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(per Mario Sbriccoli)

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WHY AMERICAN CONSTITUTIONAL HISTORY
IS NOT WRITTEN (*)

In Memory of Vine Deloria, Jr. (1933-2005).

We (legal experts) are tempted to mix up two different logics, the logic of authority, and the logic of evidence. (...) A mixture of legal dogma and legal history is in general an unsatisfactory compound. (...) The lawyer must be orthodox otherwise he is no lawyer; an orthodox history seems to me a contradiction in terms. (...) If we try to make history the handmaid of dogma she will soon cease to be history.

F.W. MAITLAND, 1888.

If we try to make history the servant of the Constitution, they will soon cease to be history and Constitution.

PARAPHRASE, 2006.

1. A creature without a history yet the character of a biography. — 2. Biography from slavery to freedom through patriarchy. — 3. History between indigenous Territories and non-indigenous States. — 4. Treaty as Constitution, Constitution as breach of Treaty. — 5. Other histories, other laws; other starts, other images. — 6. A specter looming over the United States origins. — 7. A piece of specifically constitutional, proudly legal historiography, along with indigenous law. — 8. National identity and constitutional history between exclusive delivery and shared biographies. — 9. Constitution past and present; people inside and outside. — APPENDIX: Proof of Life, the Exhibition.

1. *A creature without a history yet the character of a biography.*

Why the History of English Law is not Written is an old question successful enough to have been repeated for other, broader cases. It makes sense. In the legal field, history can be problematic; I mean well capable of being the source of thorny problems. If in addition it

* Apropos a self-named biography — not history — of the Constitution of the United States of America in the most solitary singular (n. 3, for full citation) and therefore looking for close company throughout the same American world and time — not elsewhere nor from any non-constitutional moment. As I am a go-between, I shall apologize to the people concerned — not everybody.

concerns law from the past and which is still in force, the predicament becomes extremely sensitive. History may show the contingency of law. History can jeopardize what might otherwise be held as an imperative and even a necessity for given law. In the field of constitutional history, the United States of America, this Union among States, might face such a problem right from its roots, just for upholding a rather ancient basic constitutional scripture, the 1787 Constitution ⁽¹⁾.

Why American Constitutional History is not Written is a question that may shock and confuse, astonish and scandalize, alarm and offend, or even provoke hilarity, depending on how it is taken. Reactions are understandable. I apologize and beg for a little break. Please, stop worrying and keep reading. There are no good or bad questions, but rather answers that make sense or nonsense. The latter is what matters. And the best trigger for a demanding inquiry may be affected naïveté rather than acclaimed expertise. Yet I am serious. When posing the question, there is neither display of rhetoric nor reservation of conscience on my part. Give me time and place to elaborate my point. Let me deliver enjoyment or perhaps annoyance, depending on the reader's

⁽¹⁾ Frederic William MAITLAND, *Why the History of English Law is not Written*, Cambridge, Cambridge University Press (CUP from here onward), 1888 Inaugural Lecture as the Downing Professor at CU (H.A.L. FISHER, ed., *The Collected Papers of Frederic William Maitland*, Cambridge, CUP, 1911; last reprint, Gaunt, Holmes Beach, 1999, vol. I, pp. 480-497), a posthumously published conference to which my leading quote belongs, bearing a title famous in its own right and for giving occasion to a series of paraphrases equally biased out of self-interest like my own: Harold J. BERMAN, *Why the History of Western Law is not Written*, a chapter in his *Faith and Order: The Reconciliation of Law and Religion*, Atlanta, Scholar Press, 1993, pp. 23-33, advanced as *Introductory Remarks to A Symposium in Legal History*, in « University of Illinois Law Review », 1984, pp. 511-520; Wilfrid PREST, *Why the History of the Professions is not Written*, in G. R. RUBIN and David SUGARMAN (eds.), *Law, Economy and Society, 1750-1914: Essays in the History of English Law*, Abingdon, Professional Books, 1984, pp. 300-320; Charles DONAHUE Jr., *Why the History of Canon Law is not Written*, London, Selden Society, 1986; J.H. BAKER, *Why the History of English Law has not been Finished*, Cambridge, CUP, 1999; Bruce KERCHER, *Why the History of Australian Law is not English*, in « Flinders Journal of Law Reform », 7, 2004, pp. 177-204. The seminal conference of Frederic W. Maitland is now available on the web along with his complete 1911 *Collected Papers*: <http://oll.libertyfund.org/Home3/Book.php?recordID=0242.01>. « If we try to make history the handmaid of dogma she will soon cease to be history » is a verdict much quoted by legal historians, mostly out of context, that closest of the *orthodox lawyer* as a dramatic contrast, so depriving it of a greater bite: William S. HOLDSWORTH, *The Historians of Anglo-American Law* (CUP, 1928), Union, Lawbook Exchange (LE henceforth), 1994, extending the deactivation of Maitland's verdict to America. As far as I know, the question on unwritten legal history has never been applied to the American Constitution.

initial stance. For my answer, whether right or wrong, is just what follows.

The question seems outrageous because there appears to be a lot of writing on ACH — American constitutional history. A great deal has certainly been researched and disclosed, checked and disputed, concerning the constitutional history of the United States of America. Whoever approaches this scholarly and somehow political field easily discovers that it is an authentic literary genre due to the range and intensity of its growth and the variety and abundance of its harvest. I do not dare to deny the blatant evidence ⁽²⁾, yet personally hold that American constitutional history does not exist or is not even about to put in an appearance. It has yet to be identified, let alone written. Needless to say, I do not refer to actual history — that which has taken place — but reflected historiography — what historians visualize, construe and narrate. Why — for what unexpected assault of foreseeable reasons — is what they write and publish, conceive and produce, not genuine ACH, not actual American constitutional history?

Let us start with the latest outstanding publication on the matter, which can lead us to a shortcut across the ports and routes, winds and tides, storms and quakes, of a vast historiography. I refer to a *biography* of the Constitution of the United States recently appearing at the end of the northern hemisphere summer of 2005. The author means it. It is not a lapse. He emerges as the biographer of a creature characterized by being constitutional. Here is his work, *America's Constitution: A Biography*, the biography of a still living subject over two hundred years old. The Constitution of the United States carries so much accumulated

(2) In mid April 2006, a search for « United States — Constitutional History » in the joint electronic catalogue belonging to the libraries of the ten campuses of the University of California together with various other academic and public ones in the same State (<http://melvyl.cdlib.org>) yields a list of 735 publications; put the other way round, I mean if we search by « Constitutional History — United States », 25.150 titles appear without rounding the figures up. By the time this is read, there will of course be more. And they will continue to increase. Why the order of the factors alters the product so much is, like so many aspects of computer performance, a kind of mystery to me. In any case the accurate number could be closer to the first rather than the second, where a clustering of the results of each separate phrase has probably occurred, but maybe throwing up further entries of interest for the constitutional history of the United States. And let us not rule out the possibility that some of the most incisive publications may escape the Californian site's notice. The well indexed register of Kermit L. HALL (ed.), *A Comprehensive Bibliography of American Constitutional and Legal History, 1896-1979*, Millwood, Kraus International Publications, 1984, containing 68.063 entries, and with a supplement, *1980-1987*, published in 1991, adding 16.455, fully exceeds all the figures, mainly because of the inclusion of plainly legal items, often of constitutional interest, and journal essays, sometimes the most incisive material.

experience on its shoulders that it can afford to be not just the subject of history but also the character of a biography. It is announced in a most personalized manner. It is *America's Constitution*, described thus, without any article and in the possessive form, and not the *American Constitution*, so as to make America the creature entitled to the Constitution which is biographized ⁽³⁾.

So, by way of biography, the United States of America becomes a living entity. It identifies itself through the Constitution, because, for want of a proper name or any other style for the character, that is how it comes to life. We may take for granted, without the slightest doubt, that *America's Constitution* means Constitution of the United States of America, a country with no proper name. As the aim is to biographize this nameless character, *America*, the imagining of an exclusive, constitutional personality seems plausible. Its appropriation of a name in order to become an identified polity is not what I am about to discuss in itself, but just as a constitutional need. For I shall argue, let it be clear all along that, not only in my opinion, *America's Constitution* is a brilliant account, maybe the best so far, of the history of the Constitution of the United States of America ⁽⁴⁾, or more precisely of the

⁽³⁾ Akhil Reed AMAR, *America's Constitution: A Biography*, New York, Random House, 2005, XII + 659 pp., 24 x 17 cm., ISBN 1-4000-6262-4 (for Contents, n. 10). I shall often quote simply *the biography* and *the biographer*. For a record of A.R. Amar's other publications, with some links to whole essays: <http://www.law.yale.edu/faculty/Amar.htm>. *America's Constitution: A Biography* was exactly launched on September 19, 2005, at 6:30 p.m. in the Kirby Auditorium of the National Constitution Center, Philadelphia, Pennsylvania (<http://www.constitutioncenter.org/PressRoom/PressReleases>). The first review was authored by Scott TUROW: *Everything is Illuminated*, in « The Washington Post », September, 25, 2005 (search in <http://pqasb.pqarchiver.com/washingtonpost/search.html>; the famous novelist is not a Yale alumnus: S. TUROW, *One L: The Turbulent True Story of a First Year at Harvard Law School*, 1978, New York, Warner Books, 1997). The following December, it was recommended as a holiday gift on the site of *FindLaw: Legal News and Commentary* (<http://writ.news.findlaw.com/amar/20051223.html>). Some critical blogs on the biography and the biographer are available, on George Mason's University's *History News Network* (<http://hnn.us/blogs/entries>); from a review by Richard PRIMUS in « The New Republic » (April 27, 2006; <http://www.tnr.com>; <http://www.powells.com/review>), on anonymous *Positive Liberty* (<http://www.positiveliberty.com/index.php>); etcetera (as comments will keep increasing, you may google or yahoo further on your own). For a *colloquium* on the biography (along with Jed RUBENFELD, *Revolution by Judiciary: The Structure of American Constitutional Law*, Cambridge, Harvard University Press, HUP hereinafter, 2005), « The Yale Law Journal », 115, 2006, pp. 1975-2010. On the date of this issue (June, 2006, or rather upon the receipt three months later), I bring my exploration to a close.

⁽⁴⁾ For the moment, suffice it to add that A. R. AMAR, *America's Constitution: A Biography*, was granted, in the book category, the 2006 American Bar Association Silver

changing meaning of some of the main texts among the tangle which have made up American constitutionalism.

The biographer himself points it out in his way, with the purpose of identifying his subject. He warns that he is exclusively concerned with the *written Constitution*, not merely because it is *written*, but also and above all because it is *Constitution*, proposed, elaborated, discussed, agreed, established, and enforced as Constitution in the strictest sense. Substitutes do not qualify however much they behave as such. This makes it necessary to exclude a fair amount of material which is usually regarded as the best representation of American constitutionalism. The biographer refers to discarded elements, starting with federal Supreme Court jurisprudence, often taken as the expression par excellence of United States' Constitution and the most up-to-date display of American citizens' rights ⁽⁵⁾. The biographer perceives that jurisprudence, even that of the Supreme Court, is *unwritten Constitution*, obviously not because it is *unwritten*, but because it is not part of the founding or amended scripture. It does not belong to the constitutional canon ⁽⁶⁾. Like calling *Ad Fontes!* (Let's go to the sources!), we are led *ad Constitutionem* (Back to the *written Constitution!*). Let us go exclusively and directly to the Constitution in order to see exactly what it says in itself, rather than other legal or historical sources, no matter how reputable they may be in the very constitutional field, or how much credit they might not only hold but even merit ⁽⁷⁾.

Gavel Award for Media and the Arts, whose proclaimed purpose (<http://www.abanet.org/publiced/gavel>) is « to recognize annually eligible entries and communications media that have been exemplary in helping to foster the American public's understanding of the law and the legal system ».

⁽⁵⁾ *GPO Access* (<http://www.gpoaccess.gov>), federal site for the official press (GPO stands for *Government Printing Office*), it presents a principal section for the *Constitution of the United States* which leads firstly to the federal Supreme Court's jurisprudence (material published in printed form under the title *The Constitution of the United States of America: Analysis and Interpretation. Analysis of Cases Decided by the Supreme Court of the United States*) and only afterwards to the Constitution itself, together with the Declaration of Independence, as if the former lacked some piece and they were constitutional twins.

⁽⁶⁾ A. R. AMAR, *America's Constitution: A Biography*, p. 477: « Thus we need at least one more book to start where this one ends, giving readers a detailed account of America's *unwritten Constitution* », with said consideration or rather disregard for the federal Supreme Court's jurisprudence. By now, there is even a working title for this second book: *America's Unwritten Constitution: Between the Lines and Beyond the Text* (A. R. AMAR, *An Open Letter to Professors Paulsen and Powell*, p. 2102, in « *The Yale Law Journal* », 115, 2006, the colloquium quoted in n. 3, pp. 2101-2110).

⁽⁷⁾ Focusing on constitutional texts for two imperative reasons, both legal and historiographical, and starting out by warning that the text itself as original may prove

The biography encompasses the history of the content of strictly constitutional documents, that of the Constitution of the United States, written in the summer of 1787, coming into force, after debates and ratifications by the member States, in 1789, plus the Amendments which have been made throughout time, without ever touching a single comma of the founding document. That is the history of the Constitution's seven original articles, with their twenty-four sections altogether, besides the preamble to start with, and of the twenty-seven Amendments between 1791 and 1992, the year of the last one to date. I employ initial capitals for constitutional norms and institutions. It is literally the history of these texts, of their contents as living texts, analyzed and explained in their original context of birth and also in the changing context of their development and mutations, that is, in the series of contexts which may bring about changes of meaning and even purpose. Here is the first *Biography* of that constituent creature and constitutional character, *America's Constitution*, according to its own accreditation and documentation of positions and actions ⁽⁸⁾, not to what it could be lumbered with by farther practice, even that of the very same federal Supreme Court's jurisprudence, or by other more or less official, more or less reliable treatments, including historiographical ones ⁽⁹⁾.

problematic (A. R. AMAR, *America's Constitution: A Biography*, p. 479), is not an improvised idea: A.R. AMAR, *Our Forgotten Constitution: A Bicentennial Comment*, in « The Yale Law Journal », 97, 1987, pp. 281-298; extending to jurisprudence, *Intratextualism*, in « Harvard Law Review », 112, 1999, pp. 747-827; *Architecture*, in « Indiana Law Journal », 77, 2002, pp. 671-700; for further discussion on the occasion of two conferences, one on *Constitutional Fidelity* and on *Textualism and the Constitution* the other: *A Few Thoughts on Constitutionalism, Textualism, and Populism*, in « Fordham Law Review », 65, 1997, pp. 1657-1662; *Textualism and the Bill of Rights*, in « George Washington Law Review », 66, 1998, pp. 1143-1147.

⁽⁸⁾ On the back flap Laurence H. TRIBE introduces the book: « I was about to describe *America's Constitution* as the best biography ever written about the U.S. Constitution — until it occurred to me that it's the *only* real biography of that remarkable document... Amar's biography of our nation's founding document fills a huge void » (his italics). Without a shadow of any irony, in the aforementioned colloquium on the biography, it is presented by a panelist as « the best book about the Constitution in two hundred years », « an absolutely spectacular, magnificent work of scholarship. It is encyclopedic in its knowledge, dazzling in its insights, definitive (or nearly so) in its treatment of topic after topic, lucid and comprehensive without being ponderous, pretentious, or tedious in the slightest »; « there is, almost, nothing wrong with this book »: Michael Stokes PAULSEN, *How to Interpret the Constitution (and How Not To)*, in « The Yale Law Journal », 115, 2006 (n. 3), pp. 2037-2066.

⁽⁹⁾ If there is another biography of the American Constitution, it would be the work in progress by Bruce ACKERMAN, *We the People*, vol. I, *Foundations*, vol. II, *Transformations*, Cambridge, HUP, 1991-1998, but its distinguishing mark is that it does

With this selective bundle of texts which in themselves alone cannot weave a complete canvas, the biography is clearly able to thread a constitutional history, the United States federal constitutional history⁽¹⁰⁾.

The appearance of this scoop, the first biography of *America's Constitution*, offers a good opportunity to pose the question, if I am allowed, as to why this constitutional history does not exist at all, *why American Constitutional History is not written*. Not wishing to run any risk of being accused of word play, I shall state what I understand by constitutional history strictly speaking. It is that which is of course concerned with freedom's rights, but as they are recognized and guaranteed by politics and policies⁽¹¹⁾. In any other case, without this qualification of specifically legal existence, it would be mere philosophy or simple doctrine projected over time, an ordinary academic task

not identify constitutionalism with the strictly constitutional documents, to the point of perceiving that in the constitutional history of the United States there have been non textual mutations — like the New Deal which we shall refer to — of greater importance than many of the formal Amendments. For information about publications by B. Ackerman, the non textualist biographer of the American Constitution: <http://www-law.yale.edu/faculty/BAckerman.htm>.

(10) A. R. AMAR, *America's Constitution: A Biography*, is ordered by means of a simple and efficient sequence of chapter headings as Contents: I. *In the Beginning*; II. *New Rules for a New World*; III. *Congressional Powers*; IV. *America's First Officer*; V. *Presidential Powers*; VI. *Judges and Juries*; VII. *States and Territories*; VIII. *The Law of the Land*; IX. *Making Amends*; X. *A New Birth of Freedom*; XI. *Progressive Reforms*; XII. *Modern Moves*. Nevertheless, as we shall find out, it may be controversial.

(11) Let me add a hint regarding constitutional language. Because of the obsolescence of fundamental aspects of American constitutionalism, which we are about to face, I do not always adopt its characteristic wording, like, for instance, *privileges and immunities* for *rights and guarantees*, since the former held the meaning and may hold the feeling of exclusivity which the latter does not embrace or even rejects. I also adopt my own rules on initial capitals, as explained. Especially from Ronald DWORKIN, *Taking Rights Seriously* (1977), whose influence reaches detractors and not only supporters (Justine BURLEY, ed., *Dworkin and his Critics: With Replies by Dworkin*, Malden, Blackwell, 2004, and with Dworkin's bibliography), the American language has been updated to some extent for constitutionalism rather than constitutional history. For accurate historiographical work, you must abide by past language of course, even for spelling, but the problem lies in the usual unawareness of changing legal meaning of identical language in a different context throughout constitutional history, from 18th to 21st centuries. As for *American*, it does not mean the same as *Americano*, since the former stands for the United States citizen and the latter for people of all the Americas. *America* in English may hold an exclusive meaning regularly absent from *América* in Spanish. Yet I do not argue here about the *American* abusive use. I only deal at the end with its constitutional dimension, as already warned.

which does not interest us at present. The literature we are interested in begins precisely to define itself according to the political body which it takes into consideration: constitutional history thus American, in the meaning of pertaining to the United States of America. Thus we also have British or French, Spanish or Mexican constitutional histories. Whenever a title in this literary genre lacks a political adjective, it is because it is understood that different polities are compared or common trends are drawn. Constitutional history deals with given institutions regarding human liberty — with freedom's rights and guarantees not in theory, but in practice, however established. So, American constitutional history is the legal history of United States of America so far as it affects American people, all American people's liberties and rights. This is what I am now concerned with. This is what I maintain does not exist and is not about to be born. In order to prove this, I shall not take institutions themselves into consideration; instead I shall observe legal rights to identify constitutional devices of a time past bearing relation to human liberty for good or ill. Human bondage will be the opening concern of course.

Let me warn that it is not my aim to give any state of the art account. I am not about to attempt an exhaustive survey, but carry out a selective reflection. I am even dealing with only one publication, the biography, yet together with several others so as to prevent its character from feeling lonely. *America's Constitution: A Biography* could suffice to ponder its true kind of deepest solitude, that of non-existence. ACH is not even about to be born. Here lies my aim. At the moment I am not so much concerned with what might be some individual achievements or shortcomings, those belonging to this American Constitution's biography, as with some possibly collective challenges and troubles, pertaining to ACH — American constitutional historiography on the whole. It would be a fine problem not only for a single biography if it turns out that the subject — American constitutionalism strictly identified — does not exist, or lacks the consistency to lead its own life or direct other lives. I restrict myself to this. I am not even giving a fair account of the work which serves as my operational base, the biography.

If you, reader, prefer to understand it in a different light, I am not going to deny that I seize *America's Constitution: A Biography* as an excuse for both survey and reflection. A life story is a good excuse to wonder whether the representation exists or may come to life rather than about the very being of the character involved. What is in the subject of the true existing American constitutional history, including biography? Now at least we have both a *written Constitution* and a written biography for an unwritten history — the missing genuine ACH if there may be just one in the singular. Let us take advantage of the mirror to reach for the image and reflect on the disillusionment of

running into the frame and colliding with the glass. Thank you, biographer. Thanks to the people who helped ⁽¹²⁾. I owe them a great deal, yet in the end, I alone am responsible for form and content, for good or bad manners and insightful or harebrained discussion, needless but pertinent to say ⁽¹³⁾.

2. *Biography from slavery to freedom through patriarchy.*

The United States Constitution's most immediate source is found in other Constitutions interrelated in time and coextensive in space, those of the member States — also then with an initial capital — which resisted federalism endowing powers over them and which, after fiery debates, would finally ratify that 1787 document as a common Constitution. The evidence is worth stressing when undertaking the history of federal constitutionalism ⁽¹⁴⁾. Otherwise we run the usual risk of taking it for the sole and only United States constitutionalism. State constitu-

⁽¹²⁾ During the academic year 2005-2006, a stay in the Universities of Arizona and California, as a guest of the Indigenous People's Law and Policy Program in Tucson and the Robbins Collection in Berkeley, offered me appropriate means and a suitable environment for research. My gratitude therefore to Jim Anaya and Rob Williams in Tucson and to Laurent Mayali in Berkeley, as well as to respective computing, library and administration employees who helped and whose names I keep in mind too. My thanks also to Marcel Hénaff in the Department of Literature at the University of California, San Diego, La Jolla campus, for organizing a seminar on my current work. I gratefully remember the people who made comments then and after. At my University, in Seville, my thanks for willingly taking charge during my sabbatical year go to its present legal history faculty; in first name alphabetical order, Antonio Merchán, Carmen Muñoz de Bustillo, Carmen Serván, Jesús Vallejo, Luís Rodríguez-Piñero, M^a del Mar Tizón, Pablo Gutiérrez Vega and Raquel Rico. Between Arizona and Andalusia, L. Rodríguez-Piñero also assisted me with the preparation of this essay. Moira Bryson was of great help with the English language which I translated into American, at times even of the colloquial kind, trying her patience.

⁽¹³⁾ I have willingly forgotten only one name, that belonging to a legal historian presently at the History Department of Stanford University who kindly contacted me by an invitation to a presentation and lost interest seemingly when she realized that there was no enthusiasm from the law faculty regarding the subject I proposed. Guess what it was. Bingo: *Why American Historical History is not written*, so exposed that amazingly the wink at a classic went unseen and no irony was grasped. Yet even to her I am thankful, as it was then when the idea of a historiographical survey came to me along with the derivative title and I thought of asking American legal counterparts for a little break. Take it easy, folks. I take full responsibility.

⁽¹⁴⁾ Marc W. KRUMAN, *Between Authority and Liberty: State Constitution Making in Revolutionary America*, Chapel Hill, University of North Carolina Press (UNCP from now onward), 1997; John J. DINAN, *The American State Constitutional Tradition*,

tionalisms in the plural, the constitutional variety of the member States, are here to stay from the beginning. This detail may be crucial to a starting point and entire course. As federal and even empowered, 1787 constitutionalism does not take powers from State inner self-government in any substantial degree at that time. Neither does it grasp constituent power regarding freedom's rights. For judicial guarantees, as far as they were really given, not only the States' Supreme Courts but also even local Juries were by then more relevant than the federal Supreme Court⁽¹⁵⁾. All in all, let it be clear from the start that *America's Constitution* may not have ever matched United States constitutionalism. The former never encompasses the latter.

Between such coordinates marked by the concurrence of State Constitutions and not by the loneliness of United States Constitution, even the beginning itself proves more problematic than supposed by the birth of a document in the singular, the federal one. The biography commences with the 1787 Constitution and therefore with its first words: *We the People*, emphasizing right away and moreover in the conclusions what it considers to be its libertarian inspiration and democratic character⁽¹⁶⁾. Is this a good start? Does this representation actually respond to constitutional origins independently of posterior developments, or even taking them into consideration? Does it help to give an account of the federal Constitution and its signification in the original and changing contexts of the State Constitutions? For the moment, do not expect me to go into other very different beginnings of

Lawrence, University Press of Kansas (UPK from here onward), 2006. Now there is an extended edition of Willi Paul ADAMS, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*, Lanham, Rowman and Littlefield (RL from now onward), 2001 (original, *Republikanische Verfassung und bürgerliche Freiheit. Die Verfassungen und politischen Ideen der amerikanischen Revolution*, Darmstadt, Hermann Luchterhand, 1973).

⁽¹⁵⁾ John V. ORTH, *The Judicial Power of the United States: The Eleventh Amendment in American History*, New York, Oxford University Press (OUP from here onward), 1987; for the jury, Shannon C. STIMSON, *The American Revolution of the Law: Anglo-American Jurisprudence before John Marshall*, Princeton, Princeton University Press (PUP from now on), 1990.

⁽¹⁶⁾ A. R. AMAR, *America's Constitution: A Biography*, p. XII: « Our history begins — where else? — at the beginning, with the Constitution's opening sentence » and thus with the phrase *We the People*; p. 472: « I argue that the Preamble's words and deeds made clear that the Constitution was essentially democratic ». In the biography itself there is some comparison with State Constitutions by 1787 so as to prove that the federal one turns out to be democratic, but which would not appear to endorse the description even in relative terms, as I hope we shall see. We have already seen that the initial epigraphs fluctuate, as usual, between religious-type genesis and paradise: I. *In the Beginning*; II. *New Rules for a New World*.

United States constitutionalism, even in the strictest original, literal sense desired by the biographer. Beforehand I must situate you, attentive reader, in the picture for due introduction at least of the cast. Otherwise it would be bad manners.

From the very start the 1787 Constitution is not a lonely planet covering a round orbit, but a satellite in a constellation where multiple ellipses move and interweave. Federal constitutionalism is the newcomer from the beginning. It was derivative and dependent. It derived from and depended on State constitutionalisms for the nuts and bolts of institutional mechanisms concerned with freedom's rights and guarantees. It was so at least during the decades when the greatest annihilation of human liberty was maintained, slavery of course. The fact that States held on to constituent power concerning guarantees for rights also meant that they kept control regarding slavery itself. If freedom's rights are the basic sign of constitutionalism, the very least we can do is to begin with the possibility of their complete absence in their own time, that of the constituent starting point. Previous history in the background does not concern us now.

The 1787 Constitution is a scripture which takes great care not to use pro-slavery wording or even the S-word itself — slavery of course (the S-word shall only be used by the United States Constitution for the purpose of abolition). To what extent this Constitution was in point of fact committed to it is best seen if one considers its roots and dependence on State constitutionalisms. The biographer however does not need to go deeply into them as the original basis of the federal one in order to grasp the point. His way of beginning — *We the People*, a liberty and democracy loving people — does not mislead the biography as regards slavery. In his opinion the 1787 opening is *slavocratic* as well as democratic⁽¹⁷⁾. As a matter of fact, prior to undertaking the biography, the biographer was already well aware that slavery is a key point for a lengthy first stage of United States constitutionalism, the federal side included. He is certain that it was so, even to the extent that it not only disturbed but also prevented the Union from recognizing and guaranteeing freedom's rights, the distinguishing mark of consis-

(17) A. R. AMAR, *America's Constitution: A Biography*, references in the Index to *Slaves*, *Slavery* and also *Slave trade*, particularly pp. 87-98, deeming slavery as «an expanding rot at the base of America's system», and rating the regime as *slavocratic*, in his word, stronger than pro-slavery as it points to more than a trend or bias, which may distinguish the publication. Information about this book on the internet from Random House (<http://www.randomhouse.com/catalog>): «We also learn that the Founder's Constitution was far more slavocratic than many would acknowledge». Etymologically, slavocracy is quite an awkward composite since it encompasses English and Greek roots and furthermore contradictorily, as it literally means government by enslaved people, though it obviously refers to the opposite, enslavers' rule.

tent constitutionalism (18). For better or for worse, rights were still in State hands, and so was slavery. If there existed an early working agenda of the constitutional kind in the United States, it was due to the State, not federal, side.

The prevailing image over time is however different. Against the current, it needs to be stressed that the federal Constitution was born not only under the sign of slavery, but as a pro-slavery creature. Slavery is not just camouflaged by its linguistic display, it is even guaranteed by its institutional mechanisms. The biography admits that slavocracy was there, though not to the extent of a more specific bibliography (19). If it were to do so, the panorama might change dramatically from the start and follow a more extensive itinerary than that of slavery itself. In the context of a constitutionalism based on the latter's recognition and guarantee, with private property as a fundamental right reaching the human sphere, I mean the appropriation of human beings, the most then and today reputedly libertarian stances could be the most deeply committed to slavery. They were. And they did not disguise it either. There was full knowledge. It is prospective historiography and retrospective constitutionalism which become blind later on. The emblematical name of Jefferson is proof enough (20).

Slavery was a burden for constitutionalism while it existed, and possibly after the emancipation, even after the definitive abolition which was conducted on a federal scale by means of constitutional Amendments, not through changing the 1787 Constitution itself. In any case it occurred in terms which were not only discontinuing but also constructive (Amends. XIII to XV; 1865 Amend. XIII, sect. 1: « Nei-

(18) A. R. AMAR, *The Bill of Rights: Creation and Reconstruction*, New Haven, Yale University Press (YUP from here on), 1998, stressing the subtitle's binomial in this precise meaning which discriminate between slavocratic and emancipating times, State and Union constitutionalisms concerning rights.

(19) Paul FINKELMAN, *An Imperfect Union: Slavery's Federalism, and Comity*, Chapel Hill, UNCP, 1981; *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, Armonk, M. E. Sharpe, 1996.

(20) For his literal unmasking as both President and constitutionalist against current and still predominant portraits, Conor Cruise O'BRIEN, *The Long Affair: Thomas Jefferson and the French Revolution, 1785-1800*, Chicago, University of Chicago Press (UChP hereafter), 1996; Garry WILLS, *'Negro President': Jefferson and the Slave Power*, Boston, Houghton Mifflin (HM from now onward), 2005. The first contains an incisive review of previous literature along those critical lines: C. C. O'BRIEN, *The Long Affair*, pp. 255-276. Just like *slavocratic*, as we have seen, *Negro president* does not mean of course that there ever was one, you know. Jefferson was branded so in his lifetime to signify his slavocratic stance, that is, his pro-slavery tendency not just as a private person, but also as a Virginian politician and United States ambassador, secretary of state, vice-president, and third president.

ther slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction »; here is the use of the S-word by the American Constitution). The threefold set of abolition Amendments was geared towards implementing principles of equal rights and due process as commitments so in common over and above State constitutionalisms. From now on, after this about-face, both Union and State constitutionalism undergo a change. The biography grasps and explains its extent beyond face value. The abolition of slavery marks a true constitutional watershed in the United States of America. Hitherto, despite the insinuation of the 1787 Constitution (article 4, section 2, paragraph 1: « The citizens of each state shall be entitled to all privileges and immunities in the several states ») ⁽²¹⁾, there had been no possibility of a United States citizenship whose rights might be directly recognized and duly guaranteed by a constitutionalism in common — the federal one. Afterwards it is the opposite story, although it always remains one and the same 1787 Constitution, one and the same founding scripture ⁽²²⁾. You, present-day American citizen, are used to appreciating this continuity, but what if it were not taken for granted?

Quite a lot more happens straightaway, a matter of vital concern to rights and hence the United States constitutionalism now shared by State constitutionalisms. The federal Congress, after some effort, would deceive the mandate expressly entrusted by the abolition Amendments to legislate for the guarantees of freedom's rights hampered by the effects of slavery (Amends. XIII, sect. 2; XIV, 5; XV, 2: « Congress shall have power to enforce » them « by appropriate legislation »). The federal Supreme Court would take over, abiding by the abolition Amendments contrary to its own preceding slavocratic stance of course ⁽²³⁾, yet altering their constitutional intent as it went along. Its

⁽²¹⁾ The exact, well-known constitutional references may be useful here since A.R. AMAR, *America's Constitution: A Biography*, has an Appendix reproducing the whole corpus of the *written Constitution*, the Constitution and its Amendments, with indication, in the margin, of the pages of his volume dealing with each passage.

⁽²²⁾ A.R. AMAR, *America's Constitution: A Biography*, pp. 349-401, together with the second section of *The Bill of Rights: Creation and Reconstruction* (n. 18), so we can save ourselves the extensive constitutional and historiographical debate on the so-called *incorporation* of the first set of federal Amendments to State constitutionalisms through abolition Amendments, the former in the long run thus being transmuted, with no literal change, into a general declaration of rights from a list of limits to federal powers. Some bibliography shall be registered below.

⁽²³⁾ P. FINKELMAN (ed.), *Slavery and the Law*, Madison, Madison House (MH from here on), 1996 (re-edition, Lanham, RL, 2002); Austin ALLEN, *Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837-1857*, Athens, Univer-

jurisprudence now exalted the property right together with privacy rights, as an essential value worthy of federal protection, to the detriment of personal liberty⁽²⁴⁾. On their side, taking advantage of the final leniency of the federal Congress for all but a century, States would maintain and even recuperate power to establish regimes harmful to freedom's rights through Constitutions or rather otherwise, similar to what would later and for other parts be named apartheid. The federal Supreme Court supported it⁽²⁵⁾.

The biographer does not pursue the twists and turns of these evolutions and departures, because to his way of thinking, jurisprudence, legislation, and politics are not *written Constitution*. Moreover, he does not deal with State constitutionalisms as such. Yet in the same constitutional field, there was more yesterday than meets the eye today. Supreme Court jurisprudence may not be *written Constitution* by strict law, but it is so — Constitution as much as written — in plain fact yesterday as today. By disregarding it, an essential part of actual American constitutional history is completely lost or practically concealed in an obscure background. It ought to be a decisive piece of the Constitution's biography since it affects freedom's rights, even in the strict federal area⁽²⁶⁾.

sity of Georgia Press (UGP from now on), 2006; Mark A. GRABER, *Dred Scott and the Problem of Constitutional Evil*, Cambridge, CUP, 2006.

(24) William E. NELSON, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*, Cambridge, HUP, 1988; David A.J. RICHARDS, *Conscience and the Constitution: History, Theory, and Law of the Reconstruction Amendments*, Princeton, PUP, 1993; Mark E. BRANDON, *Free in the World: American Slavery and Constitutional Failure*, Princeton, PUP, 1998; Pamela BRANDWEIN, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth*, Durham, Duke University Press (DUP from now on), 1999; Frank J. SCATURRO, *The Supreme Court's Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence*, Westport, Greenwood (GP hereinafter), 2000; Robert J. KACZOROWSKI, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876* (1985), enlarged edition, New York, Fordham University Press, 2005.

(25) Add to the just registered references Jane DAILEY, *Before Jim Crow: The Politics of Race in Postemancipation Virginia*, Chapel Hill, UNCP, 2000; Jerrold M. PACKARD, *American Nightmare: The History of Jim Crow*, New York, St. Martin's Press (MP from here on), 2002 (pp. 7 and 14: «Jim Crow came to be the most general term for American racial segregation and discrimination»; «Jim Crow wasn't a *wbo*. It was, at its core, a structure of exclusion and discrimination devised by white Americans to be employed principally against black Americans — though others felt its sting as well, not least Hispanics and Asians, and even white who opposed it »); Richard WORMSER, *The Rise and Fall of Jim Crow*, New York, MP, 2003.

(26) Desmond KING, *Separate and Unequal: Black Americans and the US Federal Government*, New York, OUP, 1995; Ira KATZNELSON, *When Affirmative Action Was*

There is yet more. Constitutional commitment to slavery was still able to bear effects among federal and State emancipations at the very moment of abolition and afterward. The emancipating process started early, from the time of independence in some States, as some others even hindered private emancipation. Public emancipation was usually carried out with indemnity for the loss of slave ownership, and ended through the federal Amendments with no compensation for the violation of fundamental rights because of slavery, not for the benefit of former slave-owners, but enslaved people themselves of course. This lack of reparation is not only due to property rights taking precedence over other more basic liberties through the federal Supreme Court's jurisprudence, but also to political determination that slaves become proletariat or sharecroppers rather than small owners or independent workers. In short, emancipation never led to actual liberty with shared guarantees for equal rights and due process ⁽²⁷⁾.

Check the biography. In limiting itself to its character's productions as *written Constitution*, it creates quite an attractive mirage in comparison with the pieces of evidence. Without direct compensation for ownership in its case, federal abolition provides the narrative to cause a partial eclipse, I do not say at all a denial ⁽²⁸⁾, of the long remaining history necessary to know the actual aftermath of the final abolition of slavery through constitutional Amendments, and not through a new nuclear Constitution in full replacement of the 1787 slavocracy's rule.

Why then the constitutional ellipsis? I mean that if the change was to be so profound according to the Amendments, it is not easy to understand the procedure through constitutional reform that does not touch a single letter of the 1787 scripture (Amendments are appendixes after all) instead of a new Constitution or constitutional construction under the new principles, which was also suggested, even in Congress,

White: An Untold Story of Racial Inequality in Twentieth-Century America, New York, W.W. Norton (WN from here on), 2005.

⁽²⁷⁾ Arthur ZILVERSMIT, *The First Emancipation: The Abolition of Slavery in the North*, Chicago, UChP, 1967; David W. COHEN and JACK P. GREENE (eds.), *Neither Slave nor Free: The Freedman of African Descent in the Slave Societies of the New World*, Baltimore, John Hopkins University Press (JHUP from now onward), 1972; Gary B. NASH and Jean SODERLUND, *Freedom by Degrees: Emancipation in Pennsylvania and its Aftermath*, New York, OUP, 1991; Donald G. NIEMAN, *From Slavery to Sharecropping: White Land and Black Labor in the Rural South, 1865-1900*, New York, Garland, 1994; Rebecca J. SCOTT, *Degrees of Freedom: Louisiana and Cuba after Slavery*, Cambridge, HUP, 2005.

⁽²⁸⁾ A. R. AMAR, *America's Constitution: A Biography*, particularly references to *Jim Crow* in the Index.

when the final abolition took place (29). Finally, there has been a textual continuity which casts a thick shadow over times both preceding and following the emancipation. From that moment on, the biography does not dwell so much on the gloomier aspects of its character's path, as if strict slavery were the exclusive hindrance. Now, redeeming the slavocratic past, the biographer enhances the Constitution's democratic image as an *intergenerational project*, not just the founding generation's (30).

Pay heed to this portrait of the American Constitution being raised by a sequence of generations rather than born by a single one since it is a true key for its biography. In general terms the strategy tends to historically resolve the more sinister moments with references to a brighter future as well as historiographically achieve a balance through the support or the contrast of neither the most blind nor the most insightful literature (31). If there is originality, it does not lie in the

(29) Earl M. MALTZ, *Civil Rights, the Constitution, and Congress, 1863-1869*, Lawrence, UPK, 1990, p. 147, for the suggestion that « anything for Human Rights is constitutional »; p. 18, for the reasoning, ever in the Congress, though this one uttered by the pro-slavery party so as to hinder the proceedings, that the aim and extent of an abolition Amendment (the final XIII) called for changes in the very Constitution, which as a matter of fact, successive Amendments (XIV and XV) tried to substitute.

(30) A. R. AMAR, *America's Constitution: A Biography*, pp. 279-280 and, concluding, p. 476: « as America's Constitution is a democratic and intergenerational project — the product of many minds over many years... ». Since it may be a key for the biography, I shall revisit more than once this idea of an *intergenerational project* as a redeeming device for *America's Constitution*.

(31) As regards the key question of slavery, the main authority for relying on and discussing throughout the respective biography's notes is not the aforementioned P. FINKELMAN, the author of *An Imperfect Union* and *Slavery and the Founders* (n. 19), and editor of *Slavery and the Law* (n. 23; from his extensive work, let us add an anthological series of scholarly articles edited by him, *Race, Law, and American History, 1700-1990*, New York, Garland, 1992: vols. I, *African-Americans and the Law*; II, *Race and Law before Emancipation*; III, *Emancipation and Reconstruction*; IV, *The Age of Jim Crow: Segregation from the End of Reconstruction to the Great Depression*; V, *The Era of Integration and Civil Rights*; VI, *African-Americans and the Right to Vote*; VII, *Struggle for Equal Education*; VIII, *Race and Criminal Justice*; IX, *Lynching, Racial Violence, and the Law*; X, *African-Americans and the Legal Profession in Historical Perspective*); but Don E. FEHRENBACHER, *Constitutions and Constitutionalism in the Slaveholding South*, Athens, UGP, 1989; posthumously, *The Slaveholding Republic: An Account of United States Government's Relation to Slavery*, completed and edited by Ward M. McAfee, New York, OUP, 2001. The latter, Don E. Fehrenbacher, is noted for his pains to underestimate federal commitment to slavery once he has quite frankly recognized it. Usual historiography disregarding slavery, overstating its exclusion in Territories along with early emancipation by some Northern States, or putting all the blame on Southern

methodological device, but the thorough implementation. The escape resorts are the usual ones in constitutional historiography when up against overwhelming obstacles such as slavery. A selective bibliography, the more legal the better, really helps. Is it bad manners to point this out? The biographer, in concentrating on his character, may have no need to accumulate references to all effects, or take particular notice of debates on all sides; in fact, he gives plenty of both, but his criterion for selection is never apparent. We are not dealing here with individual achievements or shortcomings, but historiographical trends and biases, yet the biography does not always facilitate scrutiny of historiography which may be essential for its purpose as well as ours⁽³²⁾.

There were unresolved questions which might turn up and even stand out after the abolition as a sort of surprising consequence. Such is the case of women's status. The biographer shrewdly points out the relationship between slavery and the subjection of free women, mainly if married, on the same legal grounds. It is a circumstance that he had already drawn attention to⁽³³⁾. The biographer's handling is to be expected. The biography does not enter into the constitutional origins and legal extent of sex discrimination. Ever favorable to the character, the account never completely surrenders to evidence. If it were to do so, an image would be further tarnished and a practice would become apparent. The Constitution was patriarchalistic as well as slavocratic, no less. The pro-slavery stance bore a patriarchal dimension. Patriarchalism was upheld as something natural and hence forming the very basis of the constitutional system. Although the granting of rights to women was discussed as a possibility together with slavery abolition, emancipation went only half way in this aspect too⁽³⁴⁾. Another contamination

States is useless for the biography of course, but a critical account is challenging and would have been most appropriate, especially regarding constitutional history. We shall check Territory regime, the overstating of which is shared by the biographer himself.

(32) A. R. AMAR, *America's Constitution: A Biography*, pp. 465-477, *Postscript* on method and subject, which I will check further of course.

(33) A. R. AMAR, *The Bill of Rights: Creation and Reconstruction* (n. 18), references to *Women (Fourteenth Amendment)* in the Index.

(34) Laura F. EDWARDS, *Gendered Strife and Confusion: The Political Culture of Reconstruction*, Urbana, University of Illinois Press, 1997; Ami Dru STANLEY, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation*, Cambridge, CUP, 1998; Sandra F. VANBURKLEO, *'Belonging to the World': Women's Rights and American Constitutional Culture*, New York, OUP, 2001; Nikki MANDELL, *The Corporation as Family: The Gendering of Corporate Welfare, 1890-1930*, Chapel Hill, UNCP, 2002; Sibyl A. SCHWARZENBACH and Patricia SMITH (eds.), *Women and the United States: History, Interpretation, and Practice*, New York, Columbia University Press, 2003. Add E. M. MALTZ, *Civil Rights, the Constitution, and Congress, 1863-1869* (n. 29), references to *Women* in the Index. The question of minors' status is

of servitude occurred with labor contracts, also unresolved by abolition. Male and female hired workers were legally regarded as servants under patriarchal rule. Even in constitutional terms this status for labor was able to endure through jurisprudential defense of ownership facing labor after the abolition, when the federal Supreme Court awarded private and even corporate property a greater protection than personal liberty then received⁽³⁵⁾.

Redemption for *America's Constitution* is always to be found in this biography. For women's sake, constitutional self-redemption could have arrived through a much later twentieth century Amendment, though it only contemplated limited rights, which actually failed. For the biography, the further broadening of women's legal rights would in turn redeem the failure of that general one on gender as well as rescue from other discriminations (Amend. XIX)⁽³⁶⁾. In spite of his perspicacity and with the strategic help of selective sources, the biographer's

of course of non minor interest: Holly BREWER, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority*, Chapel Hill, UNCP, 2005.

⁽³⁵⁾ Martin J. SKLAR, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics*, Cambridge, CUP, 1988; Karen ORREN, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States*, New York, CUP, 1991; Robert J. STEINFELD, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870*, Chapel Hill, UNCP, 1991, pp. 122-183; Christopher L. TOMLINS, *Law, Labor, and Ideology in the Early American Republic*, Cambridge, CUP, 1993; A.D. STANLEY, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (n. 34); Karen ORREN, *Master and Servant Law and Constitutional Rights in the United States during the Nineteenth Century: A Domain-Specific Analysis*, in Willibald STEINMETZ (ed.), *Private Law and Social Inequality in the Industrial Age: Comparing Legal Cultures in Britain, France, Germany, and the United States*, Oxford, OUP, 2000, pp. 313-334; Michael J. PHILLIPS, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s*, Westport, Praeger, 2001; Nancy COHEN, *The Reconstruction of American Liberalism, 1865-1914*, Chapel Hill, UNCP, 2002.

⁽³⁶⁾ A.R. AMAR, *America's Constitution: A Biography*, also through the Index, with entries for *Gender and Women*, and subentries on *Women* in the items on abolition Amendments, and a specific item for *Nineteenth Amendment*, the one concerning women's limited rights (1920, sect. 1: « The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex »); add p. 457 for reference to the project of Equal Rights Amendment, the famous ERA (1972, sect. 1: « Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex »), whose failure the biographer deems redeemed by the evolution of the Supreme Court's jurisprudence, ready for substitution since the abolition, along with state constitutional or statutory enactments: « The (1972) proposal might be said to have been overtaken by events », these very events that are not strict or *written Constitution* for the viewpoint of the biography. Check Alice KESSLER-

affection towards his creature is too strong to go beyond favorable evidence for the long term, particularly after the abolition. He even acknowledges the bias with an uncalled-for excuse. The shortcoming of teleology may work. He perceives this, yet shows his optimistic view of the past through the enhanced image of a present time, as if the latter were the natural development of the former instead of being the contingent product of resistance and opposing struggles, of adjustment or rather repentance and rectifications not always by Amendments. The reference he tries in vain to hold at bay is Whig history, « a tale of inexorable progress »⁽³⁷⁾, the constitutional historiography which imagines liberties reaching back to medieval times, mainly as a peculiar British history whose institutional outcome would be opposed rather than continued by the United States and whose legal product would become the reverse, upheld rather than discontinued in America⁽³⁸⁾.

In a biography which is somehow aware of its creature's undemocratic and not so libertarian, or better still, inhuman original stances, as slavocratic and patriarchalist, such a marked relapse is striking, in spite of the same biographer's protestation concerning Whig history. The only explanation is that the character of the biography is alive, it is loved, and furthermore, the biographer thinks it may thus escape criticism for a lifetime career which is not actually very distinguished in important aspects. Through the idea of the Constitution as an *intergenerational project*, the biography may presume the best for the present for substituting the worst of the past. On these redemptive grounds, how could actual ACH be written? We still have to check further beyond the very biography.

HARRIS, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America*, New York, OUP, 2001.

⁽³⁷⁾ A. R. AMAR, *America's Constitution: A Biography*, p. 468: « Doubtless, some sophisticated readers may be tempted to dismiss my general account as *Whig history* — a tale of inexorable progress », as if the problem lay here, in this qualified Manichaeism, instead of in simple teleology, the Whig stance after all. For the involuntary demonstration, suffice it to reread the opening, no need to do so in a sophisticated way: *In the Beginning* and *A New Birth of Freedom*.

⁽³⁸⁾ For revealing studies on the historiography referred to, the Whig one, P. B. M. BLAAS, *Continuity and Anachronism: Parliamentary and Constitutional Development in Whig Historiography and in the Anti-Whig Reaction between 1890 and 1930*, La Haya, M. Nijhoff, 1978; James VERNON (ed.), *Re-reading the Constitution: New narratives in the political history of England long nineteenth century*, Cambridge, CUP, 1996; Ken I. KERSCH, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*, Cambridge, CUP, 2004. Later we shall see some controversial and more or less Whig historiography regarding the constitutional relation between Great Britain and United States.

3. *History between indigenous Territories and non-indigenous States.*

It turns out that the history of the United States Constitution must cover more than the Constitution itself, extending at least to State constitutionalisms. If federal constitutionalism becomes isolated and infatuated as *America's Constitution*, then historical and present understandings emerge as unfeasible. The biography is aware of this and takes it into account⁽³⁹⁾, but there is insufficient basis to contemplate the entire constitutional history of the United States as a complex dialectic among concurrent constitutionalisms, State and federal, unequally presided over time and place by the latter. Historiographical commitment itself is completely imbalanced. Not even one State constitutionalism has produced a historical literature like the federal one, or has even come close to it. Thus also the image of United States constitutionalism as intended by the biography has been created and enhanced⁽⁴⁰⁾.

Nowadays, there is no want of historiography emphasizing the significance of State constitutionalisms that in concurrence, of course, with the federal one, particularly in the aftermath of the abolition of slavery, have always held power which, for better or worse, affects freedom's rights. Against the prevailing vision and established custom in their own field, without mentioning the outside world, there is now a certain awareness that no United States constitutional history can be achieved without the constitutional histories of the member States⁽⁴¹⁾. For this reason alone and despite its attempts to heed some interfaces, a biography of *America's Constitution*, like any history of United States constitutionalism, is premature and biased. It is not a proper subject of research or for display. It lacks viability separately, as a different history with respect to so many histories which are no less constitutional as they

⁽³⁹⁾ A. R. AMAR, *America's Constitution: A Biography*, pp. 467 and 469: « I seek to locate the federal Constitution against the backdrop of its state constitutional counterparts »; « I have continued to treat state constitutional practice as a useful baseline, with brief attention to international norms ». I shall discuss later the international dimension which the biographer in fact does not acknowledge.

⁽⁴⁰⁾ The quoted (n. 2) *Comprehensive Bibliography of American Constitutional and Legal History*, that edited by K. L. HALL, can be sufficient, although not up to date, for verification. Easier to check, Leonard W. LEVY, Kenneth L. KARST, and Dennis J. MAHONEY (eds.), *American Constitutional History: Selections from the Encyclopedia of the American Constitution*, New York, Macmillan, 1989.

⁽⁴¹⁾ Heed J. J. DINANY's style of title, *The American State Constitutional Tradition* (n. 14), dealing with the origins. Let us recall that the first American major treatise on constitutional law preceded the 1787 Constitution and dealt with State Constitutions in comparison with foreign regimes: John ADAMS, *A Defence of the Constitutions of Government of the United States of America against the Attack of M. Turgot in his Letter to Dr. Price* (1787), Clark. LE, 2001, a multivolume response.

develop on their own soil, the original and the conquered from coast to coast and even beyond. The biography's creature is an organ — although eventually, for the moment, the principal one — of a multi-dimensional body, not a body, simple or not, in itself.

Again there is more. It is acknowledged in a chapter of the biography, *States and Territories*. Inside the United States in the past as in the present there are not only *States*, but also *Territories*. They differ because the former and not the latter are political bodies with their own constitutional powers, legislative, executive and judiciary, as full and equal members of the United States. Although provided with some lower kind of the same capacities and institutions, Territories are subject to federal powers. Contrary to the quite common habit of leaving them out of constitutional history, the biographer sensibly takes the Territories into consideration, although in fact under the biography's limiting perspective, that of the federal Constitution ⁽⁴²⁾.

The constitutional reference is twofold, one explicit and the other implicit; firstly the provision for incorporation of new States, which would mainly be formed from Territories, along with the granting of federal powers over the latter (art. 4, sect. 3, par. 1: « New states may be admitted by the Congress into this union... »; and par. 2: « The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States... »; alongside art. 1, sect. 8, clause 17, investing the Congress with legislative power over federal property); secondly the availability of claims for expeditious return of runaway slaves (art. 4, sect. 2, par. 3: « No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due », taking for granted that the Territory rule could not do otherwise for this specific point of fugitive slaves). Neither the 1787 Constitution nor any of its Amendments are concerned with anything more regarding Territories. The constitutional *written* profile turned out to be even lower or rather higher as the second reference was implicit and, in fact, controversial since the Territory rule tended to exclude slavery from the Territories ⁽⁴³⁾.

At any rate, substantive Territory regime was not provided by formally constitutional rules even though concerning constitutional rights. It is a detail which must be noted and the biography does so

⁽⁴²⁾ A. R. AMAR, *America's Constitution: A Biography*, pp. 247-281, chapter seventh as we know.

⁽⁴³⁾ P. FINKELMAN (ed.), *Slavery and the Law* (n. 23); Gary LAWSON and Guy SEIDMAN, *The Constitution of Empire: Territorial Expansion and American Legal History*, New Haven, YUP, 2004.

summarily and somehow contradictorily ⁽⁴⁴⁾, whereby straying from the rule about strictly abiding by the *written Constitution*. The biographer has to do so certainly from time to time. No matter how hard he strives, there happens to be no way of producing the exclusive history of such a character, *America's Constitution*. Let us hold on to that for what remains to be seen of eclipses and blind spots, cover ups and silences, as they are not always nor mainly due to historiographical dependence on constitutional sources.

From the beginning Territory regime in fact granted constitutional rights, but only for colonizing people while being insufficient in number to establish a new member State which would take responsibility for its citizens' standing, the former settlers'. But the Territory regime did not deal with uninhabited lands to be populated from scratch. People were there, and not a dispersed population but peoples forming communities and polities. Territory regime tends to disregard this human presence ⁽⁴⁵⁾, pretending ignorance of the fact that the concerned peoples held political relations with the United States, usually even through Treaties in terms of agreements among Nations in the plural. Let us use capital letters here because all of this affected rights, the rights of both people and peoples, harmfully those — individual as much as collective ones — disregarded by the United States Territory regime. The constitutional significance of such Treaties might be not inferior to that of the Constitutions themselves, State and federal. Of course, I refer to the long set of Treaties between Indian Nations and United States, which bear constitutional value in themselves and even more by comparison ⁽⁴⁶⁾. It is visibly so if compared with the plan for invasion and domination, dispossession and displacement, or even extermination, mapped out by Territory regime that disregards this human presence, which has been justly described as a form of colonial constitutionalism or rather, better denoting the continuity, constitutional colonialism.

⁽⁴⁴⁾ A. R. AMAR, *America's Constitution: A Biography*, p. 265: « Free-soil statutes like the 1789 Northwestern Ordinance Act and the 1820 Missouri Compromise Act were textbook examples of the due process of law », stressing the contrast with the constitutional stance as regards the said claims for runaway slaves whether across State borders or to the Territories themselves without due process at all, whose extension to the latter the biographer overlooks precisely when highlighting Territory rules as « textbook examples of due process of law ».

⁽⁴⁵⁾ Check the most specific constitutional approach to Territories' acquisition and regime: G. LAWSON and G. SEIDMAN, *The Constitution of Empire: Territorial Expansion and American Legal History* (n. 43), pp. 13 and 102, noting and avoiding the point; pp. 103 and 189-201, effectively overlooking it as regards rights.

⁽⁴⁶⁾ For the most complete record, Vine DELORIA Jr. and Raymond J. DEMALLIE (eds.), *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775-1979*, Norman, University of Oklahoma Press (UOP hereinafter), 1999.

Indians — American indigenous persons and indigenous peoples with such a colonial name — are mainly concerned, though in the long run it does not affect their case exclusively ⁽⁴⁷⁾.

An early Territory Ordinance is the 1787 Constitution's twin sister. Allow me to lavish capitals whenever rights are concerned. While the text of the Constitution was discussed and finally elaborated by a Convention, the 1787 Territory Ordinance was in parallel produced by the regular Congress, that of the Confederacy, the former constitutional system of the independent United States ⁽⁴⁸⁾. This Territory Ordinance contains a substantial recognition of rights and guarantees, something that the United States Constitution would not yet incorporate. It addresses migration to and colonization of the Territories with a view to encouraging settlements through the granting of liberties. Regarding the established people, indigenous of course, it offers words of good will and promises of a beneficial legislation, United States' naturally, as if those peoples lacked polities, laws, and rights, all this together with the veiled threat of war if they did not agree. Later Ordinances or equivalent regulations for other Territories, like Treaties receiving them from foreign States, European or not, would not show so much concern ⁽⁴⁹⁾. With at least one remarkable exception that we shall see,

⁽⁴⁷⁾ E. Robert STATHAM Jr., *Colonial Constitutionalism: The Tyranny of United States' Offshore Territorial Policy and Relations*, Lanham, Lexington Books, 2002, yet explicitly disregarding the formation of Territory rule in the American continent, before extending offshore. For G. LAWSON and G. SEIDMAN, *The Constitution of Empire: Territorial Expansion and American Legal History* (n. 43), American constitutional imperialism does not entail or even excludes colonialism. Compare Ward CHURCHILL, *Perversions of Justice: Indigenous Peoples and Angloamerican Law*, San Francisco, City Lights (CL henceforth), 2003, since this set of essays on continental and overseas constitutional colonialism pays in addition attention to the continuity of Territory regime. I shall return to this link.

⁽⁴⁸⁾ Peter S. ONUF, *Statehood and Union: A History of the Northwest Ordinance*, Bloomington, Indiana University Press (IUP from here on), 1987, yet not concerned with the effect of Indian deprivation either. This is of course the Ordinance that A.R. AMAR, *America's Constitution: A Biography*, labels as one of the « textbooks examples of due process of law ».

⁽⁴⁹⁾ The 1787 Ordinance is worth quoting regarding both Indians and slavery. Sect. 14, art. 3: « ... The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them » (thus, the very first things intended to be taken from them were their rights and laws, only United States regulations and « lawful wars » being forecast); sect. 14, art. 6: « There shall be neither slavery nor involuntary servitude in the

that of the Treaty of Guadalupe Hidalgo between the United States and Mexico, those Territory regulations would tend to plainly ignore indigenous presence ⁽⁵⁰⁾.

There is an added aggravating factor, if it can be described in this way. Those people so adversely affected by the 1787 Ordinance were not aliens, if such a thing might ever have existed in the midst of humankind. There was close interaction with them, commercial as well as political; the latter even of a confederative nature through Treaties ⁽⁵¹⁾. The British colonies had participated in Confederacies with Indian Nations, with an initial capital also for these Confederations as the rights of both parties, indigenous and non-indigenous, were concerned ⁽⁵²⁾. The very first formal Confederacy of the new independent United States was open to the incorporation of Indian Nations through representatives in the Congress agreed by Treaties. There are at least a couple of documented samples of these agreements explicitly contemplating Indian representation in United States Congress, namely Cherokee and Delaware, before 1787 ⁽⁵³⁾.

Here was an alternative constitutional horizon through Treaties and Confederations unilaterally cancelled by the United States by

said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted. Provided, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid » (thus, in accordance, as we know, with the 1787 Constitution, art. 4, sect. 2, par. 3, though it referred only to States and was not still in force). The text is available on various websites, more reliably in the collected *Documents in Law, History, and Diplomacy* of the *Avalon Project* at the Yale Law School: <http://www.yale.edu/lawweb/avalon/avalon.htm>, which is also worthwhile visiting for other documents due to appear.

⁽⁵⁰⁾ Max FARRAND, *The Legislation of Congress for the Government of the Organized Territories of the United States, 1789-1895* (1896), reprint, Buffalo, William S. Hein (WH from now onward), 2000.

⁽⁵¹⁾ Richard WHITE, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815*, Cambridge, CUP, 1991; Alan TAYLOR, *The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution*, New York, Alfred A. Knopf (AK from now onward), 2006.

⁽⁵²⁾ Francis JENNINGS, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies*, New York, WN, 1984; Daniel K. RICHTER and James H. MERRELL (eds.), *Beyond the Covenant Chain: The Iroquois and their Neighbors in Indian North America, 1600-1800*, University Park, Pennsylvania State University Press (PSUP here after), 2003, an enlarged edition with a historiographical discussion, pp. XI-XVIII.

⁽⁵³⁾ V. DELORIA JR. and R. J. DEMALLIE (eds.), *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions* (n. 46), vol. I, pp. 12-102.

means of the 1787 Constitution along with the Ordinance of the same year. Let us take notice. There was a *We the Peoples* in the plural before *We the People* in the singular, a kind of *We the Peoples of America* in constitutional concurrence prior to *We the People of the United States* in constituent exclusivity. Nothing of this is even hinted at in the biography. Once we are clearly outside the *written Constitution*, is it the lamentable effect of the textual method used to identify the subject and no more? I am not very sure. There are plenty of signs that we are witnessing a sleight of hand not only by the biographer but also by the constitutional environment, scholarly and political, in which his work is embedded and built up. It is not bad manners to point it out. If this is in effect not an isolated, individual failing but a cultural, collective deficiency, its interest turns out to be of the utmost importance for our survey and reflection.

Step by step, almost phrase by phrase, the biography follows the texts of the *written Constitution* in a close examination of all its significant expressions. The biographer cannot escape Indian clauses, if there are any. Other ever elusive indirect references aside, the Constitution comes closer to contemplating the position of indigenous peoples from the United States perspective in the passage concerning legislative powers: « The Congress shall have power... to regulate commerce with foreign Nations, and among the several States, and with the Indian tribes » (art. 1, sect. 8, clause 3). Here, in this very provision lies the whole dilemma of the United States' final determination to constitute itself as an exclusive entity among the variety of peoples previously existing in the same territory. These are somehow pejoratively named *Tribes*, yet like a kind of third genus among foreign *Nations* and member *States*, closer to the former than the latter. On one hand there is commerce *among* the member States, and on the other, *with* Nations and Tribes, the outside or so it would appear, because there were indigenous peoples also inside the boundaries of the States making up so far the United States. Furthermore, Treaties were signed with such Indian peoples in terms of international relations, these peoples being deemed in English as *Nations*, as well as *Tribes*, by these bilateral or multilateral agreements.

Like so many other parts of the biography, such a clause on *foreign Nations*, *several States*, and *Indian tribes* could have provided the chance to come to grips with the complex question on constituent entities and constitutional characters which is of undoubted initial importance. Nevertheless the biographer has little to say about the Indian presence. On five occasions he deals specifically with the regulation of commerce, making it clear that the importance of the clause goes beyond international trade, concerning both congressional powers and foreign relations. It is not just a *commerce clause* as it is ordinarily called. Yet only on one of those five occasions are *Indian tribes* referred

to, without tackling or even identifying the underlying question of their constitutional standing of a different kind — a third genus — among foreign Nations and internal States from the United States perspective⁽⁵⁴⁾. *Tertium non datur*? If not, why are *Indian tribes* not *foreign Nations*? The least we can say is that it is an opportunity missed by the biography, for there is no other phrase in the *written Constitution*, including all the Amendments, that deals with *Indian tribes*, or according to Treaties, *Indian Nations*. And the biography does not even mention these formal agreements with Indian peoples — formal even from a constitutional standpoint. Article I, section 8, clause 3 was undoubtedly where their presence could have been admitted and dealt with, precisely where it is silenced. How could such negligence occur in an account which is so meticulous with all the relevant statements of a *written corpus*?

The explanation might be found in the biography's account itself. Let us take a look at its extravagant references to Indian people. By extravagant I mean what the word means, that is, out of place. They are not in the appropriate context according to the very logic of the biography. And they are not many for the past and present constitutional importance of the question. As we know, the verification is meaningful since it may indicate the stance not just of an individual author but also of a whole constitutional culture, that of the United States. The fact is that in a book on the history of the United States Constitution over five hundred pages long, only on four occasions do we find extremely brief references to the constitutional status afforded to Indians; a little handful of insignificant phrases and miserly allusions amongst thousands of corpulent paragraphs and generous references to other not always so momentous issues⁽⁵⁵⁾. It is a failing that might not compare unfavorably in a political and academic environment where there is an abundance of constitutional accounts which are even more

⁽⁵⁴⁾ As we know, A. R. AMAR, *America's Constitution: A Biography*, has a useful Appendix with the *written Constitution* and marginal notes indicating the pages dealing with each constitutional passage. For the unique occasion of reference to the inclusion of *Indian tribes* in the commerce clause, p. 108, note, simply registering the 1790 Act to Regulate Trade and Intercourse with the Indian Tribes, whose assumptions, close to those of Territory regulations, and aim, were complementary to them. The biography just mentions the act, disregarding content and context.

⁽⁵⁵⁾ *Indians*, *Indian tribes* is the Index labeling for fifteen, or really eleven references, since one is repeated, one other must be added (p. 621, above all for its references to essays concerning the later grant of United States citizenship without Indian consent, which I shall touch on), and three refer to consecutive pages. Most of the ten or so are occasional and elusive like the already mentioned concerning the commerce clause.

miserly in this respect. Yet we now refer to the *written Constitution*. The biographer does, doesn't he?

We are essentially informed by the biography that « Indian reservations » exist and that they do so as « entities of distinctly diminished constitutional status » by virtue of the fact that United States citizenship is withheld from *Indians not taxed*, both by the Constitution (art. 1, sect. 2, par. 3: « Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons... »), the latter, euphemistically, slaves of course, so as to over-represent slaveholders) and by one of the abolition Amendments (1868, Amend. XIV, sect. 2: « Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed... ») ⁽⁵⁶⁾. Take heed of the biographer's wording: *entities of distinctly diminished constitutional status* meaning Indian peoples enclosed in reservations. It may sound familiar, but there is no support for either the conception or the expression in the whole corpus of the *written Constitution* — the biography's body.

The 1868 Amendment is the same one that produces federal citizenship by declaring « all persons born... in the United States » as citizens on an impossible equal footing, impossible as long as patriarchy legally existed (sect. 1: « All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ») ⁽⁵⁷⁾. When dealing with this federalization of citizenship, the biographer omits the indigenous exception or rather any reference to the complete constitutional silence about the existence of Indian Nations, most of them in reservations by then. The fact was that Indians were neither

⁽⁵⁶⁾ A. R. AMAR, *America's Constitution: A Biography*, p. 439, further referring to the frustrated 1866 Civil Rights Act, not to the constitutional phrasing and judicial construction on *Indian tribes*, which I shall return to, either as art. 1, sect. 8, clause 3, or by the name of commerce clause.

⁽⁵⁷⁾ For the persistence of patriarchy at postemancipation time, which made it impossible for any legal equality then particularly concerning not only former slaves, but also women, let me refer again (n. 34) to L. F. EDWARDS, *Gendered Strife and Confusion: The Political Culture of Reconstruction*; A. D. STANLEY, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation*.

qualified for United States citizenship nor belonged to polities whose citizenship was acknowledged by the United States. This is what the silence meant. Since silence is not *written Constitution*, the biography keeps quiet.

Indian reservations are not in the United States and subject to them? When the biographer considers it further on, he takes notice of the indigenous omission by the citizenship Amendment and reduces it to a gap. He now, out of place, offers the absurd idea of comparing the case with that of the embassy-born offspring of diplomatic staff, not « subject to the jurisdiction » of the United States. Like foreign Nations' delegations, Indian reservations would be extraterritorial facilities ⁽⁵⁸⁾. Were it really taken seriously, and once the diminished and degraded constitutional status of the Indian reservations in the bosom of the United States is mentioned, indigenous constitutionalism should be dealt with; a specific constitutionalism with an entire, varied history between confederative practice through Treaties and the confinement to reservations by the United States counterpart. The constitutional reference to *Indian tribes* in the biography should have made it plausible. But this is exactly what is avoided. It is worthwhile pointing out that this is not owing to a lack of knowledge, as research is available.

What is the legal support, for the United States, of the idea and practice of *Indian reservations* as entities with a particular *constitutional status*? Within Territories from coast to coast new States have emerged, and in an even greater number, Indian Reservations. Let us use the initial capital as Indian rights are affected or rather ignored. The biography deals with the Territories but not the Reservations, although their existence cannot be overlooked. Why does the omission not stand out? It is a matter of the cultural implications of United States constitutionalism regarding a jurisprudential tradition which refers to the right of conquest for reducing Indian peoples to *domestic dependent Nations*, thus situated under the guardianship of the United States, unilateral and final arbiter of the very Treaties that might be subscribed between the tutor and its wards — United States and Indian peoples. Thus the former pretends to be lord of the law and master of war for the latter ⁽⁵⁹⁾. It is a legal tradition of the colonial variety, proceeding from pre-constitutional times, but which was explicitly adopted early on in the United States by the federal Supreme Court's manipulation of the constitutional reference to *Indian tribes*. Hence, between outer Nations and inner States *domestic dependent Nations* were intro-

⁽⁵⁸⁾ A. R. AMAR, *America's Constitution: A Biography*, pp. 351, 381 (this one for the grouping together with diplomacy), 430, 439 already quoted, and 621.

⁽⁵⁹⁾ David E. WILKINS, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*, Austin, University of Texas Press (UTxP from here on), 1997.

duced ⁽⁶⁰⁾. In this way then the third genus was defined. Despite the biography, the degraded constitutional and legal status of the Indian Reservations in the bosom of the United States originates on this constitutional ground — the phrasing on *Indian tribes* — more precisely than from the couple of mentions concerning *Indians not taxed* ⁽⁶¹⁾.

The constitutional reference may suffice to make the difference, whether to individuals — *Indian not taxed* — or peoples — *Indian tribes* or according to Treaties, *Nations*. It is not a case just of legal exclusion or cultural discrimination, but territorial conquest and constitutional domination. It is about peoples or nations and not just individuals or groups. Legal exclusion and cultural discrimination by the United States might be even positive if it could imply respect for Indian law and indigenous rights, showing consideration for territories and polities, but this is not the case. In the biography, *Indians not taxed* supplant and conceal *Indian tribes* and hence *Nations*. So neither a single example of indigenous constitutionalism nor even the constitutionalism in common with the United States through Treaties shows up.

It cannot be said that the biographer does not keep his promise to be faithful to his creature's documented, official life, the *written Constitution*, where not even the federal Supreme Court's jurisprudence is included. But not all seems transparent procedure or even fair play. Is it bad manners on my part to show the signs? The indigenous presence is treated as no other human appearance in the constitutional field is, by avoiding the issue in the light of the documented evidence. Wherever convenient the biographical account collates external references to the constitutional body strictly speaking, the *written Constitution*, taking care for the information to match up in order for the explanation to be satisfactory. The main exception no doubt refers to the mention of *Indian tribes* in the commerce clause, whose actual significance can only be explained through Supreme Court's decisions — like that making up *domestic dependent Nations* — which the

⁽⁶⁰⁾ Robert A. WILLIAMS JR., *The American Indian in Western Legal Thought: The Discourses of Conquest*, New York, OUP, 1990; Tim Alan GARRISON, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations*, Athens, UGP, 2002; Lindsay Gordon ROBERTSON, *Conquest by Law: How the Discovery of America dispossessed indigenous peoples of their lands*, New York, OUP, 2005; Stuart BANNER, *How the Indians Lost Their Lands: Law and Power on the Frontier*, Cambridge, HUP, 2005.

⁽⁶¹⁾ John R. WUNDER, « *Retained by the People* »: *A History of American Indians and the Bill of Right*, New York, OUP, 1994; D.E. WILKINS and V. DELORIA Jr., *Tribes, Treaties, and Constitutional Tribulations*, Austin, UTxP, 1999; D.E. WILKINS and K. Tsianina LOMAWAIMA, *Uneven Ground: American Indian Sovereignty and Federal Law*, Norman, UOP, 2001.

biography leaves aside ⁽⁶²⁾. Only with regard to Indian peoples does it prove to be blatantly careless as well as extremely awkward. It is the carelessness and awkwardness, to say the least, of an entire constitutional culture, that of the United States, whose greatest challenge is posed by that indigenous presence, a challenge practically insurmountable for the past and present terms of United States constitutionalism, federal and all ⁽⁶³⁾.

The shadow looming over the constitutional history is the one already identified by wondering *Why the English Legal History is not Written*: « If we try to make history the handmaid of dogma she will soon cease to be history », or rather, if we substitute Constitution for dogma in accordance with the current legal faith, « if we try to make history the handmaid of the Constitution it will soon cease to be history ». There are still people who stress further the legal dogma through the Christian religion along with United States Constitution making history the servant of cultural supremacism ⁽⁶⁴⁾. Let us take the opportunity to point out that in the British context, the indigenous question is today viewed as a real challenge for some legal and even constitutional historiography after a long period of a purely supremacist perspective ⁽⁶⁵⁾. Do not expect our biography to take notice of these

⁽⁶²⁾ The Index of A. R. AMAR, *America's Constitution: A Biography*, includes an item on the *commerce clause* with a subentry on *broad reading of*, which might give rise to Supreme Court's construction on the mention of *Indian tribes* by that clause — the broadest, strangest, and most obstinate judicial reading ever made of any constitutional phrase. No way. The biographer's only concern (pp. 107-108) is for the extended meaning of the word *commerce* to allocate powers between the Union and the States.

⁽⁶³⁾ R. A. WILLIAMS, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*, Minneapolis, University of Minnesota Press (UMP henceforward), 2005.

⁽⁶⁴⁾ I refer to H. J. BERMAN, *Why the History of Western Law is not Written* (n. 1), as well as F. W. MAITLAND, *Why the History of English Law is not Written*, where the verdict comes from. As for H. J. Berman's stance, a piece of debate on my part is available: *De la religión en el derecho historia mediante*, in « Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno », 15, 1986, pp. 531-549.

⁽⁶⁵⁾ Julie EVANS, Patricia GRIMSHAW, David PHILIPS, and Shurlee SWAIN, *Equal Subjects, Unequal Rights: Indigenous People in British Settler Colonies, 1830-1910*, Manchester, Manchester University Press, 2003; P. G. MCHUGH, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination*, New York, OUP, 2004. See the lecture (n. 1) of B. KERCHER, *Why the History of Australian Law is not English* (on the web: <http://www.law.mq.edu.au/html/staff/kercher/Castles.htm>); add <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000-1/kercher/#fn3>: *Where the Future Meets the Past: Pre-1900 New South Wales Case Law on the Web*, in « Journal of Information, Law, and Technology », 2000). Some more specifically constitutional studies I shall quote below.

trends outside the mainstream of constitutional history, despite their undoubted importance for an understanding of the United States constitutionalism which after all belongs to British colonialism's offspring in America.

4. *Treaty as Constitution, Constitution as breach of Treaty.*

Neither a *written* nor an *unwritten* Constitution is sufficient unless we have a very broad idea of the latter variety, even beyond documents as it affects culture. Constitutional history is bound to become wide-ranging enough to specifically comprehend the Treaties between and with indigenous Nations, a much more generous understanding than that of the biography of the United States Constitution which identifies America at their expense just like that. The biography of the United States Constitution can simply be titled *America's Constitution*. The very name *America* not only supplants a whole continent, but also cancels the presence of the indigenous peoples of America itself or rather, for that matter, the United States themselves. Concerning the histories of documents holding constitutional or even constituent value, the corpus of the Indian Treaties is the first item to disappear without trace ⁽⁶⁶⁾.

As a matter of fact, the biography deals with Treaties. It must, since they appear in the Constitution as a part of the international jurisdiction corresponding to the United States President and shared with the Chamber of the Congress where member States are represented (art. 2, sect. 2, par. 2: « He — the president — shall have power, by and with the advice and consent of the Senate, to make treaties... »). They reappear to be declared, along with the Constitution, United States law over that of the States (art. 6, par. 2: « This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land... ») ⁽⁶⁷⁾. In the biography there is no reference at all to this constitutional detail, but during most of the nineteenth century the so-called Indian Treaties — those be-

⁽⁶⁶⁾ The explicit exclusion of sources by A. R. AMAR, *America's Constitution: A Biography*, p. 477 already quoted, which begins by leaving out the federal Supreme Court's jurisprudence on the grounds that it is not a part of the *written Constitution*, lists a whole series of possible supplementary materials bearing importance for *American* constitutionalism itself, where there is not even a hint at the Indian Treaties, filed with the Senate records and even further collected and published as they are, while the opposite category, that of the Territory Ordinances, is instead explicitly mentioned.

⁽⁶⁷⁾ I keep specifying the well-known constitutional sites because they offer the best guide for the use of A. R. AMAR, *America's Constitution: A Biography*, even better than the Index when dealing with constitutional construction; as I already mentioned,

tween indigenous peoples and the United States — were formally handled in the same way as any other international Treaty. For congressional advice and consent, they followed an identical procedure to the Treaties signed with foreign States, that required by the Constitution (68).

It was a practice in keeping with *Indian tribes'* third genus constitutional standing initially closer to the *foreign Nations*. Outside the *written Constitution*, but Constitution all the same, the judicial construction of *domestic dependent Nations* provided the background to curb the indigenous international standing and the legal force of Indian Treaties. All in all, the constitutional scripture (art. 1, sect. 8, clause 3) could offer a basis for the biography to consider the agreements between the United States and the Indian Nations. I have already remarked that the detail is not even mentioned. It seems unquestionable that it bears specifically constitutional importance. By means of Treaties, the indigenous peoples sought reciprocity in the recognition of other peoples' rights for respect towards their own, which the United States signed, but did not honor. Finally, Indian Treaties were not binding documents bearing constituent significance or even any constitutional value for the United States (69).

I have already noted that Confederations were formed with Indian Nations by means of Treaties. They were feasible under the former Constitution of the United States, the so called Articles of Confederation in force during the eighties, but no longer with the final Constitution (70). This unilaterally cancelled a possibility already agreed on

America's Constitution reproduces the *written Constitution* indicating in the margin the pages where his volume tackles each constitutional passage.

(68) Francis Paul PRUCHA, *American Indian Treaties: The History of a Political Anomaly*, Berkeley, University of California Press (UCP from now onward), 1994, leaving aside the Whig bias blatantly expressed by the subtitle: *political anomaly*.

(69) For the last period from formal to casual practice, comparatively, but not for the entire constitutional field either, I mean disregarding Indian party's rights and stances, perspectives and procedures too — like F. P. Prucha —, Jill St. GERMAIN, *Indian Treaty-Making Policy in the United States and Canada, 1867-1877*, Lincoln, University of Nebraska Press (UNP from now on), 2001.

(70) In fact, the references to Indians from the Articles of Confederation did not imply any forecast of confederative relationship («No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State (). The United States in Congress assembled shall also have the sole and exclusive right and power of regulating (...) the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated»). Nevertheless, as we are about to see, there were Treaties contemplating the

with Indian Nations. One of the peoples to sign a confederative Treaty with the United States during the period of the Articles of Confederation, namely in 1785, was the Cherokee Nation ⁽⁷¹⁾. The Confederations themselves were not exclusive and on the indigenous side the constitutional option was able to be maintained alive after 1787. In 1793 this indigenous party, the Cherokee people, joins a confederative Treaty among several other Indian Nations together with Spain. In the Spanish version, this European party expresses the expectation of contemplating the Indian Nations coming together as a single Nation under the protection of a common Monarch ⁽⁷²⁾, while the indigenous peoples uphold the genuine confederative approach among Nations always in the plural, the non-American one included. A main concern in this Treaty with the Spaniards was that of the borders with both the Spanish Monarchy and the United States, the former undertaking the commitment to reach an agreement with the latter as a guarantee for the Indian Nations in-between. The United States did not abide by the terms of their respective border Treaties with indigenous peoples ⁽⁷³⁾.

The border Treaty between Spain and the United States was actually agreed upon affecting the indigenous standing. It is signed in 1795. Regarding frontiers it does not contain just what was foreseen for

possibility. Under confederative relations, constitutional regulations are just party rules, not common Constitution. I shall return more than once to this key point.

⁽⁷¹⁾ V. DELORIA Jr. and R.J. DEMALLIE (eds.), *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions* (n. 46), record the item (vol. I, p. 183), but do not reproduce the text. It is collected by Charles J. KAPPLER (ed.), *Indian Treaties, 1778-1883* (1904), New York, Interland, 1972, pp. 8-11.

⁽⁷²⁾ As a matter of fact, the United States expressed the same pretension through the just mentioned 1785 Treaty with the Cherokee Nation in the English written version: « The said Indians for themselves and their respective tribes and towns do acknowledge all the Cherokee to be under the protection of the United States of America, and of no other foreign sovereign whosoever. (...). That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress », sic, one deputy for all Indians. The clause had not been much different in the 1778 Treaty with the Delaware Nation: « And it is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress » (C. J. KAPPLER (ed.), *Indian Treaties, 1778-1883*, pp. 3-5).

⁽⁷³⁾ B. CLAVERO, *Tratados con otros Pueblos y Derechos de otras Gentes en la Constitución de Estados por América*, Madrid, Centro de Estudios Políticos y Constitucionales (CEPC from now onward), 2005, with the text of the 1793 Treaty's Spanish version in the appendix.

Indian Nations through the Treaties with them. As though these peoples did not exist there, or as though it had nothing to do with their territories, it draws borders contiguously, without intervening spaces, between Spain and the United States. In fact, it refers to Treaties of both parties with Indian Nations now inside the respective frontiers, but adding that none should be signed anymore unless for peace and trade's sake: « And whereas several treaties of Friendship exist between the two contracting Parties and the said Nations of Indians, it is hereby agreed that in future no treaty of alliance or other whatever (except treaties of Peace) shall be made by either Party with the Indians living within the boundary of the other; but both Parties will endeavor to make the advantages of the Indian trade common and mutually beneficial to their respective Subjects and Citizens observing in all things the most complete reciprocity » between the said Spanish subjects and American citizens, not with indigenous people. Therefore, not only the Constitutions, but also the Treaties with foreign States attempted to practically nullify the Treaties with indigenous peoples, reducing these latter agreements to simple resorts for sparing war with no substantial obligations for the non-indigenous parties. When Spain and the United States sign a new border Treaty in 1819, the on-going trend for even less consideration with the Indian Nations concerned will be strengthened (74). Other people's Treaties, those between States, affected indigenous rights of course, likewise trying to annul them as such. The Territory regime was able to bear this out.

The United States had gone from a Confederacy where similarly confederative Treaty relations with indigenous Nations could exist, to federal Union where there was no room for such an occurrence. Spain did not even seem to understand either federations or confederations, or rather conveniently pretended not to. When signing confederative Treaties with Indian Nations, the Spanish version was made up as if the indigenous people all came together under the dominion of the Monarchy. Needless to say, a Treaty is the business of two or more parties, never a single one. Treaties were also signed by indigenous peoples with other European Monarchies, both British and French. The Indian

(74) Spanish versions of those Treaties with the United States can be found in the collection of Alejandro del CANTILLO (ed.), *Tratados, convenios y declaraciones de paz y de comercio que han hecho con las potencias extranjeras los monarcas españoles de la Casa de Borbón, desde 1700 hasta el día* (1843), where you can search in vain for the Treaties with indigenous peoples, although they were also for *peace* and *trade*. Together with other collections Cantillo's is available on CD-Rom: José ANDRÉS GALLEGÓ (ed.), *Tratados Internacionales de España*, CD II, 1700-1902, Madrid, Fundación Tavera, 2000. English versions are at hand on internet, for instance on the already quoted (n. 49) University of Yale's site, *Documents in Law, History, and Diplomacy*: <http://www.yale.edu/lawweb/avalon/avalon.htm>.

construction is of the utmost importance, upholding the confederative approach and practice beyond the written documents (75). So, thanks to indigenous initiative there was a confederative surge in the American origins of constitutional history which historiography and anthropology can be aware of, as research is available. However, the constitutionalism does not appreciate it at all, dramatically distorting the original scenario (76). The biography of *America's Constitution* fails to remember all this. Abiding by the *written* scripture, you have to tackle things like liquor prohibition (Amends. XVIII and XXI) while losing subjects decisive for constitutional history (77).

In the mid-nineteenth century the Treaty of Guadalupe Hidalgo between the United States and Mexico, already independent from Spain for nearly three decades, transfers practically half of theoretically Mexican territory from the latter to the former. Most of it in fact belonged to indigenous peoples. There would still be some Indian Treaties afterwards, for more than a decade, but the final tendency is for the non-indigenous party to simply intrude and dominate, using all methods, even genocide (78). So the confederative perspective was finally frustrated with a tremendous human cost. All of this is constitutional history too. Here is the parabola of the Native American people's fate before the European presence which has adopted con-

(75) R. A. WILLIAMS, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*, New York, OUP, 1997.

(76) Not only is it unappreciated by legal history for constitutional purposes, but it is even devaluated by the most conscientious anthropology: William N. FENTON, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy*, Norman, UOP, 1988, on the best known case for the — let us say — intellectual non indigenous party for quite a while in America as well as in Europe: Lewis H. MORGAN, *League of the Ho-de'b4b4-no-sau-nee, or Iroquois* (1851), edition and notes by Herbert M. LLOYD, New York, B. Franklin, 1966; Friedrich ENGELS, *Der Ursprung der Familie, des Privateigentums und des Staats* (1884), with a lot of translations and editions as a Marxist classic, where I first learned, as an undergraduate student, about Hodenosaunee, the Iroquois Confederacy older than the United States.

(77) A. R. AMAR, *America's Constitution: A Biography*, pp. 415-419, regarding these Amendments which are part of the *written Constitution*, but not Constitution anymore as for their core provisions (XVIII, sect.1, prohibiting « the manufacture, sale, or transportation of intoxicating liquors... for beverage purposes »; XXI, sect. 1: « The article eighteenth of amendment to the Constitution of the United States is hereby repealed »).

(78) William B. SECREST, *When the Great Spirit Died: The Destruction of California Indians, 1850-1860*, Sanger, Word Dancer, 2003; being consummated by then, Gary Clayton ANDERSON, *The Conquest Of Texas: Ethnic Cleansing in The Promised Land, 1820-1875*, Norman, UOP, 2005. I do not know of any studies on genocides in Arizona and New Mexico like the one perpetrated against the Apache Chiricahua people.

stitutionalism without terminating colonialism. Nonetheless, it has not been fatal destiny at all, but human agency in full. For the supremacist backdrop of the constitutional view, Treaties with Indians were simply transitory resources for final dominion, not allowing any chance of establishing a confederative, equal footing (79).

As for the Cherokee Nation, it was outstanding in the constitutional field just for generating its own constitutionalism very early on and furthermore for stubbornly defending its Treaty relationship with the United States even before the federal justice itself. This is the case which gave rise to that jurisprudential construction of *domestic dependent Nations* (80). Later on, the Cherokee Nation was mostly confined in Okalahoma, under the long-standing promise that it would be *Indian Territory*, with indigenous self-government, not federal rule. In the end the United States treated it as just *Territory*, encouraging immigration to establish a non-indigenous State (81). Although it might be an added cruelty to say it, for it is not an imaginary people who suffer this evolution, the Cherokee case is also meaningful as a parable (82). It may represent the history of the United States' expansion from coast to coast curtailing and even annihilating the cultural, social, economical, political, and civil rights of indigenous peoples. Along with invasion, removal, confinement, ethnic cleansing, and genocide the deprivation was achieved through constitutional devices, mainly arbitrary decisions of the federal Supreme Court, without any support from the *written Constitution* (83).

(79) B. CLAVERO, *Freedom's Law and Indigenous Rights: From Europe's Oeconomy to the Constitutionalism of the Americas*, Berkeley, The Robbins Collection, 2005, pp. 57-182.

(80) Jill NORGREN, *The Cherokee Cases: The Confrontation of Law and Politics*, New York, McGraw-Hill College, 1995; L.G. ROBERTSON, *Conquest by Law: How the Discovery of America dispossessed indigenous peoples of their lands* (n. 60).

(81) William G. McLOUGHLIN, *After the Trail of Tears: The Cherokees' Struggle for Sovereignty, 1839-1880*, Chapel Hill, UNCP, 1994; Jeffrey BURTON, *Indian Territory and the United States, 1866-1906: Courts, Government, and the Movement for Oklahoma Statehood*, Norman, UOP, 1995. We saw an early proposal concerning the establishment of a single Indian State inside the United States for all the Indian Nations in the 1778 Treaty with the Delaware Nation.

(82) Duane CHAMPAGNE, *Social Order and Political Change: Constitutional Government among the Cherokee, the Choctaw, the Chickasaw, and the Creek*, Stanford, Stanford University Press (SUP from now onward), 1992; Andrew DENSON, *Demanding the Cherokee Nation: Indian Autonomy and American Culture, 1830-1900*, Lincoln, UNP, 2004.

(83) Sidney L. HARRING, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*, New York, CUP, 1994; Blue CLARK, *Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century*, Lincoln, UNP, 1999.

Why do I go as far as these details which have absolutely nothing to do with the biography of the United States *written Constitution* as neither the 1787 Constitution nor any of its Amendments refer to them? That is the point. There is American constitutionalism outside the United States Constitution, a lot of it as a matter of fact. On the indigenous side a non-exclusive alternative was offered, since it affected United States constitutionalism. There was no exclusion, not even of European Monarchies. Even for the non-indigenous side it could be said that the approach was non-exclusive, for the aim to include also existed, except that the actual purpose was that of subordination going as far as material expropriation and cultural deprivation through Treaty-making as well. The difference lay in the means and scope of the inclusion. The results of what was imposed are plain to see. The possibilities of the alternative which was frustrated are not part of the biography of *America's Constitution* of course, which does not mean that they never belonged to American constitutional history. They are there in the past, not in the historiography that is an obsequious servant to a zealous dogma, that germane to the United States Constitution. They are here in the present with indigenous living memories and resistant Indian constitutionalism ⁽⁸⁴⁾.

Let us emphasize that it was not a question of conflicting and incompatible alternatives. One of them, the indigenous proposal which was confederative in nature, stands out for its ability to contain the other, more limitedly constitutional perspective. If one views the panorama from the indigenous side, the Treaty itself could be Constitution; the Treaties, Constitutions; the set of Treaties and Constitutions, American Constitution. Treaties by themselves did not embody the whole constitutionalism of course, but they set up the background which could create the necessary conditions for the legal accommodation of cultural plurality in a common constitutionalism, respectful of each others' rights, among a variety of constitutionalisms ⁽⁸⁵⁾. Nowadays, in a context of constitutional States linked to international Treaties on human rights — civil, political, economical, social, and cultural — where the right to one's own culture is slowly emerging as a constituent principle for human communities and

⁽⁸⁴⁾ Let me refer again to D. E. WILKINS and V. DELORIA Jr., *Tribes, Treaties, and Constitutional Tribulations* (n. 61); R. A. WILLIAMS, *Linking Arms Together: American Indian Treaty Visions of Law and Peace* (n. 75); B. CLAVERO, *Freedom's Law and Indigenous Rights* (n. 79).

⁽⁸⁵⁾ Precisely, R. A. WILLIAMS, *Linking Arms Together: American Indian Treaty Visions of Law and Peace* (n. 75), pp. 98-123, considering «Treaties as Constitutions» and the confederative form as «Multicultural Constitution», and bearing in mind the potential, present worth of the former practice of Treaty-making.

polities ⁽⁸⁶⁾, such multicultural constitutionalism could, at last, be again understood and appreciated by indigenous and non-indigenous or even former colonialist people. And be recuperated wherever convenient ⁽⁸⁷⁾.

The mainstream constitutional standpoint is still the one which put an end to the very possibility of multiculturalism in the legal domain. The rights of a great part of humankind have been disrupted by this kind of constitutionalism and its endurance. Because of, on one hand, broken Treaties, invasion of territories, harassment against cultures, and total destruction or deep degradation of polities; on the other hand, the institution of slavery itself and the emancipation which did not deliver liberty on an equal footing, rights to reparation are pending, rights both personal and collective which go far beyond economic compensation to the point of demanding constitutional devolution ⁽⁸⁸⁾. This is history and living history, but is it the history of a specific constitutionalism? Is all this a part of American constitutional history? As long as constitutional devices also worked, is not the Shoah, reparation included, an episode of European constitutional history? Is it bad manners to trace such a comparison? Anyhow I am not the one to answer, but surviving victims ⁽⁸⁹⁾. There are occurrences which are not suitable to be put in constitutional black and

⁽⁸⁶⁾ B. CLAVERO, *Multiculturalismo constitucional, con perdón, de veras y en frío*, in « Revista Internacional de Estudios Vascos », 47, 2002, pp. 35-62; *Freedom's Law and Indigenous Rights* (n. 79), pp. 167-182; *Rights between Cultures and Polities: Legal Comments on Non-Legal Papers*, on the web, *Worlds and Knowledges Otherwise*: <http://www.jbfc.duke.edu/wko/dossiers/1.1/ClaveroB.pdf>.

⁽⁸⁷⁾ James TULLY, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge, CUP, 1995; Duncan IVISON, *Postcolonial Liberalism*, Cambridge, CUP, 2002. As far as I know, there is no elaboration alike, for present constitutionalism, in the United States. The authors of these outstanding reflections on constitutional multiculturalism for this day and age facing constitutionalist mainstreaming are Canadian and Australian respectively.

⁽⁸⁸⁾ Roy L. BROOKS, (ed.), *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, New York, New York University Press (NYUP henceforth), 1999; Elazar BARKAN, *The Guilt of Nations: Restitution and Negotiating Historical Injustices*, Baltimore, JHUP, 2000; Janna THOMPSON, *Taking Responsibility for the Past: Reparation and Historical Justice*, Cambridge, Polity Press, 2002; William C. BRADFORD, *Beyond Reparations: An American Indian Theory of Justice*, in « Ohio State Law Journal », 66, 2005, pp. 1-104.

⁽⁸⁹⁾ B. CLAVERO, *Genocidio y Justicia. La Destrucción de Las Indias, Ayer y Hoy*, Madrid, Marcial Pons, 2002; W. CHURCHILL, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools*, San Francisco, CL, 2004 (1948 United Nations Convention on the Prevention of Crime of Genocide, art. 2: « In the present convention genocide means any of the following acts committed with intent to destroy,

white. Narrate the history of the European *written Constitutions*, with their catalogs of liberties and registers of guarantees, and the massive devastation of human rights through the Shoah disappears as if it had never taken place ⁽⁹⁰⁾. Such may be the case with the biography of *America's Constitution*. Disregard the main sign — *Indian tribes* in 1.8.3 — and you miss the darkest side of ACH ⁽⁹¹⁾.

With the hidden burden of such an onerous legacy behind, it is understandable for constitutional historiography to regard itself in a mirror that polishes the image so much that the reflection turns out to be an unfaithful portrait. The 1787 Constitution together with the succession of half repentant or even unrepentant Amendments sustains the continuity of a jurisprudential tradition such as the one which curtails indigenous people and peoples' rights. This constitutional corpus requires the cleansing sieve of the germane historiography. It is what *America's Constitution*, the biography, now delivers. That is the really existing ACH, what the current American constitutional history is noted for. The biography matches the subject, not its actual life story, but the narrative that the living Constitution demands. Living Constitution is something less than *written Constitution*, because of the derogatory effects of the Amendments ⁽⁹²⁾. It is also much more, as it clearly goes beyond both Constitution and law in the books.

America's Constitution, the biography, would be consistent if its narrative began by placing itself prior to 1787, in the constitutional

in whole or in part, a national, ethnical, racial or religious group, as such:... e) Forcibly transferring children of the group to another group »).

⁽⁹⁰⁾ Since it is a kind of European constitutional history through the history of citizenship in Europe, consult instead Pietro COSTA, *Civitas. Storia della cittadinanza in Europa*, Roma, Laterza, 1999-2001, vol. IV, *L'età dei totalitarismi e della democrazia*, especially sects. III.3.3, *La comunità razziale e la retorica dell' espulsione*, and III.3.4, *Il discorso della cittadinanza e il suo rovescio: l'universo concentrazionario*.

⁽⁹¹⁾ Please, confront again, at this stage, the references to the so-called commerce clause, containing the mention of *Indian tribes*, in the Appendix that edits the *written Constitution* in A. R. AMAR, *America's Constitution: A Biography*, all of this already quoted.

⁽⁹²⁾ As the constitutional texts, the 1787 Constitution and the same Amendments, cannot be corrected, there are editions of the *United States Constitution* which put in parentheses or italics the passages referring to rules repealed by later Amendments (for instance, the 1787 euphemisms regarding slavery), but, apart from the impossibility of giving a proper account of unequal changes (remember abolition Amendments) through orthography on such an incomplete corpus, you cannot even pose the question when the legal rule bearing constitutional importance is outside the *written Constitution* (for instance, the rule on *domestic dependent Nations*, though interpreting the *commerce clause*). So far, all this has been considered here.

perspective of the United States' confederative starting point virtually shared with Indian Nations. That is to say, if it did not start out with *We the People*, but *We the Peoples*, indigenous and non-indigenous, Native American as well as European by origin or by culture. The biography would hold up if its creature grew further, if its textual corpus stretched as far as Treaties, moreover the latter not just as documents written by one of the parties, be it English or Spanish, but as agreements among all and therefore in accordance with what they agreed on, however recorded, be it in alphabetical writing on paper sheets or by another kind of meaningful signs on skin belts. The registration is also manifested in ceremonies and kept in artifacts not only on the indigenous side, but the non-indigenous one intends that their own documents and interpretations hold exclusive authority. Thus, to achieve a balance, the constitutional scriptures would have to be more than written texts ⁽⁹³⁾.

The biography of *America's Constitution* fails right away just for being strictly textual. Of course this is a defect afflicting constitutional historiography in general, but what concerns us here is neither universal history nor the specific biography, but American constitutional history, I mean its non-existence or impossibility in the present conditions of the respective constitutionalism. Along the well-trodden way, a good set of pieces are lost, essential or not. At this stage, I dare say something I repressed when discussing slavery. Do I run any risk of being misunderstood if I refer to the 1861 Constitution of the Confederate States of America, those seceding from the Union to uphold slavery, as a lost piece? It might represent a failed moment of confederative upturn ⁽⁹⁴⁾. At least, since both are slavocratic, the 1861 Constitution stands comparison with the 1787 Constitution. Comparisons are odious of

⁽⁹³⁾ For the indigenous *unwritten* but readable archive, R. A. WILLIAMS, *Linking Arms Together: American Indian Treaty Visions of Law and Peace* (n. 75).

⁽⁹⁴⁾ Marshall L. DEROSA, *The Confederate Constitution of 1861: An Inquiry into American Constitutionalism*, Columbia, University of Missouri Press, 1991; George C. RABLE, *The Confederate Republic: A Revolution against Politics*, Chapel Hill, UNCP, 1994; though neither of them shows readiness to take account of the significant fact that this confederative moment was appreciated by Indian Nations: V. DELORIA Jr. and R. J. DEMALLIE (eds.), *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions* (n. 46), vol. I, pp. 587-680. Since it is not *written Constitution* of some States any more and never was for the Union, no surprise that A.R. AMAR, *America's Constitution: A Biography*, has nothing to say about the 1861 American Constitution.

course, but not for all purposes, not for constitutional history ⁽⁹⁵⁾. ACH's unilateralism loses constitutional history, no less.

Do you recall the initial definition of constitutional history? I said that I understood it as institutional history concerned with rights, the history of America's bodies politic insofar as affecting American people's freedoms. The main reason therefore as to why American constitutional history does not exist, or why there is not even a glimmer of it, is because some collective political bodies and social groups that hold importance for the freedom of people who freely identify themselves therein are missed out. Is it necessary for me to disclose what and who they are?

5. *Other histories, other laws; other starts, other images.*

In 1993 the Congress of the United States of America identified some people: « Native Hawaiians », natives of Hawai'i, Kanaka Maoli. It did this for the record of a regrettable history in order to arrive at due apologies: « Until 1893 », a century ago, « the United States recognized the independence of the Kingdom of Hawaii, maintained relations with the Hawaiian government in accordance with full and unreserved diplomatic recognition, as well as signing treaties and agreements with the Hawaiian monarchy for the regulation of trade and navigation in 1826, 1842, 1849, 1875 and 1887 », in the words of the Congress. As the statement continues with the history, what happened afterwards was regrettable, a surprise attack to assume power by a group of non-Hawaiian people, namely colonizers, led by Americans, which finally obtained the official recognition of the United States. Still in the language of the congressional statement in 1993, all happened « without the consent of either the native people or the legitimate government of Hawaii, thereby violating the treaties between the two nations and international law ». Therefore, through this complete breach of law, the Hawai'ian archipelago became a United States Territory, with the

⁽⁹⁵⁾ Likewise, no less disturbing, Sanford LEVINSON, *Slavery in the Canon of Constitutional Law*, pp. 92 and 103, in P. FINKELMAN (ed.), *Slavery and the Law* (n. 23), pp. 89-111: « I think it is important to take seriously the possibility that (Chief Justice) Taney might have been 'right' in *Dred Scott* », the case that upheld the extension of slaveholders' expeditious claims on runaway slaves to the Territories bearing further pro-slavery implications; *right* of course according to the 1787 Constitution (art. 4, sect. 2, par. 3, already seen) and respective federal enactment. Compare the complacency of A.R. AMAR, *America's Constitution: A Biography*, p. 98: « ... as Fehrehbacher has shown, men like Taney badly misread the document », the 1787 Constitution. Both Fehrehbacher's stance and bibliography on *Dred Scott* are registered (nn. 23 and 31). Add D.E. FEHRENBACHER, *The Dred Scott Case: Its Significance in American Law and Politics*, New York, OUP, 1978.

known implications of the respective regime. All this took place following on from 1893. It is history, needless to say. What was the purpose of such a political statement on the past? Why did the United States Congress, a legislative body, produce a piece of historiography? Acquittal was expected of course, although no redress was provided ⁽⁹⁶⁾.

The Kingdom of Hawai'i was not only independent with its own legal and institutional system until 1893, during the nineteenth century it had also adopted the normative instrument of written Constitution. Hawai'i tried out three Constitutions, those of 1838-1840, 1852, and 1887. The first represented a remarkable attempt to combine indigenous law and colonially influenced institutional forms under the control in any case of the Hawai'ian polity. The second introduced destabilizing factors in favor of colonialist interests, but without endangering the Kingdom's independence. Both Constitutions were worthy of the name, not only or mainly for having adopted this form of legal display, of course, but for recognizing rights and providing guarantees. The Hawai'ian textual constitutional history commences in 1839 with a Bill of Rights that paved the way for the 1840 Constitution. The 1887 Constitution was damaged at birth and finally destroyed by colonialist interests. Proper Hawai'ian constitutional history ended in 1893, not to give way to another constitutionalism, but for the archipelago to be subjected to the United States Territory regime, presided over by the 1787 Constitution with its provision for the eventual forming of a State of the Union by the colonialist population after buttressing their dominance. At that time, and for a time, at the end of the nineteenth century, formally since 1898, the Territory regime was established without specific foresight in its case for it to be incorporated as a State, which was only uttered as a clumsy excuse for the taking of the archipelago ⁽⁹⁷⁾.

⁽⁹⁶⁾ On the centenary of those events the complete text of this statement by the United States Congress (*Joint Resolution* of both Chambers) is reproduced by W. CHURCHILL, *Perversions of Justice: Indigenous Peoples and Anglo-American Law* (n. 47), pp. 408-413 (Appendix B, *Congressional Apology to Native Hawaiians*), with a no less opportune commentary (pp. 73-123: *Stolen Kingdom: The Right of Hawai'i to Decolonization*) on presumptions, implications and limitations (sect. 3 and final: « Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States »).

⁽⁹⁷⁾ Francis Newton THORPE (ed.), *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories, and Colonies now or heretofore forming the United States of America* (1909), Buffalo, WH, 1993, vol. II, pp. 879-904, the formal annexation (1898) and Territory rule (1900). Sally Engle MERRY, *Colonizing Hawai'i: The Cultural Power of Law*, Princeton, PUP, 2000, pp. 76-85; Jonathan Kay Kamakawiwo' ole OSORIO, *Dismembering Lāhui: A History of the Hawaiian Nation to*

Mainstream narrative in the field of the really existing American constitutional history naturally tackles the Hawai'ian case, when condescending to contemplate it, as a preview of the benefits of United States constitutionalism through Territory rule providing rights and guarantees for the final State incorporation on an equal footing with the rest of the member States ⁽⁹⁸⁾, *Hawaii* being the one that would bring the number up to the round figure of fifty as late as in 1959, before the decolonizing policy of the United Nations. For that matter, the true Hawai'ian Constitutions disappear from the map of constitutional history, as if the 1959 State Constitution along with its Amendments were the first and only one experienced in Hawai'i ⁽⁹⁹⁾.

There may be an alternative constitutional account because constitutional history transpired otherwise. The same United States Territory regime would appear on its stage in a very different light, the actual one that deprived a then majority and its descendants (Kanaka Maoli, « Native Hawaiians », *We the People* of Hawai'i) of rights and guarantees in order to grant them exclusively to a non-indigenous minority, thereby bringing about the reduction of the same constitutional rights to institutional or cultural mechanisms of colonial control during both Territory and State periods. The opening question may be the key. If 1787 is to be the starting time for the constitutionalism that would reach Hawai'i and hence for Hawai'ian constitutional history, the outcome cannot be other than fictitious and cleansing historiography as an important device for colonialism's sway. Experiment with the alternative opening of the 1839 Bill of Rights of the Kingdom of Hawai'i, let us say ⁽¹⁰⁰⁾. As I have no expertise at all in Hawai'ian constitutionalism either past or present, original or imported, I cannot say anymore.

1893 clearly represents a real constitutional break in the history of Hawai'i. It had not been always so whenever the United States extended to new Territories. The most notorious case, because of the

1887, Honolulu, University of Hawaii Press, 2002; Rona Tamiko HALUALANI, *In the Name of Hawaiians: Native Identities and Cultural Politics*, Minneapolis, UMP, 2002; W. CHURCHILL, *Perversions of Justice: Indigenous Peoples and Angloamerican Law* (n. 47), pp. 73-82.

⁽⁹⁸⁾ G. LAWSON and G. SEIDMAN, *The Constitution of Empire: Territorial Expansion and American Legal History* (n. 43), pp. 108-110, drawing an odd conclusion: « The 'acquisition' of Hawaii may well have been dirty pool, but it was constitutional dirty pool », *constitutional* for the United States, to be sure.

⁽⁹⁹⁾ A. R. AMAR, *America's Constitution: A Biography*, references to *Hawaii* in the Index. Since the site has ignored the historical Hawaiian Constitutions too, so far (Fall-2006) there is no help from *Documents in Law, History, and Diplomacy* in the *Avalon Project* (n. 49).

⁽¹⁰⁰⁾ J.K. K. OSORIO, *Dismembering Lâhui: A History of the Hawa'ian Nation to 1887* (n. 97).

geographical extent involved, and also because of some peoples' and individuals' resistance, even in the United States ⁽¹⁰¹⁾, was that of the massive transfer of a theoretically Mexican geography after its conquest by the United States formalized by the 1848 Treaty of Guadalupe Hidalgo, an instrument with a strong constitutional content, not only for all that the moving of the border might imply in itself, but also specifically for its own provisions. As a Treaty between Mexico and the United States, and due to the encompassed matters, it was a kind of Constitution between both, some sort of Inter-Constitution, regarding the living humanity that was transferred with the geography's booty ⁽¹⁰²⁾.

Through the Guadalupe Hidalgo Treaty rights and even citizenship are granted to the people going along with the territory. The Treaty recognizes the right to keep Mexican citizenship or receive that of the United States in the case of explicitly choosing it, or of a year going by without exercising either option. United States citizenship of the United States was not yet federalized, consisting in that of each State, but since people colonizing Territories held federally guaranteed rights, they temporarily constituted a kind of second class citizenship. As the stipulations in the Guadalupe Hidalgo Treaty regarding both respect and access to citizenship gave no importance to the origin or culture of people concerned and the latter possibility took place automatically after a single year, the surprising consequence for the United States constitutionalism was the entry of Indians into its own citizenship, whatever the class ⁽¹⁰³⁾. Today it is not easy to imagine the amazement, but there is no need of imagination to grasp here another quite different opening to the one represented by the date of 1787 ⁽¹⁰⁴⁾.

⁽¹⁰¹⁾ Around the middle of the nineteenth century, someone who would become famous for elaborating reasons to support the inhibition from constitutional obligations, like paying taxes, resorted not only to the federal upholding of slavery, but also the American war against Mexico: Henry David THOREAU, *Civil Disobedience and Other Essays*, Amherst, Prometheus, 1998; for further information, H.D. THOREAU, *Walden and Civil Disobedience. Complete texts with introduction, historical contexts, critical essays*, ed. Paul LAUTER, Boston, HM, 2000.

⁽¹⁰²⁾ Christine A. KLEIN, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, en « New Mexico Law Review », 26, 1996, pp. 201-255. For the Spanish version of provisions important for indigenous peoples, B. CLAVERO, *Tratados con otros Pueblos y Derechos de otras Gentes en la Constitución de Estados por América* (n. 73), in appendix; the English version is available in the aforementioned *Avalon Project* (n. 49).

⁽¹⁰³⁾ B. CLAVERO, *Freedom's Law and Indigenous Rights* (n. 79), pp. 101-130, as well as for what follows.

⁽¹⁰⁴⁾ As the best testimony of the amazement there is a long set of perplexing and contradictory sentences by both local and federal judiciary, included Supreme Court,

There is an exception regarding Indians in the Guadalupe Hidalgo Treaty, but it does not cover all the indigenous peoples, only the resistant, warring kind. For those identified as « savage tribes », and disqualified as squatters ⁽¹⁰⁵⁾, Territory rule's implicit treatment becomes explicit, that is, displacement and confinement or even extermination, the latter more ambiguously referred to ⁽¹⁰⁶⁾. It concerned peoples such as the Apache, Navajo or Comanche, with whom, significantly, the first thing the United States formally attempted after Guadalupe Hidalgo was Treaty-making to gain their consent for the new state of affairs, as if the agreements between States were insufficient for both the territorial transfer and the Indian standing (1849 Treaty with Diné Bikeya, the Navajo polity: « The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred, and forty-eight, at the city of Guadalupe Hidalgo... », etc.) ⁽¹⁰⁷⁾. There are other peoples, like Pueblo

especially about Pueblo Indians, cases that are today known through historiography and anthropology, though not specifically studied for their legal dimension and constitutional implication, as far as I am informed: B. CLAVERO, *Freedom's Law and Indigenous Rights* (n. 79), pp. 120-121, for the Supreme Court's final stance in 1912 declaring Pueblo people wards of the United States through assuming that it had been so for Mexico despite common citizenship and Guadalupe Hidalgo Treaty. Check further bibliography below on land struggle in Arizona and New Mexico, since the hardest point for the courts was whether Pueblo people, as American citizens according to Guadalupe Hidalgo, were entitled to individually dispose of land.

⁽¹⁰⁵⁾ In the double written version of Treaties between States or, as the Constitution would say, with a *foreign Nation*, when they do not share the language: « Considering that a great part of the territories, which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes... »; « En atención a que una gran parte de los territorios que por el presente Tratado van a quedar para lo futuro dentro de los límites de los Estados Unidos, se halla actualmente ocupada por tribus salvages... ».

⁽¹⁰⁶⁾ Here is the end of the article on *savage tribes*, the eleventh, whose beginning is just the phrase quoted in the note before: « ... the Government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said Government, when providing for the removal of the Indians from any portion of the said territories, or for its being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain ».

⁽¹⁰⁷⁾ V. DELORIA Jr. and R. J. DEMALLIE (eds.), *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions* (n. 46), vol. I, pp. 195-201, among other Treaties pertaining to these years.

Indians, making no particular display of warlike behavior in this moment, who would obtain United States citizenship by not exercising any choice⁽¹⁰⁸⁾. The United States had to face the extreme difficulty of constitutionally accommodating this unforeseen citizenship from the 1787 American perspectives of *We the People*, people in the singular and in no way indigenous⁽¹⁰⁹⁾.

By 1848, Mexico was not actually experiencing a very constitutional moment, yet Mexican citizenship existed for both indigenous and non-indigenous people, which constituted a difference with the United States and produced that unforeseen consequence of Indian American citizenship after the Guadalupe Hidalgo Treaty. Not long previously, during the last phase of Spanish colonialism, namely in 1812, there had been an attempt to establish an imperial constitutionalism founded on a common citizenship not just between European and American Spaniards, but also with indigenous people in America and the Philippines, although the endeavor was deeply unbalanced by the intention to confine native citizenship to local politics and law, reserving the regional and general legal and political areas overseas for a marked minority, the European in culture whatever their origins. In Mexico, following independence, citizenship continued to be constitutionally shaped in these shared terms between indigenous and non-indigenous people⁽¹¹⁰⁾.

Organized after independence as a federation in the image of the United States, Mexico or rather Mexican United States also resorted to the Territory regime with all that it implied, but with the distinctiveness of the aforementioned style of citizenship. Unlike the United States, Mexico did not have the constitutional third genus of *Indian tribes*, although indigenous peoples were there of course and the first federal Mexican Constitution, in 1824, literally assumed the *commerce clause* as

⁽¹⁰⁸⁾ For their experiences, which had included some successful and well remembered revolt against colonial rule, Ramón A. GUTIÉRREZ, *When Jesus Came, the Corn Mothers Went Away: Marriage, Sexuality and Power in New Mexico, 1500-1846*, Stanford, SUP, 1991; Scott RUSHFORTH and Steadman UPHAM, *A Hopi Social History: Anthropological Perspectives on Sociocultural Persistence and Change*, Austin, UTxP, 1992.

⁽¹⁰⁹⁾ D. E. WILKINS, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (n. 59), pp. 182 and 322; Bruce Granville MILLER, *Invisible Indigenes: The Politics of Nonrecognition*, Lincoln, UNP, 2003, p. 115.

⁽¹¹⁰⁾ B. CLAVERO, *Ama Llunku, Abya Yala. Constituyencia indígena y código ladino por América*, Madrid, CEPC, 2000, especially the fourth chapter. As for the title, *Ama Llunku* means *Don't stay on your knees* or rather, at present, *Stand up for your rights*, in Quechua, the most spoken American indigenous language; and *Abya Yala* signifies *America*, the continent, in Kuna, a Central American language, whose name is now becoming widespread as an indigenous substitute for the colonial one of America.

a Congress' assignment: « arreglar el comercio con las naciones extranjeras, y entre los diferentes estados de la federación y tribus de los indios » (« to regulate commerce with foreign Nations, and among the several States, and with the Indian tribes », as we know). If there was some peculiarity, it turned out to be that Mexico took action against its own citizenship when either breaching Treaties with indigenous peoples or embarking on politics for their displacement and extermination. Theoretically, for Mexican constitutional perspectives, Indian Treaties were discussed and signed with its own citizenship. This constitutional nonsense bears aftereffects. Unlike the United States, there are no traces of these Treaties in Mexican official records, as if they represented an abnormal practice ⁽¹¹¹⁾. Yet they are there. In 1857 when federalism is reinstated in Mexico after a less constitutional period, the new Constitution's only explicit provision regarding indigenous presence is the following: « Under no circumstance can the States (of the Mexican United States) make an alliance, treaty or coalition with another State, or with foreign powers. This excludes frontier States coalitions for offensive or defensive war against savages ». Taking place after Guadalupe Hidalgo, it concerns the United States too, despite its own constitutional provision (art. 1, sect. 10, par. 1: « No state shall enter into any treaty... »). Such was the practice in spite of the historiography which, concerned with the present, still rarely gives it consideration ⁽¹¹²⁾.

California, the Continental California which passes over to the United States through the Guadalupe Hidalgo Treaty (the peninsula part remains in Mexico), hardly experiences Territory rule. In 1849 it is established as a State with its own Constitution which refers to the 1848 Treaty as the standard it is bound to follow particularly in the matter of citizenship. Yet the California Constitution introduces the condition of race which is lacking in the Guadalupe Hidalgo Treaty: « Every white male citizen of the United States, and every white male citizen of Mexico, who shall have elected to become a citizen of the United States, under the treaty of peace (that with Mexico)..., shall be entitled to vote at all elections which are now or hereafter may be authorized by law ». *White male* is the qualification for citizenship. The Constitution continues with provision for a special law « admitting to the right of suffrage Indians or the descendants of Indians, in such special cases as

⁽¹¹¹⁾ The subtitled of F. P. PRUCHA, *American Indian Treaties: The History of a Political Anomaly* (n. 68), could make sense for the case of Mexico from Mexican viewpoint, not from indigenous perspective of course.

⁽¹¹²⁾ Suffice it to check Manuel FERRER MUÑOZ and María BONO LÓPEZ, *Pueblos indígenas y Estado nacional en México en el siglo XIX*, México, Universidad Nacional Autónoma de México, 1998. There is research on genocides on the Mexican side, some well known like the one suffered by the Yaqui people, but significantly insufficient.

such a proportion of the legislative body (a two-thirds concurrent votes) may deem just and proper », which did not abide by the Guadalupe Hidalgo Treaty at all. Anyway, the law for indigenous political participation never materialized. A bill was enacted in 1850 declaring Indians wards of State judiciary (« if any tribe or village of Indians refuse or neglect to obey the laws, the Justice of the Peace may punish the guilty chiefs or principal men by reprimand or fine, or otherwise reasonably chastise them »). Genocide is what follows ⁽¹¹³⁾. Do not bother looking for a constitutional historiography, biography or not, that deals with these questions, I mean one that approaches them in their constitutional dimensions which go far beyond the constitutional texts ⁽¹¹⁴⁾. There is instead no lack of Californian historiography creating the convenient make-believe which finally ends up connecting with the 1787 start, a little detail sufficient to rid the scene of awkward evidence ⁽¹¹⁵⁾.

Try to imagine the double historical narrative, that of the United States and that of those States affected by Guadalupe Hidalgo with the respective starting points of 1787 and 1848 or rather both earlier, but anyway as different histories. California, Nevada and Utah were fully affected; Arizona and New Mexico almost completely, Wyoming and Colorado partly; previously, Texas, the rest of New Mexico and parts of Oklahoma, Kansas, Colorado, and Wyoming had crossed to the United

⁽¹¹³⁾ W. B. SECREST, *When the Great Spirit Died: The Destruction of California Indians, 1850-1860* (n. 78). Add Orin STARN, *Isbi's Brain: In Search of America's Last 'Wild' Indian*, New York, WN, 2004.

⁽¹¹⁴⁾ Unsurprisingly of course, A. R. AMAR, *America's Constitution: A Biography*, has nothing to say concerning all of this.

⁽¹¹⁵⁾ The biased perception of Guadalupe Hidalgo by Californian constitutionalism would be represented as uncontroversial history: Cardinal GOODWIN, *The Establishment of State Government in California, 1846-1850* (1914). Rockwell Dennis HUNT, *The Genesis of the California First Constitution, 1846-1849* (1895; reprint, New York, Johnson, 1973), did not even refer to the Treaty on the matter of citizenship, as if it only dealt with frontiers. He would end by paying no attention to its content, as if it were of no concern for Californian constitutional stance: R. D. HUNT, *Legal Status of California, 1846-1849*, in « Annals of the American Academy of Political and Social Sciences », 12, 1898, pp. 387-408. William H. R. WOOD (ed.), *Digest of the Laws of California* (1860), did not omit it from the founding texts, after the 1787 Constitution, but the reference would be lost in other collections, including official ones since at least the beginning of the twentieth century, to imagine in such a way another even less American tradition to lead anyway to the 1787 definitive opening: Paul MASON (ed.), *Constitution of the State of California, Magna Charta, Declaration of Independence, the Articles of Confederation, and the Constitution of the United States* (1929). The Constitution of California was then that of 1879 which had eliminated the 1849 references to Guadalupe Hidalgo and indigenous people. For the same perspective now, G. LAWSON and G. SEIDMAN, *The Constitution of Empire: Territorial Expansion and American Legal History* (n. 43), pp. 103-104.

States from Mexico, though this was just in theory for some wide areas. Borders moved rather than peoples ⁽¹¹⁶⁾. Imagine the other narrative for the case of the Texas secession from Mexico, not that history of a providential people in search of rights granted by United States constitutionalism, but of a self-regarding group escaping from another kind of constitutionalism, one of common citizenship among Indians and non-Indians and which was furthermore attempting to abolish slavery ⁽¹¹⁷⁾. For a glimpse of this other side of the history, go over the Texas Constitutions between Mexico and United States through a period of independence together with Mexican and Texan statutes concerning colonization. It is up to you ⁽¹¹⁸⁾. You must also know that what followed was a time not only for slavery, but also for genocide ⁽¹¹⁹⁾, the latter just like later in California. Maybe, since it affected constitutional rights negatively to the utmost, I should have started with genocide rather than bondage ⁽¹²⁰⁾. Had I tried, would you have stood the shock and kept reading?

⁽¹¹⁶⁾ For perspectives regarding the geography most marked in the transference, Roxanne Durban ORTIZ, *Roots of Resistance: Land Tenure in New Mexico, 1680-1980*, Los Angeles, UCP, 1980; Lisbeth HAAS, *Conquest and Historical Identities in California, 1769-1936*, Berkeley, UCP, 1995; José David SALDÍVAR, *Border Matters: Remapping American Cultural Studies*, Berkeley, UCP, 1997; Martha MENCHACA, *Recovering History, Constructing Race: The Indian, Black, and White Roots of Mexican Americans*, Austin, UTXP, 2001; María E. MONTOYA, *Translating Property: The Maxwell Land Grant and the Conflict over Land in the American West, 1840-1900*, Berkeley, UCP, 2002.

⁽¹¹⁷⁾ Jaime del ARENAL FENOCHIO, *Un modo de ser libres. Independencia y Constitución en México, 1816-1822*, Zamora, Colegio de Michoacán, 2002; B. CLAVERO, *Jurisdicciones veteranas y Estados novicios: México y Texas, 1824-1866*, in Feliciano BARRIOS (ed.), *El Gobierno de un Mundo. Virreinos y Audiencias en la América Hispana*, Madrid, Universidad de Castilla-La Mancha, 2004, pp. 1093-1130.

⁽¹¹⁸⁾ There is a website for all this legal material: <http://texinfo.library.unt.edu/lawsoftexas>, *Nineteenth-Century Texas Law Online*, containing a digital edition of H.P.N. GAMMEL (ed.), *The Laws of Texas, 1822-1897*, 11 vols., reprint, Clark, LE, 2004.

⁽¹¹⁹⁾ For the Texan case, G. C. ANDERSON, *The Conquest Of Texas: Ethnic Cleansing in The Promised Land, 1820-1875* (n. 78).

⁽¹²⁰⁾ As Bob Dylan writes and sings: « ... The Indians died / Oh the country was young / With God on its side » (*With God on Our Side*, in *The Times They Are A-Changing*, 1964; remastered, Legacy, 2005; lyrics and music available on internet: <http://bobdylan.com>). This is when and how I first learned about the American genocide (secondly, *Little Big Man*, the movie directed by Arthur Penn in 1970; a bit later, in 1973, the refusal of the 1972 Best Actor Oscar Award by Marlon Brando and the address of Sasheen Littlefeather as his representative; and last but not least, news from Wounded Knee), but now I wonder. Were we wounded at Wounded Knee rather than some other people? Were the times a-changing for better and, above all, for everybody? The negative answer, a most Unwhig one, is not conveyed by the *written Constitution*,

For the alternative constitutional history which emerges for the United States Southwest and even beyond, since it would be necessary to keep adding on in America towards the east as far as Florida, compare the start of 1787 with that of 1812, when the aforementioned Spanish imperial constitutionalism based on a common citizenship between indigenous and non-indigenous people in America was clearly enacted and unevenly enforced. It is necessary to insist on the blatant fact that in the case of present States of the United States that had lived the Spanish constitutional experience the real opening was 1812, not 1787, because it appears that the biography of the *America's Constitution* has nothing to say about the alternative origins and histories. You can search in vain among its several hundred pages. Fortunately, some help is available ⁽¹²¹⁾. The biography does not bring about the end of history or historiography. Neither has it led to any actual beginning, historical or historiographical: « Our history begins — where else? — at the beginning, with the Constitution's opening sentence », *We the People*, the biography's character ⁽¹²²⁾. Where else? Nowhere at all if it is presumed in the singular.

6. *A specter looming over the United States origins.*

The 1787 desired starting point — *We the People* — provokes some embarrassment by itself. We know that for the biographer the creature was born *slavocratic* and *democratic* all at once. He does not hide the former at all and strongly emphasizes the latter. He believes that if the character has not been left completely and irremediably schizophrenic, it is because life has taught a better way, and the shift of behavior has redeemed the past. He, the biographer, even seems to think that the creature is no longer suffering aftereffects. The original birth, all in all more slavocratic than democratic, would have been cured through generational rebirths. From his viewpoint and in his own words as we know, we are before an *intergenerational project*, ever open between American generations. The biographer himself contributes to redemption of the past from the present through the future of the past,

needless to say, and hence it is useless to take a look at *America's Constitution: A Biography* for any guide at all in this essential regard.

⁽¹²¹⁾ Add now Andrés RESÉNDEZ, *Changing National Identities at the Frontier: Texas and Mexico, 1800-1850*, Cambridge, CUP, 2004, very helpful despite not entering into either indigenous or non-indigenous strictly constitutional matters but precisely Treaties. For the background, as they deal with Treaties as well, R. Douglas HURT, *The Indian Frontier, 1763-1846*, Albuquerque, University of New Mexico Press (UNMP from here on), 2002, pp. 22-77 and 137-163; David J. WEBER, *Bárbaros: Spaniards and their Savages in the Age of Enlightenment*, New Haven, YUP, 2005.

⁽¹²²⁾ A. R. AMAR, *America's Constitution: A Biography*, p. XII already quoted.

ever the present. In spite of all his telling of American constitutional history, we never leave *America's Constitution*, the current Constitution. Here is a present-day reflection posing as historiography. I mean this for the really existing American constitutional history and not just the biography. I never play with words. I am endeavoring to explain the operation of historiography. We know that *America's Constitution* is just a pretext for a shortcut. Sorry, biographer ⁽¹²³⁾.

In the impossible effort to portray the slavocratic birth of a democratic creature it becomes necessary to deal with a specter which has been looming for almost a century so far over the United States constitutional history and which is apparently still alive and kicking. The biographer says the name in order to come to terms with it: « Charles Beard's hugely influential 1913 book, *An Economic Interpretation of the Constitution of the United States* »; in short, « the standard Beardian accounts of the Constitution ». It is the *standard* of lowering and reducing the United States Constitution-making to a question of the economic interests of the so-called Founding Fathers, gathered in Convention behind closed doors in the hot Philadelphia summer of 1787; the standard made up by « Beard and his disciples » from that *Economic Interpretation*, an true seminal work all in all ⁽¹²⁴⁾. The fact that it may still be kicking around for historiographical issues after such a long time, nearly a century, since it gives such cause for concern in the constitutional field, seems implausible or preposterous. The idea about dealing with a living specter is not my own ⁽¹²⁵⁾. Let us use initial capitals for the double-F-wording as the founders' work has affected, for good or ill, people and peoples' rights.

⁽¹²³⁾ A. R. AMAR, *America's Constitution: A Biography*, with all that series of motives already quoted and really in force throughout the book.

⁽¹²⁴⁾ A. R. AMAR, *America's Constitution: A Biography*, pp. 279, 309, 472, and 505, referring to Charles A. BEARD, *An Economic Interpretation of the Constitution of the United States* (1913), Mineola, Transaction (TP from here onward), 1998, with an introduction by Louis FILLER, pp. VII-XVI, and several editions in between, starting from 1935, this one incorporating a new prologue by the author, and now reprinted, Union, LE, 2001; ed. New York, Free Press (FrP henceforward), 1986, includes a critically appreciative introduction by Forrest McDONALD, pp. VII-XL.

⁽¹²⁵⁾ Robert A. McGUIRE, *To Form a More Perfect Union: A New Economic Interpretation of the United States Constitution*, New York, OUP, 2003, starts out (p. 4) by assuring that American constitutionalism is mistaken in believing that it « has been rightly exorcised of the ghost of Charles A. Beard ». Add, though taking for granted that the specter is exorcised in the end, Joyce APPLEBY, *Liberalism and Republicanism in the Historical Imagination*, Cambridge, HUP, 1998, p. 223: « That Beard's interpretation held sway for but a generation in the two hundred years of writing on the Constitution indicates just how powerful is the appeal of a single American tradition », 1787 of course.

Here now is the specter by the full name of Charles Austin Beard, an author who was really well-known in the past and is barely remembered today beyond the United States or even here in America; an expert on public policy and constitutional history, enjoying great prestige as a teacher and writer sensitive towards social, economic and political questions, when in 1913 he comes up with the publishing of the aforementioned *An Economic Interpretation of the Constitution of the United States*, a book that would in effect be around long after the author's life, maybe the kind that qualifies as a classic. It seems to have lived more than once ⁽¹²⁶⁾. Furthermore, judging by the biographer's concern, it is as alive as the day it was first published.

It is a most serious publication about a past event, the making of the constitutional scripture in 1787, bringing an approach and aim which went blatantly beyond the field of historical research. The book comes to light in tune with its epoch. The cultural and political contexts hold importance. The book confronts its present as much as the past. The approach and aim belong to a well noted reformist movement styled at the time as progressive. Here is where the book itself is set and begins to take meaning ⁽¹²⁷⁾. Other works by Beard containing similar views in accordance with the so-called progressive persuasion followed on, *Economic Origins of Jeffersonian Democracy* and *The Economic Basis of Politics*, in 1915 and 1922 respectively ⁽¹²⁸⁾.

Beard's *Economic Interpretation of the Constitution of the United States* has been a cause for partisan scandals and mutual attacks among constitutionalists rather than historians. In historiographical circles its reception was at the time quite in accordance with academic uses of

⁽¹²⁶⁾ The first time I read Beard's *Interpretation* was in an Argentinean translation into Spanish: C. A. BEARD, *Una interpretación económica de la Constitución de los Estados Unidos*, Buenos Aires, Arayú, 1953. Being an undergraduate student in Seville Law School, I mistook it for a Marxist essay because of the title's wording. At least I have learned from Beard that you can't judge a book by looking at the cover, which is not always the case, as we shall see.

⁽¹²⁷⁾ Richard HOFSTADTER, *The Progressive Historians: Turner, Beard, Parrington*, New York, AK, 1968, and his introduction to *The Progressive movement, 1900-1915*, Englewood Cliffs, Prentice Hall, 1963, both with new editions (UChP, 1979, and Simon and Shuster, SS from now onward, 1986, respectively). For the legal and political background, Morton J. HORWITZ, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*, New York, OUP, 1992; William M. WIECEK, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937*, New York, OUP, 1998; Michael MCGERR, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920*, New York, FrP, 2003.

⁽¹²⁸⁾ There have been re-editions of both, for the second, more theoretical title, C. A. BEARD, *The Economic Basis of Politics*, New Brunswick, TP, 2002, with introduction by Clyde W. BARROW.

welcome and controversy, the former untarnished by the latter. Yet it has not been always the case, especially among lawyers. There are concerned scholars today behaving as either fast-thinking partisans or hardworking analysts. On one side, C.A. Beard is charged with having ended the off season for the chase against the Founding Fathers as both « representatives of class interest » and « racist murderers of Indians »⁽¹²⁹⁾. On the other side, we learn that it is not he to be blamed, but a « straw man constructed explicitly for ideological purposes during the 1950s and 1960s »⁽¹³⁰⁾. They are eloquent examples of bad and good manners respectively. Anyway, Charles Austin Beard is the name over and over again. Here is the specter or rather the stand-in who looms over the United States origins⁽¹³¹⁾.

All in all, beyond the author's intent, *An Economic Interpretation of the Constitution of the United States* has become the harshest diatribe and most uncompromising charge against the Founding Fathers' constitutional work. Despite even the author's eventual complaints, an excited reception was promptly given in some political and scholarly circles, coming controversially to the knowledge of American public opinion. In such a way the book's image, the very specter has been created. Though Beard himself did not back the New Deal and disclaimed intellectual responsibility, *An Economic Interpretation* played a supporting role in the reformist constitutional mutation produced in the United States through the executive's impetus, with no formal Amendment, during the thirties and the forties of the last century, after the 1929 stock market crash and following economic depression and social unrest. The New Deal was for Beard somehow like soviet socialism and he protested that he was not a Marxist thinker. Nevertheless, for that matter, between the progressive stance, Beard's work included, and the New Deal policy, there was a patent link. If you still bear any doubt about the existing interaction between historiography and constitutionalism even beyond specific intentions, here is a fine laboratory in which to carry out the test⁽¹³²⁾.

As a historiographical work, *An Economic Interpretation of the*

⁽¹²⁹⁾ Allan BLOOM, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students*, New York, SS, 1987, p. 30.

⁽¹³⁰⁾ C. W. BARROW, *More Than a Historian: The Political and Economic Thought of Charles A. Beard*, New Brunswick, TP, 2000, p. XVI.

⁽¹³¹⁾ Shlomo SLONIM, *Framers' Construction / Beardian Deconstruction: Essays on the Constitutional Design of 1787*, New York, Peter Lang, 2001, pp. 1-9 and 52-103 particularly.

⁽¹³²⁾ Maxwell BLOOMFIELD, *Peaceful Revolution: Constitutional Change and American Culture from Progressivism to the New Deal*, Cambridge, HUP, 2000, p. 22, for brief reference to the role of Beard's work. If there is any further interest in attending

Constitution of the United States effectively contained something that one might expect in the light of the title. The report showed to what extent the 1787 founding decisions during the hot summer in Philadelphia did not stem from ideals concerned with individual liberty and political accountability, but rather from economic interests, even most personal ones, of the Founding Fathers themselves. The 1787 United States Constitution would take on its complete historical meaning if read in this way and not otherwise, in the way of economical motivations and not under legal principles. It was a self-interested, not a principled deed. It was inspired by gross ownership, not net liberty. Beard's book particularly dealt with Founding Fathers' speculation on United States debt and expectation of colonization lands, those in the Territories, because federal empowerment was in their interest rather than control by States and confederative agreements. 1787, the Constitution, would mean the accomplishment of such vested or speculative interests ⁽¹³³⁾.

An Economic Interpretation of the Constitution of the United States was not particularly concerned with slavery nor, still less, Indian Nations in 1787 nor for that matter, at any moment before or after. Neither slaves' lack of liberty according to the very Constitution nor indigenous dispossession by the Constitution's twin sister, the Territory Ordinance, was of any concern to Beard. What his essay researched was the link through mere influence of gross interests between the founding party's property rights and expectations on one side, and the new structure of federal powers on the other. In any case, this was a very sensitive issue and was related to an underlying cause beyond the scope of historical research. When the book is conceived, the constitutional moment of the abolition and its aftermath still endures. Remember that the Amendments' mandate on equal rights and due process had been thwarted by the inhibition of the federal Congress and the bias of Supreme Court jurisprudence, with property right thus taking priority at the expense of personal liberty. With no reparation contemplated, even ownership deriving from slavery received constitutional backing over and above the freedoms of former slaves. Yet the progressive persuasion was not particularly sensitive concerning the rights of people who had suffered slavery, for some of the older generation were still alive, or of those pertaining to their descendants who still bore not only

an act of exorcism as to the aftermath, visit Richard E. EPSTEIN, *How Progressives Rewrote the Constitution*, Washington, Cato Institute, 2006.

⁽¹³³⁾ C. A. BEARD, *An Economic Interpretation of the Constitution of the United States*, chapters V, *The Economic Interests of the Members of the Convention*, and VI, *The Constitution as an Economic Document*. As it describes social struggle and political debate against a Constitution standing for the « capitalist » party, add his *Economic Origins of Jeffersonian Democracy*, Clark, LE, 2005.

direct aftereffects but also the harm caused by the practice of abolition Amendments, let alone indigenous afflictions ⁽¹³⁴⁾. All this concerned the progressive bunch only for the institutional effect of empowerment of the judiciary bench and weakening of the legislative branch, the justices being non-representative while the legislators are representative. They branded this institutional consequence as a constitutional perversion as much in itself as for the specific application that exalted property right to the extent of practically blocking the kind of social and economical reforms later promoted by the New Deal ⁽¹³⁵⁾.

This is the context of Charles Austin Beard's most scandalous book. It was a heated, not to say red-hot atmosphere. It has not been the only episode of strong constitutional and historiographical controversy over the federal Supreme Court's position in the United States system, which grants a handful of judges a practically enduring constituent power over liberties and guarantees no less ⁽¹³⁶⁾. Indeed, constitutional argument keeps encouraging historical research, though not always making the most of it ⁽¹³⁷⁾. Yet what interests us now,

⁽¹³⁴⁾ The most famous progressive historian yesterday and still today, Frederick Jackson TURNER, is noted for his characterization of American history and present as the cultural endeavor and result of frontier adventure by pioneering people without any consideration — from this author as well as these people — for either Indian or African-American rights or even being there: R. HOFSTADTER, *The Progressive Historians* (n. 127), pp. 45-164; Thomas L. HARTSHORNE, *The Distorted Image: Changing Conception of American Character since Turner*, Cleveland, Press of Case Western Reserve University, 1968.

⁽¹³⁵⁾ R. HOFSTADTER, *The Progressive Historians* (n. 127), p. 202, recalls an important series of publications of the time, immediately before the *Economic Interpretation of the Constitution of the United States*, among them: Frank Johnson GOODNOW, *Social Reform and the Constitution* (1911); William L. RANSOM, *Majority Rule and the Judiciary: An Examination of Current Proposals for Constitutional Change Affecting the Relation of Courts to Legislation* (1912); GUSTAVUS MYERS, *History of the Supreme Court of the United States* (1912), and C. A. BEARD himself, *The Supreme Court and the Constitution* (1912, re-edition, Union, LE, 1962, with an introduction, pp. 1-34, by Alan F. WESTIN, *Charles Beard and the American Debate Over Judicial Review, 1790-1961*). I was able to see this series of works thanks to my host American Universities' -Arizona and California-subscriptions to the virtual library *The Making of Modern Law: Legal Treatises, 1800-1926* (<http://www.galeuk.com/trials/moml>). Now, since October 2006, I have access through the University of Seville's e-recourses.

⁽¹³⁶⁾ W. M. WIECEK, *Liberty under Law: The Supreme Court in the American Life*, Baltimore, JHUP, 1988, if you are able to read between the lines, which leads to turning title and subtitle upside down, from Whig to plain history: *Liberty under Court: The Rights in the American Life*.

⁽¹³⁷⁾ For a previous, most visited, and not so decisive moment, Robert Lowry CLINTON, *Marbury v. Madison and Judicial Review*, Lawrence, UPK, 1989; W.E. NELSON,

referring to the property right, is that the debate could have concerned itself with the aftereffects of slavery, with the consequences of a kind of emancipation that was not exactly the equivalent of liberty on an equal footing which could moreover bestow guarantees of fair, due process. However, this was not the case. The critical, controversial matters were instead the Founding Fathers' idealism or pragmatism, virtues or vices, liberality or greed, and the like. American origins were at stake in this particular fashion. Apparently it was a question of self-image, the prefix — *self* — meaning male white owners and their cronies as much for fathers as for children, their so-styled progressive offspring included. It might be said that the biographer shares this specific concern as if it were vital for the legitimacy and the value, the authority and force of the present Constitution, and not as a question of primarily historical interest about just distant forebears.

Let us suppose that, rather than resorting to Amendments, the 1787 Constitution had been substituted by reason of the federal abolition, that embodying such a constitutional turnaround from outright slavery to unequal freedom. Nowadays this Constitution, instead of inspiring love and being an object of worship, would parade along with the nefarious most slavocratic States' constitutional scriptures prior to the abolition and also in the company of a great many foreign Constitutions like, for instance, the aforementioned 1812 Spanish imperial Constitution, which shared citizenship in America with Indians and not African-Americans, still slaves as a rule. If the United States 1787 Constitution and the 1812 Spanish Constitution are not seen today

Marbury v. Madison: The Origins and Legacy of Judicial Review, Lawrence, UPK, 2000; Paul W. KAHN, *The Reign of Law: Marbury v. Madison and the Construction of America*, New Haven, YUP, 2002. Like other already quoted historical research on the judiciary's constitutional position, they come after the constitutionalist debate rather than the opposite: Alexander M. BICKEL, « *The Least Dangerous Branch* »: *The Supreme Court at the Bar of Politics* (1962); Raoul BERGER, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977); Jesse H. CHOPER, *Judicial Review and the National Political Process: A Functionalist Reconsideration of the Role of the Supreme Court* (1980); John Hart ELY, *Democracy and Distrust: A Theory of Judicial Review* (1980); Richard C. CORTNER, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties* (1981); Christopher WOLFE, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (1994). All in all, there is a sustained gap between historiographical expertise and mainstream constitutionalism, as if they were mutually dispensable, especially the former for the latter, judging by the way constitutional experts resort to obsolete narrative and disregard new research as they are obliged to continuously enter into history for such an old-aged Constitution. Now check some collective undertakings: C. WOLFE (ed.), *That Eminent Tribunal: Judicial Supremacy and the Constitution*, Princeton, PUP, 2004; Mark TUSHNET (ed.), *Arguing Marbury v. Madison*, Stanford, SUP, 2005.

as pro-slavery, it is because they are still rooted in the imagined origins of respective polities, the 1812 Constitution for Spain and even some Latin-American State one way or another. Although the latter has not been in force anywhere for a long time, a concern for the present, as a Constitution giving birth to a Nation or even Nations or rather States, is also its case, thus harder for the historiography of course ⁽¹³⁸⁾.

Had the slavocratic 1787 Constitution been discontinued when slavery was abolished, the absence of interest today towards defending any image of the Articles of the Confederation, the former United States Constitution, would have been extended to that following in 1787, not to mention sharing the contempt reserved for the Constitution of the Confederate States of America. We would have saved ourselves all the constitutional literature stressing the deficiencies of the Articles of Confederation along with the excellences of the 1787 Constitution. Then, if this belonged just to the past, it would be easier to admit the historical possibility of being just as Jefferson was, a slave-owner, patriarchalist, and at the same time libertarian constitutionalist and even a seemingly radical democrat. The Founding Fathers were able to set federal powers to protect and enhance their own vested and speculative interests while making a serious effort to limit and control, check and balance the very same powers for no other reason than to take precautions against their creation, always in defense of their interests, a very human, not especially greedy behavior indeed. Who is afraid of Thomas Jefferson? Who is afraid of the Founding Fathers? A lot of people might be.

An entire constitutional historiography — the really existing ACH, you know — and now the biography of *America's Constitution* are weighed down by the difficulty of recognizing some significant pieces of evidence through the need to defend a self-image, through dreaming up an impossible democratic inspiration for the very birth of such an old and obsolete Constitution. American constitutional history would be more achievable, at least for those origins, if a document over two centuries old had ceased to be Constitution when it should have in order to retain a minimum of coherence on the abolition of slavery. I do not mean that the discontinuation would have been sufficient, but it would have eliminated an insurmountable obstacle. The Amendments way has left questions still pending and has provoked new ones.

Among these questions, we know of two different yet connected ones: the issue referring to the then final constitutional indifference

⁽¹³⁸⁾ Discussing the point, although not dealing with any comparison that would be of interest to a broader United States constitutional history, I mean the one which gave account of the variety of American origins, B. CLAVERO, *Cádiz en España: Signo constitucional, balance historiográfico, saldo ciudadano*, in Marta LORENTE and Carlos GARRIGA, *Cádiz 1812. La Constitución Jurisdiccional*, Madrid, CEPC, forthcoming.

towards the rights of former slaves and their descendants, and the one concerning federal empowerment which, against the Amendments' intent, strengthens the federal Supreme Court rather than Congress with respect to rights. These are extremely sensitive questions, one directly concerning rights and the other dealing with powers which have to guarantee them to everybody, not just to some, but powers which, seeing how abolition was considered and postemancipation progressed, do not abide by their constitutional commitments. The biographer tackles both questions, but shows more sensitivity towards the latter — the powers — than the former — the rights, which he is well aware of anyway ⁽¹³⁹⁾. As a democrat in the legal and not only political sense, he is seriously concerned about the empowerment of institutions that can have a negative effect on rights, above all when they are in the hands of a small body of judges, thus materially exercising a constituent power, a power that would always be better held and managed by the citizenship through the necessary guarantees of participative procedure ⁽¹⁴⁰⁾. As a sensitive constitutionalist, the biographer should be concerned about rights in themselves and above all in the case of vulnerable individuals and groups whose adverse condition specifically arises from constitutional deficiencies. He deals with it, we know, but not with the awareness that might be expected especially for the questions of rights that still have a connection with the abolition Amendments. Neither is there room for the excuse that there is a lack of *written Constitution*, because it is there, between slavocratic Constitution and emancipation Amendments.

Following the same absurd notion of casting a democratic spirit over the 1787 constitutional slavocracy and thus having to struggle among real ghosts, the biography's timeframe is past and present from beginning to end, simultaneously and inseparably all the way through. With a Constitution more than two centuries old, timelessness or rather timefulness is a malady afflicting both constitutionalism and constitutional history in the United States, a malady sufficient in itself to render the American constitutional history improbable, not to say impossible. Here is a timely warning: « An orthodox history seems to me a contradiction in terms » ⁽¹⁴¹⁾. Orthodox legal history is bound to be a

⁽¹³⁹⁾ A. R. AMAR, *The Constitution and Criminal Procedure: First Principles*, New Haven, YUP, 1997; A. R. AMAR and Alan HIRSCH, *For the People: What the Constitution Really Says About Your Rights*, New York, FrP, 1998.

⁽¹⁴⁰⁾ A. R. AMAR, *Of Sovereignty and Federalism*, in « The Yale Law Journal », 96, 1987, pp. 1425-1520; *Philadelphia Revisited: Amending the Constitution Outside Article V*, in « University of Chicago Law Review », 55, 1988, pp. 1043-1104; *The Consent of the Governed: Constitutional Amendment outside Article V*, in « Columbia Law Review », 94, 1994, pp. 457-508, for that matter going beyond *written Constitution*.

⁽¹⁴¹⁾ Although today even the title referring to constitutional history sounds

tandem of the normative task of law and the analyzing endeavor of historiography, an actual make-believe. Neither good jurisprudence nor good historiography being feasible among obsolete documents forcibly kept alive, what emerges then is precisely a biography. In spite of the specter, the 1787 Constitution is alive. Here is its life story ⁽¹⁴²⁾.

In fact, the biographical genre cannot do without mature age from which to begin contemplating birth and infancy. There would be no subject for a biography unless viewed from adulthood. Nobody begins writing an autobiography at birth. Furthermore, creatures are born completely naked and voiceless, though filthy and screaming. The biographer may have difficulty in recognizing any of this since what he loves is the full-grown, well-dressed, totally cleaned-up, and most loquacious character, *America's Constitution* in the present case. And we know how blind love can be, even more than hate is. We are witnessing quite a psychodrama. Who is afraid of Charles Austin Beard?

7. *A piece of specifically constitutional, proudly legal historiography, along with indigenous law.*

Akhil Reed Amar, the biographer of *America's Constitution*, does not give a state of the art account on American constitutional historiography, but he poses some debate in a perceptive appendix and abundant notes ⁽¹⁴³⁾. To contrast differing positions, his main counterparts along the biography's historiographical discussion are such reliable constitutional historians as Gordon Wood, Bruce Ackerman, and Jack Rakove. However, neither of them happens to offer grounds for broadening the historical perspectives of United States constitutional-

anachronistic to us in relation to its medieval content, those constitutionalists who work on historiography may find stimulation in the set of conferences of the verdict's authority, F. W. MAITLAND, *The Constitutional History of England*, 1888, edited post-humously, CUP, 1908; current edition, Buffalo, WH, 2006; available on internet: <http://www.ecn.bris.ac.uk/het/maitland/ConstitutionalHistoryEngland.pdf>. The verdict is included in the leading quotation here.

⁽¹⁴²⁾ A. R. AMAR, *America's Constitution: A Biography*, p. 472 already partly quoted: « Contra Charles Beard and his disciples, I argue that the Preamble's words made clear that the Constitution was essentially democratic », anyway just the Preamble rather than the Constitution itself or the Founding Fathers themselves.

⁽¹⁴³⁾ In such a conscientious study one may effectively miss a comprehensive state of the art account, a whole section with a critical bibliographical commentary or even a critical history of American constitutional historiography, which is a vital part of the biography of *America's Constitution*. A large set of notes, pp. 501-628, and the already quoted *Postscript* on method and subject, pp. 465-477, are not sufficient substitutes in my opinion. For a suggestion, see the Appendix, *Proof of Like, the Exhibition*.

ism towards a horizon which might include not just the States alone or also the Territories, but first of all the Indian Nations for themselves, with whom the appropriate constitutional start — *We the Peoples* — would have to take place. Let us go on with the supposedly unique 1787 origins ⁽¹⁴⁴⁾.

One name is conspicuously absent in the biography's historiographical dispute, that of John Phillip Reid. He might have been implicitly disqualified in a note that, quoting other authors such as Richard Posner and David Strauss, rejects the approaches to the United States constitutionalism that relegate the strict *written Constitution*, the character of his biography ⁽¹⁴⁵⁾. Reid is the most significant author representing such a stance in the field of United States constitutional historiography and furthermore, just like the biographer of *America's Constitution*, in the textualist mode on legal sources. He, Reid, has constructed an entire *Constitutional History of the American Revolution* centered on rights and based on legal texts, but texts different from the Constitution, as if the latter were not even the nucleus, but just a clot for the original culture and experience of United States constitutionalism ⁽¹⁴⁶⁾. Concepts and practices vital for the constitutional formation of the United States would already have been tried out over a good period of time on both sides of the Atlantic to the credit of England

⁽¹⁴⁴⁾ A. R. AMAR, *America's Constitution: A Biography*, the said *Postscript*, more specifically pp. 473-476. For bibliography that I shall not consider here I can refer to a previous survey: *Constituyencia de derechos entre América y Europa: Bill of Rights, We the People, Freedom's Law, American Constitution, Constitución de Europa*, in «Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno», 29, 2000, pp. 87-171. The main works under debate are of course Gordon S. WOOD, *The Creation of the American Republic, 1776-1787*, Chapel Hill, UNCP, 1969 (current edition, Chapel Hill, UNCP, 1998); B. ACKERMAN, *We the People* (n. 9); Jack RAKOVE, *Original Meanings: Politics and Ideas in the Making of the Constitution*, New York, AK, 1996. All, whether textualists or not, whether they focus on previous or later time, work on the basis of 1787, that is, *We the People* in the singular.

⁽¹⁴⁵⁾ A. R. AMAR, *America's Constitution: A Biography*, p. 471, with references like Richard A. POSNER, *Overcoming Law*, Cambridge, HUP, 1995, and David A. STRAUSS, *The Irrelevance of Constitutional Amendments*, in «Harvard Law Review», 114, 2001, pp. 1457-1506. At this specific point, none of his references leads us to specialized legal historiography, which may be significant. Even if Amar were right as a lawyer, would he be accurate as a historian by the same token? I shall return to this question.

⁽¹⁴⁶⁾ John Phillip REID, *Constitutional History of the American Revolution*, vol. I, *The Authority of Rights*, vol. II, *The Authority of Tax*, vol. III, *The Authority to Legislate*, vol. IV, *The Authority of Law*, Madison, University of Wisconsin Press (UWP henceforth), 1986-1993. There is an abridged edition in a single volume: *Constitutional History of the American Revolution: Abridged Edition*, Madison, UWP, 1995.

(¹⁴⁷). American constitutionalism's own colonial evolution in final conflict with Great Britain would only make sense thanks to its shared background of English law and in the enduring relation with the same common-law kept in force in the former British colonies not just or mainly by specific constitutional provisions. Here is another case, a very obvious one, of Whig history (¹⁴⁸).

Reid caused some scandal when he dared to speak literally of the irrelevance of the American Declaration of Independence, implicitly blemishing in passing the ensuing constitutional texts, the State Constitutions as well as the United States' — the Articles of Confederations and the final one, the 1787 Constitution (¹⁴⁹). For Reid, American constitutionalism would be no more than a turn of the screw in the tradition of common-law as English people's birthright in the form of cultural identity rather than a laboratory product of personal freedoms

(¹⁴⁷) J. P. REID, *The Concept of Liberty in the Age of the American Revolution*, Chicago, UChP, 1987; *The Concept of Representation in the Age of the American Revolution*, Chicago, UChP, 1989; *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries*, DeKalb, Northern Illinois University Press (NIUP hereafter), 2004; *The Ancient Constitution and the Origins of Anglo-American Liberty*, DeKalb, NIUP, 2005.

(¹⁴⁸) J. P. REID, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, in « New York University Law Review », 49, 1974, pp. 1043-1091; *In a Constitutional Void: The Enforcement of Imperial Law, the Role of the British Army, and the Coming of the American Revolution*, in « Wayne Law Review », 22, 1975, pp. 1-37 *In Accordance with Usage: The Authority of Custom, the Stamp Act Debate, and the Coming of the American Revolution*, in « Fordham Law Review », 45, 1976, pp. 335-368; *'In Our Contracted Sphere': The Constitutional Contract, the Stamp Act Crisis, and the Coming of the American Revolution*, in « Columbia Law Review », 76, 1976, pp. 21-47; *In the First Line of Defense: The Colonial Charters, the Stamp Act Debate, and the Coming of the American Revolution*, in « New York University Law Review », 51, 1976, pp. 177-215; *In Legitimate Strips: The Concept of 'Arbitrary', the Supremacy of Parliament, and the Coming of the American Revolution*, in « Hofstra Law Review », 5, 1977, pp. 459-499; *In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison; and the Coming of the American Revolution*, University Park, PSUP, 1977; *In a Rebellious Spirit: The Argument of Facts, the Liberty Riot, and the Coming of the American Revolution*, University Park, PSUP, 1979; *In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution*, Chapel Hill, UNCP, 1981.

(¹⁴⁹) J. P. REID, *The Irrelevance of the Declaration*, in Hendrik HARTOG (ed.), *Law in the American Revolution and the Revolution in the Law: A Collection of Review Essays on American Legal History*, New York, NYUP, 1981, pp. 46-89. Let us recall that, in an official site on internet (Government Printing Office: <http://www.gpoaccess.gov>), the Constitution appears in company with the Declaration of Independence, as if this were its twin sister, not the same-aged Territory Ordinance of course.

by natural law or other 18th century enlightened ideals about human nature, like those alleged in the same Declaration of Independence⁽¹⁵⁰⁾. Reid's work on such grounds is extensive and consistent. For the United States constitutional origins it is the most juristic in approach and the most focused on legal texts. If his endeavor has a justification, here it is: « A dimension is missing from our histories of the American Revolution: the dimension of law »⁽¹⁵¹⁾. In this aspect his work has no match. He has also been concerned to refer critically to both historians and lawyers by way of emphasizing its usual deficiencies as regards respectively law and history⁽¹⁵²⁾. It has been no exaggeration to pay tribute to Reid by presenting him, for the aforementioned and for what remains to be seen, as a pathfinder along the trails and courses of legal history⁽¹⁵³⁾. As they are nice, fair names, along with Amar the biographer, Beard the specter, and 1787 Constitution the creature, let us call Reid the pathfinder. No bad manners are intended in the nicknames.

It seems odd that Amar, the biographer, does not confront Reid, the pathfinder. We have already seen, as regards the specter of Charles Austin Beard, that he is not in the habit of avoiding arguments. There may be reasons, whether deliberate and confessable or not, for not getting into a hand-to-hand with John Phillip Reid while attempting the biography of *America's Constitution*. The pathfinder's work does not exhaust itself in the area of constitutional history, including the study of State constitutionalism⁽¹⁵⁴⁾, neither does it stand out only in this

⁽¹⁵⁰⁾ The dramatic alternative between legal Enlightenment and common-law for the origins of American system, as if there were no possibility of compatibility or confluence (check for this purpose James R. STONER JR., *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism*, Lawrence, UPK, 1992), is one of the conflicting areas between democrat or liberal and republican or conservative lawyers in the United States, whose issues are projected back over time, the common-law-loyalists, like J.P. Reid, being regularly the latter. I shall return to this point, though not entering the dispute about current policy of law.

⁽¹⁵¹⁾ J. P. REID, *In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution*, p. 3. What follows from this verification about the missing legal dimension is his multivolume *Constitutional History of the American Revolution*.

⁽¹⁵²⁾ H. HARTOG (ed.), *Law in the American Revolution and the Revolution in the Law* (n. 149); W. E. NELSON and J.P. REID, *The Literature of American Legal History*, New York, Oceana, 1985; J.P. REID, *Law and History*, in « Loyola of Los Angeles Law Review », 27, 1993, pp. 193-223.

⁽¹⁵³⁾ R. B. BERSTEIN, *Legal History's Pathfinder: The Quest of John Phillip Reid*, in H. HARTOG and W. E. NELSON (eds.), *Law as Culture and Culture as Law: Essays in Honor of John Phillip Reid*, Madison, MH, 2000, pp. 10-37.

⁽¹⁵⁴⁾ J. P. REID, *Chief Justice: The Judicial World of Charles Doe*, Cambridge, HUP, 1967; *An American Judge: Marmaduke Dent of West Virginia*, New York, NYUP, 1968;

specific field. He also happens to be a recognized authority on a rather less frequented specialty than constitutional history, the one concerned with indigenous law in the past. In this field too, his work is extensive and meticulous. And it is not that Reid's work has passed through stages due to changes in subject and turns in curriculum along the way. The pathfinder is a legal historian prominent for working simultaneously and perseveringly on both constitutional and indigenous law (155). Had the biographer paid attention to him, might he have come up against the challenge he has avoided — that of the indigenous presence in the constitutional field? It is not exactly so, yet it is advisable to check this as being vitally important, although not directly, to ACH's mysteries.

Reid's work does not confront the constitutional challenge of the living indigenous presence in the legal field as for itself. He does not bring his reader face to face with the question. His double line of investigation, constitutional and indigenous, develops like a plotting of parallels with no appearance of crossing, and even less, converging in any time or place ahead of infinity. If a constant is to be found in his specific work on indigenous law, it is that of thinking and treating the subject like 'primitive law', in the blatant sense of a time lag which implies a backward cultural state. Thus indigenous law emerges through Reid's work as belonging to a different human time than the 'non-primitive' law. This is how the parallels are set and work. It is the way he has entered the study of indigenous law, specifically the law of the Cherokee Nation (156). According to the pathfinder's view before Indian presence, a more perfect law, that is, law plus rights, social ordainment on personal liberties, such a constitutional set, would be appropriate just for the European, or rather the British party, namely the common-law side. If indigenous people ever achieve any experience of freedom's rights, this would be due to cultural contact and exchange with the European presence, and not to any merit of their own, all this according to the pathfinder's view. When his aim is the existence of true law in the territories even before formally becoming Territories, not to say new member States of the United States, the pathfinder's gaze focuses on the immigrant, invading contingent, disregarding for that

Controlling the Law: Legal Politics in Early National New Hampshire, DeKalb, NIUP, 2004. *Chief Justice* also refers to New Hampshire, containing a chapter on constitutionalism.

(155) In H. HARTOG and W. E. NELSON (eds.), *Law as Culture and Culture as Law* (n. 153), pp. 452-466, there is a complete list of J.P. REID's publications until 1999.

(156) J. P. REID, *A Law of Blood: The Primitive Law of the Cherokee Nation*, New York, NYUP, 1970; re-edition with prologue by Gordon Morris BAKKEN, DeKalb, NIUP, 2005.

moment the previous and constant presence of indigenous peoples ⁽¹⁵⁷⁾. Is it not the same nullification of indigenous rights implied by Territory regime, carried out by colonial pathfinders then and constitutional pathfinders today? Parallels never meet. History and law, historiography and Constitution, do.

Reid has dealt with indigenous diplomacy showing the non-indigenous appreciation of relationship and exchange as effective alternatives to the clash of cultures and conflict of peoples. It would be *a better kind of hatchet*. The very expression that describes the point is significant, as if the indigenous people by themselves — the Cherokee in this case — stood for *a law of blood, a worse kind of hatchet*, the deadly alternative of war ⁽¹⁵⁸⁾. Have we not instead witnessed the indigenous' encouragement of relationships through Treaties? However, this is not a matter of interest for the pathfinder. According to his view of the unidirectional terms of the legal exchange between indigenous and non-indigenous cultures, there was no possibility of equal standing or relationship based on reciprocity ⁽¹⁵⁹⁾. The same confederative practice in common is invisible for the pathfinder. Parallels being what they are, indigenous law never meets with constitutional law, the true or real one for this kind of historical framework. The former literally vanishes when

⁽¹⁵⁷⁾ J. P. REID, *Law for the Elephant: Property and Social Behavior on the Overland Trail*, San Marino, Huntington Library (HL from now on), 1980; *Policing the Elephant: Crime, Punishment, and Social Behavior on the Overland Trail*, San Marino, HL, 1997. You may specifically confront, as both indigenous and non-indigenous law are here taken into consideration, J.R. WUNDER (ed.), *Law and the Great Plains: Essays on the Legal History of the Heartland*, Westport, GP, 1996.

⁽¹⁵⁸⁾ J. P. REID, *A Better Kind of Hatchet: Law, Trade, and Diplomacy in the Cherokee Nation during the Early Years of European Contact*, University Park, PSUP, 1976. In the preceding title, *A Law of Blood: The Primitive Law of the Cherokee Nation*, « law of blood » has nothing to do with stem law, law of lineage or nation, even less so when the Cherokee Nation was remarkable for its openness towards the integration of African-Americans as well as other non-indigenous people, in contrast with the United States themselves, especially at the moment of the respective abolitions of slavery.

⁽¹⁵⁹⁾ From a combined reading of *A Better Kind of Hatchet* and *A Law of Blood* would come the viewpoint that the Cherokee Nation not only possessed a *primitive law*, but also a *forest democracy* (do not forget that the qualification is semantically linked to *savage, selvaticus*, people of the *forest*), meaning also stateless; so, as « there was no state », consequently, « there was no one in the (Cherokee) nation authorized to make treaties » and the British had to take « the lead in foreign affairs ». Furthermore, just in case the bias is not clear enough: « They (the Cherokees) had less choice (than the British) », since « the primitive mind is less adaptable to jurisprudential innovation than are people with formal education ». Heed quotation marks for the pathfinder's wording, not mine.

face to face with the latter ⁽¹⁶⁰⁾. Reid's rights-centered American constitutional history consists of an exclusive narrative on English legal culture traveling from Europe to America to take root and flourish here ⁽¹⁶¹⁾. All in all, there remains no room for crosscultural law, actual law among cultures, despite the available evidence like that displayed in Reid's work itself ⁽¹⁶²⁾. For the pathfinder, peoples with *primitive law* cannot aspire to such a status on an equal foot as to time and right in the presence of peoples with *constitutional law*. Indigenous law's own fate appeared to be more than sentenced ⁽¹⁶³⁾. Anyway, when we awake from the parallel dreams, the blind spot is still there, noticeable thanks to the pathfinder. Who is afraid of John Phillip Reid?

⁽¹⁶⁰⁾ In the Index of the abridged edition of the *Constitutional History of the American Revolution* there is a single reference to the indigenous presence, and furthermore not alone, but in European company: *Indians, American, British Trade with*. I declare myself incapable of finding more Indian appearances in the four volume edition. *Constitutional History of the American Revolution* develops as if indigenous people do not exist in America, but just in an extraterritorial and timeless past as well as in Reid's books.

⁽¹⁶¹⁾ Check particularly J.P. REID, *Constitutional History of the American Revolution*, vol. I, *The Authority of Rights*. Furthermore, most significantly, in his *The Concept of Liberty in the Age of the American Revolution*, the opposite concept, that of *slavery*, is considered in the exclusive meaning of political oppression, namely that exercised by the British Monarchy over the British colonies, as if chattel slavery were not there.

⁽¹⁶²⁾ J. P. REID, *Patterns of Vengeance: Crosscultural Homicide in the North American Fur Trade*, Pasadena, Ninth Judicial Circuit Historical Society, 1999, announced in the quoted bibliography of H. HARTOG and W.E. NELSON (eds.), *Law as Culture and Culture as Law* (n. 153), with a working title which is more appropriate to its content, since it makes no mention of *crosscultural* or intercultural scenario: *Retaliation by Fur Traders against Indians for Homicides in the Transboundary North American West*.

⁽¹⁶³⁾ J. P. REID, *Conflict and Injustice: A Discussion of Francis Paul Prucha's 'American Indian Policy in the Formative Years'*, p. 69, in « North Dakota Law Review », 39, 1963, pp. 50-70: « The end may have been slow in coming, but it was inevitable. Inevitable not only because the force of history dictated that the stronger race would wipe out the weaker; not only because of the need of the white man for land and the inability of the Indian to marshal the resources of nature to their fullest extent... ». This was his first publication concerning indigenous law, reviewing F.P. PRUCHA, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1780-1834*, Cambridge, HUP, 1962, whereby it would be unfair to identify his position through it, but I do not find it to have changed since beyond the incomplete refining of such a frankly racist language. Remember J. P. Reid's later words: « They (the Cherokees) had less choice (than the British) », since « the primitive mind is less adaptable to jurisprudential innovation than are people with formal education ».

I do not believe that John Phillip Reid's work regarding the history of indigenous law can be in all justice disqualified as a negative image of a non-indigenous law, namely British, in order for the latter to appear in all its splendor as a sign moreover of the superiority of a culture in the singular over all those that people America. Neither, independently of the author's responsibility and intention, do I believe that a contrast between both historical parties and historiographical approaches works exactly like that. Reid's studies may be taken as a call to realize and challenge. They bring not just complementary visions, but also a most effective reminder. And they can be profited from⁽¹⁶⁴⁾. To begin with, Reid's work is not reassuring but challenging for constitutional historiography. The founding claim of *We the People* comes face to face with the evidence of *We the Peoples* on its same historical stage and constituent time, although their performances as represented by the pathfinder take place in a completely unbalanced and timeless form. So, although reduced to a lesser footing, the indigenous Nations show up in the past, just as they are here in the present. In these circumstances the summoning of a historical presence into view may be sufficient to embarrass current law and Constitution, even where it is not intended⁽¹⁶⁵⁾.

That is what I believe may explain the embarrassing silence of the biographer of *America's Constitution*, whether calculated or not. Since the pathfinder's work basically deals with constitutionalism prior to 1787 Constitution, it might be thought that the biographer should not have to pay heed to it. The former believes that the generative moment of American constitutionalism, as centered on rights rather than powers and hence connected to English law, reaches back to pre-1787 times; therefore, Reid's *Constitutional History of the American Revolution* represents the most powerful refutation, on the same ground, of the starting point adopted by Amar's *America's Constitution*. Is this not precisely a very good reason for not avoiding the argument? Yet the biographer is not the only one who carries out a selective quotation policy⁽¹⁶⁶⁾. Warning that it will be in vain, I propose the search for

⁽¹⁶⁴⁾ Note how it can be done: R. A. WILLIAMS, *Linking Arms Together: American Indian Treaty Visions of Law and Peace* (n. 75), broadly exceeding Reid's perspectives through the fastest route of all, that of ignoring them, while making good use of his work.

⁽¹⁶⁵⁾ B. CLAVERO, *Claiming for History: An American Hard Case*, in « Rechtsgeschichte », 4, 2004, pp. 28-37, although *American* without referring specifically to the United States. It might have been styled *Why the Constitutionalism of the Americas is not written*. For an extended version, *Guaca constitucional: La historia como yacimiento del derecho*, in *Istor. Revista Internacional de Historia*, 16, 2003, pp. 166-194 (*Guaca* is a Quechua word for sacred site). As already warned, I do not discuss here the exclusive use of *America* and *American* beyond inner constitutional need, which comes later.

⁽¹⁶⁶⁾ For that matter, there is no lack of occasions calling out for the attention

traces of John Phillip Reid's work all across mainstream American constitutional historiography — the prevailing ACH which neither centers on rights so much nor pays any heed to indigenous presence. The padding with quotes just for show does not count ⁽¹⁶⁷⁾. In fact, constitutional historiography is in a class of its own when it comes to maintaining blind spots even when it aims to point out consummated deceptions and disclose hidden agendas to be aired and open. Bad manners never intended of course ⁽¹⁶⁸⁾.

Given the affirmation of one culture over or even against others in historical terms, yet concerned with the present or at least affecting it, Reid's work — orthodox in this aspect — could be the object of the well-known reproach: «If we try to make history the handmaid of Constitution, either unwritten or written, it will soon cease to be history» ⁽¹⁶⁹⁾. After all, it is the underlying reason why American

which is missing: J. P. REID, *Constitutional History of the American Revolution* (n. 146), vol. I, pp. 47-59, and A. R. AMAR, *America's Constitution: A Biography*, pp. 233 and 577-578 (along with *The Bill of Rights: Creation and Reconstruction* (n. 18), pp. 81-118 and 336-348), both referring to the constitutional importance of the Jury before 1776, before independence, and the former's treatment being specific, insightful and above all preceding. Add especially S.C. STIMSON, *The American Revolution of the Law: Anglo-American Jurisprudence before John Marshall* (n. 15).

⁽¹⁶⁷⁾ Guides for the checking may be offered by Laura KALMAN, *In a Defiant Stance*, and J. P. GREENE, *John Phillip Reid and the Interpretation of the American Revolution*, in H. HARTOG and W.E. NELSON (eds.), *Law as Culture and Culture as Law* (n. 153), pp. 38-47 and 48-57 respectively. Not unfairly for the author who receives tribute, the pathfinder, and ever independently of actual intentions, in this title of *law as culture and culture as law*, such an apt motto in itself, there may lurk a supremacist stance for a legal and constitutional history in which culture is declined in the singular — Anglo-American of course. Is this concern a display of bad manners?

⁽¹⁶⁸⁾ Take notice of an uncalled-for apology in the most outstanding recent critical reflection, in my opinion, on American constitutional history: S.F. VANBURKLEO, K. L. HALL, and R. J. KACZOROWSKI (eds.), *Constitutionalism and American Culture: Writing the New Constitutional History*, Lawrence, UPK, 2002, p. XVII, for not including «an essay, for example, about the role of judicial policy in shaping American Indian-white relations», a clumsy and belittling caveat as, regarding indigenous presence, there is absolutely nothing in the contents and not just a section on the performance of a judiciary presumed to be exclusively the non-indigenous one. Please, also notice how well-mannered we all are.

⁽¹⁶⁹⁾ He came into early contact: J. P. REID, review of H. E. BELL, *Maitland: A Critical Examination and Assessment*, and C. H. S. FIFOOT (ed.), *The Letters of Frederic William Maitland*, both Cambridge, HUP, 1965, in «Columbia Law Review», 67, 1967, pp. 386-396, yet again depriving Maitland's verdict of its intent and quoting it by heart (pp. 394-395): «Maitland did not believe that legal history should be judged by the way it sheds light on contemporary law. It was his unique gift to have contemporary law to

constitutional history is not written. All in all I have not disclosed much besides, perhaps, that the biography of *America's Constitution* as a living character is impossible by itself. As the United States is a country without a name, its identification may depend on the surviving creature, *written* constitutionalism since 1787. Even if the history were tackled with knowledge of all the set of Constitutions, proxies, and substitutes, written and unwritten, there is still a dearth of bases and devices, the bases on which to get a foothold beyond 1787 and the devices for the handling of what turns out to be constitutional histories in the plural, yet deeply interrelated. That is the end of the little break I begged for. Thank you, readers. Let's recap.

8. *National identity and constitutional history between exclusive delivery and shared biographies.*

America's Constitution now has a biography because an author decided to write its life story, but also because its subject is badly in need of becoming the character entitled to history. The prosopopoeia is not only the biographer's choice. At the present time, for it was not quite so clear during the long nineteenth century, if the United States of America — the country with no name — succeeds in possessing an identity, it is a constitutional one, recognized in and by the Constitution for better or worse ⁽¹⁷⁰⁾. I hope nobody is scandalized at this late stage with the conclusions I am about to draw. You are probably acquainted with the better reasons and we have so far come to know the grounds of the worse aspects of the United States Constitution-making. In plain words, *America* owes its identity to a scripture revealed by a bunch of racist, colonialist, and sexist people — the Founding Fathers, for there was no mother. As I do not know any other clearer way to say it, no bad manners are meant. Clarity is due. In any case, I am not the first to offend ⁽¹⁷¹⁾. Whig historiography, this constitutional « tale of inexo-

shed light on legal history »; « if American historians paid heed to his warnings against making history the handmaiden of law, American historians might be less critical of the legal use of history ». At this stage, one may wonder if there must be, beyond plain legal history, a *legal use of history* which merits historians' sharp criticism. Maitland's answer no doubt was in the negative (« current phrases about 'historical methods of legal study', that is another reason why the history of our law is unwritten »). Not just the pathfinder, but the ACH party belonging to legal faculty, the biography included, stands on the opposite side.

⁽¹⁷⁰⁾ On the better, Whig side, Michael KAMMEN, *A Machine That Would Go of Itself: The Constitution in American Culture. With a New Introduction*, New Brunswick, TP, 2006 (first, AK, 1986).

⁽¹⁷¹⁾ L. H. BUTTERFIELD, Wendell D. GARRETT, and Marjorie E. SPRAGUE (eds.),

rable progress » — ACH, no less — does not even take notice of past offenses when they can still bear significance for the present ⁽¹⁷²⁾.

A Nation with no name and therefore identifying itself with a Constitution could be a country where postnational, purely constitutional patriotism would make most sense. Any national identification beyond the fundamental scripture might definitively become needless, if not even possibly counterproductive ⁽¹⁷³⁾. To be a patriot would mean not just to swear and abide by the Constitution, but to do so out of blind love and thus to worship the written document or its inspiring spirit as a truly sacred scripture or revelation. If one is skeptical of civic religion, awareness of its usefulness with the consequence of allegiance would suffice. Postnational patriotism identifies polity with constitutional structure and behavior, with representative institutions and participative politics, rather than Nation, including civic or non reli-

Adams Family Correspondence, I, December 1761 — May 1776, Cambridge (Mass.) 1963, pp. 381-383, letter from John Adams to Abigail (Quincy) Adams, his wife, trying to respond to her concern for women's rights as a question which, she thought, should be of constitutional importance: « As to your code of laws, I cannot but laugh. We have been told that our struggle has loosened the bonds of government everywhere; that children and apprentices were disobedient; that schools and colleges were grown turbulent; that Indians slighted their guardians, and negroes grew insolent to their masters. But your letter was the first intimation that another tribe more numerous and powerful than all the rest were grown discontented (...). We know better than to repeal our masculine systems. Altho' they are in full force, you know they are little more than theory (...); in practice you know we are the subjects. We have only the name of masters, and rather than give up this, which would completely subject us to the despotism of the petticoat, I hope General Washington and all our brave heroes would fight ». Abigail's biographer does not pay attention to this telling episode: Edith B. GELLES, *Portia: The World of Abigail Adams*, Bloomington, IUP, 1992.

⁽¹⁷²⁾ A. R. AMAR, *America's Constitution: A Biography*, p. 468 already quoted: « Doubtless, some sophisticated readers may be tempted to dismiss my general account as *Whig history* — a tale of inexorable progress », a completely uncalled-for disclaimer, as we know. Do you really need to be a *sophisticated reader* to perceive the not so disguised bias? And what is ill in becoming such a kind of person when it entails being perceptive beyond one's own and others' pretensions?

⁽¹⁷³⁾ What's in a name? Charles H. AMBLER, Frances Haney ATWOOD, and William B. MATHEWS (eds.), *Debates and Proceedings of the First Constitutional Convention of West Virginia, 1861-1863*, Huntington, Gentry Brothers, 1939, vol. I, p. 81: « When we look back to history and see the origin of the name — Virginia, from the Virgin Queen — the queen who swayed the scepter of England with so much glory and renown — we might almost go back a little further to Virginia, the Virgin. It always makes me think of the Virgin Mary, the mother of our blessed Redeemer ». As even *America* is a colonial brand, remember that there is some indigenous name, like *Abya Yala*, now meaning the Americas in the plural with indigenous peoples in the first place.

gious at all. For this stance there is no constitutional need of history or even less, biography. Hence the problem lies in what is taken for granted as to the terms of reference, namely the Constitution, in this specific case, the American one. The United States of America identifies itself with the Constitution to form a Nation and therefore as a Nation through the Constitution. There is no way out of this circle. The same terms of reference are practically reduced to a single one. The American Nation is a Nation in the singular canceling Nations in the plural from its very 1787 final birth, after the confederative abortion rather than miscarriage. The national aim is the constitutional intent. The American Nation is embedded in the American Constitution. Here is where the national need for constitutional history or even biography takes root. The Nation, if ever shoved out the door, comes anyhow back through the window ⁽¹⁷⁴⁾.

The identity of the American Nation is conferred by the Constitution, but what's in a name? What comes in through the open window? For this question frequently avoided even in its most elementary, that is, material or textual, dimension, the biography holds the merit of providing a categorical answer and abiding by its consequence, though this can only be relative instead. Identification through a set of texts, those of the *written* Constitution, appears plausible, yet ultimately is impossible as well as counterproductive through its uncontrollable collateral effects ⁽¹⁷⁵⁾. One may even appreciate the biography's methodological proposal of a non-originalist textualism with the Constitution as an

⁽¹⁷⁴⁾ The main elaboration of constitutional patriotism as a non-national or postnational stance does not come from the United States, but Europe: Jürgen HABERMAS, *The Inclusion of the Other: Studies in Political Theory*, ed. Ciaran CRONIN and Pablo De GREIFF, Cambridge, Massachusetts Institute of Technology, 1998 (*Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Frankfurt a.M., Suhrkamp, 1996). The German question aside, as present Europe likewise seems to be another polity badly in need of constituent history or rather biography with a most problematic background partly linked to America, you may check B. CLAVERO, *Europa hoy entre la historia y el derecho o bien entre postcolonial y preconstitucional*, in «Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno», 33-34, 2004-2005, pp. 509-607.

⁽¹⁷⁵⁾ As we know, the biographer has even got a working title for a sequel: *America's Unwritten Constitution: Between the Lines and Beyond the Text* (n. 6), further explaining that «the challenge... is to take seriously unenumerated aspects of our constitutional tradition and practice but to do so in a way that does not undermine the pre-eminent virtues of a written constitution»: A. R. AMAR, *An Open Letter to Professors Paulsen and Powell* (n. 6), p. 2102. So it is precisely how big problems arise for both rights and history. In fact, despite *America's Written Constitution* and its presumed virtues, the stance is not going forth but back to old British constitutional *conventions*: Albert Venn DICEY, *Introduction to the Study of the Law of the Constitution* (1885), Indianapolis, Liberty Classics, 1982.

intergenerational project, so as not to tie constitutionalism to faulty origins ⁽¹⁷⁶⁾. However, it does not completely work for either law or history. It does not work at all for legal history. The study cannot abide by its own rules. The explanation has to develop partly at times against or beyond pieces of textual evidence from the *written* Constitution ⁽¹⁷⁷⁾. The diachronic — *intergenerational* — delimitation of its sources may appear impeccable from an extreme juridical standpoint, but is a failure for even strictly legal purposes, let alone historiographical ones ⁽¹⁷⁸⁾. If there is a *written* specific fundamental law, a discrete Constitution, its text achieves significance above all through the context of other texts. How the constitutional word makes sense is along with other legal

⁽¹⁷⁶⁾ On the controversial issue of constitutional originalism trying to tie current constitutionalism to the founding moment, Johnathan O'NEILL, *Originalism in American Law and Politics: A Constitutional History*, Baltimore, JHUP, 2005; Dennis J. GOLDFORD, *The American Constitution and the Debate over Originalism*, Cambridge, CUP, 2005. For a recent attempt to get over the divide between originalist and evolving or living Constitution, Jed RUBENFELD, *Revolution by Judiciary: The Structure of American Constitutional Law* (n. 3). For direct checking of the founding moment, J. RAKOVE, *Original Meanings: Politics and Ideas in the Making of the Constitution* (n. 144). Needless to say at this stage, both originalist and living constitutionalisms are, along with all their variants, *We the People* constitutionalism in the singular.

⁽¹⁷⁷⁾ Check the skeptical conclusion of the review by the author of *Original Meanings*, J. RAKOVE, *Letter of the Law*, in « The Nation », December 19, 2005: « Yet Amar's notion of strict linguistic scrutiny, as applied to the origins of the constitutional text, is finally more an example of our obsession with the Constitution than an explanation of why its interpretation remains so fertile a source of perplexity and controversy. For all the attention that Amar bestows on the nuances of language, the life of the Constitution remains a story of movement, interpretation, and even exploitation. There is much to admire in Amar's densely packed disquisition, but it is not quite the biography it claims to be ».

⁽¹⁷⁸⁾ Let me return to a question I posed, that about the relation, if there is any, between legal and historiographical strategies. Let us concede that Amar's stance is fully accurate for current constitutionalism as a legal approach, what would this prove about constitutional history as an inquiring commitment? The biographer himself is not always consequent, even when he should be to the utmost, that is, concerning living people's rights. We have seen how, in the Whig mode at its best, he deems the failed Equal Rights Amendment as constitutionally irrelevant after all, like D. Strauss, *The Irrelevance of Constitutional Amendments* (n. 145). The latter's milieu may call for his stance, as he is one of the three current editors, since 1991, of the *Supreme Court Review*. Remember that for Amar's view Strauss is nemesis along with R. Posner, a federal judge since 1981 and well-known as a prolific legal scholar, above all for his *Economics Analysis of Law* (1972), nothing to do with Beard's *Economic Interpretation*, as he represents just the opposite, the deliberate subordination of law to economy, the Founding Fathers' hidden agenda according to Beard.

words ⁽¹⁷⁹⁾. The *written* Constitution is a limb, a major one of course, rather than a whole body. As a diachronic text in the singular, it needs the help of successive layers of texts in the plural to become meaningful. Doing otherwise, the biography runs the risk of depicting a timeless law. As a matter of fact, it tends to turn ancient people into the biographer's contemporaries and contemporary people into historical characters ⁽¹⁸⁰⁾.

Let us allow the biography to be the anchor now for the closing session as it was for the opening. Thanks again for everything, biographer. We know that you do not always evade obstacles. Against so much merely apologetic or obsequiously exegetic constitutional literature, contrary to the historiographical variety that openly projects the bright side of the present on the entire past in order to cover up yesterday's darkness, albeit reluctantly, that Constitution meant slavocracy. You do not hide the fact that the same basic 1787 Constitution which the country with no name identifies itself with is simply a supporter of slavery as a historical document alongside the early State constitutionalism ⁽¹⁸¹⁾. Furthermore, through the persisting identity,

⁽¹⁷⁹⁾ H. Jefferson POWELL, *A Community Built on Words: The Constitution in History and Politics*, Chicago, UChP, 2005, with expressive historical illustrations, to one of which I shall resort. The author does not take note of early intuitions about the need of paying attention to contexts so as to grasp the meaning of texts: John TAYLOR, *Construction Construed and Constitutions Vindicated* (1820); *New Views of the Constitution of the United States* (1823), sect. I: *The Meaning of Certain Primary Words*. These works are available on the web, in the *Liberty Library of Constitutional Classics* of the *Constitution Society*, ed. Jon ROLAND: <http://www.constitution.org/liberlib.htm>.

⁽¹⁸⁰⁾ H. J. POWELL, *Grand Visions in an Age of Conflict*, p. 2071, in «The Yale Law Journal», 115, 2006 (n. 3), pp. 2067-2092, referring to A.R. AMAR, *America's Constitution: A Biography*: «It is rather fun to see a twenty-first-century scholar answer nineteenth century questions and chastise nineteenth-century statesmen, but if this were meant to be history, the attempt to do so would be a category error: The views of historical figures on a question of constitutional interpretation in dispute among them cannot be right or wrong when the question at hand is what the historical meaning of the document was», particularly regarding Abraham Lincoln's stance against states' right to secession from the Union on the grounds of the 1787 Constitution, which A.R. Amar thinks right as much as Lincoln's opponents would be wrong. «Once again — H.J. Powell continues — history cannot prove the correct answer to the normative question either way, and assertions about the normative answer are not history». Endeavouring to reply, A.R. AMAR, *An Open Letter to Professors Paulsen and Powell* (n. 6), pp. 2105-2106. For further information on that point which regards powers rather than rights, F. McDONALD, *States' Rights and the Union: Imperium in Imperio, 1776-1876*, Lawrence, UPK, 2000.

⁽¹⁸¹⁾ For a revealing contrast from a European viewpoint, and furthermore concerning rights, as if their constitutional register might be disconnected from the

the slavocratic testimony is still there, I mean here, for the federal text is untouched. The reading of the scripture may vary depending on your background. Yours is Asian-American ⁽¹⁸²⁾. Mine is European, but we can both imagine the annoyance or even offence which may be felt by African-Americans who descend from slaves and are aware of the meaning in those clumsily disguised constitutional clauses backing slavery ⁽¹⁸³⁾. Slavocratic history — a history not completely neutralized

slavocratic background, Horst DIPPPEL, *Human Rights in America, 1776-1849: Rediscovering the States' Constitutions*, in « Albany Law Review », 67, 2004, pp. 713-761 (heed *human rights* for constitutional rights entailing slavery); now, upholding the sightless approach, *The Rise of Modern Constitutionalism and the Relevance of American State Constitutions*, in Andreas ETGES and Ursula LEHMKUHL (eds.), *Atlantic Passages: Constitution — Immigration — Internationalization. In memoriam Willi Paul Adams*, Münster, Lit, 2006, pp. 57-68. H. Dippel is the editor of an ambitious endeavor for the collection of American and European constitutional texts: *The Rise of Modern Constitutionalism, 1776-1849* (<http://www.modern-constitutions.de>).

⁽¹⁸²⁾ I have already referred to the biographer's website: <http://www.law.yale.edu/faculty/AAmar.htm>. Here I first learned that *America's Constitution: A Biography* won the 2006 American Bar Association Silver Gavel Award. The prize's justification mentions his personal background: « As a child of Indian immigrants, Amar grew up with a fascination for American history, government and law — that interest ultimately inspired him to tell the story of his native land by way of its Constitution ». Do not fail to notice how the history of *America* can be told *by way of its Constitution*, of course in the singular since 1787 on. For the legal background of discrimination against them, Hyung-chan KIM, *A Legal History of Asian Americans, 1790-1990*, Westport, GP, 1994; Natsu Taylor SAITO, *Interning the 'Non-Alien' Other: The Illusory Protection of Citizenship*, in « Law and Contemporary Problems », 68, 2005, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on Their Sixtieth Anniversary*, pp. 173-213. As there is nothing specifically on them in the *written Constitution*, the biography does not have to deal with constitutional issues regarding Asian-Americans of course.

⁽¹⁸³⁾ Contrast the offensive irony, as a reborn John Adams (nn. 41 and 171), of G.S. WOOD, *The Founders Rule!*, review of B. ACKERMAN, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy*, Cambridge, HUP, 2005, in « The New Republic », November 7, 2005, beginning: « Academic historians are not much interested in constitutional history these days. Historians who write on American constitutional past are a vanishing breed. For much of the academy, constitutional history, with its concentration on the actions of dead white males, is much too old-fashioned, and not to be compared in importance with cultural and social history, especially of the sort focusing on issues of race and gender ». For the effective intellectual link to John Adams, G. S. WOOD, *The Creation of the American Republic* (n. 144). Add now, among people already quoted, the insensitivity of M.S. PAULSEN, *How to Interpret the Constitution (and How Not To)* (n. 8), p. 2062: « The long-dead-white-males-shouldn't-rule-us critics have a point. There is no particularly good a priori reason

through either Amendments on abolition and citizenship or Civil Rights Acts — is embedded in the constitutional tradition and scripture which awards American identity ⁽¹⁸⁴⁾. Needless to say it no longer bears normative importance, but the scope of the Constitution goes beyond the strictly legal field, especially as America's ID. *America's Constitution* documents American identity in the best way — biography.

There is more beyond the S-word, the S-euphemisms and its aftereffects, much more as we know, but you, biographer, avoid it. There are other signs in the scripture that can also annoy and offend — *Indian tribes, Indians not taxed* — with neither formal Amendments nor substantial constitutional mutations in the case. They bear testimony to colonialism; it is worth remembering it by its plain name for this is the hardest thing to face up to then and now ⁽¹⁸⁵⁾. This predicament is most

why we should be governed, on important fundamentals, by a charter drafted (in the main) more than two centuries ago, by (white) men who have long since died, if we prefer a different arrangement today, in whole or in part, and make a considered deliberative choice for a new arrangement. But this is not really a problem with constitutional law. It is a political theory problem external to constitutional law ». Sic.

⁽¹⁸⁴⁾ For the situation after the Civil Rights Act — the legislation finally according, after a long century, to the XIV and XV Amendments' mandate and not pertaining to the *written Constitution* — still under the spell of slavery's aftereffects, worsened by the extended enacting delay, Derrick BELL, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987), with a New Appendix for Classroom Discussion, New York, Basic Books (BB hereinafter), 1989; *Afrolantica Legacies (A Geneva Crenshaw Book)*, Chicago, Third Word Press, 1997; *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform*, New York, OUP, 2004. Add Richard DELGADO and Jean STEFANCIC (eds), *The Derrick Bell Reader*, New York, NYUP, 2005. But check how, from a perceptive standpoint regarding Bell's own African-American location, the indigenous presence is instead clustered together with non-European immigration in a chapter on *other 'Nonwhiteness'*: D. BELL, *Race, Racism, and American Law* (1973), New York, Aspen, 2004, including moreover Mexicans, Indians or not, who have not crossed the border as the border crossed them, as we know. As for the indigenous standing, wouldn't this way of tackling it be deemed as supremacist in the case of its being applied to the descendants of the slave trade between Africa and America with nothing much in common either with unforced immigration?

⁽¹⁸⁵⁾ R. A. WILLIAMS JR., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, in « Arizona Law Review », 31, 1989, pp. 237-278, partially reproduced in R. DELGADO and J. STEFANCIC (eds.), *Critical Race Theory: The Cutting Edge*, Philadelphia, Temple University Press, 2000, and in Juan F. PEREA, R. DELGADO, Angela P. HARRIS, and Stephanie M. WILDMAN, *Race and Races: Cases and Resources for a Diverse America*, St. Paul, West Group, 2000. For further information about R.A. Williams' publications on legal and constitutional *barbarism*: <http://www.law.arizona.edu/faculty/getprofile.cfm?facultyid=40>.

difficult to confront because on the whole it effectively still exists. The Nation with no name, America, does not hide its colonial origins or even feels proud of them as a part of its constitutional pedigree⁽¹⁸⁶⁾. What seems hard to admit is that colonialism describes the supremacist project of European people over or against indigenous people in America rather than their subordination to their polity in Europe, the British Monarchy in the case⁽¹⁸⁷⁾. What is still harder to acknowledge is that the Constitution itself turns out to be colonialist along with the background where it remains embedded, English common-law as wells

⁽¹⁸⁶⁾ Donald S. LUTZ (ed.), *Colonial Origins of the American Constitution: A Documentary History*, Indianapolis, Liberty Fund, 1998; available on internet, on the aforementioned site of the so-named *Liberty Fund*: <http://oll.libertyfund.org/Home3/index.php>. The affirmation of the English colonial presence, since it is one among others and furthermore of the immigrant kind from the start, might be compatible with all the people there, including both indigenous and European parties, but often the English pedigree is presented as exclusive towards both sides, Indian as well as colonial. The same *Liberty Fund* on internet is quite demonstrative. There is available research on the economical domestication of common-law from colonial background into constitutional rules, for private as much as public law: James Willard HURST, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915*, Madison, UWP, 1984 (first, HUP, 1964); W. E. NELSON, *Americanization of the Common-Law: The Impact of Legal Change on Massachusetts Society, 1760-1830*, Athens, UGP, 1994 (first, HUP, 1975); M. J. HORWITZ, *The Transformation of American Law, 1780-1860*, New York, OUP, 1992 (first, HUP, 1977); H. HARTOG, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870*, Ithaca, Cornell University Press (CrUP from now onward), 1989 (first, UNCP, 1983); Howard SCHWEBER, *The Creation of American Common Law, 1850-1880: Technology, Politics, and the Construction of American Citizenship*, Cambridge, CUP, 2004.

⁽¹⁸⁷⁾ J. EVANS, P. GRIMSHAW, D. PHILIPS, and S. SWAIN, *Equal Subjects, Unequal Rights: Indigenous People in British Settler Colonies, 1830-1910*; P.G. McHUGH, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination*; both already quoted (n. 65). Champions of common-law as United States constitutional tradition, such as J.P. Reid, are radically selective by completely disregarding this aspect. As already pointed out, I shall not enter the dispute between the supporters of either legal Enlightenment or common-law for the origins of American system, a conflicting areas between liberal and conservative lawyers in the United States, since we are not concerned here with policy of law directly, but just politics at work in constitutional or legal historians' strict realm. For a contrasting scrutiny, L. KALMAN, *The Strange Career of Legal Liberalism*, New Haven, YUP, 1996. For the colonialist seeds of the very Enlightenment on the British side, Barbara ARNEIL, *John Locke and America: The Defence of English Colonialism*, Oxford, OUP, 1996; Jennifer PITTS, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France*, Princeton, PUP, 2005, pp. 25-121. On the broad legal background, Lauren BENTON, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, Cambridge, CUP, 2002.

as legal Enlightenment (188). The enlightened law of nations, shortly afterward called international law, elaborated the supremacist position through a clear double standard between colonized people and colonizing people from the latter's viewpoint, sure enough (189). If the constitutional dimension of international law — the former law of nations — is avoided by exclusively referring to American Constitution, most important constituent problems of the Americas — including the United States to be sure — are completely missed (190). International

(188) As I already spoke of *excusatio non petita* for the biographer and some other people, see also the significant example of uncalled-for disclaimer offered by J.R. STONER Jr., *Common-Law Liberty: Rethinking American Constitutionalism*, Lawrence, UPK, 2003, p. 6: « I do not mean to revive lapsed ethnic privilege » by affirming British legal tradition, although « I suppose the eclipse of common law in recent years owes something to the rise of a multiethnic America », a sort of America which would not seem to be present from the very start and a part of it before any presence of European origin. Let us recall that he authors some thoughtful research on the historical confluence between common-law and legal Enlightenment: J. R. STONER Jr., *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (n. 150). Going further not only back in time and out of any enlightened background, R.H. HELMHOLZ, *The Spirit of Classical Canon Law*, Athens, UGP, 1996, presents a European pedigree of American or even general constitutionalism in the strictest sense, as regards rights and guarantees, stemming from the medieval world and catholic law.

(189) Not sure at all instead, since Indian Nations and hence double standard are left out of sight, P. S. and Nicholas ONUF, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776-1814*, Madison, MH, 1993. We know (n. 48) that the former, Peter Onuf, did not realize the Indian position even when studying some Territory Ordinance. For more insightful approaches, Richard TUCK, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, Oxford, OUP, 1999; Edward KEENE, *Beyond the Anarchical Society: Grotius, Colonialism, and Order in World Politics*, Cambridge, CUP, 2002; Antony ANGHIE, *Imperialism, Sovereignty, and the Making of International Law*, Cambridge, CUP, 2005.

(190) It is the case of A. R. AMAR, *America's Constitution: A Biography*. Regarding the international frontier of the American inner law, that is the Territory regime, the exclusion of the law of nations really helps to avoid constitutional problems: G. LAWSON and G. SEIDMAN, *The Constitution of Empire: Territorial Expansion and American Legal History* (n. 43), and vice versa too: P. S. and N. ONUF, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions* (n. 189). In the field of really existing ACH or American legal history in general, international law is regularly disregarded, even when concerning constitutional law and even by the best accounts: Lawrence M. FRIEDMAN, *American Law in the Twentieth Century*, New Haven, YUP, 2002; for details regarding human rights international law, B. CLAVERO, *Freedom's Law and Indigenous Rights* (n. 79), pp. 166 and 167. Compare the conclusion about « integrating the United States into the Global Constitution » from K. J. KERSCH, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (n. 38)

law may shed shadow over given Constitution as well as light over substantive constitutionalism, that concerning rights ⁽¹⁹¹⁾.

Regarding the United States Constitution, the main troublesome textual indication is the provision for the incorporation of new States as if there were a wasteland to colonize. The core evidence is outside the Constitution or rather the *written* Constitution. It is the Territory regime with the double standard granting rights for colonizers at the expense of the people there. The Territory Ordinance is parallel and complementary to the 1787 Constitution, allowing the latter and ensuring the former colonialism's continuity ⁽¹⁹²⁾. Although a biography's chapter is dedicated to Territories along with States, it does not recognize the dark side of Territory rule. It does not even try to look at it. As in so many aspects, it is an accurate representation of an entire historiography, the impossible constitutional history of the United States of America that begins with *We the People* in the singular, the really existing ACH's character in short ⁽¹⁹³⁾. Indeed, there are Indians

⁽¹⁹¹⁾ Miguel ALFONSO MARTÍNEZ, Special Rapporteur for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (now Sub-Commission on the Promotion and Protection of Human Rights), *Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations: (Fourth and) Final Report*, 1999, available on internet (<http://daccessdds.un.org/doc/UNDOC/GEN/G92/136/53/PDF/G9213653.pdf?OpenElement>), par. 163, referring to the resolution here quoted in n. 96: « By virtue of the so-called Apology Bill enacted by the Congress of the United States, among other reasons, the situation of the indigenous Hawaiians takes on a special complexion now. The Apology Bill recognizes that the overthrow of the Hawaiian monarchy in 1898 was unlawful. By the same token, the 1897 treaty of annexation between the United States and Hawaii appears as an unequal treaty that could be declared invalid on those grounds, according to the international law of the time ». What if we take into consideration present international law? The rapporteur does so for Indian Treaties as well.

⁽¹⁹²⁾ There is a real classic, Charles Howard McILWAIN, *The American Revolution: A Constitutional Interpretation* (1923), New York, Da Capo, 1973, whose author is more remembered today for dealing with « mother country » law (*The High Court of Parliament and its Supremacy. An Historical Essay on the Boundaries between Legislation and Adjudication in England*, 1910) and for the characterization of constitutionalism through history (*Constitutionalism, Ancient and Modern*, 1947), than for having tackled the legal dimension of colonialism without taking into consideration indigenous peoples' rights, or their law at least, by editing and introducing Peter WRAXALL, *An Abridgment of the Indian Affairs Contained in Four Folio Volumes, Transacted in the Colony of New York, from the Year 1678 to the Year 1751*, Cambridge, HUP, 1915, pp. IX-CXVIII; reprint, New York, Benjamin Blom, 1968.

⁽¹⁹³⁾ The fact that there is no title *We the Peoples* referring to the United States, for the books which do deal with the United Nations (browse through the Library of

and slaves' ghosts hovering over *America's Constitution*, above the 1787 Constitution, the whole set of its Amendments, and the extended, borderless body of the *unwritten* Constitution. Other ghosts, such as women's, may be added of course. All of this is a well-known fact ⁽¹⁹⁴⁾. What seems to be lacking in the case of the United States is a clear awareness of the present constitutional shortcomings caused by not just the obsolescence of the *written* Constitution, but also and above all the *We the People* character entitled to it ⁽¹⁹⁵⁾. Even when the textual

Congress: <http://www.loc.gov>), while the title *We the People* actually abounds for the United States, can of course be blamed likewise and unequally on both mainstream non-indigenous and not so marginal indigenous scholarly positions. As far as I know, the one who comes closest to launching an American constitutional history as history of *We the Peoples* in the plural, through the aforementioned motives of « Treaties as Constitutions » and « Multicultural Constitution », is R.A. WILLIAMS, *Linking Arms Together: American Indian Treaty Visions of Law and Peace* (n. 75). As for *We the Peoples* referring to all Nations beyond current United Nations, as indigenous peoples ought to be included, they would better receive consideration from the international law presiding over the States, no longer the only Nations: Ronald NIEZEN, *The Origins of Indigenism: Human Rights and the Politics of Identity*, Berkeley, UCP, 2003; S. James ANAYA, *Indigenous Peoples in International Law*, updated edition, New York, OUP, 2005.

⁽¹⁹⁴⁾ B. ACKERMAN, *We the People* (n. 9), presents the absence of women, slaves and indigenous peoples in the founding moment as a constituent deficiency of the United States which weighs upon the entire American constitutional history. He later contemplates the incorporation of the first two categories — slaves and women — in their respective moments as a true rectification or even regeneration (respective Amendments are already quoted), but finally, in a definitive Whig way, disregards the third or rather the very first category — Indians — without the pretext in his case, as he is not a textualist at all, of abiding by a faulty constitutional corpus, since for the indigenous question there is no Amendment nor does one seem possible with *We the People* in the singular for Ackerman's title as for the Constitution. Still the title of Woody HOLTON, *Forced Founders: Indians, Debtors, Slaves, and the Making of the American Revolution in Virginia*, Chapel Hill, UNCP, 1999, does not refer to the subtitle — *forced founders to Indians, debtors, slaves* — but to the reluctance of non-Indians, non-debtors, non-slaves, and so forth, to independence.

⁽¹⁹⁵⁾ For contrast, let me refer again (n. 87) to some approaches from Canada and Australia: J. TULLY, *Strange Multiplicity: Constitutionalism in an Age of Diversity*; D. IVISON, *Postcolonial Liberalism*. Add Patrick MACKLEM, *Indigenous Difference and the Constitution of Canada*, Toronto, University of Toronto Press, 2001. Is there any reason for the shortage in the United States? Maybe, Federal Indian Law — that which begins with the Cherokee cases instead of Treaties, so to say — is so embedded in *We the People* law that it is really hard to achieve a perspective which needs to be both internal and external at once. Of course, there are some exceptions besides R. A.

context of constitutional texts far beyond the strict Constitution is taken into consideration, other peoples' documents do not put in an appearance ⁽¹⁹⁶⁾.

At this stage we know the one and only reason. The creature is alive and it is loved to the utmost. If it misbehaved in the past, here is its bright adulthood to redeem teenaged mischief. All in all, even taking into account a disgraceful history, the American Constitution may escape criticism for a not very distinguished life career, more so if you do not enter into comparisons with other still less graceful cases, let alone myths ⁽¹⁹⁷⁾. For the biography as we know, *America's Constitution* would concern an *intergenerational project* in which some generations might redeem others and thus the Constitution which they pass down ⁽¹⁹⁸⁾. It is a deep love practically shared by American constitutional historiography on the whole, the real stronghold of Whig history today. How can genuine ACH be written since it is unwritten? Is it bad manners to be a nuisance with the question? Needless to say, you may

WILLIAMS, *Linking Arms Together* (n. 75). See Iris Marion YOUNG, *Hybrid Democracy: Iroquois Federalism and the Postcolonial Project*, in D. IVISON, Paul PATTON, and Will SANDERS (eds.), *Political Theory and the Rights of Indigenous Peoples*, Cambridge, CUP, 2000, pp. 237-258.

⁽¹⁹⁶⁾ Suffice it to mention Neil H. COGAN (ed.), *Contexts of the Constitution: A Documentary Collection on Principles of American Constitutional Law*, New York, Foundation Press, 1999, collecting a thick corpus of all kinds of texts, from the Christian Bible to Lincoln's Proclamations through the Magna Charta, save Indian Treaties or any other written sign of the former confederative context concerning Nations in the plural. Take also a look at the section of the *Avalon Project* on *Pre 18th Century Documents* (n. 49).

⁽¹⁹⁷⁾ For the main myth of constitutional import, apart from United States founding, that of revolutionary France of course, check François FURET, *Interpreting the French Revolution*, Cambridge, CUP, 1981 (original, *Penser la Révolution française*, Gallimard, 1978); Olivier BÉTOURNÉ and Aglaïa I. HARTIG, *Penser l'histoire de la Révolution. Deux siècles de passion française*, Paris, La Découvert, 1989; Keith Michael BAKER, *Inventing the French Revolution: Essays on French Political Culture in the Eighteenth Century*, Cambridge, CUP, pp. 203-305; Steven Laurence KAPLAN, *Farewell, Revolution: Disputed Legacies — France 1789 / 1989*, and *Farewell, Revolution: The Historians' Feud — France 1789 / 1989*, both Ithaca, CrUP, 1995; Gary KATES (ed.), *The French Revolution: Recent Debates and New Controversies*, New York, Routledge (RP henceforth), 1998; Patrick GARCÍA, *Le Bicentenaire de la Révolution Française. Pratiques sociales d'une commémoration*, Paris, Centre National de la Recherche Scientifique, 2000; Annie JOURDAN, *La Révolution, une exception française?*, Paris, Flammarion, 2004.

⁽¹⁹⁸⁾ A. R. AMAR, *America's Constitution: A Biography*, p. 476, already quoted for this true key of the *intergenerational project*.

pose it for other cases and enter into comparisons ⁽¹⁹⁹⁾. Here we are only dealing with the American case.

9. *Constitution past and present; people inside and outside.*

If there is a question crucial for the biography and also an entire American constitutional historiography since it is basic for the respective citizenship, it regards the doubts about the quality of present democracy under a nuclear Constitution which is two centuries and some decades old: *How Democratic is Our Constitution?* The possessive pronoun — *our* — refers to United States citizenship of course ⁽²⁰⁰⁾. It is a question that makes full sense in the present as well as being nonsense for the origins. As for the past, the answer is known. It calls into question the very query. How can this be posed with the evidence right there even in the *written* Constitution? Only some kind of

⁽¹⁹⁹⁾ For the Spanish case, the one I am most familiar with, B. CLAVERO, *Cádiz en España: Signo constitucional, balance historiográfico, saldo ciudadano* (n. 138). For entering into a comparative constitutional field, United States included, B. CLAVERO, *El Orden de los Poderes. Historias constituyentes de la trinidad constitucional*, Madrid, Trotta, forthcoming. Usual comparisons for constitutional purposes are drawn on pretend assumptions and anachronistic grounds: Rett R. LUDWIKOWSKI and William F. FOX, *The Beginning of the Constitutional Era: A Bicentennial Comparative Analysis of the First Modern Constitutions*, Washington, Catholic University of America Press, 1993; John A. ROHR, *Founding Republics in France and America: A Study in Constitutional Governance*, Lawrence, UPK, 1995. For a more consistent historical background of a constitutionally dubious sisterhood, Patrice HIGONNET, *Sister Republics: The Origins of French and American Republicanism*, Cambridge, HUP, 1988; Susan DUNN, *Sister Revolutions: French Lightning, American Light*, New York, Faber and Faber, 1999.

⁽²⁰⁰⁾ See the prompt review of *America's Constitution: A Biography* by G.S. WOOD, *How Democratic is the Constitution* in «New York Review of Books», 53-3, 2006. For a less Whig stance that has stirred up debate, Robert A. DAHL, *How Democratic is the American Constitution?*, New Haven, YUP, 2002. Controversy in any case is there, with *We the People* always in the singular. Check also the former's characteristic perplexity, not to say stubborn incomprehension regarding the indigenous presence: G. S. WOOD, *Apologies to the Iroquois*, en *New York Review of Books*, 53-6, 2006, commenting on A TAYLOR, *The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution* (n. 71). Now, as Whig history at its best at this stage, the same G.S. WOOD, *Revolutionary Characters: What Made the Founders Different*, New York, Penguin, 2006; as a thoughtful reflection with a grain of Whig history still in the background, but also alert to the backwardness of mainstream American constitutional culture, R. DWORKIN, *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton, PUP, 2006 (add the references to his struggle for rights on the website of «The New York Review of Books»: <http://www.nybooks.com/authors/90>).

narrow-minded constitutionalism would seriously relate the present question to 1787, to the very founding moment. Thus the Constitution may easily become servant of the past, anything but democratic. Hence historical narratives are not just normative devices but relevant or even fundamental pieces of the very law ⁽²⁰¹⁾. These things happen when law and history are in love with each other or just make a nice couple, orthodox or heterodox, satisfactory or unsatisfactory, conscious or unconscious ⁽²⁰²⁾.

Nevertheless, here is the biographer plainly recognizing the slavocratic heart of the 1787 Constitution, which would suffice to invalidate the question about how much democracy it might afford, even amended, and surprisingly buying the inquiry to answer in the affirmative. For the biography, from the very start onwards the 1787 Constitution would be *democratic* in itself and furthermore as an *intergenerational project*, as if the future of the past could be the past itself, as if the course of constitutional history were ineluctable — « a tale of inexo-

⁽²⁰¹⁾ Robert M. COVER, *Nomos and Narrative (The Supreme Court 1982 Term: Foreword)*, in « Harvard Law Review », 97, 1983, pp. 4-68, reproduced in Martha MINOW, Michael RYAN, and Austin SARAT (eds.), *Narrative, Violence, and the Law: The Essays of Robert Cover*, Ann Arbor, University of Michigan Press (UMchP from now onward), 1993, pp. 95-172 (visit an adverse blog on <http://the-brooks-blog.blogspot.com/2006/09/robert-cover-on-nomos-and-narrative.html>); Renáta UITZ, *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication*, Budapest, Central European University Press, 2005, pp. 268-284, pp. IX and 307: « Historical narratives look like the ultimate tools of taming indeterminacy in constitutional interpretation. Careful analysis, however, reveals that historical narratives are interpretative and normative, and depend not on objective foundations but on the discretion of the interpreter »; « the most serious peril of historical narratives is not that they perpetuate indeterminacy but that this potential of theirs is not accounted for ».

⁽²⁰²⁾ Check for instance, as it is already quoted, B. ACKERMAN, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (n. 183). Is it bad manners to say that, outside of the United States, such a crucial debate about powers for the present, as it is projected over distant past however constitutionally connected, sounds somehow provincial? That this is not the case for today, since it affects wherever the external power of the United States reaches, is blatantly evident: Mark DANNER, *Torture and Truth: America, Abu Ghraib, and the War on Terror*, New York, New York Review of Books, 2004, about the military intervention overseas that precisely provokes the narrow-minded debate, that which looks backwards and seeks explanation in a past exclusive to the United States. For a harsh contrast, John YOO, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, Chicago, UChP, 2005, resorting to anachronistic history for supporting unconstitutional present. The most eloquent sign of that narrow-mindedness, of complacency typical of a political culture that hovers between compatible isolationist and imperialist trends, is the aforementioned negligence of international law even by best experts.

rable progress », you know. The most remarkable phenomenon is that absolute nonsense can go completely unnoticed and hence unchecked. The need for an identity prevails over not only the outrageous question but also its preposterous answer. For cover-ups and blind spots, all you need is Constitution, the good old one, 1787 in short ⁽²⁰³⁾.

1787 and *We the People* mean one and the same, Nation and Constitution all and ever in the singular by the same token. Constitutional date and constituent character are signs of a working language for an identical meaning. They describe the imagined origin and driving force of the constitutional narrative according to United States' constituent illusion just as it is in fact finally established. As if the present were the accomplished end of history, it becomes the truth for and of the past. The constituted present is the mirage for constitutional historiography. Current 1787 and *We the People* confer an impression of blatant realism to pretended history from the given state of affairs. The connection and confusion do not seem to operate in a steady or even clumsy fashion. Some degree of premeditation is necessary. Otherwise, how could any issue from the *written Constitution* be avoided just like that? It is the case of the constitutional phrasing on *Indian tribes* and the following judicial reading. Were the concealment unaware, would it work at sufficient capacity? To do so, it ought to be a deep, complete unconsciousness, which would be worse than purposefulness, as a feature characterizing not just a single author, the biographer, but a whole constitutional culture. Let us stop the innuendos to avoid behaving with blatant bad manners.

We know what has been lost. It is no less than the constitutional history of an *international project*, prior rather than intergenerational,

⁽²⁰³⁾ Nevertheless, A. R. AMAR, *America's Constitution: A Biography*, conveys insightful considerations, even somehow corrective for his Whig trend, on democratic shortfalls of the 1787 Constitution in sections still in force, especially regarding the presidential election, not just for the procedure through electoral college originally related to slavocracy (art. 2, sect. 1, par. 2, and Amends. XII and XX), but also for the candidates' minimum age (art. 2, sect. 1, par.4), which was then a device against family dynasties. The biographer does not go further to take into consideration — as this is not explicitly *written Constitution* — to what extent maleness was taken for granted (remember, among our quotations, art. 2, sect. 2, par. 2: « He shall have power... », *he* being the president of course). On the whole, A.R. AMAR, *America's Constitution: A Biography*, marks no critical stand about the crucial point of the dramatic evolution of presidential powers which could begin as early as Washington's presidency thanks to constitutional manipulations by his secretary of state, none other than Jefferson: H. POWELL, *The Founders and the President's Authority over Foreign Affairs*, in « William and Mary Law Review », 40, 1999, pp. 1471-1537, and his *A Community Built on Words: The Constitution in History and Politics* (n. 179), pp. 11-12.

frustrated by one of the parties, that named by the very appropriation of a colonial brand, America ⁽²⁰⁴⁾ It may be the very Constitution as well. A fake origin suffices to ruin history and perhaps law. Confront beginnings to check stories. Imagine the narrative starting in 1787 from the viewpoint of victims, particularly the first concerned, the indigenous peoples ⁽²⁰⁵⁾. Let the non-indigenous constitutional history of the Southwest start where it apparently should, in 1812. They would be dramatically different constitutional past histories and present perspectives. And even these are not exact beginnings. In order not to exclude indigenous peoples or place them in a subsidiary role from the outset, constitutional history has to begin previously with Treaties and Confederations. The United States Congress itself made the gesture of proposing this approach in the Hawai'i case, although deactivating the

⁽²⁰⁴⁾ For perceptive historical settings regarding openly colonial times, Bernard BAYLIN and Philip D. MORGAN (eds.), *Strangers within the Realm: Cultural Margins of the First British Empire*, Chapel Hill, UNCP, 1991; J. P. GREENE, *Negotiated Authorities: Essays in Colonial Political and Constitutional History*, Charlottesville, University Press of Virginia, 1994; Colin C. CALLOWAY, *New Worlds for All: Indians, Europeans, and the Remaking of Early America*, Baltimore, JHUP, 1997 (the title had been his opening motto in *The American Revolution in Indian Country: Crisis and Diversity in Native American Communities*, Cambridge, CUP, 1995). Yet let me add two questions, one per author: What about rights of people and peoples from the Old (American) World? What about their authorities, then non-negotiable to the same extent as English or Spanish ones or rather more negotiable by the respective peoples than those others?

⁽²⁰⁵⁾ Although she does not go into constitutional questions, here is good help now from Maureen KONKLE, *Writing Indian Nations: Native Intellectuals and the Politics of Historiography, 1827-1863*, Chapel Hill, UNCP, 2004. Add D.K. RICHTER, *Facing East from Indian Country: A Native History of Early America*, Cambridge, HUP, 2001; with J.H. MERRELL (eds.), *Beyond the Covenant Chain: The Iroquois and their Neighbors in Indian North America, 1600-1800*, ed. 2003 (n. 52), pp. XI-XVII already quoted (assuming this perspective, yet still trying to fit Indians in the non-Indian « revolutionary history », G. B. NASH, *The Unknown American Revolution: The Unruly Birth of Democracy and the Struggle to Create America*, New York, Viking, 2005). For historiographical background, Donald L. FIXICO (ed.), *Rethinking American Indian History*, Albuquerque, UNMP, 1997; Devon A. MIHESUAH, *Natives and Academics: Researching and Writing about American Indians*, Lincoln, UNP, 1998. Advisable too, of course, V. DELORIA, JR., *Red Earth, White Lies: Native Americans and the Myth of Scientific Fact*, Golden, Fulcrum (FP from here onward), 1997. As some people, even constitutional historians and most ACH faculty, only learn about Indian presence from movies, let me still add Peter C. ROLLINS and John E. O'CONNOR (eds.), *Hollywood's Indian: The Portrayal of the Native American in Film*, Lexington, University Press of Kentucky, 1998; W. CHURCHILL, *Fantasies of the Master Race: Literature, Cinema, and the Colonization of American Indians*, San Francisco, CL, 1998, a part in *Acts of Rebellion: A Ward Churchill Reader*, New York, RP, 2003.

statement so as not to encourage reparation and devolution or even discourage the no less necessary historiography from a different start than 1787 ⁽²⁰⁶⁾. We know it by now. There is not one history, but histories. There is not one beginning, but beginnings. Constitutionally, there must be *We the Peoples*, not *We the People* any longer ⁽²⁰⁷⁾. Let us not refer to any of them in the singular or exclusively grouped either, not even indigenous peoples or among them alone, or among non-

⁽²⁰⁶⁾ I already quoted (n. 96; add n. 191) the final pronouncement from the formal apologies presented by the United States to Hawai'i on the 100th anniversary of the colonial coup which did away with its independence: « Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States ». What I add now is that, since its own statement is not taken completely seriously, the deactivating effect can easily become final. And the Hawai'i case was not so unique in the same epoch, longer term outcomes aside: Stuart Creighton MILLER, *'Benevolent Assimilation': The American Conquest of the Philippines, 1899-1903*, New Haven, YUP, 1982; Matthew Frye JACOBSON, *Barbarian Virtues: The United States Encounters Foreign Peoples at Home and Abroad, 1876-1917*, New York, Hill and Wang, 2000; Christina Duffy BURNETT and Burke MARSHALL (eds.), *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution*, Durham, DUP, 2001; Efrén RIVERA RAMOS, *The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico*, Washington, American Psychological Association, 2001; Ediberto ROMÁN, *The Other American Colonies: An International and Constitutional Law Examination of the United States' Nineteenth And Twentieth Century Island Conquests*, Durham, Carolina Academic Press, 2006. As it deals specifically with these cases, see the University of Michigan website, *The United States and its Territories, 1870-1925: The Age of Imperialism* (<http://www.hti.umich.edu/p/philamer>).

⁽²⁰⁷⁾ Pace B. ACKERMAN, *We the People* (n. 9), vol. I, p. X: « I also wish to note Professor Forrest McDonald's fine book, *We the People: Economic Origins of the Constitution* (1958). I paused over the question whether another book with the same title would cause undue confusion. My conclusion: this title is special... » (as a matter of fact, there is a set of less fine publications styled *We the People*). It could be added that, after all, titles of books are irrelevant compared to titles to rights. Book titles may just be a symptom in the case of constitutional diseases concerning rights' titling (remember, n. 194, the overlapped vanishing of indigenous rights in Ackerman's *We the People*). As for F. McDONALD, *Economic Origins of the Constitution* (reprint, New Brunswick, TP, 1991), we already know (n. 124) about the connection with C. A. Beard's *Economic Interpretation* (add F. McDONALD, *Recovering the Past: A Historian's Memoir*, Lawrence, UPK, 2004, references to Beard, Charles A. in the Index), but it would be unlikely for the latter to buy as title *We the People*, the best one for a good Whig book on ACH. We know that Beard's motto comes back under otherwise inspired titles: R. A. MCGUIRE, *To Form a More Perfect Union: A New Economic Interpretation of the United States Constitution* (n. 125). Unfortunately, the *Exhibition* here in the Appendix does not reach all the way to the present.

indigenous peoples on our own. Any kind of *Nonwhiteness* is as ill-advised as *Whiteness* ⁽²⁰⁸⁾. Is it needless to say this?

No more of being on our own, so-called white people, even to do research. We have done far too much already and contributed to cause a lot of damage as a result. We alone — European and European-American people — had better keep quiet. We are the aliens, in the past as invaders and in the present as intruders ⁽²⁰⁹⁾. I am doubly so, neither an American non-white person nor a United States citizen. Since it is neither my people nor my polity, I have no right to ask, in these possessive terms, *how Democratic our Constitution is*. Ultimately, it would be plain bad manners. I should tread more carefully and be more prudent concerning these questions which are so vital first and foremost for others. As I am a pallid, male European guy, I especially address apologies, if needed, to Native and African-Americans as well as American women ⁽²¹⁰⁾. I should not be so bold as to suppose that distance gives perspective or that foreignness grants impartiality. Furthermore, I honestly do not believe this. For achieving my view, I depend on people inside, especially indigenous and African-American researchers. I have hardly raised any issue that has not previously been

⁽²⁰⁸⁾ As we know, this is a pair of working, though not elaborated categories in a most outstanding sensitive legal treatise on racism in American law: D. BELL, *Race, Racism, and American Law*, ed. 2004 (n. 184).

⁽²⁰⁹⁾ As America is also concerned through slave trade as well as freedpeople's return, for elaboration of the claim for European final silence, let me refer to B. CLAVERO, *Bioko, 1837-1876. Constitucionalismo de Europa en África, Derecho Consuetudinario Internacional del Trabajo mediante*, in « Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno », 36, 2006, forthcoming. For the specific need to connect American history with African history, which concerns constitutional history of course, Gwendolyn Midlo HALL, *Slavery and African Ethnicities in the Americas: Restoring the Links*, Chapel Hill, UNCP, 2005.

⁽²¹⁰⁾ Along with D. BELL, *Race, Racism, and American Law* (n. 184; add the forum on *Whiteness and Others: Mexican Americans and American Law*, in « Law and History Review », 21, 2003, pp. 109-214), I could complete the *other* 'Nonwhiteness' through the display of all X-Americans. Or could I maybe make the phrase easier employing the same cluster? I do not think it judicious far beyond the specific reason given before about the standing of indigenous peoples. When referring in this negative and mixed-up wording to *Nonwhiteness*, you may be reproducing, independently of your intentions, the mainstreamness of *White* people, just like me, the specter, the pathfinder, and the creature, leave the biographer, our shortcutfinder, aside for once. I do not contend that we must instead construct categories like *Nonblackness* for all non-Africans, Americans or not, or like *Nonindianness*, *Nonchicanoness*, *Nonjeunness*, *Nonarabness* and so on, alongside old and new forms of *Noncaucasiannes*. Is all this really needless to say on my part? Let me harbor some doubt, since there are manicheist readings all around, even among experts.

raised, nor said anything not already said by people affected and concerned as willing or forced participants in American citizenship⁽²¹¹⁾. On my own, I only relate questions and answers from others, taking advantage not just of written literature, but also unwritten communication⁽²¹²⁾.

Even my present research is not actually mine. If I have taken extreme care of quotations in the notes and good manners for the quotes, it is not just as information and communication, but also and mainly as a constant support for my stance beyond historiographical accuracy, for it to be clear that my role as a critic of American constitutionalism is limited to being a transmission belt. I have volunteered as a fellow traveler and harbor no intention of applying for American citizenship. As well as being a double outsider, I see myself as a medium, since the capacity for communication between aliens and non-aliens may be a good way of reducing oneself — a European voice — to silence. A good medium is not even a spokesperson, but just a

⁽²¹¹⁾ In his moments of sharp perspicacity even for the continental indigenous issue which causes him to maintain an embarrassed distance, A.R. AMAR, *America's Constitution: A Biography*, pp. 430, 439, and specifically (though not directly indicated by the Index entry, *Indians, citizenship of*) 621, n. 57, bravely recalls that United States citizenship was imposed in 1924 on the Indian Nations of the Reservations without their consent, with furthermore such eloquent references such as that of Robert B. PORTER, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, in « Harvard Blackletter Law Journal », 15, 1999, pp. 107-183 (and available on internet among other essays on *Race, Racism and the Law*, in the chapter on *Citizenship Rights and Racism*, section on *Rights of Indigenous Peoples of US*: <http://academic.udayton.edu/race>). Nevertheless, as an explanation, the biographer prefers the Whig version which attributes the granting of citizenship to accredited American patriotism on the part of Indians, as it is also supposed with reference to African-Americans regarding later civil rights politics, and not that contrasted version which takes into consideration circumstances like the existence by 1924 of the League of Nations witnessing some attempt for international recognition of Indian Nations or polities, such as Hodenosaunee, the aforementioned (nn. 52 and 76) Iroquois Confederacy today located between Canada and the United States. A later case similar to that, in times of the United Nations, was the conversion of Alaska and Hawai'i from colonies to States, without indigenous consent in either case, before the international decolonization policy. Further information is available on the website just cited on *Race, Racism and the Law* of the University of Dayton. More specifically, you can visit and confront the respective sites of Hawaii State and Kanaka Maoli Nation: <http://hawaii.gov> and <http://www.hawaii-nation.org>.

⁽²¹²⁾ Raymond D. AUSTIN, former justice of the Navajo or Diné Nation Supreme Court and current professor at the University of Arizona Indigenous People's Law and Policy Program: « I'm a second generation citizen », referring, of course, to the unilateral granting of American citizenship to first Nations' people in 1924 (n. 211).

transmitter with communication skills among people inside and outside, a go-between in short ⁽²¹³⁾.

Thus, my present essay is derivative, I admit this outright. Even the question about non-written-history is not original, you know. I hope not to have become a plain plagiarist by working so derivatively. It cannot be otherwise since foreignness is not the best position from which to observe and judge ⁽²¹⁴⁾. You, readers, are my judges; American readers, the final jury. That is the reason why I am publishing in English (sorry, close fellow citizens) ⁽²¹⁵⁾. My location is only external because of the place I inhabit, out of the United States, and the citizenry I belong to,

⁽²¹³⁾ As an outsider cannot be a reliable correspondent, if you, reader, need any pal to reflect further on the American constitutional conundrum beyond isolated constitutionalism, I may recommend to you people like Geneva Crenshaw and Vine Deloria. No insurmountable impediment that neither of them is alive. The former, Geneva, was never born. The latter, Vine, recently passed away. Books live for the sake of people. Though she does not author them, some of Geneva's are cited: D. BELL, *And We Are Not Saved* and *Afrolantica Legacies* (n. 184); add D. BELL, *Faces at the Bottom of the Well: The Permanence of Racism*, New York, BB, 1992. She is a character conceived by Derrick Bell to make less tough, through fictional conversation, uncomfortable scrutiny and unconventional analysis. Some of Vine's publications, which concern American constitutionalism even when not discussing it, are cited too. Add Barbara DELORIA, Kristen FOEHNER, and Samuel SCINTA (eds.), *Spirit and Reason: The Vine Deloria, Jr., Reader*, Golden, FP, 1999; and *A (live) Conversation with Vine Deloria*, some years ago, now, ever live, on the website of the University of Arizona: <http://wordsandplace.arizona.edu/deloria.html>. After hearing and reading this kind of material, I can promise that American constitutionalism shall take on new interest for you.

⁽²¹⁴⁾ Even for that I am partly derivative: Clifford GEERTZ, *Local Knowledge: Further Essays in Interpretive Anthropology*, New York, BB, 1983. The missing part would call into question the very specialty of *foreign* anthropology of course. *Why American Anthropology is not written* might be a hard question indeed, the hardest of all perhaps as it may encompass that about American constitutional history because of its anthropological supremacist background. Geneva and Vine could help. We ought to begin addressing the Kercher's question (nn. 1 and 65) to get an answer beyond the legal field: *Why the History of American Law is not English* even when it is so.

⁽²¹⁵⁾ For a more controversial reason, Walter D. MIGNOLO, *The Darker Side of the Renaissance: Literacy, Territoriality, and Colonization*, Ann Arbor, UMchP, 1995, p. VIII: « Writing in Spanish means, at this time, to remain at the margin of contemporary theoretical discussions ». Grounds for the controversy are provided by C. GEERTZ, *Local Knowledge* (n. 214), since the dislocation can easily go beyond language. Even shift of language by itself, with no movement, may entail further displacement (suffice it to recall the difference between exclusive *America* and inclusive *América*, not to say *Abya Yala* including indigenous peoples in the first place, as we know). Indigenous and other colonized people know better than ACH experts. W.D. Mignolo belongs to the editorial board of an alternative site, *Worlds and Knowledges Otherwise*, already quoted (n. 86).

that of both Spain and the European Union, for I derive my standpoint from non-alien research and evidence. With United States people and not against, I learn as a historian and jurist, or, since I attempt to achieve the satisfactory compound, as a legal historian.

I conclude where I began, with the heading quote. Maitland wished to separate legal historiography from law in force, taking for granted that there are only lawyers of the orthodox kind. But he was well aware that all kind of expertise, even legal, is always useful in the making of a historian ⁽²¹⁶⁾. Perhaps this link would be fitting for the hypothesis that those involved in legal historiography should be *heterodox lawyers* as well as *orthodox historians*, thus with no contradiction in terms. Let us make a multitasking effort ⁽²¹⁷⁾. Otherwise, what we have is legal history ancillary to given law, and for the case, substitutes for American constitutional history.

⁽²¹⁶⁾ F. W. MAITLAND, *Why the History of English Law is not Written*, quoted more than once, shortly after our leading paragraph: « A thorough training in modern law is almost indispensable for anyone who wishes to do good work on legal history » (stressing this point, S. F. C. MILSOM, *Maitland*, in « The Cambridge Law Journal », 60, 2001, pp. 265-270), something that could very well be preached for constitutional history if it is not taken in its old meaning which goes back even to medieval times, as already mentioned regarding Maitland's *Constitutional History of England* (n. 141). Yet if this same historical meaning were applied to an *American Constitutional History*, we would obtain a completely Indian start and thus a convenient entry point into the confederative constitutional moment *before 1787*, as long of course that this previous constitutional history did not begin in the usual style like good old Whig history, that is, transforming the European Middle Ages into American history, and legal to boot.

⁽²¹⁷⁾ You have surely noticed in our leading quote the gender-laden language discriminating between a superior masculine subject (« otherwise *he* is no lawyer ») and an inferior feminine one (« the *handmaid* of dogma », why not the servant instead or, like a teacher in Spain as I am, civil servant? Carry out the test. It makes sense: the legal historian as a civil servant of the law or rather the State). If we are of a constitutional disposition, it is not bad manners, but most advisable to realize and control the normative effects of actions like wording or rather doing things with words not only or mainly for odd old texts (with *America* and *American*, for instance; or *rights and guarantees* and *privileges and immunities*). Pay attention to J. L. AUSTIN, *How to Do Things with Words* (1955), eds. J. O. URMSON and Marina SBISA, Oxford, HUP, 1975, dealing with « cases and senses (...) in which to say something is to do something » (lecture II, beginning). Law — especially law of the least constitutional kind in constitutional times and contexts — through both oral and written language goes vastly far beyond laws — especially *written* laws. The heterodox lawyer and orthodox historian must be careful as well as thoughtful in a wide range of abilities from performative linguistics to formative constitutionalism. All in all, the endeavor may be really demanding, but it would be truly worthwhile, wouldn't it?

Appendix: Proof of Life, the Exhibition.

As there are even today proofs of charge, I mean against the stance represented in this essay, here is a display of some of the more apparent early ones. They may encourage those who have felt annoyance, and will incite those who have found enjoyment not to abandon reflection. It might be an appeal for an attentive and extensive scrutiny of texts, with an awareness of contexts. However, the display's aim is a different one. *Proof of Life* is its name. Here is an exhibition of front pages or covers from publications holding a clear reference, whether implicit or explicit, in the title or subtitle, to history just to prove its existence. It is only a sample, since it fully provides the proof of the dawn and progress, from early times, of ACH — the *American Constitutional History* together with *America's Constitution* and *America* itself. It delivers evidence of living historiography through its continuous and mostly approving contact with the Constitution which confers identity on the United States.

What you have here is the entry to the historiography that some people, like the preceding essay's author, believe improbable, if not impossible, precisely because of such a close identification between American Constitution and *America* itself. Do you allow me — that author — to double for the guide of a show whose intent I do not approve of at all? Thanks, visitors, Americans or not, wherever you come from. Is everybody ready for the promenade? I'll try to do my best as a guide. I'll be discreet so you can enjoy the exhibition by yourselves. I won't disclose to its fullest extent my deep disagreement. I'll even make an effort to find out some reason to agree before the end of the visit. Please, let me take the lead just as your guide, no longer as the author. As the latter, I'm through. To distinguish me from him, you may call me by my nickname, Pipo, instead of Bartolomé. « Pipo, at last it's your turn. Don't let me take the lead ever again ».

Here we go. Heed titles as well as authors, please (a little lapse of silence). As we move forward from cover to cover, throughout the pictures till the end of the exhibition — but not of history — you may feel that at least a stage is completed. I am not so sure however (a longer lapse in the guide's talk as the visitors peruse the front pages; please, do it). First impressions are often misleading and especially when you deal with publications. You know, don't judge a book by looking at the cover. This is exactly what we are supposed to do right now. Yet you can read between the front pages' lines and relate the readings to each other so not to take them at face value. If we are able to draw contexts from texts to construe their meanings, wrong impressions might be overcome. The exhibition does not lead to the end even of any historical stage. Let me explain this as it regards the core of the event. Let's try to go through the looking glass.

The flow of history neither stops nor ends; especially in the case of constitutional history, and particularly if the same Constitution, whatever its changes, continues all along throughout short years and long

centuries. For history there is no pause, even in the present, let alone the end. There may be no conclusive feature in the apparent fact from this exhibition that, as expertise improves — from 1923 with C. H. McIlwain's *The American Revolution: A Constitutional Interpretation*, for instance — the connection between constitutional history and law in force becomes less emphasized and even outdated. A new period would make a start. Is it so beyond doubt? I myself — Pipo the guide — am hesitant. By then, together with C. A. Beard's *An Economic Interpretation of the Constitution of the United States*, a title with no reference to history and thus out of the exhibition, there are clearly historiographical publications bearing unquestionable constitutional implications beyond even authors' intents, avowed or not, shameful at times. Needless to say, the most disgraceful had been the titles supporting the discontinuing of the 1787 Constitution not for the sake of freedom, but of slavery. The second place in the parade is for those which do not pay attention to slavery or tackle human bondage in the chapter dedicated to property right, most of them during a first century and even beyond. Just to make the staging easier, besides selecting titles somehow referring to history, the order of the exhibition is simply chronological. Time makes primary, less subjective sense even for the Constitution.

Anyway, for or against, the Constitution holds sway over historiography, beginning with the very delimitation of the subject. At the penultimate turn of the century, between the 19th and 20th, the foundations had been laid for identifying the precise matter, as textual material, of the United States constitutionalism which would not be exclusively federal for either the starting point of its own history or for the following stages in broader and broader settings. Through official initiative as well as printing, F. N. Thorpe undertook the relevant collection of *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories, and Colonies now or heretofore forming the United States of America* (1909). There is nothing similar for a century up to the present. Yet note in the display of front covers (1891 and 1898) the same author's preceding historiographical productions on federal constitutionalism as if it were the American Constitution — *America's Constitution*, if you so prefer. Even against the extensive evidence of his monumental collection not just on member States, but first of all on Territories, Thorpe may be one of those who stamped a decisive influence on the self-contemplating and complacent narrative of that American character whose history is as burdensome as it is biased, and which a biography finally identifies with that most personalized name, *America's Constitution*. Compare, shortly afterward, the work of C. H. McIlwain. His first published and today hardly remembered research dealt with the colonial frontier in America, that of the Territories, and was concerned just with colonialist law, not indigenous rights at all. Later he became famous by dealing with old

English and not so old American constitutional history. No surprise that Indian Nations did not put in an appearance all along his historiographical endeavors. He was not concerned about them even when they were in sight. He is not the only one, historian or lawyer, to be that shortsighted.

How could an exhibition show blind spots? How could evidence and fantasy be discriminated when they are so interspersed between the light of manifest expertise and the shadow of hidden and often unconscious, not to say irresponsible, neglect? Let us emphasize that for constitutional history, as for law itself, blatant evidence and make-believe are not incompatible at all. If you are a lawyer, you know quite well about fantasies that are able to represent and even produce binding realities. Fiction is a legal technicality after all — *fictio iuris* as legal jargon says. History or rather historiography may belong to this section. Fiction becomes reality through law. Fictitious history does so through legal history. Juridical fiction is not meaningful by keeping with reality, but becomes so by creating it for good or ill. In this precise way American constitutional history may work too. For that reason, the very evidence of historical fiction can be the proof of life for this particular kind of history, if not historiography on the whole. The fake ACH is the genuine American constitutional history. At last the mystery is out.

The exhibition fully deserves its provocative name — *Proof of Life* for a dead horse, the ACH. This is not unfair, dishonest, or inaccurate at all. American constitutional history exists in the fictitious fashion just how the American Constitution needs it and not otherwise. Despite both historians, legal or not, and lawyer's usual naiveté, constitutional history has effectively been in itself first of all, rather than a scientific specialty, a legal instrument, of the fictitious species — *fictio iuris* — to be more specific. There is evidence that it is still the case nowadays, but the exhibition does not go so far. Neither must my discreet role as guide come so close to us, visitors or not. Maybe, apart from the exhibition, someone could write an essay about *why American Constitutional History is not written* and at the same time, by the same token, written, black and white in full. Here is the latest and best demonstration: *America's Constitution, A Biography* by Akhil Reed Amar, 2006 American Bar Association Silver Gavel Award for Media and the Arts in the category of books. Its front cover would have to be the final picture of *Proof of Life* if the exhibition went as far as the present.

The following exhibition of front covers makes up for missing biography, a biography of biographies; I mean the history of a really existing constitutional historiography more continuous than it appears or at least less discontinuous due to the enduring inertia of assumptions from the given, fictitious, or at any rate insufficient starting point — 1787 even with all its English and colonial preludes. Where else could it make a good start? Maybe history-making should begin with historiography-surveying. A new kind of question might be tested. Try it:

How has *America's Constitution*, the character, been born and raised through American constitutional historiography? How has this constitutional historiography become constituent history? Provided that the 1787 Constitution — along with its set of appendixes — turns by this way into *America's Constitution*, the history of historiography may be the real biography — a biography of biographies — badly needed by the United States Constitution. Otherwise, it is always the same autistic narrative with all its variants. In the final count, *America's Constitution: A Biography* can be presented as an original work (remember Laurence Tribe's words: «the best biography ever written about the U.S. Constitution» or rather «the only real biography») because of a deficient awareness of the historical state of their own constitutionalism probably due, to a significant extent, to an insufficient knowledge of the boot-strapping and whole course of American constitutional historiography throughout one and the same life story in the long run.

The biographer points out that his biography may be followed up by enlarging the corpus of texts starting from the federal Supreme Court's jurisprudence (remember his words and italics: «We need at least one more book to start where this one ends, giving readers a detailed account of America's *unwritten* Constitution»), and the working title of this following book: *America's Unwritten Constitution: Between the Lines and Beyond the Text*. He, the biographer, aims to forward, not rewind. He is concerned with mainstream constitutional conventions, not their cultural assumptions and damaging implications. It does not occur to him that the biography should be a cluster of biographies. His book ought to be preceded by an enlargement starting with confederative texts, including the Article of Confederation which founded the United States in a non-exclusive context, that is, former *written* Constitution along with Treaties and the respective historiography, of course. I wager that the biography of biographies, the painstaking history of American constitutional historiography beyond American constitutionalism, would conclude likewise. Yet I cannot promise any outcome of an endeavor never undertaken to any significant extent, needless to say.

You had better not place any value on what we have said — myself, just an assistant; Bartolomé, no longer a leader — unless you become conversant with the subject in the best manner, that of going further on your own. If you, readers and visitors, have followed him and me all the way thru the essay and the exhibition, it's up to you, sure enough. Quite sure that you, all of you now in the end, are of the enjoying, not annoyed kind. It's time to say goodbye. The gift shop is close to the exit. No tips allowed. «Enjoy your new job, Pipo». Take care, folks.

Source of the pictures: <http://www.galeuk.com/trials/moml> (*The Making of Modern Law: Legal Treatises, 1800-1926*); curator of the exhibition: Javier Rodríguez-Piñero (<http://porvenir10.com>); Bartolomé's e-address, sorry, Pipo's e-whereabouts: claverous.es.

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Et subacta meis percussere litora remis,
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ABRIDGED BY THE AUTHOR,
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*"Magister hinc (sic) aperit; sed quomodo producit ad diligentem esse civem non potest;
quoniam descriptio omnia Republicam nostram continet."*
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quam civitates aut condere novæ aut conservare jam constitit."—Cic. *de Repub.*

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THE
HISTORY OF THE UNION,
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CONSTITUTION.

BEING
 THE SUBSTANCE OF THREE LECTURES ON THE COLONIAL, REVOLU-
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CICERO, DE LEGIB. LIB. 2, cap. 2.*

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 to proclaim liberty unto them.*
 —JEREMIAH.

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HONORARY DEPUTY OF GRAY'S INN
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