

QUADERNI FIORENTINI

per la storia del pensiero giuridico moderno

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FREEDOM'S LAW AND OECONOMICAL STATUS:
THE EUROAMERICAN CONSTITUTIONAL MOMENT
IN THE 18TH CENTURY

(A Presentation to the European University Institute) (*)

As all the members of society are naturally equal, it may be asked, in whose hands are the reins of government to be entrusted? To this the general answer is easy.

William Blackstone, 1765.

1. Constitution in time. — 2. Experiment in method. — 3. Individuals and persons. — 4. Liberties and *status*. — 5. States or nations. — 6. Law of nature. — 7. Visit to Virginia, U.S. — 8. American natural *oeconomy*. — 9. Linguistic return. — 10. Text in context. — 11. Way to Europe. — I. Sources. — II. References: II.1. Early Euroamerican constitutionalism; II.2. Freedom, discrimination, subjection; II.3. The severance of textualism; II.4. For further checks. — III. *Appendix*: European process and projects.

Here we are to share ideas about our constitutional past, about, on the one hand, such a seemingly good thing as *freedom's law*, the legal system self-founded on human liberty, and on the other but maybe related hand, such an imaginably ugly thing as *oeconomical status*, “oeconomical” with the old spelling, with the “oe” and not

(*) Seminar in the Department of History and Civilisation of the European University Institute, Fiesole, Toscana, Italy, European Union, 28 February 2002. It was a teaching trial for a chair in European History. I enjoyed generous support, namely the linguistic advice from Moira Bryson, the pragmatic counsel from Luis Rodríguez-Piñero and other gifted and learned nephews and nieces, the Florentine hospitality from Paolo Grossi and his close disciples, and last, but never least, the loving solicitude from Mercedes Rodríguez-Piñero. For the seminar, I delivered a set of texts and a brief of sources and references beforehand, and, through power-point, to help the attendants and myself, I exhibited my presentation's outlines without conclusions, which I reserved for the colloquium. Now, I spare the manual and visual support, and add an appendix about the chair affair. Comments will be welcome: clavero@us.es.

only “e” at the head. The addition of a single round vowel, “o”, makes a lot of difference. But let me not anticipate anything. Let us begin at the beginning.

1. *Constitution in time.*

Let me start with a brief quotation: “All men are by nature equally free and independent and have certain inherent rights”. This sentence is not taken from the Universal Declaration of Human Rights, from the European Charter of Fundamental Rights or from any Declaration of Rights of any State Constitution in force today. Actually, the phrase belongs to the first written manifestation of freedom’s law, of an institutional system founded, not on social tradition, but on human liberty: “All men are by nature equally free and independent”. It is the first statement of the first Declaration of Rights of the first written Constitution so complete in human history, the 1776 Constitution of Virginia, which was adopted only a few days before the declaration of independence of the United States of America from the British Monarchy.

Origins can always be traced back as early as we historians please. But the starting point, a real beginning, may be located in a specific moment in time. Where is the difference? Provided that we are talking about human history, consciousness may make this difference. We historians must not assume the existence of freedom’s law where there was no awareness of it. When something new becomes conscious in history, then there we may have the starting point, the beginning chapter, for historiography. Consciousness is a differential human factor and therefore of human history. Writing is one of the signs of consciousness, one among others of course. Written Constitutions are good signs of conscious constitutionalism.

Regarding European history, you may try to find the origins of freedom’s law back deep in the middle ages or even in ancient times. Indeed, this kind of reading of constitutional history, the history of freedom’s law since old times, is often found in both historical and legal literature specially in the Anglo-Saxon milieu. However, a true and decisive starting point is nearer to us. The moment of consciousness is much closer, as close as the mid 18th century, even for England or for the British Monarchy.

The significant perception of a British Constitution as a legal fundamental device, a Constitution never written as a normative document, dates back only to the second half of the 18th century, just after Montesquieu's *Esprit des Loïs* offered in 1748 a chapter *De la Constitution de l'Angleterre*. Other authors followed, dealing with this unwritten Constitution, such as De Lolme, whose *Constitution de l'Angleterre* was published in 1771. In between, from 1765 to 1769, Blackstone printed in four volumes his lectures or *Commentaries on the Laws of England*, whose first phrase was this dedication: "To the Queen's Most Excellent Majesty the following view of the Laws and Constitution of England...". Blackstone's treatise was in fact the main work *on the Constitution of England*, a unique Constitution, and even a "happy" one for these authors, as we shall see, before the constitutional independence of the United States.

The first conscious normative constitutional texts belongs to an immediately posterior date, to 1776, the year of the first proper American Constitutions such as the *Constitution of Virginia*, the earliest of all. It was not a title, a heading or a phrasing in a book, but the fundamental and superior norm of a State, Virginia. The Declaration of Rights of the 1776 Virginia Constitution represents the head of a long chain to appear in America, Europe and elsewhere: "All men are by nature equally free...".

2. *Experiment in method.*

Today, when we European citizens read or hear expressions of freedom's law from respective State Constitutions or from the European Charter of Fundamental Rights, a charter drafted in the year 2000, on the threshold of the 21st century, we take their requirements of human liberty very seriously. However, if we find signs of freedom's law in texts dating as far back in the modern age as the 18th century, we do not take them as seriously. We do not read them in literal terms. We tend to assume that they do not mean what they actually say or what we presently understand. We, as historians, presume to know better.

We historians do know or at least suspect that a system of freedom's law could hardly be established more than two centuries ago by a constitutional text, a normative document, or by any other

form. We historians know, for instance, that there in Virginia slavery existed. People like those who drafted the Virginia Constitution in 1776 owned slaves and they did not even conceive that this was in direct and immediate contradiction with constitutional principles of human freedom and equality.

How can we historians take into serious account an obvious falsehood such as the 1776 Virginian proclamation of constitutional liberty? Historians, even historians of politics, historians of political thought and practice, do not have much regard for constitutional history, a history that begins with such pretensions. Maybe they are right. Or maybe they are not. We historians are supposed to check. It is our job.

The text is there and it says what it says: “All men are by nature equally free and independent and have certain inherent rights”. Of course, historians know such a famous constitutional text, but they also know the social context. It is historians’ business. In historians’ perspective, legal documents may say many things, all they want, but, in historians’ understanding, law neither reflects nor rules reality everywhere and in all cases. If you historians find both freedom’s law in texts and slavery’s law in fact, it is not freedom, but slavery, that you historians see. In the same way, to give another example, if you historians find freedom’s law in texts for men and subjection’s law in fact for women, it is not equality, but inequality, that you historians may see.

This is not however my perspective. If the constitutional texts are there and they clearly speak of freedom’s law, we must take them into very serious account. We historians must always take texts seriously. In my view, the point is not if the social reality that historians presume to know today, or if the law of the past reflecting it, contradicts the historical document, but rather what this document truly meant. The first point is whether the constitutional text really entailed what we tend to understand nowadays. The meaning of a historical text must never be taken for granted by us historians. We must always check knowledge. As Marc Bloch used to say, to make it worse for historians, words do not change when things do. Placing himself between *Ancien Régime* and *Révolution*, Alexis de Tocqueville had made a similar observation.

Are we sure that an apparently plain phrase such as “all men are

by nature equally free and independent” meant in the 18th century the same as nowadays? If it did, and if the only thing I wanted to question today is the meaning of those words, our seminar would be over right now. But let me proceed, please. Let me conduct my experiment in method. We must question every word because the English constitutional language of the 18th century may be not exactly the same language as today.

It is plain English, of course. It was plain English then. The drafters of the Constitution did not feel the need to explain words such as “men”, “nature”, “equally”, “free” or “independent”. But maybe we are in need of the explanation. For us, maybe, those words are not conclusively so plain. Did “men”, did “all”, did “equal”, signify equality of and for everybody? The crux of the matter is the historical meaning of the very documents, the constitutional texts, as a way of access to, and not of deviation from, social reality. Maybe law always matters. Constitution does. The question is what constitutional language means in each time and place, in 1776 Virginia for our case.

That is, in a few words, my persuasion, concern and commitment. Today, I do not want to play the academic historian, but the historical character. What I would really wish to be is a Virginian constitutionalist citizen in 1776. What I want to do is to read the constitutional text not through the lenses of historiographical convention, but with the eyes of historical meaning. What was the actual understanding of the constitutional document such a time ago? How can we understand what was understood?

I define my approach. Constitutional documents, as legally normative texts, are a particular kind of historical source. They belong primarily to the legal sphere rather than being mere pieces of political or theoretical discourses, as they are often taken to be. The specifically legal context of constitutional texts tends to be disregarded in conventional historiographical accounts, even among experts in constitutional history. This bias is commonplace, specially in European continental historiography. The best constitutional historians, even those with a sound legal and not only historiographical training, do not root constitutionalism in the immediate historical context of the law nor in the whole body of it, and not only in the political branches. If there are exceptions, we find them precisely in

U.S. constitutional historiography, as I register in the bibliographical references of the paper.

In working terms, in order to understand Constitutions, we must pay attention to law, to specific legal culture. We must turn precisely to documents and literature with legal authority in theory and in practice, to jurisprudence in the broadest sense. To understand constitutional texts, we must pay close attention to other legal texts. These congener texts form the first and principal context of constitutional texts.

Our task today is to try to understand the first point of the first statement of the first proper constitutional text with the help of its immediate legal textual context. What was the meaning of *man* as subject of freedom and equality? Who were *all men*, the subjects entitled to constitutional rights?

The objective of my presentation is to understand a basic constitutional word, *man*, as it appears in the 1776 Virginia Constitution. Who was *man*, the constitutional subject of the *rights of man* that we find in this first proper constitutional text, of rights such as “the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety”? So the first section of the 1776 Virginian Declaration of Rights identified “inherent rights” of *all men*.

In order to address the question and obtain an answer, we shall resort to two fundamental, although not Virginian but European, legal texts. In spite of the geographical distance, they belong to the closest circles around the first American constitutionalism. They were the *common law*, as British law, and the *law of nations*, as a higher legal level at that time. *Law of nations*, then considered as *law of nature* too, was somehow the precedent of what has been called, since the 19th century, international law. Concretely, we are resorting to two texts as contexts.

The first text is already mentioned, William Blackstone’s *Commentaries on the Laws of England*. This work was then the most authorised treatise on *common law*. The second one is its counterpart, as authority, in the field of the *law of nations*: Emer de Vattel’s *Droit des Gens*, published in 1758. Both belong to the decisive period between Montesquieu’s *Esprit des Lois* and De Lolme’s

Constitution de l'Angleterre. This is our Euroamerican constitutional moment of the 18th century. Let us face it.

Let us move to the 18th century texts themselves and read in their first printings Blackstone's *Commentaries on the Laws of England* (1765, the first book) and Vattel's *Droit des Gens* (1758). The use of early editions is important for us because we are concerned with 18th century language and meaning and so with every 18th century trace and sign, such as the old spelling. Even the size of the letters, the blanks on the pages or the italics for some words, and not for others, will matter.

3. *Individuals and persons.*

Let us focus on legal texts, on these historical sources through which we hope to arrive at historical meaning and therefore social reality, whatever that may be. Let us begin with Blackstone's *Commentaries*, in which we find a virtually complete presentation of the *common law*, that is, for our purposes, the British Law in force in British America, both before and after independence.

We are turning to Blackstone's work with a clear purpose in mind. It was the main legal text forming the historical context of the first constitutional text. Now, we turn to it not to deal with every principal issue of constitutionalism or freedom's law, such as those of identification and guaranties of liberties, the declaration of concrete rights, or the conception and establishment of powers, the frame of government. Today, we are only concerned with a basic question previous to all. The question is *who* and not any other *what*. Who is the subject of fundamental liberty and equality? Who is entitled to freedom's law? Who may constitute powers? Whose liberties benefit from them? *Who* is "man", *who* are "all men", to whom the first Virginia Constitution refers as equal in rights? What is, *what* was, *man*? This is our only *what* question for Blackstone.

First of all, it should be noticed that the word "man" is not particularly relevant in Blackstone's work. As we can observe in the index, the title of the first part or first book of Blackstone's *Commentaries* is "Of the Rights of Persons" and the heading of the first chapter of this first book is "Of the absolute Rights of Individuals". *Person* and *individual* are the main words to name the

subject of *rights*. As *man* is not, we have two for the price of one. Of the two, the latter, the “individual”, seems the principal on the first reading. In the headings, “rights of people” appears unqualified, while “rights of individuals” is qualified with a lofty and superlative adjective: “absolute”.

To qualify individual’s rights as “absolute” may have a relevant meaning. It may imply a position prior to the law and above it, a real premise to the legal system. We read in this chapter: “The first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals”, while the “social and *relative* (rights) result from, and are posterior to, the formation of states”, that is, posterior to political powers and legal systems. “Absolute” rights, the “rights of individuals”, seem clearly superior to “relative” rights, the “rights of the persons”. Thus, in the first place, it should be emphasised that they, “person” and “individual”, are different things, just as “rights of individuals” and “rights of persons” are not the same at all. Between “person” and “individual”, which one, if either of them, is “man”, this subject of the *rights of man*, of the constitutional rights belonging to *all men*?

Between “person” and “individual”, the main category turns out to be in fact the former. Even if, according to Blackstone, the “individual” is the subject of “absolute” or superior rights, the first category to appear in his index, however, is the “person”, not the “individual”. “Person” is the subject of an entire book, while “individual” is only the subject of one of its chapters, albeit the first. So, as subjects of rights, the former, the “person”, is a more general and comprehensive category than the latter, the “individual”.

Definitively, in spite of the discrimination between “absolute” and “relative” rights, “person”, and not “individual”, is the primary legal concept. Indeed, as you can even observe in the size of the letters both in index and in text, “person” is larger than “individual”. If we are observant of such details, the first glance of the text is more telling than its first reading. “Person” stands as a more robust legal concept. It is the paramount word. What is then *person*? How did *person* bear upon *individual*?

“Person”, *persona* in Latin, was a widely recognised term, much more so than “individual”. It was a very familiar concept for the lawyer of that time as the reading of Blackstone’s text itself shows.

He did not feel the need to explain it. He took the meaning for granted. Lawyers knew the concept and attributes of “person”, that is, “the rights of persons”, quite well. As you can see, the section under this heading of the book is void. It has no content but the following chapters. It has no text of its own. Under the heading “Of the Rights of Persons”, what we find is a blank space. In the heading, there is no need to qualify the “rights of persons”. All this was well known through the study of Roman law and its medieval jurisprudence that was previous to the study of the *common law* or *law of the land*, even in Oxford, where Blackstone taught.

You may wonder whether the blank space under the books’ headings occurs throughout the rest. You do well to wonder. In Blackstone’s *Commentaries*, no book explains its own heading. The second is about “things”; the third and the fourth are about “wrongs”. You can assume that the reader knew what both “things” and “wrongs” were. That is precisely the point. The same assumption worked then for “persons” as different to “individuals”. We present day historians do not share this understanding. So first of all, we are in need of an explanation of the meaning of the word “person”.

At that time, on the contrary, *individual* was the concept that needed clarifying. Today, it may be otherwise. Historians tend to assume “individual” every time they read “person” in past documents. They seem unable to conceive that there was a time without any legal idea of the human individual or even without the plain word and that so both notion and term might be a novelty. So, they may systematically misunderstand political texts referring to legal subjects. As we shall see, it also happens with “state”.

In those times, if “person” did not signify “individual”, what did it mean? How could we know? We are not 18th century legal British or Virginian practitioners. I wish we were. If so, we would be in a position to read Blackstone properly, which implies understanding the *common law* of that time. We must do our best to reach the somehow impossible aim of thinking like an 18th century Anglo-American lawyer. What was the meaning of “person”? We must read between the lines of Blackstone’s work to find the not so hidden answer. Then, to define *individual*, the term of reference was *person*.

Let us read on. I quote some references to “persons” in the chapter of “individuals”: “The rights of persons (...) are of two sorts; such as are due from every citizen, which are usually called civil *duties*; and secondly, such as belong to him, which is the more popular acceptance of *rights*”. The first meaning, the more technical, less “popular” one, does not make sense for us today: rights were duties. But it had to make sense for its time, not for ours.

We continue reading. I quote again: “The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons; relative, which are incident to them as members of society”. Notice that “relative”, the adjective for the “rights of persons”, does not convey exactly the meaning of secondary position, but that of defining relation among different kinds of persons.

“Person” is not definitively equal to “individual”, “single person” or “man” (here we have it, *ecce homo*, the 1776 Virginian man). “Person” means something more objective or social than subjective or individual. It refers to “capacities” in society, to people’s roles “as members of society”, and not, conclusively, as individuals.

Let us move to the beginning of the second chapter, “Of the Parliament”, the first about “rights of persons”: “We (Blackstone and us, present readers) are next to treat of the rights and duties of persons, as they are members of society, and stand in various relations to each other. These relations are either public or private; and we will first consider those that are public. The most universal public relation, by which men are connected together, is that of government, namely, as governors and governed, or, in other words, as magistrates and people”. Here we have again *men* as supporters and players of *persons* and not only as candidates to *individuals*.

In short, as regards the main category, “person” meant the role of each “member of society”, be it “public” or “private”. “Persons” were the social roles, political or non-political, assumed and regulated by the law. “Rights of persons” were, in their turn, the “capacities” of each social role, the established legal capacities corresponding to positions of political powers as well as those of “people”. So, there were legal “persons” or social roles both “public” and “private”. On the one hand, there were “public persons”,

the political and judicial actors (check the index: Parliament, Monarchy, Magistrates, Clergy, Civil State, Military State, and so on); on the other hand, there were “private persons”, the non-individual “particular men”. Public positions, the political powers, were “persons” as much as private positions. The “person” of the “individual” was somewhere in between, both in the “public” domain as subject of “absolute rights” and in the “private” sphere as head of family. We shall see.

“Person” as a social and legal role, not “person” as “individual” human being, was a long-standing and deep-rooted concept. Indeed, it came from ancient Roman texts through the construction of medieval Christian jurisprudence, be it protestant or catholic in early modern times. Lawyers and clerks were well acquainted. The term “person” did not really need any specific explanation, while, on the contrary, “individual” in the sense of “man” was the new concept that badly needed the clarifying.

In the legal domain, the term “individual” was less than a century old. If you go back to a crucial moment in English history such as the mid 17th century and you read Hobbes’ *Leviathan*, you will appreciate the effort he made to speak about man, the single “man”, even though using the word “person” as the word “individual” did not yet exist. Hobbes made the first relevant attempt to change the legal meaning of “person” from man’s capacity to the human being himself. But, as Blackstone’s *Commentaries* show, his attempt had still not been successful a century later. In the 17th as in the 18th century, “person” did not mean, in legal terms, people, not the individual, as today. It meant a social fact, the socially established role and capacity.

Then, “individual”, “man”, was a new kind of “person” among old sorts of “persons”, the subject entitled to fundamental liberty in a broader scenario of rights and duties of common people and established powers. “Individual” was indeed a new word for a new concept, a new concept for a new subject, a new subject for a new reality: freedom’s law. As it came to establish itself in the old world of legal states, we can now understand the apparent paradox of the double standing of *man*: entitled to “absolute rights” and placed as a *person* among “persons”, the social roles.

4. *Liberties and status.*

Imagine that we, all of us, women too, are 18th century Virginian *men* under the British *common law* even after the American independence. If we were lucky enough to become “individual”, we would be entitled to freedom. That is, as Blackstone explains, entitled to “absolute rights” such as “personal liberty”, the free disposal of yourself, “personal security”, the safety of your physical integrity, or also “private property”, the free use and enjoyment of your belongings and acquisitions. The next individual’s right was the access to justice, “that of applying to the courts for redress of injuries”, for the guarantee of our personal liberties in the first place. Law was compelled to pay this judiciary service to us, “individuals”, and not to the rest, not to other “persons”. That was the importance of being “man” and “individual” in Great Britain as much as in British North America. British *rights of individual* were American *rights of man*.

In Euroamerica, in European America as much as in Europe, “persons” who were not “individuals” also had rights called “liberties”, but of another kind. That is to say, only the “relative” ones that were submitted to the determination of law on behalf of given “persons” as social roles. As such, as social roles, rights were indeed duties. “Liberty” or *libertas*, “liberties” or *libertates*, were old words meaning not freedom’s law, but human capacities according to *persons* or social and legal roles.

“Individual” and “person” held “liberties” and were “subjects” in a diverse sense, new the former and old the latter. Non-individual “person” was *subject* in the ancient meaning of *subiectus*, that is, dependent upon law that assumed social positions. As for “individual”, to be subject meant just the opposite, not the subjection to law, but the entitlement to liberties. Law was at the service of *individuals*, while *persons* were at the service of the law.

The “liberties” or “rights” of *persons* in the plural, not the freedom or liberties of *individual* in the singular, involved obligations to fulfil. Such a difference was implied by the discrimination between “absolute” and “relative” rights, the former of “individuals”, the latter of the remaining “persons”, a huge majority in fact. Law and justice were at the service of a minority, the “individuals”,

and not of a majority, the non-individual “persons”. These latter were at the service of law, at the service, first of all, of their own *persons*, that is, their social roles.

In accordance with his attempt to change the legal acceptance of “person”, Hobbes also conceived a new sense for the word “right”, so that it could signify unequivocally the freedom and liberties of “man”. Between the 17th and 18th centuries, “right” took on definitively the subjective meaning of liberty, but not, exclusively, of fundamental freedom.

Historically there is not much in common between *freedom’s* law and *persons’* liberties, although the historiography of political thought, even on textualist and contextualist approaches, do not usually appreciate the difference. Let me insist. Historians do not usually look at the specific historical legal text and context. So, I feel obliged to emphasise the direct clarifying of these main points by Blackstone’s *Commentaries*. Today, I would like to be Blackstone and not his present day reader.

“Person”, not “individual”, meant the social and political role. How were non-individual persons determined in their concrete roles, and thus in their “rights”? I, Blackstone, know. The answer also is not so hidden between my lines. Here it is. The existing social and political conditions, the so-called *status* or states, both “public” and “private”, determine the “persons”. We readers can learn this from Blackstone’s work.

Please look at the headings of chapters 11 to 13 still in the first book: “Of the Clergy”, “Of the Civil State”, “Of the Military and Maritime State”, that is, clergy’s, nobility’s, citizens’ and military *status*. This first book is indiscriminately about *persons* and about *status*: the parliamentarian’s, the king’s, the magistrates’, the clergy’ *status*, and so on, and also the husband’s, the wife’s, the master’s, the servant’s, etcetera. *Status* meant the political and social causes and conditions of the diverse “capacities” or rights of social roles, the “persons”, either “public” or “private”. All was *person*, social role. Everything but the “individual” was *status*, social position assumed and formalized by the law. *Status* was not an analytic sociological tool, but a constitutive social device.

The book index makes sense. It does so for Blackstone and it must do so for readers, past and present. There was no right or

position outside the framework of *person* and *status* but “individual”. Notice that the index did not reflect the trinity of constitutional powers, the legislative, executive and judiciary (something that, precisely since the independence of the United States or from a little before, from the Virginia Constitution, we have considered a basic tenet of constitutional systems). Blackstone shows knowledge of the formula, but he did not adopt it. He was a good reader of Montesquieu’s *Esprit des Loïs*, where the *Constitution de l’Angleterre* was defined by this trinity of powers, although not yet exactly in its definitive form. But there is no such thing in Blackstone’s index. It did not exist in the practice of *common law*. It was only to be found in the theory of a few authors before the independence of Virginia and the United States. “Happily for us”, Blackstone explained, “the British constitution has long remained” with no need of novel experiments such as the trinity or any diversity of powers. But here we know that we are not dealing with this matter of powers, just with the question concerning whom as regards rights.

The explanation is to be found in the second introductory section of a series of four. After them (the first “Of the Study of the Law”; the second “Of the Nature of Laws in general”; the third “Of the Laws of England”, and the fourth “Of the Countries subject to the Laws of England”), the first book, the one concerning *persons*, was a treatise about *public* and *private* states, about political, ecclesiastical, civil and military *status*, on the one hand, and on the other hand, about domestic or family *status*, then called *oeconomical* also, like *person*, in the ancient sense. *Oeconomy*, *nomos* of the *oikos*, meant the rule and government of the household, *nomos* or rule being the main root. The Greek researchers here know this for sure. Tony Molho nods in agreement.

We are moving now to the first paragraph of the 14th chapter, “Of Master and Servant”, still in the first book, “Of the Rights of Persons”. It is the first chapter about “private”, non-public or *oeconomical* matters. It begins as follows: “Having thus commented on the rights and duties of persons, as standing in the *public* relations of magistrates and people, the method I (Blackstone) have marked out now leads me to consider their rights and duties in *private* *oeconomical* relations”. Observe that Blackstone used italics in “private” and not in “oeconomical”. *Oeconomy* was a well-known

concept with no need of explanation. “Private” versus “public”, *public* in the sense of political and *private* as non-political, was, however, a novelty. Notice that the “private” matter, as it starts with the chapter “Of Master and Servant”, is not exactly what we would suppose today. *Master and servant law* was then the only labour law: “whereby a man is directed to call in the assistance of others”, in Blackstone’s words.

“Private” *status* was a matter of social power as much as “public” *status*. *Oeconomy* was concerned with rule and government too, about the specific powers of the head of family to govern the household. In Blackstone’s index, you do not find any separation between “public” and “private” matters. All the chapters follow the same sequence under the general headline “Of the Rights of Persons”. So, arriving at the “private” matter, you find the testimony of social roles and powers not only in chapter 14, “Of Master and Servant”, but also in the following 15, “Of Husband and Wife”, 16, “Of Parent and Child”, and 17, “Of Guardian and Ward”.

The “private” or “oeconomical” section of “the rights of persons” is where Blackstone places hiring owner and hired worker, employer and employee, the latter then deemed *servant* under the power of *master*. Here you find also husband and woman, man and wife, the latter then called *feme-covert*, because she lost, according to *common law*, her “person”, her “capacity”, on behalf of her husband, her *baron* in the sense of *lord*, as Blackstone specifies. In chapter 12, “Of the Civil State”, he deals with lordship as a noble *status*. Let us appreciate how he closes “Of Husband and Wife”: “The disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England”.

Most people were in fact in family *status*, under domestic or *oeconomical* positions, which were the most degrading. In contrast with the woman, the worker keeps his “person”, but always as *servant*, under the authority and power of the employer, the *master*. Here, in the *oeconomical* part, is also where Blackstone discusses slavery. He states that it is not admitted anymore in England, just in England, but he adds that the freed slave maintains a subordinate *oeconomical* relationship to the former owner as current employer, that is, the state of *servant*, the only labour relation conceivable at

that time. In successive editions of his *Commentaries*, Blackstone stressed the domestic or family *status* of servitude for former slaves.

In this theatre of characters named “persons”, which is really the “individual”, the subject entitled to “absolute” or fundamental freedoms such as personal liberty and security, private property and access to justice? At this point, it might be easy to find out. In this scenario, it could be taken for granted.

When you, 18th century *common* lawyer, speak of the “man” or “individual” as the subject of liberty, you do not think of every human being or even of every male. Indeed, first of all, the notion of woman does not occur to you. She is excluded or, rather, she is not included, which implies a most radical abstraction. Moreover, you do not have the worker, the *servant*, in mind. You think of the male entitled to fundamental rights. In short, if you are thinking as an early constitutionalist, *man* was the individual enjoying freedom in the public domain and power in the private sphere. *Ecce homo* indeed. This is our *man*, the constitutional subject of fundamental liberty.

Is my presentation over? I am afraid not. On arriving at an understanding of what *man* was, the *individual* among *persons*, problems arise. *Man* was the first notion to appear in the 1776 Virginian constitutional text, while this prior position corresponded to *person* and not to *individual* in *common law*. Constitutional *man* was not defined in relation to *persons* or to anything by the Constitution, while *individual* was qualified by *person* and therefore by *status* in the *common* legal field. Does all of this really fit? As we harvest ripe answers, bold questions crop up.

Can we really understand the qualification of *individual* by *person* in the word *man* of the first constitutional text? Could 18th century Virginian citizens do so? This is the point. Remember: “All men are by nature equally free and independent”. Could 18th century Virginian framers take that legal qualification of *man* for granted when producing, construing or complying with Constitutions? Did they not feel the need to register the exclusions or non-inclusions in the constitutional text in order, at least, to prevent and avoid misunderstandings, contradictions or contentions? Why did they not make reference to *status*, to this basic key for the adjudication of constitutional liberties or “absolute” rights? How

could they not do so? Were they not taking a risk when they failed to register *oeconomical status* in the constitutional text itself?

5. *States or nations.*

Blackstone does not offer an answer to these kinds of question. For a better understanding, we must look elsewhere. As already known, we have another legal text that is a constitutional context, Vattel's *Droit des Gens ou Principes de la Loi Naturelle* or, in the immediate English translation, *Law of Nations or Principles of the Law of Nature*. *Law of nations* was then considered *law of nature* too. Mark the words. In the 18th century, *droit des gens*, the French translation of an ancient Latin expression, *ius gentium*, was called *law of nations* in English. For our constitutional purposes, we must also examine this text as context.

Blackstone's *Commentaries* were not enough. In Virginian as in U.S. law, there were two principal lines of departure from Blackstone. First, the matter of constitutional powers, the trinity of the legislative, executive and judiciary; second, the core issue of the constituent law, that is, the colonies' power to form states and to determine both their political and legal systems. For constitutional matters not covered by Blackstone, the American constituents turned to the *law of nations* as *law of nature*. This was the law that ruled the colonists' rights to their own law, including slavery and also relations with the pre-existing people in America, the indigenous peoples.

Law of nations, not only *common law*, provided foundations for an American constitutionalism. For the same legal, not only political, issues of constitutional importance, *common law* was not sufficient. This is why we need to turn to the *law of nations* as much as the American framers. Here we arrive at our second round, the second circle. In the Euroamerican constitutional moment of the 18th century, to talk about *law of nations* was to talk, first of all, of Vattel's *Droit des Gens*, the next European legal text from one of the legal contexts for the American constitutional texts.

Let us read. Here we have what is missing in Blackstone in order to understand the legal fundamentals and presumptions of the first Euroamerican constitutionalism. Here we find as a starting point, as

a *preliminaire*, presiding over the whole text, the concepts of state and nation, or rather the concept in the singular of both of them, and, as an important addition also announced by the index, the very notion of Constitution itself. According to this *droit des gens*, nations and states share the same meaning, “corps politiques”, “sociétés d’hommes unis ensemble pour procurer leur salut et leur avantage à force réunies”, that is, “body politics” constituted by men to defend themselves. This is the concept in the singular of state or nation.

Constitution, on its part, is defined as the proper ordainment or regulation to achieve the objective of the state or nation, to guarantee the mutual safety of men organised in the body politic. “Le règlement fondamental qui détermine la manière dont l’Autorité Publique doit être exercée est ce qui forme la *Constitution de l’Etat*”, in italics as it is a new thing, a real novelty. The Constitution as regulation, as a tangible normative document, did not exist yet, but Vattel, after Montesquieu, figured it out precisely in the light of the British case. “Heureuse Constitution!”, “Happy Constitution!”, Vattel exclaimed referring to the British political and legal system.

State and nation, *status* and *natio*, both of them, were old words with different meanings. In the 18th century, they were alive even in Latin, a language still in use in the legal domain. *Status* and *nationes*, *states* and *nations*, usually signified other things. We already know the meaning of *status*. On the other hand, nation or *natio* had meant, since medieval times, the human cultural origin or community to which one belonged by sharing languages, customs, traditions, narratives, folklore and so on. Take a look at the fourth introductory section of Blackstone’s *Commentaries*, “Of the Countries subject to the Laws of England”, and you will find, for instance, the *Irish nation*.

A century before, when Hobbes wrote *Leviathan*, he borrowed this name from a biblical creature (the good one, the bad one being *Behemoth*) for want of a less anthropomorphic appellation to identify the state as the body politic supposed to defend men, and not things such as religion or dynasty. He was already aware of the availability of terms such as “Commonwealth or State, in Latin *Civitas*”, signifying *state* the *status* of the Monarchy and *commonwealth* the *respublica*, all political *status*, including clergy, nobility and citizenship. Because of the actual legal link with *person* or mere

social role for *political* as much as for *oeconomical* purposes, *status* was not a good choice either in the singular or in the plural. In fact, with words such as *state* or *nation*, Hobbes did not even try what he attempted with *person* or with *right*. How could Vattel do it successfully a century later? What was entailed by the application of two words loaded with other meanings, states and nations, to body politic?

In Vattel's *Droit des Gens*, it seems that old meanings no longer existed. As a *preliminary* concept, state or nation dominated. There, in this *law of nations*, the questions of *status* or *persona*, legal capacities and social roles, are not found for England or for elsewhere. Neither do we find any discussion about the diverse issue of *natio* or nation, of *nationes* or nations in the old sense of origin and community. The matters of legal *status* and cultural *nations* appeared unthinkable in Vattel's discourse. None of this existed for the *law of nations*. It was in fact *law of states* as bodies politic and, by legal presumption, nations too.

If nation or *natio* is now synonymous with state or *status*, only the body politic, what is then the place left for other *status* such as the domestic or *oeconomical* ones? If nation and state coincide, what room is there for *nations* in the cultural sense, the traditional and living sense? What was the place for the qualification of the group or "sociétés d'hommes" entitled to form each body politic, for the identification of the human constituencies of the states?

If states were conceived as the body constituted by *hommes*, by *men*, to defend themselves and the objective could be achieved through the means of written Constitutions, then, there was, although not specified, the idea of *constituency*, of human agency to do so. Therefore, they, *men*, *hommes*, had the collective right or held the group power to establish their state. How were *they* identified by the *law of nations* before constituting the respective body? Did this *droit des gens* consider cultural nations?

It was not the case. In the discourse of *law of nations*, there was no room at all for cultural nations, as there was none for social states, and not because they had disappeared or had to be abolished, but because they, social states and cultural nations, were excluded from this field. They were out of sight. *Nations* were ruled out by *law of nations*. That *droit des gens* considered true cultural nations and

existent social states completely meaningless and unimportant for the establishment of body politic. Matters of Constitution as norm were not notions such as *status* and *nationes*.

The *law of nations* covered states constituted to defend *men* in the sense we have learnt, the male proprietors and heads of families, women and workers' lords and masters. Vattel spoke of *hommes* as constituents of the body politic and he meant it. But he was not in need to recall who they were. This social and legal reality could be presumed and ignored. The culture of social *status* and *oeconomical* rule dominated.

Insofar as it was a long-standing and deep-rooted legal culture in Europe, Vattel could take this background for granted. *Droit des gens* did so. The *law of nations*, the constituent right of constituted states and of nothing else, could be strengthened by the intellectual abstraction of non-men and non-political nations. Your discourse became stronger if you spoke of *men* as constituent subjects assuming that they, male European proprietors and heads of family, were the natural representatives of their respective society and of the whole of humanity, both mankind and womankind. You did not need to specify it because your presumption constituted culture.

All men, the *hommes unis ensemble*, were constituent subjects in Vattel's *Droit des Gens*, as in the 1776 Virginia Constitution. One knew what it meant. Legal culture, European culture, made you read what was not in the text. You heard in the song what was not in the lyrics. Non-legal people, excluded or non-included persons, even slaves, could contend the meaning, of course, but there was no receptiveness in the legal world to understand the text otherwise. For legal people, the reading was obvious. In the legal field, contentions could not function easily.

Indeed, Vattel's *Droit des Gens* took the abstraction both of social *states* and of cultural *nations* for granted. That is how the *law of nations* really operated. *Men* were the constituent actors as much as *state* was the constituent *nation*. So, because *nation* and *state* converged exclusively as body politic by the action of *men*, there might not be any criterion to identify constituent groups as cultural realities of human communities. How then could constituencies of states be recognised?

For the *droit des gens*, constituencies existed. They were the

nations in their political sense. They are the states, the actual independent states and, eventually, newly independent states recognised by the existing ones. The idea of constituency is not specified because it also was simply identified with state or nation. In other words, according to the *law of nations*, only men belonging to a given political state, to an existent body politic, are entitled to constitute it and so to defend themselves. In other words again, only Europeans had this right. For Vattel, for the *law of nations*, for the also said *law of nature*, non-European peoples lacked any *inherent* right and so any *constituent* power. Law and nature, both European law and European nature, supported the principle.

6. *Law of nature.*

According to Vattel's work, as we can see by its very title, after the same tradition of the *ius gentium* or *droit des gens*, all that discourse was conceived and managed as *droit naturel* or *natural law*, that is, as a frame established by *nature* itself, not by men. So, it did not depend on human determination or social convention. That is an important point when you, 18th century citizens, are dealing with the lofty questions of rights of peoples and rights of men. As *natural law*, the *natural rights*, those of European male individuals and European peoples, were the background for the production and consumption of constitutionalism.

Without these contemporary cultural and normative elements, we historians could not understand those historical texts. In order to comprehend properly, we must look at contemporary historical contexts rather than at prior traditional pre-texts. The key is in semantics, and not in philology, in the science of meaning and not of stemming. We need to know what nation or state meant in the 18th century rather than their meaning before or after. Cultural nations and social states still existed. Nature embodied law, and so on. As this is not the usual approach taken by the history of political or legal thought, let me insist on some elementary evidence.

Status and *natio*, state and nation, were old words, but *nation* as state was, just like *individual*, a new concept for a new reality. *Natura* and *ius naturale* or *ius naturae* were equally ancient expressions, but *droit des gens* or *law of nations* were new constructs. Always pay

attention to words. *Droit des gens* was the literal translation of an old expression, *ius gentium*, but, as *law of nations*, was a young discourse. In the 18th century, French did not take the meaning of *nations* from the Latin *gens*, but from the English *nation* as *state*. *Law* was the translation of *droit* because its English equivalent, *right*, had taken on the meaning of *liberty* and *freedom*, of human liberty not only in accordance with *law*, but also irrespective of it. *Droit*, like *derecho*, *Recht*, *diritto*, *direito* and so on, entails both meanings, objective and subjective, *law* and *liberty*. The common medieval Latin root, *rectus* or *directus*, bore the former sense in a religious prior to legal way. *Libertas* was also an old word traditionally lacking constitutional meaning. Insofar as Latin was still a legal language, Hobbes tried also to make *ius* and *lex* mean respectively *right* and *law*, human liberty and legal system, but he was not really successful in his effort. In his search for new meanings, he succeeded better in English than in Latin.

Let us return to Blackstone. Notice how he explained in the first chapter of the first book the superiority of the individual's rights: "The principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable law of nature". He applies the idea both to the British *Constitution* and *individual*: "That constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct". He considers the principle as a matter of *natural law* for it "tends to man's real happiness". Add the quotation heading this paper: "As all the members of society are naturally equal...". Blackstone further explains these more general elements of the legal system in his second introductory section "Of the Nature of Laws in general", where he also assumes the political concept of state: "A state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man". For Blackstone, this collective *man* is a kind of *person* among others. See how he considers that all incorporated *persons* are *bodies politic* in chapter 18, the last one of the first book, "Of Corporations".

Nevertheless, like the *hommes* or *men* of Vattel, the *men* or *individuals* of Blackstone constituted political states. They were

supposed to do so complying with *nature*. “The immutable law of nature” could rule over states and so over Constitutions. Remember also the distinction in Blackstone’s *Commentaries* between *public* and *private* law, political and non-political. It was another way, a more timid one, to exclude the latter from the former, the domestic space of women and workers from the constitutional universe of rights and powers. Therefore, at that time, *Constitution* was *public law* under *law of nature*, which could mean male right under proprietors’ rule. The constitutional key might lie in *private law*. Needless to say that *publicus* and *privatus* were old words not meaning *public* and *private* in previous times.

Both natural and private law work in the law of nations for the exclusion of indigenous people from the constitutional universe or, rather, for their non-inclusion. Let us come back to Vattel. In his *Droit des Gens* we also find *private* property producing discrimination against non-Europeans. He explains that the exploitation of the earth’s resources should be considered as a natural obligation or fundamental duty of humankind. “Obligation naturelle de cultiver la terre” is the note in the margin of the page, which will become a heading in later editions, announcing the discussion. He returns to it with another marginal note that will be also a heading: “S’il est permis d’occuper une partie d’un pays, dans lequel il ne se trouve que des peuples errants et en petit nombre”. So he develops the argument. To comply with *natural obligation*, Vattel explains that every human group ought to exploit their land by due means of private management. If not, Vattel continues, others hold the power to invade. Europeans in dire straits or who need to emigrate have the right to do so. This implies that non-Europeans cannot either oppose or regulate the Europeans’ arrival and settling. Furthermore, Europeans can even resort to genocide against reluctant non-European people. For Vattel, the constitutional example is British colonialism in America.

To establish what the law for Americans was, Vattel did not need either to travel to America or even to know about it. European presumption ruled. European culture was in command. To state the law for non-Europeans, Europeans did not need to be informed. Vattel could uphold that indigenous nations did not have any entitlement versus the British colonists because he could presume

that they were errant people and did not cultivate the land, as he also presumed that this was a just cause for the deprivation of rights, even political rights. Neither “public” nor “private” rights could be “inherent rights” for non-Europeans according to European *law of nations*. Property law, property culture, might beget European powers, Europeans’ rights, constitutionally.

Law of nature, that is European culture, was enough for Europe at home and everywhere else. It sufficed to determine, even over Constitutions, what European, Euroamerican and non-European rights and non-rights were. In Vattel’s *Droit des Gens*, after the independence of the United States and also after the French revolution, *droit naturel* or *loi naturelle* will be translated into *rights of man* or *droits de l’homme*, into these more constitutional expressions. However, the translation did not make any difference by itself. Already in the 18th century, *law of nature* could be *law of rights*, law of the *rights of man*, this sort of freedom’s law.

We can understand it today, thanks to legal texts that form the context of constitutional texts. By two legal texts, Blackstone’s *Commentaries* and Vattel’s *Droit des Gens*, belonging to two legal contexts, *common law* and *law of nations*, we get to know the meaning of the constitutional text. Of course there are further circles, including legal ones, as there are many texts for every circle, but these two are chosen for our experiment in method. My task is accomplished, is it not? I can see some sceptical smiles. Our chairperson, Raffaele Romanelli, seems to doubt. Is the floor open for the colloquium?

7. *Visit to Virginia, U.S.*

Is my turn over at last? Not yet, you are right. We still face problems. Rather, we have had one lurking from the beginning. I did not warn you for the sake of my own presentation. Now, I apologise and try to rectify. Here is the problem. How can we be sure that Vattel and Blackstone were actually the legal context of the constitutional text? To understand the 1776 Virginia Constitution, the first true Constitution ever, I said that our task should be to become 18th century American lawyers. Obviously Vattel and Blackstone

were not. They did not even set foot in America. How can we trust them?

We have attempted to read a text in its immediate context, a constitutional text in the social context of the legal culture with the testimony of only a couple of authors. How can we know that our selection for the experiment is right? Would it be the option of 18th century Virginian citizens? Did they read in their constitutional text what we understand now in the light of *common law* and the *law of nation* according to two, only two, European authors? Is our reading their reading, the Virginian reading? Were Blackstone's *Commentaries* and Vattel's *Droit des Gens* the immediate legal contexts of the earliest constitutional texts? Were *common law* and *law of nations* so important and decisive for the legal system under independent American Constitutions such as the first proper one of Virginia? To eliminate doubts, what if we travel there? What if we resort to actual Virginian citizens and lawyers bound precisely by the 1776 Constitution?

Thomas Jefferson, a Virginian constitutionalist citizen before becoming U.S. president, left some notes about the *Education for a Lawyer*. He thought that it was advisable to know a lot more than one single science in order to be a good lawyer. You were supposed to study things like mathematics, geography, anatomy, ethics, religion... and law too, of course. As legal items, according to Jefferson, we find first of all "*Natural Law: Vattel, Droit des Gens*" and, in the last place for *common law*, "Blackstone's *Commentaries* (Tucker's edition) as the best perfect digest" in Jefferson's literal words: *best perfect digest* was Blackstone's work in the edition by someone called Tucker. George Tucker, Blackstone's editor, was a lawyer who americanised and virginianised the *Commentaries on the Laws of England*.

So far, we can guess what Tucker wrote about the issues we have touched upon. He described the individual who was the subject of constitutional rights under the 1776 Virginia Constitution. I quote from the long "Note" *Of the Constitution of Virginia in Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia (...)* containing short tracts upon such subjects as appeared necessary to form a connected view of the Laws of Virginia,

as a member of the Federal Union, by George Tucker, Professor of Law, Judge of the General Court of Virginia, the virginianiser.

Here is the portrait of the Virginian subject of constitutional liberty according to George Tucker: "Every free white man (...) in possession of (...) land (...) in his own right or in the right of his wife". So you, Virginian citizen, have to be *white*, from the European branch, *free*, neither slave nor hired worker, and qualified by property yours or your wife's. As *feme-covert's*, the woman's ownership granted the man's right, and not her own, to that extent she was not included in the constitutional universe.

The 1776 Virginia Constitution required, for the exercise of constitutional rights, "sufficient evidence of permanent common interest with, and attachment to, the community". A good way for men to fulfil these requirements might be marriage. Tucker expressed it very eloquently: "The acquisition of a wife is ordinarily attended with that of a farm sufficient to entitle the owner to a vote". Woman concurred with property for the qualification of man as the subject of freedom. Commenting on Blackstone in compliance with *common law*, it was not at odds with the very beginning of the same Constitution: "All men are by nature equally free and independent".

Tucker is eloquent on other matters too. He holds his own opinions and obtains his own evidence. He criticizes an observation in Jefferson's *Notes on the State of Virginia* about a deep imbalance among election, militia and tax registers. "A majority of the men in the state who pay and fight for its support are unrepresented in the legislature", Jefferson thought. Tucker thinks that this is not the case. Here is what he considers a good argument: "Free negroes and mulattoes are excluded from elections; they are now excluded from the militia rolls, and very few of their names appear upon the tax-gatherers' books". The constitutional exclusion of even the so-called *free negroes*, and not only of slaves, seemed unarguable. Slavery or at least servitude could be regarded as the natural state for them, for Afro-Americans.

Slavery was not the highly controversial topic we would expect today. At that time, they discussed and argued about it, but not to the extent we tend to imagine after reading proclamations of freedom and equality such as the first pronouncement of the Declaration of Rights of the 1776 Virginia Constitution. We know that

contentions could hardly work in the legal field. Furthermore, in the specific constitutionalist discourse, the word *slavery* took on another meaning, a political one; or, rather, one traditional acceptance of the term was reinforced: oppression under despotism, be this monarchical or even parliamentary. *Slavery* came to mean mostly colonial dependence while *freedom* began to signify mainly political independence. *Slaves* described the colonists under British rule, like Canadians or Jamaicans, and *free* entailed *independent*, like Virginians, their neighbours from Pennsylvania or citizens from other brother States. The 1776 Pennsylvania Constitution commenced in a similar way: “All men are born equally free and independent and have certain natural, inherent and inalienable rights”.

As for *slavery*, such as we have seen for *state* or for *nation* in the *law of nations*, the political meaning left no proper place in 18th-century American constitutional literature for the social, economic and legal sense, cattle slavery in this case. The abstraction did not assume the disappearance of actual slavery, just as political state or nation did not mean the inexistence of social states and cultural nations. On the contrary, all of this was taken for granted and also considered meaningless in constitutional matters.

Except for basic *individual's* rights, such as property, Tucker also thought that, in these constitutional matters, the English “*ius commune*, *common law* or *folk right*” did not rule. So Blackstone did not help in this fundamental field, for which Tucker turned to the *droit des gens* or *law of nations*. He preferred it, instead of Blackstone, for issues such as slavery, as he also did so for the relationship with indigenous peoples.

Contrary to Blackstone, Tucker stated that the British colonists were not a subordinated people. He thought that the *Commentaries* confused *Americans* with *Indians*. In his fourth introductory section, “Of the Countries subject to the Laws of England”, Blackstone denied that colonists in America shared rights on an equal footing with British people in Europe: “Our American plantations”, he wrote, hold the condition of “conquered or ceded countries” under the king’s pleasure, “being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire) or by treaties”. In some

posterior editions of Blackstone's *Commentaries*, the legal doubt between brackets was cancelled.

According to *law of nations* and against Blackstone, Tucker argued as follows: "The British emigrants by whom the colonies were settled were neither a conquered nor a ceded people, but free citizens of that state by which the conquest was made or to which the territory was ceded, the Indians, the former people, having uniformly withdrawn themselves from the conquered or ceded territory". Conquered referred to Indians, the indigenous peoples whose voluntary cession of territories and withdrawal from them were also presumed.

After independence, can you guess what the constitutional position of the indigenous peoples might be? You are right if you are thinking of an *oeconomical status*. Indeed, under the 1787 US Constitution that placed the "Indian Tribes" in a limbo between the "foreign Nations" and the inner States, such as Virginia, the Federal Supreme Court's jurisprudence recognised that the said *tribes* were in fact *nations*, but not states. They were deemed *domestic nations* and therefore placed under the guardianship or tutorial authority of the President and the Congress of the United States. As a more *oeconomical* than political or international relation, this federal power over the *Indian nations* has no constitutional restraint. Even the treaties between indigenous peoples and the United States are submitted to these *domestic* powers. Take another look at the fourth introductory section of Blackstone's *Commentaries*, "Of the Countries subject to the Laws of England". Here, the position where you find the *Irish nation* is "in a state of dependence", that was, under the collective form of *oeconomical status*.

8. *American natural oeconomy*.

The Indians were not alone. Let us take a look also at the next American counterpart of Blackstone's *Commentaries* following Tucker's *Blackstone*, the *Commentaries on American Law* by James Kent, Professor of Law, Chief Justice of the Supreme Court of New York and Chancellor of this State. There we find a whole part, the fourth, "Of the Law concerning the Rights of Persons" with the first chapter "Of the Absolute Rights of Persons" and one after "Of

Master and Servant” discussing “Slaves” and “Hired Servants”. *Person* means *individual* as the subject of *absolute* rights, not implying however the disappearance of other *persons*, but their abstraction in the constitutional field. Slaves and workers are both *servants*. Both of them are under *oeconomical status* just as the *Indian tribes*. For this American law, there were no more political *states* in the sense of *status*, but *oeconomy* still existed.

At this point, we are not surprised. So far, we know quite well how much humanity entered in *oeconomical status* and how little in freedom’s law. Also we are already aware of the legal position of the constitutional text. The index of Kent’s *Commentaries* obeys this order for its initial parts: I, “Of the Law of Nations”; II, “Of the Government and Constitutional Jurisprudence of the United States”; III, “Of the various Sources of the Municipal Law of the several States”. *Municipal* law meant state law. *Law of nations*, the also called *law of nature*, was placed in a superior position over federal and state constitutionalisms.

As for all these issues of the “Rights of Persons”, Virginian and federal constitutionalisms could go together. The 1776 Constitution of Virginia, that was in force till 1830, made only these derogatory references to both slave and Indian presence: “Whereas George the third, King of Great Britain and Ireland, and elector of Hanover” has abused his authority “by prompting our negroes to rise in arms against us, those very negroes whom, by an inhuman use of his negative, he hath refused us permission to exclude by law; by endeavoring to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions of existence”. *Negative* was the royal veto against Virginian decisions such as the one specifically regarding colonial exclusion even of free Afro-Americans.

For our present purposes, we have no need to further verify the meaning of *man* and its implication for rights in early constitutional Virginia. Neither do we need here to concern ourselves with particular nuances, important as they might be. Actually, the piecemeal disappearance of slavery was taken into consideration even as a logical consequence of the established principle of freedom and equality under the 1776 Virginia Constitution, yet the assumptions

of the maintenance of *oeconomical status*, namely of servitude, like that of the *feme-covert*, lingered on. Even after its definitive abolition in 1865 (Amendment XIII of the United States Constitution: “Neither slavery nor involuntary servitude... shall exist...”), *status* both of *servant* and *wife* continued. In Virginia, there was the tradition of constitutional exclusion of free Afro-Americans. *Servitude* as social state, and not slavery, was Blackstone’s way, the British way for which *common law* stood or vice versa, as you like.

Definitively, on the one hand, there was no longer political *status* and, on the other, cattle slavery, but *oeconomical status* still existed. *Common law* and *law of nature* did. At all events, somehow over the constitutional and legal systems of the United States and Virginia, there were both *common law* and, above all, primarily, *law of nation* pretending to be *natural law*, a kind of law that was considered completely beyond the reach of any human constituency. So, as *natural* or supra-constitutional law, as *natural oeconomy*, we have the deprivation of rights for the preceding and current human presence in America, the indigenous peoples or *Indian nations*, and we have also, as *natural law*, the servitude of labour and the non-inclusion of women in the constitutional universe. So, *natural oeconomy* ruled.

“All men are by nature equally free”. They were so according to *oeconomic nature*. The sentence conveyed the meaning that white male proprietors and heads of families, women and workers’ lords and masters, were “*by nature* equally free”. *Nature* qualified words. A powerful cultural construct did so. In this light the text concerning freedom and equality of the 1776 Virginia Constitution was understood. That is what its wording and phrasing, its presuming and abstracting, said precisely. A language was born.

The normative constitutional language began to function in this manner. It had no need to reflect social reality to rule or even perform it. *Man* meant what it did by force of the Constitution according to *oeconomy*. So, by the same constitutional enforcement, *man* continued to be what it was, now empowered by freedom’s law, the law of European, male, proprietor, head of family, women’s and worker’s, slaves’ and Indians’, lord and master. That was *oeconomy*. This was a legal kind of *oeconomical* determination.

My presentation is over. Let me still offer a few very simple

suggestions. Read the usual historiography on constitutional matters and, if you are observant, you will find things such as the complete omission of *status* and *nationes*, of *oeconomical* states and cultural nations. You will face a serious overlapping of these kinds of real problems from the past and for the future through our present. Do not resort to economic history in search of *oeconomy* if you do not wish to be disappointed. Most social history also disregards this sort of things. Keep reading historiographical specialities and generalities to verify on your own. Do not trust me. I have not ever set foot in past time. Draw your own conclusions. I have mine, but they will not be enough.

9. *Linguistic return.*

At this concluding point of my presentation for our seminar, let me now add some reflections about the use of method and the result of evidence. Let me return to the question that I have posed since the beginning. Are we sure that the phrase “all men are by nature equally free and independent and have certain inherent rights” meant in itself for the Euroamerican constitutional moment of the 18th century the same as today? It is plain English of course, but maybe the words and meanings are not so plain. Did “men”, did “all”, did “by nature”, did “equally”, did “free”, did “independent”, did “inherent”, did “rights”, did all these linguistic signals mean human freedom recognised, granted and guaranteed for everybody as the due bases of the political and legal system? You historians did not need my explanations to know that the answer is negative.

It was plain English, but it was not our plain English, the English that, for better or worse, we speak and write, hear and understand, today. The same thing must be affirmed too for Latin or for French, German, Spanish, Italian and so on, and also for many other living European and American tongues that are not official languages of states in Europe or elsewhere today. Words do not change when their meaning does. The meanings of the European state languages, specially these that are official, changed deeply and definitively somewhere between the 18th and the 20th century. And meanings are not exactly the same when dominant languages work in their original places as when they expand at the expense of others

both European and non-European, as for instance in America. They overlap or even impose exclusions and non-inclusions. Words always matter. They do to an extreme when languages face each other on an unequal footing.

Language in the singular and, to a greater extent, in the plural may produce the performative effects of injecting unequal ways into apparently non-discriminatory constitutional norms. Inequalities are not mere social realities and economic facts, but complex cultural constructs and juridical devices. They might be imposed by an abstract and dominant language with that kind of performative power, a power prior to and independent from the eventual enforcement of the norms themselves. In our 18th century Euroamerican moment, legal and political culture ruled over law and politics. Europe dominated through linguistic performance and not only by normative and political or also economical and military means. As a performative Euroamerican language, constitutionalism can behave like *law of nations* reproducing and overlapping the discriminatory bias of the legal subject of freedom's rights.

Nowadays, you historians realise the linguistic bias with no need to know the constitutional matter. In the end, you historians are right to assume intuitively that the first real Constitution, the 1776 Virginia Constitution, could not mean what it actually said. Or maybe you were not so right. Good intuition can make bad history. Watch your steps, please. By not taking the historical text seriously, the historiographical point is cancelled. So, you historians may miss a decisive cultural moment of social domination. Key questions are lost. Constitutions meant exactly what they said and not what they seem to say today. To understand the true meaning of early constitutionalism, we historians must learn 18th century legal English, a different language from current English, legal or otherwise. We must even know the so-called "*law-french*", the Norman terms used in *common law*.

Consider the following paragraph from Blackstone's *Commentaries* in the chapter "Of Husband and Wife": "By marriage, the husband and wife are one person in law; that is, the very being of legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and *cover*, she performs every thing,

and is therefore called in our law-french a *feme-covert*, is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities". We need to learn this legal jargon in English and non-English languages. We must start by learning to read in order to know what was meant by such apparently simple syntagmas as *rights of man* or, in a renewed "law-french", *droits de l'homme*.

The historical syntagma of *rights of man* or *droits de l'homme*, a true constitutional synthesis, may be easily misunderstood if read in non-contextual terms. It may be taken as a general adjudication of liberty to the human being, notwithstanding additional discriminations that, as accidental contingencies, might be feasibly surmountable afterwards. Quite differently, cultural reading through legal literature brings us to a historical scenario in which *man* or *homme* is conceived and behaves as a subject radically alien to the woman, the worker, the non-owner, or whoever neither belonged to nor participated in European culture or, as it was deemed, *civilisation*. Historically, this is the constitutional stage.

So far, on the threshold of the 21st century, recognition of the worker, the woman or non-European people as subjects of freedom's rights may seem easy, but its actual implementation is not easy at all. You have to know and face, among other things, history, your own history, even a history far back in time from our 18th century Euroamerican constitutional moment. The revision and overcoming of such a whole long-standing and deep-rooted culture of the European male proprietor and head of family as natural representative of both his own society and the whole of humanity, as subject therefore entitled to constitute states and thus to dominate in the name of liberty and on behalf of his own actual freedom, is a hard challenge. To face it, you should master history and its aftermath, the past living still in the present. To become proficient historians, we need to know both past and present.

We need to know past and present languages, the different ones historically embedded in a single one, English, Latin or others. Languages do not change when paradigms do. Between the middle of the 17th and the middle of the 18th century, between *Leviathan* and *Esprit des Lois* we could say, there was some sort of a paradigm

shift, the appearance of a culture of freedom's law for the individual European male owner in the traditional setting of *status* of subjection for the majority of humankind.

But since the 18th century there has been another more transcendent paradigm shift for us, for 21st century citizens and historians. The chain headed by the 1776 Virginia Constitution does not extend so far as today. There is a paradigm shift not only between *Ancien Régime* and *Révolution*, but also afterwards. The latter is the change that has overtaken legal *status* as social basis or social *status* as legal basis. So, we no longer understand the complex kind of society with both constitutional freedom and legal *status*, unless we undertake textualist and contextualist juridical research as due part of the historiographical enterprise. Historical study is linguistic apprenticeship.

The framework of plural *status* was not only a mere linguistic legal scheme, but also social reality, whatever that may be. If one can speak of historical realities, here you have a case to which we can access through the linguistic knowledge of legal texts. Here we find a not so hidden treasure, I think, for plain historiography, and not only for the legal and constitutional branch. Juridical texts provide cultural clues at least for the history of Europe. Without a cultural history, a history of meaning and understanding, how can you, European historian, study social or plain and full history of your own past? Can you research history while misunderstanding sources?

Legal culture is a constitutive culture in the case of Europe. No matter how introverted and boring European legal or constitutional historians may be, legal and constitutional history is not only interesting and helpful to law and politics. No wonder if indigenous, gender and labour histories are more help nowadays than any other research strategies. Their issues are cultural or even legal, being concerned with the legal and constitutional culture that legal and constitutional historians usually neglect. A good piece of advice could be to recommend a return to legal history through past texts.

10. *Text in context.*

Are we historians aware of all of that when we read and interpret the literature of 18th century Enlightenment, the intellec-

tual homepage where the Euroamerican constitutional moment would be placed? Are we historians well mindful when we research and analyse papers or other sources from that time in archives or other reservoirs? Do we historians realise that we cannot understand any 18th century text but in context, in an alien context?

Our relation with the so-called Enlightenment, with that past culture between the two mentioned paradigm shifts, may be in question. We do not share its language. The usual identification is deceiving. It is a fallacy for us Europeans and a fraud towards non-Europeans to maintain the feeling that our culture has been the culture of liberty, and our law freedom's law, since the 18th century, if not even before and throughout all European colonialism.

There does not seem to be any lineal development of an enlightened culture on the same premises of human freedom through successive constitutional moments adding new subjects of fundamental rights, such as the worker, the woman or the non-European alongside the male white owner. Such a progressive history cannot or must not be traced because since its origin the constitutional category of *man* has been biased and loaded with social, sexual and racial prejudices, imposed as culture or *civilisation*. The piecemeal incorporation of new subjects has continued to lean on a defective background that impairs them. The origin exercises a great hold on the constitutional and international universe of rights, both civil and political, and powers, both public and private.

Let us take a brief look at the historical move from rights to powers. Usually, constitutionalism is identified as a system of powers, the trinity of the legislative, executive and judiciary, rather than as a rule of rights, *absolute rights* in old words, *rights of man* or *droits de l'homme* in modern fashion, *human rights* in today's usage. The bias comes from early constitutionalism, from the format of its subject, *man* or *homme*, as the social *person* entitled both to freedom and to power, to free dominion over women, workers and non-Europeans. Individual rights were social powers. *Man* or *homme* was the social agent who had law and justice at his service.

Today, the ease with which we confuse powers and liberties, regarding the constitutional trinity of powers as the definitive sign of freedom, has something to do with European history, with the

Euroamerican past and, to a certain extent, its present. We may talk of the subject of liberties, the *man* between rights and powers. About all the rest, we can only hint. Here we have not discussed specific rights and powers, but the subject of rights, who happened to be the subject of powers indiscriminately. We have not asked any question about *what*, but *whom*. Otherwise, we could wonder whether the political forms of the first constitutionalism have something to do with the democratic policy, responsible government and accessible justice needed when *man*, the man we know, is no longer the exclusive subject of freedom's rights. In the 18th century Euroamerican constitutional moment, there was freedom's law, but not our freedom's law. Freedom's rights existed for a very qualified human subject. Others could have *liberties*, which were, as we have learnt, a different thing than *freedom*.

Remember Blackstone: "As all the members of society are naturally equal, it may be asked, in whose hands are the reins of government to be entrusted? To this the general answer is easy". He could say so because he counted on *status*. You could think that *all the members of society are naturally equal* or, as the 1776 Virginia Constitution would say, that *all men are by nature equally free*, and add that, despite this principle, the problem of *government* may receive, *in general*, an *easy answer*, because you are presuming that *equality* is according precisely to *nature* and thus to *status*. In fact, that is Blackstone's way. To answer the question of *government* in a condition of *equality*, he immediately refers to the given position of the Monarchy, the first *status*. So, *all the members of society* are not all the human individuals in a society. It is also the first assumption of the 1776 Virginia Constitution. For Constitutions, political powers were no longer a matter of *status*, but they still counted on *oeconomical status*. So, to face the problem of *government* today, to answer our question of powers, can they help?

They, *Commentaries* and Constitutions, may help to understand, as they helped to manage their period and not previous or later ones. On their part, previous texts, the pre-texts, can help as contemporary texts in their own context. On the front page of the first edition of Vattel's *Droit des Gens*, there is a quotation from Cicero: "Nihil ist enim illi principi Deo, qui omnem hunc mundum regit, quod quidem in terras fiat, acceptius, quam concilia coetusque

hominum jure sociati, quae Civitates appellantur”. You grasp it, because you cannot become historians of Europe if you are not able to read Latin. But let me make a suggestion. Here, in this 18th century text, Cicero, the old Cicero, writes about *states* or *nations* and assemblies of *status*, of clergy, nobility and citizenship. The former is denoted by *Civitas* and the latter by *concilia et coetus*. Cicero’s text in Vattel’s context refers to the British Parliament, an assembly of *status* as Blackstone explains. So, when he, Cicero, writes *homo* on Vattel’s front page, he, old Cicero, means 18th century *man*, the subject of rights. That is the reading of text in context.

For sensitive substantive things such as the cultural determination of the subject of freedom or the historical shift from powers to rights and vice versa, in order to oust myths and fictions, you always need the text in context, texts in contemporary textual contexts. Always bear this in mind. The maxim must mean text in society before text in history. We must look at synchronic con-texts rather than at diachronic pre-texts. If not, you may only recreate and renew not so enlightened myths and fictions. The key is in semantics, not in philology, that is, in meaning, not in stemming.

So, what could be recommended is legal semantics and not the legal philology usual in legal history and which is largely characteristic of the history of political thought. In short, if our aim is new good history and not old bad ideology, we cannot have any direct link with the so-called, presuming the relationship, Enlightenment. In contrast with present legal practice, we must not connect with people such as Blackstone or Jefferson directly.

11. *Way to Europe.*

Is your goal good history? Then you need to work in the plural. You must not permit any text or any context to be cancelled. You need all or at least most of both. We historians do need texts and contexts always in the plural referring not only to the multiplicity of sources, but also to everybody’s meanings, including non-Europeans’. You do not learn much about women, workers, slaves, *Indians* and so on if you only rely on *men*’s sources. Be aware. All the people we have met here (Blackstone, Vattel, Jefferson, Tucker...) are *men* in the sense we know. Moreover, we have taken into consideration

only two languages, English and French, both European. Like you and I, like all of us, culturally, Blackstone and company, even Jefferson and Tucker, were first of all European. So is our history, our not so new good history.

To be acceptable, history cannot spring only from a dominant European stance or from anywhere else in the singular and alone. We all need both our and others' histories, our own and alien, for both science and citizenship. There is no good *European History* without non-European histories. There is no sound *History of Civilisation* but also and always in the plural, that is, histories of civilisations or, rather, histories of cultures. Culture admits the plural better than civilisation does. Civilisation entails a pretension of superior culture that discriminates against other cultures. The very idea of European, Euroamerican or Western civilisation may be pretentious. Just suppose that you, a European Department of History and Civilisation, understood singular as plural, Civilisation as Cultures?

In order to save the name, if you are fond of it, let us say that civilisation means a related variety of cultures of ours among others' cultures. Let us not deceive ourselves and defraud others. Do not forget that the very word is a sign of colonial mentality in a post-colonial word. You are misrepresenting your culture if you call it civilisation or only if you feel able to do without the rest. In historiographical terms, to become historian, you must be mostly aware of the place of your culture among other cultures. For the European case, for any sort of European history, some kind of post-colonial stance is badly needed. You, Europe, tried to be the world through *law of nations* among other means, but you, fortunately, neither stood nor stand for humankind. Are you aware when still deeming your culture, even past and colonial, as civilisation? When you talk or think about an Euroamerican Enlightenment as a unique and direct origin and source of human freedom, that is what you presume. You travel a path to Europe from Europe and through Europe, through Euro-America or other European expansions. So, all the non-European worlds are a matter not for historians on shared grounds, but for anthropologists on unbalanced standings.

However, nowadays, in times that ought to be post-colonial, the way to Europe must tread and cross all paths from and to other

worlds, from and to Europes and non-Europes outside and inside Europe, everything, including Europe, in the plural. The way to the Europeans entitled to constitutional rights must tread and cross all paths from and to non-European subjects of equal human and thus shared freedoms. These trails are not post-modern, but post-colonial. Please, let us not get confused ourselves. I am not adopting an intellectual fashion, but assuming a historiographical responsibility. European colonialism implied that European rights entailed European powers. The implication still exists if common and shared freedoms are not placed on an equal footing among Europeans and non-Europeans. The same statement must be affirmed referring to, on the one hand, *rights of man*, and, on the other, rights of woman. Otherwise, rights of man are powers over women. We are aware of this by now. History and historiography have something to do with all of that.

Let us not forget that historiography, and not only history itself, can produce performative effects upon the present in some way, be the outcome positive or negative. This is historians' responsibility. For the theory and practice of freedom's law, information and awareness, and not pretensions and legends, about its origins and developments may be the most sound and convenient. In other words, to behave in the world that we, historians or not, have inherited, we should free ourselves through knowledge and consciousness from European and Euroamerican myths and fictions, from traditions and narratives that continue to blind us, such as the copyright on and pedigree of human freedom's culture. History matters. Historiography does too.

Can you be sure that we, European citizens and scholars on the threshold of the 21st century, are able to embrace all humankind when thinking of universal human rights, of person and people, beings and bodies, as subjects of individual and collective liberties? Do we common Europeans realise that this very question is both completely impossible and inappropriate? Humanity cannot be conceived by only a part of it. To face evidence and achieve consciousness, the consciousness that begins to make the difference, history may work and help. I often wonder if we historians do.

I. Sources.

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*, Washington, Government Printing Office, 1909, vol. VII, pp. 3812-3819 (facsimile, Williams S. Hein and Co., 1993) offers an available edition of the 1776 Virginia Constitution. The text is also on the internet, even though this is still a less trustworthy medium for the critical requirements of our historiographical métier: www.yale.edu/lawweb/avalon/states/va05.htm. The address, home of the *Avalon Project* of the Yale Law School, provides a good repertory of texts, including, of course, 1787 US Constitution and its Amendments.

There are facsimiles of both William BLACKSTONE, *Commentaries on the Laws of England*, Oxford 1765-1769, and Emer de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle Appliqués à la conduite et aux affaires des Nations et des Souverains*, Leiden (but Neuchâtel) 1758: Blackstone, University of Chicago Press, 1979; Vattel, Carnegie Institution of Washington, 1916 (and Geneva 1983). In the annexes (for the seminar), there are some photocopied fragments from Blackstone's *Commentaries* (1765, book I, index, chapters 1, 2, 14 and 15) and Vattel's *Droit des Gens* (1758, front page, *preliminaires*, and book I, paragraphs 24, 27, 81, 208 and 209), where my quotations may be found. The photocopies come from first editions due to our interest both in wording and phrasing and in every meaningful sign and trace. There are editions on the internet, Vattel in one of the several English versions since the first in 1759 (1852, printed in 1883): www.yale.edu/lawweb/avalon/blackstone/blacksto.htm. (Blackstone's *Commentaries*); www.concordance.com/vatt.htm. (Vattel's *Law of Nation*). For Thomas Hobbes' *Leviathan* (1651), www.concordance.com/levi.htm. The address, home of *Concordances*, is useful for all kinds of literature.

On the internet you may also find works closely related to the 1776 Virginia Constitution, such as Thomas Jefferson's *Notes on the State of Virginia*, 1781-1782: www.yale.edu/lawweb/avalon/jevifram.htm., and St George Tucker's *Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 1803: www.constitution.org/tb/tb-0000.htm. Although there is a Jefferson site with his writings of all kinds, reproducing the edition by Albert Ellery BERGH, 1907 (www.constitution.org/tj/jeff.htm), I have not been able to find his *Education for a Lawyer* (c. 1767, revised in 1814, when he added the reference to Tucker). It was published by Saul K. PADOVER (ed.), *The Complete Jefferson. Containing his mayor works, published and unpublished, except his letters*, New York, Duell, Sloan and Pearce, 1943, pp. 1043-1047). For James Kent, *Commentaries on American Law*, 1826: www.constitution.org/jk/jk-000.htm. You may add Joseph Story, *Commentaries on the Constitution of the United States with a Preliminary Review of the Constitutional History of the Colonies and States before the adoption of the Constitution*, 1833: www.constitution.org/js/js-000.htm. With browsers, you can check the quotations. The address, home of the *Constitution Society*, is another catering service on the net.

II. References.

II.1. *Early Euroamerican constitutionalism.*

According to my knowledge, up to now, the best historiographical work about the 18th century Euroamerican moment, for our textualist methodical needs, is offered by John Phillip REID. Among his publications, I specially recommend *The Concept of Liberty in the Age of the American Revolution*, Chicago, University of Chicago Press, 1988, and the first volume, *The Authority of Rights*, of his *Constitutional History of the American Revolution*, Madison, University of Wisconsin Press, 1986 (vol. II, *The Authority of Tax*, 1987; vol. III, *The Authority to Legislate*, 1991; vol. IV, *The Authority of Law*, 1993). On this line and for further background on early American constitutionalism, see Shannon C. STIMSON, *The American Revolution of the Law: Anglo-American Jurisprudence before John Marshall*, Princeton, Princeton University Press, 1990; Jack N. RAKOVE, *Original Meanings: Politics and Ideas in the Making of the Constitution*, New York, Alfred A. Knopf, 1996; Marc W. KRUMAN, *Between Authority and Liberty: State Constitution Making in Revolutionary America*, Chapel Hill, University of North Carolina Press, 1997; and Akhil Reed AMAR, *The Bill of Rights: Creation and Reconstruction*, New Haven, Yale University Press, 1998.

For further historiographical and methodological information and reflection, you may resort to my own commentary to this American constitutional literature: *Constitución de Derechos entre América y Europa (Bill of Rights, We the People, Freedom's Law, American Constitution, Constitution of Europe)*, in *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno*, 29, 2000, pp. 87-171. Here I refer to Ronald DWORKIN, *Freedom's Law: The Moral Reading of the American Constitution*, New York, Oxford University Press, 1996, from where I take the expression *freedom's law*.

On the European background of American constitutionalism from a textualist methodological approach (not frequent for constitutional history in continental European historiography), see, in addition to J.P. REID, Richard TUCK, *Natural Rights Theories: Their origin and development*, Cambridge, Cambridge University Press, 1981; James R. STONER Jr., *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism*, Lawrence, University of Kansas Press, 1992; Barbara ARNEIL, *John Locke and America: The Defense of English Colonialism*, Oxford, Clarendon Press, 1996; and my own work, *Happy Constitution: Cultura y lenguas constitucionales*, Madrid, Trotta, 1997. As for European theories on *natural rights*, I prefer Tuck's view rather than later studies, such as Annabel S. BRETT, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*, Cambridge, Cambridge University Press, 1997.

II.2. *Freedom, discrimination, subjection.*

As regards the subjects of freedom or subjection (that is, *subject* both in the sense of being entitled to liberty and being in a position of dependency), possibly the best introduction to the 18th century moment is a collective work on the following period: Willibald STEINMETZ (ed.), *Private Law and Social Inequality in the Industrial Age: Comparing Legal Cultures in Britain, France, Germany, and the United States*, New York, Oxford University Press, 2000. You may find it useful to consult Helmut COING,

Europäisches Privatrecht, I, 1500 bis 1800, and II, 1800 bis 1914, Munich, C.H. Beck, 1985-1989, although, as still usual in legal history, it casts an anachronistic light now on the near past, particularly the 18th and 19th centuries.

Referring to another stage in time and place, because I know of nothing similar focused either on the 18th century Euroamerican constitutional moment or on other phases of the European or American constitutionalisms, I strongly recommend Frederic C. SCHAFFER, *Democracy in Translation: Understanding politics in an unfamiliar culture*, Ithaca, Cornell University Press, 1998 (studying the political interplay among European and non-European languages, French and Wolof for the case). Who is afraid of American non-European languages for constitutional history? Despite my ignorance, as my linguistic knowledge is confined to Europe, I can prove, after field work, that they are badly needed: *Estado pluricultural, orden internacional, ciudadanía postcolonial: Elecciones constitucionales en el Perú*, in *Revista de Estudios Políticos*, 114, 2001, pp. 11-39 (an extended version, adding the European side, will be published in *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno*, 31, 2002).

On specific aspects of freedom's law and cultural inequality in early constitutional history, see Jack P. GREENE (ed.), *The American Revolution: Its Character and Limits*, New York, New York University Press, 1987; Carole PATEMAN, *The Sexual Contract*, Stanford, Stanford University Press, 1988; Robert WILLIAMS Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, New York, Oxford University Press, 1990; Urs BITTERLI, *Die "Wilden" und die "Zivilisierten": Grundzüge einer Geistes- und Kulturgeschichte der europäisch-überseeischen Begegnung* (1976), Munich, C.H. Beck, 1991; Maryanne C. HOROWITZ (ed.), *Race, Gender, and Rank: Early Modern Ideas of Humanity*, Rochester, University of Rochester Press, 1991; Christopher L. TOMLINS, *Law, Labor, and Ideology in the Early American Republic*, Cambridge, Cambridge University Press, 1993; Francis Paul PRUCHA, *American Indian Treaties: The History of a Political Anomaly*, Berkeley, University of California Press, 1994; Margaret R. SOMMERVILLE, *Sex and Subjection: Attitudes to Women in Early-Modern Society*, London, Edward Arnold, 1995; and my own work, *Ama Llunku, Abya Yala: Constituyencia indígena y código ladino por América*, Madrid, Centro de Estudios Políticos y Constitucionales, 2001. For the Virginian case, Woody HOLTON, *Forced Founders: Indians, Debtors, Slaves, and the Making of the American Revolution in Virginia*, Chapel Hill, University of North Carolina Press, 1999.

II.3. *The severance of textualism.*

In order to check specific constitutional textualist approach and legal contextualist methodology, you may see, among the mentioned authors, Akhil R. AMAR, *Our Forgotten Constitution: A Bicentennial Comment*, in *Yale Law Journal*, 97, 1987, pp. 281-298, and *Intratextualism*, in *Harvard Law Review*, 112, 1999, pp. 747-827. Add some collective works less centred on legal context: Anthony PAGDEN (ed.), *The Languages of Political Theory in Early-Modern Europe*, Cambridge, Cambridge University Press, 1987; Terence BALL and J.G.A. POCOCK (eds.), *Conceptual Change and the Constitution*, Lawrence, University Press of Kansas, 1988; T. BALL, James FARR and Russell L. HANSON (eds.), *Political Innovation and Conceptual Change*, Cambridge, Cambridge University Press,

1989 (a volume belonging to the important series *Ideas in Context* that offers examples of *ideas out of context*, beginning precisely with *Constitution*).

On these textualist assumptions, for an outstanding example of the common confusion between liberty contingent on law and law due to liberty, between *liberty* and *freedom* as historical categories, Quentin SKINNER, *Liberty before Liberalism*, Cambridge, Cambridge University Press, 1998. For historiographical context, James TULLY (ed.), *Meaning and Context: Quentin Skinner and his Critics*, Princeton, Princeton University Press, 1988. Under a textualist approach too, you may find it more worthwhile to resort to the entries referring to our issues (such as *Freiheit*, *Herrschaft*, *Stand* or *Verfassung*; no entry for *Individuum*) in Otto BRUNNER, Werner CONZE and Reinhart KOSELLECK (eds.), *Geschichtliche Grundbegriffe: Historisches Lexicon zur politisch-sozialen Sprache in Deutschland*, Stuttgart, Ernst Klett, 1972-1992; fortunately for our Angloamerican moment, it cannot always keep the German-centred focus.

For collecting and checking information on the present diversity of textualist approach, including the so-called linguistic turn, Melvin RICHTER, *The History of Political and Social Concepts: A Critical Introduction*, Oxford, Oxford University Press, 1995; Iain HAMPSTER-MONK, Karin TILMANS and Frank VAN VREE (eds.), *History of Concepts: Comparative Perspectives*, Amsterdam, Amsterdam University Press, 1998. On the same occasion of this paper (the teaching trial for a chair in European History, as we know), Steven Kaplan, now fostering a more direct social history, declared he no longer supports the more radical linguistic stance and cultural access for which he once stood: Dominick LACAPRA and Steven L. KAPLAN (eds.), *Modern European Intellectual History: Reappraisals and New Perspectives*, Ithaca, Cornell University Press, 1982. For the turning point of those years, you may add Quentin SKINNER (ed.), *The Return of Grand Theory in the Human Sciences*, Cambridge, Cambridge University Press, 1985 (chapters on Hans-Georg Gadamer, Jacques Derrida, Michel Foucault, Thomas Kuhn, John Rawls, Jürgen Habermas, Louis Althusser, Claude Lévi-Strauss and “the *Annales* historians”). By then convinced myself, I still think that you cannot study any significant kind of history save through *cultural* history, through wondering radically and continuously about meaning. Wondering is the method. Most historians simply feel free of any concern about the historicity of languages or other semiotics and thus about the diachronic diversity of every single system of human signs.

II.4. For further checks.

You may see text, study and references in my edition of Jean Louis DE LOLME, *Constitución de Inglaterra*, Madrid, Centro de Estudios Constitucionales, 1992. My academic colleague and fellow working group member (HICOES: *Historia Cultural e Institucional del Constitucionalismo en España*), Jesús VALLEJO, has done likewise for the Spanish realm: Duque de ALMODÓVAR, *Constitución de Inglaterra*, Madrid, Centro de Estudios Políticos y Constitucionales, 2000. I do not know of anything similar in the textualist legal mode for 18th century European constitutionalist writing before the French Revolution.

On this line, for early Spanish constitutional and other legal texts, see Carmen MUÑOZ DE BUSTILLO, *Cádiz como impreso*, in *Constitución Política de la Monarquía Española. Promulgada en Cádiz a 19 de Marzo de 1812*, Sevilla, Fundación El Monte,

2000, *Estudios*, vol. II, pp. 7-73; Marta LORENTE, *La Voz del Estado: La publicación de las normas, 1810-1889*, Madrid, Centro de Estudios Políticos y Constitucionales, 2002. Our working group, the aforementioned HICOES, cooperates in a project directed by Horst DIPPEL, *The Rise of Modern Constitutionalism, 1776-1849*, to collect and edit, initially in an electronic format, all the American and European constitutional texts until the mid 19th century (about 800 documents) in their original languages along with English translations and introductions (www.modern-constitutions.de).

For difficulties in the textualist and contextualist modes and ways, add the predicament of our usual underestimation of the Euroamerican moment in connection with the close, but deeply different, Eurocontinental one of the French Revolution and its aftermath. For a single example of historiographical myth in present constitutional context as regards the key point of freedom's subject, *man* or *homme*, you may see Massimo LA TORRE (ed.), *European Citizenship: An Institutional Challenge*, Hague, Kluwer Law International, 1998, pp. 27-50; Michel TROPER, *The Concept of Citizenship in the Period of the French Revolution*. For a telling survey of constitutional exclusions and non-inclusions in the French-revolutionary moment, see Pietro COSTA, *Civitas: Storia della cittadinanza in Europa*, vol. II, *L'età delle rivoluzioni*, Bari, Laterza, 2000.

On politics and *oeconomy* (both the old spelling and the old meaning), you may also want to see my own work in the issue (for further references too): *Tantas Personas como Estados: Por una antropología política de la historia europea*, Madrid, Tecnos, 1986; *Antidora: Antropología católica de la economía moderna*, Milan, Giuffrè, 1991 (*La Grâce du Don: Anthropologie catholique de l'économie moderne*, Paris, Albin Michel, 1996, translation by Jean-Frédéric SCHAUB; preface by Jacques LE GOFF); *Beati Dictum: Derecho de linaje, economía de familia y cultura de orden*, in *Anuario de Historia del Derecho Español*, 63-64, 1993-1994, pp. 7-148 (very abridged version, *A proposito della cultura del lignaggio*, in *Quaderni Storici*, 86, 1994, pp. 335-363), referring to *Bernardus super re familiari gubernanda* (*res-familiaris* as counterpart of *res-publica*), a simple sheet translated into many languages (Leopoldus JANAUSCHEK, ed., *Bibliographia Bernardina ... usque ad finem anni MDCCCXC*, 1891, Hildesheim, Georg Olms, 1959, items 12, 17, 53, 104, 145, 169, 183, 184, 197, 202, 261-263, 290, 318, 331, 335, 348, 354, 356, 369, 376, 377, 393, 397, 466, 479, 530, 540, 697, 799, 881 and 941; further references, *Beati Dictum*, pp. 35-54), the most important work on *oeconomy*, as for social significance, all across early-modern Europe, despite economic history. You may finally add the controversy on *Antidora* or *Grâce du Don* in the first section of the last issue (before the seminar) of *Annales. Histoire, Sciences Sociales*, 59-6, 2001, pp. 1109-1175: *Les économies anciennes*, early-modern economies.

III. Appendix: European process and projects.

At this point, after the seminar, I hope that all of you are wondering about the long and winding ways of European freedom's law that set out from such an adverse launching point as *oeconomical status*. That is precisely the research and teaching matter I offered to the Department of History and Civilisation of the European University Institute. Let me finally expose something regarding this proposal, as I tried to do in my

formal interview with the selection committee, and let me place my performance in this framework of the application for a chair in European History at the Department of History and Civilisation of the European University Institute.

I do not intend to break any confidence if I reject the strange sense of *oeconomical* privacy adopted by the management of the aforesaid committee for a *public* issue such as the selection process in a public institution, this University Institute. We candidates suffered an academic procedure in a European body below the European average as regards minimal transparency and elementary guarantees. Four people were short-listed for the chair: Steven Kaplan, Janet Coleman, Colin Jones and myself. Jones was the selected candidate. I cannot say anything on his behalf, but I may stand for Kaplan and Coleman in relation to our feelings about the ways of the committee. Officially, we do not know anything of each other's research projects and teaching programs because of the secrecy surrounding the whole procedure. Off the record, we exercised our right to inform ourselves, of course. So, you even get private information not to be disclosed. I have also witnessed some public performances intended to be spared to us, the candidates. We were even warned not to attend each other's seminars, a suggestion, so to say, with which I did not comply at all ⁽¹⁾.

I misbehaved then and continue to do so according to the particular rules of the European University Institute. The selection committee was formed, concerning the right to vote, by four professors of the Department, one representative from the students and two external members. Regarding their respective elections, we candidates did not receive any information but the final names that we were to face. Apart

⁽¹⁾ Jones' seminar was not to be missed. Title: *Teeth, Mouths, Smiles, Paris*. He explained how the French Revolution entailed a shift from "close mouth culture" to "open mouth culture". Indeed, he showed it through an amusing set of visual support, from illustrations of dental practice (unwillingly open mouth and bared teeth) up to 18th century portraits (convinced closed mouth, but one that received a single criticism for showing teeth, definitive proof of the implication of the following revolution along with Robespierre's still mouth wide open from a gunshot). In contrast, in accordance with their work, both Kaplan and Coleman's presentations (*The Enlightenment between Opera and Marketplace, Salon and Workplace: Reflections framing a Research Agenda and Pre-modern understandings of property: personal ownership and self-understanding*, respectively) were serious, albeit not pedagogical. Nevertheless, in the light of the outcome and in discordance, as we shall see, with the calling for the chair, matters such as the hard history of social culture or of political thought do not seem to be needed in the Department of History and Civilisation of the European University Institute, let alone legal and constitutional history. At this point, I even wonder whether the last reflection of my paper makes any sense for present and future historians in this European Institute: "To face evidence and achieve consciousness, the consciousness that begins to make the difference, history may work and help. I often wonder if we historians do". For both past and present, for the issue of this appendix too, wondering is certainly the method from which historians usually feel free.

influences, it would be useless. There is no prevision of challenge to members of the committee or of any other preliminary or posterior formal claim by the candidates. Even once you have been short-listed, even then, no right or remedy is granted. On my own and sole responsibility, I may always make use of my freedom of expression. At least you, kind reader, let me carry on and complete my report.

As for my application, I conceived the seminar as the opening gate into both the research project and teaching programs that I was offering. The former bore the following title: *Constitutional literature as performative culture, 18th-20th centuries. Europe and beyond*. Before the seminar, this project might have needed explanation (2). Afterwards, I do not believe it does. All of you know quite well by now what I am talking about when I say “constitutional”, “performative” or even “beyond”, beyond Europe. Still, let me add something referring to the reason of the proposal precisely to the European Institute and History Department.

Here you, Institute and Department, have a fine Babel of languages of which you do not seem to take sufficient advantage. You even tend to impoverish such a cultural richness confining yourself to English or French, although, theoretically, the working tongues in this European body are the eleven state languages of the European Union. And here your concern is not bureaucracy, but science. You may have students mastering not only those state languages, but also others that are not official here, from *Euskera* or Basque to *Saami* or Lapp along with some of which I do not even know the proper names. You may even receive non-European students with knowledge of non-European languages. That is an excellent milieu for collective research on the performative force of political conceptions through the extreme variety of European and non-European languages. To give another example, if you are not a native German, it is extremely difficult to study the political usages of the several *Germans* in the 18th and 19th centuries. Proposing and supervising theses in these fields, we researchers and professors could reach where I cannot dare to tread by myself, with only my personal work or with the sole assistance of students in a state University. When I wrote *Beati Dictum*, I could not do a good comparative job among all

(2) A written explanation had been required, so I had complied: “Constitutionalism is a cultural artefact. It is not only a matter of law and institutions. Constitutional culture is the discourse of the individual as subject of rights prior to the construction of the State as subject of powers. It is about the conception of the human being as social (i.e. not theological) stuff, as well as the translation of this premise into the legal and institutional realms. *Constitutionalism* is culture, culture that plays a normative role prior to the very norms and to the Constitution itself. The current research project focuses precisely on constitutional literature as performative culture; an issue of interest not only for past history, but further for our contemporary understanding and practice of constitutionalism...”, et cetera. Now we know.

the versions of the most important work on *oeconomy* all across early-modern Europe (*Bernardus super re familiari gubernanda*) from Swedish to Catalan and including many other tongues ⁽³⁾.

In my formal interview with the selection committee, I was interrogated about the appeal of my offer to the students in the Institute. Do I think that a demand exists in a Department of History for this kind of matter? Of course, I do not know, but some reflection perhaps is needed. First of all, I must say that I cannot jump over my shadow. I offer what I know or what I am able to know through my research. After more than thirty years in the works, I may have some confidence in the matter I choose and in the approach I follow, that is, in legal and constitutional issues through a linguistic and cultural turn. So I dare to say that if you think that there is not any prior interest for such matter and method in the Department of History and Civilisation of the European University Institute, it may be a problem for you rather than for me. You present professors and researchers ought to feel worried.

But I share your concern, of course. If I were to become professor here, the wanting interest also would be a serious problem for me. Anyway, as I said to you in our interview, I assume as a part of my work the challenge to create an interest where there is none and to foster it as best I can. As a professor, in the teaching and research market, I do not wish to be a consumers' client, but a creator of demand. I do not behave as a salesman in the students' store. So, with this responsibility in mind, I also tried to specify my proposal for courses of history before the selection committee.

I proposed the following menu as main courses for a choice: *Family and Republic: Oeconomical and political powers (16th-19th centuries)*; *Freedom's culture and social inequalities (17th-19th centuries)*; *Juries, judges and citizenship (17th-20th centuries)* or *Constitutionalism and*

⁽³⁾ After publishing *Beati Dictum*, I received news from Spanish archives about non-catalogued versions: *Apostilla al Beati Dictum: Cuatro traducciones catalanas, una aragonesa, otra más castellana y ninguna portuguesa*, in *Anuario de Historia del Derecho Español*, 66, 1996, pp. 927-931. Can you imagine the difference that a net reaching out from the fine Babel of the European University Institute could make? Regarding the *Beati Dictum*, let me refer to an elementary as much as disregarded methodological point that I exposed in the interview. The documentary falsehood (*Bernardus super re familiari gubernanda* was a fake) is not a criterion to ignore sources, specially when the credit of their content was oral rather than written, all of which may cast doubts on some of the conventional historiographical methodology: *Blasón de Bartolo y Baldón de Valla*, in *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno*, 25, 1996, pp. 573-616. In short, we historians must make use of the methodology belonging to the times we study, be it legal or theological, and not to any of present social sciences or approaches, be they Gadamerian or Foucaultian. This is an aspect of the anthropological way that I am going to explain, or only to remember if you are acquainted with my work, just below. My wish to become Blackstone the 18th century lawyer and not only his reader the 21st century historian is not a joke. The lenses of historiographical convention are not the eyes of historical meaning.

colonialism (18^e-20th centuries). At this point, after the seminar, they need no introduction. I also suggested the possibility of gathering together all these issues as a mixed recipe in a single course on cultural and institutional history of European and American constitutionalisms in the plural but related: *Comparative Constitutional History*. In addition, as appetisers suggestions I offered more instrumental or introductory kinds of courses such as this twin couple: *How law works in Euro-American modern history: Instruction manual* and *Who is afraid of political thought? Try the therapy of legal history*.

In my meeting with the committee, I insisted on the idea that the history I am advocating is not so much a part to be added to other partial histories as a way of access to plain history, the broad social history that does not ignore constitutive and structural moments. I am dealing with both the historicity of culture and the making of history through culture. The past is also a foreign or even an alien country. None of us has ever set foot in such a remote place. And we never will. Archives are not preterite times. Neither are libraries, of course. For want of a time machine, I try to research and teach like an anthropologist who is supposed to learn and handle others' languages and cultures in order to understand and explain alien societies (4).

(4) My initial interest in legal history was twofold: analysing the inner working of legal practices, such as primogeniture, and understanding the social incidences and economical functions of legal institutions, such as entailed property in consequence of primogeniture and beyond (*Mayorazgo: Propiedad feudal en Castilla, 1369-1836*, 1974, Madrid, Siglo XXI, 1989). My motto was *Law and Society* or *Law in Society*. But I came to realise that my way of connecting both elements was rather mechanical and not precisely historical. I did not pay sufficient attention to the cultural moment of both legal mechanisms and social dynamics. So, I shifted to *Law in Society through Culture* and put the stress upon the medium, that is, on legal or jurisprudential culture (for presentations, *The Jurisprudence on Usury as a social paradigm in the history of Europe*, in Erk Volkmar HEYEN, ed., *Historische Soziologie der Rechtswissenschaft*, Frankfurt a.M., Vittorio Klostermann, 1986, pp. 23-36; *Úsura: Del uso económico de la religión en la historia*, Madrid, Tecnos, 1985; *Tantas Personas como Estados*, cited above). So, I undertook the task of the reconstruction of juridical thought in early modern Europe as a social transitive mentality in the anthropological way, in which anthropologists study alien cultures in order to access to alien societies, to each society through its own culture. I tested the approach in some of the working groups for the *Vergleichende Untersuchungen zur kontinentaleuropäischen und anglo-amerikanischen Rechtsgeschichte* founded by the late Helmut COING (H. COING and Knut Wolfgang NÖRR, eds., *Englische und kontinentale Rechtsgeschichte: Ein Forschungsprojekt*, Berlin, Duncker und Humblot, 1985; Lloyd BONFIELD, ed., *Marriage, Property, Succession*, Berlin, Duncker und Humblot, 1992, pp. 215-254; Vito PIERGIOVANNI, ed., *The Growth of the Bank as Institution and the Development of Money-Business Law*, Berlin, Duncker und Humblot, 1993, pp. 191-224), but my cultural studies are mostly published in the *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno* and the annexed *Biblioteca* founded and edited by Paolo GROSSI. However, I was somehow still unsatisfied. Like anthropologists, I also came to verify that law was not enough for access to society through culture. I realised that historical European juridical culture was not a round whole even in its legal

For definitive determination of my teaching offer, I told the selection committee that, of course, as a fresh professor there and an old one elsewhere, I would rely on them, on both faculty and alumni or researchers in the Department of History and Civilisation of the European University Institute. There is useful information on the internet from both sides (from the former: www.iue.it/HEC/teaching.html; from the latter, more casual and *alternative*: www.iue.it/Personal/Researchers/studrep/ap.html), but you need direct and lively academic communication to settle and program courses and thesis, your teaching and supervising work.

Raffaele Romanelli, Head of the Department and president of the committee, asked me, in the formal interview, about my concern with the history of the European Communities and Union. Could I deal with this matter if I became finally professor there? That is a good point. Otherwise, what is the use of a specifically European University Institute, an institution sustained by European citizens? That question on the history of the Union is also sensitive right there. I was aware that an authorised specialist belongs to the same department. Here he taught for three years and now he is back for a second period. I refer to Alan Milward, the economic historian.

The approach is quite known: Alan S. MILWARD, Frances M.B.

working. So I tackled other cultural forces historically relevant to social structure, such as religious scriptures and oral traditions on their own (*Beati Dictum* is posterior to *Antidora* or *Grâce du Don*, both cited above; about the turning point in historiographical perspective, let me remit you to *Religión y capitalismo*, in *Áreas: Geografía, Historia, Economía, Sociología y Antropología*, 10, 1989, *Debates recientes de historia económica*, pp. 17-24). I researched on and on in the direction of cultural rooting and cultural working of past law. I have dealt with past law, past religion, past economy, past culture, past society, *past* here meaning European early modern age. Now, to be honest, I must confess that my current research on constitutionalism is something like projecting my achievements for pre-constitutional culture to a following period, but a different system. As a matter of fact, I came to constitutional history for political reasons. As the Spanish dictatorship was coming to an end in the second half of the 70s, law schools were in need of constitutional training. Encouraged by the late FRANCISCO TOMÁS Y VALIENTE (when you are not a servant, you can recognise masters: *Tomás y Valiente: Una biografía intelectual*, Milan, Giuffrè, 1996, *Pagina introduttiva* by Paolo GROSSI), I contributed with handbooks and courses on constitutional history without especial methodological concern on my part. As for me, teaching preceded research, which is the wrong way. In any case, as a citizen and not only as a scholar, I have come to be interested in constitutional culture as a way of access to constitutional institutions and practice, and also to plain society for Europe and America (*Happy Constitution* and *Ama Llunku*, cited above). Although there may be a common thread all along my more than thirty working years, as always dealing with *Law in Society*, I would rather define my present stance in a new way so to stress both objective and method. My current motto might be *Back to Grand Theory through Petty Theories*, back to macro-cultural convictions through micro-cultural indictments. That is what I offered and what I am doing. The pudding was there to be tasted, specially if one could read Spanish, which, although a secret detail, the majority of the selection committee could not.

LYNCH, Federico ROMERO, Ruggero RANIERI and Vibeke SORENSEN, *The Frontier of National Sovereignty: History and Theory, 1945-1992*, London, Routledge, 1993. Here you find a history of the European Communities reduced to the economical interests of the European States, lacking any significant trace of the historical force of constitutional and legal culture, namely freedom's law, for the current construction of Europe. Milward's bias is also well known. For reliable criticism, you may now resort to Michael BURGESS, *Federalism and European Union: The Building of Europe, 1950-2000*, London, Routledge, 2000.

What is the use of a chair in European History at the European History Department of the European University Institute if the History of the European Union you offer is Milward's history, so to say, a kind of history reduced to economic interests of bodies politic, states as nations, regarding Europe? If so, states themselves are enough. Of course, the problem is not the presence, even twice, of such an accurate scholar in history of economy, not of *oeconomy*, as Alan Milward. Nobody in the academic world could dare to think so, of course ⁽⁵⁾. The problem may be that hardly anybody in the European Institute seems to appreciate the additional or even primordial need of other kinds of European history such as cultural in general and constitutional in particular. Cultural matters, including *oeconomy*, are taken into account as mere accessories and not as necessary means for history. I know there are exceptions. They are precisely exceptional there, in the Department of History of the European University Institute.

To answer Romanelli's question, I reaffirmed my concern about the history of the European Union from the cultural and constitutional perspective, as the research project had tried to explain ⁽⁶⁾. Therefore,

⁽⁵⁾ I would not feel at ease in a History Department as the only historian for early modern Europe and the unique *oeconomist*, as this kind of double exception among the faculty. Check, for criticism, the cited section on *Les économies anciennes* in *Annales*, 59-6, 2001 (add Renata AGO, *Lecture rispettose e descrizioni pertinenti*, in *Quaderni Storici*, 100, 1999, pp. 105-120). As my cultural approach is controversial, I would rather prefer, at least for the sake of the students economy, to be escorted even by economic historians. In law schools, you get sufficiently used to the sort of people who are not concerned with anything beyond their own myopic professional matter. Even for legal history, you rarely find people paying attention to anything but law in the present acceptance and so with anachronistic implications regarding past times. Janet Coleman, who teaches in the Government Department of the London School of Economics, stressed this criticism against current economic and political history in her research and teaching projects for the chair in European History. Alan Milward proceeds precisely from the same centre, the London School of Economics.

⁽⁶⁾ Prudently, I had not made any reference to the point in my teaching programs, but I had done so in the written presentation of my research project: "Last but not least, the distinct way we, Europeans, understand the origin, the evolution and the horizon of constitutionalism (its past, present and future) has an unambiguous effect on the form we conceive the cultural, legal and political history of the integration of Europe (up to the very *événement* of the Union) from a historical perspective always marked by the

in the interview, I referred expressly to my deep disagreement with Milward's approach and I showed my disposal to the encounter in the teaching field. I asked the committee if they thought that the eventual shock would be exciting for the students or researchers in the Institute. I know that sometimes you have to resign yourself for the sake of academic peace, but I do not consider the simple juxtaposition of research and teaching projects of the several professors to be the best way to programme a postgraduate department. I am not so naive to think that, in the present case, the outcome of the selection has much to do either with the personal interview or with the teaching trials and offers, and still less with the respective background, but I must recognise that it was a very telling and even touchy form of answering.

Fortunately, there are indeed exceptions. You can detect signs of concern inside the very Department of History and Civilisation of the European University Institute. On 19 July 2001, the letter I received from the Head of the Department inviting me to apply enclosed a calling that described a profile for the chair: "The historian appointed should be someone who is capable of looking at developments in different countries and of adopting an innovative, comparative approach to the study of European History (...), a historian who is concerned with core issues in terms of European development and European identity, who is capable of relating historical concerns and methods to current issues and preoccupations, and who is at ease with an interdisciplinary approach to history". As the set of references goes beyond specialisation, past times and Europe (7), here we have a good

performative range. Similar to the process undergone by European States, the European Union does found itself neither exclusively nor primarily by means of its own explicit determinations, i.e. through legal texts and political processes. The material constitution-making of the Union, more evolved up to now than the formal one, is also the result of the cumulative and spill-over effect of a number of cultural evolutions, not always conscious, and hence not always controlled by current law and politics. We, Europeans, are in need of research, knowledge and conscience of the performative dimensions of our past and present cultures in the whole (*sic*). The normative set is neither the only nor the first one (Edward W. SAID, *Culture and Imperialism*, New York, Alfred A. Knopf, 1993)".

(7) I must concede that it is really hard to compare heterogeneous works, even counting on terms of reference, but you are supposed to do so sometimes. Now, when the case is closed and my appeal is to the public, this may be your task, kind reader, rather than mine, concerned author, one-man-jury and fourth-share-party, a fourth at least because I do not know how many people applied and were not short-listed. If you have arrived at this note, I dare to suggest to you, kind accomplice, a simple comparison, from the viewpoint of the terms of reference, between two recent collective volumes: Colin JONES and DOR WAHRMAN (eds.), *The Age of Cultural Revolutions: Britain and France, 1750-1820*, Berkeley, University of California Press, 2002; Pietro COSTA and Danilo ZOLO (eds.), *Lo Stato di diritto: Storia, teoria, critica*, Milan, Feltrinelli, 2002, including my contribution, pp. 537-565: *Stato di diritto, diritti collettivi e presenza indigena in America*, English translation forthcoming. As I am not taking your verdict for

identikit of what the Department is still in need of. Through the actual misruled and mismanaged procedures, it may be really hard to achieve. Like your image on the mirror, like your shadow on the floor, unchecked cooptation tends at the very least to reproduce current profile.

What is the use of announcing such sound criteria if you, Department and Institute, do not feel bound by them? You attract people that you are going to defraud. Let alone the outcome, you clearly do not seem to comply with your own guidelines from initial steps such as the choice of the external members of the selection committee. If you had, you would have at least taken into account linguistic skills to appreciate the work of all the candidates. For us candidates even the short-list was officially an encrypted issue until the schedule for the seminars was published a few days before. On seeing it along with your calling, I made a guess and failed completely. You seemed to be searching for something that you were lacking, such as history of political thought and culture, and not for anything lighter ⁽⁸⁾. If it was otherwise, the failure is on the side of your procedures. I know that for selection, even good Universities, specially non-public, follow this kind of *private* practice, but we are talking about the postgraduate centre of the

granted and my appeal is *to heaven*, as Locke would say, I insist on welcoming electronic comments: clavero@us.es.

⁽⁸⁾ Let us say, to simplify, that, on the threshold of the 21st century, all of us are post-modern and, to keep simplifying, that post-modernism is a move from class and economy to culture and analysis. The big problem comes when, to become a genuine post-modernist, you make the latter a substitute for the former, that is, when you forget about classes and needs in order to look at peoples and sexes. Anti-post-modernism, another post-modern way, follows you willingly. Then, you suffer easy criticism against setting ethnics, gender and multiculturalism where proletariat, revolution and socialism were and have now been lost. Critics presume the substitution together with supporters, the true post-modernist. But what is the use of alternative and choice? I mean that you need to be neither a loser nor a believer to appreciate cultural moments in human agencies and structures. You place, for instance, constitutive law where episodic politics reigned. On the contrary, genuine post-modernism put, for example, smiles and teeth where class and economy were. Of course, I do not think that the move from socialism to culturalism describes either the whole set or the mainstream of historiographical research today, but it is the hard trend to which I belong. Nowadays, maybe, we are in a soft-core season not only for historiography. Let us go legal and take a look at the 2000 European Charter of Fundamental Rights (www.europarl.eu.int/charter/default-en.htm): “The Union shall respect the cultural, religious and linguistic diversity” (art. 22). This is all about cultural rights in the plural. So, with that light phrasing, the European Union does not recognise any cultural right to non-European people even inside Europe. In order to compare, take a look also at the 1966 United Nations Covenant on Civil and Political Rights (www.unhchr.ch/html/menu3/b/a-ccpr.htm): “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language” (art. 27). No doubt the present European legal scenario is more fitting for light social sciences, including historiography.

European Union. Please be aware, sensitive and responsible. You are the European University Institute Department of History and Civilisation.

No wonder, so far, that you are not a regular partner, let alone the centre, for European doctorates among other Universities. The European University Institute is certainly a good case to check the principle of subsidiarity as a basic rule of the European Union ⁽⁹⁾. What is the use of a European University if older Universities can do the job better, even for post-graduation, by sharing programs, organising nets, exchanging both students and professors, and therefore receiving European funds? So the present practice goes.

Obviously, the two roads may address the same objective. Of course, they are not uncongenial. But you, the European University Institute, are the part that must still find its proper place. An organ neither creates function nor assures reproduction. Human agency does so. It is up to you. As a fine Babel, not as an Anglo-French centre, you could construct your room with views. You are in need of a lower and a higher profile, of both simultaneously. You should be more humble and more ambitious; that is, on the one hand, more subsidiary and well disposed; on the other, more open and hard working. Whatsoever the sum of your personal credits may add up to, you have an authority to gain and to maintain as a faculty and as an institution. You need to be more demanding and more transparent. That is free advice from a disappointed candidate, although *persona grata*. Consider my concern *grâce du don* or even *antidora*, counter-gift. It is a presentation and a present with due gratitude, which is the meaning of the Greek word *antidora* (Tony Molho nods) ⁽¹⁰⁾.

⁽⁹⁾ European Charter of Fundamental Rights: "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers" (art. 51.1). This is not the occasion to discuss either the dubious normative nature of the European Charter or the particular belonging and complex embedding of the European University Institute in the European Union. A course on *Legal and Constitutional History of Europe from Communities to Union* in the History Department of the European University Institute might have offered the chance. There is bibliographical support to begin with, of course. To the cited *Building of Europe* by Michael BURGESS, add mainly a collection of papers of a former professor of the neighbouring Law Department, here in the same facility, the Villa Schifanoia, of the European University Institute: J.H.H. WEILER, *The Constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration*, Cambridge, Cambridge University Press, 1999.

⁽¹⁰⁾ Gratitude is willingly due to faculty, researchers and staff of the Department of History of the European University Institute not only for the twofold invitation to apply and lecture. In such a historiographical milieu lacking legal-historical training and even prejudiced against the interest of strict legal culture both for historians and for Europe, the colloquium in the seminar and the subsequent interview with the selection

Among encryptions and secrecies, looseness and opacity, pride and prejudice, you have the reasons why I referred to the contentious issue of lacking provisions for challenge and other remedies, including manners ⁽¹¹⁾. You need the cooperation of outsiders to control (in the proper constitutional acceptance) your own actions. It is a matter of both candidates' rights and Institutes' checks, and so of common responsibility for individuals and bodies. If not, how can you, a body, be confident and sure of the fairness of your own procedures and decisions? How can you prevent the appropriation of positions or *economical status* with modern spelling and post-modern understanding?

"In whose hands are the reins of government to be entrusted? To this the general answer is easy", we know Blackstone's insufficient question and useless reply. If sometimes we seem to keep in touch with early modernity, with bad old Enlightenment, it is due to our faults and not to the merits of all the former ⁽¹²⁾. After my post-modern experi-

committee were heedful and concerned. For this extended version of the whole paper, including sources, references and appendix, I benefit from those comments and from external readers. Allow me to name Julius Kirshner, Horst Dippel, Tony Molho, Rada Ivekovic, Txema Portillo and Janet Coleman.

⁽¹¹⁾ Personal messages from Steven Kaplan, Cornell University, 8 March 2002: "I explicitly requested to attend the sessions at Florence. I met with a surprising but emphatic rejection. I found the (paternalistic? bureaucratic? myopic?) quarantine detestable and disappointing. In the name of intellectual sociability and civility as well as transparency..."; and from Janet Coleman, London School of Economics, 11 March 2002: "The problem is not only the lack of academic transparency and a lack of intellectual rigour concerning what ought to be taught to European postgraduates...". Messages from Jean Mény, President of the European University Institute, 5 March 2002: "Allow me not to react to your comments on the outcome. As a member [of the selection committee] with voice but no vote, I feel that it would not be appropriate for me to do so"; and from Raffaele Romanelli, Head of the Department of History and Civilisation and president of the committee, 6 March 2002: "If I were a candidate, I would never distribute my own comments and my personal ranking after having attended the seminars of the others (having being the only one in doing so)". Message disseminating news from an anonymous source, 24 April 2002: "The Committee of Professors at EUJ/Florence last week rejected the nomination of Prof. Colin Jones to the Chair in the Department of European History and Civilization". On my part, I must confess the effective dissemination of an early version of this appendix via e-mail.

⁽¹²⁾ I am not even sure whether an ingenuous reference to the *appeal to heaven* "as Locke would say" (in the second *Treatise of Government*, 1690: www.constitution.org/jl/2ndtreat.htm.) could generate and overlap some cultural complicity contrary to my own approach. And what of the case of the religious background of expressions such as *limbo* or *Babel* that I have also used? Neither in English nor in Spanish do I intend to exclusively address people at ease with such loose language as we are accustomed to. Indigenous, Afro-American and other non-European citizens may feel offended every time that constitutionalist discourse still resorts to John Locke as an intellectual authority. The racist legal approach of *Law of Nations* or *Droits des Gens*, such as Vattel's, came quite directly from him (B. ARNEIL, *John Locke and America*, cited above and in the written references for the seminar). "Don't you consider *liberal theory*

ence in the European University Institute, I feel worried, offended and ashamed not only as a European historian, but mainly as a European citizen. Relief and reward are my work and my liberty, that is, our free academy and our freedom's law.

from John Locke onwards an important historical source of constitutionalism?" is a question addressed to me, with emphasis, in the colloquium. Of course, the former, John Locke, was also a main partner, along with Thomas Hobbes, for the latter, Emer de Vattel. Both of them were con-text, and not only pre-text, for the Euroamerican constitutional moment of the 18th century. In fact, I use the good live editions of Cambridge University Press by Peter LASLETT (Locke's *Treatises of Government*, 1960) and Richard TUCK (Hobbes' *Leviathan*, 1996). For both the not so liberal stemming and the wounded feeling, you, my kind reader and accomplice, may check Robert 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. As for myself, a male white European citizen, I am not concerned with impossible correction on our part, but with plausible respect towards others.