are concerned that the resilience of liberal-democracy may be diminished by a 'crisis of representation' which affects, or is perceived to affect, many liberal-democracies today. This refers to a constellation of phenomena that are thought to undermine liberal-democracy, including falling electoral turnouts, public apathy or ignorance about their political institutions and processes, loss of trust in political leaders and institutions, the rise of far-right parties and a new form of anti-democratic populism, and attempts to secure policy changes through extra-parliamentary means, whether by increased reliance on instruments of majoritarian direct democracy such as referendums, or by means of alternative forms of expression such as riots and civic protests. Other aspects of the crisis of representation may include the emergence of an individualistic and disintegrated political culture, with a decline in the mass-membership organisations such as political parties, trade unions and churches that once gave form and substance to political action (Putnam, 2000; Manin, 1997), and the erosion of the civic virtues that were once held to be essential to a liberal-democratic polity, such as tolerance, integrity, truthfulness and responsibility (Milbank, 2012).

Despite reassurance from scholars such as Arend Lijphart (2000), the resilience of liberal-democracy-as-we-know-it in the post-industrial, post-modern age is yet to be proven. Even in those countries where it is reasonably well established, it seems less assured now than it was two decades ago. The Economist's Democracy Index has reported retrograde developments in democratisation around the world during the last five years (The Economist Intelligence Unit, 2010-15). Several countries have reached a point of incomplete democratization, where competitive elections regularly take place, but where corruption, material inequalities, various restrictions on human rights and civil liberties, a weak civic culture, and a fragile civil society, result in a thin, superficial democratization, in which power is often retained by narrow and self-serving elites. This hybrid semi-democracy fails to deliver on its promises of societal and material well-being, does not enjoy the passionate loyalty of its citizens, and might easily be overturned in times of crisis.

This matters because desperate, frustrated people, who no longer trust democratic politics to bring home the goods, may be attracted to non-democratic forms of government, which ask less from them in terms of citizens engagement, and promise more in terms of material benefits. As Barack Obama noted during his 2016 State of the Union address to the US Congress, this is an existential problem for democracy: 'Democracy breaks down when the average person feels their voice doesn't matter; that the system is rigged in favor of the rich or the powerful or some narrow interest' (Obama, 2016). Or, to quote an earlier US President, 'People who are hungry and out of a job are the stuff of which dictatorships are made' (Roosevelt, 1944). Even some countries which were once counted as good examples of consolidated democratic liberalisation in Europe, such as Hungary and Poland, are now seen as either backslidden into a post-democratic regime or precariously close to backsliding, indicating that the progress of liberal-democracy in the 1990s might have been more superficial, and more conditional, than once expected (Blokker, 2013).

Definitions and Theoretical Framework

Liberal-democracy is defined, for the purpose of this project, as a system of government which combines public participation in decision making (chiefly through systems of representative government in which the allocation of power is determined by free, fair, regular and competitive elections based on universal suffrage) with civil liberties (such as freedom of speech and association, due process rights under the rule of law, and access to alternative sources of information) (Schumpeter, 1942, Dahl, 1971, Lijphart, 1999; Crick, 2002). Having appeared to emerge triumphantly from 21st century, liberal-democracy in the early 21st century is confronted by a range of profound and long-term existential threats. These threats include, but are not limited to, the rise of terrorism, environmental sustainability, climate change, economic and technological changes, and ideological-religious challenges. Resilience is the ability of liberal-democracies to survive and to overcome these threats in ways that defend liberal-democratic institutions and sustain liberal-democratic principles. Liberal-democracies lacking this resilience will either flounder under these threats, or respond to them only by resorting to undemocratic measures which are fatally self-defeating.

This definition focuses on legal institutions and procedures. It reflects the criteria of political liberty and civil liberty, adopted by the widely cited democracy monitoring organisation *Freedom House*. It is usefully descriptive because it ‘describes the essential characteristics of states that claim to be, and are widely accepted as, democracies’ (Borst, 2010). Nevertheless, it is a conceptually thin definition, which ignores the actual distribution of power within society, quality of governance, corruption, or substantive equality. It is possible for a country to meet the minimal criteria of liberal-democracy, while still giving disproportionate voice and influence to the rich, while excluding or marginalising the voices of the non-rich in general and the poor in particular.

The core principle of democracy is political equality (Hyland, 1995). From ancient times, democracies have been distinguished from oligarchies or aristocracies by the degree to which they give equal weight and influence in public decisions to rich and poor, noble and common, talented and mediocre, famous and obscure. Political equality embraces the classical concepts of *isegoria* (equal right to address the public assembly), *isopsephos* (equal voting rights), *isonomia* (equality before the law, understood in its widest and most substantive sense) and *isokratia* (equality of power). All contemporary liberal-democracies pay at least lip-service to these principles, through universal suffrage and equality before the law. However, in their actual operation, through representative processes, liberal-democracies may in practice deviate from this core principle, and may in fact sustain considerable political inequality between the rich and the non-rich.

If democracy required perfect political equality then it would be a chimera; every society, no matter how small, must delegate some preparatory and executive functions to select bodies, whose power is thereby rendered greater than that of their fellow, non-selected citizens. Thus, according to Rousseau’s rather purist classification ‘there never has been a real democracy, and there never will be.’ Yet, the impracticality of pure and absolute political equality does not deny the validity of political equality as a concept by which to measure the democratic shortcomings of liberal-democracies. Kenneth Bollen (1980) accordingly defined democracy as ‘the extent to which the political power of the elite is minimized and that of the non-elite is maximized’ (cited in Borst, 2010). A democracy is more democratic to the extent that it gives non-elites an equal voice in public decisions, and less democratic to the extent that elites have a privileged role and dominant influence. The defining characteristic of oligarchy, in contrast, is a profound and persistent inequality of power, with great privileges and prerogatives given to the wealthy (Winters, 2011).

‘Oligarchic democracy’ refers to a hybrid regime-type which is liberal-democratic in form but oligarchic in substance. It denotes a system of government in which the processes and institutions of liberal-democracy are established, but in which politics is in practice captured by economic elites who can use the power of

the state to further their own interests as a class. This means that everyone can vote, elections are genuinely competitive amongst the elite, and civil liberties and the rule of law are generally upheld, but the rich have a disproportionate say in the determination of policy, while the poor are disproportionately excluded from exercise of political power.

Thus defined, oligarchic democracy is a relatively common form of government. It is, however, one that evades easy operationalization or measurement. Oligarchy and liberal-democracy are neither binary nor mutually exclusive. All states exist along a continuum of wealth-related political inequality, and it would be arbitrary to set a point along that continuum as the point at which 'oligarchic democracy' exists. Above all, then, oligarchic democracy is not so much a taxonomic category for the classification of states (a label to pin on countries whose liberal-democracy is unusually oligarchic), but is an analytical concept with two main uses. The first use is as a means of criticism, to contrast the professed democratic nature of liberal-democratic constitutions (with their claims of political equality) with the often oligarchic manner in which they operate. The second use is as a means of correction, to examine ways in which the oligarchic nature of liberal-democracy might be reduced, if necessary, and its democratic nature correspondingly reinforced.

This project suggests that there may be a connection between the exclusions and under-representation of the non-rich majority in liberal-democracies, a crisis of representation, and a lack of democratic resilience. In other words, it may be that liberal-democracies are weaker, more vulnerable, less resilient, and more prone to crisis than they should be, because they are also less democratic than they should be; they are overly sensitive to the demands of the rich minority, and do not adequately live up to the expectations of democracy in protecting and promoting the interests of the non-rich majority. If this is substantiated, then in order to strengthen liberal-democracies in the face of current and future challenges, it may be necessary to explore ways in which the dominance of the rich can be restrained and the rights, voice and inclusion of the non-rich can be augmented.

This exploration, with a particular focus on potential constitutional remedies, lies at the heart of what this project seeks to achieve. In so far as there is a case for specific constitutional mechanisms for the benefit of other under-represented or politically marginalised groups, there might be a case for the inclusion of constitutional provisions for the benefit of the non-rich, whether by augmenting the power of the non-rich or limiting the power of the rich. We seek to examine that case in an innovative but critical way, and to consider the theoretical and practical consequences arising, from a constitutional design perspective, from a desire to rebalance liberal-democracy away from its oligarchic form and towards a form that more closely approximates the democratic ideal of political equality.

Thematic Areas of Investigation

This project seeks to address five broad sets of questions, grouped into five thematic areas.

Theme One: The nature, extent and consequences of oligarchic democracy.

This theme addresses empirical questions concerning the nature, extent and consequences of oligarchic democracy. In terms of its nature, we need to understand how oligarchic democracy actually operates: what are the forces and mechanisms by which the rich dominate politics? Should oligarchic democracy be conceptualised mainly as economic inequality of participation in policy making (voting, opportunity to hold office) or as policy outcomes that disproportionately favour the rich and disfavour the non-rich? In terms of extent, how deep and how prevalent is the political inequality between the rich and the non-rich? How does it relate to other inequalities of political power such as those arising from ethnicity, education and gender? What socio-historical or geographical patterns might account for it? Is it getting worse? In terms of consequences, does it actually matter? Does it contribute to a crisis of representation and to the lack of democratic resilience?

Theme Two: Oligarchic democracy in the history and theory of constitutional design.

Secondly, there are questions of a normative, theoretical and historical nature to be asked about oligarchic democracy. How did oligarchic democracy arise? How is it embedded in conservative and liberal models of constitutionalism? Is oligarchic democracy a modern version of the classical ideal of the 'mixed constitution'? Is the disproportionate voice of the rich in political decisions normatively justified, as some conservative and liberal theorists have asserted? What can we usefully learn from models of democratic constitutionalism outside the historically dominant conservative-liberal paradigm, such as socialist, radical, neo-populist and Christian Democratic forms of constitutionalism?

Theme Three: Sub-, extra- and para- constitutional responses to oligarchic democracy.

Thirdly, there are questions as to whether oligarchic democracy is at root a constitutional issue. Perhaps effective responses to oligarchic tendencies can be found without constitutional change. Perhaps statutory and administrative reforms – for example to campaign financing, public broadcasting, lobbying rules, and requirements for public consultation or participatory budgeting – would be sufficient? Perhaps the solution lies in the formation of new civic and social movements or political parties that are specifically designed to strengthen the voice of the non-rich in public decision-making? If so, where have these approaches been undertaken, how successful have they been, what lessons have been learnt, and how transferable are they?

Theme Four: Existing constitutional responses to oligarchic democracy.

Fourthly, there are questions concerning contemporary constitutional responses to oligarchic democracy. Existing constitutions have taken various measures to strengthen political equality, often by putting some of the statutory and administrative reforms discussed under question three upon a constitutional footing – for example, constitutionally mandating the public financing of election campaigns or establishing bodies in the constitution for the representation of diverse economic interests. How effective are these measures? Does constitutionalising them make a difference, either in securing their legal effect or in raising public awareness? Constitutions have also sought to reduce political inequality in respect of gender and, to a lesser extent, ethnicity and disability. Would it be advisable, and desirable, for these measures, such as reserved seats and candidate quotas, to be applied to the non-rich as a class? What existing practices, perhaps pioneered in one or a few jurisdictions, could be more widely adopted?

Theme Five: Potential constitutional responses to oligarchic democracy.

Fifthly, there are speculative questions of constitutional design. These go beyond the sorts of reforms or innovations considered under the fourth question, and include more radical and fundamental changes to the way democracy might work. What innovations are worthy of consideration? What former practices and institutions – for example from pre-modern republican institutions – could usefully be re-established?

How to Apply

Please apply by email to Dr Elliot Bulmer, Constitution Building Programme, International Institute for Democracy and Electoral Assistance. Email: e.bulmer@idea.int Informal enquiries by email are also invited. Applications should be made in the form of an abstract setting out the argument of your proposed paper, noting clearly which of the five thematic areas it addresses. The abstract should be written in English and should be between 350 and 500 words. Please also include a short (250-300 word) author biography.

The deadline for applications is 1200 noon Central European Time 4 January 2017.

Discussion Document: Thematic Areas of Enquiry

This discussion document serves as a framing paper to outline the areas of interest and set forth some of the main issues and questions for consideration. It reflects our present thinking on these subjects and also identifies the gaps and limitations of our knowledge. We seek responses that expand upon, criticise, or otherwise engage with, the themes we identify and that address the questions we raise in this document. However, this document is by no means final or exhaustive; there may be aspects to oligarchic democracy that we do not address here, or mention only in passing, but which are nevertheless relevant to one or more of these themes.

Theme One: The nature, extent and consequences of oligarchic democracy.

This theme encompasses empirical questions concerning the nature and extent of oligarchic democracy and on whether oligarchic democracy contributes to the crisis of democracy or undermines democratic resilience. The first consideration is to explore the reality of oligarchic democracy in what has been described as the ‘New Gilded Age’, discussing the relationship between the rise of oligarchy and the dominance of neo-liberalism.

Neo-liberalism has been the dominant mode of thinking about issues of political economy since the 1970s. Backed by the ‘Washington Consensus’ of the IMF and World Bank, neo-liberalism advocated so-called ‘structural reform’ policies (privatization, cutting income and corporation taxes, deregulation of markets, weakening of trade unions, the liberalization of trade, and the reduction in welfare expenditures, coupled with strict monetary policy designed to keep inflation low). This programme, which has been consistently and aggressively applied in many countries, amounted to the rolling-back of the mid-twentieth century gains of ‘New Dealism’ and social democracy, and the erosion of social and economic *droits acquis*. This has had predictable effects on poverty and economic inequality. Inequality increased in many parts of the world, with more than 80 percent of the world’s population living in countries with widening income differentials by 2007 (United Nations, 2007: 25).

The financial crisis of 2008 exacerbated these trends. Governments stepped in to bail out the losses of private banks, turning private loss into public debt. This sent debt-to-GDP up ratios to unacceptable levels, increasing the cost of public borrowing in many European countries. The severity of the debt crisis, and the depth of the recession, varied from country to country, but in almost all cases the same unpopular remedies, as prescribed by hegemonic neo-liberal economics, were rigorously applied: austerity to bring debt and borrowing under control, financed mostly by cuts to public services, a reduction in transfer payments to the poor, and privatisation of public assets. In some cases, these measures were taken at the initiative of national governments. Elsewhere, they were effectively imposed by the European Union, European Central Bank and the International Monetary Fund. Now, even relatively rich developed countries such as the UK have seen the return of absolute poverty (Sentamu, 2015). Those who are not actually ‘poor’ may experience economic insecurity, worsening working conditions, longer hours, or reduced opportunities for self-betterment. Meanwhile, there has been a concentration of wealth in the hands of the few, with the rise of a super-rich class who have acquired an unprecedented control of the economy (Hacker & Pierson, 2010).

The financial crisis, and the neo-liberal response to it, coincided with the emergence into academic and public consciousness of a body of research examining the social failures of neo-liberal policies. The rigorous application of neo-liberal policies has resulted in ‘increasing domestic unemployment, falling living standards, and profound social and economic inequality’ (Church of Scotland, 2012). Neo-liberalism

led to increased economic inequality (Atkinson, 2015), having predictably catastrophic consequences not only for the poorest in society (Frank, 2004), but also for society as a whole (Wilkinson & Pickett, 2009). Moreover, it is increasingly recognized that inequality is in itself damaging – the experience not only of absolute, but also relative poverty, can stunt one’s life chances and diminish human flourishing, as well as increasing tensions in society (Wilkinson & Pickett, 2009).

Since 2008, many countries have seen the rise of a new populism of the left, which seeks to challenge neo-liberalism with a reenergised (if still inchoate in policy terms) social democracy. This is exemplified by Labour leader Jeremy Corbyn in the UK, Bernie Sanders’ presidential bid in the US, and by the rise of new parties of the left such as Syriza in Greece and Podemos in Spain. Although the electoral success of such left-populist movements has so far been limited, and has arguably been overshadowed by the electoral success of right-populists, the left has had some success in changing the lexicon of politics and broadening the possible boundaries of political ideology. Words that had almost disappeared from political discourse during the three decades of neo-liberal hegemony – class, wages, inequality, solidarity, poverty, oligarchy, workers’ rights – have now returned with new vigour. The political agenda has shifted, at least a little. The liberalism of the last few decades, which has broadly accepted the primacy of market economics and focused on post-material social and lifestyle issues, now has to compete with the return of ‘bread and butter’ issues. The issues that were central to Sanders’ campaign, for example, while novel and radical in our present generation, would have been very familiar to the politicians of a century or more ago:

‘Today, as class inequalities have returned to Gilded Age levels, our political system is beginning to re-fight a striking number of the great political-economic battles of the late nineteenth and early twentieth centuries – over the regulation of banking and credit; the political power of corporations; and more generally, policy responses to heightened economic inequality, both in terms of mounting poverty and economic insecurity and in terms of concentrations of wealth and power at the top.’ (Fishkin and Fortbath, 2014)

One question to be addressed, then, is why, if democracy is supposed to promote the interests of the general public, have democratic states embraced an economic model that seems to reliably to favour the rich, squeeze the middle, and penalize the poor? What accounts for the dominance of neo-liberalism, now that the failure of neo-liberalism to deliver in accordance with its promises has become apparent? In posing this question, we are not raising an ideological objection to neo-liberalism as such, but are suggesting that the continued influence of neo-liberalism, despite its costs and consequences to the non-rich majority, might have something to do with the over-representation of a rich minority, who do disproportionately gain from neo-liberal policies, in decision-making, and that if so this connection is worth investigating. It appears that an oligarchic form of democracy, that is highly responsive to the preferences of rich, and less responsive to those of the non-rich, is at the root of the crisis of representation. As the US philosopher Michael Sandel put it:

‘There is a widespread frustration with politics, with politicians and with established political parties. This is for a couple of reasons; one of them is that citizens are rightly frustrated with the empty terms of public discourse in most democracies. Politics for the most part fails to address the big questions that matter most and that citizens care about: what makes for a just society, questions about the common good, questions about the role of markets, and about what it means to be a citizen. A second source of the frustration is the sense that people feel less and less in control of the forces that govern their lives. And the project of democratic self-government seems to be slipping from our grasp. This accounts for the rise of anti-establishment political movements and parties throughout Europe and in the US.’ (Sandel, 2016).

At the heart of this is a growing (or perhaps it would be more accurate to say ‘re-emerging’) tension between neo-liberal capitalism and liberal-democracy. The modern liberal-democratic state was born from a fusion of democratic and liberal ideas (Bobbio, 2006; Dahl, 2003). During the honeymoon period of the 1990s, when democratic resurgence coincided with transitions to market economies, these ideas were conflated. ‘Democracy and free markets’ were referred to in the same breath, without noticing that they are not necessarily always happy bedfellows. Former theorists had taken a less sanguine and more critical view of the relationship between liberal-democracy and capitalism. Writing in the aftermath of the 1930s Great Depression, the socialist author Harold Laski noted the tension between liberal capitalism, based upon the unequal concentration of private economic power, and liberal-democracy, based in principle on the equal distribution of public political power. This tension, as he saw it, must produce a winner: either a renewed, empowered democracy must constrain the excessive influence of wealth, or the new oligarchy of wealth would undermine democracy (Laski, 1937: 20-47).

The latent tension between liberal-capitalism and liberal-democracy has now become more acute and increasingly obvious. We see, on the one hand, the imposition of a certain type of economic liberalism that, in favouring oligarchy, is anti-democratic in its instincts and effects – for example through corporate-backed trade treaties that appear threaten to limit the ability of the democratic state to regulate markets in the interests of workers, consumers, the environment, and wider social goods. Russian, Chinese and Singaporean models have been presented as attractive alternatives to liberal-democracy for some economic elites, who can enjoy a stable market economy which allows for economic liberalism while using the power of an economically captive authoritarian state to repress social demands and labour rights. We also see, on the other hand, the rise of an illiberal form of democracy that asserts majoritarian populism above civil liberties, human rights and social pluralism (Zakaria, 1997).

The relationship between wealth and power is a close but complex one. At the lower end of the socio-economic pile, it is clear that the lack of sufficient income is an imposing barrier to effective political participation. Poverty is exhausting, demoralizing, boring, frightening and disempowering. Those who are worried about where their next meal or next month’s rent is coming from are hardly in a position to become informed, active voters. It is easier for a relatively prosperous middle class citizen to pay a babysitter, jump in the car, and go to a local planning meeting, for example, than it is for a poor citizen who has to juggle two jobs, rely on family for child care, and take public transport. Indeed, we find that the poorest citizens are less likely to vote than their richer fellow-citizens (in many cases they are also less likely to be registered to vote, which may be a product of a precarious housing situation).

These barriers to participation are particularly noticeable in the composition of elected assemblies. During the first half of the nineteenth century, the rise of the mass-membership party and the sponsorship of candidates by trade unions and co-operative societies, created a slightly more level playing field for working class candidates. In the UK, for example, the Labour Party was founded expressly to give representation to the working class, who, although recently enfranchised, had until that point only been able to choose between candidates representing the liberal and conservative wings of the ruling class. Much of this social structure which once supported the representation of the working class has now disappeared (Manin, 1997). Social democratic and Labour parties across democratic states have increasingly come to represent the old liberal parties of the nineteenth century – centrist in outlook and middle class or above in their sociological composition. In the words of sociologist and anti-poverty activist Bob Holman (2016):

‘Labour is now controlled by very similar people to those in coalition, people from Oxbridge and public schools. These people are drawn from this tiny fraction of this country. They don’t understand, have experience of, or live among the poorest, so there’s so little chance of change. The number of working class MPs in parliament as a whole has declined dramatically. Can you name an MP who lives in a deprived area?’

However, threats to democracy come not only from poverty, but also from excessive concentrations of wealth. Writing in 1653, James Harrington identified the connection between power arising from private wealth (*dominium*) and power arising from public office (*imperium*). Maintaining a republican polity, in

which *imperium* is widely distributed, would require restraints on the excess of wealth, chiefly through an Agrarian Law that would limit the inheritance of land, in order to ensure a correspondingly wide distribution of *dominion* (Harrington, 1997). Machiavelli likewise identified the ‘gentlemen’ as a threat to republican liberty (Machiavelli, 1983) and indeed witnessed the destruction of republics at the hands of rich *signori* who used their private wealth to buy access to public power, and then used public wealth as a form of self-enrichment, until they had established monocratic regimes (Waley, 1988). The exclusion, marginalisation and under-representation of the very poor, and of the working class in general, is therefore one aspect of oligarchic democracy that this project seeks to explore.

On the other hand, there is also a risk posed to liberal-democracy by the very rich, who may be able to use their wealth to dominate of political life. Sometimes, they do this directly, using their money to run for office. Their access to vast resources gives them advantages over those who must devote more of their energies to fund-raising. Since they are not under obligation to donors, they can change policy positions more easily and can even pose as ‘outsiders’ or populists challenging a tainted political system. The very rich may also have their own networks of patronage, outside of party or state structures, that enable them to cultivate a following.

More often, the rich may have an indirect influence through political donations and lobbying, which enable them to install leaders who are responsive to their demands and to influence the policy agenda in accordance with their own interests. Money plays an important role in electoral politics. In the United States, in particular, political action committees contribute vast sums of money to political candidates to get them elected into office. According to the campaigning group ‘Let’s Free Congress’, which seeks to free politics from the influence of big money, less than 1% of Americans contribute to 68% of all election funding (Let’s Free Congress, 2016). These figures suggest that economic elites control political candidates through their large campaign contributions and therefore have a disproportionate influence over politics. In addition, the rich may disproportionately influence politics and public debate through ownership of, or access to, the media, and through privately funded think tanks that support policy options favourable to the rich.

The newer and perhaps more fragile liberal-democracies are also affected. Many Eastern European states have reached a point of democratisation where competitive elections are held and basic rights are for the most part protected, but where there is still a prevailing sense that politics is corrupt and oligarchic in practice. For example, while the proximate cause of the Ukraine crisis was a foreign policy issue, this built on an underlying satisfaction with a political system that, despite twenty years of competitive elections, was seen as favouring the few and not the many. In Latin America, frustration with the ability of traditional democracy to ‘deliver the goods’, in terms of economic and social well-being, has led to the rise of neo-populist variants of democracy in such countries as Venezuela, Bolivia and Ecuador (Wolff, 2012).

Finally, the dominance of economic elites is not confined to domestic borders. In the globalized era, technology and the dissolution of borders have allowed global economic elites to influence policy even at the transnational level. International trade agreements, and international organisations - including WTO, NAFTA, IMF and the World Bank - have assumed political functions in regulating various aspects of global trade and in setting external limits on the ability of elected governments to regulate economies in the national interest. The negotiation of these trade instruments and international agreements, and the bodies set up to administer them, provide opportunities for international financial and corporate interests to shape policies that have impact at the domestic level, but in forums that are often immune from public scrutiny.

Possible Questions to Consider:

- How deep and how prevalent is the political inequality between the rich and the non-rich?
- How does it relate to other inequalities of political power in society such as those arising from ethnicity, education and gender? In particular, how well do measures taken to reduce gender inequality in representation and participation reach women of lower socio-economic status?

- What is the relationship between the under-representation and marginalisation of the very poor, and the over-representation and marginalisation of the very rich? How connected are these two phenomena?
- What socio-historical or geographical patterns might account for incidences of oligarchic democracy?
- How does oligarchic democracy differ, sociologically, between developing, middle-income and high-income countries?
- Is oligarchic democracy getting worse, or are we just more aware of it?
- How does oligarchic democracy actually operate – what are the forces and mechanisms by which the rich dominate?
- If the rich have a disproportionately large, and the non-rich a disproportionately small, influence over public decision making, does this actually matter, in terms of making a difference to policy?
- How firm is the connection outlined between oligarchic democracy and neo-liberalism?
- If the non-rich tend to vote against their own economic interests, is the adoption of policies that economically harm the non-rich really a consequence of democracy in action, not of oligarchy?
- What is the connection between oligarchic democracy and the notion that representative democracy is in crisis, or lacks resilience?
- How does criticism of oligarchic democracy relate to other forms of anti-elitism (e.g. opposition to experts) and to the loss of trust and deference in society?
- Does oligarchy pose an existential threat to liberal-democracy itself?

Theme Two: Oligarchic democracy in the history and theory of constitutional design.

This thematic enquiry examines different ideological and theoretical responses to oligarchic democracy in modern constitutional history (that is, since the American and French revolutions). It draws upon a typology of constitutions developed by Roberto Gargarella in *The Legal Foundations of Inequality* (2010). Gargarella, drawing primarily on Latin American examples, identifies three constitutional archetypes: conservative, liberal and radical constitutions. Conservative constitutions are orientated around a commitment to the preservation of order and authority; they seek to protect existing hierarchies of power and to maintain traditional social values and practices (Gargarella, 2010: 90-152). Liberal constitutions are concerned, primarily, with the protection of individual rights and the restriction of state power, whether this power is used for conservative (tradition defending) or radical (inequality removing) ends (Gargarella, 2010: 153-214). Radical constitutions are based, above all, on a principle of democratic populism; they seek to elicit and to apply the will of the people with a minimal degree of filtering or restraint (Gargarella, 2010: 9-89).

Gargarella's typology focuses on the purpose, ideology and ethos of constitutions, rather than their structural features. It therefore cuts across other forms of classification, such as whether a state is unitary or federal, or has a presidential or parliamentary form of government, or a majoritarian or proportional electoral system. However, Gargarella argues that certain constitutional provisions, both in terms of structure and substance, generally follow from each of these models. Thus conservative constitutions typically concentrate power in the executive branch, while weakening legislatures, courts, sub-national authorities and other potentially competing centers of power. They minimize opportunities for direct, public participation, while adopting a minimalist approach to rights, which allows political authorities wide discretion in restricting rights on grounds of state security or to prevent assaults on the traditional moral order. Liberal constitutions are also dubious of the role of public participation, which they see as a route to majoritarian populism. They typically provide for judicially-enforced individual rights, for extensive checks and balances, a separation of powers between different branches of government, and often a federal division of powers between national and sub-national bodies.

Gargarella discusses the 'fusion' of liberal and conservative constitutional ideas that gave rise, in Latin America, to a period of relative institutional stability from the 1880s until the rise of populist mass politics challenged it in the interwar era. An earlier but similar fusion of liberal and conservative ideas – and a rejection of radical constitutionalism – can be seen in European constitutions of the early nineteenth century, roughly from the restoration of the Bourbons to the French throne in 1814 to the constitutions produced by the 1848 revolutions. Such a fusion is possible because, although differing on questions such as individual autonomy, religion-state relations, and the centralisation or decentralisation of power, liberal and conservative theorists share an essentially oligarchic conception of government. Both are wary of the people, and both believe – albeit for different reasons – that government should be directed by an elite class. Seen as a liberal-conservative fusion, oligarchic-democracy was at first a deliberate design choice of property-owning elites who, in the aftermath of the American Revolution, the French Revolution, and the 1848 Revolutions, feared that too much democracy would harm their interests. If these constitutions provided a basis for oligarchic democracy, it was not because an intended democracy had been corrupted, but because an intended oligarchy was forced, over time and in the face of social and political pressure, to make some compromise with democracy.

For conservatives, money and power go together in a traditional hierarchy of power. It is assumed that the rich have a right to rule, because they alone have a long term vested interest in society; property holding is associated, in the conservative mind, with competence and responsibility. Only the propertied (those whose ownership of productive property, and rentier lifestyle, enabled them to live without labour) were deemed to have the culture, leisure and educations necessary to rule. Only by concentrating power in a class of 'gentlemen' could civilisation be protected from the great unwashed. We see such views animating the Federalist party in the development of the US Constitution: 'Conservative delegates among the framers – later the core of the Federalist Party – had feared that if ordinary people were given ready

access to power they would bring about policies contrary to the views and interests of the more privileged classes, which, as the conservative delegates viewed their interests, were also the best interests of the country' (Dahl, 2003: 24).

Subsequent generations of conservatives may have come to accept procedural democracy. Some did so reluctantly, as an expedient that could not be avoided. Others saw at least a basic level of procedural democracy as a powerful source of legitimacy for those in government. For conservatives, however, a trusteeship model of democracy prevails. The power to decide policy is still to be concentrated at the top and subject to as few constraints as possible. Opportunities for democratic action should be few, with long terms of office, less inclusive electoral systems, centralised decision-making, and a clear focus on the discretionary authority of the executive. In so far as rights are protected, primacy is given to property rights, rather than civil and political rights that could be used to challenge those in power, or socio-economic rights that could result in a redistribution of resources away from the elite. The privileges of particular classes – aristocrats, landowners, priests, the military – may also be protected, partly in order to bind these natural leaders, moral guardians and praetorians closely to the centre of political power and partly to guarantee their corporate influence over a polity and society that might otherwise go dangerously astray. The art of conservative constitution-making, then, is to use a minimal procedural democracy as a way of legitimating the state, while protecting elites against the levelling desires of the people.

For classical liberals and neo-liberals, likewise, money and power go naturally together. They are less concerned than conservatives with questions of fitness to rule, but equally concerned to avoid the levelling effects of democracy. The priority for classical and neo-liberals is to maintain a sphere of individual sovereignty that exists outside the control of the state, particularly with regard to property rights and freedom of contract. They value liberty, but do not conceive of liberty in its positive sense, as active participation in the public life and decision-making of the community; rather, they uphold liberty in narrow and mostly negative terms, primarily as freedom from state interference in social, cultural and economic matters. The state may be a realm of formal legal equality, but its scope is limited, and its influence on the very unequal realm of social, cultural and economic life should be minimal. Such liberals may be sceptical or at best ambivalent about democracy, but strongly committed to the principle of limited government. They regard the constitution as a means of, firstly, protecting private rights, and secondly of frustrating the exercise of public power. For this reason, they favour strong judicial review, enumerated (as opposed to plenary) powers for legislatures, federalism, strong bicameralism, separation of the powers between executive, legislative and judicial branches of government, and other impediments to majority rule, all of which make it more difficult people to channel economic grievances and inequalities into effective political action (Gargarella, 2010). These ideas have had a subtle but powerful resurgence under neo-liberalism, as privatisation, deregulation, and the 'hollow state' have re-imposed narrow limits on the scope of democratic public action (Marquand, 1997).

The third constitutional archetype identified by Gargarella is radicalism. Radical constitutionalism is committed to the principle of popular sovereignty, embedded in a vision of democracy in which the collective political will of the people is emphasised. Radical constitutions typically concentrate powers in elected legislatures – preferably unicameral ones, they are wary of second chambers and other checks and balances that could thwart the will of the popular majority. In so far as radicals agree that elected leaders representing the majority may require some external control, they prefer popular checks, through direct public participation, recall votes and the use of initiatives and referendums. Radical constitutionalism has also tended to promote a broad range of rights, including social and economic rights and rights enhancing political participation, but has been suspicious of enshrining the sort of rights that restrict the scope of democratic politics. Some radical constitutionalists have treated judicial review of the constitutionality of legislation with particular scepticism, because of a fear that unelected judges representing the legal elite will use the courts as a means of frustrating the decision-making power of the popular majority in favour of private property rights or other established private interests (Gargarella, 2010; 2014).

Radical constitutionalism had a brief heyday in the immediate aftermath of the American and French revolutions. In the United States, Thomas Paine and Thomas Jefferson were amongst its chief supporters. The 1776 Constitution of Pennsylvania, one of the most innovative texts of its time, was a

prime example of the first generation of radical constitutionalism, with a wide suffrage, a unicameral legislature, and a preference for popular rather than inter-institutional checks and balances (Wood, 1969). These popular checks included annual elections, a requirement for bills to be circulated for public comment before being voted upon, and the direct popular election, at seven year intervals, of a 'Council of Censors' whose functions combined those of an impeachment tribunal, a court of auditors, an administrative ombudsman, and a constitutional court. Thomas Jefferson's 1776 draft Constitution for Virginia included a provision abolishing entail and mandating the equal distribution of estates between all heirs, together with a provision enabling landless citizens to obtain 50 acres of unsettled government land; together, these provisions were intended to maintain an agrarian republic based on a wide and broadly egalitarian distribution of productive property. The distribution of property in society was regarded as an issue of constitutional importance, to be handled at a constitutional level, if a republic was to be secured.

Such experiments in radical constitutionalism were short-lived. After the initial phases of the revolution, more oligarchic constitutions, drawing on liberal and conservative ideas were to prevail. US Constitution in the Americas and the post-Napoleonic French Charter (1814) in Europe were to set the parameters for future constitutionalism on both sides of the Atlantic for the following century or more (Lane, 1996). These liberal-conservative constitutions prioritized the protection of private property rights and carefully excluded 'the masses' from exercising the sort of effective political power that could threaten the class interests of the rich.

However, constitutional design is not a static art. The period of time – a little less than a century – that separates, for example, the Italian constitutional *Statuto* of 1848 from the 1946 Constitution of Italy, marks an era of intense transformative development both in constitutional technology and constitutional thought. The *Statuto* of 1848 is a typical product, on the level of constitutional thought, of the liberal-conservative fusion. It sought to establish representative and deliberative parliamentary bodies that favoured the richest and most influential sections of the population and a system of limited rights that would provide the basis for a liberal-capitalist society operating under the rule of law, while concentrating leadership in a unitary government headed by a cabinet that was nominated by the king (Adams & Barile, 1972; Thornhill, 2011). The 1946 Italian Constitution not only incorporated several new constitutional technologies – a constitutional court, referendums, universal suffrage, proportional representation, a socio-economic council, positive parliamentarism, and a figurehead presidency – that did not exist a century earlier, but it also reflected a shift in expectations about what a constitution should achieve (through the inclusion of socio-economic rights, for example). The same contrast between two constitutional texts can be found in other countries over a similar period. One may compare, for example, the French Charter of 1814 with the Constitution of 1946, the Prussian Constitution of 1852 with the Basic Law of the Federal Republic of Germany of 1949, the Imperial Japanese constitution of 1889 with that of 1946, or the 1853 Constitution of Argentina with that of 1949. In each case we find an increase in the democratic features of the Constitution: expansion of the suffrage from limited to universal and a greater emphasis on effective but responsible democratic government. In many cases, we see the incorporation of a wider range of socio-economic rights, reflecting the acceptance by the state of broader socio-economic responsibilities – as found, for example, in the 1925 Constitution of Chile and the 1938 Constitution of Bolivia. Even in countries which had a more stable constitutional journey from the mid-nineteenth to the mid-twentieth century, we see similar trends. The Constitution of Belgium, for example, was transformed between 1893 and 1922 from a liberal-conservative oligarchic constitution, with a narrow tax-payer franchise and high property qualifications for public office, into a more democratic constitution characterised by proportional representation and universal suffrage (Fitzmaurice, 1996).

In those countries where universal or near-universal suffrage was established relatively early, it soon became apparent that the right to vote, in itself, would not guarantee a state that was inclusive of and responsive to the interests of non-elites. The power of oligarchy continued to operate – through 'robber barons' with links to politicians, campaign donations, lobbying and the development of 'machine politics' – a system of organised corruption that kept real power in the hands of those who could afford to buy or hire it. It was in this context that the Progressive movement arose in the United States, becoming an influential political force during the late 19th and early 20th centuries. The Progressives drew a connection

between socio-economic conditions that condemned many to labour in squalor and poverty while robber barons engrossed the profits with a political system dominated by the ‘trusts’, the corporate lobby, and the corrupt machine politicians of the cities. They argued that policies favouring the rich were a product of political systems that enabled the rich to monopolise political power for their own class. The Progressive response was to seek to make political institutions more inclusive, less corrupt, and more effective. The US Constitution is notoriously difficult to amend, but much was achieved, notably the direct election of Senators and the authorisation of a federal income tax. At the state level, the Progressives introduced direct democracy measures such as the referendum and the citizens’ initiative to State constitutions and promoted the recall procedure for removing incumbents.

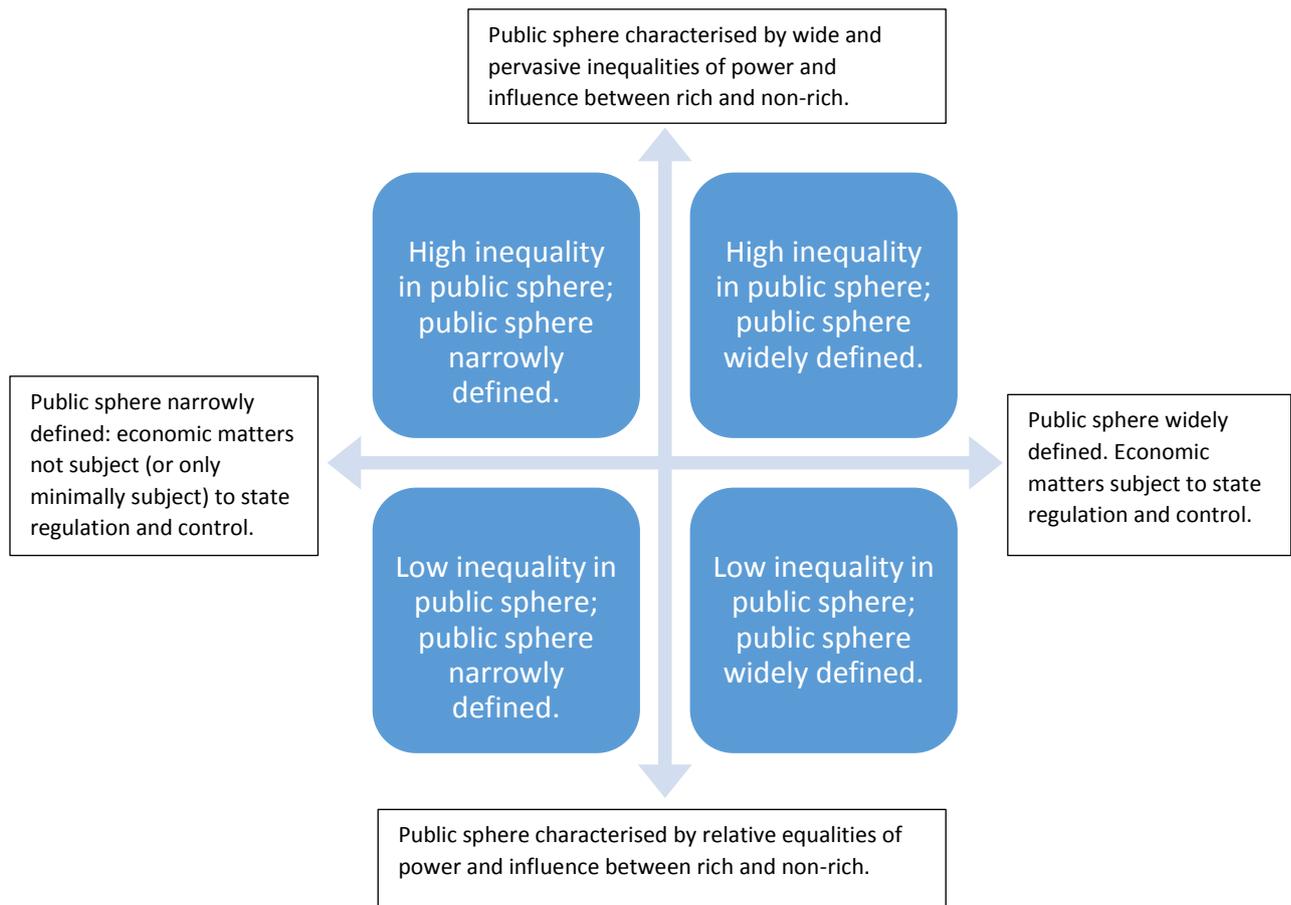
The contrast between radical-progressive constitutionalism and liberal-conservative ideas was also apparent in the judicial sphere, and in particular on the question of whether judicial review should set substantive limits on the scope of the state’s regulatory power over economic and social life. The radical argument is that democracy can operate only if it has the scope to do so, including ‘not only the ability but also the essential obligation to shape markets—through moral choices and government action—to create outcomes good for our communities’ (Liu and Hanauer, 2016). Constitutional provisions that had the effect of limiting the scope of democracy over the market and over the economic life of the nation could therefore be considered as pro-oligarchic provisions, since they place obstacles in the path of essentially egalitarian collective public power and leave economic affairs to the free play of inequalitarian private power.

In a series of US Supreme Court decisions, including such infamous cases as *Lochner v. New York* [1905] and *Hammer v. Dagenhart* [1918], the court limited the power of both state and federal legislatures to regulate working conditions. In other words, the court took the view that the constitution prevented the people, by means of legislative action in the public sphere from exercising collective power that would affect the lives of citizens. The US Supreme Court began reversing these decisions in the wake of the Great Depression, the New Deal, and the clear public demand for a more activist and interventionist government (Ackerman, 2000). President Franklin D. Roosevelt even went so far as to propose a ‘Second Bill of Rights’ which would have included social and economic rights, and presumably have empowered Congress to legislate to realise those rights – although this Second Bill of Rights never made it beyond the rhetorical stage and was never made the subject of a formal constitutional amendment (Sunstein, 2006).

In Australia, in contrast, the Constitution was amended in 1946 to empower the federal Parliament to legislate for ‘maternity allowances, widows’ pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services [...] benefits to students and family allowances’ (Sect. 51, xxiii-A). Although these provisions did not create a right to such benefits, they did grant the government the power to act, removing constitutional obstacles to the introduction of such benefits by ordinary law. The inclusion of these provisions may also have created an implicit expectation that the government had a duty to act in this sphere, making such policies more legitimate and harder to retreat back from. Conversely, provisions such as those in the 1980 Constitution of Chile, which entrench economically conservative fiscal and economic policies, making it very difficult for the state to nationalize industries or to provide public services (Bulmer, 2015), can be seen as pro-oligarchic, since they restrict the scope of democratic politics and increase the scope of private wealth and power.

Thus the treatment of oligarchy in constitutions could perhaps be theorised along two dimensions, as shown in Fig. 1 below. The first dimension concerns the degree of substantive equality of power and influence in the public sphere. The second concerns the boundaries between the public sphere, characterized by at least notional equality, and the private sphere characterized by inequality. Provisions that extend substantive equality of power and influence in the public sphere are anti-oligarchic, since they prevent oligarchic interests from exercising *imperium* – that is, public power (Pettit, 1997; Harrington, 1997). Provisions that keep control of resources and policy areas in the public sphere (for example, by keeping natural resources under public control rather than in private hands), or that prevent the bracketing off of economic relations in a realm of private activity in which the state may not tread (for example by regulating labour relations) are also anti-oligarchic, since they prevent the oligarchy from exercising *dominion* – that is, the power arising from private ownership.

Figure 1: A Possible Two-Dimensional Conceptualisation of Oligarchy



These historical reflections on the ideology of constitutions are significant for the overall argument and purpose of the project, since the story told by these constitutional developments helps us to address the question of whether and how developments in constitutional design can effectively restrain oligarchy and strengthen the voice and influence of economic non-elites. The story that emerges, in country after country during this period, is of a liberal-conservative, deliberately oligarchic constitution that gives way, either through revolutionary or evolutionary change, to a different type of constitution – one that is more democratic and more collectivist. These new constitutions are less concerned with the limitation of state power and more concerned with placing state power in the hands of the popular majority, and with using that power to bring about progressive socio-economic change: from liberal-conservative to radical ideas.

In part, this change was a response to the so-called ‘social question’ – the brute fact that the liberal-conservative oligarchic state, combined with industrialisation, urbanisation, and the decline of pre-capitalist modes of production (such as artisan workshops) and relations of production (such as the guilds), brought about low living standards for many. The result was not only poverty, overcrowding, squalor, disease and misery, but also a loss of autonomy, a loss of place and culture, and a dehumanising sense of being voiceless, alone and uprooted – alienation in a multiplicity of forms. The working classes were not slow to realise that their grievances were not merely the result of blind economic forces, but were caused and compounded political decisions. Working class radical movements, such as the Chartists in the UK, concluded that constitutional change would be needed if those who had hitherto been excluded from power were to share in it. The liberal-conservative oligarchic was criticised as serving the private economic interests of a propertied elite, to the exclusion of the interests of the majority. The overwhelming objective of the non-elite, propertyless classes, therefore, was to gain control over the state – chiefly, although not only, through expansion of the suffrage and the responsibility of political leadership to the people – so that the state could then carry out the work of enforcing policies that would improve working and housing

conditions, shift tax burdens from the poor to the rich, legalise trade unions, and create various forms of social assistance or national insurance provision.

Perhaps the harshest criticism of the liberal-conservative constitutional order during this period came from the Marxist tradition. Marx was not a constitutional thinker. He tended to downplay the role of institutions as mere 'superstructure' on top of class dynamics. From the outset, therefore, Marxist thinkers tended to be very sceptical of the capacity of representative democracy to be reformed in ways that would bring about the radical transformation they desired. The attitude to constitutional questions was one of the most important sources of disagreement between the communists, on the one hand, and the democratic socialists and social democrats on the other. The latter generally sided with progressives in promoting a form of radical, democratic constitutionalism that emphasised popular sovereignty, and they sought to obtain public office by winning elections held under universal suffrage. Communists, in contrast, considered that 'bourgeois parliamentarism', in which the government was merely an 'executive committee of the ruling class', was fundamentally incapable of being democratically reformed. It had to be overthrown and replaced by a new type of regime - the 'dictatorship of the proletariat', in which competitive party politics would be displaced by the vanguard leadership of the communist party. This alone would bring about eventual transformation into a classless Communist eternity in which the state, shorn of its function as a tool of the ruling class, would simply 'wither away' (Marx and Engels, 1848). That did not happen, but the communist tradition did result in some interesting innovation in constitutional design - most of which has been ignored by scholars, because of the non-competitive, single-party nature of communist regimes and their inability to sustain open societies or the rule of law. Nevertheless, despite these failures, we are interested in papers that reassess the socialist tradition of constitution-making, looking perhaps at some of the early revolutionary constitutions and constitutional proposals, adopted before the consolidation of one-party tyranny.

Aside from the radical, progressive and socialist traditions of constitutional thought, the other major ideological response to the liberal-oligarchic state during the period from the mid-19th to the mid-20th centuries came from Christian Democracy. The Christian Democratic tradition is little studied in English-language literature, since its impact on party politics and public policy in the Anglosphere has been limited (Hanley, 1996). Yet Christian Democratic thought has developed a sophisticated set of constitutional principles which have been very influential in continental European democracies (Fogarty, 1953). During the interwar period, the 1921 Constitution of Poland (Brzezinski, 2000) and the 1937 Constitution of Ireland (Keogh and McCarthy, 2003) were both based on Christian Democratic constitutional thought - indeed, these two texts may be taken almost as definitive expressions of that thought. However, the high-point of constitutional influence for Christian Democracy occurred during the democratic refoundation of Western Europe after the Second World War. The French Constitution of 1946 (Williams, 1954), and the Italian Constitution of the same year (Adams and Barile, 1972) were directly shaped by Christian Democratic principles, as well as being influenced by social democratic and left-liberal ideas. In other continental European countries, including the Netherlands, Luxembourg and Austria, Christian Democratic parties have been major parties of government in the twentieth century and, while not perhaps as influential at moments of constitutional founding, have been influential in shaping the practical working and development of the constitution.

Christian Democracy offered a sophisticated, theo-politically grounded critique of the liberal-conservative constitutional order, a coherent set of constitutional values or principles on which to base its own preferred constitutional order, and, withal, a coherent set of constitutional institutional prescriptions. Concepts such as 'sphere sovereignty', holistic personalism (as opposed to reductionist individualism), solidarity and subsidiarity - rooted in a Thomist Christo-Aristotelian view of the purpose and nature of the state as a servant of the common good - all intersected with a renewed commitment to the liberal-democratic state (as opposed to Catholic integralism or various forms of interwar authoritarian institutions) to produce a distinctively Christian Democratic constitutionalism. This was characterised by proportional representation, parliamentarism, regionalism or federalism as an expression of territorial subsidiarity, generous socio-economic rights which were nevertheless structured around the traditional family, and a

co-operative policy making style which was inclusive of ‘social partners’ in the form of trade unions, professional associations and business.

The liberal state (following Gargarella’s terminology) sought to divide public power and to limit it, in order to protect the autonomy of an extra-political sphere of personal, social and economic life. This was rooted in beliefs about the self-sufficiency of social life and of markets, which needed only to be left alone by the state in order to flourish. The radical or progressive state sought to unite public power, under democratic leadership, in order to use public power to reshape social and economic relations for the benefit of non-elites, but its understanding of the nature of both ‘democracy’ and ‘the people’ was often crudely majoritarian. The Christian Democratic state, in contrast to both of these approaches, sought to share power – to include as many as possible in the decision-making process and to achieve the common good not through the crude application of majority force, but by a commitment to negotiation and compromise. Unlike the liberal state, Christian Democracy envisaged an active role for public authorities in promoting the ‘good life’ of its citizens through the regulation of markets, the provision or promotion of public goods and services, and the redistribution of wealth. Unlike the radical, progressive or socialist state, however, it attempted to distribute power both within the state, to different levels of government, and between the state and other institutions of solidarity, such as the family, the religious community, and the trade union or professional association. All this was underpinned by a concept of natural law which made Christian Democrats view popular sovereignty in less absolutist terms, and made them less hostile than radicals to judicial review (Kselman and Buttigieg, 2003). We are interested in papers examining the Christian Democratic tradition in constitutional design, and particularly in those assessing whether the insights of that tradition are capable of being universalised, outside of their specifically Christian context.

This necessarily brief survey of ideological and institutional constitutional developments between the middle of the 19th and the middle of the 20th centuries, gives rise to two points of fact that are relevant to this project. The first point is that oligarchic democracy was, at least initially and at least in part, a deliberate design choice for constitution-makers seeking to protect the interests of elites. A fusion of liberal and conservative ideas combined to produce constitutions in which property qualifications for office, limited suffrage, and various other institutional means, were used to limit democracy and promote oligarchy. This raises the question of to what extent oligarchic democracy represents a deliberate design choice by elites today. The second point is that a variety of ideological and institutional responses to liberal-conservative oligarchic constitutionalism arose, drawing the connection between the dire socio-economic conditions of the majority of the people and their exclusion from political power, and seeking ways in which to incorporate them in the decision-making process.

From these two points of fact, two further tentative conclusions follow. Firstly, that the constitution matters, and that those seeking to challenge and overcome the oligarchic domination of politics should consider – amongst a range of sub-constitutional legal and policy provisions – constitutional solutions. Secondly, that there are many possible constitutional variables to consider in designing a constitution that shift the balance in favour of democracy and away from oligarchy: universal suffrage can perhaps ensure that a state is an oligarchic democracy and not a pure oligarchy, but more detailed and innovative constitutional design may be necessary to strengthen the democratic aspect and weaken the oligarchic aspect.

Possible Questions to Consider:

- How valid are conservative and liberal defences of oligarchy? Is it possible to have too much democracy, with oligarchy being a useful and necessary corrective against popular passions?
- Should we return the classical and renaissance ideal of the ‘mixed Constitution’, in which a deliberate melding of, and balance between, democratic and oligarchic elements is achieved?
- What relevance do 19th and early 20th century critiques of liberal-conservative constitutionalism have for today’s constitution-makers?

- Is the criticism of legal constitutionalism from the left (e.g. Hirschl) really only a criticism of liberal-conservative constitutionalism? Do these same objections apply to radical models?
- Do alternative models of constitutionalism - such as the socialist model - have anything to teach today's anti-oligarchic democrats?

Theme Three: Sub-Constitutional, Para-Constitutional and Extra-Constitutional Responses

The notion that we face an economic crisis of neo-liberalism and a political crisis of representative liberal-democracy, and that these crises may be linked in some way, while still debatable, is no longer outside the mainstream. It is not altogether clear, however, that this is necessarily a constitutional crisis – a crisis to which constitutional change is an applicable answer. An underlying assumption of this project is that institutions in general, and constitutions in particular, do matter. That is to say, firstly, that the problems of economic inequality, economic marginalization and poverty – whatever their other causes may be – are in many cases a product of policy decisions arising from institutional and constitutional mechanisms that give the rich too much, and the non-rich too little, power. Secondly, we do not see this as a mere accident, but as a logical and perhaps necessary consequence of the prevailing constitutional forms of contemporary democracies, meaning that any deep and lasting solution must address the constitutional root of oligarchy.

However, these basic assumptions need to be challenged. It may be that the solution to oligarchic democracy does not need new constitutional thinking, but only responses worked out at sub-constitutional, para-constitutional, or extra-constitutional levels.

By **sub-constitutional**, we mean the laws, regulations, or administrative practices, which have been or could be adopted under existing constitutional forms. While leaving constitutions essentially unchanged, these could perhaps transform the nature and practice of existing institutions in ways that restrain oligarchy and empower the non-rich, for example through the regulation of political donations and expenditures, the public funding of political parties, and the equitable regulation of public service broadcasting.

Although we anticipate some of the shortcomings and limitations of such sub-constitutional approaches (because the lack of constitutional entrenchment enables incumbent majorities, in principle, to amend the rules for their own advantage) we are nevertheless interested in exploring situations where this approach has been adopted, to see under what conditions it is likely to work. Perhaps (although this is speculative) sub-constitutional approach work if there is a board consensus amongst the political parties to the effect that the rules and procedures restraining oligarchic power are legitimate and important, giving them a quasi-constitutional character which informally protects them from partisan amendment.

We are also interested in the limits of this approach. For example, while limits on campaign spending, public funding for political parties, disclosure requirements, and equitable access to public broadcasting, could be in principle regulated at the sub-constitutional level, courts may nevertheless frustrate such legislative efforts unless there is a suitable constitutional foundation for them, perhaps in the form of a permissive provision enabling the legislature to regulate such matters. More radical changes, for example, altering the composition of legislatures through the establishment of quota systems or reserved seats for economically excluded groups, are unlikely to be successful unless grounded in constitutional provisions.

By **para-constitutional** institutions and practices, we refer to all those mechanisms and processes, some experimental, existing within and alongside our current constitutional models, that can augment and complement existing models of representative democracy with various forms of inclusive and participatory decision-making (Smith, 2009; Escobar, 2014; Fishkin, 2011). These may include, but are not limited to: (i) primary elections, which have increasingly been used to select party leaders in parliamentary democracies, and other means of promoting internal party democracy; (ii) ‘quasi-direct democracy’, by which candidates for elective office pledge to vote as determined by their constituents in on-line polls; (iii) citizens’ juries or ‘mini-publics’, established to discuss and advise on particular policy decisions; (iv) participatory budgeting processes. For the most part, where these institutions or processes exist, they do so at a sub-constitutional level. We are keen to receive comparative case studies and analytical reports on the effectiveness of the various mechanisms of participatory democracy that have been experimented with in various countries. We especially encourage the submission of papers that evaluate these participatory institutions and practices: (i) from a specifically anti-oligarchic perspective, focusing on the ways in which they may reduce (or fail to reduce) political inequalities between the rich and the non-rich; and (ii) from a

specifically constitutional perspective, which examines the consequences, advantages, and disadvantages of placing these institutions, which now exist para-constitutionally, on a clearer constitutional basis.

Thirdly, there are questions concerning changes to the **extra-constitutional** political conditions that may help increase the power of the non-rich in society in general. We particularly welcome submissions on the constitutional role of trade unions (which have historically been a major counter-weight to the power of the rich) and on the rise of pro-poor neo-populist parties and new anti-oligarchic social movements. In many jurisdictions, trade unions were able, during the period from the late 19th to the mid-20th centuries, to establish themselves as ‘social partners’ whose views had to be taken into consideration by governments. Sometimes, they even had ‘tribunate’ functions, since they were effectively able to veto policies, at least within the sphere of economic policy and industrial relations. Trade unions were able to use this position, working together with allied political parties, to extract concessions from the economic elites, which helped to improve the living and working conditions of the working class as a whole. Policy changes, technological changes, and changes to working patterns, have widely diminished the political power of unions, leaving working people without a champion or defender who can act for them as a class in the political sphere. Is it possible to replace the influence of trade unions with new forms of social and political mobilisation amongst the non-rich? Are new parties and new social movements – such as Podemos in Spain, the Five Star movement in Italy, and the Pirate Party in Iceland, a sign that ordinary mechanisms of representative liberal-democracy can be self-correcting, and can provide platforms for non-rich citizens to challenge the power of rich elites, or is neo-populism itself a threat to liberal-democracy?

As well as trade unions and political parties, churches once provided hubs for public mobilization as well as places for the exercise of social solidarity across classes. Does the secularisation of society in many established democracies, which have falling rates of religious attendance and observance, have some connection to the rise of oligarchy: does that lack of a public space at the heart of local communities, which transcends class and socio-economic differences, make it more difficult to mobilize people against the capture of the state by economic elites – and, if so, can this be overcome through new forms of ethically-rooted social solidarity?

Finally, there are questions of public ethics. Perhaps the difference between a healthy, civic, liberal-democracy (a system of government in which responsible representative leaders respond to the real needs, interests and informed opinions of the public in order to hold power and use it for the public good, subject to on-going public scrutiny and debate) and a populist oligarchy (a system in which unscrupulous greedy professional politicians manipulate the fears, prejudices and baser instincts of the people in order to hold power and use it for the benefit of a very rich ruling class, subject to deals done with corporate lobbyists and media barons) is not, at root, a constitutional issue, or even an institutional issue at the sub- or para-constitutional level, but an extra-constitutional issue, which depends on the wider political landscape. This wider landscape includes questions of leadership and political ethics. The difference between these two visions is that, in the former, the political class governs with a sense of responsibility for the public good, whilst in the latter the political class is willing to treat the public sphere as if it were a tradable commodity. If so, instead of constitutional tinkering, ought we to be putting our energies into the moral formation of a political class who will take their duties and responsibilities to the public more seriously? In the words of John Milbank (2012):

‘[A]n egalitarian democracy actually requires a hierarchy both of values and of persons of excellence. Otherwise, money and sophistry co-conspire to destroy it, as they have in recent years. Democracy can only be sustained when there is a parallel, non-democratic concern with *paideia*—the formation of good character—which links talent to virtue and both to positions of appropriate social influence. Without the extra-democratic inculcation of character, democracy cannot enter into the debate about the good, which is the only legitimate and non-corrupt debate that can be held.

Possible Questions to Consider:

- Can effective responses to oligarchic tendencies can be found without needing constitutional change?
- What are the limitations and shortcomings of reliance on statutory and administrative reforms (for example to campaign financing, public broadcasting, lobbying rules, etc) rather than relying on constitutional reform?
- What specific mechanisms for public participation alongside representative process and between elections (e.g. mini-publics) are most effective for reducing the power of oligarchy?
- How effectively are new civic and social movements or political parties responding to the challenge of oligarchic democracy within existing institutional and constitutional structures?
- What lessons have been learnt, and how transferable are these findings to other contexts?
- What can replace the role of trade unions, traditional mass-membership parties, and churches in providing a popular counter-balance to the power of 'big money'? Can sub-constitutional responses, such as the organisation of a new unionism for post-industrial workers, achieve this?
- What is the role of leadership, character, values and ethics in sustaining the reliance of democracy and protecting it from oligarchic tendencies?

Theme Four: Existing constitutional responses to oligarchic democracy.

The purpose of this thematic enquiry is to examine what constitutional responses to oligarchic democracy exist currently and to what extent, if any, these constitutional responses are effective. The constitution for these purposes is defined as a written legal and political text that is a paramount source of law, can be changed only by a higher law-making procedure that is more rigid than ordinary statute law and that organizes institutions, distributes powers, defines rights, and proclaims the identity and purposes of the state.

As a preliminary scoping enquiry, we have examined seven constitutional texts: Kenya, Ecuador, Bolivia, South Africa, Ireland, India, and Mexico. The choice of these particular seven constitutions stems from their transformative intent; these are either post-colonial constitutions (Ireland, India), revolutionary constitutions intended to establish a new and more democratic political order (Mexico, Kenya, South Africa) or constitutions emerging from neo-populist rejections of neo-liberalism (Ecuador, Bolivia). The purpose of this initial survey was simply to identify existing constitutional provisions that are potentially relevant to anti-oligarchic constitutionalism, in the sense that their effective inclusion in the constitution may either strengthen the power, voice and inclusion of the non-rich or restrain the rich in their ability to dominate the state.

Firstly, there are provisions relating to voting rights and ballot access. In some countries, difficulties in voting or in voter registration may disproportionately disadvantage the poor. Voting turnout is generally less in lower income groups. Constitutional provisions such as an explicit right to vote (which may prevent, for example, the systematic disenfranchisement of former felons), automatic voter registration rules, and compulsory voting may help to empower those who might otherwise be excluded. Likewise, provisions which ensure that polling places are easily accessible even to those who do not have their own transport, and that election days are public holidays, may help to encourage poorer citizens to vote.

Secondly, there are provisions relating to the funding of political parties and election campaigns. These include spending limits, public funding for political parties, restrictions on donations, transparency and disclosure provisions, restrictions on 'soft' spending, and rules on the internal democracy and auditing of political parties. Such rules may limit the extent to which rich donors can determine election results and indirectly influence the policy-choices of incumbents. While many of these rules exist, and will be discussed, under the fourth thematic heading, the role of formal constitutional entrenchment cannot be ignored. In the USA, for example, the lack of constitutional provisions has made it easier for the Supreme Court to attack legislation designed to reduce the power of the rich and augment that of the non-rich:

'The thrust of recent Supreme Court decisions in cases such as *Citizens United*, *Arizona Free Enterprise*, and *McCutcheon v. FEC* has been the wholesale rejection of statutory efforts to in any way equalize political influence - among donors, among candidates, among citizens.'
(Fishkin & Forbath, 2014: 696.)

Thirdly, there are provisions regulating the use of media for political campaigning. Disproportionate access to the media, driven by market forces, can be an important source of power for the rich. Some constitutions seek to counteract this by the provision of impartial public service broadcasting services, or by restrictions on the use of the broadcast media for electoral purposes. The Kenyan Constitution for example provides parties with access to the media, requiring Parliament to enact laws for the 'the reasonable and equitable allocation of airtime, by State owned and other mentioned categories of broadcasting media, to political parties either generally or during election campaigns' (Article 92). The Mexican Constitution likewise directly addresses the electoral process: 'No private individual or legal entity can buy airtime on television or radio to influence political preference, or to promote or attack certain candidate or party.' (Article 41). Such provisions should in principle moderate oligarchic power by ensuring that poorer, weaker parties can still be heard by the general public.

Fourthly, constitutions may contain provisions intended to prevent incumbents (who may be presumed to mostly be drawn from the relatively rich) from pursuing goals that are contrary to the public

interest, and from abusing their power for their own benefit. Such provisions could include bans on commercial activity while in office, mandatory disclosure of financial assets or liabilities, or 'revolving door' provisions that prohibit the circulation of the same persons between the commercial and political spheres. For example, the Indian, Bolivian, and South African constitutions all place restrictions on the ability to be elected to public office if one has commercial stakes in State business. Constitutions may also include provisions aimed at preventing abuses of power, such as general anti-corruption measures, auditing of public offices, or penalties for abuse of power or official immunity. General anti-corruption measures, auditing provisions, and penalties for abuse of immunity may also be considered under this heading, although the precise relationship between measures intended to reduce corruption generally and those targeted at reducing the influence of oligarchic power in particular remains to be seen.

Fifthly, we find provisions for direct democracy in many current constitutions. In principle, direct democratic institutions - referendums and initiatives - have the potential to empower ordinary citizens and reclaim decision-making from elites, including economic elites. However, in practice, they can be used by elites to further their own interest: not mitigating oligarchy, but simply making it more populist in tone. The state of California serves as a good example. In California, citizen initiatives and referendums are constitutionalized direct democracy processes; Californian citizens can both initiate legislation and vote on proposed legislation through public referendums. However, many citizens feel that the legislation passed through these methods reflects the will of special interests rather than that of the average citizen. A perceived cause of special interest influence relates to signature gathering. As special interests have better access to funds, these groups are capable of paying persons to gather signatures for so-called citizen initiatives. In contrast, non-elite groups often lack the resources to gather enough signatures within enough time to put an issue on the ballot. The intricate details of direct democracy mechanisms (who can call referendums, when, on which subjects, under what safeguards and protections, who sets the question, how are they funded, how is campaigning organised, whether they are advisory or binding), may be crucial in determining the effectiveness of these mechanisms from an anti-oligarchic perspective.

Sixthly, some constitutions provide for mechanisms of 'functional' representation, by which the economic interests of society (and perhaps various non-economic civil society interests) are included in the representative and decision-making processes. Such bodies are largely a product of Catholic political thought, and were found - either constitutionally or on a sub- or para- constitutional level - in several European countries that were influenced by Catholic thought or in which Christian Democratic parties were electorally dominant: the composition of the Irish Senate, the French 'Economic and Social Council', created by the Constitution of the Fourth Republic in 1946, and the Italian 'National Council for Economics and Labour', created by the Constitution of 1947, as well as similar institutions in the Netherlands and elsewhere. These bodies give trade unions and other economic interests a guaranteed, institutionalised voice in decisions concerning economic and social affairs, mainly in the form of a consultative role in legislation. In principle, this should have an anti-oligarchic potential, in the sense of preventing business and financial interests from dominating the policy-making process unchallenged by representatives of workers. However, we are interested in papers critically examining the effectiveness of these bodies in practice, particularly evaluating them from an anti-oligarchic perspective and considering, where they are weak or ineffective, means by which they could perhaps be strengthened.

During the pilot study, we identified interesting institutions in Ecuador, in the form of the Council for Public Participation and Social Control (CPPSC), and in Mexico in the form of the National Council for the Social Development Policy (CONEVAL). These are different from the institutions of functional representation discussed above in that they have a smaller, appointed, more technocratic membership - more akin, perhaps, to a 'Fourth Branch' institution. Ecuador's CPPSC has a very wide remit, with the authority to 'promote public participation, encourage public deliberation processes and foster citizenship training, values, transparency, and the fight against corruption', an anti-corruption oversight function, an ombudsman-like function in investigating state actions, and a role in the selection and appointment of certain important public officials, including members of the Attorney-General's Office, National Electoral Council, the Electoral Dispute Settlement Court, and the Judiciary Council (Constitution of Ecuador, Arts. 207-208). While portrayed as a mechanism for encouraging public participation - and so, presumably, of

allowing the non-rich majority to have a greater influence on public policy – the real effect of the CPPSC may be limited by the presidential dominance built into the Ecuadorian system of government.¹

In contrast, the Mexican CONEVAL has a narrower remit. Its principal function is to monitor the performance of the state, specifically in terms of the measurement of poverty and ‘the evaluation of programs, objectives, goals, actions of the policies related to social development’, in order to provide the general public with a reliable and robust source of information. The Independent Evaluation Group (IEG, DATE) argues that CONEVAL has been effective in increasing transparency with regards to poverty estimation and social program evaluation. It may be a promising example of an anti-oligarchic institution which by empowering citizens with knowledge, and by monitoring outcomes in a systematic way, induces the government to be more attentive to the needs of the non-rich and poor. This is just one, however, of a series of monitoring and transparency institutions established by the Mexican Constitution – which also includes the National Transparency Agency, the National Hydrocarbons Commission, the Energy Regulatory Commission, the Federal Economic Competition Commission, the National Electoral Institute, the National Commission for Human Rights, the Citizen Participation Committee of the National Anticorruption System, and the Commission for Conciliation and Arbitration, composed of an equal number of workers and employers (which shall mediate disputes between these groups). In placing such reliance on these specialist commissions, the Mexican Constitutions seems to reveal a very low level of trust in elected institutions to carry out the functions of monitoring and policy scrutiny. We are interested not only in the Mexican experience, but more generally in the strengths and limitations of this approach from an anti-oligarchic perspective. Do these fourth branch monitoring institutions provide an additional means for controlling and limiting the power of the rich, and in forcing the state to pay attention to the wants and needs of the non-rich? Or do they simply perpetuate oligarchic rule, or even worsen it because power shifts away from elected into the hands of unelected institutions?

Seventhly, constitutions may seek to encourage participation from marginalized socio-economic groups by means of quotas or the reservation of seats. We are familiar with such techniques in respect of gender, but using them expressly for economically excluded groups – and in particular the non-rich majority – would be something of an innovation. Nevertheless, we can see living examples of similar provisions in the case of the Indian Constitution, which reserves seats for ‘Scheduled Castes and Tribes’. These are sections of society who have traditionally been marginalized, both by social stigma and by poverty. There is of course an on-going debate about the rationale for these reservations, their effects, and whether they actually empower and protect the marginalized or whether they simply allow a small minority from those marginalized groups to rise to the elite – the so called ‘creamy layer’ problem (Tushnet, 2004).² Of greater interest for our purposes, however, is the question of whether similar types of provisions could be adopted specifically addressing the economic dimension of representation: for example, if 99% of the population are non-millionaires, should 99% of parliamentary seats be reserved for candidates who are not millionaires? What would be the theoretical arguments surrounding such a scheme, what would be the practical challenges to be overcome in adopting it, and what would the likely effects be?

This list is not exhaustive. We have focused only on those aspects of the constitution that concern the representative-participatory-decisional aspects (what might be regarded as the ‘political constitution’), as opposed to those aspects of the constitution that are concerned with substantive rights or distributive outcomes. In this discussion document, we have sought to show that constitutions can and do take various measures to increase the representation, participation and political weight of the non-rich, and to reduce the opportunities by the rich to dominate the political system. However, it seems that such measures are piecemeal and, perhaps, mostly ineffective. Papers critically examining the effect and effectiveness of such constitutional provisions, whether in the countries included in our initial pilot survey or elsewhere, are

¹ Andrés Martínez Moscoso, *A new concept of the separation of powers. The fifth power: Transparency and Citizen Participation. A new proposal of new Latin American constitutionalism the case of Ecuador*

² Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CT L. Rev 649, 655 (2004).

welcomed, especially if they examine the ways in which the anti-oligarchic potential of such institutions might be increased.

Possible Questions to Consider:

- How effective are the measures taken to protect against oligarchy in existing constitutions? (We welcome papers examining particular institutions in depth as a single case study and those examining sets of similar institutions across countries).
- Does constitutionalising them make a difference, either in securing their legal effect or in raising public awareness?
- Constitutions have also sought to reduce political inequality in respect of gender and, to a lesser extent, ethnicity and disability. Would it be advisable, and desirable, for these measures, such as reserved seats and candidate quotas, to be applied to the non-rich as a class?
- What existing practices, perhaps pioneered in one or a few jurisdictions, could be more widely adopted?

Theme Five: Speculative constitutional responses to oligarchic democracy.

This theme explores speculative and innovative approaches to constitutional design. These go beyond the sorts of reforms or innovations considered under the fourth theme, and include more radical and fundamental changes to the way democracy might work.

The main institutional forms of democracy found in the world today are based on a small number of models devised in the aftermath of the American and French revolutions (Lane, 1996). These in turn were descended from Medieval European monarchies, in which limited and contractually obligated monarchies were advised and constrained by parliaments which represented 'estates of the realm'. Across most of Europe in the high middle ages, these parliaments acquired a more or less stable institutional identity, and were able – with varying degrees of vigor and autonomy – to exercise legislative, financial and deliberative powers (Myers, 1975). The medieval state was based not on equal citizenship, but on distinct 'orders' – such as the clergy, nobility, burgesses and peasantry – which each had certain chartered rights and special communal privileges that the monarch was legally obliged to respect (Myers, 1975).

Given these origins, perhaps the oligarchic of nature liberal-democracy as we know it is intrinsic to its institutional design, and that only by radically changing that design on the macro level, not by micro level tinkering, can oligarchy be overcome. At the heart of this thematic enquiry is the view that the oligarchic tendencies seen in liberal-democracy are unsurprisingly derived from the process of election itself, which systematically favours the few. Compared to the institutions known to Ancient Greeks or medieval Italian, all existing models of liberal-democracy, which are based on elections perhaps once every four or five years, would seem barely democratic. We therefore see to identify alternative constitutional 'roads less travelled', emerging from the experiences of ancient and medieval city republics. We wish to explore innovative approaches which, in the words of Harrington (1997), 'ransack the archives of ancient prudence', to see what new things be gleaned from the history of pre-modern forms of republicanism.

The centrality of the constitution to the relationship between money and power has deep roots in political thought. It can be found, for example, in Aristotle's classification of regimes into oligarchies and democracies. For Aristotle, democracies are states in which the non-rich majority rule, while oligarchies are those in which the rich minority rule. Aristotle makes it clear in Book IV, Part III, of *The Politics* that it is the wealth of rulers, not their numerical strength, that marks the distinction between these two types: if there were a state in which the rich were a majority, but these excluded the poor from holding office and participating in government, then it would be an oligarchy – albeit an unusually broadly based one (Sinclair, 1982).

Classical and medieval political thought, drawing on the intellectual tradition of Aristotle, Cicero and Polybius, celebrated the ideal of the 'mixed constitution' – a system of government in which the interests of the few and the many would be balanced and harmonised (Honohan, 2002). Sometimes, this gave rise to institutional structures in which the three traditional forms of government were blended: rule by the one, the few, and the many. However, the 'one' (the monarchic element) often had an executive rather than sovereign status, so that the real dynamic of power-sharing was between the rich, privileged ruling few and the non-rich, less privileged, co-ruling many. For two millennia, this classification of regimes based on whether they were ruled by the rich few or non-rich many, coupled with a preference for the mixed constitution as a way of harnessing the strengths and overcoming the weaknesses of each 'simple' form, provided a common framework for the understanding of the good state, at least within Western societies.

The close and symbiotic relationship between wealth and power, and both the necessity and the difficulty of ensuring that the rich few do not overbalance and consume the non-rich many, was a recurring theme of classical history. Aristotle writes, in *The Constitution of Athens*, that the government of Athens was originally 'in all respects oligarchical'. The poor were 'in a state of bondage to the rich'. The land was 'in the hands of a few', and those who worked the land for rent were liable to be sold into debt-bondage. The living and working conditions of these people must have been both miserable and precarious. Yet, according to Aristotle, 'The hardest and bitterest thing then to the majority was that they had no share in

the offices of government; not but what they were dissatisfied with everything else, for in nothing, so to say, had they any share.' In other words, the people were aware that, at root, their problems were constitutional; having no say in public decision making, they had no share in anything else. Draco had attempted to reform the constitution, still keeping the most important offices (the nine archons who had executive and leadership functions) in the hands of the rich, but allowing the Council to be selected indiscriminately by lot from amongst the citizenry, including the poor. However, this was 'to no avail', because the rich retained ownership of the land, while the poor were still in fear of debt-slavery. Dissension and division between the rich and poor continued until the time of Solon, 'the first to come forward as the champion of the people'. Solon's new constitution cancelled debts and abolished slavery for debtors.

Livy (DATE) recounts, in Book II of his *History of Rome*, that after the expulsion of the kings, 'the people of Rome became a free people, the civil and military affairs of which were governed by annually elected magistrates, and in which the laws were more powerful than individual men'. Yet the early Roman Republic was a state in which the privileges of citizenship were not equally shared. Real power rested in the patrician order and in the body which represented their interests, the Senate. The two consuls in whom executive power and political leadership were vested were annually elected, but the voting system was designed to give greater weight to the richest citizens, and the office of consul was limited to those who belonged to the patrician class. The laws favoured the rich. The civil laws were not written down, but were preserved as oral customary law amongst the patricians, meaning that the legal rights of ordinary citizens, the so-called plebians, were difficult to ascertain or enforce. The Roman state was also almost constantly engaged in wars for territorial expansion amongst its neighbours. The plebian citizens were required to pay taxes and to fight in wars, but the booty of war and the distribution of land went mainly to the rich. Debt - a consequence of being absent from one's farm or workshop while fighting wars - could lead easily to enslavement (Adcock, 1959; Greenidge, 1901; Wood, 1988).

It was in this context that the ordinary people, those of the so-called plebeian order, sought to complete the move to a genuine *res publica* - a state in which the public good, not that of a narrow elite class, prevails. Pushed to breaking point, the plebians decided on an extreme course of action - a *secessio plebis*, or secession of the plebians. The plebians shut up shop, left the city, and refused to fight. This might be seen, in modern terms, as a combination of a general strike and a military mutiny. It left the patrician order isolated. It highlighted the fact that for all their power, wealth and prestige, it was they who were dependent upon the plebians, and not the plebians who were dependent on them. Without plebians to carry spears or follow ploughs, the patricians were rulers over an empty ghost of a city. This drastic action by the plebians forced the patricians to the negotiating table. The outcome of these negotiations was a constitutional change: the creation of a new office, that of 'tribune of the plebs'. The office of tribune would be limited to plebians and elected exclusively by the plebians, with the right of veto over the decisions of the consuls in order to protect the distinct class interests of the plebeian order. Machiavelli, commenting on this development in his *Discourses*, argued that it perfected the republic, because it balanced the republic with the addition of a lively democratic element, and thereby provided a means by which the people could restrain the nobles (Viroli: 1998). People faced with 'bread and butter' issues - debts, poverty, subjection to the arbitrary power of the rich over their lives and livelihoods - sought redress through constitutional change. They tried, above all, to change the system of government, to increase their voice and their veto power in the decision-making process, and to secure for themselves constitutional guarantees.

This is not, however, a subject of merely antiquarian interest. Rather, it is a practical - if necessarily speculative - enquiry into alternative institutional designs. The long history of democracy may provide a radical corrective to the flaws of democracy-as-we-know-it, which has the capacity, suitably adapted to current needs, to rescue democracy from the oligarchic tendencies of its currently dominant form. In particular, we are interested in the practical application of the ideas put forward by scholars such as J.P. McCormick in *Machiavellian Democracy* (McCormick, 2011) and by Kevin O'Leary in *Saving Democracy* (O'Leary, 2006) - in institutions, that is, that specifically represent the non-elite and give them real powers over public decision making. Despite the growth in the interest in the civic republican tradition in the history of political thought and in political theory, the implications of these ideas are yet to be

absorbed in to the practical world of designing constitutions – and that is a gap which we, in this theme of the project, would very much like to bridge.

In particular, we are interested in the constitutional possibilities of sortition (selection by random lot). This mechanism was widely used in classical and medieval republics. It has long been apparent, from Aristotle and Rousseau, that election is an inherently oligarchic process (Manin, 1997; Dowlen, 2008), because it favours those with wealth, leisure and connections. Random lot, in contrast, is a democratic (in the sense of anti-oligarchic) device, since it is blind to all considerations of wealth, fame, popularity, status, education, connections and ability. Random lot, compared with elections, not only allows for a more truly representative sample of the whole population to be taken, but also prevents the rise of cliques and factions, ensures the equal distribution of offices, rewards, burdens and honours, and removes the need both for fund-raising and campaign spending.

It may be that there are very good reasons not to choose members of Parliament or chief executives by random lot, since random lot has no chain of delegation and accountability, and removes the element of popular choice. Yet it is possible that random lot could usefully be introduced at other points of the constitutional system, where achieving a truly representative sample of public opinion, or avoiding party cliques, is of greater importance than delegation and accountability: for example, in the selection of second chambers, or in the choice of ‘tribunate’-like officials who might, say, have the power to call a referendum or to impeach a president. There is now some established practice in using random lot to select members of constitution-making bodies (in Ireland, for example), and we would welcome papers examining both the theoretical and practical implications, from an anti-oligarchic perspective, of using random lot as part of the ordinary legislative, policy-reviewing and appointing processes.

Another aspect of pre-modern constitutional design was the selection of public officials from sectors of society. In Florence, for example, the method of selecting magistrates was revised in 1343 such that the three strata of society - the *majors*, *minori* and *minuto* - were each given equal participation in the process of selection, which ‘gave power to the lower artisan class for the first time’ (Dowlen, 2008: 90). This can be seen as a form of reservation, similar to that discussed in the previous section with regard to scheduled castes and tribes in India, although based the representation of particular guilds, membership of which was an approximate measure of wealth.

Possible Questions to Consider:

- What former anti-oligarchic practices and institutions from pre-modern civic republicanism are worthy of reconsideration under contemporary circumstances? (This need not be limited to those discussed above: could ostracism, for example, be a useful anti-oligarchic measure?)
- What are the uses and limitations, as an expressly anti-oligarchic device, of random lot?
- Can existing models of constitutionalism be augmented by certain innovative / restored practices, without challenging the essential structure of a representative, election-based system?
- What would a constitutional model derived from ‘ancient prudence’ look like, and would it actually be an improvement over existing models?

References

- Ackerman, B. (2000) *We the People, Vol. 2 – Transformations*, Harvard University Press.
- Adams J. C. & Barile, P. (1972) *Government of Republican Italy* (3rd Ed.), Houghton Mifflin.
- Adcock, F. E. (1959) *Roman Political Ideas*, Ann Arbor: University of Michigan Press.
- Atkinson, A. B. (2015) *Inequality: What Can be Done?*
- Bobbio, N. (2006) *Liberalism and Democracy*, Verso.
- Brzezinski, M. (2000) *Struggle for Constitutionalism in Poland*.
- Blokker, P. (2013) *New Democracies in Crisis: A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge.
- Bulmer, W. E. (2015) 'Exclusionary Constitutionalism: Developments in Chile and Hungary', in *Annual Review of Constitution Building Processes: 2014*, International IDEA.
- Dahl, R. (2003) *How Democratic is the American Constitution?*, Yale University Press.
- Dowlen, O. (2008) *The Political Potential of Sortition: A Study of the Random Selection of Citizens for Public Office*, Exeter: Imprint Academic.
- The Economist Intelligence Unit, *Economist Democracy Index* (2010-15)
- Escobar, O. (2014) *Transformative practices: the political work of public engagement practitioners*, PhD Thesis, University of Edinburgh.
- Fishkin, J. (2011) *When the People Speak* [Reprint edition], Oxford: Oxford University Press.
- Fishkin J. & Forbath, (2014) 'The Anti-Oligarchy Constitution', *Boston University Law Review*, Vol. 94, No. 671, 2014.
- Fitzmaurice, J. (1996) *The Politics of Belgium: A Unique Federalism*, Westview Press.
- Fogarty, M. P. (1957) *Christian Democracy in Western Europe 1820-1953*, London: Routledge and Kegan Paul.
- Frank, T. (2004) *What's the Matter with Kansas?*, Henry Holt & Co.
- Gargarella (2010) *Legal Foundations of Inequality*, Cambridge University Press.
- Gilens M. & B. I. Page (2014) 'Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens', *Perspectives on Politics*, Vol. 12, No.3., pp. 564-581.

Greenidge, A. H. J. (1901) *Roman Public Life*, University of California.

Hacker, Jacob S. and Pierson, Paul (2010) *Winner-take-all Politics: How Washington Made the Rich Richer and Turned its Back on the Middle Class*, Simon & Schuster.

Harrington, J. (1997) 'The Commonwealth of Oceana' [1653] in *Ideal Commonwealths*, Dedalus Ltd.

Holman, B. (2016) 'Q & A with Bob Holman: Leading by example in the fight against inequality', *New Start Magazine*, 28 June 2016.

Honohan, I. (2002) *Civic Republicanism*, Routledge.

Hope, C. 'Cabinet is worth around 70 million', *The Telegraph*, 27 May 2012.

Keogh, D. and A. McCarthy (2003), *The Making of the Irish Constitution 1937*, Cork: Mercier Press.

Kselman T. and J. A. Buttigieg (2003) *European Christian Democracy: Historical Legacies*, Notre Dame University Press.

Lane, J-E (1996) *Constitutions and Political Theory*, Manchester: Manchester University Press.

Laski, H. (1937) *Liberty in the Modern State*, London: Penguin.

Let's Free Congress (2016) (www.letsfreecongress.org)

Lijphart, A. (1999) *Patterns of Democracy: Government Forms and Performance in Thirty-Six Democracies*, Yale University Press.

Lijphart, A. (2000) The Future of Democracy: Reasons for Pessimism, but Also Some Optimism, *Scandinavian Political Studies*, 23 (New Series), 3.

Liu, E. and N. Hanauer (2016) 'Complexity Economics Shows Us Why Traditional Economics Always Fails: Why markets are like gardens, not machines', *Economics*. <http://economics.com/complexity-economics-shows-us-that-laissez-faire-will-never-work/>

Manin, B. (1997) *The Principles of Representative Democracy*, Cambridge: Cambridge University Press.

Machiavelli, N. (1983) *The Discourses*, London: Penguin.

McCormick, J. P. (2011) *Machiavellian Democracy*, Cambridge: Cambridge University Press.

Marquand, D. (1997) *New Reckoning: Capitalism, States and Citizens*, Polity Press.

Milbank, J. (2012) quoted in Schneider, N. 'Orthodox Paradox: An Interview with John Milbank', *The Immanent Frame: Secularism, religion and the public sphere*. <http://blogs.ssrc.org/tif/2010/03/17/orthodox-paradox-an-interview-with-john-milbank/>

Myers, A. (1975) *Parliaments and Estates in Europe to 1789*, Harcourt, Brace, Jovanovich.

- Obama, B. H. (2016) State of the Union Address Congress, 12 Jan 2016.
- O'Leary, K. (2006) *Saving Democracy: A Plan for Real Representation in America*, Stanford Law Books, Stanford University Press.
- Roosevelt, F. D. (1944) State of the Union Message to Congress, 11 Jan 1944.
- Sandel, M. (2016) 'The energy of the Brexiteers and Trump is born of the failure of elites', *The New Statesman*, 13 June 2016.
- Sentamu, J. (ed.) (2015) *On Rock or Sand? Firm Foundations for Britain's Future*, SPCK.
- Smith, G. (2009) *Democratic Innovation: Designing Institutions for Citizen Participation*, Cambridge: Cambridge University Press.
- Sunstein, C. (2006) *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever*, Basic Books.
- Thornhill, C. (2011) *A Sociology of Constitutions*, Cambridge: Cambridge University Press.
- United Nations (2007) *Human Development Report*, November 27, 2007, p.25
- Viroli, M. (1998) *Machiavelli*, Oxford: Oxford University Press.
- Waley, D. (1988) *Italian City Republics*, London: Longmans.
- Wilkinson, R. & Pickett, K. (2009) *The Spirit Level: Why More Equal Societies Almost Always Do Better*, London: Allen Lane.
- Williams, P. (1954) *Politics in Post-War France: Parties and the Constitution in the Fourth Republic*, London: Longmans.
- Winters, J. (2011) *Oligarchy*, Cambridge: Cambridge University Press.
- Wolff, J. (2012) 'New Constitutions and the Transformation of Democracy in Ecuador and Boliva', in Detlef, N. and A. Schilling-Vacaflor (eds) *New Constitutionalism in Latin America: Promises and Practices*; Farnham, Ashgate, 183-202.
- Wood, G. (1969) *Creation of the American Republic*, Chapel Hill: University of North Carolina Press.
- Zakaria, F. (1997) 'The rise of illiberal democracy', *Foreign Affairs*, Nov/Dec 1997, Vol. 76, No. 6.