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The Legal Education of Thomas Jefferson

Relatore ***Dottorando***

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Abstract

THE LEGAL EDUCATION OF THOMAS JEFFERSON

Thomas Jefferson's legal education offers a unique insight into the authoritative foundations of modern constitutionalism and sheds light on the revolutionary effort to digest American political experience according to the scientific legacy of Western jurisprudence.

Much attention has been dedicated by contemporary literature to the sources of Jefferson's thought. However, the interpretations offered over the past fifty years have told us more about Jefferson's political alignment, than of his comprehensive engagement with the many strands and several authorities the Western legal tradition.

The dissertation offers a study of Jefferson's engagement with European jurisprudence. It tries, in particular, to connect Jefferson's constitutionalism with medieval and early modern authorities addressing questions of sovereignty and religious freedom. These trans-Atlantic connections point equally to Common Law sources, as well to Continental Romano-

Canonical jurisprudence and challenge, at the same time, the very distinction between the two traditions.

In selecting the sources, preference has been given to those that belonged to Jefferson's personal library. And, amongst these, particular attention has been dedicated to the ones that bear Jefferson's annotations or inscriptions.

The Introduction presents Jefferson's copy of the foundational treatise on modern public law: Jean Bodin's *Les Six Livres de la Republique*. Although Jefferson's engagement with Bodin constitutes one of the main themes of the entire dissertation, the Introduction focuses mostly on the markings inscribed by Jefferson in his copy of the *Republique* and suggests that Jefferson may have been drawn to this work as it addressed the nature of power and of its constitutional limitations beyond any contingent concern.

The dissertation's first part is then dedicated to the exploration of Jefferson's doctrine on sovereignty. It assumes, as its starting point, Jefferson's "Bartolist" doctrine on tyranny. The first chapter traces the development of this doctrine from the Middle Ages to Modernity. It also evaluates the force of its various arguments in Jefferson's own historical understanding of the conditions that defined the struggle for independence as the rational outcome of a legal process. The second chapter investigates, instead, the legal titles placed by Jefferson at the origins of the Americans' lawful acquisition of power – expatriation, conquest, and citizenship – and their connection to the European jurisprudence on the *iura naturalia*. The third

chapter closes the first part of the dissertation with an examination of Jefferson's later reflections on the exercise of power. It focuses, in particular, on a two distinct groups of letters, dedicated to the independent exercise of sovereign power by each living generation, according to a Bodinian understanding of sovereignty, and to the constitutional relevance of intermediate bodies, maintained by Jefferson in keeping with Montesquieu.

The second part of the dissertation is dedicated to religious freedom. The fourth chapter provides an examination of Jefferson's participation in the "Grotian moment" and illustrates his understanding of religion as the naturalized foundation of morality and jurisprudence. Moreover, it traces the enduring relevance of the distinction between spiritual and temporal jurisdictions within his thought. The fifth and final chapter, instead, focuses on Jefferson's integrative jurisprudence and insists that the multiple dimensions of law remained a fundamental feature of Jefferson's legal persuasion, as he strived to substantiate the checks on power through his continuous engagement with the legacy of Western jurisprudence.

Introduction

A FEW OBSERVATIONS ON THOMAS JEFFERSON'S COPY OF BODIN'S *LES SIX LIVRES DE LA REPUBLIQUE*

The only exact knowledge there is, said Anatole France, is the knowledge of the date of publication and the format of books.

Walter Benjamin, Unpacking my Library

Among the many books belonging to Jefferson still treasured at the Library of Congress is a copy of Jean Bodin's *Les Six Livres de la Republique* edited in Paris in 1580 by Jacques du Puys ([1]). The volume in *octavo* is well preserved and bears the

[1] Jean BODIN, *Les Six Livres de la Republique*, a Paris: Chez Iacques du Puys, 1580, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C. A review of the ancient editions of the *Republique* is provided in Roland CRAHAY, Marie-Thérèse ISAAC, Marie-Thérèse LENGER, *Bibliographie critique des éditions anciennes de Jean Bodin*, Académie Royale de Belgique, Brussels, 1992. The 1580 edition is examined on pp. 117-119. For the *Republique*'s placement in Jefferson's catalogues see Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. III, The Library of Congress, Washington D.C., 1953, p. 24; as well as James GILREATH and Douglas L. WILSON, (eds.), *Thomas Jefferson's Library: A Catalogue With Entries in His Own Order*, Library of Congress, Washington, D.C., 1989, p. 80.

characteristic ownership markings that Jefferson inscribed in most of his books: the dotted initials *t.* and *i.*, recorded respectively at signatures *i* (p. 129) and *t* (p. 209) of the volume ([2]). In addition to these discrete ownership markings, Jefferson's copy of the *Republique* bears three more sets of markings, which are all inscribed - with only two exceptions (on pp. 87 and 976) - in the margins of the text or in the margins of the lateral notes. These additional markings are made by short vertical dashes or long undulated vertical lines written in cuttlefish ink and by bookstand brackets written in pencil instead. The inconsistency of the markings and the difference in the *medium* employed to record them could suggest that more than one reader highlighted the *Republique* or that the same reader marked the volume over an extended period of time. Whether such reader could have been Jefferson is a question still open to speculation.

Although Jefferson did not typically underline or annotate his books, marginal markings and notations do occasionally appear and while some have almost certainly been inscribed by previous owners, occasional borrowers, or perhaps subsequent readers, there are others which are commonly recognized as

[2] The page number is erroneously printed as 209, while it should be 289. For a detailed description of Jefferson's ownership markings see James A. BEAR, Jr., *Thomas Jefferson's Book-Marks*, Charlottesville, 1958, re-issued in 1993; Douglas L. WILSON, *Jefferson's Books*, Monticello Monograph Series, Monticello, 1996, p. 47; and Armand London FELL, *Origins of Legislative Sovereignty and Legislative State*, vol. VI, *American Tradition and Innovation with Contemporary Import and Foreground*, Book 1, *Foundations (to Early 19th Century)*, Praeger, Westport, 2004, p. 90.

being his own ([3]). No such consensus has yet been reached on the markings inscribed in Jefferson's copy of the *Republique*. Therefore, scrutiny of the highlighted passages in Bodin's monumental treatise on sovereignty offers the opportunity not only to investigate the "authorship" of these markings, but also to assess just how closely did Jefferson actually read Bodin's masterpiece. Moreover, it provides the opportunity to situate Jefferson within the long arch of the Western legal tradition and investigate his intellectual engagment with its modern authorities ([4]).

The first set of markings inscribed in the *Republique* may be found in book one. Here the marginal dashes are well over one hundred and, although they highlight several different passages throughout the entire ten chapters of the first book, they appear

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[3] See Francis W. HIRST, *Life and Letters of Thomas Jefferson*, Macmillan, New York, 1926, pp. 508-513; as well as Mark DIMUNATION, '*The Whole of Recorded Knowledge': Jefferson as Collector and Reader*, in Robert C. BARON and Conrad EDICK WRIGHT, (eds.), *The Libraries, Leadership, and Legacy of John Adams and Thomas Jefferson*, Fulcrum Publishing, Golden (Colorado), 2010, p. 37.

[4] The revolutions of the Western legal tradition are at the heart of Harold Berman's historiography. Their fullest account is presented in Harold J. Harold J. BERMAN, *Law and Revolution. The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge and London, 1983; and in ID., *Law and Revolution, II. The Impact of the Protestant Reformations on the Western Legal Tradition*, Harvard University Press, Cambridge and London, 2003. For a correlation between Berman's legal historiography and the legacy of the Historical School of Law see Gerhard DILCHER, *The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization*, in *Rechtsgeschichte, Legal History*, vol. 24, 2016, pp. 20-72.

to be longer and most frequent in chapters five (on slavery), six (on citizenship), and eight (on sovereignty) ([5]).

As noted in a recent study, «the texture of these marks does not [always] seem to match the quality of Jefferson's initials in the signature inscriptions», the latter being rather thinner than the former. However, «the unobtrusive careful placement of the vertical lines of short dashes in the margins of *Republique* I» (placed «*in lieu* of underlinings, so as not to mar or clutter the book and its text») does bear a certain similarity to the discrete ownership markings inscribed by Jefferson in so many of his books ([6]).

The second set of markings appears only on p. 290 and highlights the comparison between monarchy and tyranny, described by Bodin in the fourth chapter of the *Republique*'s second book, entitled *De la Monarchie Tyrannique*.

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[5] Many of the topical passages in the first book of Bodin's treatise are singled out by the vertical dashes, however the markings highlight more often then not historical *exempla* chosen by Bodin to describe his theoretical claims, rather than the abstract enunciation of the claims themselves. This is consistent with Jefferson's commonplacing practice. As noted by Douglas Wilson, Jefferson «rarely content[ed] himself with copying out the most celebrated passages from a work and he often ignor[ed] what [was] most characteristic». See Douglas L. WILSON, *Introduction*, in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, edited by Douglas L. Wilson, Princeton University Press, Princeton, 1989, pp. 13-14. It is also consistent with Jefferson's general mistrust of abstractions. «All theory must yield to experience» he wrote to James Maury on the 16 June 1815. See *The Papers of Thomas Jefferson,* Retirement series, vol. 8, *October 1814 to August 1815*, edited by J. Jefferson Looney *et al*., Princeton University Press, Princeton, 2011, p. 544.

[6] Armand London FELL, *Origins of Legislative Sovereignty and Legislative State*, vol. VI, *American Tradition and Innovation with Contemporary Import and Foreground*, Book 1, *Foundations (to Early 19th Century)*, cit., pp. 91-92.

The third set of markings may be found, instead, in the seventh chapter of the third book, entitled *Des Corps & College, Estats, & Communautez*. These penciled brackets are relatively few and signal out about six different passages ([7]).

On p. 499 of the same seventh chapter of the third book there is also a cross, inscribed in pencil, in correspondence to the passage: «*Donc pour persuader ceste question, s'il est bon d'auoir des estats, colleges & communautés, & si la Republique s'en peut passer, on peut dire, à mon aduis, qu'il n'y a rien meilleur pour maintenir les estates populaires, & ruiner les tyrannies* […]» ([8]).

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[7] It is worth noting that, although pencils seem to have been commonly used in his time, Jefferson himself appears to have preferred writing and drawing in ink, at least until 1784, when his drawing habits changed. In fact, «[u]ntil his arrival in France in 1784, ink was Jefferson's accustomed medium for his designs. There is not a single authenticated use of lead pencil by him before this time. Pencil notes indeed occur on a few drawings which were in his possession and even on one or two of his own drawings from this period, but in every case it is obvious that they are from the hands of other men. As pencil was thus apparently common among the artisans of Virginia, Jefferson's failure to make use of it must have been out of choice. […] Although after Jefferson took up his residence in Europe he continued to employ ink for certain drawings, he henceforth preferred to work in pencil». See Fiske KIMBALL, *Thomas Jefferson Architect*, Riverside Press, Cambridge, 1916, p. 105. If Kimball's observations could be applied also to the handwritten markings in Jefferson's copy of the *Republique*, than it could be argued by analogy that the pencil markings in the third book might have been inscribed after the ink ones in the first. This would seem to be consistent with the content of the passages highlighted, the ones in the first book being of a more general and introductory nature than those in the third one. Morover, Jefferson mostly addressed the questions delt with by Bodin in the seventh chapter of the third book late in life, see *infra* chapter three, paragraph 3, *The Form of Government of a Democratic Republic: the Ward Republics*.

[8] Jefferson often stressed the constitutional importance of intermediate bodies. In 1787, for instance, he insisted that «the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits , without being effectually

Leaving aside the few handwritten notations marked on the *recto* and *verso* of the title page and probably written by the hand of a librarian, there are hardly any handwritten marginal notations in the *Republique*, except for two puzzling ones: one on page 147 (chapter eight, book one) which has almost entirely faded away and is presently unreadable and one on p. 976 (book six, chapter five), which does not appear to have been written in Jefferson's hand ([9]). Here the Roman numeral «CCCLVI», referring to year in which Damasus II was elected pope, is underlined in ink and the number «371» followed by a «.23» or possibly a «.43» and then a scribble (that may stand for «vol.») is written in cuttlefish ink next to it.

Emily Millicent Sowerby, who edited the catalogue of the library that Thomas Jefferson sold to Congress in 1815, described the binding of the *Republique* as «[o]ld vellum» and noted the presence, within the book, of «some headlines and marginal notes», but excluded the handwriting to be Jefferson's ([10]).

Partially departing from Sowerby's assessment, Joseph Felicijan, Jacob Peter Mayer, and Armand London Fell, who

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checked and restrained by the others». See Thomas JEFFERSON, *Notes on the State of Virginia*, edited by William Peden, The University of North Carolina Press, Chapel Hill and London, 1954, re-issued in 1982, p. 120. The issue is further addressed *infra*, see chapter three, paragraph 3, *The Form of Government of a Democratic Republic: the Ward Republics.*

[9] A critical survey of Jefferson's «bewildering variety of handwriting stiles» may be read in Douglas L. WILSON, *The Handwriting of the Literary Commonplace Book*, in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, cit., pp. 191-207.

[10] Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. III, cit., p. 24.

also appear to have examined the volume at first hand, suggested that both the vertical markings and the brackets inscribed within the chapters of the *Republique* had been written by Jefferson himself ([11]).

In a lecture delivered at Harvard in 1976 entitled *Jefferson as Reader of Bodin: Suggestions for Further Studies*, Mayer compared the markings in the seventh chapter of the third book of the *Republique* to «identical» bookstand brackets he found in Jefferson's copy of Sydney's *Discourses on Government* and to the square brackets used in the original rough draft of the *Declaration of Independence* ([12]). This resemblance between the bookstand and the square brackets lead Mayer to «suggest that the markings […] from Bodin, Sydney and the Declaration of Independence» had all been made by Jefferson «approximately during the same period» of time, which Mayer believed might have occurred around the middle of the 18th century, while

[11] Cfr. Joseph FELICIJAN, *The Genesis of the Contractual Theory and the Installation of the Dukes of Carinthia*, Society of St. Mohor, Klagenfurt,1967; Jacob Peter MAYER, *Jefferson as Reader of Bodin. Suggestions for Further Studies*, in ID., *Fundamental Studies on Jean Bodin*, Arno Press, New York, 1979, pp. 2-32; Armand London FELL, *Origins of Legislative Sovereignty and Legislative State*, vol. VI, *American Tradition and Innovation with Contemporary Import and Foreground*, Book 1, *Foundations (to Early 19th Century)*, cit., pp. 11-100 Although Felicijan was among the first to have noticed the markings in the *Republique*, his essay seems not to have influenced neither Mayer nor Fell, who never reference it. Felicijan does not discuss the "authorship" of the markings, but assumed them to be Jefferson's. Earlier, the markings had also been noticed by Francis LIEBER, in *The Manual of Political Ethics*, vol. 1, William Smith, London, 1839, p. 322: «The is, in the Congress library at Washington, a copy [of *Les Six Livres de la Republique*] which belonged to Mr. Jefferson, with pencil-marks by his hand». Mayer signals Liebler's observation on p. 5 of his aforementioned essay.

[12] Jacob Peter MAYER, *Jefferson as Reader of Bodin. Suggestions for Further Studies*, cit., p. 18.

Jefferson was drafting the fundamental documents of the American Revolution and of the Virginian Commonwealth ([13]).

In regard to the markings in book one of the *Republique*, Mayer was, instead, «inclined to believe» that they had been inscribed in «a much later period of Jefferson's life, probably around 1804-5» ([14]). No particular evidence is offered to support this hypothesis, which Mayer seems to have presented simply as a suggestion, leaving its examination to future studies.

In his expansive series on the *Origins of Legislative Sovereignty and Legislative State*, Fell picked up where Mayer had left off and provided some additional clues to support the claim that Jefferson «must have been familiar with Bodin's importance in European political thought since his years as a law student» ([15]). Although Fell has persuasively argued that the fundamental revolutionary documents drafted by Jefferson in the mid 1770s bear significant traces of a Bodinian influence, the central evidence he provided as proof of Jefferson's early possession of the *Republique* seems to be less than conclusive.

Fell rested his case on a review of the manuscript catalogues that Jefferson compiled or commissioned for his library. The catalogues taken into consideration are three: the 1783 manuscript catalogue, that Jefferson used until 1812; the 1789 catalogue, in which Jefferson recorded the volumes purchased in

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[13] *Ibid*., p. 19.
[14] *Ibid*., p. 27.
[15] Armand London FELL, *Origins of Legislative Sovereignty and Legislative State*, vol. VI, *American Tradition and Innovation with Contemporary Import and Foreground*, Book 1, *Foundations (to Early 19th Century*, p. 19.

Europe between 1784 and 1789; and the 1823 catalogue, that Jefferson commissioned «to reconstruct the order and classifications in his lost library catalogue or 'fair copy' of 1812» ([16]).

Fell begins to articulate his case by contending that Bodin's *Republique* is listed as entry number five among the political works recorded in the 1783 catalogue. Its appearance «at the very head of Jefferson's extremely long listing of other modern works […]» placed Bodin's treatise, according to Fell, «not just chronologically before such 17th century theorists as Filmer, Locke, and Sidney, but also well prior to Machiavelli before them and Hooker after them, both being of the 16th century. In other words, Jefferson's prominent positioning of Bodin in the 1783 catalogue shows his especially high estimation of Bodin's importance» ([17]).

Fell has taken the *Republique*'s placement near the very beginning of the chapter on politics of the 1783 catalogue as proof of Jefferson's «early possession» of the treatise ([18]). Douglas Wilson has, in fact, argued that the so called 1783 catalogue was began much earlier. «The 1783 manuscript catalogue was not, as Sowerby believed, 'originally written by Jefferson in 1783'. That it was begun earlier is evident by the handwriting of the original entries and other facts of time and

[16] *Ibid*., p. 84.
[17] *Ibid*., pp. 85, 86.
[18] *Ibid*., p. 87.

location. My own belief» wrote Wilson in 1984 «is that it may well have been started as early as the mid-1770s» ([19]).

Fell contended that additional evidence of Jefferson's early possession of the *Republique* could be gathered from further details. «It is well established that Jefferson intended to use his 1783 catalogue as a guide, once he got to Paris in 1784, for books he already had and those he wanted to obtain. On the front cover […] he cited the date ('1783, Mar. 6'), the number of books included at that point in his collection ('2040 vols.'), and the system of check marks to the left of books he already possessed ('✔this mark denotes the books I have. Those unmarked I mean to procure'). In the 'chapter' or section on politics [of his so called 1783 catalogue], beginning with political theory, Jefferson placed a check mark […] to the left of all the initial books […], including Bodin's *Republique*» ([20]).

While reaching the end of a period of intense book acquisition in Europe, Jefferson compiled a new catalogue, where he listed his acquisitions. This is the so called 1789 catalogue. According to Fell, «Justinian's *Corpus Iuris Civilis* (1598) was significantly included», while «Bodin's *Republique* [was] conspicuously absent and was therefore not a later added entry to the 1783 catalogue but was in it from the start […]» ([21]).

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[19] Douglas L. WILSON, *Sowerby Revisited: The Unfinished Catalogue of Thomas Jefferson's Library*, in *The William and Mary Quarterly*, vol. 41, n. 4, 1984, p. 619.
[20] Armand London FELL, *Origins of Legislative Sovereignty and Legislative State*, vol. VI, *American Tradition and Innovation with Contemporary Import and Foreground*, Book 1, *Foundations (to Early 19th Century)*, cit., p. 87.
[21] *Ibid*., p. 89.

Finally, Fell noted that Bodin was present in the 1823 catalogue as well. In this final, recently republished ([22]), catalogue the *Republique* is listed as entry number thirteen among the books on general theories of politics ([23]), and it is likely that this was its placement when Jefferson sold his library to Congress in 1815.

Although Fell appears to have articulated a compelling case supporting Jefferson's early possession of the *Republique*, there are at least two reasons to doubt his conclusion.

First of all, it is questionable whether Bodin's *Republique* does actually appear as entry number five in the chapter on politics of the 1783 catalogue. A scrutiny of the manuscript, in fact, allows an alternative reading. The chapter on politics begins on p. 135 of the manuscript ([24]). On the top of the page Jefferson clearly wrote the title: «Chap. 24. Politics» and then inscribed the subtitle of the first section: «general theory». All the entries that follow are unnumbered. The first one (in itself rather significant, as will be discussed further) reads: «*Machiavelli Princeps; Agrippae oratio contra Monarchiam; Moecenatis oratio pro Monarchiam; Steph. Junii Bruti vindiciae contra tyrannos; De jure magistratuum tractatus*». This entry

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[22] See Thomas JEFFERSON, *Thomas Jefferson's Library: A Catalogue With Entries in His Own Order*, cit.

[23] See Armand London FELL, *Origins of Legislative Sovereignty and Legislative State*, vol. VI, *American Tradition and Innovation with Contemporary Import and Foreground*, Book 1, *Foundations (to Early 19th Century)*, cit., pp. 84-85.

[24] The manuscript is held by the Massachusetts Historical Society. Although a critical edition has not been published, the manuscript has been entirely digitized and can be seen online at the following address http://www.masshist.org/thomasjeffersonpapers/catalog1783/

refers to a single volume, probably printed in Basel in 1589, which is also listed as the entry number one in the chapter on politics of Sowerby's critical edition of Jefferson's later library catalogue ([25]). Contrary to expectations, Bodin's *Republique* does not appear in the following entries on politics, but rather precedes them. At the top of p. 134 Jefferson recorded the final entries in chapter 23 of his catalogue, dedicated to books on «Foreign Law». On the lower half of the same page, and separated from the previous entries by a wide blank space, Jefferson listed a number of works on politics, among which Bodin's *Republique* appears as the fifth entry. The somewhat odd placement of this cluster of political works, listed after the chapter on foreign law but prior to the chapter on politics, could be explained by assuming that Jefferson recorded the acquisition of these books once he had already filled out all the available space in his chapter on politics and had no more room available to record additional acquisitions.

The possibility that Jefferson acquired Bodin's *Republique* later in his life is supported by the 1789 catalogue ([26]). Despite Fell arguing otherwise, the *Republique* is in fact listed in this manuscript on p. 31, among the very first entries of the chapter on politics. It would thus appear that Jefferson purchased at least

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[25] See Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. III, cit., pp. 1-2. See *infra*, as well as chapter one paragraph 1, *Tyranny in Western Jurisprudence*.

[26] Also the manuscript of this catalogue is held by the Massachusetts Historical Society, which has provided a digital reproduction at the following address http://www.masshist.org/thomasjeffersonpapers/catalog1789/

one copy of Bodin's treatise while in Europe ([27]). On the same page, Jefferson records his acquisition of Aristotle's treatise on government, edited by Ellis and published in *quarto* ([28]). This is also the entry that immediately precedes Bodin's *Republique* in the 1783 manuscript catalogue. Both books would therefore appear to have been purchased abroad and this is the second reason why Fell's conclusions would seem to be at least partially questionable.

However, since both entries in the 1783 and 1789 catalogue record only the author, the abridged title, and the format of the volume, but provide no further bibliographical information, it cannot be excluded that Jefferson owned more than one *octavo* of Bodin's French version of the *Republique*. In fact, Fell is correct in noticing that Jefferson placed a checkmark next to Bodin's name in the 1783 catalogue. So, early possession of the *Republique* cannot entirely be excluded.

In addition, it is highly significant that Jefferson opened the chapter on politics in the 1783 catalogue with two influential 16th century political treatises: the *Vindiciae contra tyrannos* and a Catholic re-edition of Théodore de Bèze's *Du droit des Magistrates*. Their prominent placement in the catalogue

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[27] It is not unreasonable to assume that Jefferson might have discussed Bodin's doctrine with some of his French friends and acquaintances. In 1755 Condorcet had, in fact, published an abridged edition of the *Republique* for his *Bibliothéque de l'homme publique*. See *infra*, chapter three paragraphs 1 and 2, *Jefferson at the «tournant rousseauiste»* and *The Subject of Popular Sovereignty: the Living Generation*.

[28] It is significant that Bodin's abridged *Republique* follows Aristotle's *Politics* also in the *Bibliothéque de l'homme publique.* Could Jefferson, in keeping with Condorcet, have sensed a proximity between Bodin and Aristotle?

suggests that Jefferson esteemed 16th century French political literature and appreciated its fundamental importance for his own political education since the middle of the 1770s, as Mayer and Fell have both correctly assumed ([29]).

Regardless of when Jefferson acquired his copy of the *Republique*, the comparative analysis of the markings in Jefferson's books and manuscripts, initially conducted by Mayer and then carried on by Fell, tentatively suggests that Jefferson might have been first introduced to Bodin by some other author.

A number of works that Jefferson read (and, in some cases, supposedly marked) in the early 1770s contain, in fact, more or less extensive references to Bodin. Mayer points out that «Filmer, Milton, Sydney, Locke, and Montesquieu» all mentioned Bodin, «and one cannot convince oneself that such a fantastic reader as Jefferson was, would not have gone back to a study of Bodin» ([30]).

With the exception of Filmer, these were all authors recommended by Jefferson to Robert Skipwith, in a letter dated 3 August 1771 ([31]). Robert Skipwith was, at the time, the

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[29] One of Fell's further contentions should be revised. In the appendix to his volume, Fell claims to have found vertical dashes inscribed in the margins of p. 15 of the *Codex*, in Jefferson's *octavo* edition of the *Corpus Iuris Civilis*. Although markings on this page to appear, they do not appear to be vertical marginal dashes, but rather the traces of ink that have transpired from the marking inscribed on the *verso* of the same page, where thick continuous line highlights a single paragraph.

[30] Jacob Peter MAYER, *Jefferson as Reader of Bodin. Suggestions for Further Studies*, cit., p. 22.

[31] Thomas JEFFERSON, *letter to Robert Skipwith*, *3 August 1771*, in *The Paper of Thomas Jefferson*, vol. 1, *1760-1776*, edited by Julian P. Boyd *et al.,* Princeton University Press, Princeton, 1950, pp. 76-81.

brother-in-law of Martha Wayles Skelton, Jefferson's bride-to-be, and he had written to Jefferson, requesting a list of recommended books «suited to the capacity of a common reader who understands but little of the classicks and who has not leisure for any intricate or tedious study» ([32]). Jefferson compiled with the request suggesting, in addition to the aforementioned authors, Davila's *Istoria delle guerre civili di Francia*, Bayle's *Dictionnaire Historique et Critique*, and Bolingbroke's *Philosophical Works*. These treatise too discuss at length Bodin's doctrine. So, it would appear that Jefferson was at least familiar with Bodin's thought, if not with his treatise on sovereignty, by the beginning of the 1770s.

This conclusion is supported by three further observations. Around 1773, Jefferson recommended to «a young friend whose course of reading was confided in [him]» to enhance his understanding of the law by reading Pierre Charron's *De la Sagesse* ([33]). This treatise on morals, that Jefferson listed among the books on Ethics and Natural Law that he recommended to his young «friend», drew amply from to Bodin's *Republique* and silently paraphrased many of its key passages. So much so, that

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[32] Robert SKIPWITH, *letter to Thomas Jefferson*, *17 July 1771*, in *ibid*., p. 74.
[33] Thomas JEFFERSON, *letter to Bernard Moore*, *letter enclosed in the later letter Jefferson addressed to John Minor*, *30 August 1814*, in *The Papers of Thomas Jefferson*, Retirement series, vol. 7, *28 November 1813 to 30 September 1814*, edited by J. Jefferson Looney *et al*., Princeton University Press, Princeton, 2010, pp. 625, 627, 631. The existing copy to the letter to Moore is undated. The editors have assigned to it a «highly conjectural» date, «based on the assumption that it was written shortly before or after» Jefferson extended to the younger Moore credit towards the purchase of the books from Dabney Carr's estate.

Jefferson could have gathered a first *abrégé* of Bodin's doctrine by reading Charron ([34]).

Sometime earlier, between May 1771 and December 1772, Jefferson drafted some notes on a case of divorce he was following on behalf of one of his clients, dr. James Blair ([35]). Among the authoritative passages listed in support of Blair's case, Jefferson recalled several passages of the first chapter of the sixth book of Pufendorf's *De iure naturae et gentium.* Two of the paragraphs recalled (nn. 22 and 24), expressly refer to the third chapter of the first book of Bodin's *Republique,* which in turns deals with matrimony and repudiation ([36]).

Finally, Bodin's historiographical doctrine is largely discussed in Bolingbroke's *Letters on the Study and the Use of History* - a work well known to Jefferson, ever since he read and

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[34] See Anna Maria BATTISTA, *Alle origini del pensiero politico libertino. Montaigne e Charron*, Giuffrè, Milano, 1966 and especially pp. 87-100 where Battista provides a detailed review of Charron's engagement with Bodin and of the debts he contracted with the *Republique*. It is worth noting that Jefferson placed special importance on Charron. In a letter to Augustus B. Woodward he acknowledged that the system of classification of knowledge devised by Bacon, that he employed as the basic partition of his library catalogue, had been previously conceived by Charron. See Thomas JEFFERSON, *letter to Augustus B. Woodward*, *24 March 1824*, quoted in Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. V, The Library of Congress, Washington, D.C., 1983, p. 167: «[…] L ^{d}. Bacon founded his 1 st. great division on the faculties of the mind which have cognisance of these sciences. It does not seem to have been observed by any one that the origination of this division was not with him. It had been proposed by Charron, more than 20. years before in his book de la Sagesse. B. 1. c. 14. […]».

[35] See Frank L. DEWEY, *Thomas Jefferson's Notes on Divorce*, in *The William and Mary Quarterly*, vol. 29, n. 1, 1982, pp. 212-223.

[36] See *ibid*., pp. 219, 220, 222; Samuel PUFENDORF, *De iure naturae et gentium libri octo*, vol. II, Francofvrti et Lipsiae, ex officina Knochio-Erlingeriana, 1759, pp. 42, 47.

commonplaced Lord Kame's *Historical Law Tracts*, which amply quote Bolingbroke's *Letters* in their introduction ([37]).

So, although neither the provenance nor the date of acquisition of the *Republique* are precisely known, it seems reasonable to suppose that Jefferson became familiar with Bodin in the mid seventies, since the author of the *Republique* appears to have been by that time a ubiquitous presence in his reading ([38]).

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[37] See Thomas JEFFERSON, *The Commonplace Book of Thomas Jefferson. A Repertory of his ideas on Government*, edited by Gilbert Chinard, The John Hopkins Press, Baltimore, 1926, pp. 95-135. A new critical edition of the *Legal Commonplace Book* edited by David T. Konig is forthcoming and will be published by the Princeton University Press as part of *The Papers of Thomas Jefferson*.

[38] I am unaware of any study on Bodin's reception in the American colonies or specifically in Virginia. There is no surviving record of the books held in the collage library at William and Mary during Jefferson's time. See John M. JENNINGS, *The Library of the College of William and Mary, 1693-1793*, The University Press of Virginia, Charlottesville, 1968. Nor does Bodin appear in the provisional catalogue of George Wythe's library, Jefferson's legal mentor. See the catalogue published by the Wolf Law Library at http://lawlibrary.wm.edu/wythepedia/index.php/Wythe's_Library. Bodin is also absent from the standard study on legal literature in private libraries in colonial Virginia. The compilation is derived from lists of books held in private libraries inventoried after the death of the owner. It does not include libraries of people who died after the Revolution, and it does not include libraries of people whose estate inventories do not survive and have not been published. Political treatises are also not included. See W. Hamilton BRISON, *Census of Law Books in Colonial Virginia*, University Press of Virginia, Charlottesville, 1978. However, Louis B. Wright has claimed that «[b]ooks on politics and statecraft found a favored place in the libraries of Virginian planters, as they did in New England. Although political differences that would later become a chasm were already developing in the two regions, both groups nevertheless studied some of the same political theorists. Machiavelli, Guicciardini, and Bodin were not uncommon». See Louis B. WRIGHT, *The First Gentlemen of Virginia. Intellectual Qualities of the Early Colonial Ruling Class*, The Huntington Library, San Marino (California), 1940, p. 132. Howell A. LLOYD has recently edited a volume on *The Reception of Bodin*, Brill, Leiden, Boston, 2013. This interesting and complex collection of essays explains the fortune and success that Bodin's

As Jefferson was not usually accustomed to inscribe marginal notations in his books, the few that can be found seem to be of particular importance. Although there are almost none in the *Republique,* it is worth noting that Jefferson recalled Bodin's masterpiece in a footnote of Vattel's *Le Droit des Gens* ([39]).

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works enjoyed in Europe. Two contributions - Glenn BURGESS, *Bodin in the English Revolution,* pp. 387-415 and Diego QUAGLIONI, *The Italian Readers of Bodin, 17th-18th Centuries: The Italian "Readers" out of Italy - Alberico Gentili,* pp. 371-386 - are particularly germane as they illustrate Bodin's reception in England and explain how Bodin's doctrine influenced many of the authors that Jefferson himself would have later studied. Sara Miglietti, one of the other contributors to the aforementioned volume, does mention that «North American copies» of Bodin's *Methodus as facilem historiarum cognitione* «were typically bought on the antiquarian market in the nineteenth or twentieth centuries». See Sara MIGLIETTI, *Reading from the Margins: Some Insights in the Early Reception of Bodin's Methodu*s, in *The Reception of Bodin*, edited by Howell A. Lloyd, cit., p. 199. However, she also notes that «the 1572 copy [of Bodin's *Methodus*] which is now held by the Library Company of Philadelphia probably [reached] the New World along with its owner, James Logan (1674-1751)», *ibid*., p. 205. J. S. Maloy is the only author I know of who attempts to retrace the fortune and circulation that Bodin enjoyed in the colonies. According to him the «Puritans who emigrated to America came from an intellectual world in which Bodin figured as one of the most familiar authorities on politics. […] New Englanders used Bodin as, among other things, a source of lessons from the history of political thought and practice». See Jason S. MALOY, *The Colonial American Origins of Modern Democracy Thought*, Cambridge University Press, Cambridge, 2008, p. 95. Apart from this work, I should also mention the oftentimes quoted volume written by Armand London Fell, that has attempted to retrace the influence of Bodin over the Founding Fathers.

[39] See Emmerich de VATTEL, *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite & aux affaires des Nations & des Souverains*, a Amsterdam: Chez E. Van Harrevelt, 1775, p. 141, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C. Sowerby noted that Jefferson entered this volume in his so called «undated manuscript catalogue», compiled, around 1789, when approaching the end of his diplomatic mission to France. See Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. II, The Library of Congress, Washington, D. C., 1953, pp. 71-72. It is worth noting that on pages 98 and 99 of the *Tome Second* (bound together with the first) there are two paragraphs highlighted by vertical dashes inscribed in pencil. The two passages refer to the right of conquest. In the second tome there are also a few cuttlefish ink markings.

In chapter twenty-three of the first book of his treatise, Vattel highlighted the main principles of maritime law by paraphrasing the doctrines of Grotius, Selden, and Bodin. More precisely, the Swiss author affirmed that, according to Bodin, «[…] *la domination du prince s'étend jusqu'à trente lieues des côtes* […]» and referred his readers to «*De la République, Liv. I. chap. X.*» (p. 141). Jefferson completed the footnote by adding «pa. 246.» ([40]). This, of course, is the page number in which the principle recalled by Vattel is mentioned in Jefferson's copy of the *Republique*: «[…] *les droits de la mer n' appartiennent qu'au Prince souuerain, qui peut imposer charges iusques à xxx. lieuës loing de sa terre* […]» ([41]).

Not only is this passage recalled in the notation added by Jefferson to Vattel's footnote, it is also highlighted by the vertical dashes that single out so many of the passages in the first book of Jefferson's copy of the *Republique*.

Whether the correspondence between Jefferson's addition to Vattel's footnote and the vertical dashes may be only a happy coincidence or whether it may be regarded as tentative evidence of Jefferson's "authorship" of the markings inscribed in the first book of the *Republique*, the issues addressed by Vattel and Bodin in the passages just mentioned surely arose Jefferson's interest by 1793, when it became his responsibility as Secretary

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[40] Sowerby identified the notation as being Jefferson's, see Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. II, cit., p. 72.

[41] Jean BODIN, *Les Six Livres de la Republique*, cit., livre I, chapitre 10, *De vrayes marques de Souueraineté*, p. 246.

of State to determine how far «the territorial protection of the Unites States» extended into the sea ([42]).

It was in this year, in fact, that Jefferson wrote to a number of European ambassadors in the Unites States, claiming that the country's maritime jurisdiction extended up to «three geographical miles» from the nation's shores ([43]). This was the first time any country ever proclaimed the three mile limit for its maritime jurisdiction ([44]).

The source of such measurement is, in all likelihood, recorded by Jefferson himself, in a second autograph footnote he added to his copy of Vattel. On page 142, shortly after recalling Bodin's opinion on the matter, Vattel argued that the breadth of territorial sea could no longer be calculated according to Bodin's measurements, as «[*a*]*ujourd'hui*» it only comprised «[…] *l'espace de mer, qui est à la portée du cannon* […]» ([45]). It is to this observation that Jefferson added his footnote: «*C'est a dire*» he remarked, quoting from paragraph 122 of von Martens's *Droit des gens moderne*, «*à trois lieues du rivage*».

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[42] Thomas Jefferson, *letter to certain Foreign Ministers in the Unites States*, *Germantown 8 November 1793*, in *The Papers of Thomas Jefferson*, vol. 27, *1 September to 31 December 1793*, edited by John Catanzariti *et al*., Princeton University Press, Princeton, 1997 p. 328. Jefferson discussed in greater detail his understanding of the different views entertained by «Governments and jurisconsults» on the matter in a letter addressed, on the same date, to the French ambassador Edmond Charles Genet, see *ibid*., pp. 330-331.

[43] Thomas JEFFERSON, *letter to certain Foreign Minister in the Unites States*, *Germantown 8 November 1793*, cit., p. 329.

[44] See *ibid*., p. 330.

[45] Emmerich de VATTEL, *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite & aux affaires des Nations & des Souverains*, cit., p. 142.

Trois lieues du rivage, «three geographical miles», precisely the breadth of American territorial sea that Jefferson claimed in his letter to the European ambassadors.

The correspondence between the autograph notes in Vattel, the markings in the *Republique*, and the observations in his own letter to the European ambassadors, all suggest that Jefferson had a direct and specific knowledge of Bodin at least by 1793 and further suggests that it might have been him who inscribed the vertical dashes in the first book of the *Republique*.

As brief as they may be, the autograph notations in the inferior margins of Vattel offer some insight into Jefferson's understanding of sovereignty. Moreover, they suggest that Jefferson might have adopted Bodin's notion of sovereign prerogatives. And this, in turn, could help explain why Jefferson felt the need to complete Vattel's reference to Bodin by adding the precise page number in which maritime jurisdiction was listed among the defining features of sovereignty in chapter ten of the *Republique*.

Such notation is a unique example of the awareness with which Jefferson addressed questions of public law. The issue at hand was not simply determining (more or less arbitrarily) the breadth of maritime jurisdiction. As important as it might have been, the measurement was in itself susceptible to change, so much so that Jefferson openly acknowledged it in his letter ([46]).

[46] See Thomas JEFFERSON, *letter to certain Foreign Minister in the Unites States*, *Germantown 8 November 1793*, cit., p. 328: «The President of the United States thinking that before it shall be finally decided to what distance from our sea shores the territorial protection of the United States shall be

However, the implications of his proclamation were much subtler: by claiming control over a portion of the sea, the United States was reaffirming its independence and claiming one of the fundamental prerogatives of sovereignty.

So, despite determining the breadth of maritime jurisdiction according to the indications of Vattel and von Martens, Jefferson appears to have been actually following the principles laid down by Bodin in the heavily marked tenth chapter of the *Republique*'s first book. Throughout this chapter, Bodin illustrated an analytical conception of sovereignty, carefully examining those exclusive powers, or *regalia*, whose unitary exercise secured absolute independence and supremacy. Sovereignty, thus, was presented less as an abstract proclamation and more as the concrete exercise of specific prerogative powers ([47]).

This is the conception that Jefferson seems to have recalled by annotating his copy of Vattel. A conception that allowed him to secure the newly proclaimed independence of the United States by exercising the prerogatives that distinguished sovereignty from all other kinds of subordinate power.

Without the aforementioned notation such a conclusion might have been only conjectured, for Bodin - as far as I know - is

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exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the mean time, to fix provisionally on some distance for the present government of these questions».

[47] See Margherita ISNARDI PARENTE, *Introduzione*, in Jean BODIN, *I sei libri dello Stato*, vol. I, edited by Margherita Isnardi Parente, Utet, Torino, 1964, p. 53.

never mentioned in any of Jefferson's letters. But, thanks to Jefferson's autograph notation, we are offered the chance to read his writing through the transparency of his own legal understanding and may conclude that he viewed sovereignty through the lens of Bodin's doctrine.

If indeed the markings in the first book of the *Republique* could be legitimately considered Jefferson's, as the tentative evidence gathered so far would seem to suggest, the volume would than acquire a special significance for anyone interested in Jefferson's legal education, as it could offer a unique glimpse into Jefferson's scrutiny of early modern continental legal and political scholarship.

Along with the other early volumes belonging to his collection and with the rich *Legal Commonplace Book* he compiled as a young man ([48]), the marked copy of the *Republique* could belong to the cluster of sources that shaped his legal mind. After all, the passages highlighted appear consistent with Jefferson's understanding of law as a comparative and historical endeavor and might have contributed to its consolidation.

But the *Republique* was not the only early modern treatise of continental legal and political doctrine in Jefferson's library. Along with it, the stacks at Monticello shelved the *Vindiciae contra tyrannos* ([49]), a few works edited by Théodore de Bèze

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[48] See Douglas L. WILSON, *Thomas Jefferson's Early Notebooks*, in *The William and Mary Quarterly*, vol. 42, n. 4, 1985, pp. 433-452.
[49] See Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. III, cit., pp. 1-2.

([50]) and Francois Hotman ([51]), Louis Le Roy's edition of Aristotle's *Politics* and Plato's *Republic* ([52]), the later *Essais* of Montaigne ([53]), an English translation of Charron's *De la sagesse* ([54]), the *Istoria delle guerre civili di Francia* by Enrico

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[50] See *ibid*., vol. II, p. 99. The catalog lists a French translation of the *Psalms*, edited by Clément Marot and de Bèze. The catalog also lists two translations of the *New Testament* by de Bèze. See *ibid.*, vol. II, pp. 92 and 100. However, there is no entry in the catalogue recording *Du droit des Magistrates*, *i.e.* the main political treatise written by de Bèze and published in 1574. This absence is somewhat surprising. Nevertheless, Jefferson owned a copy of another treatise, written precisely to counter de Bèze and his doctrine. The treatise in question is Johan Baptist Fickler's *De iure magistratuum* (1578). Fickler clarifies his intent to refute the doctrine of de Bèze in the subtitle of his work: «*Contra libellum cuiusdam Calvino, sub eadem inscriptione* […]». This short treatise is bound in the same volume that collects together a latin translation of Machiavelli's *Il principe*, Agrippa's oration *Contra Monarchiam*, Gaius Maecenas' oration *Pro Monarchia*, and the *Vindiciae contra tyrannos*. Machiavelli, Agrippa and Mecenate are heavily annotated, although apparently not in Jefferson's hand. A few autograph notations by Jefferson occur on the title pages of the *Vindiciae* and of Fickler's treatise. See *infra*, as well as Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. III, cit., pp. 1-2.

[51] Also Hotman's main political treatise (*Francogallia*) is missing from Jefferson's catalogue. Nevertheless, there is one entry recording his *De jure connubiorum*. See *ibid*., vol. II, p. 405. It is also worth noting that Jefferson might have learned about Hotman's doctrine by reading Thomas Craig, who authored a treatise on feudal law and was strongly influenced by Hotman. See John G. A. POCOCK, *The Ancient Constitution and the Feudal Law*, Cambridge University Press, Cambridge, 1987, pp. 79-92. Hotman's doctrine is also amply discussed by Algernon Sidney in his *Discourses on Government*, which Jefferson described as «[…] a rich treasure of republican principles, supported by copious & cogent arguments, and adorned with the finest flowers of science […]» and regarded as «[…] probably the best elementary book of the principles of government, as founded in natural right which has ever been published in any language […]». Thomas JEFFERSON, *letter to Mason Locke Weems*, *13 December 1804*, quoted in Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. III, cit., p. 13.

[52] See in Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. III, cit., p. 20.

[53] See Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. II, cit., pp. 46-46.

[54] See *ibid*., vol. II, cit., p. 156.

Caterino Davila ([55]), Denis Godfrey's edition of Philippe de Commynes' *Memoirs* ([56]) and Pierre Bayle's *Dictionnaire historique et critique* ([57]), along with his *Pensées sur la Comete de 1680* ([58]), his *Critique générale de l'histoire du Calvinisme de Maimbourg* ([59]), and an English translation of his *Commentaire philosophique sur ces mots de Jésus-Christ* ([60]).

The presence of these works proves in itself the soundness of Mayer's intuition and demonstrates how Jefferson's interest in Bodin was part of his larger interest for 16th and 17th century scholarship. The legal, political, and religious controversies of the time reverberated, after all, in his own age, as sovereignty and freedom of conscience, subjecthood and citizenship were still some of the most vexing issues challenging the founders.

Mayer's intuition is even further supported by a few autograph notations, inscribed by Jefferson in an «early hand», on the title page of his own copy of the *Vindiciae* ([61]). Here, just below the title and the author's pseudonym, Jefferson inscribed «by Hubert Languet» and added «see 1st Hollis's memoirs. 129» ([62]).

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[55] See Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. I, The Library of Congress, Washington, D.C., 1952, p. 88.
[56] See *ibid*., vol. I., cit., p. 87.
[57] See *ibid*., vol. I, cit., p. 66.
[58] See *ibid*., vol. II, cit., pp. 19-20.
[59] See *ibid*., vol. II, cit., p. 134.
[60] See *ibid*., vol. II, cit., p. 22.
[61] According to Sowerby the autograph notations are written by Jefferson see *ibid*. vol. III, cit., p. 2. Just how early this hand might be is hard to tell as the reference inscribed by Jefferson refers to a work published in 1780. See immediately below, note 62.
[62] Jefferson owned the 1589 Latin edition of the *Vindiciae*, which was published in *octavo*, along with the Latin translation of Machiavelli's

These concise notations refer to page 129 of the first volume of Francis Blackburne's *Memoirs of Thomas Hollis* and recalls a passage in which the author retraced the history surrounding the publication of the *Vindiciae* and attributed its authorship to Huber Languet ([63]).

In doing so, the *Memoirs* expressly followed Pierre Bayle's analysis. For his part, Bayle wrote in his *Dictionnarie* an extensive and detailed dissertation on the *Vindiciae*, with the intent to disprove any attribution of the text which did not recognize the authorship of Languet ([64]). By doing so, Bayle mentioned and discussed the work of the main antagonists of absolutism, offering to his readers - and among these especially to Jefferson - a wealth of information on Hotman, Bèze, Du Plessis Mornai, Languet, Fickler, Grotius, and even Milton.

Principe edited by Sylvester Telius, Johan Baptist Fickler's *De iure magistratuum*, Agrippa's oration *Contra Monarchiam*, and Gaius Maecenas' oration *Pro Monarchia* under the title *Nicolai Machiavelli Princeps. Ex Sylvestri Telii Fulginatis traductione diligenter emendata. Adiecta sunt eiusdem Argumenti aliorum quorundam contra Machiavellum Scripta de potestate & officio Principium contra Tyrannos*, [n.p.], 1589, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C.

[63] On Jefferson's copy of Francis BLACKBURNE, *Memoirs of Thomas Hollis*, London, 1780 see Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. I, cit., p. 166. As noted by Sowerby, «Jefferson's copy was sent to him by Thomas Brand Hollis, the friend and heir of Thomas Hollis [in] 1878», *ibid*. On p. 129 of the *Memoirs* one may read: «There have been many debates concerning the real author of the *Vindiciae, &c.* which Mr. Bayle has endeavoured to adjust in a dissertation at the end of his dictionary, and seemingly with sufficient success, to put it out of doubt that the book was the work of the excellant Hubert Languet […]».

[64] See Pierre BAYLE., *Dissertation concernant le livre d'Etienne Junius Brutus, imprimé l'an 1579*, in ID. *Dictionnarie politique et critique,* vol. IV, Jean Luois Brandmuller, Basel, 1741, pp. 569-577, Special Collection, Società Letteraria di Verona.

It is hard to believe that Jefferson may have been interested in the authorship of the *Vindiciae* without at the same time admitting that he must have felt a strong interest in the doctrine of the Huguenot jurists of the 16th century. And, if indeed he happened to be drawn towards these authors and their doctrines, could he really have comprehended them without constantly comparing their tenets to the rival opinions of Bodin and the *Politiques*?

So, assuming that Mayer was right and Jefferson closely read Bodin (as seems now to have been confirmed also by Armand London Fell's research), it is most likely that his reading of the *Republique* was particularly attentive to the nuances and peculiarities of the work, that placed it whitin the doctrinal debate of the time.

All these early modern works, though occasioned by a crisis of unprecedented order, as was the one that shook France and Europe in the late 16th century, addressed beyond any contingent concern, the nature of power and, even more so, of its constitutional limitations, and they did so by departing from or recalling, with unprecedented commitment, the principles of Roman law as reinterpreted by late medieval jurisprudence ([65]).

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[65] See Diego QUAGLIONI, *Dal costituzionalismo medievale al costituzionalismo moderno,* in *Annali del seminario giuridico dell'Università di Palermo*, vol. 52, 2008, p. 57: «Tutte queste opere, benché occasionate da una crisi d'ordine senza precedenti, com'è quella che scuote la Francia e l'Europa di fine Cinquecento, ponevano in termini non contingenti la questione della natura del potere e più ancora quella dei "freni" del potere, cioè dei suoi limiti "costituzionali", e lo facevano richiamandosi, ora per discostarsene ora per aderirvi ancor più radicalmente che in passato, alla

Read in this light, the several highlighted passages, in Jefferson's copy of the *Republique*, on the natural law limitations that constrain the power of the prince acquire a remarkable importance and could indicate how deeply Bodin's insistence on the natural law limitations constraining absolute power impressed Jefferson and led him to claim «as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also […]. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law» ([66]).

In his earlier masterpiece, the *Methodus ad facile historiarum cognitionem*, Bodin insisted that a true lawyer should engage in a global study of legal and political institutions and of the principles and foundations that sustain them ([67]). Only by systematically mapping the permutations of law and comparing the causes that determined certain institutional arrangements in one country and fostered different ones in another could it be possible to review laws and comprehend the rationales behind them ([68]). No such review could be passed by someone who ignored the different manners of people or the historical laws according to which empires were erected and shattered.

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tradizione romanistica e alle sue rielaborazioni tardo-medievali, dotate ormai di un'autorità esemplare».

[66] Thomas JEFFERSON, *letter to Spencer Roane*, *6 September 1819*, in *Thomas Jefferson, Writings*, edited by Merrill D. Peterson, New York, The Library of America, 1984, p. 1426.

[67] See Cesare VASOLI, *Il metodo ne La République*, in ID., *Armonia e giustizia. Studi sulle idee filosofiche di Jean Bodin*, edited by Enzo Baldini, Olschki, Firenze, 2008, p. 86.

[68] See *ibid*., p. 87.

The «*storico-giurista*», as Cesare Vasoli called him, must investigate the *humanae actiones (quae) semper erroribus implicantur*, and the customs, the manners of life, the different kinds of civilizations, the ethical and moral norms, the political institutions, the ever-changing beliefs and the multiple religions, in all the breadth of their variations though time and space and must do so, without allowing that such a transient and contingent variety of historical instances deflect him from his steady comprehension of the universal order in which all such events are ultimately encompassed ([69]).

It is within such order that Bodin attempted to inscribe his doctrine on sovereignty. Whether such an attempt may be called successful is a question still debated by historians. But, regardless of the answer, it is an attempt that decisively influenced generations to come and introduced a distinctly historical and comparative bend into legal studies, that justified the need for an encyclopedic understanding of life.

It seems to me that Jefferson shared a similar conviction. The very existence of his extensive library, the largest private collection gathered in America at the time, is proof of an education acquired through a seamless dialogue with the many voices of a centuries-old tradition ([70]). Moreover, the order he impressed to his library though its catalogue and its many partitions, under which he classified no less than «the whole of

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[69] See *ibid*.

[70] See Robert C. BARON and Conrad EDICK WRIGHT, (eds.), *The Libraries, Leadership, and Legacy of John Adams and Thomas Jefferson*, cit.

recorded knowledge» ([71]), reflected Jefferson's historical and comparative understanding of law and politics. The same interes is mirrored by the several markings in the *Republique*, as they highlight an erudite inquiry in the historical sources of the Western legal tradition, of which Bodin's work on the nature of sovereignty and its fundamental limitations proved to be one of the most decisive turning points.

However, Jeffersonian scholarship seems to have been less concerned by similar doctrinal preoccupations and more intent on refining an impressive sociological sensitivity and enhancing its powers of psychological introspection. Earlier Jeffersonian scholarship has indeed sought to ascertain the ideological origins of American constitutionalism, but the interpretations suggested over the past fifty years have become somewhat conventional. Generally, they have tended to narrow down the sources Jefferson relied upon, in order to select a canon of politically consistent texts, and declare Jefferson's affiliation to their creed ([72]). It would seem that these interpretations have told us more of Jefferson's supposed political alignment, than of his intellectual and spiritual education. Nevertheless, such interpretations have certainly been able to demonstrate the decisive influence of a few authors on Jefferson's doctrine (say, for instance, John Locke or James Harrington). Nontheless, they

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[71] James GILREATH and Douglas L. WILSON, *Introduction*, in Thomas JEFFERSON, *Thomas Jefferson's Library: A Catalogue With Entries in His Own Order*, cit., p. 2.

[72] A comprehensive review may be read in Perter S. ONUF, *Making Sense of Jefferson*, in ID., *The Mind of Thomas Jefferson*, University of Virginia Press, Charlottesville and London, 2007, pp.19-49.

have not been able to provide a thorough examination of the authorities gathered in Jefferson's library and a deeper understanding of their significance as a whole.

To this end, my concern in the following pages has not been to present a comprehensive account of Jefferson's personality or of his thought. He himself never provided neither. It has rather been to read Jefferson's doctrine in light of the tradition within which he consciously wrote and the scholarship that has most sharply interpreted it. I have attempted, in other words, to follow Jefferson in his effort to construe Western jurisprudence and construct a new scientific language out of the legal and political lexicon of the sources he studied throughout his life and gathered in his library ([73]). Hence, my work will revolve around the coming of age of a jurist and the invention of a new legal science. And its focus will be equally on Jefferson and on the books that he read and gathered in his great library.

Although Jefferson's papers comprise a wide range of political reflections, none articulate systematically his constitutional thought. Therefore, interpreters have read his doctrine according to political assumptions not always consistent with his jurisprudence. However, Jefferson was mindful of his own legacy and summarized it in a number of works, his epitaph being the main. In writing it, Jefferson did

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[73] On Wester jurisprudence and American law see Harold J. BERMAN, *The Historical Backgroung of American Law*, in *Talks on American Law: A Series of Broadcasts to Foreign Audiences by Members of the Harvard Law School Faculty*, edited by Harold J. Berman, Vintage Books, New York, 1961, pp. 3-17.

not only articulate his major accomplishments, he also digested the principles of his constitutionalism. In fact, by memorializing himself as «Author of the Declaration of Independence and of the Virginia Statute for Religious Freedom, and Father of the University of Virginia» ([74]), Jefferson signaled out his contribution to the three main fields of inquiry of modern political scholarship: what is sovereignty? In what relation does it stand to the freedom the individual's conscience? And what body of knowledge prepares the individual's conscience to handle the exercise of sovereign power?

As this appears to have been the ultimate partition that Jefferson gave to his legacy, I will attempt to follow it by subdividing my dissertation into two parts, dealing respectively with his thoughts on sovereignty and religion, while collectively illustrating his engagement with the Western legal tradition in which he was educated as both a lawyer and a statesman.

[74] Quoted in Richard B. BERNSTEIN, *Thomas Jefferson*, Oxford University Press, New York, 2003, p. IX.

Part One

SOVEREIGNTY

1

THE CONSTITUTIONAL PURPOSE OF JEFFERSON'S DOCTRINE ON TYRANNY

1. Tyranny in Western Jurisprudence

In keeping with the Western legal tradition, Thomas Jefferson (1743-1826) held sovereignty to be the lawful expression of supreme power ([1]). This ultimately medieval persuasion in the supremacy of law over politics led him to regard power as «arbitrary» whenever history could prove that its acquisition or its exercise had been achieved through a series of «usurpations» or «abuses» ([2]). In both cases, in fact, power degenerated into «tyranny», for having either been acquired through an act of force devoid of right, or for having been exercised in spite of its

[1] See Hannah ARENDT, *On Revolution*, The Viking Press, New York, 1963, re-published by Penguin, London, 1990, p. 181: «The men of the American Revolution […] understood by power the very opposite of a pre-political natural violence. To them, power came into being when and where people would get together and bind themselves through promises, covenants, and mutual pledges; only such power, which rested on reciprocity and mutuality, was real power and legitimate, whereas the so-called power of kings or princes or aristocrats, because it did not spring from mutuality but, at best, rested only on consent, was spurious and usurped».

[2] Thomas JEFFERSON, *Original Rough Draught of the Declaration of Independence*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p. 424.

constitutional limitations ([3]). To be regarded as «just» power needed, instead, a proper foundation: sovereignty could not emanate but from a title capable of constituting, at once, its lawful source and its limiting principle ([4]).

This distinction between arbitrary and legitimate power allowed Jefferson to digest American political experience according to the scientific legacy of European jurisprudence and justify American independence by qualifying British rule as tyrannical. Such indictment could hardly have been pronounced had the notion of tyranny not retained, however indirectly, in the last quarter of the 18th century, some trace of the technical meaning it had acquired at the height of the *ius commune*, when tyranny came to be understood as the subversion of *iurisdictio*, *i.e.* as the radical perversion of that sacred rule of nature established by God to adjudicate questions of power and order human society accordingly ([5]).

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[3] *Ibid.*

[4] *Ibid*., p. 423.

[5] Written in the imminence of one of the darkest apparitions of perverted power, the classical English study on tyranny is Ephraim EMERTON, *Humanism and Tyranny. Studies in the Italian Trecento*, Harvard University Press, Cambridge, 1925, reprinted by Peter Smith, Gloucester, 1964. A more recent and succinct account of medieval doctrines on tyranny and resistance may be found in Anthony BLACK, *Political Thought in Europe, 1250-1450*, Cambridge University Press, Cambridge, 1992, pp. 148-152. The literature on medieval conceptions of *iurisdictio* is as vast as well known. The standard references are: Francesco CALASSO, *«Jurisdictio» nel diritto commune classico*, in *Studi in onore di Vincenzo Arangio-Ruiz nel XLV anno del suo insegnamento*, vol. 4, Jovene, Napoli, 1953, pp. 423-443, also published in *Annali di storia del diritto*, vol. 9, 1965, pp. 89-110; Walter ULLMANN, *Law and Jurisdiction in the Middle Ages*, edited by George Garnett, Variorum Reprints, London, 1988; Pietro COSTA, *Iurisdictio. Semantica del potere politico nella giuspubblicistica medievale (1100-1433)*, Giuffrè, Milano, 1969; Harold J. BERMAN, *Law and Revolution. The Formation of the Western*

It had taken the greatest of all medieval jurists, Bartolus a Saxoferrato (1314-1357), to transpose in the sharp language of the law the theological and political notion of tyranny ([6]). His effort to classify the perverted forms of acquisition and exercise of power led him to revise the *μεταβολαί τών πολιτειών* according to the Scholastic reading of Aristotle and compose the first comprehensive treatise on the tyrannical degeneration of government, entitled *De tyranno* ([7]). Its lasting influence over

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Legal Tradition, cit., pp. 289-292; Diego QUAGLIONI, *«Dominium», «iurisdictio», «imperium». Gli elementi non-moderni della modernità giuridica*, in *Gli inizi del diritto pubblico*, *Die Anfänge des öffentlichen Rechts*, vol. 3, *Verso la costruzione del diritto pubblico tra medioevo e modernità*, *Auf dem Wege zur Etablierung des öffentlichen Rechts zwischen Mittelalter und Moderne*, edited by Gerhard Dilcher and Diego Quaglioni, Il Mulino, Bologna, Duncker & Humblot, Berlin, 2011, pp. 663-677. The greatest medieval account of the anti-tyrannical purpose of universal jurisdictions was given by DANTE ALIGHIERI in *Monarchia*, edited by Diego Quaglioni, in *Opere*, vol. 2, published under the direction of Marco Santagata, Mondadori, Milano, 2014, pp. 809-1415. Conversely, BARTOLUS A SAXOFERRATO observed that «cum Imperium fuit prostratum insurrexerunt dirae tyrannides», *Super constitutione extravaganti Ad reprimendum*, glo. «In cuius tranquillitate», n. 7, in ID., *Consilia, Quaestiones, et Tractatus*, vol. 10, Venetiis, 1596, fol. 95rA, as quoted in Francesco CALASSO, *Gli ordinamenti giuridici del rinascimento medievale*, Giuffrè, Milano, 1965, p. 263.

[6] The most recent biographical entry written on Bartolus is Diego QUAGLIONI, *Bartolus a Saxoferrato*, in *Encyclopedia of Diplomacy*, edited by Gordon Martel, Wiley-Blackwell, Chichester, forthcomming. Classical accounts of his life and thought may be read in Cecil Nathan Sidney WOOLF, *Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought*, Cambridge University Press, Cambridge, 1913; and Francesco CALASSO, *Bartolo da Sassoferrato*, in *Dizionario biografico degli italiani*, vol. 6, Istituto della Enciclopedia Italiana, Roma, 1964, pp. 640-669. The political and theological origins of the juristic conception of tyranny have been retraced in Diego QUAGLIONI, *«Quant tyranie sormonte, la justice est perdue». Alle origini del paradigma giuridico del tiranno*, in *Tiranni e tirannidi nel Trecento italiano*, edited by Andrea Zorzi, Viella, Roma, 2013, pp. 37-56.

[7] The critical edition is published in Diego QUAGLIONI, *Politica e diritto nel trecento italiano. Il "De tyranno" di Bartolo da Sassoferrato (1314-1357). Con l'edizione critica dei trattati "De Guelphis et Gebellinis", "De regimine*

the Western legal tradition provided generations of lawyers with a technical definition of tyranny, which fulfilled, according to Diego Quaglioni, «una funzione eminentemente costituzionale» ([8]).

Bartolus began classifying the deviated forms of government by defining tyranny as the quintessentially unlawful political regime: «tyrannus civitatis est qui in civitate non iure principatur» ([9]). His silent paraphrase of St. Gregory the Great's definition of a tyrant, «tyrannus dicitur qui […] non iure principatur» ([10]), led him to acknowledge that there were as many forms of tyranny, as were the means of perverting power. «Sicut autem non iure principari multis modis contingit, ita multe sunt tyrannorum species» ([11]). So, Bartolus distinguished tyranny in two species, depending on whether the unlawful

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civitatis" e "De tyranno", Olschki, Firenze, 1983, pp. 171-213. An English translation of the *De tyranno* may be read in Eric COCHRANE and Julius KIRSHNER, (eds.), *University of Chicago Readings in Western Civilization*, vol. 5, University of Chicago Press, Chicago, 1986, pp. 7-30. The medieval reception of Aristotelian political thought is summarized in, once again, Anthony BLACK, *Political Thought in Europe, 1250-1450*, cit., pp. 136-146.

[8] Diego QUAGLIONI, *Tyrannis*, in *Il lessico della "Politica" di Johannes Althusius. L'arte della simbiosi santa, giusta, vantaggiosa e felice*, edited by Francesco Ingravalle and Corrado Malandrino, Olschki, Firenze, 2005, p. 325.

[9] BARTOLUS A SAXOFERRATO, *Tractatus de tyranno*, in Diego QUAGLIONI, *Politica e diritto nel trecento italiano.*, cit., p. 184. In previous paragraphs Bartolus acknowledged that tyranny could only occur where there was actual jurisdiction, such as in the empire, in the kingdom, in the city or in the household and even in the conscience, if plans and arrangements for tyrannical action were actually under way. However, from the fifth paragraph onward, his treatise was mostly dedicated to the tyrannical degeneration of city government, which he considered to be an instance of exemplary political importance.

[10] *Ibid*., p. 177.

[11] *Ibid*., p. 184.

pursuit of power had been achieved through a series of undisguised or rather concealed acts of usurpation or abuse. He called the first overt or manifest, the second veiled or concealed. «Nam quidam est tyrannus apertus et manifestus, quidam est tyrannus velatus et tacitus» ([12]).

Manifest subversion could either be *ex defectu tituli* or *ex parte exercitii*. The distinction was drawn on the basis of a well-known categorization outlined by St. Thomas Aquinas according to earlier canon law sources ([13]). Bartolus followed it by distinguishing tyrants which had come to power by usurping their office, from tyrants who abused the power legitimately entrusted to them. The ones brandished a power to which they were not entitled: «tyrannus manifestus ex defectu tituli [est] ille qui in civitate sine iusto titulo manifeste principatur» ([14]). The others stretched the power entrusted to them beyond its limits, by pursuing partisan interests rather than the common good:

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[12] *Ibid*., pp. 184-185. English translations of the aforementioned passages are provided in Eric COCHRANE and Julius KIRSHNER, (eds.), *University of Chicago Readings in Western Civilization*, vol. 5, cit., p. 15.

[13] See Robert Warrand CARLYLE and Alexander James CARLYLE, *A History of Mediaeval Political Theory in the West*, vol. 6, *Political Theory from 1300 to 1600*, William Blackwood & Sons, Edinburgh and London, 1936, p. 81. A much more detailed analysis of the sources from which Bartolus drew this distinction is in Diego QUAGLIONI, *Politica e diritto nel trecento italiano*, cit., pp. 44-45: «La stessa distinzione […] è di diretta derivazione dal commento di Innocenzo IV alle decretali *Nihil est quod Ecclesiae* e *Cum ex iniuncto* (c. 44, X, i, 6 e c. 2, X, v, 32) […]. Gli stessi canoni *Neque enim* e *Principatus* (c. 9, C. XIV, q. v e c. 25, C. I, q. i), che riproducono due luoghi del *De bono coniugali* di Agostino e dell'*Epistola XIII* di Leone Magno e che costituiscono senza dubbio alcuno la fonte prima e più importante della distinzione bartoliana, sono espressamente allegati in più luoghi del *De tyranno* giusto come *canones*, come autorità normative e non semplicemente come fonti dottrinali».

[14] BARTOLUS A SAXOFERRATO, *Tractatus de tyranno*, in Diego QUAGLIONI, *Politica e diritto nel trecento italiano*, cit., p. 185.

«tyrannus est ex parte exercitii, qui opera tyrannica facit, hoc est, opera eius non tendunt ad bonum commune, sed proprium ipsius tyranni» ([15]).

Concealed forms of tyranny, on the other hand, could either be *propter defectum tituli* or *propter titulum*. Both equally masked the subversion of legitimate authority under their apparent compliance with fundamental laws ([16]). Magistrates turned into tyrants *propter defectum tituli* whenever they remained in office beyond the term for which tenure had been granted them, exercising a power they were no longer entitled to. «Primum [velamen est], quod quis facit sibi concedi iurisdictionem ad tempus, et finito tempore refirmari […]» ([17]). Whereas tyrants *propter titulum* arose whenever subordinate magistrates arbitrarily exercised a power far greater than the one properly conferred to them by their office. «Secundum velamen est, quod quidam tyranni faciunt sibi fieri aliquem titulum, cui nulla quasi iurisdictio inest […] Certe ex isto titulo tyrannus non est. Sed ex hoc quandoque in tantam venit potentiam, quod officia civitatis ordinat prout vult, et officiales ei obediunt ut

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[15] *Ibid*., p. 196. English translations are provided in Eric COCHRANE and Julius KIRSHNER, (eds.), *University of Chicago Readings in Western Civilization*, vol. 5, cit., pp. 15, 22.

[16] As noted by Francesco CALASSO in *Gli ordinamenti giuridici del rinascimento medievale*, cit., p. 263: «[…] c'è invece un'altra sorta di tirannide, quella che [Bartolo] chiama 'velata et tacita', che viene esercitata sotto la maschera del rispetto delle forme costituzionali».

[17] BARTOLUS A SAXOFERRATO, *Tractatus de tyranno*, in Diego QUAGLIONI, *Politica e diritto nel trecento italiano*, cit., p. 208.

domino: tunc dico, quod si opera tyrannica facit vel fieri facit, vere tyrannus est» ([18]).

By classifying these four aberrations of legitimate authority Bartolus fixed the legal contours of each deviation of power. He unified the multiple forms in which tyranny historically presented itself into a «rigorous paradigm» of perverted government. And concluded that not only were tyrannical acts inherently void, but tyranny itself could be legitimately redressed by deposing the illegitimate ruler ([19]).

Quaglioni has written extensively on this paradigm and has summarized the complex history of its later receptions, through the succeeding revolutions and convulsions of the Western legal tradition, in an entry on Johannes Althusius (1563-1638) and his early 17th century re-visitation of the tyrannical *perversio*

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[18] *Ibid*., p. 209. English translations are provided in Eric COCHRANE and Julius KIRSHNER, (eds.), *University of Chicago Readings in Western Civilization*, vol. 5, cit., pp. 27, 28.

[19] Diego QUAGLIONI and Vittor Ivo COMPARATO, *Italy*, in *European Political Thought, 1450-1700. Religion, Law and Philosophy*, edited by Howell A. Lloyd, Glenn Burgess, and Simon Hodson, Yale University Press, New Haven and London, 2007, p. 67. Effects and remedies to tyranny are analytically discussed in paragraphs VII, IX, XI, and XII of the treatise authored by Bartolus. Whereas Bartolus regarded tyrannical acts to be inherently void, just as contracts stipulated by the *tyrannus ex defectu tituli* or prosecutions brought against political expatriates, he did not challenge the validity of contracts stipulated by the *tyrannus ex parte exercitii* that did not imping on the common good or prosecution of citizen that would have been equally carried out under a non-tyrannical rule. In regards to the deposition of the tyrant, Batolus held it to be one of the chief responsibilities of each superior jurisdiction and ultimately entrusted it to the Emperor and the Pope. See BARTOLUS A SAXOFERRATO, *Tractatus de tyranno*, in Diego QUAGLIONI, *Politica e diritto nel trecento italiano*, cit., pp. 188-196, 202-204, 205-207, 211-213.

ordinis ([20]). From this vantage point it appears clear that, once tyranny entered into the language of the law, it remained part of the lexicon through which political obliquities were rationalized and rectified, for as long as human enterprises and political agency were believed in need to comply with some notion of transcendental justice ([21]). Once this need began to be questioned, either by those who followed Machiavelli (1469-1527) in acknowledging that political agency was compelled to a greater degree by the harsher laws of history than by the abstract principles of religion and morality ([22]), or by those who exasperated Bodin (1529/30-1596) in emphasizing power's capacity to establish and maintain itself regardless of consent or

[20] Diego QUAGLIONI, *Tyrannis*, in *Il lessico della "Politica" di Johannes Althusius,* cit., pp. 325-337.

[21] The ethical need shared by law and politics to comply with some notion of transcendental justice is one of the defining features of the *ius commune.* See generally Bruno PARADISI, *Il pensiero politico dei giuristi medievali*, in *Storia delle idee politiche, economiche e sociali*, vol. 2, *Ebraismo e Cristianesimo. Il Medioevo*, book 2, edited by Luigi Firpo, Utet, Torino, 1983, pp. 211-366 and especially, p. 212: «Ogni costruzione teorica [dello *ius commune*] sulla natura e sui poteri degli organismi politici non si fondava così sulla constatazione delle loro possibilità effettuali, ma in primo luogo su una giustificazione etico giuridica che soddisfacesse la giustizia, premessa fondamentale di ogni azione e modo d'essere concernente le relazioni umane».

[22] On history's normativity see Diego QUAGLIONI, *Machiavelli e la lingua della giurisprudenza*, in *Il pensiero politico*, vol. 32, n. 1, 1999, pp. 171-185, now collected in ID., *Machiavelli e la lingua della giurisprudenza. Una letteratura della crisi*, Il Mulino, Bologna, 2011, pp. 57-75. See also Corrado VIVANTI, *Niccolò Machiavelli. I tempi della politic*a. Donzelli, Roma, 2008, pp. 111-116. Whereas, on the persistent relevance of justice in Machiavelli's political doctrine see Erica BENNER, *Machiavelli's Ethics*, Princeton University Press, Princeton and Oxford, 2009, pp. 290-324; as well as Diego QUAGLIONI, *Machiavelli, the Prince and the Idea of Justice*, in *Italian Culture*, vol. 32, n. 2, 2014, pp. 110-121.

compliance with higher laws of nature and God ([23]), the notion of tyranny began to lose its edge. But, even at this later juncture, tyranny was still far from becoming «un *tópos* erudito o una questione obsoleta» ([24]).

Bodin himself had never formally dismissed the institution of tyranny, nor had he ever supported tyrannical rule ([25]). His absolute monarch was in no way a tyrant. «Quite the contrary: as God's representative, he was supposed to rule by just laws»

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[23] Chief among early misreaders of the *Republique* was James I, who stiffened Bodin's doctrine and turned it into an authoritarian ideology by disregarding the several checks that Bodin had firmly maintained in place to limit sovereignty from transgressing its natural boundaries. See Harold J. BERMAN, *Law and Revolution, II. The Impact of the Protestant Reformations on the Western Legal Tradition*, cit., pp. 234-238; Glenn BURGESS, *British Political Thought, 1500-1600*, Palgrave Macmillan, London, 2009, pp. 142-152; and more generally Diego QUAGLIONI, *La sovranità*, Laterza, Bari, 2004, p. 44 Insights may be also gathered from Kenneth PENNINGTON, *The Prince and the Law, 1200-1600. Sovereignty and Rights in the Wester Legal Tradition*, University of California Press, Berkeley, 1993, p. 202. The varying receptions of Bodin's thought have been explored in Howell A. LLOYD, (ed.), *The Reception of Bodin*, cit.

[24] Margherita ISNARDI PARENTE, *Jean Bodin su tirannide e signoria nella «République»*, in *La «République» di Jean Bodin. Atti del convegno di Perugia, 14-15 novembre 1980*, Firenze, Olschki, 1981, pp. 61-77, now collected in ID., *Rinascimento politico in Europa*, edited by Diego Quaglioni e Paolo Carta, Cedam, Padova, 2008, pp. 131-149: 139. A conventional reading of tyranny, that places little to no relevance on its juristic character, but significantly emphasizes its renewed relevance for modern political discourse across the Atlantic, may be found in John H. M. SALMON, *Tyranny, Theory of*, in *Europe, 1450 to 1789: Encyclopedia of the Early Modern World*, vol. 6, *Tasso to Zwingli; Index*, edited by Jonathan Dewald, Charles Scribner's Sons, New York, 2004, pp. 84-87.

[25] See Margherita ISNARDI PARENTE, *Jean Bodin su tirannide e signoria nella «République»*, cit. On Bodin's understanding of the limits binding absolute sovereignty see generally Margherita ISNARDI PARENTE, *Introduzione*, in Jean BODIN, *I sei libri dello stato*, vol. 1, Utet, Torino, 1964, pp. 11-100; and Diego QUAGLIONI, *I limiti della sovranità. Il pensiero di Jean Bodin nella cultura politica e giuridica della modernità*, Cedam, Padova, 1992.

([26]). Should he, instead, overstep the limits of his power and transgress God's explicit commandments, his rule would indeed become tyrannical, «but his subjects [would still be] required […] to obey him», for the prince's exclusive accountability to God was the defining feature of Bodin's notion of absolute sovereignty ([27]). However, his detailed enumeration of the tyrant's distinguishing features is, quite remarkably, one of the several passages highlighted in Jefferson's own copy of *Les Six Livres de la Republique* ([28]). And, although the institute of

[26] Harold J. BERMAN, *Law and Revolution, II. The Impact of the Protestant Reformations on the Western Legal Tradition*, cit., p. 236.

[27] *Ibid*., p. 237. See also Margherita ISNARDI PARENTE, *Introduzione*, cit., p. 28-29; and more generally Diego QUAGLIONI, *Il pensiero politico dell'assolutismo*, in *Il pensiero politido. Idee teorie dottrine*, vol. 2*, Età moderna*, edited by Alberto Andreatta and Artemio Enzo Baldini, Utet, Torino, 1999, pp. 99-125.

[28] See Jean BODIN, *Les Six Livres de la Republique*, cit., livre II, chapitre 4, *De la Monarchie Tyrannique*, p. 290: «l'un s'efforce de maintenir les subiects en paix & vnion: l'autre y met tousiours diuision, pour les ruiner les vns par les autres, & s'engraisser de confiscations: l'un prend plaisir d'estre veu quelquesfois, & oui de ses subiects: l'autre se cache tousiours d'eux, comme de ses ennemis. l'un fait estat de l'amour de son peuple: l'autre de la peur. l'un ne craint iamais que pour ses subiects: l'autre ne redoute rien plus que ceux-là. l'un ne charge les fiens que le moins qu'il peut, & pour la necessité publique: l'autre hume le sang, ronge les os, succe la mouelle des subiects pour les affoiblir. l'un cherche les plus gents de bien pour employer aux charges publiques: l'autre n'y employe que les larrons & plus meschants, pour s'en seruir comme d'esponges. l'un donne les estats & offices pour obuier aux concussions & foule du people: l'autre les vend le plus cher qu'il peut pour leur donner moyen d'affoiblir le peuple par larcins, & puis couper la gorge aux larrons, pour estre reputé bon iusticier. l'un mesure ses moeurs, & façons au pied des loix: l'autre faict seruir les loix à ses moeurs. l'un est aimé & adore de tous ses subiects: l'autre les hait tous, & est hai de tous. l'un n'a recours en guerre qu'à ses subiects: l'autre ne fait guerre qu'à ceux-là. l'un n'à garde y garnison que des siens: l'autre que d'estrangers. l'un s'esiouist d'un repos assure, & tranquilité haute: l'autre languit en perpetuelle crainte. l'un attend la vie tres heureuse: l'autre ne peut euiter le supplice eternel. l'un est honnoré en sa vie, & desire apres sa mort: l'autre est diffamé en sa vie & deschiré apres sa mort. Il n'est pas besoin de verifier cecy par beaucoup d'examples, qui son en veue d'un chacun. Car nous trouuons és

tyranny did lose much of its technical sharpness once Bodin had so firmly denied that sovereignty rested upon consent ([29]), this very doctrine was challenged by contemporary Huguenot jurists, who recovered the medieval notion of tyranny in their effort to oppose the progressive centralization of power and compulsion of religious beliefs that led to the outbreak of the 16th century Wars of Religion ([30]).

Not only was Jefferson quite familiar with this literature, but he placed the *Vindiciae contra tyrannos*, the most vigorous Huguenot inquiry into the nature of power and the forms of its tyrannical degeneration ([31]), as the very first entry in the chapter

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histoires, la tyrannie auoir esté si detestable,qu'il n'estoit pas iusques aux escholiers & aux femmes […]». Here the page ends, and so does the marginal marking, the phrase continues thusly on the next page: «qui n'ayent voulu gaigner le prix d'honneur à tuer les tyrans […]».

[29] See Margherita ISNARDI PARENTE, *Jean Bodin su tirannide e signoria nella «République»*, cit., p. 145. On tyranny's inherent subversion of the consensual foundation of legitimate power in Bartolus, see Diego QUAGLIONI, *Tyrannis,* cit., pp. 236-237.

[30] See Saffo TESTONI BINETTI, *Il pensiero politico ugonotto. Dallo studio della storia all'idea di contratto (1572-1579)*, Centro editoriale toscano, Firenze, 2002; and Michael WALTZER, *The Revolution of the Saints. A Study in the Origin of Radical Politics*, Harvard University Press, Cambridge and London, 1982, pp. 68-92. The compulsion of religious beliefs as a new and typically modern ground upon which to resist against any tyrannical degeneration of power is highlighted in Alessandro FONTANA, *Du droit de resistance au devoir d'insurrection*, in *Le Droit de résistance, XII^e^-XX^e^ siècle*, edited by Jean-Claude Zancarini, ENS Éditions, Fontanay Saint-Cloud, 1999, pp. 15-33. A classic overview of Huguenot resistance theories, published only one year before Ephraim Emerton's study on tyranny in the Italian *Trecento,* is Harold J. LASKI, *Historical Introduction,* in *A Defence of Liberty Against Tyrants, a Translation of the Vindiciae Contra Tyrannos by Junius Brutus*, Harcourt Brace & Co., 1924, pp. 1-60.

[31] The *Vindiciae contra tyrannos* was first published in 1579, under the pseudonym of Stephanus Junius Brutus. Although the title page reported Edinburgh as the place of publication, the true publisher, Thomas Guérin, was based in Basel. See STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos, sive De Principis in Populum et Populi in Principe legitima*

on politics of his 1783 library catalogue, which arranged the books of his collection both by subject and importance ([32]). This prominent placement would appear to suggest Jefferson's high esteem for the treatise that, in the second half of the 16th century, offered, as its contribution to the ongoing debate on sovereignty, a passionate plea in favor of prosecuting and deposing rulers who had unlawfully acquired or exercised their power.

To this end, not only did the *Vindiciae* expressly maintain the distinction between the *tyrannus absque titulo* and the *tyrannus exercitio* ([33]), but it built its case against tyranny by charging the

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potestate, Edimburgi, 1579. Two years later, the treatise, which had originally appeared in Latin, was published in French, see ETIENNE JUNIUS BRUTUS, *De la puissance legitime du prince sur le peuple et du peuple sur le prince. Traits trtes-utile et digne de lecture en ce temps, secret en Latin par Estienne Junius Brutus, et nouvellement traduit en François*, 1581. An extensively commented re-issue of the French 1581 edition is provided in ETIENNE JUNIUS BRUTUS, *Vindiciae contra tyrannos*. *Tradution française du 1581*, introduced and commented by Arlette Jouanna, André Turnon, Henri Weber, *et al*., Droz, Genève, 1979. The most recent English translation and commentary of the text is given in STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos: or, Concerning the Legitimate power of a Prince over the People, and of the People over the Prince*, edited and translated by George Garnett, Cambridge University Press, Cambridge, 1994, re-issued in 2003.

[32] In his later, and now lost, 1814 catalogue Jefferson supposedly listed the *Vindiciae* as entry number 8 in his chaper on Politics. See James GILREATH and Douglas L. WILSON, (eds.), *Thomas Jefferson's Library: A Catalogue with Entries in his own Order*, cit., p. 80. Jefferson's complex system of classification in analyzed *ibid*., pp. 2-3.

[33] See STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos,* [n.p.], 1589, quaestio III, *Qui sint tyranni*, p. 167, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C.: «Eum itaque tyrannum, vtpote regi plane contrarium esse, sequitur qui aut vi malisque artibus imperium invasit, aut vltro sponteque delatum regnum contra ius & fas regit, conraque leges & pacta, quibus sese sacrosante devinxit pervicaciter administrat. Quod etiam utrumque in unum eundemque hominem cadere potest. Ille vulgo dicitur Tyrannus absque titutlo, hic Tyrannus exercitio». For an English translation see STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos: or, Concerning the Legitimate power of a Prince over the People, and of the People over the Prince*, cit., p.

tyrant, and especially the tyrant *ex parte exercitii*, for sedition. By arguing that all rulers received their power from the people and where thus no more than its chief magistrates ([34]), the *Vindiciae* maintained that, whenever a prince disregarded the word he had given to his people or perverted the laws of the commonwealth, he betrayed his subjects, violated the majesty of the body politic, and turned himself into a rebel ([35]). Guilty of *lèse-majesté* ([36]), not only resistance against his rule was legitimate, but so was also his deposition ([37]).

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140. The notion of *tyrannus absque titulo* appears here to have subsumed within itself all cases of illegitimate acquisition of power, be they manifest or concealed.

[34] See STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos,* cit., quaestio III, *Adversus Tyrannos exercitio quantum iure concedatur*, p. 187: «Deinde probauimus, reges omnes regiam dignitatem a populo accipere; populum universum rege potiorem & superiorem esse; regem regni, imperatorem imperii supremum tantum ministum & actorem esse: populum vero, vere dominum existere». For an English translation see STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos: or, Concerning the Legitimate power of a Prince over the People, and of the People over the Prince*, cit., p. 156.

[35] See STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos,* cit., quaestio III, *Adversus Tyrannos exercitio quantum iure concedatur*, p. 185: «At certe si rempublicam consulto evertat, si iura proterue peruertat, si nullam fidei datae, nullam conventionum, nullam iustitae, nullam pietatis curam habeat: si suorum ipse sit hostis, si denique eas artes, quas enumerauimus, aut omnes, aut precipuas ineat: tum sane tyrannus […] id est Dei hominumque hostis, iudicari poterit». And *ibid*. quaestio III, *Adversus Tyrannos exercitio quantum iure concedatur*, p. 187: «Sequitur ergo, tyrannum in populum, tanquam feudi dominum, feloniam committere, regni imperiique sacram Maiestatem laedere, rebellem esse […]». For an English translation see STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos: or, Concerning the Legitimate power of a Prince over the People, and of the People over the Prince*, cit., pp. 154-155, 156.

[36] See generally Mario SBRICCOLI, *Crimen laesae maiestatis. Il problema del reato politico alle soglie della scienza penalistica moderna*, Giuffrè, Milano, 1974.

[37] See STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos,* cit., quaestio III, *Adversus Tyrannos exercitio quantum iure concedatur*, p. 187: «Itaque, ait Bartolus, poterit is deponi a superiore […]. Superior vero, universus populous est, quive eum repraesentant». For an English translation see

The claim, first advanced by Bartolus in his treatise on tyranny and recalled in his glosses to the constitution *Quoniam nuper* of Henry VII ([38]), became, through the mediation of the *Vindiciae* and its recollection of both texts, the ground upon which English and American revolutionaries maintained the rightfulness of deposing tyrannical rulers.

Whereas deposing tyrants had been the ultimate responsibility of the Empire and the Church for as long as Western societies had recognized the existence of the two universal jurisdictions ordained by God to guide men in spiritual and temporal affairs ([39]), once these jurisdictions had been compromised in their universality, either by the insurgence of national polities or by

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STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos: or, Concerning the Legitimate power of a Prince over the People, and of the People over the Prince*, cit., pp. 156.

[38] For Bartolus's qualification of tyrants *ex parte exercitii* as «ipso iure […] rebelles» see BARTOLUS A SAXOFERRATO, *Tractatus de tyranno*, in Diego QUAGLIONI, *Politica e diritto nel trecento italiano*, cit., pp. 204. On his glosses to the *extravagentes* of Henry VII see Diego QUAGLIONI, *«Rebellare idem est quam resistere». Obéissance et résistance dans les gloses de Bartolo à la constitution «Quoniam nuper» d'Henri VII*, in *Le Droit de résistance XII^e-XX^e siècle*, edited by Jean-Claude Zancarini, cit., pp. 35-46, and especially p. 38. For a general analysis of Henry VII's constitutions, and the reaction they provoked among jurists see Kenneth PENNINGTON, *Henry VII and Robert of Naples*, in Jürgen MIETHKE, *Das Publikum politischer Theorie in 14. Jarhundert*, R. Oldenbourg Verlag, München, 1992, pp. 81-92; now expanded in ID., *The Prince and the Law, 1200-1600. Sovereignty and Rights in the Western Legal Tradition*, cit., pp. 165-201, and especially pp. 196-201. The most recent contribution on the matter is Christian ZENDRI, *La legislazione pisana di Enrico VII: Problemi filologici e interpretativi*, in *Enrico VII, Dante e Pisa a 700 anni dalla morte dell'imperatore e dalla Monarchia (1313-2013)*, edited by Giuseppe Petralia and Marco Santagata, Longo, Ravenna, 2016, pp. 337-357.

[39] See BARTOLUS A SAXOFERRATO, *Tractatus de tyranno*, in Diego QUAGLIONI, *Politica e diritto nel trecento italiano*, cit., p. 202: «[A]d superiorem pertinent populum de servitude eripere» wrote Bartolus, concerning himself primarily with the imperial jurisdiction. «Item ad superiorem spectat tyrannos deponere» he added immediately after.

the schism that had fractured Christianity after the Reformation, neither could enforce any longer the correction of political obliquities. And so the deposition of tyrants fell on other shoulders. Those of the people, or rather of their representatives, claimed the *Vindiciae*, as it contended that no magistracy, not even the king, was superior to the collective body of the people acting through the agency of the officers representing it ([40]).

It was these magistrates, observed John Milton (1608-1674) seventy years later in a treatise written to justify the deposition and execution of king Charles I, who were called to enforce the king's subjection to the law, originally «enacted as a rule» by «Theodosius the yonger», then included in Justinian's *Codex* as the *lex Digna Vox* (C. 1, 14, 4), and later quoted at the outset of the *Vindiciae* as both a recollection of medieval constitutionalism and the clearest proclamation «that a Prince is bound to the Laws; that on the authority of Law the authority of a Prince depends, and to the Laws ought submit» ([41]). «Digna

[40] See Michael WALZER, *The Revolution of the Saints. A Study in the Origins of Radical Politics*, cit., pp. 84-85.

[41] John MILTON, *The Tenure of Kings and Magistrates*, in *The Complete Works of John Milton*, vol. 6, *Vernacular Regicide and Republican Writings*, edited by Neil H. Keeble and Nicholas McDowell, Oxford University Press, Oxford, 2013, p. 158. On the legal authority of the principle that Milton claimed to have been enacted as a rule see the contrary argument provided in Ennio CORTESE, *Il problema della sovranità nel pensiero giuridico medievale*, Bulzoni, Roma, 1966, re-issued in 1982, p. 141-142: «Teodosio aveva designato questa sua legge con l'appellativo di 'oraculum praesentis edicti'. Azzone commenta: '[…] et bene dicit oraculo, quia per legem istam orat futurum imperatorem quod ita faciat, cum ei imperare non possit […]'. Data, infatti, l'incontrovertibile regola che il principe non possa ritenersi vincolato in senso tecnico dalle norme dei suoi predecessori, non essendo soggetto alla loro autorità, questi possono indirizzargli tutt'al più un invito, una semplice *suasio* a mantenere un certo comportamento. Posto, cioè, che

vox [est] maiestate regnantis legibus alligatum se principem profiteri: adeo de auctoritate iuris nostra pendet auctoritas; et re vera maius imperio est submittere legibus: et oraculo praesentis edicti quod nobis licere non patimur [aliis] indicamus» ([42]).

As influential as the *Vindiciae* became during the English Revolution ([43]), the *lex Digna vox* had already established itself as one of the main sources of English constitutionalism by the second half of the 13th century, when Bracton (c. 1210 - c. 1268) had incorporated its text in his *De Legibus et Consuetudinibius Angliae* among the authoritative foundations of his doctrine on kingship ([44]). So, when English readers of the *Vindiciae* paused over its opening citation of the *lex Digna vox*, they must have

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'par in parem non habet imperium', la Digna vox non è nei suoi confronti imperativa, tanto che se egli dicesse 'ego sum legibus obligatus, mentiretur' ».

[42] STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos,* cit., epigraph quotation. For an English translation see STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos: or, Concerning the Legitimate power of a Prince over the People, and of the People over the Prince*, cit., p. 6. On the constitutional importance of the *lex Digna Vox* throughout the Western legal tradition see Diego QUAGLIONI, *Sovereignty Versus Tyranny in Medieval and Early Modern Political Thought,* in *In the Footsteps of Herodotus. Towards European Political Thought*, edited by Janet Coleman and Paschalis M. Kitromilides, Olschki, Firenze, 2012, pp. 65-75.

[43] The pioneering study on the influence exercised by 16th century French jurisprudence over English political thought is John H. M. SALMON, *The French Religious Wars in English Political Thought*, The Clarendon Press, Oxford, 1959. A more recent, yet not as broad, account is given in Stefania TUTINO, *Huguenots, Jesuits and Tyrants: Notes on the Vindiciae Contra Tyrannos in Early modern England*, in *Journal of Early Modern History*, vol. 11, n. 3, 2007, pp. 175-196.

[44] See the dated but still insightful Fritz SCHULTZ, *Bracton on Kingship*, in *The English Historical Review*, vol. 60, n. 237, 1945, pp. 136-176, which remains indespensable to retrace the civil law sources on which Bracton relied. Of equal importance is the highly persuasive critical review of previous Bractionian scholarship provided in Brian TIERNEY, *Bracton on Government*, in *Speculum*, vol. 38, n. 2, 1963, pp. 295-317.

been immediately reminded of the foundational treatise of English jurisprudence and its use of the text «placed at the origin» of medieval and modern discussions on limited sovereignty across Europe ([45]).

This association would seem to have been even more likely given that Bracton reverted to the authority of the *lex Digna vox* to draw the same distinction between the prince and the tyrant that three centuries later would have been ultimately re-affirmed on the same textual grounds by the *Vindiciae*. «Dicitur enim rex a bene regendo et non a regnando, quia rex est dum bene regit, tyrannus dum populum sibi creditum violenta opprimit dominatione» claimed Bracton, as he paraphrased the proverbial notions of *rex* and *tyrannus* he found in the great medieval treatises on kingship and adapted them to the English polity ([46]). «Temperet igitur potentiam suam per legem […]» he then added, going on to append the fundamental authorities on which he laid his claim, «quia hoc sanxit lex humana, quod leges suum ligent latorem. Et alibi in eadem: Digna vox maiestate regnantis

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[45] Diego QUAGLIONI, *Sovereignty Versus Tyranny in Medieval and Early Modern Political Thought*, cit., p. 67. And more extensively, ID., *Dal costituzionalismo medievale al costituzionalismo moderno*, cit., pp. 55-67.

[46] Henry BRACTON, *De Legibus et Consuetudinibus Angliae, On the Laws and Customs of England*, vol. 2, edited by George E. Woodbine and translated with revisions and notes by Samuel E. Thorne, Harvard University Press, Cambridge, 1968, p. 305. The sources from whence Bracton drew his notions of king and tyrant are reviewed in Fritz SCHULTZ, *Bracton on Kingship*, cit., pp. 140, 151-153. On the medieval *specula principum* see Diego QUAGLIONI, *Il modello del principe cristiano. Gli «specula principum» fra Medio Evo e prima Età Moderna*, in *Modelli nella storia del pensiero politico*, edited by Vittor Ivo Comparato, Olschki, Firenze, 1987, pp. 103-122; and more generally Angela DE BENEDICTIS and Annamaria PISAPIA, (eds.), *Specula principum*, Vittorio Klostermann, Krankfurt am Main, 1999.

est, legibus silicet alligatum se principem profiteri. Item, nihil tam proprium est imperii, quam legibus vivere. Et maius imperio est, legibus submittere principatum» ([47]).

Ennio Cortese has argued that the incorporation of the *lex Digna vox* into English medieval jurisprudence gave way to «taluni atteggiamenti legalitari particolarmente marcati del pensiero inglese successivo» ([48]). Bracton's reliance on its authority, in fact, shaped English political discourse in so much as the central tenet of his doctrine, «Ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem» ([49]), became, along with the aforementioned passages of his treaty, the ground on which royal absolutism was challenged throughout the 17th century, first and foremost by sir Edward Coke ([50]), who was quite familiar with each of these passages having underlined them in his copy of Bracton ([51]); and then

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[47] Fritz SCHULTZ, *Bracton on Kingship*, cit., pp. 140-141. I have preferred to quote this second passage from the edition given by Schultz in his aforementioned article. Though fragmentary, it seems quite clearer than the one provided by Woodbine, which can be read in Henry BRACTON, *De Legibus et Consuetudinibus Angliae, On the Laws and Customs of England*, cit., pp. 305-306.

[48] Ennio CORTESE, *La norma giuridica. Spunti teorici nel diritto comune classico*, vol. 1, Giuffrè, Milano, 1962, re-issued in 1995, p. 154.

[49] Henry BRACTON, *De Legibus et Consuetudinibus Angliae, On the Laws and Customs of England*, cit., p. 33.

[50] See Harold J. BERMAN, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, cit., pp. 238-245, 464-465.

[51] Coke's copy of Bracton's *De Legibus et Consuetudinibus Angliae* is part of the special collection held by the Edward Bennett Williams Law Library of the Georgetown University Law Center in Washington, D.C. In it Coke has inscribed extensive marginal notations as well as highlighted numerous passages. The text has been digitized and may by referenced at https://repository.library.georgetown.edu/handle/10822/761480. For the purposes of this discussion it is worth noting that Coke underlined the

secondly by the renewed doctrine on tyranny, much indebted to the legacy of the *ius commune* and the authority of the *Vindiciae* ([52]), that eventually unfolded in the works of John Milton, Algernon Sidney, and John Locke: three of Jefferson's main sources ([53]).

Each of them was intent on drawing the medieval persuasion in the supremacy of law over politics to its ultimate conclusions

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passage in which Bracton paraphrased the *lex Digna vox*. See Henry BRACTON, *De legibus et consuetidinibus Angliae*, Londini: Apud Richardum Tottellum, 1569, book 3, *Ad quod rex creatus sit in ordinaria iurisdictione*, fol. 107 v, Special Collection, Edward Bennett Williams Law Library, Georgetown University Law Center, Washington, D.C.: «Dicitur enim rex a bene regendo, & non a regnando, quia rex est dum bene regit, Tyrannus dum populum sibi creditum violenta opprimit dominatione. Temperet igitur potentiam suam per legem, quae fraenum est potentiae quod secundum leges vivat, quod hoc sanxit lex humana, quod leges suum ligent latorem, & alibi in eadem, digna vox maiestate regnantis est legibus alligatum se principem proficiscere .i.profiteri. Item nihil tam proprium est imperij, quam legibus vivere, & maius imperio est legibus submittere principatum, & merito debet retribuere legi, quia lex tribuit ei, facit enim lex quod ipse sit rex». The passages are underlined as they appear in Coke's copy of Bracton.

[52] This indebtedness of English political thought to the *ius commune* should not come as a surprise. As much as its doctrine on tyranny was developed out of continental literature, so was the English understanding of regality and of the corporate personhood of the king «derived from arguments which the glossators and post-glossators had advanced long before». This seems to me the most vital lessen of Ernest H. KANTOROWICZ, *The King's Two Bodies. A Study in Medieval Political Theology,* Princeton University Press, Princeton, 1957, re-issued in 2016, p. 408. The influence of the Civil Law over later English constitutionalism and Stuart political thought has recently been reviewed in Daniel LEE, *Popular Sovereignty in Early Modern Constitutional Thought*, Oxford University Press, Oxford, 2016, pp. 273-315.

[53] See generally Kevin J. HAYES, *The Road to Monticello: The Life and Mind of Thomas Jefferson*, Oxford University Press, New York, 2008, pp. 204, 179. For a summary of Milton's influence on Jefferson see Douglas L. WILSON, *Register of Authors*, in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, edited by Dougals L. Wilson, Princeton University Press, Princeton, 1989, pp. 174-175. On the influence of Sidney and Locke see David N. MAYER, *The Consitutional Thought of Thomas Jefferson*, University of Virginia Press, Charlottesville and London, 1994, pp. 20-21, 297-298.

([54]). And this meant intensifying claims and practices current in the earlier days of the *ius commune*, by articulating a broader and far more radical right to resist tyranny ([55]).

Of the three, Milton's doctrine was the most complex. Not only did he recall Bracton's distinction between king and tyrant ([56]), but he also maintained the distinction between tyranny by

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[54] The first to suggest that modern political doctrines on power exaspereted the tenets of medieval jurisprudence, by drawing them to their ultimate conclusions was Margherita Isnardi Parente, see. ID., *Introduzione*, cit., p. 43. Since then, the idea has been developed further by Diego QUAGLIONI, see ID., *Presentazione dell'edizione italiana*, in Harold J. BERMAN, *Diritto e rivoluzione II. L'impatto delle riforme protestanti sulla tradizione giuridica occidentale*, Italian edition edited by Diego Quaglioni, Il mulino, Bologna, 2010, pp. IX-XXIII, and especially p. XIII: «[…] non si tratta di riaffermare la profondità e la persistenza delle radici "medievali" nell'esperienza giuridica "moderna", ma più ancora di ricordare che quest'ultima scaturisce da un complesso di tematiche medievali portate alle estreme conseguenze».

[55] See Alessandro FONTANA, *Du droit de resistance au devoir d'insurrection*, cit., pp. 25-26.

[56] See John MILTON, *A Defence of the People pf England*, in *Complete Prose Works of John Milton*, vol. IV, *1650-1651*, part 1, edited by Don M. Wolfe, Yale University Press, New Haven, 1966, p. 492: «Thus in book I chapter 8 our famous jurist of old, Bracton, writes: 'Where passion rules, there is neither king nor law', and in book III chapter 9: 'A king remains a king while he governs well, but becomes a tyrant when by a rule of violence he crushes those entrusted to him' In the same chapter he adds 'The king should exercise the power of the law as God's agent and servant; the power to do wrong is of the Devil's servant'». The Complete Prose Works of John Milton provide only an English translation of the text originally written in Latin by Milton. A critical edition of the original text appears to be forthcoming and should be published as part of Oxford's new series dedicated to *The Complete Works of John Milton*. For an illustration on Milton's doctrine on sovereignty see Daniel LEE, *Popular Sovereignty in Early Modern Constitutional Thought*, cit., pp. 299-300. In these pages, Lee also insists on the influence exercised by Huguenot jurists over Milton's understanding of the king as «a "usufructuary" rather than as a *dominus*», *ibid*., p. 299. This contention will become central in Jefferson's own constitutional thought, as will be discussed *infra*, see chapter three, paragraph *2, The Subject of Popular Sovereignty: the Living Generation*.

usurpation and tyranny by abuse ([57]), bequeathed most directly to him by the French 16th century jurisprudence and in particular by the *Vindiciae* ([58]).

Beyond retaining these traditional distinctions, Milton subsumed them in the broader notion of «custom», that he derived from Michel de Montaigne (1533-1592). Just as Montaigne, Milton saw in custom the consolidation of those collective beliefs and institutions passed down by history and society and instinctively, perhaps even unconsciously, adopted

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[57] See John MILTON, *The Tenure of Kings and Magistrates*, cit., p. 161: «We may from hence with more ease, and force of argument determin what a Tyrant is, and what the people may doe against him. A Tyrant whether by wrong or by right coming to the Crown, is he who regarding neither Law nor the common good, reigns onely for himself and his faction: Thus St. Basil among others defined him». Although Milton maintains the distinction between the ruler who comes to power legitimately and the one who does so wrongfully, he believes that the true measure of tyranny lies in the exercise of power itself, rather than in the means of its acquisition. So tyranny is for Milton predominantly *ex parte exercitii*. This seems in keeping with Erasmus, who articulated a similar stance in his *Institutio principis christiani*. See Margherita ISNARDI PARENTE, *L'educazione del principe cristiano di Erasmo da Rotterdam*, in ERASMO DA ROTTERDAM, *L'educazione del principe cristiano*, edited by Margherita Isnardi Parente, Morano, Napoli, 1977, pp. 9-46, now collected in ID., *Rinascimento Politico in Europa*, cit., pp. 23-55: 37-38: «Il concetto di tirannide si estende, per Erasmo, all'assolutismo di tradizione giuridica romanistica. Ogni sovrano che pretenda di essere fonte assoluta della legge è di per sé tirannico e pagano. Ciò perché, va premesso, il concetto di tirannide in Erasmo non ha aspetto specificamente giuridico: è un concetto di ordine etico. Erasmo non accetta affatto la distinzione con la quale Bartolo di Sassoferrato, concludendo in maniera sistematica un lungo travaglio del pensiero medievale, aveva conciliato e insieme contrapposto i due concetti rappresentanti i due aspetti fondamentali della tirannide, quello del *tyrannus ex defectu tituli* e quello del *tirannus ex parte exercitii*. […] Per Erasmo, il tiranno è sempre e solo *ex parte exercitii*: il titolo che si accampa è indifferente, è il modo di reggere lo stato e di amministrare il potere che caratterizza il principe come buon reggitore politico o come tiranno».

[58] On the influence the *Vindiciae* exercised over Milton see Elizabeth SAUER, *Milton, Toleration, and Nationhood*, Cambridge University Press, New York, 2014, p. 34.

by men ([59]), who in so doing subjected themselves to a kind of tyranny over mind and actions that would ultimately be at the heart of Immanuel Kant's *Was ist Aufklärung?* and of Thomas Jefferson's profession of «eternal hostility against every form of tyranny over the mind» and body «of men» ([60]).

This led Milton to acknowledge the existence of a «double tyrannie, of Custom from without, and blind affections within» ([61]). Men were entitled to challenge both and could enjoy political freedom without only if they ceased to be «slaves within» ([62]). This was the condition on which rested their capacity to enforce the rule of law over their rulers. For only «the liberty and right of free born men, to be governe'd as seems to them best» entitled the people to either chose or reject their rulers «as oft as they shall judge it for the best» ([63]).

Sidney (1623-1683) reached similar conclusions retaining much of the same jurisprudential authorities. «This indeed is the

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[59] This understanding of custom in Montaign's thought is indebted to Anna Maria BATTISTA, *Nuove riflessioni su «Montaigne Politico»*, in *Studi politici in onore di Luigi Firpo*, edited by Silvia Rota Ghibaudi and Franco Barcia, vol. 1, Ricerche sui secoli XIV-XVI, Franco Angeli, Milano, 1990, p. 807.

[60] Thomas JEFFERSON, *letter to Benjamin Rush, 23 September 1800*, in *The Papers of Thomas Jefferson,* vol. 32, *1 June 1800 to 16 February 1801*, edited by Barbara B. Oberg *et al*., Princeton University Press, Princeton, 2005, p. 166. On the notion of tyranny over mind and actions in Montaigne and its later development in Kant see Anna Maria BATTISTA, *Nuove riflessioni su «Montaigne Politico»*, cit., p. 828.

[61] John MILTON, *The Tenure of Kings and Magistrates*, cit., p. 151.

[62] *Ibid*. This notion of slavery from within does not seem to be too distant from Etienne de la Boetie's notion of voluntary servitude. On Milton's indebtedness to Etienne de La Boetie, and his Montaignan notion of custom, see Merritt Y. HUGHES, *Introduction*, in *Complete Prose Works of John Milton*, vol. III, *1648-1649*, edited by Merritt Y. Hughes, Yale University Press, New Haven, 1962, pp. 109.

[63] *Ibid*., p. 159.

doctrine of Bracton» he wrote in the third part of his *Discourses Concerning Government*, not long before referring himself to the *lex Digna vox* ([64]), «who having said that the power of the king is the power of the law, because the law makes him king, adds 'That if he do injustice, he ceases to be king, degenerates into a tyrant, and becomes the viceregent of the Devil'» ([65]).

Tyranny for Sidney was of three kinds. «The first» occurred when «one or more men [took] upon them the power and name of a magistracy, to which they [had] not [been] justly called» ([66]). «These [were] by other authors called *tyranni sine titulo*, and that name [was] given to all those who obtain[ed] the supreme power by illegal and unjust means. The laws which they overthr[ew] [could] give them no protection; and every man [was] a soldier against him who [had become] a public enemy» ([67]).

«The second» kind of tyranny occurred «when one or more being justly called, continue[d] in their magistracy longer than the laws by which they [had been] called [did] prescribe» ([68]). This second instance on which Sidney paused was none other than the tyranny *propter defectum tituli* outlined by Bartolus in the twelfth paragraph of his *De tyranno*. Though the text was not itself referenced by Sidney, it is not unlikely he might have been familiar with its doctrine, having perhaps discovered it

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[64] Algernon SIDNEY, *Discourses Concerning Government*, edited by Thomas G. West, Liberty Found, Indianapolis, 1996, p. 446
[65] *Ibid*., p. 399.
[66] *Ibid*., p. 220.
[67] *Ibid*., p. 221.
[68] *Ibid*., p. 220.

during his extensive travels through Italy ([69]). Unfortunately though, no study has yet focused on Sidney's indebtedness to the legacy of the *ius commune* beyond his clear indebtedness to early modern continental jurisprudence ([70]).

Finally, the third kind of tyranny mentioned by Sidney occurred «when he or they who [had been] rightly called, [did] assume a power, tho within the time prescribed, that the law [did] not give; or turn[ed] that which the law [did] give, to an end different and contrary to that which [was] intended by it» ([71]). His last partition included the two remaining types of tyranny classified by Bartolus: the tyranny *propter titulum* and the tyranny *ex parte exercitii*.

Though far from Milton's complex combination of inner and outer forms of tyranny and Sidney's close adherence to the traditional partition of tyrannical regimes consolidated by Bartolus, John Locke (1632-1704) offered a no less influential meditation of the perversion of power.

After having devoted his entire *First Treatise of Government* to prove that true sovereignty could emanate exclusively from a legitimate title ([72]), he concluded his *Second Treatise* by examining the illegitimate acquisition of power and its abusive exercise ([73]). He discussed the first in his chapter on

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[69] Jonathan SCOTT, *Algernon Sidney and the English Republic, 1623-1677*, Cambridge University Press, Cambridge, 1988, pp. 151-163.
[70] See *ibid*., p. 19.
[71] Algernon SIDNEY, *Discourses Concerning Government*, cit., p. 220.
[72] John LOCKE, *Two Treatise of Government*, edited by Peter Laslett, Cambridgne University Press, Cambridge, 1988, pp. 141-262.
[73] *Ibid*., pp. 387-405.

«Usurpation» and restricted his treatment of «Tyranny» to the second ([74]).

It would be a mistake, however, to infer from such partition that Locke ignored the jurisprudential tradition and contented himself with a belated Aristotelian understanding of tyranny as abuse of power and disregard for the common good ([75]). His choice to consider the illegitimate acquisition of power as an aberration of authority distinct from tyranny appears to have been a means to emphasize the egregiousness of the violation perpetrated by the usurper. «Whoever gets into the exercise of any part of the Power, by other ways, than what the laws of the Community have prescribed, hath no Right to be obeyed […]; since he is not the Person the Law have appointed, and consequently not the Person the People have consented to» ([76]). It was precisely this lack of title that Locke stigmatized in his

[74] *Ibid*., pp. 397, 398.
[75] In the introduction to her translation of the *Institutio principis christiani*, Margherita Isnardi Parente noted: «La distinzione del buono dal cattivo reggitore, del principe dal tiranno […] è desunta […] dalla *Politica* aristotelica […]. Essa è fondata infatti, costantemente, sul motivo della *publica utilitas*, del bene e dell'interesse di tutti, del *κοινόν συμφέρον* […]. Ora, tale motivo è desunto […] dalla *Politica* aristotelica, in base a una costante tradizione di pensiero che la tarda Scolastica ha convalidata con la conoscenza diretta e il commento di Aristotele e il primo Rinascimento ha per suo conto originalmente continuata […] Nel III libro della *Politica* di Aristotele […] la distinzione assume un carattere più largamente e concretamente sociale: il criterio di distinzione fra buono e cattivo governo è il riferimento all'utilità comune […]». See Margherita ISNARDI PARENTE, *L'educazione del principe cristiano di Erasmo da Rotterdam*, cit., p. 31.
[76] John LOCKE, *Two Treatise of Government*, cit., p. 398.

brief yet brilliant chapter on usurpation, to the point of denying the «Usurper» could ever «[…] have Right on his side» ([77]).

[77] *Ibid*., p. 397. «Nor can such an Usurper, or any deriving from him, ever have a Title» he went on «till the People are both at liberty to consent, and have actually consented to allow, and confirm in him, the Power he hath till then Usurped», *ibid*., p. 398. This closing statement is among the most remarkable in the chapter and would require a more extensive discussion. Suffice it to note that Locke here resolves in the affirmative the vexing question of whether belated consent might rectify an originally illegitimate acquisition of power. The traditional answer given by the masters of the *ius commune*, and chiefly by Bartolus, had been in the negative. (See Margherita ISNARDI PARENTE, *Jean Bodin su tirannide e signoria nella «République»*, cit., pp. 141-142: «Sono […] largamente reperibili nella casistica giuridica della tirannide, nel corso del pensiero medievale, proseguitisi nel Rinascimento e negli ulteriori repertori, le affermazioni di non prescrittibilità del potere sovrano: la tirannide, usurpazione di sovranità, non può cadere in prescrizione. Si ricordi che la prescrizione esige la 'bona fides', che rende possibile la legittimazione del possesso per usucapione; ma la 'bona fides' è, per definizione, esclusa dalla tirannide»). Howerver, in this very passage, Locke recalls one of the most distinctive traits of Bartolus' doctrine on tyranny. The consent given by the people to a ruler must be free from any kind or physical or moral compulsion or it otherwise constitutes an illegitimate extortion invalidating the title claimed by the ruler. See Diego QUAGLIONI, *Tyrannis*, cit., pp. 236-237: «Al centro dell'indagine bartoliana, tendente a delineare una compiuta casistica della tirannide, sta il problema del consenso, assimilato, nel linguaggio del diritto commune, al priblema dei vizi della volontà del negozio giuridico. Tra questi è non solo la violenza fisica, ma anche la violenza morale (*iustus metus*), cioè la minaccia attuale di un male ingiusto e notevole, posta in essere al fine di costringere qualcuno a concludere un negozio e dunque rilevante per inficiare la volontà negoziale. Perciò il giurista ricerca I modi della violenza fisica e morale ('qualiter violentia vel metus inferatur in populum') e richiama in modo esplicito l'*actio quod metus causa*, cioè il rimedio concesso dal magistrato una volta accertata concretamente la presenza della minaccia di un male notevole moralmente o giuridicamente illecito, come elemento perturbatore del processo formativo della volontà. Insomma, nello schema bartoliano è provata – e come tale è perseguibile – la tirannide per difetto di tiolo ogni qual volta la *civitas* trasferisca la giurisdizione nel *dominus*, sia pure con un formale atto di elezione, ma in presenza di uno stato di opporessione, poiché il potere pubblico deve essere trasferito con un atto di libera manifestazione della volontà, e dove questa volontà sia viziata da un timore fondato, quella trasmissione ha il palese carattere dell'illegittimità ('iurisdictio debet transferri voluntarie est si per metum fiat ipso iure non valet')». As is the case for Sidney, I am unaware of any study tracing the influence of the *ius commune* over the political thought of John Locke. But passages such as the

There is a remarkable echo in these words. Whether or not Locke and his contemporaries were aware of it is hard to say. Nonetheless, by reading these texts, it might not be unreasonable to assume that the memory of tyranny's longstanding tradition, which had found in Dante's «usurpatio enim iuris non facit ius» the sharpest indictment of what Bartolus would classify a generation later as the *tyrannus ex defectu titutli*, had not been entirely forgotten in the days of the English Revolution ([78]).

No doubt this medieval doctrine on tyranny stands, more generally, as the root of the administrative law institutes of incompetence and abuse of power ([79]). But within the Anglo-American political tradition it seems to have acquired a special relevance amid the 17th and 18th centuries, when it became –

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ones discussed above seem to indicate a keen interest on the part of both for earlier continental jurisprudence.

[78] DANTE ALIGHIERI in *Monarchia*, cit., pp. 456-458 Locke's echo of the *ius commune* can be traced even further. The final chapter of the *Second Treatise* offers, in fact, one last reminiscence of Bartolus and his legacy, as mediated most likely by the *Vindiciae*. Like Bartolus and the *Vindiciae*, Locke held that being «Rebellion […] an Opposition not to Persons but Authority, which is founded only in the Constitutions and Laws of the Government; those whoever they be, who by force break through, and by force justify their violation of them, are truly and properly *Rebels*. For when Men by entering into Society and Civil Government, have excluded force, and introduced Laws for the preservation of Property, Peace, and Unity among themselves; those who set up force again in opposition to the Laws, do *Rebellare*, that is, bring back again the state of War, and are properly Rebels: Which they who are in Power (by the pretence they have to Authority, the temptation of force they have in their hands, and the Flattery of those about them) being likeliest to do; the properest way to prevent the evil, is to shew them the danger and injustice of it, who are under the greatest temptation to run into it». See, John LOCKE, *Two Treatise of Government*, cit., p. 415.

[79] See Francesco CALASSO, *Gli ordinamenti giuridici del rinascimento medievale*, cit., p. 263.

through its indirect reception, mediated by such works as the *Vindiciae* – the ultimate foundation on which a new paradigm of power was constituted, in an effort to redress the abuses and usurpations that had led to the outbreak of the English and American Revolutions. It had been, in other words, «la patologia del potere a sollecitare» the Anglo-American legal thought «alla riaffermazione di un principio universale di legittimità e giustizia» ([80]). And so, it happened that modern constitutionalism was conceived as an expressly anti-tyrannical doctrine.

2. *Jefferson's doctrine on tyranny*

Thomas Jefferson held most of these doctrines at arms' reach. Since early on, he had begun collecting a wide selection of sources on tyranny in his library. Not only because these were the elementary treatises of any legal education, but because the perversion of power rapidly became the primary concern of his early political career and the main issue of his revolutionary writings ([81]). Yet, scholarly appreciation of his engagement with the doctrine ultimately championed by Bartolus has mostly been

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[80] Diego QUAGLIONI, *«Dominium», «iurisdictio», «imperium». Gli elementi non-moderni della modernità giuridica*, cit., p. 675.

[81] Annette GORDON-REED and Peter S. ONUF, *«Most Blessed of Patriarchs". Thomas Jefferson and the Empire of the Imagination*, Liveright, New York, 2016, p. xv: «[…] hostility to tyranny was at the heart ot his politics and plan for the United States», however, as the authors go on to note, «that sentiment had no real currency» on his plantation, ruled as it was by the corrupt and corrupting institute of slavery.

cursory. As a result, the limited review of his sources has blurred out perception of his own notion of tyranny.

Even at first sight, Jefferson's revolutionary papers appear to have been written in the language of Western jurisprudence, at a time when tyranny was still very much part of that language and questions concerning the acquisition or exercise of power were treated as legal controversies. It is that language that shaped Jefferson's political discourse and informed his understanding of power. And it is to that same language that Western politics owes, more than its legalistic tone, the conceptual framework needed to conceive the nature and effects of political obligations ([82]).

Jefferson did not conceive power in the abstract. It had been the imperial crisis with Britain which had led him to retrace the «true ground» on which colonial settlements had been first established and then urged him to pit the origin of American jurisdictions against the foundations of English parliamentary and royal prerogatives ([83]). And it was this historical investigation of colonial past that Jefferson progressively shaped into a broader doctrine on sovereignty and its degeneration into tyranny.

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[82] The idea that Western political discourse owes its conceptual lexicon to the language of jurisprudence has been put forth in Diego QUAGLIONI, *Machiavelli e la lingua della giurisprudenza*, cit., p. 59: «A quella lingua e al suo vocabolario la politica stessa deve, più che un "colorito giuridico", quasi tutto il suo patrimonio concettuale. In tal senso, sul terreno del diritto pubblico, la lingua della giurisprudenza non è altro che la lingua del potere».

[83] Thomas JEFFERSON, *Draft of Instructions to the Virginia Delegates in the Continental Congress (MS Text of A Summary View of the Rights of British America)*, cit., p. 125.

Jefferson's earliest restatement of tyranny came in his first piece of revolutionary writing, published in 1774 under the title *A Summery View of the Rights of British America* ([84]). He had not himself overseen the publication of the text, which had been drafted as a set of instructions to the Virginia delegates in the First Continental Congress. His political allies had seen to it, rightly convinced, by the forcefulness of Jefferson's arguments, that the text would have easily won public approbation, strengthening the colonists' stance against the British Parliament and its asserted right of legislation over the colonies ([85]).

In the text Jefferson levied two main charges against British rule.

He began by claiming that Parliament had usurped a power it was not entitled to and denied that any right could be established through such encroachment ([86]). According to Jefferson, the colonists had «acquired» the right to govern themselves by expatriating and establishing new societies in the territories they

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[84] *Ibid*., pp. 121-137.

[85] See Stephen A. CONRAD, *Putting Rights Talk in its Place: The* Summary View *Revisited*, in *Jeffersonian Legacies*, edited by Peter S. Onuf, University Press of Virginia, Charlottesville, 1993, pp. 256-261; as well as David N. MAYER, *The Constitutional Thought of Thomas Jefferson*, University of Virginia Press, Charlottesville and London, 1994, pp. 28-37. For an overview of the various scholarly readings of the *Summary View* see Kristofer RAY, *Thomas Jefferson and A Summary View of the Rights of British North America*, in *A Companion to Thomas Jefferson*, edited by Francis D. Cogliano, Wiley-Blakwell, Chichester, 2012, pp. 32-43.

[86] The idea that «force cannot give right» (see Thomas JEFFERSON, *Draft of Instructions to the Virginia Delegates in the Continental Congress (MS Text of A Summary View of the Rights of British America)*, cit., p. 134) runs through all of Jefferson's thought. For a preliminary discussion see Maurizio VALSANIA, *Nature's Man. Thomas Jefferson's Philosophical Anthropology*, University of Virginia Press, Charlottesville and London, 2013, pp. 77-78.

conquered «at the hazard of their lives and loss of their fortunes» ([87]). These new jurisdictions were in themselves independent, as each possessed within itself «the sovereign powers of legislation» ([88]). On the contrary, Parliament's «exertion of power» over the colonies appeared to be baseless, as no title justified the subjection of British Americans to the legislation of a body to whom they had relinquished allegiance by removing themselves from its purview ([89]). «Single acts of tyranny» could have been ascribed «to the accidental opinion of a day; but a series of oppression, begun at a distinguished period, and pursued unalterably thro' every change of ministers» proved «too plainly» a «deliberate, systematical plan of reducing» the colonies «to slavery» ([90]). Hence, Jefferson qualified Parliament's acts of colonial legislation as tyrannical for they constituted the exercise of a «usurped power», which, in the jurisprudential language Jefferson reverted to in his revolutionary papers, meant Parliament was not entitled to «exercise [any] authority» over the colonies and all its acts of colonial legislation were inherently «void» ([91]).

There can be no doubt that by usurpation Jefferson meant the illegitimate acquisition of power traditionally known as tyranny *ex defectu tituli*. His language could not have been more

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[87] Thomas JEFFERSON, *Draft of Instructions to the Virginia Delegates in the Continental Congress (MS Text of A Summary View of the Rights of British America)*, cit., p. 123.
[88] *Ibid*., p. 132.
[89] *Ibid*., p. 123.
[90] *Ibid*., p. 125.
[91] *Ibid*.

explicit, nor could he have argued more stringently that by usurping a power it was not entitled to Parliament had acted tyrannically. A part from being consistent with the language of his most immediate sources (Locke, Sidney, Milton, and the *Vindiciae*), Jefferson's use of tyranny highlighted one of the fundamental tenets of his constitutionalism: power may not establish itself. In order for it to be legitimate, power must emanate from a lawful title. It must, in other words, have been constituted. In the absence of a proper constitution, power can claim no title and is thus tyrannical.

Jefferson was adamant: any *de facto* acquisition of power was not only illegitimate, it was against nature itself. A power devoid of title, was a power that pretended to be the source of its own strength and legitimacy, a creature of its own creation ([92]).

[92] This notion stands in sharp contrast to a quite opposive view of constitutionalism according to which legal sistems are originally established *de facto* and as such do not tolerate any review of their foundations. This doctrine has been discussed most clearly in Santi ROMANO, *L'instaurazione di fatto di un ordinamento costituzionale e sua legittimazione*, in *Archivio giuridico*, vol. 68, 1901, re-published in ID., *Scritti minori*, vol. 1, *Diritto costituzionale*, edited by Guido Zanobini, Giuffrè, Milano, 1990, pp. 131-201; as well as in ID. *Rivoluzione e diritto*, in ID., *Frammenti di un dizionario giuridico*, Giuffrè, Milano, 1947, re-published in 1983, pp. 220-233. The relationship between the revolution, understood as the *de facto* establishment of a new regime, and the law has also been drawn the attention of Antonio MARONGIU, see his *Diritto e potere nell'inghilterra del seicento*, in *Diritto e potere nella storia europea. Atti in onore di Bruno Paradisi*, Olschki, Firenze, 1982, p. 564: «Chi ha studiato i rapporti tra le rivoluzioni e il diritto trova – o può trovare, se lo voglia – che la rivoluzione rechi in sé un momento necessario e sufficiente di giuridicità e la coesistenza, nel tempo che precede la instaurazione di un nuovo ordine, di un diritto statuale e di un diritto non statuale, oppure ritenere che essa attui un potere di fatto, che poi essa medesima non validerà o ratificherà, rendendolo definitivo e giuridicamente valido: rivoluzione, quindi, attuazione di un potere di fatto tendente a diventare una nuova giuridicità. La rivoluzione è ed è stata sempre creazione di diritto. Ma va considerata rivoluzione anche la reazione, o la

This had been Parliament's exorbitant claim, against which Jefferson levied his second charge. Being one «free and independent legislature», Parliament could not take it upon itself «to suspend the powers» of colonial legislatures, which were equally free and independent assemblies, without pretending to become «the creator and creature of it's [sic] own power» and thus «exhibiting a phenomenon, unknown in nature» and inadmissible in law ([93]).

Locke and Sidney had confronted similar claims advanced by Filmer (1588-1653), who had forbidden to «examine titles» and maintained that power must have been obeyed «whether

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restaurazione, che tende a negare la giuridicità della rivoluzione vera e propria, come ciò che era avvenuto in Inghilterra, tutti lo sanno, nel 1660». Of opposite opinion was Victor Hugo, who seems not to have forgotten either Locke or the legacy of Bartolus. See, Victor HUGO, *Les Misérables*, edited by Maurice Allem, Gallimard, Paris, 1951, p. 854: «Pour les vieux partis qui se rattachent à l'hérédité par la grâce de Dieu, les révolutions étant sorties du droit de révolte, on a droit de révolte contre elles. Erreur. Car dans les révolutions, le révolte, ce n'est pas le people, c'est le roi. Révolution est précisément le contraire de révolte. Toute révolution, étant un accomplissement normal, contient en elle sa légitimité, que de faux révolutionnaires déshonorent quelquefois, mais qui persiste, même souillée, qui survit, même ensanglantée. Les révolutions sortent, non d'un accident, mais de la nécessité. Une révolution est un retour du factice au réel. Elle est parce qu'il faut qu'elle soit». In deposing the old regime, Jefferson himself claimed similarly the need «to re-establish such antient principles as are friendly to the rights of the people». See Thomas JEFFERSON, *First Draft of the Virginia Constitution*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p. 339. The significance of «re-establish» can only be appreciated if the tyrannical rule of George III is understood, in keeping with the legacy of Bartolus and the *Vindiciae*, as a rebellion against the ancient rights of the people guarded by Western Jurisprudence: «[…] quod si existentes in tali tyrannide […] ipso iure sunt rebelles et dignitatem perdunt». See BARTOLUS A SAXOFERRATO, *Tractatus de tyranno*, cit., pp. 203-204.

[93] Thomas JEFFERSON, *Draft of Instructions to the Virginia Delegates in the Continental Congress (MS Text of A Summary View of the Rights of British America)*, cit., p. 126.

acquired by usurpation or otherwise» ([94]). They both rejected such propositions, reclaiming instead the cornerstone principle of the rule of law, ingrained in Western jurisprudence ever since Dante had claimed: «Nullus princeps se ipsum potest auctorizare» ([95]), and Bartolus had paraphrased the maxim, adding: «[…] debet quis ab alio rex constitui, non ipse sua auctoritate sibi regnum assumere: tunc enim non esset rex sed tyrannus […]» ([96]).

Jefferson himself drew the principle to its ultimate conclusion. Just as power could not rightfully establish itself, nor could it rightfully limit itself. There was no room in his constitutionalism for what would later be called *Selbstverpflichtung* ([97]). He expressly dismissed any kind of

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[94] Algernon SIDNEY, *Discourses Concerning Government*, cit., p. 220.

[95] DANTE ALIGHIERI, in *Monarchia*, cit., p. 404

[96] BARTOLUS A SAXOFERRATO, *Tractatus de regimine civitatis*, in Diego QUAGLIONI, *Politica e diritto nel trecento italiano*, cit., p. 159. The passage is part of Bartolus' commentary on Deuteronomy 17, 14-20. On the political and normative relevance of this passage in Western jurisprudence and political thought see Diego QUAGLIONI, *«Religio sola est, in qua libertas domicilium conlocavit». Coscienza e potere nella prima età moderna*, in *Religious Obedience and Political Resistance in the Early Modern Wrold. Jewish, Christian and Islamic Philosophers Addressing the Bible*, edited by Luisa Simonutti, Brepols, Turnhout, 2014, pp. 33-51. The relevance of this same scriptural passage in English political thought has been reviewed in Eric NELSON, *The Hebrew Republic. Jewish Sources and the Transformation of European Political Thought*, Harvard University Press, Cambridge and London, 2010.

[97] On *Selbstverpflichtung* and Georg Jellinek's *Staatslehre* see Diego QUAGLIONI, *Sovranità e autolimitazione. (Rileggendo la «Dottrina generale del diritto dello Stato» di G. Jellinek),* in *Crisi e metamorfosi della sovranità*, edited by Maurizio Basciu, Giuffrè, Milano, 1996, pp. 271-282. See, more recently, Sara LAGI, *The Formation of a Liberal Thinker: Georg Jellinek and his early Writings (1872-1878)*, in *Res Publica*, vol. 19, n. 1, 2016, pp. 59-76; and ID., *Georg Jellinek, a Liberal Political Thinker against Despotic Rule*

self-obligation: «to ourselves, in strict language, we can owe no duties, obligation requiring […] two parties», he famously wrote to Thomas Law in 1814 ([98]). Jefferson might have drawn the strict language of this dismissal from the language of Roman Law as it had been rephrased by Bodin, according to who's reading of the Digest: «Nulla obligatio consistere potest, quae a voluntate promittentis statum capit». This crucial passage, highlighted in Jefferson's copy of the *Republique*, led Bodin to claim unequivocally that no authority could bind itself: «[…] car on peut bien receuoir loy d'autruy, mais il est impossible par nature de se donner loy, non plus que commander a soy-mesme chose qui depende de sa volonté, comme dit la loy, *Nulla obbligatio consistere potest, quae a voluntate promittentis statum capit*: qui est une raison necessaire, qui monstre euidemment que le Roy ne peut estre subiect à ses loix.. Et tout ainsi que le Pape ne se lie iamais les mains, comme disent les canonistes: aussi le Prince souuerain ne se peut lier les mains, quand ores il voudroit» ([99]).

(1885-1898), in *The Hungarian Historical Review*, vol. 5, n. 1, 2016, pp. 103-120.

[98] Thomas JEFFERSTON, *letter to Thomas Law, 13 June 1814*, in *The Papers of Thomas Jefferson*, *Retirement Series*, vol. 7, *28 November to 30 September*, edited by J. Jefferson Looney *et al*., Princeton University Press, Princeton, 2010, p. 413. On the legal impossibility of a self-obligation see Diego QUAGLIONI, *Costituzione e costituzionalismo nella tradizione giuridica occidentale*, in *La Costituzione Francese, La Constitution Française. Atti del convegno biennale dell'Associazione di Diritto pubblico comparato ed europeo, Bari, Università degli Studi, 22-23 maggio 2008*, edited by Marina Calamo Specchia, Giappichelli, Torino, 2009, p. 15.

[99] Jean BODIN, *Les six livres de la Republique*, cit., livre 1, chapitre 8, *De la souveraineté*, p. 132. The dotted underlining corresponds to the marginal markings in Jefferson's copy of the *Republique*. For a commentary see Diego

This same logic had informed Jefferson's earlier criticism of the newly adopted Constitution of Virginia. Because the Charter had been enacted by the ordinary legislature, it did not possess the capacity to bind future legislatures for the strictly Bodinian reason that it did not «pretend» to any «higher authority than the other ordinances» enacted in «the same session», nor was it «transcendent above the powers of those who they knew would have [maintained] equal power with themselves» ([100]).

Now, against Parliament's inordinate acts of usurpation some remedy was needed and Jefferson sought it in the «mediatory power» entrusted to the king ([101]). Drawing from the long standing tradition which had envisioned the king as chief magistrate of the people ([102]), «appointed by the laws, and circumscribed with definite powers, to assist in the working of the great machine of government» ([103]), and reminding «his majesty» that he could not «put down all law under his feet» or «erect a power superior to that which» had «erected» him to the throne ([104]), Jefferson called the king to fulfill his office: «[hold]

QUAGLIONI, «*Omnes sunt cives civiliter». Cittadinanza e sovranità fra storia e diritto*, in *Dallo status di cittadino ai diritti di cittadinanza*, edited by Fulvio Cortese, Gianni Santucci, and Anna Simonati, Università degli Studi di Trento, Trento, 2014, pp. 9-10.

[100] See Thomas JEFFERSON, *Notes on the State of Virginia*, cit., p. 122.

[101] Thomas JEFFERSON, *Draft of Instructions to the Virginia Delegates in the Continental Congress (MS Text of A Summary View of the Rights of British America)*, cit., p. 129.

[102] See Diego QUAGLIONI, *Il modello del principe cristiano. Gli "Specula principum" fra Medioevo e perima età moderna*, cit, pp. 103-122.

[103] Thomas JEFFERSON, *Draft of Instructions to the Virginia Delegates in the Continental Congress (MS Text of A Summary View of the Rights of British America)*, cit., p. 121.

[104] *Ibid*., p. 134.

the balance» of the empire, preserve its harmony, «resume the exercise of his negative power», and prevent «any one legislature» from passing acts which might have «infringe[d] on the rights and liberties of another» ([105]).

Had the king reconciled the competing interests within the empire, rather than side with those of one particular body against all the others, Jefferson would have had no cause to levy an additional charge of tyranny against the monarch. But the petition voiced in the *Summary View* was answered by the repeated injuries of a monarch who disregarded balance within his empire and conspired to subject American societies to the «foreign jurisdiction» of Parliament ([106]).

The new charge against the king was brought by Jefferson's preamble to the Constitution he had drafted for the Commonwealth of Virginia in 1776, after the Second Continental Congress had urged all former colonies to revise their fundamental laws ([107]). Virginia ended up adopting a

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[105] *Ibid*., pp. 135, 134. The idea according to which sovereignty ultimately consists in the mediation of conflicting interests is typically Bodinian. It would thus be tempting to ascribe these Jeffersonian ruminations on the mediatory power of the king to his reading of Bodin and the *Republique*. It must not be forgotten, however, the Jefferson seems to have acquired his copy of the *Republique* during his diplomatic mission to France. Although it is possible that Jefferson had access to Bodin prior to his European tour (copies of Bodin's French, Latin, and English editions of the *Republique* where held at the Loganian Libray in Philadelphia, as evidenced by the existing catalogues of the Library Company of Philadelphia), there seems to be no hard evidence supporting this hypothesis.

[106] Thomas JEFFERSON, *First Draft of the Virginia Constitution*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p. 338.

[107] See Pauline MAIER, *American Scripture. Making the Declaration of Independence*, Knopf, New York, 1997, re-issued by Vintage Books, New York, 1998, p. 37: «Finally, on May 10, 19776, the Continental Congress

different text, but it did incorporate Jefferson's preamble in its Constitution. This would be sufficient to make the text worthy of consideration, but what rendered it still more significant was Jefferson's own reliance on its text as a blueprint for the *Declaration of Independence* he drafted only a few weeks later ([108]).

The preamble not only allowed Jefferson to indict the king's endeavors «to pervert» government «into a detestable & insupportable tyranny» ([109]), it allowed him also to qualify the king as a tyrant *ex parte exercitii*, who had put «his negative on [colonial] laws the most wholesome & necessary for the public good» ([110]), but had not exercised the same power to prevent parliamentary encroachments over colonial autonomy. And so did all the other charges levied in the following paragraphs reinforce Jeferson's qualification of the king as a tyrant who had not fulfilled his office, but had rather abused his power, and disregarded the rights of his subjects ([111]).

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recomended to 'the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs has been hitherto established', that they 'adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and America in general'». See also Robert G. PARKINSON, *The Declaration of Independence*, in *A Companion to Thomas Jefferson*, edited by Francis D. Cogliano, cit., p. 47.

[108] See Pauline MAIER, *American Scripture. Making the Declaration of Independence*, cit., p. 105.

[109] Thomas JEFFERSON, *First Draft of the Virginia Constitution*, cit., p. 337.

[110] *Ibid*., p. 338.

[111]The escalating conflict between the colonies and Parliament prompted several British Americans to invoke the monarch's protection and urge him to exercise his negative against Parliament to prevent the enactment of laws detrimental to colonial autonomy. Although such prerogative power had not

Looked through the lens of his revolutionary writings, American political experience provided Jefferson with two different examples of tyrannical practices: Parliament's usurpation of colonial self-government and the King's abusive disregard of colonial rights. Both these instances were distinct manifestations of an overall perversion of power that threatened

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been exercised by any monarch since the English Revolution and Parliament had actually claimed prerogative powers for itself, British Americans insisted in their claim and firmly rejected the principle of parliamentary supremacy, along with all its implications. In a recent monograph, Eric Nelson has strongly insisted that, through such claim, British Americans advocated a return to the constitutional settlement preceding the English Revolution, when Parliament enjoyed no supremacy – especially over the colonies – and was countered in its action by the exercise of royal prerogatives. See Eric NELSON, *The Royalist Revolution: Monarchy and the American Founding*, Harvard University Press, Cambridge, 2015. Thus, in Nelson's view, the very people who would eventually become the leaders of the American Revolution articulated a neo-Stuart defense of prerogative power and came to reject kingship only after their king had actually refused to avail himself of such powers. As compelling as this interpretation is (for not only does it challenge the prevailing interpretation of the American Revolution, but in doing so it opens new research perspectives), it does not appear to be entirely consistent, as Nelson himself acknowledges, with the constitutional rationale given by Jefferson for the American Revolution (see *ibid*., pp. 58-60) Although it's true that Jefferson expressly invoked the royal negative against parliamentary usurpation, and thus advocated in favor of a constitutional arrangement in which prerogative powers could be exercised as a limit against the illegitimate pretense of one legislator to suppress the autonomy of another, it would be a misinterpretation of his thought (as Nelson admits) to contend that Jefferson defended prerogative power *per se*. What Jefferson's did appreciate was the constitutional purpose that prerogative powers could fulfill when exercised as a remedial power against tyrannical acts of usurpation. Therefore, it was only within the broader framework provided by the doctrine on tyranny that Jefferson justified the existence of prerogative powers, given that such powers were themselves limited by that very doctrine – a point Jefferson clearly articulated in the *Summary View*, where he expressly insisted that neither the power enjoyed by Parliament, nor the one enjoyed by the king, were devoid of titles and of limits, granted they both could degenerate into tyranny, as they both eventually did. Just how borad was such constitutional appreciation of tyranny amongst British Americans is a question still in need to be addressed by interpreters of the American Revolution.

the foundations of colonial societies by subjecting them to a «jurisdiction foreign to [their] constitutions» and exposing them to the injuries perpetrated by «sacrificing the rights of one part of the empire to the inordinate desire of another» ([112]).

Jefferson was thus confronted with the problem of proving his multiple charges ([113]). And what evidence could he submit «to the tribunal of the world» if not historical ([114])? As Alessandro Fontana has remarked, «[s]i la question de la résistance se situe, au Moyen Âge, sur le plan de la loi, si à l'époque des guerres de religion elle se situe sur le plan de la conscience, du XVII[e] siècle à 1798 elle va se situer sur le plan de l'histoire: résistance au monarque qui enfreint la loi d'abord, résistance au prince qui viole la conscience ensuite, résistance enfin au roi dont les ancêtres son censés avoir usurpé le pouvoir par la conquête» ([115]).

It had been the colonists who had expatriated, relinquished their allegiance to the mother country, conquered for themselves, and themselves alone, the Atlantic shores of North America, and then, once «settlements [had] been thus effected in

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[112] Thomas JEFFERSON, *Original Rough Draught of the Declaration of Independence*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p. 425; ID., *Draft of Instructions to the Virginia Delegates in the Continental Congress (MS Text of A Summary View of the Rights of British America)*, cit., p. 134.

[113] Not only was this a characteristically juristic problem, but it had also been, evers since Bartolus, one of the traditional problem confronting anyone who challenged the tyrannical nature of power. See BARTOLUS A SAXOFERRATO, *Tractatus de tyranno*, cit., pp. 185-187, 207, 213.

[114] Thomas JEFFERSON, *letter to Henry Lee, 8 May 1825*, in *Thomas Jefferson, Writings*, edited by Merrill D. Peterson, The Library of America, New York, 1984, p. 1501.

[115] Alessandro FONTANA, *Du droit de resistance au devoir d'insurrection*, cit., p. 25.

the wilds of America», chosen «to continue their union» with the empire «by submitting themselves to the same common sovereign, who was thereby made the central link connecting the several parts of the empire thus newly multiplied» ([116]). No submission to Parliament had, instead, ever been granted ([117]). And it was the colonists expectation that the king would enforce their legislative independence against any parliamentary usurpation ([118]). When the monarch betrayed such duty, he altered the conditions on which the colonists had agreed to submit to his empire and became thus liable for deposition ([119]).

This historical line of reasoning ran through all of Jefferson's revolutionary writings and culminated in his draft of the *Declaration of Independence.* It underpinned the detailed list of charges levied against king and parliament alike. And moreover it offered him the chance to expound systematically, and in a single historical narrative, his doctrine on tyranny, which –

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[116] Thomas JEFFERSON, *Draft of Instructions to the Virginia Delegates in the Continental Congress (MS Text of A Summary View of the Rights of British America)*, cit., p. 122-123.

[117] See Thomas JEFFERSON, *Original Rough Draught of the Declaration of Independence*, cit., p. 426: «[…] in constitutiong our several forms of government, we had adopted one common king […] but that submission to their parliament was no part of our constitution, nor ever in idea, if history may be credited […]».

[118] As David Myer has contended, the *Summary View* «provided not only the justification for American independence, but also the rational for the federal union that the new American nation ultimately would adopt as the form of its constitution». See David N. MAYER, *The Constitutional Though of Thomas Jefferson*, cit., p. 29.

[119] See Thomas JEFFERSON, *Third Draft of the Virginia Constitution*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p. 357: «[…] by which several acts of misrule the said George Guelf has forfaited the kingly office and has rendered it necessay for the preservation of the people that he should be immediatly deposed from the same, and divested of all it's [sic] priviledges, powers, & prerogatives […]».

according to Pauline Maier – constituted his distinguishing contribution to the cause of independence ([120]).

The text of Jefferson's original rough draft went even further than his earlier revolutionary writings in qualifying British rule as manifestly tyrannical and chastising the «many acts of tyranny without a mask» perpetrated by George III ([121]). The wording of this most technical qualification was altered in the following draft of the *Declaration*, but its substance remained unchanged, as the text attacked the «foundation so broad & so undisguised» of British tyranny ([122]). But, rather significantly, this same qualification was expunged from the paragraph as adopted by Congress. Jefferson's technical language was glossed over in favor of a more synthetic, but less articulate wording ([123]). The drafting history of the *Declaration* proves,

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[120] See Pauline MAIER, *American Scripture. Making the Declaration of Independence*, cit., p. 123.

[121] Thomas JEFFERSON, *Original Rough Draught of the Declaration of Independence*, cit., p. 426: «a prince [Jefferson is reverting to the romanistic notion of *princeps*] whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a people who mean to be free. Future ages will scarce believe that the hardiness of one man, adventured within the short compass of 12 years only, on so many acts of tyranny without a mask, over a people fostered & fixed in principles of liberty».

[122] Thomas JEFFERSON, *Notes of Proceedings in the Continental Congress, 7 June – 1 August 1776*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p. 318: «a prince who's character is thus marked by every act which may define a tyrant is unfit to be the ruler of a free people. […] future ages will scarcely believe that the hardiness of one man adventured, within the short compass of twelve years only, to lau a foundation so broad &so undisguised for tyranny over a people fostered & fixed in principles of freedom».

[123] See *The Declaration of Independence as Adopted by Congress, 11 June – 4 July 1776*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p. 431, where the aformentioned passage is reduced to: «A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people».

however, Jefferson's technical understanding of tyranny and his clear perception of its dogmatic and historical articulations. Whereas this allows us to claim that the legacy of Bartolus mediated by the *Vindiciae* and adopted by 17th century English political thought was still alive in Jefferson's recollection of Western jurisprudence on tyranny, it is undoubtedly true that the notion of tyranny had lost much of its technical sharpness since the earlier days of the *ius commune*. And this is equally proven by the drafting history of the *Declaration*. Not only because the express qualification of tyranny as «undisguised», *i.e.* manifest, was absent from the final text of the *Declaration*, but because of another highly significant alteration in the text.

In the second paragraph of his rough draft, Jefferson had distinguished «just powers» of government, which derived from a proper title: «the consent of the governed» ([124]), from «arbitrary powers», resulting instead from «abuses and usurpations», which led inescapably to «absolute tyranny» ([125]).

> «We hold these truths to be sacred & undeniable; that all men are created equal & independent, that from that equal creation they derive cerain rights inherent & inalinable, among which are the preservation of life, & liberty, & the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any for of government shall become destructive to these ends, it is the right of the people to alter or abolish it, & to institute new government, laying it's [sic] foundation on such principles & organizing it's [sic] power in

[124] Thomas JEFFERSON, *Original Rough Draught of the Declaration of Independence*, cit., p. 423.
[125] *Ibid*., p. 424.

such form as to them shall seem most likely to effect their safety & happiness. […] But when a long train of abuses &usurpations, begun at a distinguished period, & pursuing invariably the same object, evinces a design to subject them to arbitrary power, it is their right, it is their duty, to throw off such government & to provide new guards for their future security. Such has been the patient sufferance of these colonies; & such is now the necessity which constrains them to expunge their former sistems of government. The history of his present majesty, is a history of unremitting injuries & usurpations, among which no one fact stands single or solitary to contradict the uniform tenor of the rest, all of which have in direct object the establishment of an absolute tyranny ofer these states».

The symmetry of this juxtaposition was somewhat altered once John Adams revised Jefferson's rough draft, for in the copy he made of the draft *Declaration* the word «arbitrary» was substitute for «absolute» ([126]). Furthermore, Benjamin Franklin appears to have suggested an additional revision and proposed to replace «power» with «Despotism» ([127]). Thus, in the end

[126] *Ibid*., p. 428.

[127] *Ibid*., p. 428. A tentative comment on this sequence of alterations is provided in Julian P. BOYD, *The Declaration of Independence. The Evolution of the text*, revised edition edited by Gerard W. Gawalt, The Library of Congress in association with the Thomas Jefferson Memorial Foundation Inc., University Press of New England, Hanover and London, 1999, pp. 27-28: «At first glance it appears as if the words 'to arbitrary power' were cancelled by two parallel lines with two continuous strokes of the pen and as if 'Despotism' was written above this cancellation at the same time as 'under absolute'. Strangely, however, Adams did not copy the phrase as 'under absolute Despotism' but as 'under absolute power'. This, as Mr. Becker observes, 'is neither the original nor the corrected reading, but a combination of both. Adams may of course have made a mistake in copying (he made a number of slight errors in copying); or it may be that at this time Franklin wrote in *under absolute* in place of *to arbitrary* and that not until later, after Adams had made his copy, was *power* crossed out and *Despotism* written in. In the original manuscropt, *Despotism* appears to have been written with a different pen, o with heavier ink, than *under Absolute*, as if written at a different time'. I think Mr. Becker is quite right in suggesting that 'under

Jefferson's clear contrast between «just» » and «arbitrary» powers was lost, and, more significantly, it appeared that «a long train of abuses and usurpations» had reduced the colonies under an «absolute Despotism» as well as an «absolute tyranny» ([128]).

«We hold these truths to be self evident: that all men are created equal; that they are endowed by their creator with certain inherent and inalinable rights; that among these are life, liberty, and the pursuit of

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absolute' and 'Despotism' were written at different times and the latter after Adams had taken his copy. Both Adams' copy and the differences in shading in the words point to this conclusion. But I would go much further than Mr. Becker, though without some trepidation. I would suggest that 'under absolute' and 'Despotism' were written at different times – and by different persons, the former by Jefferson before Adams took his copy and the latter by Franklin after Adams had sone so. The three words 'under absolute Despotism' have always been attributed to Franklin because of Jefferson's marginal notation opposite them 'Dr. Franklin's handwriting', with an identifying mark berfore each phrase connecting them with another. It seems clear, however, that Jefferson's marginal notations were written many years after 1776, as the feebleness of the handwriting indicates; it is apparent also that Jefferson failed in these marginalia to give Franklin credit for all of the changes that were made by him in the Rough Draft. Could he have been mistaken in this instance likewise in giving Franklin credit for too much? It appears plausible in light of the Adams copy and almost conclusive in light of the differences in writing that 'under absolute' and 'Despotism' were not only written at different times but by different persons: the 's' in 'absolute' appears makedly different from those in 'Despotism'; the 'u'certainly has a Jeffersonian appearance; the 'i' in the two words are different of appear to be; there is, as Mr. Beker points out, the striking difference in the shading of the words; the word 'absolute' bears a very strong resemblance to the same word in the third line from the bottom of the same page; and finally, the strokes of the pen by which the phrase 'to arbitrary power' is cancelled our were not continuous, as will be seen when the lines are examined under a powerful magnifying glass. […]». See also Carl L. BECKER, *The Declaration of Independence. A study in the History of Political Ideas*, Alfred A. Kopf, New York, 1953, pp.154-155; and *infra*, chapter 2, note 66.

[128] See, *The Declaration of Independence as Amended by the Committee and by Congress*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p. 430; as well as Thomas JEFFERSON, *Notes of Proceedings in the Continental Congress*, in *ibid*., pp. 315-316.

happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive to these ends, it is the right of the people to alter or abolish it, & to institute new government, laying it's [sic] foundation on such principles, & organizing it's [sic] power in such form, as to them shall seem most likely to effect their safety & happiness. […] But when a long train of abuses & usurpations […], evinces a design to reduce them under absolute Despotism it is their right, it is their duty to throw off such government, & to provide new guards for their future security. Such has been the patient sufferance of these colonies; & such is now the necessity which constrains them to alter […] their former government. The history of the present king of Great Britain is a history of repeated […] injuries & usurpations […] all having in direct object the establishment of an absolute tyranny overe these states».

Was there no distinction between the two qualifications of tyranny and despotism? Apparently not, at least not in the minds of Franklin and the other delegates to the Second Continental Congress. Nor is there any evidence suggesting that Jefferson himself opposed such amendment. However, the final wording appears less precise and more ambiguous than the original, given that tyranny and despotism had been traditionally distinct notions ([129]), the one referring to an unlawful regime, the other to a highly centralized government that did not acknowledge any distinction between public and private property ([130]). Using the two notions as synonyms testified to a certain loss of

[129] See the remarks in Margherita ISNARDI PARENTE, *Introduzione*, cit., pp. 89-90.
[130] *Ibid*.

technicality in the understanding of tyranny, that coexisted with Jefferson's staunch re-affirmation of its essential traits.

Distinguishing absolutism from despotism and tyranny had been a challenge throughout the 16th and 17th centuries and even John Adams himself had confronted the problem in one of his marginal notations to William Ellis' English translation of Aristotle's *Politics* ([131]). «Despotism, absolute Monarchy, and limited Monarchy as explained by modern Writers are three distinct species of Government. But they don't appear in this place to have been clearly comprehended by Aristotle. Absolute Monarchy is used here for Despotism and a king governing by Laws is said to be but a Republik» ([132]). Regardles, these subtle distinctions seem to have been ultimately superseded by the final wording of the *Declaration*, in which absolute power was taken to be inherently arbitrary, and the juxtaposition of tyranny to despotism seemed to have become a distinction without a difference.

Jefferson often complained about the final text of the *Declaration* ([133]). It is generally assumed he did not disapprove the alterations proposed by Adams and Franklin, regarding them

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[131] See Rosanna FAVALE, *Tirannide e dispotismo nel dibattito politico tra cinque e siecento. IX giornata Luigi Firpo, Torino 27-28 settembre 2002*, in *Bruniana & Campanelliana*, vol. 8, n. 2, 2002, pp. 533-535.

[132] This autograph notation is inscribed by John Adams in ARISTOTELE, *A Treatise on Government*, translated by William Ellis, London, 1776, book III, chapter xvi, p. 171. The text has been digitized and is abailable online at https://archive.org/stream/treatiseongovern00aris#page/170/mode/2up

[133] Pauline MAIER, *American Scripture. Making the Declaration of Independence*, cit., pp. 143-153.

as «merely verbal» ([134]). However, he also offered his own precise definition of despotism, in line with the notations inscribed by Adams in his copy of Aristotle, but at odds with Franklin's amendment. «The concentrating [of all the powers of government, legislative, executive, and judiciary] in the same hands is precisely the definition of despotic government» ([135]). So, there remains an appreciable difference between Jefferson's original wording of the *Declaration* – as well as his later thought – and the following versions of the text, at least in regards to tyranny. But even the text as adopted by Congress remained, despite these internal inconsistencies, a decisive indictment of British tyrannical rule.

Pauline Maier has persuasively argued that, by proving the tyrannical nature of British rule, the *Declaration* served to justify the revolution ([136]). The *Declaration* also proved, at least in Jefferson's intentions, that American independence had been established *de iure* and not simply *de facto* ([137]). It denied that power had the capacity of establishing itself and rejected the

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[134] Thomas JEFFERSON, *letter to James Madison, 30 August 1823, in The Republic of Letters*, *The Correspondence between Thomas Jefferson and James Madison, 1776-1826*, vol. 3, *1804-1826*, edited by James Morton Smith, W.W. Norton & Company, New York, 1995, p. 1875.

[135] Thomas JEFFERSON, *Notes on the State of Virginia*, cit., p. 120.

[136] See Pauline MAIER, *American Scripture. Making the Declaration of Independence*, cit., p. 115.

[137] Exactly opposite is the view of David Mayer and Thomas Grey. See David N. MAYER, *The Constitutional Thought of Thomas Jefferson*, cit., p. 41: «Yet, as Thomas Grey has noted, the case for independence 'could not be made in legal terms 'but rather had to be based upon extralegal considerations of utility and political philosophy». See also, Thomas C. GREY, *Origins of the Unwritten Constitution: Fundamental Law in American Revolution Theory*, in *Stanford Law Review*, vol. 30, 1978, pp. 843-893.

proposition that would eventually reduce, two centureis later, public law to the mere sanction of power and give way to an alternative interpretation of the notion of revolution as «l'instaurazione di fatto di un ordinamento» ([138]). American societies constituted proper jurisdictions because they derived their power from lawful titles that had been established, in pursuance of a higher law, as the earliest colonial settlements were being effectuated, through expatriation, conquest, and later citizenship.

This insistent need to retrace the titles from which power emanated was at the origin of Jefferson's constitutionalism. His understanding of power depended, in other words, on his apreciation of its deviation from its proper foundations. Thus Jefferson conceived constitutionalism not simply as a check on tyranny, but as its dialectical opposite. To the point that he could not conceive the one, if not in direct relation to the other.

In a constitutional democracy, a «succesful majority» could not forget that, «though its will [was] to prevail, that will, to be rightful, [had to be] reasonable», *i.e.* consistent with the *recta ratio*, the higher law of Western jurisprudence ([139]). And an «equal law» binding all factions of society had to guard the «equal rights» of «the minority» from all possible

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[138] Santi ROMANO, *L'instaurazione di fatto di un ordinamento costituzionale e sua legittimazione*, cit., pp. 131-201. For an even more explicit interpretation of the revolution as a *de facto* foundation of a legal system see ID. *Rivoluzione e diritto*, cit., pp. 220-233

[139] Thomsa JEFFERSON, *First Inaugural Address*, in *The Papers of Thomas Jefferson*, vol. 33, edited by Barbara B. Oberg *et al*., Princeton University Press, Princeton, 2006, p. 149.

encroachments of the majority ([140]). Because even a government representing the will of the majority could degenerate into tyranny, if the majority did not comply with the fundamental laws establishing society. A lesson contemporary constitutionalism seems, if not to have forgotten, at least to have given for granted, as it has increasingly lost interest in the relationship between sovereignty and its negative. To the point that none of its current institutes seems any longer capable of conceptualizing the radical perversion of power and providing effective remedies against the degeneration of sovereignty into its aberration ([141]).

Tyranny remained at the heart of Jefferson's constitutionalism even after the revolution. And it was through the language of tyranny that Jefferson expressed his anguished perplexion over slavery. Writing to James Holmes in 1820 Jefferson claimed that, in regards to slavery, Americans had «the wolf by the ears»

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[140] *Ibid*.

[141] Incitendally, it is worth noting that one of Italy's foremost constitutional scholars has recently reverted to the notion of tyranny in an effort to qualify the abuses perpetrated by the Italian Parliament, which has approved a comprehensive revision of the existing Constitution, despit the Constitutional Court had previously declared the partial unconstitutionality of the law by which its members had been elected to office. In this context, Gustavo Zagrebelsky recalled the distinction between tyranny «ex defectu tituli» and tyranny «quoad exercitio», acknowledging that the negative paradigm of power belonged to both the medieval doctrine and the wisdom «dei padri del costituzionalismo moderno» and insisting that such distinction «è perenne e vale anche nel nostro caso». See Gustavo ZAGREBELSKY, *La sentenza n. 1 del 2014 e i suoi commentatori*, in *Giurisprudenza costituzionale*, vol. 54, n. 3, 2014, p. 2987. The constitutional reform was eventually rejected by a *referendum*.

and could neither «hold him nor safely let him go» ([142]). This forceful metaphor belonged to a long literary tradition on tyranny. It had at first been attributed the Roman emperor Tiberius by Suetonius ([143]), then collected by Erasmus in his *Adagia* ([144]), and finally recalled in the final pages of, quite remarkably, the *Vindiciae contra tyrannos* ([145]).

«Tyrannus enim quam violenter invadit tyrannidem, violenter retinere quodammodo cogitur. Quia lupum, ut dicebat Tyberius, auribus tenere sibi videtur, quem neque absque vi retinere, neque absque periculo dimittere potest» ([146]).

This would seem to suggest that the language of Western jurisprudence on tyranny, originally conceived by the *civilis sapientia* in the 14th century, was still very much the language of Jefferson's 18th century constitutionalism; while English 17th century political writers and French 16th century jurists its most

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[142] See Thomas JEFFERSON, *letter to James Holmes*, *12 April, 1820*, in *Thomas Jefferson, Writings*, cit., p. 1434.

[143] See SVETONIUS, *De XII Caesaribus,* in ID., *Opera omnia*, Londini: e Typographeo Mariae Matthews, 1718, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C., p. 257: «Cunctandi causa erat, metus undique imminentium discriminum: us saepe *lupum se auribus tenere* diceret». Tiberius would later become the paragon of tyranny for Thomas More. See Vittorio GABRIELI, *Introduzione*, in *Tommaso Moro, Storia di Re Riccardo III*, edited by Vittorio Gabrieli, Edizioni di storia e letteratura, Roma, 2005, pp. XXXVI.

[144] See Desiderius ERASMUS, *Adagiorum epitome, Ex novissima Chiliadum ceu, ipsorum fontium recognitione excerpta, & multis in locis jam longè accuratius, quàm antè emendata. Cum triplici Indice, Authorum, Locorum & Proverbiorum locupletissimo*, Amstelodami: apud Joannem Janssonium, 1663, p. 422, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress.

[145] See STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos,* cit., quaestio IV, pp. 222-223.

[146] *Ibid*.

immediate sources. Whereas no evidence proves Jefferson's direct knowledge of Bartolus or his texts, the legal and political sources in which he was read did indeed mediate and reinterpret the legacy of the *ius commune* ([147]). Milton, Sidney, and Locke relied on Huguenots resistance theorists, as much as the *Vindiciae* relied on Bartolus. Through their works and their participation in the revolutions that constituted the Western legal tradition, the doctrine of tyranny was handed down to later generations. Jefferson and his fellow revolutionaries received it and assumed it as the negative paradigm against which they shaped, by contraposition, a renewed unuderstanding of sovereignty as the constitutional expression of supreme power.

Despite common assumptions generally understand 18th century constitutionalism as having supported the establishment of new forms of government by refuting earlier doctrines on power, the founding moments of American constitutionalism did not radically break with the past. Accordingly, the revolution led

[147] On the fundamental continuity of the Western legal tradition, not despite, but by virtue of its characteristic revolutions see Diego QUAGLIONI, *Costituzione e costituzionalismo nella tradizione giuridica occidentale,* cit., p. 7: «Un simile collegamento fra passato e presente[…] potrebbe apparire appunto paradossale a chi, scrutando nell'ideario giuridico medievale e impacciato dal carico ideologico della modernità, fosse incapaee di riconoscere nella tradizione giuridica occidentale una fondamentale trama unitaria, non al di là delle cesure, ma proprio in ragione di quelle "rivoluzioni" che ne costituiscono il tratto più caratteristico (almeno nella visione che di quella tradizione ci ha dato Harold J. Berman in Law and Revolution, come capacità tipica dell'occidente di rielaborare in continuazione una dimensione scientifica del diritto: 'the sense of an ongoing historical continuity between past and future', "senso" dello sviluppo organico degli istituti giuridici lungo generazioni e secoli, con ciascuna generazione che costruisce coscientemente sull'opera di quelle che l'hanno preceduta».

by Jefferson can be read, in keeping with a school of thought that goes from Hannah Arendt to Harold J. Berman, as a «gigantic attemp[t] to repair» the spoiled foundations of the Western legal tradition and «renew the broken thread» of its moral and scientific heritage ([148]). Rather than constituting an entirely new body politic floating on the surface of history, Jefferson seems to have taken «a tiger's leap into the past» to ground the constitution of a new political regime into revived interpretations of forgotten or neglected practices of power and of its limitations ([149]). As a result, «la stessa letteratura costituzionale moderna», so indebted to Jefferson's writings, «si muove, senza sapero», the words are those of a young Gaetano Salvemini, written in an essay originally published in 1901, «su un terreno i cui confini furono fissati fin dal secolo XIV dalla mente veramente geniale di Bartolo da Sassoferrato» ([150]).

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[148] Hannah ARENDT, *What is Authority?*, in ID., *Between Past and Future. Eight Exercises in Political Thought*, Viking Press, New York, 1961, re-issued by Penguin, New York, 2006, p. 140.

[149] Walter BENJAMIN, *Thesis on the Philosophy of History*, in ID., *Illuminations. Essays and Reflections*, edited and with an introduction by Hannah Arendt, Harcourt Brace Jovanovich, San Diego, 1968, re-issued by Schocken Books, New York, 2007, p. 261

[150] Gaetano SALVEMINI, *La teoria di Bartolo da Sassoferrato sulle costituzioni politiche*, in ID., *Studi Storici*, Tipografia galileiana, Firenze, 1901, re-printed in ID., *La dignità cavalleresca nel comune di Firenze e altri scritti*, edited by Ernesto Sestan, Feltrinelli, Milano, 1972, p. 350.

2

THE TITLES OF SOVEREIGNTY

1. Expatriation

Almost two centuries before Jefferson claimed expatriation had allowed American settlers to relinquish their mother country and establish self-governing colonies, the duke of Parma and Piacenza had issued a decree in which he prohibited his subjects from residing abroad for over a semester and compelled those who had left his dominions to return within two months, threatening otherwise to seize their lands and possessions ([1]).

Soon after its adoption, the decree became increasingly controversial and sparked a complex debate amongst jurists, many of whom rendered *consilia*, some defending the decree's lawfulness, others rejecting it.

Among the latter, Giacomo Antonio Marta (1559-1628) was surely the most prominent scholar and practitioner ([2]). The first

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[1] See Gino GORLA, "*Ius libertatis" e diritto "naturale" di libertà di espatrio, in un celebre caso discusso in Italia tra i secoli XVI e XVII (per un raffronto con i "diritti dell'uomo" dal 1789 a oggi)*, in *Scritti in onore di Massimo Severo Giannini*, vol. II, edited by Paolo Pistone, Giuffrè, Milano, 1988, pp. 225-250. The following considerations draw amply from this study.

[2] See Federico ROGGERO, *Giacomo Antonio Marta*, in *Dizionario biografico degli italiani*, vol. 71, Istituto dell'enciclopedia italiana, Roma, 2008, pp. 24-29; and Paul F. GRANDLER, *Giacomo Antonio Marta: Antipapal Lawyer and*

consilium he rendered on the issue, along with the far more compelling second one, prompted by his rejection of Giacomo Menochio's defence and published as the *consilium primum* in his repertoire of advisory opinions, was among the most eloquent examples of early modern jurisprudence on *iura naturalia* seen through the prism of expatriation and freedom of establishment ([3]).

Gino Gorla has dedicated a captivating essay to the analysis of Marta's doctrine. Building on previous studies, he has contended that expatriation was held by modern European jurists as one of the *iura naturalia* limiting the legislative authority of the prince. These *iura* were «determinate principles» of natural law, «*res decisae et determinatae naturali lege vel moribus gentium*» as Baldus (1327-1400) had called them ([4]), restraining an otherwise *plena* and *absoluta potestas* ([5]).

English Spy, 1609-1618, in *The Catholic Historical Review*, vol. 93, n. 4, 2007, pp. 784-814.

[3] See Giacomo Antonio MARTA, *Consilia doctoris Martae svmmi practici : in qvibvs omnes cavsae, qvae svis temporibus in controuersiam vocatae fuerunt, iudicio grauissimo definiuntur, et noua respondendi, & allegandi de iure methodus exhibetur*, Avgvstae Tavrinorvm: Apud HH. Io. Dominici Tarini, 1628, pp. 1-4, Special Collection, Robbins Collection in Religious and Civil Law, UC Berkeley School of Law, Berkeley, (CA).

[4] BALDUS DE UBALDIS, *Consilia*, I, *Cons*. 328 quoted in Gino GORLA, "*Ius libertatis" e diritto "naturale" di libertà di espatrio, in un celebre caso discusso in Italia tra i secoli XVI e XVII (per un raffronto con i "diritti dell'uomo" dal 1789 a oggi)*, cit., p. 229.

[5] See Gino GORLA, *«Iura Naturalia Sunt Immutabilia»: Limits to the Powers of the 'Pinceps' (as Sovereign) in Legal Literature and Case Law between the 16th and 18th Centuries*, in *Italian Studies in Law*, vol. I, edited by Alessandro Pizzorusso, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1992, p. 56. The original Italian unabridged version of this article is published as Gino GORLA, *«Iura naturalia sunt immutabilia»: I limiti al*

According to Gorla, Marta's *consilium* highlighted the *opinio communis* settled at the time, in light of which any legislative enactment violating natural rights was considered to be inherently flawed and could be successfully challenged for having infringed upon the principle of higher law *iura naturalia sunt immutabilia* ([6]).

Marta condemned the duke of Parma and Piacenza for his attempt to curtail his subject's right to expatriate and claimed, moreover, that suppressing freedom of movement and preventing citizens from travelling around the world, in search of knowledge and success, constituted an offense against humanity itself: «*inhumanum est igitur interdicere subditis hominibus facultatem peregrinandi per orbem, et facultatem ediscendi apud diversas nationes; atque propriam fortunam inveniendi: libertas voluntatis et electionis tollenda non est*» ([7]).

Reflecting on this sweeping and imposing assertion of freedom, Gorla wondered whether its influence extended to later

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potere del "Principe" nella dottrina e nalla giurisprudenza forense tra I secoli XVI e XVIII, in *Diritto e potere nella storia europea. Atti in onore di Bruno Paradisi*, vol. 2, Olschki, Firenze, 1982, pp. 629-684.

[6] See Gino GORLA, "*Ius libertatis" e diritto "naturale" di libertà di espatrio, in un celebre caso discusso in Italia tra i secoli XVI e XVII (per un raffronto con i "diritti dell'uomo" dal 1789 a oggi)*, cit., p. 230. Marta re-affirmed the prince's duty to comply with the *iura naturalia* in Giacomo Antonio MARTA, *Consilia doctoris Martae*, cit., p. 2: «[…] Princeps non potest facere legem contra ius naturale & gentium […] quia potestas Principis subest iuri naturali & gentium, ideo non potest legem condere illa iura derogando».

[7] Giacomo Antonio MARTA, *Consilia doctoris Martae*, cit., p. 2. So, it was «opera e merito di Marta» if the right to expatriate became part of that *ius libertatis* inherent in the human condition and regulated by the *ius commune.* See Gino GORLA, "*Ius libertatis" e diritto "naturale" di libertà di espatrio, in un celebre caso discusso in Italia tra i secoli XVI e XVII (per un raffronto con i "diritti dell'uomo" dal 1789 a oggi)*, cit., p. 245.

generations as well. Had the drafters of the Declarations and Constitutions adopted during the French Revolution been familiar with Marta's writings and mindful that he had construed freedom of movement as the paradigm of man's *ius libertatis*? And were the 18th century constitutional codifications of expatriation indebted in any meaningful way to the earlier jurisprudence and case law on *iura naturalia*?

Gorla answered these questions in the negative: the jurisprudence and case law on the natural right to freely expatriate, cross borders and settle abroad had fallen into oblivion, following the broader demise of the jurisprudence and case law on *iura naturalia*. Neither the 17th and the 18th century natural law scholars, nor the authors of the several Constitutions, Charters, and Declarations adopted from the French Revolution onwards had these earlier currents of thought in mind ([8]).

But what about the drafters of the Declarations, Bills, and Constitutions adopted amidst the American Revolution? Could it be that American jurists preserved the memory of what later European jurists would instead forget? After all, the importance immigrations had assumed in the constitutional history of colonial settlements was very much present to 18th century Americans, who took a keen interest in the institute of

[8] See Gino GORLA, "*Ius libertatis" e diritto "naturale" di libertà di espatrio, in un celebre caso discusso in Italia tra i secoli XVI e XVII (per un raffronto con i "diritti dell'uomo" dal 1789 a oggi)*, cit., pp. 247-250. «Sicché» he carried on «non si è potuto vedere cosa vi fosse veramente di "antico" nell'Antico regime rispetto al "Nuovo" […], né spiegare il passaggio dall'uno all'altro». See *ibid*., p. 248.

expatriation and the determination of its legal effects ([9]). To the point that Thomas Jefferson argued it constituted the foundation

[9] See John P. REID, *Constitutional History of the American Revolution*, vol. 1, *The Authority of Rights*, University of Wisconsin Press, Madison, 2003, pp. 114-123. Whereas Reid did address the authority of migration in colonial legal discourse and did acknowledge that migration had not been traditionally given «any weight by the constitutional historians of the American Revolution» (*ibid*., pp. 115-116), who had not recognized it to be a legal argument, he also stressed that, taken in itself, the «migration principle was not an important authority for colonial rights» (*ibid*., p. 115). Though this might have been true for the discussion at large, it is surly was not the case for Jefferson. Moreover, Reid did recognize that migration had been treated as a legal institute by both British and Irish political literature. Yet, as the brief mention of Marta's *consilium* suggests, expatriation belonged to a much broader legal discourse and was generally recognized throughout Europe as one of the *iura naturalia* since at least early modernity. Reid's qualification of the legal authority of migration is equally problematic. Dispite recognizing that the «natural right of migration was neither an American original nor a radical doctrine but one that long had been a staple in the legal literature of Europe» (*ibid*., p. 119), Reid oddly claimed that being a natural rather the positive right migration «may not have existed at common law», apparently forgetting that sir Edward Coke had claimd, in the landmark *Calvin's case*, that natural rights were part and parcel of the English common law. Coke had gone even further and had claimed such rights could never be «altered or changed», since it was «certainly true that *jura naturalia sunt immutabilia*». See *Calvin's case*, *English Reports*, vol. 77, *King's Bench Division*, 6, *Containing Coke, Parts 5 to 13*, Stevens & Sons, London, 1907, pp. 391, 392-393. In this respect, it seems appropriate to recall once more of Gino Gorla's penetrating remarks: «[…] it is interesting to notice that [here], Coke reveals one of his habits, well known to English and American lawyers of the 18th and 19th century, and even today […]; *i.e.* he borrows from civil law principles, concepts, maxims, without indicating the source, but using instead words or concepts proper of common law. For instance, in *Bohnam's case* he translates into terms of 'common reason' (as declared by common law courts) and of common rights, or rights based upon such common reason, what for English civilians and Bracton (who influenced so much Coke) were the *ius naturale vel gentium* and the *iura naturalia immutablia*. In Calvin's case, decided the same year […], Coke mentions a ius natural divine and eternal». See Gino GORLA, *«Iura Naturalia Sunt Immutabilia»: Limits to the Powers of the 'Pinceps' (as Sovereign) in Legal Literature and Case Law between the 16th and 18th Centuries*, cit., p. 65; the original Italian version may be read in ID., *«Iura naturalia sunt immutabilia». I limiti al potere del «principe» nella dottrina e nella giurisprudenza forense fra i secoli xvi e xviii*, cit., pp. 653-654.

of America's claim to independence ([10]). Would it then be unreasonable to wonder whether Jefferson himself had in mind European authorities when claiming that the American legal systems had been founded upon «the rights of men; of expatriated men»? ([11])

It is well known that Jefferson never authored a comprehensive treatise on constitutional law. Driven by the urgency of putting words to action, he committed most of his thoughts to letters and occasional writings and seems not to have felt the desire of fixing once and for all the shape of his doctrine, preferring – not unlike a judge – to articulate his views case by case, according to the relevant circumstances presented by history. Undoubtedly, this rhapsodic quality of his constitutionalism has frustrated many scholars, who have lamented, to a greater or lesser degree, its fragmentation. But, perhaps no other author as Jefferson has been able to reveal, through the «petit écrits du temps» and the «correspondances particulier», the beliefs and principles underlying and sustaining the construction, not only of a new legal system, but of the renewed understanding of law necessary for its constitution ([12]).

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[10] See David N. MAYER, *The Constitutional Thought of Thomas Jefferson*, cit., pp. 29-30, 338-339.

[11] Thomas JEFFERSON, *letter to Judge John Tayler*, *17 June 1812*, in *The Papers of Thomas Jefferson*, *Retirement Series*, vol. 5, *1 May 1812 to 10 March 1813,* edited by J. Jefferson Looney *et al*., Princeton University Press, Princeton, 2009, p. 135.

[12] Alexis DE TOCQUEVILLE, *letter to Louis de Kergolay*, *16 May 1858*, quoted in Gino GORLA, *Commento a Tocqueville. "L'idea dei diritti"*, Giuffrè, Milano, 1948, p. 26: «[…] j*e n'ai jusqu'à present trouvé qu'un seul moyen: c'est en quelque sorte de vivre à chaque moment de la révolution avec les contemporains en listant non ce qu'on dit d'eux, ou qu'eux-mêmes ont dit*

Jefferson began reflecting on expatriation ever since his earliest writings and consistently reverted to its notion throughout his career ([13]). His opinions on the subject made their first organic appearance in the *Summary View*. Right from the opening paragraphs, it is clear that Jefferson's argument in favor of colonial self-government hinged on his notion of expatriation. According to which, colonial settlers emigrated from England to Northern America at their own risk and expense, having received hardly any aid from their distant homeland, not being considered agents of the empire, but rather free men seeking to establish commonwealths of their own in pursuance of natural law.

Before «they emigrated to America», the words are Jefferson's, «our ancestors […] were free inhabitants of the British dominions in Europe, and possessed a right which nature has given all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to

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d'eux depuis, mais ce qu'ils disaient eux-mêmes alors, ed, autant que possible, ce qu'ils pensaient réellement. Les petits écrits du temps, le correspondances particulières, etc., ont, pour atteindre ce but, plus d'efficacité encore que les debates des assemblées».

[13] As David T. Konig has recently noted, Jefferson's earliest «announcement» of the freedom of movement may be found in the legal brief written to defend Samuel Howell, an enslaved Virginian who sued his master and sought Jefferson's assistance in 1770. According to Jefferson's claim: «Under the law of nature, all men are born free, [and] everyone comes into the world with a right to his own person which includes the liberty of moving […]». See David T. KONIG, *Jefferson and the Law*, in *A Companinon to Thomas Jefferson*, edited by Francis D. Cogliano, cit., p. 355.

promote public happiness» ([14]).

Like his understanding of power, Jefferson's understanding of expatriation was in no way abstract. Precisely because he believed it to be a right, naturally inherent in the human condition, he believed it to be actionable, and was eager to recall the specific instances in which it had been concretely put into action and exercised throughout history ([15]). The Saxons had expatriated from Germany to England several centuries prior to the British emigration to North America and the precedent they had set was amply discussed by Jefferson in the opening paragraphs of his *Summary View* ([16]).

This precedent, along with the larger history of the Saxon people, was of particular relevance for Jefferson ([17]). It traced the origins of English history to its Germanic roots and revealed that, much as Montesquieu had argued, «si l'on veut lire l'admirable ouvrage de Tacite sur les moeurs des Germains, on

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[14] Thomas JEFFERSON, *Draft Instructions to the Virginia Delegates in the Continental Congress (Manuscript Text of A Summary View of the Rights of British America)*, cit., p. 121.

[15] Dumas Malone, the author of the classic and still most comprehensive biography written on Jefferson, insisted that Jefferson «craved historical as well as philosophical authority» and «could not be content without finding precedent for the freedom he was so sure was right». See Dumas MALONE, *Jefferson and His Time*, vol. 1, *Jefferson the Virginian*, Little, Brown, and Company, Boston, 1948, p. 185.

[16] A concise overview is provided in Brian STEELE, *Thomas Jefferson and American Nationhood*, Cambridge University Press, Cambridge, 2012, pp. 34-35; as weel as in Ari HELO, *Thomas Jefferson's Ethics and the Politics of Human Progress. The Morality of a Slaveholder*, Cambridge University Press, New York, 2014, pp. 124-125.

[17] See Trevor COULBOURN, *The Lamp of Experience, Whig History and the Intellectual Origins of the American Revolution*, University of North Carolina Press, Chapel Hill, 1965, re-published by Liberty Fund, Indianapolis, 1998.

verra que c'est d'eux que les Anglois ont tire l'idée de leur gouvernement politique. Ce beau système a été trouvé dans les bois» ([18]). Rather than being the achievement of a particular national history, the rights and liberties enjoyed by Englishmen and English expatriates belonged to the shared European heritage of the Germanic people. Their indomitable temperament and characteristic form of government by general assembly had been described with admiration by Tacitus and his *Germania* had became throughout the 17th and 18th centuries one of the main sources of English and later French critics of absolutism ([19]). Like Montesquieu, Algernon Sidney had amply referred to Tacitus and openly acknowledged that English had drawn their «original and government» from the «Germanic nations». He further acknowledged that the Saxons coming into England had «retain'd to themselves the same rights» enjoyed on the continent and «had no kings but such as were set up by themselves», whose power they could abrogate «when they

[18] Charles-Louis de Secondat de MONTESQUIEU, *De l'esprit des loix*, livre XI, chapitre 6, *De la Constitution d'Angleterre*, in *Œuvres de Montesquieu, nouvelle édition, revue, corrigée & considérablement augmentée par l'auteur*, tome premier, a Londres: Chez Nourse, 1767, p. 221, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C.

[19] See the conventional account in John G. A. POCOCK, *The Ancient Constitution and the Feudal Law. A Study of English Historical Thought in the Seventeenth Century*, Cambridge University Press, Cambridge, 1987; an insightful account may be read in Anna Maria BATTISTA, *La «Germaina» di Tacito nella Francia illuminista*, in *Studi urbinati*, vol. 53, 1979, pp. 93-131, now republished with an introduction by Diego Quaglioni, by Quattroventi, Urbino, 1999.

pleased» ([20]). But, whereas in England and France the Saxon myth had been used to curtail absolutism ([21]), Jefferson reverted to this precedent to establish, on historical and legal grounds, the American claim to independence.

By expatriating, the colonists had re-enacted the experience of «their Saxon ancestors», whom had «in like manner» in the 5th century «left their native wilds and woods in north of

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[20] Algernon SIDNEY, *Discourses Concerning Government*, cit., p. 376. Sidney's remarks are particularly significant as they are inscribed in a work heavily influenced by 16th century French jurisprudence and its political use of Tacitus and his Germania. See Diego QUAGLIONI, *«Suivant Taciet». Anna Maria Battista e la "questiona germanica" nella Francia settecentesca*, in Anna Maria BATTISTA, *La «Germaina» di Tacito nella Francia illuminista*, cit., pp. 19-20.

[21] A fascinating reading of this particular kind of historical discourse in give in Michel FOUCAULT, *«Il faut défender la société». Cours au Collège de France (1975-1976),* edited by Mauro Bertani and Alessandro Fontana, A. Gallimard, Paris, 1997, translated into English as *«Society must be defended». Lectures at the Collège de France*, 1975-1976, Picador, New York, 2003. According to Foucault, this discourse on the Saxon heritage of English law and politics «developed completely within the historical dimension (*ibid*, p. 55) and was interested «in defining and discovering, beneath the forms of justice that [had] been instituted, the order that [had] been imposed, the forgotten past of real struggles, actual victories, and defeats which [might] have been disguised but which remain[ed] profoundly inscribed. It [was] interested in rediscovering the blood that [had] dried in the codes, and not, therefore, the absolute right that lie[ed] beneath the transience of history; it [was] interested not in referring the relativity of history to the absolute of the law, but in discovering, beneath the stability of the law of the truth, the indefiniteness of history (*ibid*., p. 56). This had been the «discourse of the Puritans, the discourse of the Levellers. And then fifty years later, in France at the end of the reign of Louis XIV» it had been spoken from the «the opposite side», but it was «still the discourse of a struggle against the king […]» (*ibid*., p. 59). It had been «discovered, or at least asserted» in 17th century England, once it began to appear «that the history of the Saxons after their defeat at the Battle of Hastings, [was] not the same as the history of the Normans who were the victors in the same battle». One man's victory was another man's defeat. «The victory of the Franks and Clovis» was also «read, conversely, as the defeat, enserfment, and enslavement of the Gallo-Romans. What look[ed] as right, law, or obligation from the point of view of power look[ed] like the abuse of power, violence, and exaction when [was] seen from the viewpoint of the new discourse […]» (*ibid*, pp. 69-70).

Europe» and, «under [the same] universal law», had «possessed themselves of the island of Britain […] and had established there that system of laws which has long been the glory and protection of that country» ([22]).

Jefferson recalled the Saxon precedent to clarify the legal effects of expatriation and apply them to the American case: as no claim «of superiority or dependence» had ever been asserted over Saxon expatriates by «that mother country from which they had migrated», and as «no circumstance [had] occurred to distinguish materially the British from the Saxon emigration», no such claim of superiority or dependence could have been advanced by Britain over American settlers, thus proving emigration to be at the origin of American self-government ([23]).

The connection between expatriation and self-government came into even sharper focus one year later, in a succinct paragraph of the draft Jefferson submitted to the committee established by the Second Continental Congress to draw up a declaration explaining why the thirteen colonies had taken up arms against Britain ([24]).

«Our forefathers, inhabitants of the island of Gr. Britn. […] having […] long endeavored to bear up against the evils of

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[22] Thomas JEFFERSON, *Draft Instructions to the Virginia Delegates in the Continental Congress (Manuscript Text of A Summary View of the Rights of British America)*, cit., pp. 121-122.
[23] *Ibid*., p. 122.
[24] For an introduction to the drafting history of the *Declaration of the Causes and Necessities for Taking Un Arms* see Julian P. BOYD, *The Disputed Authorship of the Declaration on the Causes and Necessity of Taking Up Arms, 1775*, in *Pennsylvania Magazine of History and Biography*, vol. 74, 1950, pp. 51-73. The multiple drafts are printed in *The Papers of Thomas Jefferson*, vol. 1. cit., pp. 187-219.

misrule, left their native land to seek on these shores a residence for civil & religious freedom. At the expence [*sic*] of their blood […], to the […] ruin of their fortunes, with the relinquishment of every thing quiet & comfortable in life, they effected settlements in the inhospitable wilds of America; they there established civil societies […] with various forms of constitutions but possessing all, what is inherent in all, the full & perfect powers of legislation» ([25]).

In this remarkable passage, tellingly written in a language highly reminiscent of earlier jurisprudence on *plena potestas* ([26]), Jefferson condensed and combined two of the most distinctive principles of his constitutionalism. On the one hand, he argued that each society had «the right […] and the inherent power to legislate for its own affairs» ([27]), on the other, he suggested that expatriation had perfected the inherent power of colonial societies to legislate autonomously.

In order to sustain his argument, Jefferson implicitly reversed

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[25] Thomas JEFFERSON, *Composition Draft of the Declaration of the Causes and Necessities for Taking Un Arms*, in *The Papers of Thomas Jefferson*, vol. 1. cit., p. 193.

[26] Learned readers of the day would hardly have missed Jefferson's echo of John Locke's *Second Treatise on Government*: «the full and perfect powers of legislation» is, in fact, an expression that repeats almost *verbatim* one of the Locke's «*formules les plus heureuses*» to describe his understanding of sovereignty. See John LOCKE, *Two Treatise on Government*, cit., p. 356. For a preliminary comment see Luisa SIMONUTTI, *La souveraineté comme problème chez Locke*, in *Penser la souveraineté à l'époque moderne et contemporaine*, vol. 1, edited by Gian Mario Cazzaniga and Yves Charles Zarka , Edizioni ETS, Pisa, 2001, pp. 141-158: 141.

[27] Armand London FELL, *Origins of Legislative Sovereignty and the Legislative State*, vol. 6, *American Tradition and Innovation with Contemporary Import and Foreground,* book 1*, Foundations (to Early 19th Century)*, cit., p. 48.

the traditional point of view on expatriation. Instead of considering it exclusively as a limit to legislative authority, as had been done for instance by Marta, he regarded it as its natural foundation and claimed colonial societies possessed «within» themselves «the sovereign powers of legislation» precisely because they had been established by «expatriated men» ([28]). Men who had relinquished and dissolved their ties to the commonwealth of origin and were, as such, no longer subject to any external jurisdiction.

Expatriation, thus, became the title of American subjecthood, the origin of its legal and political capacity, the source of its self-government, and the foundation of the power to enforce it.

By expatriating, the colonists had quitted Britain and dissolved their allegiances to its body politic, ceasing to be English subjects and unburdening themselves from «any claim of superiority or dependence asserted over them by that mother country from which they had migrated» ([29]). So, the powers of legislative self-government inherent in the newly established American societies could perfect themselves free from any external constraint.

No reader of the time would have failed to perceive in Jefferson's words the echo of ancient principles of public law,

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[28] Thomas JEFFERSON, *Draft Instructions to the Virginia Delegates in the Continental Congress (Manuscript Text of A Summary View of the Rights of British America)*, cit., p. 132. ID., *letter to Judge John Tayler*, *17 June 1812*, cit., p. 135.

[29] Thomas JEFFERSON, *Draft Instructions to the Virginia Delegates in the Continental Congress (Manuscript Text of A Summary View of the Rights of British America)*, cit., p. 122.

upon which late medieval and early modern jurists had erected the doctrine of sovereignty, and upon which Jefferson was attempting, with renewed effort, to lay the foundations of American independence ([30]).

Supremacy, understood as independence from higher civil authorities, had been one of the defining features of sovereignty, ever since the 13th century, when legal scholars had begun to acknowledge the majesty of those free kings who refused to recognize *alium supra se* ([31]). Over time, several Glossators consolidated this doctrine in the formula *rex superiorem non recognoscens in regno suo est imperator*. The maxim enjoyed a remarkable success and later generations of scholars repeatedly adopted it, endlessly varying its wording and progressively broadening its meaning, until the formula came to express, a century later, the self-sufficiency of all municipal legal systems, possessing in full the well-rounded powers of self-government (*plena et rotunda potestas*), while holding within themselves «*le ragioni della propria vita*» ([32]). Thus, at the dawn of modernity,

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[30] There would see to be a conflation within Jefferson's though of Germanistic (or rather Saxon) and Romanistic (or rather Medieval) principles of law. For a similar conflation see Gerhard DILCHER, *The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization*, cit.

[31] See Francesco CALASSO, *I Glossatori e la teoria della sovranità. Studio di diritto comune pubblico*, Giuffrè, Milano, 1957, p. 23.

[32] *Ibid*: «[…] da principio, infatti, essa [the maxim *rex sumperiorem non recognoscens in regno suo est imperator*] aveva voluto semplicemente dire questo: che quei poteri medesimi che la coscienza dell'epoca riconosceva all'imperatore, "dominus mundi", sopra l'impero universale, dovevano essere riconosciuti a ciascun re libero, entro l'ambito del proprio regno. Da questa proposizione la formula non tardò ad allargarsi ben oltre la cerchia dei re liberi, fino a comprendere tutti gli ordinamenti particolari i quali, avendo in

superiority came to be understood as fullness of power and was defined, by jurists such as Jean Bodin, as the supreme power to legislate and, even more importantly, derogate ordinary legislation ([33]). This, in short, was the complex legacy behind Jefferson's restatement of John Locke's earlier claim that the «one Supreme Power […], to which all the rest are and must be subordinate» is «the Legislative» one inherent in all political societies ([34]).

Jefferson almost certainly ignored the writings of Continental Glossators, but nevertheless he familiarized himself with the essential tenets of their doctrine on sovereignty by reading Bracton, who incorporated and paraphrased in his treatise several of their maxims ([35]). After all, Jefferson was well aware that the «terms» and principles of European «civil law» had been «introduced […] into the English law» «by Ecclesiastics»,

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se medesimi le ragioni della propria vita, possedevano anche i poteri relativi per la esplicazione di questa; e non mancò, inoltre, di riverberare i suoi riflessi sul sistema delle fonti del diritto, capovolgendo lo schema originario di un diritto comune assoluto, escludente i diritti particolari in contrasto con esso, per affermare la priorità del *ius proprium* come manifestazione spontanea e libera, e quindi legittima, della vita degli ordinamenti particolari, e assegnando al diritto comune una funzione sussidiaria di regolatore e coordinatore supremo».

[33] See Margherita ISNARDI PARENTE, *Introduzione*, cit., p. 43.

[34] John LOCKE, *Two Treatise of Government*, cit., pp. 366-367.

[35] On Jefferson and Bracton see Edward DUMBAULD, *Thomas Jefferson and the Law*, The University of Oklahoma Press, Norman, 1978, pp. 14, 20; and Merrill D. PETERSON, *Thomas Jefferson and the New Nation: a Biography*, Oxford University Press, Oxford, 1970, re-issued in 1975, pp. 17-18. On Bracton's incorporation of early civil law doctrine see the classic Frederic MAITLAND, *Select Passages from the Works of Bracton and Azo*, Bernard Quaritch, London, 1895.

such as Bracton ([36]). And he was equally aware of the influence that Bracton's reception of the supremacy doctrine had exercise over the Anglo-American legal tradition, which had come to conceive sovereignty precisely as the absence of any superior civil jurisdiction ([37]).

«*Parem autem non habet rex in regno suo, quia sic amitteret preaeceptum, cum par in parem non habeat imperium. Item nec multo forties superiorem, neque potentiorem habere debet, quia sic esset inferior sibi subiectionis, et inferiors pares esse non possum potentioribus*» ([38]).

Jefferson did not deny that his «bold» doctrine on expatriation had not won the support of his contemporaries. His fellow British Americans praised its eloquence, but were wary of its radicalism ([39]).

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[36] Thomas JEFFERSON, *Notes on the State of Virginia*, cit., p. 123. See also Thomas JEFFERSON, *The Commonplace Book of Thomas Jefferson. A Repertory of his ideas on Government*, cit., p. 355: «Bracton too was an ecclesiastic […]».

[37] See, for example, Matthew HALE, *The History of the Common Law of England*, The University of Chicago Press, Chicago, 1971, p. 19: «[…] the King of England does not recognize any Foreign Authority as superior or equal to him in this Kingdom, neither do any Laws of the Pope or Emperor, as they are such, bind here: But all the Strenght that either the Papal or Imperial Laws have obtained in this Kingdom, is only because they have been received and admitted either by the Consent of Parliament […] or else by immemorial Usage […]».

[38] Henry BRACTON, *De Legibus et Consuetudinibus Angliae, On the Laws and Customs of England*, vol. 2, cit., p. 33.

[39] Thomas JEFFERSON, *Autobiography*, in *Thomas Jefferson, Writings*, cit., p. 9: «[…] I prepared a draught of instructions to be given to the delegates whom we should send to Congress […] In this I took the ground which from the beginning I had thought the only one orthodox or tenable, which was that the relation between Gr. Br. and these colonies was exactly the same as that of England & Scotland after the accession of James & until the Union, and the same as the present relations with Hanover, having the same Executive chief but no other necessary political connection; and that our emigration

According to the prevailing view in English legal scholarship, British American colonies were peripheral legal systems, subject to the general authority of the British empire, and retained only marginal powers of self-government, largely derived from British concessions.

In the first edition of his *Commentaries*, «which appeared in four volumes between 1765 and 1769», William Blackstone (1723-1780) «claimed that the American colonies were 'conquered or ceded countries', and consequently were 'distinct' and 'dependent' dominions of England, 'the mother country'. According to eighteenth-century theories of sovereignty, this meant, as Blackstone put it, that 'the common law of England [had] no authority there'; being conquered territory, the colonies were 'subject […] to the control of Parliament', legislating on behalf of the Crown» ([40]).

«In 1774 William Maurray (Lord Mansifield) reinforced Blackstone's view, stating that because the colonies were conquered territories, 'they [had] their whole constitution from the crown'» ([41]). England had, in other words, «treated the British colonies as 'subordinate' in a variety of respects and

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from England to this country gave her no more rights over us, than the emigrations of the Danes and Saxons gave to the present authorities of the mother country over England. In this doctrine however I had never been able to get any one to agree with me but Mr. Wythe. […]. It was read generally by the members [of the Virginia convention], approved by many, but thought too bold for the present state of things; but they printed it in pamphlet form […]».

[40] G. Edward WHITE, *Law in American History*, vol. I, *From the Colonial Years through the Civil War*, Oxford University Press, New York, 2012, p. 116.

[41] *Ibid*.

since the Glorious Revolution the principal body exercising 'dominion' over them had been Parliament» ([42]).

To counter this doctrine, the colonists began claiming that the first colonial settlers had «brought with them» from England, «and transmitted to their Posterity», «all the Liberties, Privileges, Franchises, and Immunities, that [had] at any Time been held […] by the People of Great Britain» ([43]). So it was through the legal authority of emigration that the colonists believed they had maintained the rights of natural born Englishmen and were still entitled to invoke the protection of common law against royal and parliamentary encroachments ([44]).

«The British position […] was basically that no matter what rights migrated to the colonies, they were subject to parliamentary supremacy. American Whigs, by contrast, not only claimed all rights existing in the mother country but

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[42] *Ibid*.

[43] Patrick HENRY, *Virginia Resolves*, in *Journals of the House of Burgessess of Virginia*, *1761-1765*, edited by John Pendelton Kennedy, Richmond, 1907, p. 360. The principle was not unheard of in English case law. According to one particular theory, in fact, common law followed the subjects, so when «Subjects of England, by Consent of their Prince, go and possess an uninhabited desert Country; the Common Law must be supposed their Rule, as 'twas their Birthright, and as 'tis the best, as to be presumed their Choice; and not only that, but even as Obligatory, 'tis so». The argument of council in *Dutton v. Howell* is quoted in John Phillip Ried, *Constitutional History of the American Revolution*, vol. I, *The Authority of Rights*, cit., p. 120.

[44] See John Phillip RIED, *Constitutional History of the American Revolution*, vol. I, *The Authority of Rights*, cit., pp. 114-123. Because of this, there seems to be an appreciable semantic difference between the notion of migration and that of expatriation. Whereas migration simply implies a factual event – the flight from one territory to another – which in itself possesses no necessary legal relevance, expatriation is first and formost a legal notion, as it inherently implies the unilateral relinquishment of all juridical ties with the country of origin.

derived from migration itself additional rights or, at least, extra protection for these rights» ([45]).

Jefferson did not share either point of view. He believed that the foundations of independence laid at the origin of American settlements and argued that their self-government did not depend from any royal grant. Rather, it stemmed from the very nature of American societies. Having been established by expatriated men, these societies were by definition *superiorem non recognoscentes*. The choice to continue the union with the empire had been taken only after American jurisdictions had been fully constituted as self-governing bodies politic. So, the settlers' decision to subject themselves to a common sovereign had not extinguished neither their right nor their power to self-govern. It had, however, transformed their claim to independence into one of legislative autonomy. Yet, once the conditions upon which British Americans had agreed to subject themselves to the British monarch had been violated by that same magistrate who should have secured their autonomy, the ancient claim to independence could have been, and was effectually, fully resumed.

This unique understanding of American legal history led Jefferson to reject the common conviction that British emigrants had brought with them from England and transplanted into America their common law rights. According to this doctrine, English common law was to be considered as the general law of the colonies, while for Jefferson English common law had

[45] *Ibid*., pp. 120-121.

become the American «lex loci» only in so far as it had been expressly adopted by colonial legislators and had proven applicable to local circumstances ([46]). Had a general incorporation of English common law been acknowledged instead, the dignity and foundations of American independence would have been undermined ([47]), for, in Jefferson's opinion, «there were only two legitimate sources of law in America»: «the law of nature and the law enacted by the American people» ([48]). And English common law belonged to neither.

Therefore, Jefferson could legitimately argue that if a partial and selected adoption of English common law had indeed

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[46] Thomas JEFFERSON, *letter to John Manners*, *12 June 1817*, in *The Papers of Thomas Jefferson*, Retirement Series, vol. 11, *January to August 1817*, edited by J. Jefferson Looney *et al*., Princeton University Press, Princeton, 2014, p. 433.

[47] Although he did not share this point of view, James Kent acknowledged that according to some «the dignity or independence of [American] Courts» had been affected «by adopting» English judicial precedent. See *Manning v. Manning*, 1 Johns. Ch. 527, 531 (N.Y. Ch. 1815), quoted in John H. LANGBEIN*, Chancellor Kent and the History of Legal Literature*, in *Yale Law School Legal Scholarship Repository*, *Faculty Scholarship Serie*s, 1993, p. 569.

[48] Lynton Keith CALDWELL, *The Jurisprudence of Thomas Jefferson*, in *Indiana Law Journal*, vol. 18, n. 3, 1943, p. 199. See further Thomas JEFFERSON, *letter to John Goodenow*, *13 June 1822*, quoted ibid., pp. 200-201: «That [the English common law] makes more or less part of the laws of the States is, I suppose, an unquestionable fact. Not by birthright, a conceit as inexplicable as the trinity, but by adoption». And ID., *Draft of a Declaration of Rights Prepared for the Virginia Convention of August 1774*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p. 119: «We the subscribers inhabitants of the colony of Virginia do declare that the people of the several states of British America are subject to the laws which they adopted at their first settlement and to such others as have been since made by their respective Legislatures duly constituted and appointed with their own consent. That no other Legislature whatever may rightfully exercise authority over them, and that these privileges they hold as the common rights of mankind, confirmed by the political constitutions they have respectively assumed, and also by several charters of compact from the crown».

occurred, it had been justified only by reasons of expediency, for colonial *iura propria* were wholly self-sufficient ([49]). And, in this sense, Jefferson believed that the American settlements had been, from their very origin, the expression of a *plena potestas* or, as he translated the notion, of the «full and perfect powers of legislation» ([50]), which had secured the self-sufficiency of all American jurisdictions.

It had been, in other words, the language of a "tempered" absolutism that had provided Jefferson with the conceptual framework needed to establish American independence ([51]). And, quite consistently, Jefferson did not give up the idea of a higher law, a law common to mankind, binding all nations and

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[49] See Thomas JEFFERSON, *Draft Instructions to the Virginia Delegates in the Continental Congress (Manuscript Text of A Summary View of the Rights of British America)*, cit., p. 122: «[…] settlements having been thus effected in the wilds of America, the emigrants thought proper to adopt that system of laws under which they had hitherto lived in the mother country […]».

[50] Thomas JEFFERSON, *Composition Draft of the Declaration of the Causes and Necessities for Taking Un Arms*, cit., p. 193.

[51] The original anti-tyrannical character of absolutism has been at the heart of the Italian historiography on Jean Bodin. An effective summary of its main findings is provided in Diego QUAGLIONI, *Il pensiero politico dell'assolutismo*, cit., see especially pp. 111, 121-123. The idea that Jefferson reverted to one of the old languages of the Western spirit to articulate his claim of independence his also put forth and quite compellingly, though from a partially different vantage point, in Peter S. ONUF and Annette GORDON-REED, *«The Most Blessed of Patriarchs». Thomas Jefferson and the Empire of Imagination*, cit., pp. 227-228: «American settlers could […] trace their roots to regions that had been conquered and oppressed by the same corrupt and tyrannical regime that now sought to deprive them of their freedom. […]. It also led [Jefferson] to emphasize the importance of recovering the ancient languages of liberty, for the spirit of free people survived in the words that expressed their common sentiments. Uncorrupted, authentic language sustained communities. For romantic nation makers like Jefferson, the history of a people's poetry, song, and music was the vital source of their collective identity. Jefferson's ecstatic response to the poems of "Ossian", the "rude bard of the North" and "the greatest Poet that has ever existed", anticipated the young patriot's quest for a usable, national past».

integrating their legal systems ([52]). He simply was not willing to recognize it in the English common law, which he considered a municipal law, the law of one particular polity, separate and distinct from the American societies. This common law of mankind was instead «the law of nature and of nature's god» ([53]), that universal law that granted individuals the right to expatriate and secured their right to establish sovereign jurisdictions.

Qualifying expatriation as an institute of natural law was of critical importance to Jefferson. For only by proving that expatriation consisted in the universal right to dissolve former political obligations and constitute new sovereign jurisdictions could the American founding be said to have been effectuated *de iure*. And here laid, in Jefferson's mind, the origin of American politics: in the foundational swerve «from "I" to "we"» ([54]), in the leap from the individual's right to relinquish «the country in which birth or other accident» might have placed him, to the shared constitutional enterprise of men establishing new societies and «seeking» together «subsistance and happiness wheresoever they may be able, or may hope, to find

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[52] On the relation between absolutism and natural law see Diego QUAGLIONI, *Assolutismo laico e ricerca del dritto naturale*, in *Il pensiero politico*, vol. 25, n. 1, 1992, pp. 96-106.

[53] Thomas JEFFERSON, *Original Rough Draught of the Declaration of Independence*, cit., p. 423.

[54] John STEINBECK, *The Grapes of Wrath*, The Wiking Press, New York, 1939, re-published by Penguin, London, 2006, p. 152. Jefferson's Epicureism is briefly discussed in Stephen GREENBLATT, *The Swerve. How the World Became Modern*, WW. Norton & Company, New York, 2011, pp. 262-263.

them» ([55]).

2. Conquest

Jefferson invoked a second title to sustain American independence: conquest ([56]). Although he did not ascribe to it the same decisive importance he had given to expatriation, conquest allowed him to sharpen the effects of American subjecthood and strengthen its standing. As such, it seems he considered it to be a subordinate title.

It had been the subjecthood gained through expatriation that had granted Americans the standing necessary to claim jurisdiction over the territories in which they established themselves. But to give effectiveness to that claim, those territories had to have been conquered by the expatriates themselves, acting on their own behalf and not on behalf of any third party, not even of the British crown. Jefferson was well aware of it and meant accordingly to prove, in the *Summary View*, that the lands acquired by British expatriates in North America had been seized at the expense of their blood and treasure alone.

«America was conquered, and her settlement made and

[55] Thomas JEFFERSON, *A Bill Declaring Who Shall be Deemed Citizens of this Commonwealth,* in *The Papers of Thomas Jefferson*, vol. 2, edited by Julian P. Boyd *et al*., Princeton University Press, Princeton, 1950, pp. 476-479.

[56] Jefferson's understanding of conquest has been considered mostly in passing by scholarship and, for the most part, it does not appear to have been appreciated as a title distinct from expatriation. A general overview is give in Andrew CAYTON, *Jefferson and the Native Americans*, in *A Companion to Thomas Jefferson*, edited by Francis D. Cogliano, cit., p. 246.

firmly established at the expence [*sic*] of individuals, and not of the British public. Their own blood was spilt in acquiring lands for their settlement, their own fortunes expended in making that settlement effectual. For themselves they fought, for themselves they conquered, and for themselves alone they [had] a right to hold» ([57]).

As Britain had not provided either financial nor military assistance, all pretenses to consider these lands as dependencies subject to its foreign rule could be rightfully dismissed ([58]). Hence, to quote Machiavelli, Jefferson concluded that power over America had been acquired by the expatriates «armis propriis et virtute» ([59]).

There is more here than the simple assertion that the material effort to establish new outposts in the wilds of America had been largely, if not exclusively, carried out by British emigrants. There is the precisely Machiavellian understanding that the foundations of newly established commonwealths, those «nuovi ordini e modi» recalled with such insistence by Hannah Arendt

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[57] Thomas JEFFERSON, *Draft Instructions to the Virginia Delegates in the Continental Congress (Manuscript Text of A Summary View of the Rights of British America)*, cit., p. 122.

[58] See Thomas JEFFERSON, *Refutation of the Argument that the Colonies Were Established at the Expence of the British Nation*, in *The Papers of Thomas Jefferson*, vol. 1, cit., pp. 277-285. See also John P. REID, *Constitutional History of the American Revolution*, vol. 1, The *Authority of Rights*, cit., p. 124-131; and Brian STEELE, *Thomas Jefferson and American Nationhood*, cit., p. 32. The distinction between *imperium* and *dominium* within the British empire and the respective views on Jefferson and Adams are recalled in David ARMITAGE, *The Ideological Origins of the British Empire*, Cambridge University Press, 2000, pp. 175-176.

[59] Niccolò MACHIAVELLI, *Il principe*, in ID., *Opere*, vol. 1, edited by Corrado Vivanti, Torino, Einaudi-Gallimard, 1997, p. 130.

in her essay on the meaning of Authority ([60]), «rare volte periclitano», or in other words can withstand subversion, «quando dependono da loro propri e possono forzare», only when they do not depend from foreign jurisdictions and may avail themselves of the use of their own force ([61]).

If Arendt was right in arguing that «the actors of the American Revolution» had indeed been «spared the effort of "initiating a new order of things" altogether», it was only because «the colonization of America had preceded the Declaration of independence» ([62]). So, the efforts of Jefferson and the other framers of the American republic could fall back, and consciously did fall back, on earlier «charters and agreements», confirming and legalizing «an already existing body politic», brought to life through expatriation and conquest ([63]). This allowed them, and it allowed Jefferson in particular, to place the foundations of independence, *i.e*. the titles of American sovereignty, at the earliest moment in the history of the colonies. And there they laid, securing the colonies autonomy within the empire, until later usurpations and abuses revived them and projected onwards their effects.

Establishing that the colonization had been carried out *armis propriis* had a further implication. Because, by relying on themselves alone to effect settlements, the colonists had

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[60] *Ibid*, p. 132. See Hannah ARENDT, *What is Authority?*, in ID., *Between Past and Future: Eight Exercises in Political Thought,* The Viking Press, New York, 1961, re-published by Penguin, London, 1993, p. 140-141.
[61] Niccolò MACHIAVELLI, *Il principe*, cit., p. 132.
[62] Hannah ARENDT, *What is Authority?*, cit., p. 140.
[63] *Ibid*.

acquired an original title over the territories in which they had settled, they had also acquired the right to enforce their self-government against Parliamentary encroachments.

«The large strides of late taken by the legislature of Great Britain towards establishing over these colonies their absolute rule, and the hardiness of the present attempt to effect by force of arms what by law or right they could never effect, render it necessary for us also» he wrote «to change the ground of opposition, and to close with their last appeal from reason to arms» ([64]). «And as it behoves those, who are called to this great decision» he went on «to be assured that their cause is approved before supreme reason; so it is of great avail that it's [sic] justice be made known to the world […]» ([65]).

This opening paragraph of Jefferson's fair copy of the *Declaration of the Causes and Necessities for Taking Up Arms* deserves close reading. Jefferson began by asserting parliament's effort to establish an absolute rule over the colonies, *i.e.* a rule unrestrained by the existence of American rights of self-government as well as American legislatures. He qualified this attempt as unlawful, insisting that Parliament had attempted to achieve through force a power it was not entitled to claim by right and thus reaffirmed the radical antithesis between *ius* and *factum* that informed his entire constitutionalism. As a result of Parliament's military enforcement of its act of

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[64] Thomas JEFFERSON, *Fair copy of the Declaration of the Causes and Necessities for Taking Up Arms*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p. 199.
[65] *Ibid*.

usurpation, the Americans embraced arms in their own defense, but felt compelled to prove their *iusta causa resistendi*. Their armed resistance had not turned them away from reason. Their military actions were instead consistent with it, because they complied with the *recta ratio* of the Western legal tradition and adhered to the law. Thus, arms and reason, or as Machiavelli would have had it «iustitia et armi» ([66]), had been the grounds of American colonization and turned into the grounds of American independence ([67]).

«Noi abbiamo detto di sopra come a uno principe è necessario avere e' sua fondamenti buoni, altrimenti di necessità conviene che ruini. E' principali fondamenti che abbino tutti li stati, così nuovi come vecchi o misti, sono le buone legge e le buone arme […]» ([68]).

Machiavelli's thought, which seems to have been very much in Jefferson's mind as he drafted his remarks on the American conquest ([69]), cannot be understood without reference to the language of Western jurisprudence ([70]). It is to this lexicon and to its original utterance, the *Institutes* of Justinian, that the reference to arms and reason belongs. Machiavelli could have read it, not unlike Jefferson, in the opening lines of the treatise:

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[66] Niccolò MACHIAVELLI, *La cagione dell'ordinanza, dove la si truovi e cosa abbisogni*, in ID., *Opere*, vol. 1, cit., p. 26.
[67] See Diego QUAGLIONI, *Machiavelli, the Prince, and the Idea of Justice*, cit., pp. 112-113.
[68] Niccolò MACHIAVELLI, *Il principe*, cit., p. 150.
[69] For the Machiavellian or Republican interpretations of Jefferson's thought see Peter S. ONUF, *Making Sense of Jefferson*, cit., pp. 19-49.
[70] See Diego QUAGLIONI, *Machiavelli, the Prince, and the Idea of Justice*, cit., p. 113.

«Imperatoriam maiestatem non solum armis decoratam sed etiam legibus oportet esse armatam […]» ([71]). Such implicit recollection uncovers not simply the correlation between the use of force and politics, but the essence of sovereignty itself. It is sovereignty, understood in keeping with Justinian's notion of *maiestas*, which is *armis decorata* and *legibus armata* ([72]). So, by adopting such a Machiavellian understanding of the need to establish new commonwealths upon the conjunction of arms and reason, Jefferson – who was and attentive reader of Justinian's *Institues* ([73]) – might have wished to suggest, as has been written *à propos* the Florentine secretary, that «*buone armi* e *buone leggi* sono il primo e fondamentale principio di tutto il *corpus* giustinianeo» and therefore «di tutto il supporto autoritativo della scienza del diritto pubblico» ([74]). Moreover, this same authoritative foundation laid at the origin of the English legal tradition, as Bracton himself had incorporated the

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[71] *Corpus Iuris Civilis*, vol. 1, *Institutiones*, edited by Paul Kruger and Theodor Mommsen, Weidmann, Berlin, 1965, p. XXII.
[72] See Diego QUAGLIONI, *La sovranità*, cit., p. 38.
[73] On Jefferson's reading of Justinian's *Institutes* and Roman Law more generally see the preliminary inquiry provided in Henry C. MONTGOMERY, *Thomas Jefferson Admirer and User of Roman Law*, in *Synteleia Vincenzo Arangio Ruiz*, edited by Antonio Guarino and Luigi Labruna, Jovene, Napoli, 1964, pp. 170-175. On Jefferson's belief in the superiority of the civil law over the common law as «a system of perfect justice» see Thomas JEFFERSON, *letter to John Tyler*, *17 giugno 1812*, in *The Papers of Thomas Jefferson*, *Retirement serie*s, vol. 5, edited by J. Jefferson Looney *et al*., *1 May 1812 to 10 March 1813*, Princeton University Press, Princeton, 2009, p. 135; and ID., *letter to John Brazier*, *24 agosto 1819*, in *Letters of Thomas Jefferson Concerning Philology and the Classics*, edited by Thomas Fitzhugh, University of Virginia, Charlottesville, 1919, p. 50: «The lawyer finds in the Latin language the system of civil law most conformable with the principles of justice of any which has ever yet been established among men, and from which much has been incorporated into our own».
[74] Diego QUAGLIONI, *La sovranità*, cit., p. 38.

opening of Justinian's *Institutes* in his treatise and had thus claimed that: «In rege qui recte regit necessaria sunt duo haec, arma videlicet et leges, quibus utrumque tempus bellorum et pacis recte possit gubernari» ([75]).

One can only wonder, in the absence of any further research, whether this Justinian idea of sovereignty manifesting itself through enforceable laws and rightful force played any role in the drafting history of the right of a sovereign people to bear arms inscribed in the second amendment to the Constitution of the United States and its inevitable connection to the sovereignty enjoyed by each person over his own conscience inscribed in the first. As citizens of a republic became sovereign over themselves and free to collectively defend their right to self-government from external constraints shouldn't they have retained for themselves the vestments of power as well? ([76])

Conquest fulfilled a further and rather peculiar function. It grounded American jurisdictions, it settled them within a given territory. These legal systems had not been constituted as territorial entities, quite the contrary. Being established through expatriation, they had come to existence by severing their ties to a territorial state, rather than becoming one. And because of this,

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[75] Henry BRACTON, *De Legibus et Consuetudinibus Angliae, On the Laws and Customs of England*, vol. 2, cit., p. 18. Both «arma» and «leges» have been underlined in Coke's edition of Bracton, see Henry BRACTON, *De legibus et consuetidinibus Angliae*, Londini: Apud Richardum Tottellum, 1569, book 3, *Ad quod rex creatus sit in ordinaria iurisdictione*, fol. 1 r, Special Collection, Edward Bennett Williams Law Library, Georgetown University Law Center, Washington, D.C.

[76] See, as a first reference on the history of the second amendment, Akhil Reed AMAR, *America's Constitution: a Biography*, Random House, New York, 2005, pp. 322-326.

power, at least as Jefferson understood it, «was not only prior to the Revolution, it was in a sense prior to the colonization of the continent» ([77]). Hadn't the *Mayflower Compact* been «drawn up» while the Pilgrims were still «on the ship» and «signed» only «upon landing»? ([78]) Didn't this prove that the powers of legislation – considered by Jefferson to be inherent, at all times, within every society ([79]) – had seen their first light while the expatriates were still at sea? And didn't Jefferson expressly contend that «[w]hile those bodies are in existence to whom the people have delegated the powers of legislation they alone possess and may exercise these powers. But when they are dissolved» or relinquished «the power reverts to the people, who may use it to unlimited extent, either assembling together in person, sending deputies, or in any other way they may think proper»? ([80])

Regardless of «their obvious fear of one another», British expatriates had availed themselves precisely of such power «to combine […] together into a 'civil Body Politick'» and hold each other accountable «solely by the strength of mutual promise» ([81]). So, they were able to constitute, upon embarking

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[77] Hannah ARENDT, *On Revolution*, cit., p. 167.
[78] Hannah ARENDT, *On Revolution*, cit., p. 167.
[79] See Thomas JEFFERSON, *Draft Instructions to the Virginia Delegates in the Continental Congress (Manuscript Text of A Summary View of the Rights of British America)*, cit., p. 132: «From the nature of things, every society must at all times possess within itself the sovereign powers of legislation».
[80] Thomas JEFFERSON, *Draft Instructions to the Virginia Delegates in the Continental Congress (Manuscript Text of A Summary View of the Rights of British America)*, cit., p. 132.
[81] Hannah ARENDT, *On Revolution*, cit., p. 167. This passing reference to fear bears a large significance in the history of Hannah Arendt's own education.

on their common quest, new political societies that enjoyed power and were entitled to claim rights, chiefly those of «men, of expatriated men» ([82]). And Jefferson emphasized it by implying that the colonists had acquired jurisdiction through expatriation and territory, only later, through conquest.

The distinction between these two titles is significant in itself, but it acquires additional importance by suggesting Jefferson's proximity to a particular trait of Bodin's *Republique*. Although evidence gathered by reviewing Jefferson's book catalogues shows that he purchased his copy of the *Republique* about ten years after he had drafted his revolutionary writings, Jefferson's

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When in 1960 she sent to her former mentor and lover Martin Heidegger a copy of her recently published *The Human Condition*, translated in German as *Vita Activa*, Arendt enclosed a letter apologizing she had not dedicated to him the work she almost entirely owed to his inspiration. *The Human Condition* was, in fact, Arendt's own interpretation of Heidegger's notion of *Dasain*. The treatise took its move, just as Heidegger had done in *Sein und Zeit*, but even more openly in his *Grundbegriffe der aristotelischen Philosophie*, from a reinterpretation of Aristotle. But, whereas Arendt «pur ispirandosi ai commenti heideggeriani di Aristotele, si serve del filosofo Greco per una rivalutazione dell'agire politico in senso che oggi diremmo 'democratico, Heidegger al contrario si servì di Aristotele per quella svalutazione pessimistica della politica e della democrazia che in qualche misura spiega anche la sua temporanea adesione al nazismo». Unlike Arendt, Heidegger had, in fact, described the predominant emotion of the political life, the *ζωή πρακτική*, or in other words the *vita activa*, as fear. See Enrico BERTI, *Le passioni tra Heidegger e Aristotele*, in *Bollettino della Società filosofica italiana*, vol. 206, 2012, pp. 23-29: 28

[82] Thomas JEFFERSON, *letter to Judge John Tayler*, *17 June 1812*, cit., p. 135.. Hannah Arendt did not recognize that the society of expatriates had become sovereign. Instead she claimed that these «[…] new bodies politic really were 'political societies', and their great importance for the future lay in the formation of a political real that enjoyed power and was entitled to claim rights withuot possessing or claiming sovereignty», Hannah ARENDT, *On Revolution*, cit., p. 168. This political realm was that of autonomy. But such societies became autonomous only once, in Jefferson's view, settlements had been effected. See Thomas JEFFERSON, *Draft Instructions to the Virginia Delegates in the Continental Congress (Manuscript Text of A Summary View of the Rights of British America)*, cit., p. 122.

understanding of the political capacity of American societies as being the exercise of the full and perfect powers of legislation over a corporate body politic rather than over a specific territory, appears to be consistent with Bodin's own definition of statehood.

At the very opening of the *Republique*, Bodin had defined statehood as the just exercise of sovereignty over a collective body of families and what they shared in common. «Republique est un droit gouvernement de plusieurs mesnages, & de ce qui leur est commun, avec puissance souveraine» ([83]). Territoriality was not part of his definition. Jurisdiction could exist regardless of it. And wherever sovereignty happened to be exercised over a body comprised of at least three families there Bodin recognized the existence of a state: «[…] aussi le peuple peut estre escarté en plusieurs endroits, ou du tout esteint, encore que la ville demeure en son entier: car ce n'est pas la ville, ny les personnes qui sont la cité, mais l'union d'un peuple sous une seigneurie souveraine, encor qu'il n'y ayt que trois mesnages» ([84]).

This doctrine was expanded further in the sixth chapter of the first book, where Bodin, recalled the motto Cicero had attributed to Pompeus (*Ad Atticum*, VII, 11, 3), *non est in parietibus res publica*, to prove that legal systems and political societies did not require a territorial or physical consistency to exist, their life being primarily that of obligations and rights, rather than that of

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[83] Jean BODIN *Les six livres de la Republique*, cit., livre 1, chapitre 1, *Quelle est la fin principale de la Respublique bien ordonnee*, p. 1.
[84] *Ibid*., livre 1, chapitre 2, *Du mesnage, & la difference entre la Republique & la famille*, p. 13.

bricks and walls ([85]). And Jefferson must have found this claim rather congenial, if indeed the markings highlighting such passage in his copy of the *Republique* may be considered to be additional evidence of his own thought ([86]), as expressed several years later, in a letter to John Taylor, by quoting a few verses of sir William Jones (1746 – 1794), that summarized effectively the entire doctrinal debate over the nature of legal and political bodies: ([87])

What constitutes a state?
Not high rais'd battlements, or labor'd mound,
Thick wall, or moated gate:
Not cities proud with spires and turrets crown'd
No: Men, high-minded men;
Men, who their duties know;
But know their rights; and, knowing, dare maintain.

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[85] *Ibid*., livre 1, chapitre 6, *Du citoyen, & la difference d'entre le subiect, le citoyen, l'estranger, la ville, cité, & Republique*, p. 76. See also Diego QUAGLIONI, *I limiti della sovranità. Il pensiero di Jean Bodin nella cultura politica e giuridica dell'età moderna*, cit., pp. 277-294.

[86] See Jean BODIN *Les six livres de la Republique*, cit., livre 1, chapitre 6, *Du citoyen, & la difference d'entre le subiect, le citoyen, l'estranger, la ville, cité, & Republique*, pp. 75-76: The full underlined passage reads thusly: «[…] comme il en print aux Atheniens à la venue du roy de Perse, auquel ils quitterant la ville, se mettans tous sur mer, apres auoir beillé en garde aux Trezeniens leurs femmes & enfans: suyuant l'oracle qui auoit respond que leur cite ne pouuit ester sauuee, sinon auec murailles de bois: ce que Themistocle interpreta, que la cite (qui gist au corps legitime des citoyens) ne se pouuoit garentir que par nauires. In en aduint autant habitans de Megalopolis, lesquels aduertis de la venue de Cleomenes Roy de Lacedemone, vuiderent tous: elle n'estoit pas moins ville qu'au parauant: mais ce n'estoit ny cite s'enfuit hors de la ville. Ainsi parloit Pmpee le grand, apres auoir apparents siegneurs, & quittant la ville à Cesar, vsa de ces mots: *Non est in parietibus Repblibica*».

[87] Thomas JEFFERSON, *letter to John Taylor*, *28 May 1816*, in *The Papers of Thomas Jefferson*, Retirement series, vol. 10, *May 1816 to 18 January 1817*, edited by J. Jefferson Looney *et al*., Princeton University Press, Princeton, 2013, p. 88.

These constitute a state.

Glosses could be appended to each verse, recalling how walls and moated gates had been taken or rejected, over the course of the Western legal tradition, as the material manifestations of a body politic. To Isidore of Seveille's (560 ca. – 636) maxim *civitas non saxa sed habitatores vocantur* (*Etym*., 5, 2, 1), one could juxtapose Bodin's indictment of Bartolus for having reduced the *iuris societas* to the material edifices of a city, «Bartolus, qui civitatem moris definit […]» ([88]). And the allegations of authorities could enlist several more passages from Brunetto Latini (1220 ca. – 1294/95), Baldus de Ubaldis (1327 – 1400), Paulus Castrensis (1360 ca. – 1441), up to John Locke and even later Carlo Cattaneo (1801 – 1869) ([89]). But what is even more notable is that, however these debates reached the shores of America, Jefferson and his correspondents seem to have been quite aware of their legal and political implications.

3. Citizenship

Had it not been for the *Bill Declaring Who Shall be Deemed Citizen of this Commonwealth*, drafted in the aftermath of independence, there would hardly be any trace of Jefferson's

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[88] Jean BODIN, *Methodus ad facilem historiarum cognitionem*, Scientia Verlag, Aalen, 1967, p. 161.

[89] See Diego QUAGLIONI, «*Civitas»: appunti per una riflessione sull'idea di città nel pensiero politico dei giuristi medievali*, in *Le ideologie della città europea. Dall'umanesimo al rinascimento*, edited by Vittorio Conti, Olschki, Firenze, 1993, pp. 59-76.

doctrine on citizenship and its complex re-interpretation of the common law tradition set by the landmark judgment rendered in the *Calvin's case* and published by sir Edward Coke in his *Reports* ([90]).

The *Bill* Jefferson drafted was part of a larger revision of the laws of Virginia. Once the new state Constitution had entered into force, the legislature commissioned five of its members to revise the laws of the Commonwealth and render them consistent with the new republican form of government. Having been elected to the commission in 1776 – along with George Wythe, Edmund Pendelton, George Mason, and Thomas Ludwell Lee – Jefferson spent the following three years drafting some of the most radical proposals submitted to the assembly ([91]).

Expatriation and conquest had justified American claims to independence against the tyrannical usurpations and abuses of Britain, but once independence had been achieved and new republican governments were being put in place, the laws on subjecthood and citizenship, disciplining the fundamental political obligation between rulers and ruled, required their own revision ([92]). Jefferson attended to it, drafting a *Bill* that

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[90] Thomas JEFFERSON, *A Bill Declaring Who Shall be Deemed Citizens of this Commonwealth,* in *The Papers of Thomas Jefferson*, vol. 2, edited by Julian P. Boyd *et al*., Princeton University Press, Princeton, 1950, pp. 476-479.

[91] See Julian P. BOYD, *The Revisal of the Laws 1776-1786*, in *The Papers of Thomas Jefferson*, vol. 2, cit., pp. 305-324.

[92] The classical study on American citizenship is James H. KETTNER, *The Development of American Citizenship, 1608-1870*, University of North Carolina Press, Chapel Hill, 1978.

established citizenship as the title of republican sovereignty ([93]).

The main purpose of the *Bill* was to specify who would have enjoyed the rights of citizenship within the commonwealth of Virginia. This implied that Jefferson held it was within the discretional power of the commonwealth to regulate citizenship, according its rights to some while denying them to others. As such, the *Bill* refrained from qualifying citizenship as a natural right, but treated it primarily as an institute of the *ius civile*, while indirectly acknowledging it also belonged to the *ius gentium* by providing a specific procedure for naturalization of foreign emigrants.

The wording chosen by Jefferson to classify the means of acquisition and exclusion from citizenship could not have been more prescriptive or selective. «Be it enacted by the General Assembly, that all white persons born within the territory of this commonwealth and all who have resided therein two years next before the passing of this act, and all who shall hereafter migrate into the same […] and all infants wheresoever born, whose father, if living, or otherwise, whose mother was a citizen at the time of their birth, or who migrate hither, their father, if living, or otherwise their mother becoming a citizen, or who migrate

[93] Scholarship has generally overlooked this *Bill*. An overview, mostly focused on expatriation, is provided in Douglas BRADBURN, *The Citizenship Revolution: Politics and the Creation of the American Union, 1774-1804*, University of Virginia Press, Charlottesville and London, 2009, pp. 105-107. Some remarks are provided also in Peter THOMSON and Peter S. ONUF, (eds.), *State and Citizen, British America and the Early United States*, University of Virginia Press, Charlottesville and London, 2013, pp. VIII-X. See also, Merrill D. PETERSON, *Thomas Jefferson and the New Nation: A Biography*, cit., pp. 153-154.

hither without father or mother, shall be deemed citizens of this commonwealth […]» ([94]).

Leaving aside the coarse exclusion from citizenship based exclusively on the color of the individual's skin, that held as aliens Christian Indians as well as free African Americans born in Virginia ([95]), and the residual cases involving residents and infants ([96]), the text articulated two distinct and complementary notions of citizenship: one acquired through birth (either *iure loci* or *iure sanguinis*), the other through naturalization. Though the means of acquisition varied, the *Bill* drew no distinction between the two classes of citizenship: both were established by statue, both entitled their holders to the enjoyment of the same rights, and both were equally protected by the law.

No preference was accorded to what Jefferson had called «natural born» in the provision on naturalization he drafted in his proposed Constitution for the Commonwealth of Virginia.

«All persons who by their own oath or affirmation, or by other testimony shall give satisfactory proof to any court of record in this country that they purpose to reside in the same 7 years at the least and who shall subscribe the fundamental laws, shall be considered as residents and entitled to all the right of

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[94] Thomas JEFFERSON, *A Bill Declaring Who Shall be Deemed Citizens of this Commonwealth*, cit., pp. 476-477.

[95] Peter THOMSON, *Preface*, in *State and Citizen, British America and the Early United States*, edited by Peter Thomson and Peter S. Onuf, cit., p. IX.

[96] Jefferson's concern with the protection of infants is reviewed in Holly BREWER, *Beyond Education: Thomas Jefferson's "Republican" Revision of the Laws Regarding Childern*, in *Thomas Jefferson and the Education of a Citizen*, edited by James Gilreath, Library of Congress, Washington, D.C., 1999, pp. 48-62.

persons natural born» ([97]).

Here again, the main purpose of the provision was to confer equal standing to persons who had acquired citizenship either through naturalization or at birth. Jefferson sought to achieve this end by extending the rights enjoyed by «natural born» to naturalized citizens. However, while no apparent preference was accorded to natural born citizens, the ambiguous wording of the provision suggested that, whereas naturalization was an institute of municipal law and as such could have been repealed by an amendment to the Constitution, the rights of citizenship enjoyed by persons born under the protection of the Commonwealth were instead natural. As an institute of natural law, natural born citizenship required no defining provision and Jefferson's draft Constitution in fact provided none.

Qualifying citizenship as the natural obligation each individual owed to the Commonwealth protecting his rights was supported by the authoritative precedent set in English jurisprudence by the *Calvin's case* decided in 1608 by the Court of Exchequer Chamber ([98]).

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[97] Thomas JEFFERSON, *Third Draft of the Virginia Constitution*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p. 363.

[98] *Calvin's case*, in *English Reports*, vol. 77, *King's Bench Division*, 6, *Containing Coke, Parts 5 to 13*, Stevens & Sons, London, 1907, pp. 377-411. The literature on the case is vast. See William S. HOLDSWORTH, *A History of English Law*, vol. 9, Methuen & co., London, 1926, pp. 72-86. For an overview of the debate that opposed Charles H. McIllwain to Robert L. Schuyler over the influence exercised by the *Calvin's case* in American early jurisprudence see Harvey WHEELER, *Calvin's Case (1608) and the McIlwain-Schuyler Debate*, in *The American Historical Review*, vol. 61, n. 3, 1956, pp. 587-597 and the bibliography therein provided. More recently the case has come under scrutiny in Polly J. PRICE, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, in *Yale Journal of Law and*

According to Coke's report, the court deciding the case had maintained that Scottish subjects of James VI born after their king had ascended the throne of England in 1603 were entitled to claim protection of their rights in front of English courts of common law and could not be dismissed as aliens. Although English municipal laws had not extended to the Scots the common law rights enjoyed by Englishmen, the Court nevertheless deemed that Scotsmen owed to the common king of England and Scotland an allegiance «as well within [their] realm, &c. as without», in exchange for which they were entitled to the King's protection throughout all the kingdoms under his rule ([99]). This entitlement, which had the practical effect of extending to Scotsmen the rights of proper Englishmen, conferred to all those who were «born under the obedience, power, faith, ligealy, or ligeance of the King» the *status* of «natural subjects» ([100]).

The judgment seems to have been often read as the first English enunciation of the notion of «territorial birthright citizenship» ([101]). However, this interpretation, and its contention that «all persons born within any territory held by the King of England were to enjoy the benefits on English law as

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Humanities,vol. 9, n. 1, 1997, pp. 73-146. For an account on Coke's historical jurisprudence see Harold J. BERMAN, *Law and Revolution, II. The Impact of the Protestant Reformations on the Western Legal Tradition*, cit., pp. 238-245.

[99] *Calvin's case*, cit, p. 386.

[100] *Ibid*., p. 383.

[101] Polly J. PRICE, *Natural Law and Birthright Citizenship in Calvin's Case (1608),* cit., p. 73.

subjects of the king» ([102]), seems to have excessively emphasized the relevance of territoriality in the acquisition of citizenship, to the detriment of the personal bond between subject and lord which lay instead at the heart of the text reported by Coke and the tradition on which it relied. According to Coke, in fact, the ligeance owed by the subjects to the king who offered them protection «was of as great an extension and latitude, as the royal power» itself and could not be considered «local» or confined to any specific realm ([103]). Not only because, as several contemporary interpreters have conceded, «the protection and government of the King [was] general over all his dominions and kingdoms» ([104]), but for the much more relevant reason that «ligeance [was] a quality of the mind» and, as such, could not be «confined within any place» ([105]). Obedience and subjecthood, in other words, were not primarily matters of territoriality, but rather of conscience and mutual obligation.

This line of reasoning had its own origin in the Germanic notion of *regia tuitio*, which, as Ennio Cortese has shown, played a fundamental role in shaping the medieval understanding of citizenship ([106]). During the high Middle Ages, it had become custom for aliens protected by Germanic lords to adopt the laws of their rulers and thus obtain a limited private

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[102] *Ibid*., pp. 72-73.
[103] *Calvin's case*, cit, p. 386.
[104] *Ibid*., p. 388.
[105] *Ibid*.
[106] See Ennio CORTESE, *Cittadinanza (diritto intermedio)*, in *Enciclopedia del diritto*, vol. VII, Giuffè, Milano, 1960, pp. 132-140.

law capacity ([107]). This protection established, in the case of the Francs for instance, «un vincolo diretto con il re, una sottoposizione immediata a lui che consentiva di scavalcare giurisdizioni e poteri locali» ([108]).

The direct link between subject and lord resulting from the *tuitio*, or *mundeburdio*, was exactly the same kind of direct obligation sought by Coke. «Now it appeareth by demonstrative reason» he claimed «that ligeance, faith, and obedience of the subject to the Sovereign, was before any municipal or judicial laws» ([109]). It was a personal bond, belonging to an essentially feudal conception of social relations ([110]). But, in Coke's view, it did not emanate from any express oath, but from the nature of the relationship itself. «Every subject is by his natural ligeance bound to obey and serve his Sovereign» ([111]). And because «the

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[107] See *ibid*., p. 134-135

[108] Ennio CORTESE, *Il diritto nella storia medievale*, vol. 1, *L'alto Medioevo*, Il Cigno Galileo Galilei edizioni, Roma, 1995, p. 270.

[109] *Calvin's case*, cit, p. 392.

[110] See the classic William S. HOLDSWORTH, *A History of English Law*, vol. 9, cit., p. 72: «The beginnings of the modern rules of the common law, which define the persons who are to be accounted as British subjects, do not make their appearance till England, in the course of the thirtheenth century, had lost the reater part of her continental posessions. These rules center round the doctrine of allegiance; for it is the duty of allegiance, owed by the subject to the crown, which differentiates the subject from the alien. This doctrine has its roots in the feudal ideal of a personal duty of fealty to the lord from whom lend is held; and, thou it has necessarily developed with the development of the position of the king, its origin in this idea has coloured the whole modern law on this topic». This conception is not far from Bodin's, see Margherita ISNARDI PARENTE, *Introduzione*, cit., p. 47: «[…] il rapporto fra il signore e il suddito si configure ancora in forma nettamente bilaterale: "l'obbligo mutuo intercorrente fra il sovrano e il suddito, al quale ultimo il primo deve, in cambio di fedeltà e dell'obbedienza che ne riceve, consiglio, conforto, aiuto e protezione"».

[111] *Calvin's case*., p. 393.

law of nature» establishing this personal bond was «part of the law of England», English courts were compelled to accord it preeminence over «any municipal or judicial law» ([112]). Coke insisted on this preeminence of natural law, by contending that, unlike municipal law, it «never was nor could be altered or changed», for «jura naturalia sunt immutabilia» ([113]). And thus, Locke concluded that «Parliament could not take away that protection which the law of nature giveth» to all natural subjects of the king ([114]).

It had been only one year since the death of Giacomo Menochio and not long after he and Marta had argued over the effects of this same principle in regards to expatriation ([115]). Just then, a similar question was emerging in English jurisprudence. Could the right of migration between kingdoms ruled by the same monarch limit the power of each municipal parliament to provide a positive definition of subjecthood? *Calvin's case* found it could and reverted to the notion of natural subjecthood precisely to protect the freedom of movement of the king's subjects from one realm to the other; thus preventing migration from impairing the rights of subjects establishing themselves in a jurisdiction which, although different from the one they had

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[112] *Ibid*., p. 392.
[113] *Ibid*., pp. 392-393.
[114] *Ibid*., p. 393.
[115] The exact date in which the case was debated is unknown. Given Menochio's death in 1607, Gorla argues it was discussed between the end of the 16th and the beginning of the 17th centuries. Not long before, that is, the Calvin's case. See Gino GORLA, "*Ius libertatis" e diritto "naturale" di libertà di espatrio, in un celebre caso discusso in Italia tra i secoli XVI e XVII (per un raffronto con i "diritti dell'uomo" dal 1789 a oggi)*, cit., p. 225.

been born in, was still under the protection of the same common sovereign.

By virtue of its implications, British emigrants to North America began referring to *Calvin's case* as evidence that migration had not extinguished their rights as natural born Englishmen ([116]). But in so doing, as Christopher Tomlins has argued, they missed the point of the ruling. Given that British emigrants had a right to quit their country, a question not directly addressed by the decision, the rights they enjoyed through migration were not those secured by the common law, but rather those conferred by natural law. Or, as Jefferson correctly called them, those inherent in men who chose to expatriate and quit the protection of their former sovereign. Whereas Scotsmen migrating to England had not exceeded the protection of their king, but had actually sought it, as evidenced by the *Calvin's case*, Americans had relinquished their country and established themselves abroad by effecting settlements at the expense of their own military and financial efforts. So, as no protection had been sought or provided, no subjecthood (natural or otherwise) could have been claimed.

Jefferson still very much held dear the notion of a personal and mutual bond between rulers and rules, but rejected the idea that such obligation was in any way natural. He recovered instead an alternative conception of citizenship, widespread in

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[116] See Christopher TOMLINS, *Freedom Bound. Law, Labour, and Civic Identity in Colonizing English America, 1580-1865*, Cambridge University Press, Cambridge, 2010, pp. 82-92.

modern literature on public law and rooted in the history of the *ius commune* ([117]). Thus, Jefferson placed himself within the long scholarly tradition that had conceived citizenship essentially as a contract between the individual and the Commonwealth, which had found its earliest articulation in the notions of *contractus cictadinaticus* and *civitas contracta* shaped in the late 14th century by Bartolus ([118]).

Instead of according any preference to the natural born

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[117] A history of citizenship in the West is provided in Piero COSTA, *Civitas. Storia della Cittadinanza in Europa*, vol. 1-4, Laterza, Bari, 1999-2002. A highly compressed synthesis is given in Piero COSTA, *The Discourse of Citizenship in Europe: A Tentative Explanation*, in *Privileges and Rights of Citizenship. Law and the Juridical Construction of Civil Society*, edited by Julius Kirshner and Laurent Mayali, The Robbins Colletion, Berkeley, 2002, pp. 199-225.

[118] See See Ennio CORTESE, *Cittadinanza (diritto intermedio)*, cit., p. 132. For a more detailed and specific analisys of the contributions offered by Bartolus see Julius KIRSHNER, *«Civitas sibi faciat civem»: Bartolus of Sassoferrato's Doctrine on the Making of a Citizen*, in *Speculum*, vol. 48, 1973, pp. 694-713; and Diego QUAGLIONI. *Le radici teoriche della dottrina bartoliana della cittadinanza*, in ID., «*Civilis sapientia». Dottrine giuridiche e dottrine politiche fra medioevo ed età moderna. Saggi per la storia del pensiero giuridico moderno*. Maggioli, Rimini, 1989, pp.127-144. The reflections on citizenship of Baldus, encompassed within the general Aristotelian framework of his thought, are reviewed in Joseph CANNING, *The Political Thought of Baldus de Ubaldis*, Cambridge University Press, Cambridge, 1987, pp. 159-184. On the legacy of medieval conceptions of citizenship in modern jurisprudence and political thought see Diego QUAGLIONI, *«Omnes sunt cives civiliter». Cittadinanza e sovranità fra storia e diritto*, in *Dallo status di cittadino ai diritti di cittadinanza*, edited by Fulvio Cortese, Gianni Santucci, Anna Simonati, Editoriale scientifica, Napoli, 2014, pp. 5-14. A highly interesting interpretation of Bodin's doctrine on citizenship (understood as a bilateral obligation not dissimilar to the feudal one) is provided in Daniel LEE, *Citizenship, Subjection, and Civil Law: Jean Bodin on Roman Citizenship and the Theory of Consensual Subjection*, in *Citizenship and Empire in Europe, 200-1900. The Antonine Constitution after 1800 years*, edited by Clifford Ando, Franz Steiner Verlag, Stuttgart, 2016, pp. 113-134. According to Lee, Bodin maintained that citizenship could not be relinquished except by mutual consent and, in this sense, his intepretation of Bodin offers an important contrast to Jefferson's doctrine on expatriation.

citizens, Jefferson constructed the *Bill* around his understanding of citizenship as an act of will: a «choice» consciously made by persons who intended to commit themselves to the Commonwealth they constituted as their own, rather than the mere act of «chance» by which a person born accidentally within the territory of the Commonwealth was held subject to its laws in exchange for its protection. Regardless of any natural obligation, all individuals were called to choose for themselves whether to be citizens of the commonwealth or not. Individuals born within the territory of Virginia had to choose whether to relinquish the citizenship they had acquired at birth and expatriate, whereas aliens immigrating in Virginia had to choose whether to settle within its jurisdiction and swear allegiance to its society. The heart of the *Bill* was, therefore, dedicated to establishing the institutes of naturalization and expatriation, which Jefferson framed as the foundations of the individual right to actively participate in the life of the Commonwealth or relinquish it entirely ([119]).

Naturalization hinged on an «assurance of fidelity»: each migrant, who wished to establish himself within the commonwealth, had to declare «before any court of record» his intention «to reside therein» and offer «satisfactory proof» of his

[119] See *contra* Peter THOMSON, *Preface*, cit., pp. IX-X: «[…] Jefferson believed that the polity known as the commonwealth of Virginia lacked legitimacy because it had been called into beign without adequate reference to the people, so it comes as something of a surprise that his bill strengthened the legitimacy of the flawed commonwealth by requiring oaths of allegiance to it from its people».

commitment by swearing an «oath» of allegiance ([120]).

Jefferson provided the text of the oath himself in his *Bill Prescribing the Oath of Fidelity, and the Oaths of Certain Public Officers* ([121]). «Be it enacted by the General Assembly that every person appointed to act in any office within this Commonwealth legislative, executive, or judiciary by authority from the laws thereof and all persons migrating hither to become citizens of the Commonwealth shall take the following oath of fidelity before some court of record, or before the high court of Chancery or General court to be by such judge certified into his court, to wit: "I do declare myself a citizen of the commonwealth of Virginia. I relinquish and renounce the character of subject or citizen of any Prince, or other state, whatsoever, and abjure all allegiance, which may be claimed by such Prince, or other state; and I swear to be faithful and true to the said commonwealth of Virginia, so long as I continue a citizen thereof. So help me God" […]» ([122]).

Through this sworn oath of fidelity, recited before a court of justice, God was called to witness and guarantee the voluntary relinquishment of previous allegiances and the constitution of a new political bond between the individual acquiring citizenship and the commonwealth in which he sought to fulfill his material

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[120] Thomas JEFFERSON, *A Bill Declaring Who Shall be Deemed Citizens of this Commonwealth*, cit., p. 477.

[121] See Thomas JEFFERSON, *A Bill Prescribing the Oath of Fielity, and the Oaths of Certain Public Officers*, in The Papers of Thomas Jefferson, vol. 2, cit., pp. 589-590.

[122] *Ibid*., p. 598, 589. I have reproduced the text of the enacting clause as drafted by Jefferson and published in the first footnote to the text rendered in *The Jefferson Papers*.

and spiritual needs. It was this willful act of commitment that constituted the origin of political obligations according to Jefferson. No simple residence within the territory of the Commonwealth, however prolonged, could have had the same effect, because it did not imply the same contractual relationship between the parties. A Commonwealth was not just a city, a material gathering of edifices and all that pertained to them, one could enter by simply inhabiting it. It was a «Society of Men», as Locke had admonished, a legal order known in the scientific language of the time as «Civitas» ([123]). The French, who followed Bodin, could distinguish this society of laws and men from the *ville* and call it *cité* ([124]), but, as Locke warned English readers, «City among us has a quite different notion» ([125]). Hence, entrance into the Commonwealth could not be gained but by a «positive engagement», an «express Promise and Compact» ([126]). This pledged compact, this sworn oath of

[123] John LOCKE, *Two Treatise of Government*, cit., p. 355. On the notion of *civitas* in medieval and modern European jurisprudence and its understanding as a particular kind of *aedificiorum collatio* see Diego QUAGLIONI, «*Civitas»: appunti per una riflessione sull'idea di città nel pensiero politico dei giuristi medievali*, cit., pp. 59-76. See also ID., *The Legal Definition of Citizenship in the Late Middle Ages*, in *City States in Classical Antiquity and Medieval Italy*, edited by Anthony Molho, Julia Emlen, Kurt Raaflaub, University of Michigan Press, Ann Arbor and Stuttgard, 1991, pp. 155-167.
[124] See. Diego QUAGLIONI, *I limiti della sovranità. Il pensiero di Jean Bodin.nella cultura politica e giuridica moderna*, cit., pp. 277-294; and ID., *«Les Citoyens envers l'Etat»: The Individual as a Citizen from Bodin's Republique to Russeau's Contract Social*, in *The Individual in Political Theory and Practice*, edited by Janet Coleman, Carendon Press, Oxford, 1996, pp. 269-280.
[125] John LOCKE, *Two Treatise of Government*, cit., p. 355.
[126] *Ibid*., p. 349.

fidelity, exchanged in the presence of God and fellow men ([127]), had been the foundation of the Commonwealth and became the act, in Jefferson's *Bill*, through which immigrating individuals were entitled, under municipal law, to acquire citizenship and the right of participating in the exercise of the Commonwealth's jurisdiction.

Paolo Prodi has argued that this practice of oath-taking had been central in the history of Western constitutionalism since the early Middle Ages, as it had provided «the transcendent justification of the vertical ties binding rulers and subjects and the horizontal ties binding citizens within a city or state to each other» ([128]). And this persuasion in the ability of mutually sworn obligations to constitute an agreement capable of binding a society together and subjecting its rulers to the laws collectively enacted was, to paraphrase Marc Bloch, a conviction according to which Jefferson still desired American societies to live by ([129]).

He made it clear in 1801, contrasting in his first inaugural address «the exterminating havoc» afflicting Europe, a continent whose rulers its subjects had not chosen (nor could choose), to the well-being that the American people had secured for themselves, «to the thousandth and thousandth generation», by

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[127] See Hannah ARENDT, *On Revolution*, cit., pp. 167, 170-173.
[128] Julius KIRSHNER, *Rewiew of Paolo Prodi, Il sacrametno del potere: Il giuramento politico nella storia costituzionale dell'Occidente*, in *American Historical Review*, vol. 98, n. 5, 1993, p. 1583. See also Paolo PRODI, *Il sacramento del potere. Il giuramento politico nella storia costituzionale dell'Occidente*, Il multino, Bologna, 1992.
[129] See Marc BLOCH, *The Feudal Society*, vol. 2, *Social Classes and Political Organization*, Routledge, London, 1965, p. 452.

«possessing a chosen country», a country they had chosen for themselves and constituted, through mutual pledged of sworn fidelity, as a *iuris societas*, *i.e.* a Commonwealth ([130]).

Precisely because citizenship was an act of choosing and a sign of commitment its bond could be relinquished. Should a person desire to quit «the country, in which birth or other accident» might «have thrown» him and seek «subsistance and happiness wheresoever» he «may be able, or may hope to find them», he was entitled to exercise his «natural right» of expatriation ([131]).

Jefferson openly acknowledged in the *Bill* that expatriation was a natural right, «incapable», as he would later write to Albert Gallatin, «of being rightfully taken from [man] even by the united will of very other person in the nation» ([132]). It was, in other words one of the *iura naturalia* Edward Coke had declared to be *immutabilia* in the *Calvin's case* ([133]). And it provided the natural foundation for the establishment of self-governing jurisdictions. For, if individuals did not possess a natural right to become citizens of any particular jurisdiction, natural law did grant them the right to dissolve *ad nutum* any municipal ties and establish entirely new ones.

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[130] Thomas Jefferson, *First Inaugural Address*, cit., p. 149. See Maurizio VALSANIA, *Nature's Man. Thomas Jefferson's Philosophical Anthropology*, University of Virginia Press, Charlottesville and London, 2013, p. 19.
[131] Thomas JEFFERSON, *A Bill Declaring Who Shall be Deemed Citizens of this Commonwealth*, cit., p. 477.
[132] Thomas JEFFERSON, *letter to Albert Gallatin*, *26 June 1806*, quoted in Ari HELO, *Thomas Jefferso's Ethics and the Politics of Human Progress. The Morality of a Slaveholder*, cit., p. 153.
[133] See *supra*, chapter 2, paragraph 1, note 10.

It had been, once again, Coke who had claimed in *Calvin's case*, that «magistracy and government are of nature» ([134]). By this he had meant that in all times and in all societies nature had established rulers and ruled. Like Machiavelli before him, who had written «il mondo fu sempre ad uno modo abitato da uomini che hanno avuto le medexime passioni; et sempre fu chi serve et chi comanda, et chi serve malvolentieri, et chi serve volentieri, et chi si ribella et è ripreso» ([135]), Coke insisted that «to command and to obey is of nature, and that magistracy is of nature» ([136]).

Jefferson largely rejected this contention, but he did maintain that magistracy was from nature as well, although in a sense closer to Sidney's than perhaps to Coke's. It had been Sidney who had claimed, in the opening of this *Discourses Concerning Government*, that «the whole fabric of tyranny will be much weakened if we prove that nations have a right to make their own laws, constitute their own magistrates; and that such as are so constituted owe an account of their actions to those by whom, and for whom they were appointed» ([137]). This right, belonging to nations, was itself part of the law of nations, the *ius gentium* upon which medieval jurists had grounded the rights of self-government, as it had been fully articulated in the 14th century by Baldus de Ubaldis in his commentary on the *lex Omnes*

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[134] *Calvin's case*, cit, p. 392.
[135] Niccolò MACHIAVELLI, *Del modo di trattare i popoli della Valdichiana ribellati*, in ID., *Opere*, vol. 1, cit., p. 24.
[136] *Calvin's case*, cit, p. 392.
[137] Algernon SIDNEY, *Discourses Concerning Government*, cit., p. 12.

populi: «populi sunt de iure gentium ergo regimen populi est de iure gentium […]» ([138]).

Through this meditation, Jefferson seems to have recovered a typically medieval conception of self-government, one rooted in a law that transcended municipal obligations and was thus capable of resisting against political encroachments. One against which Bodin had openly written, contending that autonomy could only exist as a sovereign concession ([139]). Early political absolutism could not allow intermediate societies to be exempt from the *potestas absoluta* of the sovereign and claim that the *ius gentium* had granted them a right of self-government that could challenge and limit sovereign prerogatives ([140]). Jefferson's owed much to this Bodinian understanding of autonomy and took it to be the foundation of his doctrine on administrative decentralization. However, he distinguished administrative jurisdictions which had been granted the power of self-government, from societies which held those powers within themselves *ab origine*. And when it came to the latter, he was relentless in maintaining that their rights of self-government were rooted in the law of nature and nations.

It was as a jurist educated on the *Institutes* and the *Reports* of Coke that Jefferson read modern literature on public law. So,

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[138] Quoted in Francesco CALASSO, *Autonomia*, in *Enciclopedia del diritto*, vol. IV, Giuffrè, Milano, 1959, pp. 349-356: 354. See also Joseph CANNING, *The Political Thought of Baldus de Ubaldis*, cit., p. 104-113.

[139] On these competing conceptions of autonomy see Diego QUAGLIONI, *La sovranità*, cit., p. 54. On the medieval understanding of autonomy see Francesco CALASSO, *I glossatori e la teoria della sovranità*, cit., pp. 108-110.

[140] See Diego QUAGLIONI, *«Civitas». Appunti per ua riflessione sull'idea di città nel pensiero politico dei giuristi medievali*, cit., p. 74.

when he found, in Vattel's (1714-1767) *Le droit des gens*, that «[i]l est des cas dans lesquels un citoyen est absolument en droit […] de renoncer à sa patrie», the chief occurring whenever «le citoyen ne peut trouves sa subsistence dans sa patrie», for «la société politique, ou civile, n'étant contractée que dans le vue de faciliter à un chacun les moyens de livre & de faire un sort heureux & assure, il seroit absurdre de pretender qu'un member, à qui elle ne pourra procurer les chise les plus nécessaires, ne sera pas en droit de la quitter» ([141]); or when he read that the same right existed whenever «le corps de la société, ou celui qui le représente, manqué absolument à ses obligations envers un citoyen» ([142]); or again when «la majeure partie de la nation, ou le Souverain qui la représente, veut établir des loix sur des choses à l'égard desquelles le pacte de societé ne peut obliger tout citoyen à se soummettre», as for instance «si le Souverain, ou la plus grande partie de la nation, ne veut souffrir qu'une seule religion dans l'Etat» ([143]), these propositions must not have appeared to him as simply an abstract enunciation of natural rights. Although a plain reading of Vattel might have suggested to a lesser reader that expatriation had no historical foundation, the earlier jurisprudence on *iura naturalia* shaped Jefferson's doctrine and led him to see in the right to seek happiness elsewhere the foundation of what in earlier days

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[141] Emmerich de VATTEL, *Les droit des gens, ou principes de la loi naturelle, appliqués à la conduit & aux affaires des nations & des* souverains, cit., livre 1, chapitre 19, *De la patarie, & de diverses matieres qui y ont rapport*, p. 119.
[142] *Ibid*.
[143] *Ibid*.

Sidney had considered to be – through his re-interpretation of Bodin ([144]) – the right men enjoyed of framing together a society, «having all power in themselves over themselves, subject to no other human law than their own» ([145]).

[144] On Sidney's reading of Bodin see Jonahtan SCOTT, *Algernon Sidney and the English Republic, 1623-1677*, p. 19.
[145] Algernon SIDNEY, *Discourses Concerning Government*, cit., p. 99.

3

EMBODYING SOVEREIGNTY

2. *Jefferson at the «tournant rousseauiste»*

When Jefferson arrived in Paris in 1784, as a diplomatic agent of the United States government ([1]), only twenty-two years had passed since the publication of Rousseau's *Du Contrat Social, ou Principes du droit politique* had shaken European political wisdom to its core ([2]). The treatise had made no attempt to conceal its radical reversal of traditional public law ([3]). To the contrary, Rousseau emphasized at every page his effort to place the artificial and corporate body of the people at

[1] See William Howard ADAMS, *The Paris Years of Thomas Jefferson*, Yale University Press, New Haven and London, 1997; and Iain MCLEAN, *The Paris Years of Thomas Jefferson*, in *A Companion to Thomas Jefferson*, edited by Francis D. Cogliano, cit., pp. 110-127. More recently Annette GORDON-REED and Peter S. ONUF, «*Most Blessed of Patriarchs». Thomas Jefferson and the Empire of Imagination*, cit., pp. 97-132.

[2] See Yves Charles ZARKA, *Rousseau and the Sovereignty of the People, in Rousseau, Between Nature and Culture. Philosophy, Literature, and Politics*, edited by Anne Deneys-Tunney and Yves Charles Zarka, De Gruyter, Berlin, 2016, pp. 137-150. See also, ID., *Le tournant rousseauiste ou la reinvention de la souveraineté du peuple*, in *Penser la couveraineté à l'époque modern et contemporaine*, edited by Gian Mario Cazzaniga and Yves Charles Zarka, Ets-Vrin, Pisa and Paris, 2001, pp. 287-302.

[3] See James MILLER, *Rousseau. Dreamer of Democracy*, Yale University Press, New Haven and London, 1984, pp. 118-119.

the helm of civil power ([4]). The novelty of this democratic subject challenged the traditional understanding of sovereignty, which had frequently cautioned against entrusting concrete political action to an abstract entity such as the people, whose historical character appeared at best passive and at worst seditious.

Bodin, in particular, had warned, at least in the eyes of such 18th century readers as Condorcet – who had abridged the *Republique* for the first volume of the *Biblithèque de l'homme public*, the series of political classics he edited in the last quarter of the 18th century – that «[l]a démocratie, ou gouvernement populaire […] est impraticable dans un pays étendu, par-tout elle est sujette à beaucoup de désordres & abus. […] ce qu'il y a de sûr, c'est que le désordre est inséparable de tout ce que le people fait en tourbe, & qui n'est point le fruit de l'examen & des réflexions des gens les plus sages […]» ([5]). In other words, Condorcet's Bodin had shared with 18th century readers his doubts whether democracies could effecitvely compose into a superior harmony those fragmented interests that unsettled societies, given how democratic sovereignty belonged to those

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[4] Jean-Jacques ROUSSEAU, *Du Contrat Social, ou Principes du droit politique*, in *Oeuvre Complètes*, vol. 3, edited by Robert Derathé, Gallimard, Paris, 1964, p. 361: «A l'instant, de lieu de la personne particulière de chaque contractant, cet acte d'association produit un corps moral & collectif, compose d'autant de membres que l'assemblée a de voix; lequel reçoit de ce même acte son unité, son moi commun, sa vie & sa volonté».

[5] Nicolas de CONDORCET, *Bibliothèque de l'homme public, ou analyse raisonnée des principaux ouvrages François et étrangers, sur la Politique en général, la Législation, les Finances, la Police, l'Agriculture, & le Commerce en particulier, & sur le Droit naturel & public*, Tome premier, a Paris: chez Buisson, 1790, pp. 96.

very factions that splintered the commonwealth's unity and thus prevented the establishment of an effective mediatory power over the moltiplicity of compleating parties.

«Tels sont les principes de l'excellent livre de Jean Bodin», concluded Condorcet. «Leur réunion forme la base d'un traité complet de droit public, le plus méthodique, le plus sage & le plus juste que l'on puisse présenter» ([6]). The year was 1790 and, while the revolution that according to Tocqueville would have eventually brought to completion the centralization of power initiated by the French monarchy in the 15th century was on its way, Condorcet recalled the "republican" lesson of Bodin – who had «[…] sucé avec le lait un esprit républicain» he maintained «presque toute sa vie» ([7]) – to present a complete scientific exposition of the foundations of power and, more importantly, of the limitations needed to keep it in check and assure its justness ([8]). Hence, far from being the champion of a doctrine

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[6] *Ibid*., p. 129.

[7] *Ibid*., p. 77. The same metaphor was used five years earlier by Jefferson in a letter addressed to Richard Price from Paris in 1785, see Thomas JEFFERSON, *letter to Richard Price*, *7 August 1785*, in *The Paper of Thomas Jefferson*, vol. 8, 25 February to 31 October 1785, edited by Julian P. Boyd *et al*., Princeton University Press, Princeton, 1953, p. 356: «[The young men of Virginia] have sucked in the principles of liberty as it were with their mother's milk, and it is to them I look with anxiety to turn the fate on this question [of slavery]».

[8] Much should be said and written on Condocet's republican interpretation of Bodin and his participation in the larger revival of Bodinian thought that took place in the 18th century. This movement had been probably initiated, or at least substantially supported, by Jean-Charles de Lavie, who in 1755 had published an *Abrégé de la République de Bodin* in London, a copy of which was eventually acquired by John Adams. Introducing his edition, Lavie stressed the success enjoyed by Bodin's doctrine in England and compared it to Montesquieu's *oeuvre*. «La République de Bodin a eu, dans son temps, un succès semblable à celui dont l'Esprit des loix a joui de nos jours. […] On

justifying limitless power, Condorcet saw in Bodin one of the earliest interpretars of modern constitutionalism.

Among the limitations placed by Bodin to check power, the subjecthood of sovereignty stood preeminent. Only a clearly identified and circumscribed subject, such as a prince, could effectively fulfill sovereignty's demands and exercise its power with sound judgment[9]. «Enfin notre auteur, revenant aux différents genres de républiques, & balançant encore une fois le mérite de l'état populaire, aristocratique & royale, conclut toujours en faveur du dernier. Il recommande aux rois cette justice qu'il appelle distributive; il veut qu'elle soit de plus harmonique, c'est-à-dire, graduellement utile aux différens

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peut dire que l'un & l'autre on traité la même matiere considérée sous deux points de vue différentes. L'un en donnant les regles du Gouvernement des différentes Républiques, a exposé les meilleures loix des législateurs; l'autre a pénétré l'esprit qui les avoit animés». See Jean-Charles de LAVIE, *Abrégé de la République de Bodin*, Tome premier, a Londres: Chez Jean Nourse, 1755, p. I-II. Condorcet echoed these same remarks (see Nicolas de CONDORCET, *Bibliothèque de l'homme public*, cit., pp 76, 78). Their implication was clear: because Bodin had been censured by the Catholic Church, his widest circulation had been in Protestant countries, especially England, where his thought became the foundation of later public law doctrines. On Lavie see Jean-Pierre DURAT, *Le president Jean-Charles de Lavie, critique de l'Esprit des lois*, in *Etudes offertes a Pierre Jaubert. Liber amicorum*, edited by Gérard Aubin, Presses Universitaires de Bordeaux, Bordeaux, 1992, pp. 189-202. Mention of Lavie and his indebtedness to Bodin may be also found in Vittor Ivo COMPARATO, *Il diritto di natura a Perugia tra la Repubblica romana e l'unità*, in *Annali di storia delle Univeristà italiane*, vol. 18, 2014, pp. 221-241: 235. On Adams as reader of Bodin see Armand London FELL, *Origins of Legislative Sovereignty and Legislative State*, vol. VI, *American Tradition and Innovation with Contemporary Import and Foreground*, Book 1, *Foundations (to Early 19th Century)*, cit., pp. 101-136.

[9] In her Introduction to the Italian translation of the *Republique*, Margherita Isnardi Parente has maintained that the sovereign's subjecthood constituted the essential limitation to his power. See Margherita ISNARDI PARENTE, *Introduzione*, cit., p. 32.

ordres de l'état, qu'il considère comme autant de cordes d'un même instrument: la corde du clergé est, dit-il, la plus délicate à toucher, on appuie plus l'archet d'ordinaire & on prince plus portement celle du tiers-état, ou du pauvre peuple; mais comme un bon musicien tire de son instrument les meilleurs sons possible, un bon roi & un ministre habile doivent savoir également employer toutes les cordes de l'administration pour en former des accords régulières & harmonieux» ([10]). Clearly, no collective body of people could carry out such an articulate and measured exercise of power.

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[10] Nicolas de CONDORCET, *Bibliothèque de l'homme public*, cit., pp. 128-129. There appears to be a slight misinterpretation of Bodin's words in this passage, as Condorcet would seem to confuse distributive and harmonic justice, two categories sharply distinguished by Bodin. On Bodin's notion of harmonic justice see Michel VILLEY, *La Justice harmonique selon Bodin*, in *Jean Bodin. Verhandlungen der internationalen Bodin Tagung*, edited by Horst Denzer, Beck, Munich, 1973, pp. 69-86. The history of the reception of this particular theory of justice would not seem to have been yet written. But even before Condorcet reformulated Bodin's doctrine in the late 18th century, the same notion appears to have been adopted one century earlier by Algernon Sidney in his *Court Maxims*. See Algernon SIDNEY, *Court Maxims*, Cambridge University Press, Cambridge, 1996, p. 23: «This is the work of a prudent lawgiver or political man. If there were not difficulty in it, those endowed with that science they call policy would not deserve the honour which by all wise men is given to them. That body is well composed as to duration and performance of all acts belonging unto it, which has such a mixture of elements that no one is wanting or too much abounds. And that tune in music is well framed in which the sharpness of one tone is sweetened by the gravity of another; and the perfection of the harmony consists in the due proportion of one unto the other. So in civil societies those deserve praise that make such laws as conduce to a civil harmony wherein the several humours, natures, and conditions of men may have such parts and places assigned to them, that none may so abound as to oppress the other to the dissolution of the whole; and none be o wanting as that the part naturally belonging to it should be left imperfect. But everyone, in his own way and degree, may act in order to the public good and the composing of that civil harmony in which our happiness in this world does chiefly consist».

But Rousseau had claimed otherwise, subverting Bodin's judgment, or rather re-establishing on new grounds «i concetti fondamentali della *République*» ([11]).

Condorcet did not shy from this confrontation, he rather engaged in it hand to hand and placed at the opening of the following volume in the series of the *Biblithèque* – which gathered, among others, writings by Francesco Guicciardini, Thomas More, and Francis Bacon ([12]) – a telling quotation drawn precisely from Rousseau's *Contrat social*, later reproduced in all subsequent volumes. «Quelque foible influence que puisse avoir ma voix dans les affaires publiques, le droit d'y voter suffit pour m'imposer le devoir de m'en instruire» ([13]).

Far from allowing that popular sovereignty could rest on abstract generalities or rationalistic principles, Condorcet insisted that the popular exercise of sovereign power required an educated citizenry, largely conversant in the historical subtleties of legal and political thought. «D'après la nouvelle constitution», he wrote in the general preface of the series, «il n'est personne qui ne puisse être appelé à discuter & à defender les intérêts de son contons, de sa province, & même de tout le

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[11] Salvo MASTELLONE, *Storia ideologica d'Europa da Savonarola a Adam Smith*, Sansoni, Firenze, 1979, p. 336.

[12] Nicolas de CONDORCET, *Bibliothèque de l'homme public, ou analyse raisonnée des principaux ouvrages François et étrangers, sur la Politique en général, la Législation, les Finances, la Police, l'Agriculture, & le Commerce en particulier, & sur le Droit naturel & public*, tome troisième, a Paris: Chez Buisson, 1790. The first two volumes had been published jointly.

[13] Ibid., p. 2. The quotation is taken from Jean-Jacques ROUSSEAU, *Du Contrat Social,* cit., p. 351

royame: l'artisan, que la nature a doué d'un génie supérieur, peut désormais être porté par le vœu général, aux premières places du gouvernement, & donner les loix à sa patrie. Mais le génie ne supplée point les connaissances qu'on n'a pas; &, il faut l'avouer, ces connaissances si nécessaires doivent être bien rares chez un people qui nait, per ainsi dire, à la liberté» ([14]).

While popular sovereignty was not rejected but rather embraced, the whole editorial enterprise launched by Condorcet seems to have critiqued the abstractness of Rousseau's claims. And although Jefferson had already left France in 1790, when the first issue of the *Biblithèque* was published, the time he spent in France between 1784 and 1789, and his personal friendship with Condorcet ([15]), allowed him, in all likelihood, to engage in the public discourses that prepared the massive intellectual and editorial review of European jurisprudence and political thought published in response to the unconcealed revision of received political wisdom provoked by Rousseau.

During this time, Jefferson undertook his own critique of Rousseau's doctrine. Now that the sovereignty of American societies had been established and the discussion of a federal

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[14] Nicolas de CONDORCET, *Bibliothèque de l'homme public*, Tome premier, cit., pp. iv-v. The particular insistence on local interests and intermediate bodies should not go unnoticed, as it belongs to a Bodinian critique of Rousseau's abstract sovereignty and its firm dismissal of any intermediate power between individual subjects and the corporate sovereign. Not only had Bodin emphasized the constitutional role of intermediated bodies, but their constitutional relevance had been recalled and further stressed by Lavie in his *Des corps politiques et de leurs gouvernements*, published by Duplain, in Lyon in 1764. See Jean-Pierre DURAT, *Le president Jean-Charles de Lavie, critique de l'Esprit des lois*, cit., pp. 193-197.

[15] See Iain MCLEAN, *The Paris Years of Thomas Jefferson*, cit., pp. 110-127.

constitution was under way, the abstractness of the people became one of his major concerns. And, as turmoil mounted in France, he began questioning who actually exercised power where only an artificial entity, removed from the here and now of history, claimed to be sovereign.

As he became more involved in the efforts of French liberals to assess the rights of men and citizens, Jefferson committed these reflections to his correspondence and summarized them in one of the most famous and controversial letters to James Madison ([16]). Although the exchange between Jefferson and Madison on the nature of popular sovereignty raised perhaps more questions than it ultimately answered, it testifies how intesly both men struggled over the riddles of popular sovereignty and consciously commitment themselves towards opening «the way to the historical experience of real democracy» ([17]). More precisely, it chronicles their pursuit of a conception of sovereignty «capable of being embodied» in the actual institutions of an historical people ([18]). In this sense, their exchange took part in that broad «critique of Rousseau's sovereignty» which needed to take place, according to Yves

[16] See Herbert E. SLOAN, *Principle and Interest: Thomas Jefferson and the Problem of Debt*, Oxford University Press, New York, 1995, re-published by University Press of Virginia, 2001, pp. 62-70. On the relationship between Jefferson and Madison see Andrew BURNSTEIN and Nancy ISENBERG, *Madison and Jefferson*, Random House, New York, 2010.
[17] Yves Charles ZARKA, *Rousseau and the Sovereignty of the People*, cit., p. 137
[18] *Ibid.*

Charles Zarka, if the sovereignty of the people was ever to become «the real principle of historical democracies» ([19]).

2. The subject of popular sovereignty: the living generation

On the 6th of September 1789, Jefferson addressed a letter to James Madison from Paris ([20]). The letter would not reach its destination until several months later. Jefferson carried it with him as he returned to the United States later that September and did not mail it but on the 9th of January 1790 ([21]). Madison replied on the following 4th of February, with a letter as dense as the one he had received ([22]).

This exchange on the nature of democratic power and the rights enjoyed by each generation of a sovereign people to govern itself independently is perhaps the best known instance of the vast correspondence that the two statesmen shared over the fifty years of their intense political collaboration and

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[19] *Ibid*. See *contra* Ari HELO, *Thomas Jefferson's Ethics and the Politics of Human Progress. The Morality of a Slaveholder*, cit., p. 120: «The act of giving on's consent to political society provides the grounds of Jefferson's grand concept of generational independence, which could rest equally well on Lockean or Rousseauean theory».

[20] Thomas JEFFERSON, *letter to James Madison*, *6 September 1789*, in *The Papers of Thomas Jefferson*, vol. 15, *27 March 1789 to 30 November 1789*, edited by Julian P. Boyd *et al*., Princeton University Press, Princeton, 1958, pp. 392-398.

[21] See Charles F. HOBSON and Robert A. RUTLAND, *Madison's Rebuttal to «the Earth Belongs to the Living»*, in *The Paper of James Madison*, vol. 13, 20 January – 31 March 1791, edited by Charles F. Hobson and Robert A. Rutland, University Press of Virginia, Charlottesville, 1981, p. 18.

[22] See James MADISON, *letter to Thomas Jefferson*, *4 February 1790*, *in The Papers of James Madison*, vol. 13, cit., pp. 18-26.

personal friendship ([23]). It marks also a significant divergence in the often consistent constitutional doctrines of the two Virginians. This distance has not gone unnoticed. Much of the scholarship has drawn attention to the difference in argument, and even in tone, displayed by the two letters. «The impression one gathers here» observed Adrianne Koch in one of the first attempts to interpret the significance of this exchange, «is that Jefferson is more speculative and more daring in putting forward dynamic generalizations, and that Madison is the more astute politician» ([24]).

Far from fading, this impression has instead lingered on in the literature, strengthening itself over time, as the intellectual personalities of Jefferson and Madison have been increasingly portrayed as those of men who shared a common commitment to constitutionalism, but were set apart by their different inclinations towards abstraction ([25]).

Because of this enduring template, interpretations of the exchange have mostly offered a rationalistic reading of the principles advanced by Jefferson and Madison, tempered – in

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[23] See James Morton SMITH, (ed.), *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison*, *1776-1826*, voll. 1-3, cit.

[24] Adrianne KOCH, *Jefferson and Madison: The Great Collaboration*, Alfred A. Kopf, New York, 1950, p. 63.

[25] The distinction is reiterated once again, for instance, in Andrew BURSTEIN and Nancy ISENBERG, *Madison and Jefferson*, a cit., pp. 207: «Madison was predisposed toward a structure that bent but did not break. No matter the issue, he always sought to uphold the usefulness of civil institutions. Jefferson, in contrast, celebrated the unfettered freedom of natural rights, the sovereignty of the individual, and his entitlement to protest whatever law curtailed personal liberty. Madison and Jefferson did not merely have different priorities; their manner of thinking was fundamentally different».

the most authoritative analysis – by an effort to construe the alternative takes within their respective contexts: revolutionary France in the case of Jefferson and the constitutional republic of the Unites States in the case of Madison ([26]).

This line of interpretation has been ultimately consolidated by Herbert Sloan in his 1995 study entitled *Principle and Interest: Thomas Jefferson and the Problem of Debt* ([27]). To this day, this remains the standard reference in the literature. Sloan's book considers generally Jefferson's attitudes towards debt and

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[26] Among the most rationalistic interpretations see Daniel J. BOORSTINE, *The Lost World of Thomas Jefferson,* Beacon Press, Boston, 1948, pp. 204-213. More sophisticated, but no less abstract is the view offered in Maurizio VALSANIA, *Nature's Man. Thomas Jefferson's Philosophical Anthropology*, cit., pp. 71-72. Emphasis on context has been instead placed in Julian P. BOYD, *The Earth Belongs in Usufruct to the Living*, in *The Papers of Thomas Jefferson*, vol. 15, cit., pp. 384-391. Not much more than a paraphrase is provided in David N. MAYER, *The Constitutional Thought of Thomas Jefferson*, cit., pp. 302-308. As it is often quoted and discussed in the literature, I should also mention Richard K. MATTHEWS, *The Radical Philosophy of Thomas Jefferson: An Essay in Retrieval*, in *Midwest Studies in Philosophy*, vol. 28, 2004, pp. 37-57 (which abridged the earlier ID., *The Radical Politics of Thomas Jefferson. A Revisionist View*, University Press of Kansas, Lawrence, 1984). Matthews has a great merit: amid a literature that has mostly ignored Hannah Arendt, he recovered her interpretations of Jefferson's constitutionalism and returned to Jeffersonian scholarship what remains the single most insightful and convincing reading of Jefferson's 1789 letter. However, his essay is unfortunately compromised by a number of serious misunderstandings of Jefferson's though that lead his interpretation astray. The most egregious one seems to be his claim that «Jefferson never embraced the notion that a society could create a fundamental law that was superior to other laws». See *ibid*., p. 48. Matthews mistakes the object of Jefferson's criticism for his thought and thus ends up reaching untenable conclusions. See Thomas JEFFERSON, *Notes on the State of Virginia*, cit., pp. 118-129 and especially pp. 121-125.

[27] Herbert E. SLOAN, *Principle and Interest: Thomas Jefferson and the Problem of Debt*, cit., see especially pp. 50-85. A condensed version of this book, focused mostly on the interpretation of the letter at hand is given in ID., *«The Earth Belongs in Usufruct to the Living»*, in *Jeffersonian Legacies*, cit., pp. 281-315.

provides a highly introspective, almost psychological interpretation of the 1789 letter to Madison, in which Jefferson famously claimed that each generation held the earth in usufruct and was thus not allowed to bind, either financially or constitutionally, its successors. According to Sloan, this puzzling principle would have voiced Jefferson's personal anxieties towards his own growing indebtedness and the mounting indebtedness of the American states. It would also have voiced the larger concern, shared by Jefferson along with his closest French connections, over the «dead hand of the past» and its stalling grip on a society committed to disband the old regime it had been subjected to ([28]).

Many, if not most, reviewers have praised this reading, as it offered a biographical explanation for the ambiguities of Jefferson's apparently whimsical argument and justified Madison's rather cool reply by considering not only his remoteness from the revolutionary scene of France, but also his commitment to the newly ratified federal constitution ([29]). However, while personal experiences and local contexts may undoubtedly have shaped the understanding of constitutional issues of both men, Jefferson took great care in warning Madison that the doctrine he submitted to his consideration belonged «to the fundamental principles of every government» and was, as such, removed from the contingency of time and

[28] *Ibid*., p. 285.
[29] See, for all, Cathy MATSON, *Review of Principle and Interest: Thomas Jefferson and the Problem of Debt by Herbert Sloan*, in *The William and Mary Quarterly*, vol. 54, n. 3, 1997, pp. 669-671.

place ([30]). In other words, despite being occasioned by a particular course of events, it addressed the essential questions of power and its limitation in a democratic society. Madison's articulate reply did curb or dismiss many of Jefferson's claims, but it did so by moving from several of the same underlining authorities on which Jefferson had relied. So, both texts carried-on the same ongoing effort of re-interpreting the traditional notions of public law, handed down by modern European jurisprudence, in light of the revolutionary transformations that were occurring in the conception of sovereignty and in the institutional exercise of its power ([31]).

The letter written to Madison began with a clear articulation of the question Jefferson wished to address and the answer he provided for it ([32]).

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[30] Thomas JEFFERSON, *letter to James Madison*, *6 September 1789*, cit., p. 392.

[31] See Paola PERSANO, *La catena del tempo. Il vicolo generazionale nel pensiero politico francese tra Ancien Régime e Rivoluzione*, Eum, Macerata, 2007, pp. 127: «Proprio Jefferson, protagonista in ambiente Americano di un confront serrato con Madison su questo tema, spingerà il suo interlocutore a ritornare al giusnaturalismo seicentesco per comtrobattere alla tesi radicale secondo cui una generazione non ha mai il diritto di costringere le generazioni successive a pagare I debiti contratti». See *contra* Merrill D. PETERSON, *Mr. Jefferson's «Sovereignty of the Living Generatioin»*, in *Virginia Quarterly Review*, vol. 52, n. 3, 1976, pp. 437-447. Interpreting this letter, Peterson draws the rationalistic argument to its ultimate concllusions. «The nation began in revolt not only against the British Empire but against the empire of the past. It began with a fundamental commitment to redeem man from history, with all its cumulated guilts and terrors, and to place him in possession of himself. […] It was this faith that lay behind the most radical idea in the Jeffersonian catalogue: 'the sovereignty of the living generation'», *ibid*.

[32] Thomas JEFFERSON, *letter to James Madison*, *6 September 1789*, cit., p. 392.

«Dear sir,

I sit down to write to you without knowing by what occasion I shall send my letter. I do it because a subject comes into my head which I wish to develop a little more than is practicable in the hurry of the moment of making up general dispatches.

The question Whether one generation of men has a right to bind another, seems to never have been stated either on this or our side of the water. Yet it is a question of such consequence as not only to merit decision, but place also, among the fundamental principles of every government. The course of reflection in which we are immersed here on the elementary principles of society has presented this question to my mind; & that no such obligation can be so transmitted I think very capable of proof».

The question put to Madison was clearly a legal one, a question – according to Jefferson – never raised before, neither by European nor American scholarship. And, though its wording seemed to understate the scope of the inquiry, the «question Whether one generation of men has a right to bind another» bore momentous implications, as it concerned the determination of the power enjoyed by each generation over itself and its successors ([33]). It was, in other words, a question about sovereignty, which introduced a new political subject, the generation of men. And, though Jefferson clearly acknowledged that his reflections were occasioned by the crisis currently shaking the received wisdom that supported the legal and political order of France, he specified very consciously that his

[33] *Ibid*.

considerations addressed the nature of power and its limitations beyond any contingent concern ([34]).

Framed in these terms, the question was indeed new and Jefferson could consider himself among the first to have raised it, because up until that particular juncture – Zarka's *tournant rousseaviste* – «[…] la souveraineté du peuple n'était pensée comme fondement possible de la légitimité du pouvoir politique, que pour être aussitôt neutralisé» ([35]).

According to the common experience, sovereignty most typically belonged to an individual, the sovereign prince. And while Jefferson was acknowledging, in his letter, that sovereignty had passed in the hands of a new political subject, by asking whether this corporate sovereign could bind its successors, he was rephrasing an ancient jurisprudential question that had been traditionally asked in relation to the powers of a sovereign prince. In this sense, Jefferson's question recalled the earlier scientific understanding of sovereignty and implied a comparison with those doctrines which had denied to the sovereign the power of binding his successors. Chief among

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[34] For an analysis of the course of events in which Jefferson was immersed see Herbert E. SLOAN, *Principle and Interest: Thomas Jefferson and the Problem of Debt*, cit., pp. 62-70

[35] Yves Charles ZARKA, *Le tournant rousseauiste ou la reinvention de la souveraineté du peuple*, cit. p. 288: «Rousseau n'a pas inventé la notion de souveraineté du peuple, loin de là. On pourrait facilement montrer que cette notion a une longue histoire. Pour s'en tenir aux Temps Modernes, on doit noter que les monarchomaques protestants font usage de cette notion dans la dernière partie du XVI^{e} siècle. La souveraineté est pour eux celle du peuple ou de ses représentants. Ce qu'il faut cependant remarquer, c'est qu'avant Rousseau la souveraineté du peuple n'était pensée comme fondement possible de la légitimité du pouvoir politique, que pour être aussitôt neutralisée».

them had been the doctrine of Jean Bodin, which had dealt most extensively with the matter in the eighth chapter of the first book of his *Republique*.

By 1789 Bodin had found his way into Jefferson's library. The book catalogues prove that Jefferson had acquired his copy of the *Republique* in the early period of his European diplomatic mission. And, in any case, he must have possessed it by the end September 1789, when Jefferson left the continent bound for the United States. So, Bodin's presence in Jefferson's intellectual and physical life at the time he drafted his letter to Madison is no longer hypothetical. Plus, given the importance ascribed to Bodin by Condorcet and his restatement of the *Republique* in the first volume of the *Biblithèque de l'homme public* published shortly after Jefferson's departure from France, it does not seem far fetched to assume that Bodin might have been among the authors discussed by Jefferson and Condorcet in the early days of the French Revolution. Finally, the relevance of the highlighted passages in the first book of Jefferson's copy of the *Republic* for the development of Jefferson's own constitutional thought, especially as it pertains to the ideas outlined in this letter, seems to further support the assumption that Jefferson relied on Bodin to articulate the doctrine of generational sovereignty he shared with Madison in 1789.

According to Bodin, in fact, the freedom from laws enacted by predecessors was at the heart of sovereignty's definition ([36]).

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[36] See Margherita ISNARDI PARENTE, *Introduzione*, cit., pp. 44-45; Diego QUAGLIONI, *La sovranità*, cit., p. 51.

This «puissance absolue & perpetuelle» required its holder to be un-subjected throughout his entire life-time to any law, save those fixed by God and nature, *les loix de Die & de nature* so often recalled by Bodin, and those set to be the fundamental laws of the commonwealth, *les loix qui concernent l'estat du royaume* ([37]). Hence, sovereignty consisted essentially for Bodin in the supreme power of giving and amending municipal law. «Or il faut que ceux-là qui son souveraines, ne soyent aucunement subiects aux commandements d'autruy, & qu'ils puissant donner loy aux subiects, & casser au aneantir les loix inutiles, pour en faire d'autres: ce que ne peut faire celuy qui est subiect aux loix, ou à ceux qui ont commandement sur luy» ([38]). From this proposition Bodin drew an inescapable conclusion: the sovereign prince could not be subjected to the laws of his predecessors and was certainly not bound by his own. «Si donc le Prince souverain est exempte des loix de ses predecesseurs, beaucoup moins seroit-il tenu aux loix & ordonnances qu'il fais: car on peut bien recevoir loy d'autruy, mais il est impossible par naure de se donner loy, non plus que commander à soy mesme chose qui despende de sa volonté, comme dit la loy, *Nulla obligation consistere potest, quae a voluntate promittentis statum capit*; qui est une raison necessaire, qui monster evidemment que le Roy ne peut ester subiect à ses loix» ([39]). In

[37] Jean BODIN, *Les six livres de la Republique*, cit., livre 1, chapitre 8, *De la soveraineté*, p. 122. Underlined passages such as this are the ones highlighted by vertical dashes in Jefferson's copy of the *Republique*.
[38] *Ibid*.
[39] *Ibid*., livre 1, chapitre 8, *De la soveraineté*, p. 132.

short, no sovereign could be truly such, had the municipal constraints enacted by his predecessors remained in force.

This tenet, later repeated by Grotius and Pufendorf ([40]), enunciated the same conclusion outlined by Jefferson in his letter, where, in a similar manner, Jefferson denied to each generation the power of constraining its successors ([41]).

> «I set out on this ground, which I suppose to be self-evident, 'that the earth belongs in usufruct to the living': that the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when himself ceases to be, & reverts to the society. […] Then no man can by any natural right oblige the lands occupied, or the persons who succeed him in that occupation, to the payment of debts contracted by him. For if he could, he might, during his life, eat up the usufruct of the lands for several generations to come, & then the lands would belong to the dead, & not the living, which would be the reverse of our principle».

Of all the markings in the *Republique,* the most striking may be found in the ninth chapter of the first book. It is a very small, inconspicuous marking on page 182, made by only two vertical dashes, highlighting the following passage: «[…] car les Princes souuerains à bié parler, ne sont qu'usufruictiers, ou pour mieux dire, vsagers du bien & dommaine publique» ([42]). Should one choose to follow Jacob-Peter Mayer's advice and read the

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[40] See Paola PERSANO, *La catena del tempo. Il vincolo generazionale nel pensiero politico francese tra Ancien régime e Rivoluzione*, cit., pp. 119-122.
[41] See Thomas JEFFERSON, *letter to James Madison*, *6 September 1789*, cit., p. 392-393.
[42] Jean BODIN, *Les six livres de la Republique*, book 1, chapter 9, *Du prince tributaire ou feudataire, & s'il est souverain, & de la prerogatiue d'honneur entre les Princes souuerains*, cit., p. 182.

markings inscribed in the *Republique* in relation to Jefferson's constitutional thought ([43]), it would be hard not to wonder whether Jefferson had in mind this very passage, while claiming that the earth belonged in usufruct to the new corporate sovereign embodied by the living generation.

The analogy between these two arguments is further heightened by the *exemplum* referred by Bodin to illustrate the aforementioned principle. «Et pour ceste cause Charles IIII. ottroyant la confirmation des priuileges à ceux de Perouze, y adiousta ceste clause, TANT QV'IL VIVROIT […]» ([44]). Precisely because the prince held in usufruct the public domain, Charles IV could confirm the privileges granted to the citizens of Perugia only for as long as he lived. Privileges and decrees expired at the death of each successive sovereign. And consequently, «[…] à la venue des nouveaux Rois», «tous les colleges & communautés demandent confirmation de leurs privileges, puissance, & iurisdiction: & mesmes les Parlements & Cours souueraines, aussi bien que les officiers particuliers» ([45]).

This earlier remark, from chapter eight of the same book of the *Republique,* is equally highlighted by vertical dashes and concludes a long passage dedicated by Bodin to laws and their coming into force. Far from being perpetual, municipal laws

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[43] Jacob Peter MAYER, *Jefferson as Reader of Bodin. Suggestions for Further Studies*, cit., p. 27.
[44] Jean BODIN, *Les six livres de la Republique*, cit., livre 1, chapitre 9, *Du prince tributaire ou feudataire, & s'il est souverain, & de la prerogatiue d'honneur entre les Princes souuerains*, p. 182.
[45] *Ibid*., livre 1, chapitre, 8, *De la soveraineté*, p. 132.

remained in force for as long as the legislator who enacted them retained the sovereign powers of legislation, so: «[…] il est bien certain que les loix, ordonnances, lettres patentes, priuileges, & ottrois des Princes, n'ont aucune force que pendant leur vie, s'ils ne sont ratifiés par consentement expres, ou du moins par souffrance du Prince, qui en a congnoissance, & mesmement des priuileges» ([46]). Therefore, no tacit acquiescence could prolong the life of such enactments, without impairing the successor's sovereignty.

Had Jefferson not read these remarks in his copy of the *Republique*, he would nonetheless have been familiar with them, as they were directly quoted and discussed by John Locke in the first part of his *Treatise on Government*: «[…] in Bodin's words: It is certain, that all Laws, Priviledges, and Grants of Princes, have no force, but during their Life; if they be not ratified by the express Consent, or by Sufference of the Prince following, especially Priviledges» ([47]).

If indeed these passages of the *Republique* furnished the basis for Jefferson's doctrine, it would seem he interpreted them more in keeping with the later lesson of Grotius, rather than with the actual text of Bodin. It had been Grotius, in fact, who had distinguished those who hold «summum imperium summum modo», from those who have it «modo non summo» ([48]). The distinction, recalled by Algernon Sidney who warned that

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[46] *Ibid*., livre 1, chapitre 8, *De la soveraineté*, pp. 131-132.
[47] John LOCKE, *Two Treatise of Government*, cit., p. 147
[48] As quoted in Algernon SIDNEY, *Discourses Concerning Government*, cit., p. 115.

Grotius had probably «looked upon the first sort as a thing merely speculative» ([49]), allowed Grotius to maintain that sovereignty could be held either in property, or in usufruct, or for a limited duration of time. «Cependant quelle que soit l'une des trois manières dont la souveraineté est possédée», observed Zarka «sa nature et l'étendue de son exercice restant les memes» ([50]).

Whereas usufruct qualified for Bodin simply the title by which the sovereign held the public domain, in Grotius it became one of the titles by which the prince could hold sovereignty itself. And this latter interpretation seems, indeed, closer to Jefferson's position, accoding to which: «This corporal globe, and everything upon it belongs to its present corporal inhabitants, during their generation. They alone have a right to direct what is the concern of themselves alone, and to declare the law of that direction […]» ([51]). Hence, Jefferson could

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[49] *Ibid*. Was the medieval distinction between *protestas absoluta* and *potestas ordinaria et ordinata* part of Sindey's understanding of public law? This observation would seem to suggest it, as it implies that Sidney was aware that according to the the masters of the *ius commune* sovereigns enjoyed *potestas absoluta* only in the abstract and possessed in actuality only a potestas ordinaria et ordinata. See Diego QUAGLIONI, *La sovranità*, cit., p. 25-29.

[50] Yves Charles ZARKA, *La mutation du droit de résistance chez Grotius et Hobbes: du droit collectif du peuple au droit de l'individu*, in *Le Droit de résistance, XII^e^-XX^e^ siècle*, edited by Jean-Claude Zancarini,, pp. 144-145. As Zarka highlights, Grotius is able to draw this distinction because he distinguishes «deux sujets de la souveraineté: un sujet commun (subjectum commune) qui est l'Etat (civitas) et un sujet propre (subjectum proprium) qui est la personne une ou multiple du souverain», ibid., p. 143. See also Daniel LEE, *Popular Sovereignty in Early Modern Constitutional Thought*, cit., pp. 268-271.

[51] Thomas JEFFERSON, *letter to Samuel Kercheval*, *12 July, 1816*, in *The Papers of Thomas Jefferson,* Retirement Series, vol. 10, May 1816 to January

conclude that, whereas sovereignty was formally held by the people, the funn exercise of its powers belonged to the living generation.

The combined mediation of Bodin and Grotius, later recalled by Pufendorf ([52]), seems furthermore to have reconnected Jefferson to those medieval doctrines that had fashioned the exercise of popular sovereignty as a kind of usufruct. Medieval jurists had found in the *Corpus Iuris* «a text which seemed expressly to indicate in the Will of the People the source of Rulership. Ever since the days of the Glossators the universally accepted doctrine was that an act of alienation performed by the People in the *Lex Regia*» had transferred the ultimate power «from the *populus* to the *princeps»* ([53]). The legal nature of this *translatio*, however, was hotly debated.

According to a first interpretation «there had been a definitive alienation, whereby the People [had] renounced [their] power for good», subjecting themselves to the *imperium* of the prince ([54]). On the other hand, a second interpretation «saw the *translatio* as a mere *concessio*», whereby the people had granted to the prince simply the use of their supreme power and

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1817, edited by J. Jefferson Looney *et al*., Princeton University Press, Princeton, 2013, p. 227.

[52] See Paola PERSANO, *La catena del tempo. Il vincolo generazionale nel pensiero politico francese tra Ancien Régime e Rivoluzione*, cit., pp. 119-122.

[53] Otto von GIERKE, *Political Theories of the Middle Age*, translated with an introduction by Frederic William Maitland, Cambridge University Press, Cambridge, 1958, pp. 39, 43. For a more recent discussion of this doctrine see Daniel LEE, *Popular Sovereignty in Early Modern Constitutional Thought*, cit.

[54] Otto von GIERKE, *Political Theories of the Middle Age*, cit., p. 43.

remained entitled to resume it, upon conditions ([55]). This *concessio* was regarded as a kind of usufruct, which established a bilateral relationship between the wielder of sovereignty and its holder and allowed medieval jurists to maintain that «Sovereignty remained in the People despite the institution of a Monarch» ([56]).

This second interpretation proved to be highly influential. Otto von Gierke has, in face, argued that the theory of popular sovereignty built by jurists such as Cynus Pistoriensis and Paolus Castrensis upon the notion of usufruct influenced – trough the later mediation of Hotman, Du Plessis Mornai and the other Huguenot jurists of the 16th century – the doctrines of Althusius and Grotius ([57]). Moreover, it would seem likely that this same interpretation ultimately reached Jefferson himself, leaving a trace of its memory in his constitutional doctrine.

Whether, instead, Jefferson chose to qualify sovereignty as the relationship between its holder and the *res* upon which it insisted to avoid the ambiguity of Rousseau's formulation of democratic sovereignty, according to which «tout le peuple statue sur tout le peuple» and thus entertained no relationship

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[55] *Ibid.*

[56] *Ibid*., p. 45. These doctrines, and Gierke's own interpretations of them, have been recently reviewed by Daniel Lee, according to whom the Glossators exploited the difference, inherent in Roman Law, between jurisdictions held *suo iure* and *alieno beneficio*. See Daniel LEE, *Popular Sovereignty in Early Modern Constitutional Thought*, cit., pp. 25-50.

[57] See Otto von GIERKE, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstherrien. Zugleich ein Beitrag zur Geschichte der Rechtssystematik,* Breslau, 1880, translated in Italian as *Giovanni Althusius e lo sviluppo storico delle teorie politiche giunaturaliste*, edited by Antonio Giolitti, Einaudi, Torino, 1943, re-published in 1974, pp. 111-165.

but with itself, «il ne considère que lui-même», remains a question open to speculation ([58]). But, be that as it may, Jefferson did construct the agent of popular sovereignty in sharp contrast to Rousseau's doctrine ([59]).

«What is true of every member of the society individually, is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of the individuals. To keep our ideas clear when applying them to a multitude, let us suppose a whole generation of men to be born on the same day, to attain mature age on the same day, & to die on the same day, leaving a succeeding generation in the moment of attaining their mature age all together. Let the ripe age be supposed of 21. years, & their period of life of 34. years more, that being the average term given by the bills of mortality to person who have already attained 21. years of age. Each successive generation would, in this way, come on, and go off the stage at a fixed moment, as individual do now. Then I say the earth belongs to each of these generations, during it's [sic] course, fully, and in their own right. The 2d. generation revives it clear of debts & incumbrancers of the 1st. the 3d. of the 2d. & so on. For if the 1st. could charge it with debt, then the earth would belong to the dead & not the living generation. Then no generation can contract debts greater than may be paid during the course of it's [sic] own existence».

Whereas much of the *Contrat social* is dedicated by Rousseau to present the people as an artificial and corporate body, possessing a life and will of its own, as well as a common *ego* distinct from that of its individual subjects ([60]), once independence had been declared, Jefferson proved himself far

[58] Jean-Jacques ROUSSEAU, *Du Contrat Social, ou Principes du droit politique*, cit., p. 379.
[59] See Thomas JEFFERSON, *letter to James Madison*, *6 September 1789*, cit., p. 393.
[60] See Diego QUAGLIONI, *La sovranità*, cit., p. 85.

less concerned with the abstract proclamation of popular sovereignty, than with the exploration of its actual exercise. The fear that, by establishing a perpetual constitution, the Founders might have denied their successors the freedom to establish their own laws and devise a form of government suited to their own needs, led Jefferson to distinguish between the abstract entitlement to sovereignty, belonging (of course) to the people and the substantial exercise of its prerogatives ([61]). These belonged to each generation separately. Through their exercise alone could each people «choose for [itself]», as a distinct historical entity, «the form of government [it] believ[ed] most promotive of [its] own happiness» ([62]).

This distinction between the wielder of sovereignty and its holder, led Jefferson to consider the living generation as the actual agent of sovereign power. Unlike the people, who Bodin had thought would never die, «le people ne meurt iamais» ([63]), generations were, if not mortal, at least transient. They passed, as did individual human beings, allowing for power to be successively acquired by each new generation «fully, and in [its] own right» ([64]). In a passage that seems almost to unravel the implications of Jefferson's condensed thought, Bodin observed that the identity of the people was not altered by the flow of time: «Or la loy dit que le people ne meurt iamais, & tient que

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[61] See Hannah ARENDT, *On Revolution*, cit., p. 232.
[62] Thomas JEFFERSON, *letter to Samuel Kercheval*, *12 June, 1816*, cit., p. 227.
[63] Jean BODIN, *Les six livres de la Republique*, cit., book 1, chapter 2, *Du mesnage, & la difference entre la Republique & la famille*, cit., p. 12.
[64] See Thomas JEFFERSON, *letter to James Madison*, *6 September 1789*, cit., p. 393.

cent, voire mil ans apres, c'est le mesme people […]» ([65]). However, all usufructs granted to the collectivity expired within the passing of what Bodin considered the longest possible span of a human life, a hundered years: «l'usufruict laisse à la Republique, est reuni à la proprieté, qui autrement seroit inutile, cent ans apres: car on presume, que tous ceux qui vivent, meurent en cent ans […]» ([66]). True, Bodin continued, men were «immortels par succession» ([67]), and could perpetuate themselves, as Jefferson would have said two hundred years later, «to the thousandth and thousandth generation» ([68]), «comme la nauire de Thesee, qui dura tant qu'on eut soin de le reparer» ([69]), through a cycle that secured the integrity of a people and the continuity of a commonwealth. But all these implications, which seem so tightly related to one another, were not openly addressed by Jefferson in his letter to Madison. No, Jefferson's emphasis fell on the transience of the living generation, rather than on the continuity of the people.

At first, Jefferson presented Madison with a purely artificial image of the generation, conceived in perfect analogy with the individual human being. Yet, he soon moved beyond this rudimentary *persona ficta* and presented a more natural and, at the same time, more complex description of the constant

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[65] Jean BODIN, *Les six livres de la Republique*, cit., livre 1, chapitre 2, *Du mesnage, & la difference entre la Republique & la famille*, p. 12.
[66] *Ibid*.
[67] *Ibid*.
[68] Thomas JEFFERSON, *First Inaugural Address*, cit., p. 149.
[69] Jean BODIN, *Les six livres de la Republique*, cit., book 1, chapter 2, *Du mesnage, & la difference entre la Republique & la famille*, cit., p. 12.

succession of renewal and decay within the body of a people ([70]).

«What is true of a generation all arriving to self-government on the same day, & dying all on the same day, is true of those in a constant course of decay & renewal, with this only difference. A generation coming in & going out entire, as in the first case, would have a right in the 1st. year of their self-dominion to contract a debt for 33. years, in the 10th. for 24. in the 20th. for 14 in the 30th. for 4. Whereas generations, changing daily by daily deaths & births, have one constant term, beginning at the date of their contract, and ending when a majority of those of full age at that date shall be dead. The length of that term may be estimated from the tables of mortality, corrected by the circumstances of climate, occupation, &c. peculiar to the country of the contractors. Take, for instance, the table of M. de Buffon wherein he states 23,994 deaths, & the ages at which they happened. Suppose a society in which 23,994 persons are born every year, & live to the ages states in this table. The conditions of that society will be as follows. 1st. It will consist constantly of 617,703. persons of all ages. 2ly. Of those living at any one instant of the time, one half will be dead in 24. years 8. months 3dly. 10,675 will arrive every year at the age of 21. years complete. 4ly. It will constantly have 348,417 persons of all ages above 21. years. 5ly. And the half of those of 21. years & upwards living at any one instant of time will be dead in 18. years 8. months, or say 19. years as the nearest integral number. Then 19. Years is the term beyond which neither the representatives of a nation, nor even the whole nation itself assembled, can validly extended a debt».

This, which appears to be one of the most perplexing paragraphs in the letter, has been generally interpreted as an expression of Jefferson's fascination with numbers as well as a testimony of his close reading of Condorcet, who outlined

[70] See Thomas JEFFERSON, *letter to James Madison*, *6 September 1789*, cit., p. 394.

similar observations in his *Sur la nécessité de faire ratifier la constitution par les citoyens* ([71]).

Relying on mortality tables compiled by Buffon, Jefferson attempted to prove the convergence of natural and political sciences on the question of generational sovereignty. Power could be exercised fully by the living generation, without compromising the rights of its successors, because its course could be scientifically calculated and fixed to accommodate the succession of sovereign power within a republic. Whereas traditional legal scholarship had reverted to the notion of succession to prove that the «continuity of the king's natural body – or of individual kings acting in hereditary succession […] – was vouched for by the dynastic idea» ([72]), Jefferson reverted to the same notion of succession to deconstruct the abstractness of the people into the natural and transient body of each individual generation. In this sense, Jefferson's letter seems to have been an attempt to move away from the abstractions that had dominated the political language, especially of the English and French monarchies, and address what Harold Laski has called «the most real problem of modern politics»: the actual attainment of popular sovereignty ([73]).

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[71] See Herbert E. SLOAN, *Principle and Interest. Thomas Jefferson and the Problem of Debt*, cit., pp. 58-59. On Condorcet see Iain MCLEAN, *The Paris Years of Thomas Jefferson*, cit., pp. 121-123.

[72] Ernst H. KANTOROWICZ, *The King's Two Bodies. A Study in Medieval Political Theology*, cit., p. 383. See also Bruno PARADISI, *Il pensiero politico dei giuristi medievali*, cit., pp. 319-336.

[73] Harold J. LASKI, *The Foundations of Sovereignty and Other Essays*, Yale University Press, New Haven, 1921, re-issued in 1931, p. 227. On Laski's conception of popular sovereignty and the contemporary doctrine of

Hence, this doctrine furnished the basis of Jefferson's «advocacy» of periodic «constitutional change» ([74]). The need to regularly revise the fundamental compact, which animated Jefferson's «occasional, and sometimes violent, antagonism towards the Constitution and particularly against those who» ([75]), in his own words, «look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched» ([76]), was motivated – according to Hannah Arendt – by Jefferson's intuition that popular sovereignty needed to be perpetually exercised in order not to be lost ([77]).

«On similar grounds it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, & what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, & consequently may govern them as they please. But persons & property make the sum of the objects of government. The constitution and the laws of their predecessors extinguished then in their natural course, with those who gave them being. […] Every constitution then, & every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, & not of right».

Giuseppe Capograssi see Enzo SCIACCA, *Interpretazione della democrazia*, Giuffè, Milano, 1988, pp. 100-101. A review is provided in Diego QUAGLIONI, *Il problema della sovranità negli studi di Enzo Sciacca*, in *Studi in memoria di Enzo Sciacca*, vol. 1, *Sovranità, democrazia, costituzionalismo*, edited by Franca Bionda Nalis, Giuffrè, Milano, 2008, pp. 23-28.

[74] David N. MAYER, *The Constitutional Thought of Thomas Jefferson*, cit., p. 302.

[75] Hannah ARENDT, *On Revolution*, cit., p. 233.

[76] Thomas JEFFERSON, *letter to Samuel Kercheval*, *12 June, 1816*, cit., p. 226.

[77] See Thomas JEFFERSON, *letter to James Madison*, *6 September 1789*, cit., pp. 395-396.

Should power be exercised beyond its natural term, should the constitution or the laws be enforced longer than the legislator who enacted them retained the right to exercise «the sovereign powers of legislation» ([78]), acts of right would turn into acts of force and pervert government into a tyranny, since: ([79])

> «[…] between society & society, or generation & generation, there is no municipal obligation, no umpire but the law of nature. […] by the law of nature, one generation is to another as one independent nation to another».

It had been John Milton who had warned that a usurper had as much right to govern a people as could be claimed by a foreign king: «[…] how much right the King of Spaine hath to govern us at all, so much right hath the King of England to govern us tyrannically» ([80]). By considering generations as separate societies and even separate nations, Jefferson seems to have been recalling this same principle to sustain his doctrine and warn against the perils of attributing sovereignty to an abstract entity removed from the actual association of a commonwealth's citizens.

Jefferson's interest in Bodin, and in his later readers, should not come as a surprise. Bernard Bailyn and Gordon Wood have

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[78] Thomas JEFFERSON, *Draft Instructions to the Virginia Delegates in the Continental Congress (Manuscript Text of A Summary View of the Rights of British America)*, cit., p. 132.
[79] See Thomas JEFFERSON, *letter to James Madison*, *6 September 1789*, cit., p. 395.
[80] See John MILTON, *The Tenure of Kings and Magistrates*, cit., p. 162.

extensively proven that sovereignty was the fundamental issue confronted by the founders during the revolution ([81]). So, Jefferson's careful reading of 16th century French political literature is nothing but consequential. In fact, it was during early modernity, and especially in the aftermath of the French wars of religion, that the principles of medieval constitutionalism began to be re-shaped into a new conception of supreme power and of its fundamental limitations. Jefferson himself seems to have acknowledged this, when he noted his debt to French history: «[this] principle that the earth belongs to the living, and not to the dead, is of very extensive application and consequences, in every country, and most especially in France» ([82]).

But how could Jefferson - and for that matter Bodin - maintain that the sovereigns were free from the laws enacted by their predecessors? What was the legal justification?

The question points directly to the heart of Bodin's doctrine: the prince is sovereign in so much as his legislative power is absolute, *i.e.* unconstrained by positive municipal law, whether it be enacted by himself or by his predecessors. His only constraints are dictated by natural and divine law and by the fundamental laws of the kingdom. And this is remarkably the

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[81] See Barnard BAILYN, *The Ideological Origins of the American Revolution*, Harvard University Press, Cambridge and London, 1967, re-issued in 1992, pp. 198-229; Gordon S. WOOD, *The Creation of The American Republic: 1776-1787*, The University of North Carolina Press, Chapel Hill and London, 1969, re-issued in 1998, pp. 344-389.

[82] Thomas JEFFERSON, *letter to James Madison*, *6 September 1789*, cit., p. 396.

exact same argument laid down by Jefferson in his letter to Madison: «[…] between society and society, or generation and generation, there is no municipal obligation, no umpire but the law of nature» ([83]). Sovereigns, whether they may be individual princes or a collective people embodied in one particular generation, wiled a power unrestrained by civil law and checked exclusively by natural law.

In light of these considerations, the ultimate purpose of Jefferson's letter to Madison appears to have been the attribution of sovereignty's defining traits to the power exercised by the living generation. In Jefferson's Bodinian view, in fact, this power should have been considered both perpetual and absolute. The power was perpetual because, as Bodin had explained, it remained in the hands of the sovereign for his entire lifetime and was seamlessy transferred from one holder of to the next, hence Jefferson's insistence on calculating the exact length of a generation's life-span, «si on disoit perpetuelle, qui n'a iamais fin, il n'y auroit souveraineté qu'en l'estat Aristocratique & populaire, qui ne meuret point […]. Il faut donc entendre ce mot perpetuel, por la vie de celuy qui a la puissance» ([84]). And the power was absolute, not because it was limitless, but rather because no positive constraint could bind it, «[…] si nous disons que celuy a puissance absolue, qui n'est point subiect aux loix, il ne se trouvera Prince au monde souverain, veu que tous les princes de la terre sont subiects aux

[83] *Ibid*., p. 395.
[84] Jean BODIN, *Les six livres de la Republique*, cit., p. 126.

loix de Dieu, & de nature, & a plusieurs loix humaines communes à tous peoples» ([85]), for its only constraints were set by the laws of nature and of God, «[…] quant aux loix diuines & naturelles, tous les Princes de la terre y sont subiects, & n'est pas en leur puissance d'y contreuenir, s'ils ne veulent ester coulpables de leze-maiesté diuine, faisant guerre à Dieu, sous la grandeur duquel tous les Monarques du monde doyuent faire ioug, & baisser la teste en toute crainte & reuerence» ([86]).

The kind of political absolutism brought about by the French revolution and foreshadowed in Rousseau's writings, had only began to unfold itself in the years of Jefferson's residence in France. At that time, and still shortly after Jefferson's departure, Bodin was considered to be a champion of limited sovereignty. And although some had already begun to place particular emphasis on the more authoritarian traits of his thought, others, such as Condorcet, insisted on recalling the several limitation's Bodin had put in place to check sovereignty. «La qualification d'absolue mérite quelque explication. Il n'y a point de puissance que l'on puisse qualifier ainsi, si l'on entend par-là un pouvoir au-dessus de toutes les loix divines & humaines; mais un prince est absolu, lorsqu'il peut faire tout ce qui est juste, & que la seule injustice lui est interdite; lorsqu'il n'est oblige qu'a ce qui est du droit naturel & du droit des gens; qu'il n'a au-dessus de lui que Dieu & sa conscience, & qu'il peut faire tout ce que l'un & l'autre ne lui défendent pas. Cependant, dans tous les temps

[85] *Ibid*., p. 131.
[86] *Ibid*., p. 133.

& dans tous les pays du monde, les princes ne son pas absolus. Il y a des souverainetés restreintes & bornées […]» ([87]). And moreover: «Ainsi le souverain n'est tel, que lorsque sa puissance est indépendante de tout autre, & qu'il n'est lié que par les loix constitutives, qui le fond ce qu'il est; il fait les loix particulières & il y déroge selon son bon Plaisir & le bien de ses sujets» ([88]). In short, Condorcet presented Bodin as the herald of a *souveraineté restreinte & bornée*, *i.e.* a sovereignty restrained by the fundamental law of nature and nations and the fundamental laws of the realm. These limitations obliged the prince to act within the confines of rightfulness and justice alone. And they offered Condocet's readers a precise interpretation of Bodin, that emphasized the full complexity of absolutism and stressed his constitutional insights over his asserted justification of raw power and its effectiveness.

The multiple dimension of the law remained a fundamental feature of Jefferson constitutionalism. Men could rule their affairs through ordinary legislation and could frame their governments through their constitutions. But constitutions themselves had to comply with a higher law. In this sense, one could speak not only of the *Higher Law Background of American Constitutional Law*, but also of a higher law actually binding the constitution of the commonwealth ([89]). So, only a narrow and positivistic understanding of constitutionalism, one

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[87] Nicolas de CONDORCET, *Bibliothèque de l'homme public*, cit., p. 87.
[88] *Ibid*., p. 90.
[89] See Edward S. CORWIN, *The Higher Law Backgound of American Constitutional Law*, in *Harvard Law Review*, vol. 42, n. 2, 1928, pp. 149-185.

that reduces all fundamental checks on power to sanctions provided by a written charter can allow to maintain that, «[w]hen considered as a coherent doctrine of timeless guarantees for stable government», Jefferson's «constitutionalism inevitably falls apart» ([90]).

Read in this light, the several highlighted passages in Jefferson's copy of the *Republique* on the natural law limitations that constrain the power of the prince acquire a remarkable importance and could indicate how deeply Bodin's insistence on the limitations constraining absolute power impressed Jefferson and led him to claim «as an axiom of eternal truth in politic, that whatever power in any government is independent, is absolute also […]. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law» ([91]).

Jefferson may have indeed raised more questions than he answered. After all, his reflections were committed to a letter, a fragment of a larger conversation entertained with Madison on an issue that still today is far from settled: how sovereign can a

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[90] Ari HELO, *Thomas Jefferson's Ethics and the Politics of Human Progress. The Moarlity of a* Slaveholder, cit., p. 149. The reference to «stable government» is rather surprising as only in a very broad sense can stability of government be considered one of the constitution's purposes. For Jefferson, constitutions are primarily meant to order a society according to the individual and corporate rights of men and formalize a covenant between governors and governed, rather than secure the stability of those who govern regardless of those who are governed.

[91] Thomas JEFFERSON, *letter to Spencer Roane*, *6 September 1819*, in *Thomas Jefferson, Writings,* edited by Merrill D. Peterson, The Library of America, New York, 1984, p. 1426.

people claim to be when the fundamental exercise of sovereign power is not at the disposal of its actual citizens? ([92])

Madison seemed less concerned with the question and emphasized in his answer that the corporate continuity of the people and its distinct subjecthood were sufficient grounds to claim the legitimacy for one generation to bind another, whenever such constitutional or financial obligations had been contracted in the overall interest of the people ([93]). More broadly, Madison claimed that the revolution had established a form of government worth cherishing. Its foundation had been the true aim of the revolution and so the revolutionary spirit could not be simply reduced to «beginning something new», as he assumed Jefferson had claimed in his letter, but it encompassed «starting something permanent and enduring» as well ([94]). Thus, Madison ultimately dismissed Jefferson's preoccupations.

But can the foundations of a society outlast the spirit that first put them in place? Jefferson wondered and feared throughout his lifetime that while the revolution «had given freedom to the people», it had «failed to provide a space where this freedom could be exercised» ([95]). If that was the case, then such freedom might eventually wither. A preoccupation that would be ultimately shared by one of Jefferson's most sensitive readers.

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[92] See Bruce ACKERMAN, *We The People*, vol. 1, *Foundations*, Harvard University Press, Cambridge, 1991.
[93] See James MADISON, *letter to Thomas Jefferson*, *4 February 1790*, *in The Papers of James Madison*, vol. 13, cit., pp. 18-26.
[94] Hannah ARENDT, *On Revolution*, cit., p. 232.
[95] *Ibid.*, p. 235.

«Je me suis souvent demandé où est la source de cette passion de la liberté politique qui, dans tous les temps, a fait faire aux hommes les plus grandes choses que l'humanité ait accomplies, dans quels sentiments elle s'enracine et se nourrit. Je vois bien que, quand les peuples sont mal conduits, ils conçoivent volontiers le désir de se gouverner eux-mêmes; mais cette sorte d'amour de l'indépendance, qui ne prend naissance que dans certains maux particuliers et passagers que le despotisme amené, n'est jamais durable : elle passe avec l'accident qui l'avait fait naître; on semblait aimer la liberté, il se trouve qu'on ne faisait que haïr le maître. Ce que haïssent les peuples faits pour être libres, c'est le mal même de la dépendance» ([96]).

3. *The form of government of a democratic republic: the ward republics*

Jefferson's fear, that the proclamation of popular sovereignty was in itself not sufficient to satisfy each citizen's right to exercise his individual share of sovereign power, led him to his most decisive departure from Rousseau's doctrine. Whereas Rousseau had expressly denied that actuation of popular sovereignty demanded the preservation of intermediate bodies reconciling the rights of individuals to the prerogatives of the whole ([97]), Jefferson came to regard the preservation and institution of intermediate bodies as the strongest foundation of

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[96] Alexis de TOCQUEVILLE, *L'Ancien Régime et la Revolution*, edited by Jacob Peter Mayer, Gallimard, Paris, 1967, pp. 266-267.
[97] See Diego QUAGLIONI, *La sovranità*, cit., p. 85.

a «good and safe government» ([98]). Because of this persuasion, he grew increasingly unsatisfied with the mechanism of political representation put in place by early American constitutions to implement popular sovereignty ([99]). Though the adoption of representation was itself a departure from Rousseau, who had rejected the institute ([100]), Jefferson feared that the constitutions drafted in the aftermath of the American Revolution had succeeded in granting only to «the representatives of the people», and not to «the people themselves», the right and the opportunity to «engage in those activities of 'expressing, discussing, and deciding'», which according to Hannah Arendt comprised the positive acts of freedom ([101]). Yet, Jefferson did not dismiss representation altogether. Indeed, it remained a vital principle of his constitutionalism ([102]), without exhausting by any measure the public space he strived to open for political participation.

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[98] Thomas JEFFERSON, *letter to Joseph C. Cabell*, *2 February 1816*, in *The Papers of Thomas Jefferson*, Retirement Series, vol. 9, *September 1815 to April 1816*, edited by J. Jefferson Looney *et al*., Princeton University Press, Princeton, 2012, p. 435.

[99] On representation in early American constitutionalism see Bruce A. ACKERMAN, *Storrs Lectures: Discovering the Constitution*, in *Yale Law Journal*, vol. 93, n. 3, 1984, pp. 1013-1072.

[100] See Jean-Jacques ROUSSEAU, *Du Contrat Social, ou Principes du droit politique,* cit., pp. 429-430: «La Souveraineté ne peut être présentée, par la même raison qu'elle ne peut être aliénée; elle consiste essentiellement dans la volonté générale, & la volonté ne se représente point: elle est la même, ou elle est autre, il n'y a point de milieu. Les députés du peuple ne son donc ni ne peuvent être ses Représentants; ils ne son que ses Commissaires; ils ne peuvent rien conclure définitivement».

[101] Hannah ARENDT, *On Revolution*, cit., p. 235.

[102] See, among the many scholarly sources who have dealt with Jefferson's thoughts on representation, Ari HELO, *Thomas Jefferson's Ethics and the Politics of Human Progress. The Morality of A Slaveholder*, cit., pp. 156-162.

By the late 18th century, representation had become one of the defining features of republican government, if not perhaps the most distinguishing institute of this renewed form of government ([103]). To succeed in his effort, Jefferson impressed to the notion a particular inflection that heightened its democratic trait. «Where I to assign to [the republic] a precise and definite idea», he wrote to John Taylor in 1816, «I would say that, purely and simply it means a government by it's [*sic*] citizens, in mass, acting directly and personally, according to rules established by the majority: and that every government is more or less republican in proportion as it has in it's [*sic*] composition more or less of this ingredient of the direct action of the citizens» ([104]). As Gaetano Salvemini has shown in an article on *The Concepts of Democracy and Liberty in the Eighteenth Century*, published in a collection of essays on American constitutionalism edited by Conyers Read in 1938,

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[103] On the history of representation see Hasso HOFFMANN, *Repräsentation. Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert*, Duncker & Humbolt, Berlin, 2003, translated in Italian as *Rappresentanza-Rappresentazione. Parola e concetto dall'antichità all'Ottocento*, Giuffrè, Milano, 2007.

[104] Thomas JEFFERSON, *letter to John Taylor*, *28 May 1816*, cit. pp. 86-87. Similar ideas were expressed a month earlier to Du Pont de Nemours, see Thomas JEFFERSON, *letter to Pierre Samuel du Pont de Nemours*, *24 April 1816*, *The Papers of Thomas Jefferson*, Retirement Series, vol. 9, *September 1815 to April 1816*, edited by J. Jefferson Looney *et al*., Princeton University Press, Princeton, 2012, pp. 699-702: «But when we come to the moral principles on which the government is to be administered, we come to what is proper for all conditions of society. […] that action by the citizens in person, in affairs within their reach and competence, and in all others by representatives, chosen immediately, & removable, by themselves, constitutes the essence of a republic; that all governments are more or less republican in proportion as this principle enters more or less into their composition […]».

democracy was understood by Jefferson and his contemporaries as involving the direct participation of citizens in the direction of society ([105]). It was this distinctly democratic «direct action» that Jefferson placed at the heart of his definition of a republic, thus diminishing the relevance of representation as the defining institute of its characteristic public space ([106]).

This particular inflection implied something more. Since «every government» could be «more or less republican», as it was predicated to a larger or lesser degree on the direct participation of its citizens in «the government of affairs» ([107]), Jefferson fashioned the republic more as a standard against which to measure particular forms of government, rather than as a particular form of government itself. In this sense, and only in this sense, Jefferson seems to have understood the notion of republic similarly to how it had been conceived by early modern public law. Authors such as Bodin had not used the term

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[105] See Gaetano SALVEMINI, *The Concepts of Democracy and Liberty in the Eighteenth Century*, in *The Constitution Reconsidered*, edited by Conyers Read, Columbia University Press, New York, 1938, re-published by Harper & Row, New York, 1968, pp. 105-119.

[106] See *ibid*., p. 106: «"Democracy" was also termed "pure", "perfect", or "simple" democracy, in order to keep it distinct from a democratic but representative regime. Jefferson called it a "republic" or a "pure republic", and called "government democratical but representative" the parliamentary regime based on universal suffrage». See *contra* Richard TUCK, *The Sleeping Sovereign. The Invention of Modern Democracy*, Cambridge University Press, 2015, according to whom modern democratic doctrines adopted across the Atlantic followed, for the most part, Hobbes in insisting that «[…] a sovereign democracy need not be involved at all in the ordinary business of government» (p. ix). For a review of Jefferson's writings on republics and republicanism see David N. MAYER, *The Constitutional Thought of Thomas Jefferson*, cit., pp. 308-314.

[107] Thomas JEFFERSON, *letter to Joseph C. Cabell*, *2 February 1816*, cit., p. 437.

republic to qualify a particular form of government, but to capture the essential features of all sovereign political entities ([108]). Likewise, Jefferson acknowledged that all forms of goverments shared, to some degree, republican features, given that «the whole body of the nation» remained in each society the true «sovereign» ([109]). Although governments could be entrusted «to a single person, as an emperor of Russia», to «a few persons, as the Aristocracy of Venice», or to «a complication of councils, as in [the] former regal government [of the colonies] or [the] present republican one [of the American federation]», such alteration in the form of government never amounted to an alteration in the subject of sovereignty and therefore never completely estinguished the direct involvement of citizens in the direction of their polities ([110]). Thus, Jefferson's constitutional thought seems to have implied, though not fully developed, the distinction between "form of state" and "form of government" anticipated in Bodin's *Republique* ([111]), to the effect of

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[108] See Margherita ISNARDI PARENTE, *Per la storia della traduzione italiana di J. Bodin, «Les six livres de la République»,* in *Jean Bodin a 400 anni dalla morte. Bilancio storiografico e prospettive di ricerca*, edited by Artemio Enzo Baldini, Leo S. Olschki, Firenze, 1997, pp. 159-168, now re-issued in ID. *Rinasimento politico in europa*, cit., pp. 187-197, see especially p. 190: «"Repubblica" è, […] nell'italiano politico moderno, parola compromessa e circoscritta (né le altre lingue moderne fanno eccezione) mentre Bodin la usava nel suo significato più generale. Con "republique" Bodin intendeva sempre l'insieme di un organismo giuridico, a qualsiasi configurazione politica, e della società che da questo è retta […]».

[109] Thomas JEFFERSON, *letter to Edmund Randolph*, *18 August 1799*, in *The Papers of Thomas Jefferson*, vol. 31, *1 February 1799 to 31 May 1800*, edited by Barbara B. Oberg *et al*., Princeton University Press, Princeton, 2004, p. 168.

[110] *Ibid*., p. 169.

[111] See Margherita INSARDI PARENTE, *Introduzione*, cit., pp. 90-91.

rendering republican the form of state of all political societies, whether their government be monarchical, aristocratic, or instead purely democratic ([112]). A conception that would eventually be further developed by Tocqueville in his first *De la démocratie in Amérique* of 1835, according to whom: «Le principe de la souveraineté du people, qui se trouve toujours plus o moins au fond de Presque toutes les institutions humaines, y demeure d'ordinaire comme enseveli. On lui obéit sans le reconnaitre, ou si parfois il arrive de le produire un moment au grand jour, on se hâte bientôt de le replonger dans les ténèbres du sanctuaire» ([113]).

Through such conception, Jefferson allowed for the development of a public space open to the direct participation of all citizens within each of the traditional forms of government and assumed such personal involvement to be the primary criterion by which to distinguish the several political regimes. «Societies exist under three forms sufficiently distinguishable» he wrote to James Madison in 1787, while still in Paris ([114]). «1. Without government, as among our Indians. 2. Under governments wherein the will of everyone has a just influence,

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[112] See Thomas JEFFERSON, *The Anas*, quoted in Matthew E. CROW, *History, Politics, and the Self: Jefferson's «Anas» and Autobiography*, in *A Companion to Thomas Jefferson*, edited by Francis D. Cogliano, cit., p.482: «the catholic principle of republicanism [is] that every people may establish what form of government they please and change it as they please, the will of the nation being the only thing essential».

[113] See Alexis de TOCQUEVILLE, *De la démocratie en Amerique*, vol. 1, edited by Jacob Peter Mayer, Gallimard, Paris, 1961, p. 54.

[114] Thomas JEFFERSON, *letter to James Madison*, *30 January 1787*, in *The Papers of Thomas Jefferson*, vol. 11, *1 January to 6 August 1787*, edited by Julian P. Boyd *et al*., Princeton University Press, Princeton, 1955, p. 92,

as in the case of England in a slight degree, and in our states, in a great one. 3. Under governments of force: as is the case in all other monarchies and in most of the other republics» ([115]). It is hard not to see, even at first glance, just how complex was the relationship between this partition proposed by Jefferson and the one offered by Montesquieu, almost forty years earlier, in *Du l'esprit des loix*. «Il y a trois espèces de gouvernemens; le Républicain, le Monarchique, & le Despotique. […] le gouvernement républicain est celui où le people en corps, ou seulement une partie du people, a la souveraine puissance; le monarchique, celui où seul gouverne, mais par des loix fixes & établies; au lieu que, dans le despotique, un seul, sans loi & sans règle, entraine tout par sa volonté & par ses caprices ([116]).

For one, Montesquieu had claimed that: «Une société ne sçauroit subsister sans un gouvernement» ([117]). So, Jefferson's first class of political societies, those without governments,

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[115] *Ibid*.

[116] Charles-Louis de Secondat de MONTESQUIEU, *De l'esprit des loix*, livre 2, chapitre 1, in *Œuvres de Montesquieu, nouvelle édition, revue, corrigée & considérablement augmentée par l'auteur*, tome premier, a Londres: Chez Nourse, 1767, p. 10, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C. On Montesquieu's classification see Catherine LARRERE, *Les typologies des gouvernements chez Montesquieu, in Revue Montesquieu*, n. 5, 2001, pp. 157-172. The classic study on Montesquieu's constitutional thought remains Élie CARCASSONNE, *Montesquieu et le problème de la constitution française au XVIIIe siècle*, Presses Universitaires de France, Paris, 1927. For one of the most recent contributions on Montesquieu's engagement with Western Jurisprudence, which begins to challenge common and widely held views on the author of *De l'esprit des loix*, see Antonio MERLINO, *Montesquieu's Legal Thought. The Separation of Powers*, in *The Milestones of Law in the Area of Central Europe*, Comenius University in Bratislava, Bratislava, 2015, pp. 445-450.

[117] Charles-Louis de Secondat de MONTESQUIEU, *De l'esprit des loix*, cit., livre 1, chapitre 3, p. 8.

would seem to have been directly at odds with the most authoritative treatise on public law of his time. According to a widely held view in the literature, this would not be particularly surprising. Although Jefferson had amply studied and transcribed excerpts from Montesquieu in the *Legal Commonplace Book* he kept as a student, devoting to *L'esprit des loix* more pages than to any other text abridged in his notebook, over time he grew increasingly critical of Montesquieu's doctrine, to the point of arranging and promoting the English translation and American publication of Antoine-Louis-Claude Destutt de Tracy's critical commentary on *L'esprit des loix* ([118]). However, a closer look at the implications of Montesquieu's claim and at Jefferson's understanding of Native American societies reveals a deeper harmony between the two propositions.

The societies which according to Montesquieu could not subsist without a government were the political ones. Montesquieu could no longer refer to them by calling them republics, as they had been traditionally known to modern jurisprudence, because in his thought the republic had become a specific form of government, «le gouvernement républicain est celui où le people en corps, ou seulement une partie du people, a la souveraine puissance» ([119]), so it could no longer be the

[118] Jefferson's complex relationship with Montesquieu is reviewed in James F. JONES, JR. *Montesquieu and Jefferson Revisited: Aspects of a Legacy*, in *The French Review*, vol. 51, n. 4, 1978, pp. 577-585.
[119] Charles-Louis de Secondat de MONTESQUIEU, *De l'esprit des loix*, cit., livre 2, chapitre 1, p. 10.

comprehensive name given to political bodies. The constitution of these bodies could be achieved whenever particular associations of men united themselves under a common sovereign power. «*La reunion de toutes les forces particulièrs*, dit trés-bien Gravina, forme ce qu'on appelle l'*état politique*» ([120]). It was because of this that Montesquieu could conclude, in a distinctly Bodinian fashion, that «La puissance politique comprend nécessairement l'union de plusieurs familles» ([121]). It had been Bodin who had, in fact, defined the commonwealth as «the lawful government of many families and of that which unto them in common belongeth» (the «forces particulièrs» later mentioned by Gravina) «with a puissant soveraigntie» ([122]): «Republique est un droit gouvernement de plusieurs mesnages, & de ce qui leur est commun, avec puissance souveraine» ([123]). Therefore, it would seem that by claiming that no political society could subsist without a government, Montesquieu was recalling the definition of commonwealth given by Bodin, who identified in the existence of sovereign power over an association of families, with all they held in common, the defining feature of what was coming into being as modern statehood ([124]).

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[120] *Ibid*., livre 1, chapitre 3, p. 8.
[121] *Ibid*.
[122] Jean BODIN, *The Six Bookes of a Commonweale, out of French and Latin copies done into English by Richard Knolles*, London: G. Bishop, 1606, p. 1.
[123] Jean BODIN, *Les six livres de la Republique*, cit., p. 1.
[124] On the relation between Montesquieu and Bodin see Catherine LARRERE, *Montesquieu: l'éclipse de la souveraineté?*, in *Penser la souveraineté à l'époque moderne et contemporaine*, vol. 1, edited by Gian Mario Cazzaniga et Yves-Charles Zarka, cit., pp. 199-214.

This same power of direction over a federation of families was what characterized Native American societies according to Jefferson. He largely described them in the 6th and 11th Queries of his *Notes on the State of Virginia*, which he wrote with the intention of refuting the assertions of Buffon, according to whom «Il ne faut pas aller chercher plus loin la cause de la vie disperse des sauvages & de leur éloignement pour la société: la plus précieuse étincelle du feu de la nature leur a été refuse; ils manquent d'ardeur pour leur femelle, & par conséquent d'amour pour leur semblables: ne connaissant pas l'attachement le plus vif, le plus tender de tous, leurs autres sentiments de ce genre, son froides & languissants: ils aiment foiblement leurs pères & leurs enfans; la société la plus intime de toutes, cette de la même famille, n'a donc chez eux que de foibles liens; la société d'une famille à l'autre n'en a point de tout: dès lors nulle réunion, nulle république, nulle état social» ([125]). This long passage, quoted by Jefferson in his *Notes*, reverted clearly to a Bodinian understanding of political societies and dismissed the existence of a Native American body politic on the grounds that the social ties within the Native American families were loose and those between the several Native American families simply non-existent. No appreciable union of «forces particulièrs» had, in other words, established a Native American *république* ([126]).

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[125] Quoted in Thomas JEFFERSON, *Notes on the State of Virginia*, cit., pp. 58-59.
[126] Charles-Louis de Secondat de MONTESQUIEU, *De l'esprit des loix*, livre 1, chapitre 3, cit., p. 8.

It was indeed within this Bodinian framework that Jefferson articulated his refutation ([127]). (Incidentally, this is of particular interest for the purpose of determining the extent of Jefferson's engagement with Bodin's doctrine, since, though the first draft of the *Notes* was completed by 1781, its publications in a private and limited edition issued in Paris did not occur till 1785, while the first publication at large occurred only two years later in London in 1787, once Jefferson had fully undertaken his diplomatic mission to France, at a time in which his direct knowledge of Bodin may no longer be considered merely speculative, given the presence of the *Republique* among the entries in the 1789 book catalogue). Jefferson dismissed the feebleness of social ties within Native American societies, bearing his own direct testimony to the contrary. «The Indian of North America being more within our reach, I can speak of him somewhat from my own knowledge, but more from the information of others better acquainted with him, and on whose truth and judgment I can rely. From these sources I am able to say, in contradiction to this representation [provided by Buffon], that he is neither more defective in ardour, nor more impotent with female, than the white reduced to the same diet and exercise […]; that he is affectionate to his children, carful of them, and indulgent in the extreme; that his affections comprehend his other connexions, weakening, as with us, from

[127] On Jefferson's consideration of American Indian politial theories see Donald A. GRINDE Jr., *Thomas Jefferson's Dualistic Perceptions of Native Americans*, in *Thomas Jefferson and the Education of a Citizen*, edited by James Gilreath, cit., pp. 193-208.

circle to circle, as they recede from the centre; that his friendship are strong and faithful to the uttermost extremity […]» ([128]). The societies thus established by Native Americans through these social ties lacked neither organization, nor political direction, but rather mechanisms of external compulsion and coercive enforcement of positive laws. This resulted, as Jefferson highlighted, «from the circumstance of their having never submitted themselves to any laws, any coercive power, any shadow of government», their «only controls» being instead «their manners, and the moral sense of right and wrong» ([129]).

So, when Jefferson claimed that Native American societies existed regardless of any government, what he seems to have implied is the absence of coercion, rather than the want of agency. An absence which strengthened, if not properly the sovereignty, at least the self-government of Native American societies and the direct action of Native American men. It is in this very specific and limited sense that Jefferson's claim should be read: Native American societies had no government, not because they lacked those fundamental features of a body politic, summarized by Montesquieu at the opening of *L'esprit de loix*, but because Native American societies were not subjected to any external direction and were instead entirely self-governed. Hence, they enjoyed «an infinitely greater degree of happiness than those who live[d] under European

[128] Thomas JEFFERSON, *Notes on the State of Virginia*, cit., pp. 59-60.
[129] *Ibid*., p. 93.

governments» ([130]), for happiness came to those who put their freedom to action in the common pursuit of the public affairs determining the destiny of their society ([131]).

This conclusion was strengthened by an even more overt refutation of Buffon submitted to Jefferson by Charles Thomson for the first English edition of his *Notes* and published as an appendix to the text ([132]). In his observations, Thomson expressly challenged the French naturalist and his claim that Native Americans where inherently «averse to society and a social life» ([133]). «Can any thing be more inapplicable than this to a people who always live in towns of clans?» he asked. «Or can they be said to have no 'republic', who conduct all their affairs in national councils […]?» ([134]). These councils, which Jefferson would eventually come to consider as the essential intermediate bodies of the American federal and decentralized form of government ([135]), were at the heart of Native American self-government. «The several towns or families that compose a tribe, have a chief who presides over it, and the several tribes

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[130] Thomas JEFFERSON, *letter to Edward Carrington*, *16 January 1787*, *in The Papers of Thomas Jefferson*, vol. 11, *1 January to 6 August 1787*, edited by Julian P. Boyd *et a*l., Princeton University Press, Princeton, 1955, p. 48.
[131] Hannah ARENDT, *On Revolution*, cit., pp. 115-140.
[132] See Donald A. GRINDE Jr., *Thomas Jefferson's Dualistic Perceptions of Native Americans*, cit., p. 197.
[133] See Charles THOMSON, *Commentaries*, published in Thomas JEFFERSON, *Notes on the State of Virginia*, cit., p. 202.
[134] *Ibid*.
[135] See Thomas JEFFERSON, *letter to Edmund Randolph*, *18 August 1799*, cit., p. 168: «[…] a complication of councils, as in our former regal government, or our present republican one». For a preliminary commentary see Suzanna W. MORSE, *Ward Republics: The Wisest Invention of Self-Government*, in *Thomas Jefferson and the Education of a Citizen*, edited by James Gilreath, cit., pp. 264-277.

composing a nation have a chief who presided over the whole nation» ([136]). «The matters which merely regard the town or family are settled by the chief and principle men of the town; those which regard a tribe, such as the appointment of head warriors or captains, and settling differences between different towns and families, are regulated at a meeting or council of the chiefs from the several towns; and those which regard the whole nation, such as the making war, concluding peace, of forming alliances with the neighboring nations, are deliberated on and determined in a national council composed of the chief of the tribe, attended by the head warriors and a number of the chiefs from the towns, who are his counselors» ([137]).

Because of these considerations, Jefferson held that Native Americans were «evidently in a state of nature» which had «passed the association of a single family», but had «not yet submitted to the authority of positive laws, or of any acknowledged magistrate» ([138]). Although this was sufficient to disprove that monarchy, or paternal government, was in any way natural, as had been largely claimed instead by the end of the 17th century in the political literature on the divine right of kings, and though it allowed Jefferson to maintain that self-governed republics were the natural, and therefore spontaneous,

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[136] See Charles THOMSON, *Commentaries*, published in Thomas JEFFERSON, *Notes on the State of Virginia*, cit., p. 202.
[137] *Ibid*., p. 203.
[138] Thomas JEFFERSON, *letter to Francis W. Gilmer*, *7 June 1816*, in *The Papers of Thomas Jefferson*, Retirement Series, vol. 10, cit., p. 155.

form of organization generally assumed by societies ([139]), it still confirmed that an association resting entirely on personal persuasion was fit to become the political regime adopted exclusively by relatively small societies ([140]). «It will be said» wrote Jefferson, quite probably referring precisely to Montesquieu, «that great societies cannot exist without government. The savages therefore break them into small ones» ([141]).

Once again, as had been the case ever since the discovery of America had forced Europe into a comparison with the radically other, Native American manners and societies proved to be the limit against which European jurisprudence tested its principles ([142]). The comparative effort undertaken by Jefferson in his review of the «savages» shared with the similar inquiry pursued two centuries earlier by Montaigne «un sentimento complesso» in which «l'ansia di percepire una nuova dimensione umana» furnished the basis for a reconsideration of received political

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[139] *Ibid*.: «There is an error into which most of the speculators on government have fallen, and which the well-known state of society of our Indians ought, before now, to have corrected. In their hypothesis of the origin of government, they suppose it to have commenced in the patriarchal or monarchical form. Our Indians are evidently in that state of nature which has passed the association of a single family; and not yet submitted to the authority of positive laws, or of any acknowledged magistrate. […] This the only instance of actual fact within our knowledge, will be then a beginning by republican, and not by patriarchal or monarchical government, as speculative writers have generally conjectured».

[140] Thomas JEFFERSON, *Notes on the State of Virginia*, cit., p. 62: «The principles of their society forbidding all compulsion, they are to be led to duty and to enterprize by personal influence and persuasion».

[141] *Ibid*., p. 93.

[142] See Anna Maria BATTISTA, *Alle origini del pensiero politico libertino. Montaigne e Charron*, Giuffè, Milano, 1966, pp. 135-142.

wisdom ([143]). But, while Montaigne's encounter with the «savages» of the New World led him to call into question the universality of European political assumptions towards natural law and the validity of its traditional understanding ([144]), the question of what form of government was best suited for progressively larger societies, raised by Jefferson's reflections on Native American manners, brought to the forefront of his constitutional inquiry a renewed commitment to the scientific relevance of Western jurisprudence and led him to reinterpret the lesson of Montesquieu and its own silent adaptation of that scholarly tradition, first articulated by Bartolus in his *De regimine civitatis*, on the relationship between the forms of government and the extension of societies ([145]).

So, the historical discovery of the existence of an entirely self-governed political society in the woods of America increased for Jefferson the urgency of determining on what conditions self-government could be preserved in larger and more complex societies: «insomuch that were it made a question, whether no law, as among the savage Americans, or too much law, as among the civilized Europeans, submits man to the greatest evil; one who has seen both conditions of existence would pronounce it to be the last: and that the sheep

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[143] *Ibid*., p. 139.
[144] See Paolo PRODI, *Una storia della giustizia: dal pluralismo dei foria al moderno dualismo tra coscienza e diritto*, Il mulino, Bologna, p. 357.
[145] See Gaetano SALVEMINI, *La teoria di Bartolo da Sassoferrato sulle costituzioni politiche*, cit., pp. 331-350.

are happier of themselves, than under the care of the wolves» ([146]).

The form of government that Jefferson believed to be most adequate to embody the sovereignty of the American people was representative, federal, and decentralized. Its institutional architecture was articulated through «a complication of councils» ([147]), described by Jefferson over time and in a variety of different writings, which he epitomized in the reflections on the ward republics that he committed to his late correspondence ([148]).

The first of these councils were the representative assemblies within each of the federated republics of the union. Contrary to the opinion maintained by Montesquieu, Jefferson did not believe, that republics were necessarily best suited for small

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[146] Thomas JEFFERSON, *Notes on the State of Virginia*, cit., p. 93.

[147] Thomas JEFFERSON, *letter to Edmund Randolph*, *18 August 1799*, cit., p. 168.

[148] See, among the several contributions, Suzanne W. MORSE, *Ward Republics: The Wisest Invention of Self-Government,* cit., pp. 264-277; as well as Peter S. ONUF, *Jefferson and American Democracy*, in *A Companion to Thomas Jefferson*, edited by Francis D. Cogliano, cit., pp. 411-415. In this essay Onuf writes: «As [Jefferson] rejected the political sociology of the imperial old regime and embraced the principle of citizen equality, Jefferson made a virtue of necessity, discovering "safeguards" to liberty in the multiplicity of state-republics that constituted the federal union», *ibid*., p. 115. If Jefferson "discovered" this principle it is in the sense that he found it inscribed in the jurisprudence of the old regime, which constituted the scholarly tradition which had first "discovered" that the multiplicity of intermediate bodies constituted a safeguard to liberty by checking the power of central political authorities. Because of this, it would see untenable to conclude, as Onuf does, that the gradation of authority proposed by Jefferson, through his doctrine on intermediate bodies, rendered «the constitutionalism of the old regime obsolete», *ibid*., p. 414. The relationship that Jefferson entertained with such constitutionalism was, indeed, too complex to be liquidated so abruptly.

societies. Within a small population directly involved in government, in fact, it would have been unlikely to find any third party truly indifferent to the interests at play, capable of pursuing the common good despite the urgency of partisan interests. On the contrary, in a republic governed by the principles of representation, the Founders were largely convinced that «the medium of a chosen body of citizens», removed from local interests and partisan passions, could effectively «refine and enlarge the public views» ([149]). «I suspect that the doctrine that small states alone are fitted to be republics», wrote Jefferson to a Genevan correspondent in 1795, «will be exploded by experience with some other brilliant fallacies accredited by Montesquieu and other political writers. Perhaps it will be found that to obtain a just republic (and it is to secure our just rights that we resort to government at all) it must be so extensive as that local egoisms may never reach it's [*sic*] greater part, that on every particular question, a majority may be found in it's [*sic*] councils free from particular interests, and giving therefore an uniform prevalence to the principles of justice. The smaller the societies, the more violent and more convulsive their schisms» ([150]).

In a celebrated biography published over sixty years ago, Jean Starobinski claimed that Montesquieu had been generally

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[149] James MADISON, *Federalist n. 10*, in ID., *James Madison, Writings*, edited by Jack N. Rakove. New York, NY: The Library of America, 1999, p. 165.
[150] Thomas JEFFERSON, *letter to François D'Ivernois*, *6 February 1795*, in *The Papers of Thomas Jefferson,* vol. 28, *1 January 1794 to 29 February 1796*, edited by John Catanzariti *et al*., Princeton University Press, Princeton, 2000, p. 261.

admired in «a silent and unpassionate way» ([151]). His thought had never raised the heated controversies that accompanied the reception of Voltaire or Rousseau. The questions it did raise had been long settled and later generations had eagerly engraved his legacy «into the marble of sculpture and into the metal of medals» ([152]). If this is true, it must be so for generations largely uninvolved with Montesquieu and essentially unconcerned with his thought because it seems not to apply to the generation of the Founding Fathers, which read Montesquieu as the pre-eminent authority on public law and passionately questioned his doctrine according to its political experience and its broader understanding of the Western legal tradition ([153]). Jefferson's excerpt is a telling example, as it shows how, in this particular instance, he challenged Montesquieu's doctrine and criticized him for having forgotten the true nature of sovereignty, which Jefferson conceived, in keeping with a longstanding jurisprudence, as the ultimate mediatory power, combining together the aggregate union of a society and preserving its internal complexity, while at the same time arbitrating between

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[151] Jean STAROBINSKI, *Montesquieu par lui même*, Seuil, Paris, 1953, p. 136, as quoted in Antonio MERLINO, *Montesquieu's Legal Thought. The Separation of Powers*, cit., p. 446.
[152] Jean STAROBINSKI, *Montesquieu par lui même*, Seuil, Paris, 1953, p. 7, as quoted in *ibid*.
[153] A conventional review of the reception of Montesquieu in Revolutionary America is given in Anne M. COHLER, *Montesquieu's Comparative Politics and the Spirit of American Constitutionalism*, University Press of Kansas, Lawrence, 1988.

the competing interests pursued independently by each of its individual parties ([154]).

Precisely because of its nature, the exercise of sovereignty required to be entrusted to the agency of an organ capable both of representing the social complexity and of reconciling its enduring plurality into a corporate whole. This was the intrinsic merit and the express purpose of representation: «contrary to the principle of Montesquieu, it will be seen that the larger the extent of country, the firmer its republican structure, if founded, not on conquest, but in principles of compact and equality» ([155]).

However, representation alone was not sufficient to guarantee that the will of each member of society exercised its «just influence» over government, since the American society was composed by individual citizens as well as federated states. Jefferson acknowledged the necessity of granting to both classes of subjects due participation in the ordering of society ([156]).

Urged by the enactment of controversial legislation, the *Alien and Sedition Acts*, adopted to safeguard the Unites States during

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[154] For this traditional jurisprudential conception of sovereignty see Diego QUAGLIONI, *La sovranità*, cit. The volume is closed by a double recollection of Harold J. LASKY, *The Pluralistic State*, in Id., *The Foundations of Sovereignty and Other Essays*, cit., pp. 232- 249; and Marc BLOCH, Marc BLOCH, *The Feudal Society*, vol. 2, cit., p. 452. The traditional understanding of sovereignty as an arbitrating and mediatory power entrusted to a third party is restated by John Locke in the second of his *Two Tretises of Government.* See John LOCKE, *Two Treatises of Government*, cit., pp. 275-276: «[…] That it is unreasonable for Men to be Judges in their own Cases […] that therefore God hath certainly appointed Governments to restrain the partiality and violence of Men».

[155] Thomas JEFFERSON, *letter to Francois Barbé de Marbois*, *14 June, 1817*, in *The Papers of Thomas Jefferson*, Retirement Series, vol. 11, cit., p. 437.

[156] Thomas JEFFERSON, *letter to James Madison*, *30 Jamnuary 1787*, cit., p. 92.

the undeclared naval war with France in the last three years of the 18th century ([157]), Jefferson envisioned a particular constitutional role for state assemblies *vis-à-vis* the federation ([158]). In the so-called *Kentucky Resolutions*, the propositions drafted by Jefferson and adopted by the legislative assembly of Kentucky in 1798 ([159]), Jefferson maintained that «whensoever the general government assume[d] undelegated powers» each state legislature retained the right to declare its acts «unauthoritative, void, & of no force» ([160]). The several states composing the federation had not, in fact, «united on the principle of unlimited submission to their general government» ([161]). They had rather constituted «by a compact under the style and title of a Constitution» a «general government for special purposes» and delegated to it «certain definite powers», «reserving, each state to itself, the residuary mass of rights to their own self-government» ([162]). As a consequence, whenever «a tyrannical legislative body» moved «beyond constitutional

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[157] Gordon S. WOOD, *Empire of Liberty: A History of the Early Republic*, Oxford University Press, New York, 2009, pp. 247-250.
[158] See Richard B. BERNSTEIN, *Thomas Jefferson and Constitutionalism*, in *A Companion to Thomas Jefferso*n, edited by Francis D. Cogliano, cit., p. 429. More broadly on Jefferson's federalism see Peter S. ONUF, *Thomas Jefferson, Federalist*, in ID., *The Mind of Thomas Jefferson*, University of Virginia Press, Charlottesville and London, 2007, pp. 83-98.
[159] See David N. MAYER, *The Constitutional Thought of Thomas Jefferson*, cit., pp. 201-208.
[160] Thomas JEFFERSON, *The Fair copy of the Kentucky Resolutions*, in *The Papers of Thomas Jefferson*, vol. 30, *1 January 1798 to 31 January 1799*, edited by Barbara B. Oberg *et al*., Princeton University Press, Princeton, 2003, p. 245.
[161] *Ibid*.
[162] *Ibid*., p. 246.

limitations and usurp[ed] the rights of the governed» ([163]), every federated state enjoyed, «in cases not within the compact, *casus non foederis*», a «natural right» to «nullify», of its own authority, such illegitimate «assumptions of power» ([164]).

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[163] Kristofer RAY, *Thomas Jefferson and A Summary View of the Rights of British America*, cit., p. 42

[164] Thomas JEFFERSON, *The Fair copy of the Kentucky Resolutions*, cit., p. 246. For a general commentary see Gordon S. WOOD, *Empire of Liberty. A History of the Early Republic, 1789-1815*, cit., pp. 267-271. This doctrine has been generally criticized in the literature as it has been commonly interpreted as the earliest anticipation of the states' rights theory, which challenged, in the first half of the 19th century, the supremacy of the federal union over the federated states and ultimately led to the outbreak of the American Civil War. See Brian STEELE, *Thomas Jefferson and American Nationhood*, cit., pp. 250-251. But the constitutional significance of Jefferson's doctrine may perhaps be better appreciated from a different vantage point, one apparently unrelated to the history of early American constitutionalism. In 1984 the Italian Constitutional Court delivered its judgment in the *Granital* case (C. Cost, n. 140/1970). Judge rapporteur was Antonio La Pergola, a former academic who had established himself as one of the leading students of US federalism. In 1966 La Pergola had published a first major contribution on federalism, *Processo formativo e caratteri strutturali dell'ordinamento federale statunitense*, Giuffè, Milano, and further expanded his inquiry three years later in *Residui "contrattualistici" e struttura federale nell'ordinamento degli Stati Uniti*, Giuffè, Milano, 1969 (for observations regarding Jefferson's federalism and the aforementioned resolutions see especially pp. 30-32, 39-40, 79). These studies seem to have borne their most enduring fruits in the *Granital* decision. In this «unusually theoretical» ruling, the Italian Constitutional Court reversed its precedent and gave up «its claim to an exclusive role in setting aside, on the basis of references made by ordinary courts, Italian legislation inconsistent with Community rules previously enacted». See Giorgio GAJA, *Constitutional Court (Italy), Decision No. 170 of 8 June 1984, SpA Grantial v Amministrazione delle Finanze dello Stato*, in *Common Market Law Review*, vol. 21, 1984, pp. 754-772, p. 764. However, the Constitutional Court stressed its persistent power to review all asserted inconsistencies of national legislation with Community laws suspected of violating provisions of the Italian constitution. In other words, the Italian Constitutional Court accepted the supremacy of Community law, emphasized by the Court of Justice of the European Community, on the condition that such law did not threaten the fundamental principles of the Italian legal system. See Antonio LA PERGOLA and Patrick DEL DUCA, *Community Law, International Law, and the Italian Constitution*, in *American Journal of International Law*, vol. 79, n. 3, 1985, pp. 598-621; where at p. 598 the two authors allow that «there may be a hint of a federal

This placed representative assemblies at the heart of Jefferson's federal form of government, as they embodied both the complexity within and the associations without individual federated states. But Jefferson pushed his inquiry into the corporate nature of democratic republics even further and articulated an extensive doctrine on the decentralization of governmental and administrative power.

The principle of decentralization had been foreshadowed in Jefferson's *Bill on the More General Diffusion of Knowledge*, which had been presented to the legislative assembly of Virginia in 1779 ([165]). The text prescribed a subdivision of the state's counties into minor administrative bodies, composed by all local electors gathered in assembly for the purpose of directly overseeing the administration of primary schools. These bodies

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character in Italy's relation to the European Communities» and, on the following page: «We leave it to readers the task of drawing inferences about federalism issues in their own political and legal systems»; as well as Marta CARTABIA, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union*, in *The European Court and the National Courts: Doctrine and Jurisprudence. Legal Change in Its Social Context*, edited by Anne-Marie Slaughter, Alec Stone Sweet, and Joseph H. H. Weiler, Hart, Oxfort, 1999, p. 138. This doctrine of counter-limits, as it has been called, echoed the rational underlying Jefferson's similar claim, according to which federated legislators retained the power to negative federal acts which violated the federal constitutions. Further scrutiny of La Pergola's scholarship would be needed to assess the precise extent to which this specific Jeffersonian doctrine influenced his overall understanding of federal relations regarding fundamental rights. But, at least at a preliminary overview, it would seem that Jefferson's doctrine allowed for a non-strictly hierarchical understanding of federal relations, which may also be read in the *Granital* case law of the Italian Constitutional Court and its later evolutions in the constitutional jurisprudence of European higher jurisdictions.

[165] See Thomas JEFFERSON, *A Bill on the More General Diffusion of Knowledge*, in *The Papers of Thomas Jefferson*, vol. 2, 1777-18 June 1778, edited by Julian P. Boyd et al., Princeton University Press, Princeton, 1950, pp. 526-535.

were called in the *Bill*, with an unmistakable reference to the elementary councils of the Anglo-Saxon polities, «hundreds» ([166]). This reference to the political organization of the Saxons was meant to signal Jefferson's affinity to the constitutional tradition of the Germanic people, which had been taken precisely by Montesquieu, and before him by Algernon Sidney ([167]), to emphasize the constitutional relevance of intermediate bodies within larger political societies ([168]).

Late in life, Jefferson rephrased and enlarged his conception of administrative decentralization. He began by warning that «the way to have good and safe government» was «not to trust it all to one», but rather «to divide it among the many, distributing to every one exactly the functions he [was] competent to» ([169]). This meant «dividing and subdividing» the general republic into the several different corporate bodies composing it, entrusting to the federal government «the defence of the nation» and the care of its «foreign & federal relations», conferring to the governments of each federated state the protection of civil rights, the enforcement of laws and the administration of the police, assigning to the counties the oversight of local concerns, and finally delegating to the elementary administrative bodies, now called by Jefferson «wards», the direction of their own

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[166] *Ibid*., p. 527.
[167] Algernon SIDNEY, *Discourses Concerning Government*, cit., p. 376-377.
[168] See Anna Maria BATTISTA, *La "Germania" di Tacito nella Francia illuminista*, cit.
[169] Thomas JEFFERSON, *letter to Jospeh C. Cabell*, *2 February 1816*, in *The Papers of Thomas Jefferson*, Retirement Series, vol. 9, *September 1915 to April 1816*, edited by J. Jefferson Looney *et al*., Princeton University Press, Princeton, 2012, pp. 436-437.

internal concerns ([170]). It was only «by dividing and subdividing these republics», Jefferson added, «from the great National one down thro' all it's [*sic*] subordinations», by decentralizing the national government until it ended «in the administration of every man's farm and affairs by himself», and by «placing under every one what his own eye could superintend» that each individual citizen could be «elevated to a majestic dignity» and see his participation in the exercise of popular sovereignty effectively secured ([171]).

«Divide the counties into wards of such size as that every citizen can attend, when called on, and act in person» he further enjoined to a correspondent in 1816 ([172]). «Ascribe to [the citizens] the government of their wards in all things relating to themselves exclusively» ([173]). Hence, the only power delegated by the people will concern enterprises «beyond [their] competence» and will be ceded, «by a synthetical process», «to higher & higher orders of functionaries, so as to trust fewer and fewer powers, in proportion as the trustees become more and more oligarchical» ([174]).

Certainly Jefferson had in mind Montesquieu's observations on the nature of sovereignty and the organization of government within a democracy as he wrote to Samuel Kercheval and Joseph Cabell in 1816. «Le peuple, qui a la souveraine

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[170] *Ibid*., p. 437.
[171] *Ibid*.
[172] Thomas JEFFERSON, *letter to Samuel Kercheval*, *12 July 1816*, cit., p. 225.
[173] *Ibid*.
[174] Thomas JEFFERSON, *letter to Jospeh C. Cabell*, *2 February 1816*, cit., p. 437.

puissance, doit faire par lui-même tout qu'il peut bien faire; et qu'il ne peut pas bien faire, qu'il fasse par sa ministères» ([175]). But who can say that, in reading these observations, Jefferson might not have recalled the lesson imparted by Milton? A lesson so close to the text and the spirit of his own doctrine on the elementary republics of the wards and the gradation of ever higher jurisdictions within the compound federal republic, that it would almost seem as if Jefferson had adopted Milton, having fully internalized his thought, and undertaking its development along the lines traced by the literature on federalism at Jefferson's immediate disposal: Grotius's *De iure belli ac pacis*, Pufendorf's *De iure naturae et gentium*, Barbeyrac's commentary and translation of both authors, Montesquieu's own remarks in *L'esprit des loix* to mention but a few of the texts that contributed to further the questions addressed by Johannes Althusius, the chief 17th century interpreter of popular sovereignty and federalism, whose *Politica methodice digesta* was held by the Loganian Library in Philadelphia ever since James Logan (1647-1751) had brought with him a copy of the text to the New World, as he emigrated there from England in 1699, but who – at present – does not seem to have directly influenced the thought of either Jefferson or the other Founders ([176]).

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[175] Charles-Louis de Secondat de MONTESQUIEU, *De l'esprit des loix*, cit., p. 12.

[176] On the federal authorities most directly referenced by the Founders see Allison LA CROIX, *The Ideological Origins of American Federalism, Harvard University Press*, Cambridge and London, 2010. On Althusius and

It had been Milton, in fact, who rather than «envisioning the state as a household with a single patriarch» had made, in the words of Gregory Chaplin, «the single patriarch of every household a sovereign» ([177]). Or, to put it differently, it had been

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his readers see Otto von Gierke, *Giovanni Althusius e lo sviluppo storico delle teorie politiche giunaturaliste*, cit.; Thomas O. HUGELIN, *Early Modern Concepts for a Late Modern World. Althusius on Community and Federalism*, Wilfrid Laurier University Press, Waterloo, 1999, especially pp. 109-112 for considerations on Montesquieu (and Madison); Diego QUAGLIONI, *Quale modernità per la «Politica» di Althusius?*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, vol. 39, 2010, pp. 631-647; and for a review of the legal and political lexicon of Althusius see Francesco INGRAVALLE and Corrado MALANDRINO, (eds.), *Il lessico della «Politica» di Johannes Althusius. L'arte della simbiosi santa, giusta, vantaggiosa e felice*, Olschki, Firenze, 2005.To my knowledge, the only evidence of a direct familiarity given by one of the Founding Fathers to the thought of Althusius is provided by a simple marginal notation inscribed by John Adams in his English translation of Condorcet's *Outlines of an Historical View of the Progress of the Human Mind*, London: J. Johson, 1795, p. 201. The text has been digitized and may be read at https://archive.org/stream/outlinesofhistor00cond#page/200/mode/2up.
Adams, as was his custom, annotated the name of Althusius in correspondence of the brief passaged dedicated by Condorcet to his thought: «Such are the opinions which Althusius and Languet, and afterwards Needham and Harrington, boldly professes, and investigated thoroughly». The opinions were summarized thusly by Condercet: «Ashamed at seeing the people oppressed, in the very faculty of their conscience, by kings, the superstitious of political slaves of the priesthood, some generous individuals dared at length to investigate the foundations of their power; and they revealed this grand truth to the world: that liberty is a blessing which cannot be alienated; that no title, no convention in favour of tyranny, can bind a nation to a particular family; that magistrates, whatever may be their appellation, their functions, or their power, are the agents, not the masters, of the people; that the people have the right of withdrawing an authority originating in themselves alone, whenever that authority shall be abused, or shall cease to be thought useful to the interests of the community; and lastly, that they have the right to punish, as well as to cashier their servants», *ibid*., pp. 200-201. No particular reference to federalism was made.

[177] Gregory CHAPLIN, *Milton Against Servitude: Classical Friendship, Tyranny, and the Law of Nature*, in *Discourses and Representations of Friendship in Early Modern Europe, 1500-1700*, edited by Daniel T. Lochman, Maritere López, and Lorna Hunton, Ashgate, Franham, 2011, p. 216.

Milton who, in 17th century England, had recalled the compound nature of political bodies, which, not only were composed according to Bodin's teaching by a plurality of families united under a common sovereign power, but partook in that concerted gradation of jurisdictions which Milton had certainly read in Claude de Seyssel's *La Grande Monarchie de France* ([178]), and, in all probability, had also seen described by Dante in the 14th chapter of the *Monarchia*'s first book, a treatise he referenced in his *Commonplace Book* amid considerations on the nature of sovereignty and the tyrannical degeneration that ensued whenever the separation of spiritual and temporal jurisdictions, or the separation between the several temporal jurisdictions, became blurred ([179]). To prevent governments from degenerating into tyrannies, Milton maintained in *The Tenure of Kings and Magistrates* that the power «which is at the root and source of all liberty», that is «the power to dispose and oeconomize in the Land which God hath giv'n [to the people], as Maisters of Family in thir own house and free inheritance» had to be preserved against all attempts to eradicate it ([180]).

The full implementation of this principle and the decentralization of administrative jurisdictions down to the

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[178] Milton expressly referrs to Seyssel in *The Tenure*, see John MILTON, *The Tenure of Kings and Magistrates*, cit., p. 159. For an introduction to Seyssel's thought see Enzo SCIACCA, *Le radici teoriche dell'assolutismo nel pensiero politico francese del primo cinquecento (1498-1519)*, Giuffrè, Milano, 1975, pp. 87-156.

[179] See John MILTON, *Commonplace Book*, in ID., *Complete Prose Works of John Milton*, vol. 1, cit., pp. 438, 475-477.

[180] Milton expressly referrs to Seyssel in *The Tenure*, see John MILTON, *The Tenure of Kings and Magistrates*, cit., p. 159.

individual *iurisdictio domestica*, Jefferson's «farm» ([181]), required the establishment of a particular institutional arrangement. Within the American states there were regions where this institutional arrangement had spontaneously established itself, as had happened in New England where local townships had become, to quote Tocqueville, «la source des pouvoirs sociaux» ([182]). But, as Jefferson realized very well, similar institutions had not arisen everywhere and were absent in Virginia and in the other southern states. It thus became necessary, in order to truly guarantee to each citizen the same participation in the exercise of sovereignty, to establish through positive law, what had not established itself autonomously. It was this specific realization which led Jefferson to advocate for the establishment of the «elementary republics of the wards» ([183]).

Unlike the townships, which were originally autonomous societies, the wards stood exclusively «on the basis of the law» and held only «a delegated share of powers» ([184]). Because of this, rather than being a «bottom-up organization», as they have been recently described ([185]), they were presented by Jefferson as being the institutional result of an inverse process of legislative subdivision of central authority.

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[181] Thomas JEFFERSON, *letter to Jospeh C. Cabell*, *2 February 1816*, cit., p. 437.
[182] Alexis de TOCQUEVILLE, *De la démocratie en Amerique*, cit., p. 60.
[183] Thomas JEFFERSON, *letter to Jospeh C. Cabell*, *2 February 1816*, cit., p. 437.
[184] *Ibid*.
[185] Maurizio VALSANIA, *Nature's Man. Thomas Jefferson's Philosophical Anthropology*, cit., p. 64.

Hence, two distinct notions of self-government co-existed in Jefferson's constitutionalism. One was original, the other derivative. One was natural, the other artificial. And one was grounded in the law of nature and nations, while the other was established through municipal law. The great merit of this distinction was that it allowed the expansion of self-government, and permitted autonomy to flourish even where it had not spontaneously established itself. Moreover, it ultimately secured the decentralization of government, without undermining the sovereign unity of the body politic ([186]).

Such intermediate bodies had been considered by Montesquieu as the essential institutions of a well-regulated monarchy. «Les pouvoirs intermédiaires, subordonnés & dépendant, constituent la nature du gouvernement monarchique, c'est-à-dire, de celui où un seul gouverne par des loix fondamentales. J'ai dit les pouvoirs intermédiaires, subordonnés, & dépendants: en effet, dans la monarchie, le prince est la source de tout pouvoir politique & civil. Ces loix fondamentales supposent nécessairement des canaux moyens par où coule la puissance: car, s'il n'y a dans l'état que la

[186] Because of this, sovereignty remained for Jefferson «coextensive with the general mechanism of power». And, through the gradation of authority, sovereignty remained also «coextensive with the entire social body». So sovereignty remained ultimatly for Jefferson «the theory that goes from subject to subject, that establishes the political relationship between subject and subject». See Michel FOUCAULT, *Society Must be Defended*, cit., pp. 35, 43. Contrary to this Tocquevillian interpretations was Santi Romano, see Santi ROMANO*, Decentramento amministrativo*, in *Enciclopedia giuridica italiana*, vol. 6, part 1, 1897, now published in ID., *Scritti minori*, vol. 2, *Diritto amministrativo*, edited by Guido Zanobini, Giuffrè, Milano, 1950, p. 29.

volonté momentanée, & capricieuse d'un seul, rien ne peut être fixe, & par conséquent aucune loi fondamentale» ([187]). Jefferson maintained that they characterized the distinctive form of government by «a complication of councils» that had been adopted, to a lesser degree, by the «former regal government» of the colonies and, to a larger one, by the «present republican» government of the American federation ([188]). This remarkable continuity seems to be explained, not only by Jefferson's persuasion that whatever the form of government sovereignty remained with the corporate body of the people, but also by the critique of Montesquieu's distinction between forms of government advanced by Destutt de Tracy. It had been Destutt de Tracy, in fact, who had shown how Montesquieu had arbitrarily ascribed to each form of government principles or institutions shared by all ([189]). But there may be a further and deeper explanation for Jefferson's general appreciation of the constitutional importance of intermediate bodies.

It had been, once again, early modern public law and, in particular, Bodin who had insisted on the constitutional role intermediate bodies maintained even within a society unified by an indivisible sovereign power. This had been one of the most vexing questions addressed by Bodin's doctrine and one on which he repeatedly returned at almost every successive edition

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[187] Charles-Louis de Secondat de MONTESQUIEU, *De l'esprit des loix*, livre 2, chapitre 4, cit., p. 20.
[188] Thomas JEFFERSON, *letter to Edmund Randolph*, *18 August 1799*, cit., p. 168.
[189] See Antoine-Louis-Claude DESTUTT DE TRACY, *Commentaire sur L'esprit des lois de Montesquieu*, Th. Desoer, Paris, 1822, livre 8, pp. 95-107.

of the *Republique* ([190]). In Jefferson's edition of the treatise, the question was addressed in the seventh chapter of the third book, the only chapter which bears, in Jefferson's whole copy, pencil markings. These markings highlight a selection of passages which synthesize Bodin's persuasion in the constitutional role played by intermediate bodies in the prevention of the tyrannical degeneration of power. «Donc pour resoudre ceste question, s'il est bon d'auoir des estats, colleges & communautés, & si la Republique s'en peut passer, on peut dire, à mon aduis, qu'il n'y a rien meilleur pour maintenir les estates populaires, & ruïner les tyrannies […]» ([191]). Whether the markings in this chapter of the *Republique* may be Jefferson's or not, it seems that Jefferson shared Bodin's search for a well-concerted institutional arrangement and sought to achieve it by acknowledging the derivative nature of the wards' self-government and the constitutional relevance of establishing «a gradation of authorities, standing each on the basis of law, holding every one

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[190] See Diego QUAGLIONI, *I limiti della sovranità. Il pensiero di Jean Bodin nella cultura politica e giuridica dell'età moderna*, cit., pp. 81-105.

[191] Jean BODIN, *Les six livres de la Republique*, cit., p. 499. As indicated in the preface, this passage is highlighted by a plus sign penciled in the margin of the text. Earlier, on p. 495 (and then on the first line of the following p. 496) this other passage in enclosed by penciled in brackets. «Nous avons dit que les hommes par societés & compagnies mutuelles, s'acheminerent aux alliances & communautés des estates, corps & colleges, pour composer en fin les Republiques que nous voyons: qui n'ont point de fondament plus seur apres Dieu, que l'amitié & bienueuillance des uns envers les autres: laquelle amitié ne se peut maintenir que par alliances, societés estats, communautés, confraires, corps & colleges». It is certainly rather tempting to imagine Tocqueville remembering these words, while insisting on the fundamental importance of associations in the American polity. Is it to daring to imagine Jefferson having them in mind as well, as he repeatedly dismissed the Hobbesian assumption of man's natural hostility to his fellow men?

its delegated share of powers, and constituting truly a system of fundamental balances and checks on the government» ([192]). «Where every man is a sharer in the direction of his ward-republic, or of some of the higher ones», Jefferson further observed, «and feels that he is a participator in the government of affairs not merely at an election, one day in the year, but every day; when there shall not be a man in the state who will not be a member of some one of it's [*sic*] councils, great or small, he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar of a Bonaparte» ([193]).

Once again, it had been Bodin who had taken Caesar to be an examples of the tyrant's typical aversion towards intermediate bodies. He described Caesar's effort to dissolve them in a dramatic passage that lead to one of the highlighted paragraphs in Jefferson's copy of the *Republique*. «Neantmoins Claude le Tribun, pour maintenir le people en contrecarre de la noblesse, à laquelle il renoncea, & se faisant adopter par un homme roturier, pour ester Tribun, restitua tous les colleges & confrairies, & les augmenta: mais si tost que Cesar fut Dictateur, il les abolit pou maintenir sa puissance, & ravaller celle du people: Depuis Auguste ayant assure son estat, les remit par edict expres: &

[192] Thomas JEFFERSON, *letter to Jospeh C. Cabell*, *2 February 1816*, cit., p. 437. On the importance of a well-concerted institutional arrangement in Bodin see See Diego QUAGLIONI, *La sovranità*, cit., pp. 53-56.
[193] Thomas JEFFERSON, *letter to Jospeh C. Cabell*, *2 February 1816*, cit., p. 437.

Neron le tyran les supprima; & tousiours les tyrans ont eu en haine les estates, corps & communautés des peoples […]» ([194]).

The constitutional relevance of these bodies, which allowed all individual citizens to enter into the public space of the commonwealth and take part in its deliberations, was further heightened by Jefferson's firm conviction that every government degenerated «when trusted to the rulers of the people alone» ([195]). Whenever public awareness diminished and attention to public affairs lessened, than «you and I», Jefferson claimed, «and Congress, and Assemblies, judges and governors shall all become wolves» ([196]). Despotism, as Jefferson came to understand the absolute centralization of power, was a form of government in which the acquiescent passiveness of the

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[194] Jean BODIN, *Les six livres de la republique*, cit., p. 500. Two other passages are enclosed by brackets in the same chapter. The first occurs on p. 502. «I'ay dit que la mediocrité, qui est louable en toutes choses, se doit aussi garder és estats Aristocratiques, & iustes Royautés, pour le regard des corps & colleges: car d'oster tous les corps & communautés, c'est ruïner un estat, & en faire une barbare tyrannie: aussi est il dangereux de permettre toutes assemblees & toutes confrairies: car bien souvent on y couve des coniurations, ou des monopoles: nous en auons trop d'exemples: qui a esté la cause d'oster plusieurs fois les confrairies par edict expres, qui toutesfois n'ont iamais peu ester executés: il vaut beaucoup mieux arracher les abus, comme les mauvaises herbes, que d'arracher les bonnes & mauvaises tout ensembleles les bonnes & mauuaises tout ensemble». The second, on the following p. 503, the last one in the chapter. «Or tout ainsi qu'il n'y a rien meilleur pour la force & union des subiects que les corps & communautés, aussi n'y a il rien plus expedient pour asseruir les ennemis vaincus, que leur oster premierement les corps & colleges, comme tresbien pratiquerent les Rommaines apres auoir vaincu les Rois de Macedonie: & depuis encores les Acheans assubiectis, le consul Mummius *concilia omnia singularum Achatiae nationum, & Phocensium, ac Boetorum, aut in alia parte Graecia delenit*. Puis apres les auoir rendus bons subiects & obeïssans, il est dit, *antiqua concilia genti cuique restituta*».

[195] Thomas JEFFERSON, *Notes on the State of Virginia*, cit., p. 148.

[196] Thomas JEFFERSON, *letter to Edward Carrington*, *16 January 1787*, cit., p. 48.

citizenry extinguished all passion for independence and subdued its spirit of resistance, allowing the ruler to monopolize «the right of action», banish his subjects «from the public realm», confine them «into the privacy of their households, and demanded of them that they mind their own, private business» ([197]).

Once the demise of all challenges to centralism perfected itself, then the particular happiness experienced by each citizen of a republic in the collective determination of society's common destiny could no longer be pursued. But as long as the people retained the clear awareness of their sovereignty, than even a «despot» would have been forced to govern them according to their republican spirit ([198]). And although this particular form of republican government had «its evils too», the principle being «the turbulence» to which it was subjected ([199]), Jefferson stressed, by quoting a passage from Sallust he had read in all likelihood in Rousseau's *Contrat social*, «Malo periculosam libertatem quam quietam servitutem» ([200]).

Thus, Jefferson fully understood the relational nature of power and the threat posed by «l'affermazione di un potere assoluto di tipo nuovo, perché realmente unico, indivisibile, e non limitato da altro che dalla propria volontà di imporre a se

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[197] Hannah ARENDT, *On Revolution*, cit., p. 130.
[198] Thomas JEFFERSON, *letter to Samuel Kercheval*, *12 July 1816*, cit., p. 223: «Where then is our republicanism to the found? Not in our constitution certainly, but merely in the spirit of our people. That would oblige even a despot to govern us republicanly».
[199] Thomas JEFFERSON, *letter to James Madison*, *30 January 1787*, cit., p. 92.
[200] *Ibid*. See Jean-Jacques ROUSSEAU, *Du Contrat Social, ou Principes du droit politique*, cit., p. 405.

stesso dei limiti costituzionali» ([201]). This power had arisen once the French Revolution realized Rousseau's desire to see all intermediate bodies liquidated. While the warning against all forms of authority which pretended to subject individuals and uniform them under an equalizing power would not be fully articulated until the publication of Tocqueville's second *Democratie in Amerique* in 1840, the intuition of this danger seems to have been already alive in Jefferson's awareness that «what [had] destroyed liberty and the rights of man in every government which [had] ever existed under the sun» had been «the generalising & concentrating all cares and powers into one body» ([202]), since – as Montesquieu had warned back in *L'esprit des loix* – «Les hommes sont tous égaux dans le gouvernement républicain; ils sont égaux dans le gouvernement despotique: dans le premier, c'est parce qu'ils sont tout; dans le second, c'est parce qu'ils ne sont rien» ([203]).

[201] Diego QUAGLIONI, *La sovranità*, cit., p. 86.
[202] Thomas JEFFERSON, *letter to Joseph C. Cabell*, *2 February 1816*, cit., p. 437.
[203] Charles-Louis de Secondat de MONTESQUIEU, *De l'esprit des loix*, cit., livre 6, chapitre 2, p. 101.

Part Two

RELIGION

4

THE FREEDOM OF CONSCIENCE

3. The religious foundation of jurisprudence

It has been suggested in the scholarly literature that the religious pilgrimage undertaken by Jefferson in his lifetime led him to his most intimate and intense inquiry into the moral and theological premises of social bonds and political action ([1]). This suggestion, which has been recently recalled in the latest contributions on Jefferson's commitment to the principle of religious freedom ([2]), was first advanced over thirty years ago by Eugene Sheridan, in his introduction to the volume dedicated by *The Papers of Thomas Jefferson* to the publication of the two edited versions of the Gospels that Jefferson prepared late in life for his political meditation and spiritual edification: *The Philosophy of Jesus*, which he compiled in 1803, and *The Life*

[1] The expression is borrowed from Paul K. CONKIN, *The Religious Pilgrimage of Thomas Jefferson*, in *Jeffersonian Legacies*, cit., pp. 19-49.

[2] See Annette GORDON-REED and Peter S. ONUF, *«The Most Blessed of Patriarchs». Thomas Jefferson and the Empire of Imagination*, cit., pp. 267-299; John RAGOSA, *Religious Freedom. Jefferson's Legacy, America's Creed*, University of Virginia Press, Charlottesville and London, 2013; Daniel L. DREISBACH, *Thomas Jefferson and the Wall of Separation between Church and State,* New York University Press, New York and London, 2002.

and Morals of Jesus, which he began in 1819 and completed in all probability by the summer of the following year ([3]).

In compiling these works, Sheridan claimed that Jefferson was responding to a problem «that was of deep concern to him: how to guarantee the perpetuation of republican government in the United States at a time when, as it seemed to him, political factionalism and social disharmony were threatening to undermine its basic foundations» ([4]). «Jefferson's solution to this problem», Sheridan continued, «was an effort to foster the social harmony that he considered essential for the survival of America's republican experiment by formulating a moralistic version of Christianity on which all men of good will could agree» ([5]).

Despite overlooking Jefferson's engagement with the age-old effort to repair the moral and theological premises of law that had been shaken by the 16th century Wars of Religion ([6]), Sheridan's interpretation had the great merit of acknowledging

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[3] See Eugene R. SHERIDAN, *Introduction*, in Thomas JEFFERSON, *Jefferson's Extracts from the Gospels, «The Philosophy of Jesus» and «The Life and Morals of Jesus»*, edited by Dickinson W. Adams et al., Princeton University Press, Princeton, 1983, pp. 3-42.

[4] *Ibid*., p. 13. An even more open acknowledgment of the religious premises of Jefferson's constitutionalism is in Eugene R. SHERIDAN, *Liberty and Virtue: Religion and Republicanism in Jeffersonian Thought*, in *Thomas Jefferson and the Education of a Citizen*, edited by James Gilreath, cit., pp. 242-263.

[5] *Ibid*., p. 13.

[6] See Anna Maria BATTISTA, *Alle oringini del pensiero libertino. Montaigne e Charron,* cit., pp. *191-216.* More recently, Italo BIROCCHI, *Alla ricerca dell'ordine. Fonti e cultura giuridica nell'età moderna*, Giappichelli, Torino, 2002, pp. 159-180. The English reader may turn to Charles S. EDWARDS, *Hugo Grotius: the Miracle of Hollande. A Study of Political and Legal Thought*, Nelson Hall, Chicago, 1981.

Jefferson's firm conviction in the necessity of assuming a common system of moral beliefs, concerning primarily the exercise of religious freedom, as the foundation of the American republic ([7]).

Jefferson's earliest pursuit of religious questions appears to have occurred sometime around 1765 ([8]), when he began to transcribe, in one of the commonplace books he kept as a young man, several passages on the nature of Christianity extracted from the *Philosophical Works* of Henry Saint-John, Viscount Bolingbroke (1678-1751) ([9]). The passages he extracted, and committed to this personal digest of moral authorities, re-meditated the 17th century lessons of Hugo Grotius and John Locke ([10]). Their progressive naturalization of religion had been equally distinguished by the rejection of dogmatism and the

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[7] The notion of belief systems is central in the historiography of Harold Berman, see Harold J. BERMAN, *The Historical Foundation of Law*, in *Emory Law Journal*, vol. 54, 2005, pp. 13-24.

[8] See Eugene R. SHERIDAN, *Introduction*, cit., p. 5.

[9] See Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, edited by Douglas L. Wilson, Princeton University Press, Princeton, 1989, pp. 24-55, 155-157. As Wilson argues in his introduction, it would appear that Jefferson started keeping this commonplace book around 1758, at the time when he began his classical studies under Rev. James Maury. He kept up the practice in his later years as a college student and during the time he spent reading law under George Wythe. But, by the time Jefferson got married in 1772 and began his political career one year after, his habit of commonplacing moral authorities came to an end. See Douglas L. WILSON, *Introduction*, in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, cit., p. 4.

[10] For a preliminary review of Bolingbroke's use of Grotius see Isaac KRAMNICK, *Bolingbroke and His Circle: The Politics of Nostalgia in the Age of Walpole*, Cornell University Press, Ithaca and London, 1968, pp. 87-89. The naturalization of religious doctrines in Grotius and his complex relation to Antitrinitarian confessions is addressed in Henk NELLEN, *Hugo Grotius. A Lifelong Struggle for Peace in Church and State, 1583-1645*, Brill, Leiden and Boston, 2014, especially pp. 422-437, 529-535.

support for religious freedom ([11]). Moreover it had prepared the advent of what the 18th century came to call the natural religion ([12]): a theistic profession of belief that retained, in the history of its own conception, the legacy of those several denominations that had challenged, to a greater or lesser degree, in the aftermath of the Protestant Reformation, the Trinitarian dogma and had called for a simplification of the articles of faith, that had allowed them, according to the pioneering work of Francesco Ruffini, to be among the first, and certainly among the most steadfast, defenders of the freedom each person enjoyed within the *forum* of conscience from all forms of external compulsion ([13]). Thus, early modern Antitrinitarianism was at the root of Jefferson's religious persuasion.

Through Bolingbroke, Jefferson first came to share with early Antitrinitarianism a strong skepticism towards the historicity of biblical accounts ([14]). It was Bolingbroke who taught him to

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[11] The progressive naturalization of religion that developed in the 17th century and prepared the later advent of a so-called natural religion is discussed in Pietro PIOVANI, *Linee di una filosofia del diritto*, in ID., *Per una filosofia della morale*, Bompiani, Milano, 2010, p. 744.

[12] See Harold J. BERMAN, *The Impact of Enlightenment on American Constitutional Law*, in *Yale Journal of Law and Humanities*, vol. 4, n. 2, 1992, pp. 311-334.

[13] See Francesco RUFFINI, *La libertà religiosa*. vol. 1, *Storia dell'idea*, Fratelli Bocca Editori, Torino, 1901, see especially pp. 68-98 on Socinianism; pp. 107-108 on Grotius and the relations between Socinianism and Dutch Arminianism, as well as pp. 110-122 on Locke. Among the several authors considered by Ruffini, there is also Jefferson, see pp. 336-339. No second volume was ever published. On Ruffini see Diego QUAGLIONI, *«A ciascuno il suo»: libertà religiosa e sovranità in Francesco Ruffini*, in *Pólemos*, vol. 2007, n. 2, 2007, pp. 33-43.

[14] See Douglas L. WILSON, *Register of Authors*, *Henry Saint-John, Viscout Bolignbroke*, in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, cit., pp. 155-157. The critical inquiry into Scriptural text that

summon the authority of Scripture to the tribunal of his own conscience and compare «the various and contradictory testimonies» it offered, «balancing the degrees of probability that resulted from them», with no less rigor than the one demanded in ordinary «judicature» ([15]).

Jefferson kept this lesson at heart, repeated it to the young men he mentored, and acted according to it late in life, when he began selecting passages from the Gospels and compiling them together to present a purely historical account of the life of Jesus, along with an unadulterated testimony of his teachings, freed from the errors of the Evangelists, as well as the mystifying subtleties of theological dogmatism ([16]). As he wrote

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flourished amongst Antitrinitarias, especially of Italian origin, see Francesco RUFFINI, *La libertà religiosa*, cit., p. 71.

[15] Henry Saint-John, Viscount BOLINGBROKE, *Philosophical Works*, essay n. 4, section 2, quoted in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, cit., entry 23, p. 33; entry 25, p. 34.

[16] The editions of the New Testament that Jefferson used to compile his extracts were first accounted for in Edgar J. GOODSPEED, *Thomas Jefferson and the Bible*, in *The Harvard Theological Review*, vol. 40, n. 1, 1947, pp. 71-76. A further account was later given in Eugene R. SHERIDAN, *Introduction*, cit., pp. 27, 30-31. Although Jefferson possessed some of the finest editions of the Gospels, including those edited by Erasmus, Montanus and de Bézè (see Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. 2, cit., pp. 93-94, 100, 101) he seems to have been rather disinterested in obtaining particular editions for his compilations. In the case of *The Philosophy of Jesus* he availed himself of an English edition of the King James Bible, published in Dublin by George Grierson in 1791. Whereas, in the case of *The Life and Morals of Jesus*, Jefferson placed in parallel columns extracts from Greek, Latin, French, and English verions of the Gospels. The Greek and Latin edition he used was published in London by Wingrave in 1794 and reproduced respectively the Greek text as edited by Johannes Leusden (first published in Utrecht in 1675) and the celebrated Latin text prepared by Benedictus Arias Montanus. The French was taken from the edition prepared by Jean Frédéric Ostervald and published in Paris by J. Smith in 1802, while the English came from an edition of the New Testament printed in Philadelphia by Jacob Johnson in 1804.

to James Fishback in 1809, «[r]eading, reflection and time have convinced me that the interests of society require the observation of those moral precepts only in which all religions agree», leaving aside instead «those particular dogmas in which all religions differ» and which are «totally unconnected with morality» ([17]).

Men, who like Jefferson, lived in the aftermath of «un'esperienza di ripensamento critico radicale dei principi-base della propria tradizione di pensiero» dedicated themselves to politics in the broader effort to repair «il complesso dei convincimenti collettivi» that substantiated the moral and religious unity of a people ([18]). This had been similarly the case of Jean Barbeyrac (1674-1744), who in his *Préface* to the French translation of Pufendorf's *De iure naturae et gentium*, a text well known to Jefferson ([19]), had claimed that «les principes foundamentaux de la Religion Naturelle, qui doit être la base de toutes les Religions, son le plus ferme, ou plutôt l'unique fondement de la Science des Mœurs» ([20]).

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[17] Thomas JEFFERSON, *letter to James Fishback*, *27 September 1809*, in ID., *Jefferson's Extracts from the Gospels, «The Philosophy of Jesus» and «The Life and Morals of Jesus»*, cit., p. 343.

[18] Anna Maria BATTISTA, *Nuove riflessioni su «Montaigne politico»*, cit., p. 826.

[19] See Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. 2, cit., p. 69.

[20] Jean BARBEYRAC, *Préface du traducteur*, in Samuel PUFENDORF, *Le droit de la nature et des gens, ou Systeme general des principes le plus importans de la morale, de la jurisprudence, et de la politique*, *traduit du Latin par Jean Barbeyrac*, vol. 1, a Londres: Chez Jean Nours, 1740, p. XL, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C. The quoted passage proceeds thusly: «Sans la Divinité, on ne voit rien qui impose une nécessité indispensable

In its essence, this understanding of religion as the naturalized foundation of morality and jurisprudence was largely influenced by to the works of Hugo Grotius, whom Jefferson considered to be, along with Erasmus, an Antitrinitarian and, in particular an Arian ([21]). The *Prolegomena*

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d'agir ou de ne pas agir d'une certaine manière. Les idées d'ordre, de convenance, de conformité avec la Raison, ont sans doute quelque réalité; elles son fondées sur la nature des choses, sur certaines relations très-véritables: ceux-là mêmes qui ne les développent pas distinctement & dans toute leur étendue, en ont un sentiment confus, nos Esprits son faits de telle manière, qu'ils ne peuvent qu'y acquiesce dès qu'on les leur propose; c'est ainsi que l'Honnête a fait de tout temps impression sur les Hommes, parmi les Nations tant soit peu civilisées; j'en conviens. Mas pour donner à ces idées toute la force qu'elles peuvent avoir, pour les rendre capables de tenir bon contre les passions & l'intérêt particulier, pour établir le Devoir, proprement ainsi nommé, qui mette un frein à nos Volontez, & qui les lie de maniere qu'il ne soit pas en notre disposition de nous dégager quand il nous plaira; il faut un Etre Supérieur, un Etre plus puissant que nous, qui ait droit manifestement de nous assujettir, & qui nous assujettisse actuellement à régler notre conduit sur les lumieres de notre propre Raison».

[21] See Thomas JEFFERSON, *Notes on Heresy*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p. 554: «Arians. [Christian] heretics. They avow there was a time when the Son was not, that he was created in time, mutable in nature, & like the Angels liable to sin. They deny the three persons in the trinity to be of the same essence. Erasmus & Grotius were Arians». This proximity of Grotius to Erasmus has been recalled, among others, by Hugh Trevor-Roper who has insisted that, like Erasmus, Grotius «deplored the schism of the Church and thought that it could be healed if exact scholarship were used to extract the true meaning, and thus show the essential rationality, of Christian doctrine – what Erasmus had called *philosophia Christi*», see Hugh TREVOR-ROPER, *Hugo Grotius and England*, in ID., *From Counter-Reformation to Glorious Revolution*, The University of Chicago Press, Chicago, 1992, p. 48. In this same essay, Trevor-Roper then went on to illustrate how the Erasmian program had been resumed in France, where, «in the circle of Jacques-Auguste de Thou, the architect of the Edict of Nantes, the great historian of his age, and one of the central figures in the European Republic of Letters, Huguenots and Catholics conceived the idea of a reunion, within their country, of the two religions, so recently at war, and dared to cite the officially forbidden name of Erasmus», *ibid*., p. 49. Not only did de Thou welcome Grotius in his circle, but his *Historia* eventually found its way among the works held in Jefferson's library. See Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. 1, cit., p. 73. On the religious views held by Erasmus see the classic Johan HUIZINGA,

to his *De iure belli ac pacis* ([22]), as well as the first three chapters of his *De veritate religionis Chistianae* ([23]), were a reaction to the relativism that had unhinged law from a fixed principle of justice, intelligible to men and recognized by nations ([24]). Once Christianity had turned against itself and devastating wars had obliterated the religious foundation that for centuries had guaranteed political obligations ([25]), the restoration of a universal foundation of law required the capacity to look beyond «alla mutevolezza e alla parzialità delle religioni storiche» and to see in the common tenets of Christianity «una religione divino-naturale» that articulated itself through laws both divine and natural, capable of transcending and unifying the inevitable relativity of human norms ([26]). This aspiration towards a natural-divine religion had

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Erasmus and the Age of Reformation, Harper & Row, New York, 1957, re-issued by Dover, Mineola, 2001, pp. 109-116.

[22] See Franco TODESCAN, *Le radici teologiche del giusnaturalismo laico*, vol. 1*, Il problema della secolarizzazione nel pensiero giuridico di Ugo Grozio*, Giuffè, Milano, 1983; Paolo PRODI, *Una storia della giustizia*, cit., p. 359-363.

[23] See Jan-Paul HEERING, *Hugo Grotius as Apologist for the Christian Religion. A Study of his Work De Veritate Religionis Christianae (1640)*, Brill, Leiden and London, 2014. See also Henk NELLEN, *Hugo Grotius. A Lifelong Struggle for Peace in Church and State, 1583-1645*, Brill, Leiden and Boston, 2014, especially pp. 422-437.

[24] Grotius wrote his *De iure belli ac pacis* «pro iustitia», as he declared in the dedication of the treatise to Luis XIII. See Diego QUAGLIONI, *La giustizia nel Medioevo e nella prima età modern*a, cit., pp.136-137.

[25] See Anna Maria BATTISTA, *Nuove riflessioni su Montaigne politico*, cit., p. 803.

[26] See Diego QUAGLIONI, *«Sans violence ny peine quelconque au port de salut», Il problema della libertà di coscienza nella «République» di Jean Bodin*, in *La formazione storica della alterità. Studi di storia della tolleranza nell'età moderna offerti a Antonio Rotondò*, vol. 1, *Secolo XVI*, Olschki, Firenze, 2001, pp. 361-373, now re-published in ID. *Machiavelli e la lingua della giurisprudenza. Una letteratura della crisi,* cit., p. 170.

been cherished since the 16th century and animated the thought of Bodin, for whom «il pensiero religioso e quello politico» converged in «un'aspirazione ad un'eurotimia istituzionale in cui l'ordine cosmico si traduce in un ordine politico», a view he certainly articulated in the *Republique*, but expanded with even greater intensity in his last and highest achievement, the *Colloquium Heptaplomeres* ([27]). Grotius was indeed familiar with Bodin and had the opportunity to read his *Colloquium* during his French exile, when a copy of it was lent to him by Jean des Cordes ([28]). Jefferson, who possessed a copy of the English translation of the *De veritate* prepared by Simon Patrick, could read in the preface written by Patrick himself that the treatise of Grotius was deserving of praise, although some had criticized it for it had not «answered a Book of Bodin's, which seemed to impugn it» ([29]). To which, Grotius reportedly replied, with an observation that was not immune from a certain impression of Nicodemism, that «whatsoever» seemed «to shake the foundations» he had laid, and «upon which the Christian Faith relie[d]», he had «already obviated» to it, «as far as [was] necessary to perswade a Reader that [was] not pertinacious» ([30]). Grotius appeared, in other words, to have been consciously

[27] See *ibid*., p. 165.
[28] See Henk NELLEN, *Hugo Grotius. A Lifelong Struggle for Peace in Church and State, 1583-1645*, cit., p. 362.
[29] Simon PATRICK, *A Preface Giving Some Account of the Author and of the Work*, in Hugo GROTIUS, *The Truth of the Christian Religion, Translated into English with the Addition of a Seventh Book Against the Present Roman Church*, London: Printed by J. L. for Luke Meredith, 1694, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C. No page number are printed for the *Preface*.
[30] *Ibid*.

claiming that through his scholarship a new foundation had been established for law, one that ultimately gave rise to a new school of thought to which Pufendorf and Barbeyrac, Hutchinson and Kames, Bolingbroke and later Jefferson were all bred.

This Grotian school held «una concezione "religiosa" della giustizia e del diritto», not simply because it maintained «l'idea della sacralità o inviolablità dei princìpi giuridici fondamentali», but because it claimed that these principles where treasured by the *religio*, «il deposito di quella razionalità comune» inherent in each men's conscience, that established «la giustizia del diritto civile», by reviewing, before the tribunal of conscience, the conformity of human norms to the higher laws of justice ([31]). In this sense, the *religio* was considered throughout the "Grotian moment" of the Western legal tradition as the foundation of jurisprudence ([32]), and Jefferson consistently placed «Religion» as the opening chapter of the section dedicated, in the 1783 library catalogue, to his books on «Jurisprudence» ([33]).

More broadly, the indirect presence of Grotius in Jefferson's earlier *Literary Commonplace Book* is apparent in several entries extracted from Bolingbroke. The most transparent reference occurs in entry thirty-six. «I say that the law of nature

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[31] Diego QUAGLIONI, *La giustizia nel Medioevo e nella prima età moderna*, cit., p. 29.
[32] I have borrowed the expression from Diego QUAGLIONI, *Bodin e il "machiavellismo": «conversiones rerumpublicarum» e diritto di guerra*, in ID., *I limiti della sovranità. Il pensiero di Jean Bodin nella cultura politica e giuridica dell'età moderna*, cit., p. 139.
[33] See Douglas L. WILSON, *Jefferson's Books*, Monticello Monograph Series, 1996, pp. 42-43.

is the law of god» transcribed Jefferson approvingly ([34]). «Of this I have the same demonstrative knowledge that I have of god, the all-perfect being. I say that the all perfect being cannot contradict himself […]. [of] all this I have as certain, as intuitive, knowledge, as I have that two and two are equal to four, or that the whole is bigger than the part» ([35]). This intuitive, purely abstract, and almost mathematical knowledge claimed by Bolingbroke to attest the worldly presence of divinity was confirmed, according to Jefferson, by the physical experience and observation of divinity at work. A similar intuition of «design» drawn by «consummate skill and infinite power» arose necessarily in anyone contemplating the «movements of the heavenly bodies, so exactly held in their course by the balance of centrifugal and centripetal forces», or «the structure of earth itself, with it's [*sic*] distribution of lands, waters and atmosphere, animal and vegetable bodies, examined in all their minutest particles, insects mere atoms of life, yet as perfectly organized as man or mammoth» ([36]). While the «missionary of supernatural religion», noted Bolingbroke, could appeal only «to the testimony of men he never knew, and of whom the infidel he labors to convert never heard, for the truth of those extraordinary events which prove the revelation he

[34] Henry Saint-John, Viscount BOLINGBROKE, *Philosophical Works*, fragment n. 21, quoted in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, cit., entry 36, p. 40.
[35] *Ibid*.
[36] Thomas JEFFERSON, *letter to John Adams*, *11 April 1823*, in *The Adams-Jefferson Letters. The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams*, edited by Lester J. Cappon, The University of North Carolina Press, Chapel Hill, 1956, re-published in 1987, p. 592.

preaches», the «missionary of natural religion», he went on, could appeal «at all times, and every where, to present and immediate evidence, to the testimony of sense and intellect, for the truth of those miracles which he [brought] in proof: the constitution of the mundane system being in a very proper sense an aggregate of miracles» ([37]).

In this most crucial passage among those commonplaced by Jefferson, Bolingbroke reverted to the notion of miracle to distinguish between a supernatural and a natural religion. Whereas miracles had been traditionally understood as preternatural acts of god subverting, or at least suspending, the ordinary course of nature ([38]), Bolingbroke reversed the notion and contended that, instead of being a transgression capable of exceptionally suspending the laws of nature, miracles were the actual constitution of the worldly order. A constitution so firm that it was even «beyo[nd] omnipotence» itself to «cause that, which [had] been done, not to have been done» ([39]).

In keeping with a long established doctrine consolidated in the 13th century by St. Thomas Aquinas (1225- 1274) and

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[37] Henry Saint-John, Viscount BOLINGBROKE, *Philosophical Works*, essay n. 4, section 2, quoted in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, cit., entry 26, p. 34.

[38] See the rich discussion on the "miraculous theorem of power" in Kenneth PENNINGTON, *The Prince and the Law, 1200-1600. Sovereignty and Rights in the Western Legal Tradition*, cit., pp. 54-75.The 20th century totalitarian degeneration of this doctrine is well known, see Johan HUIZINGA, *In de schaduwen van morgen. Een diagnose van het geestelijk lijden van onzen tijd*, H. D. Tjeenk Willink & Zoon, Haarlem, 1935, translated into English as *In the Shadow of Tomorrow*, W. W. Norton & Company, New York, 1936.

[39] Henry Saint-John, Viscount BOLINGBROKE, *Philosophical Works*, fragment n. 68, quoted in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, cit., entry 52 p. 47.

implicitly recalled by Grotius as he renovated the foundations of modern law ([40]), Bolingbroke contended that not even god himself could undo his own creation and subvert the order according to which the world had been established. This would have entailed a contradiction within that most perfect of all beings, to whom, by definition, life in all its inexhaustible fullness had to be and actually was constantly present.

«Est autem ius naturale adeo immutabile», wrote Gortius in the first chapter of his *De iure belli ac pacis*, «ut ne a Deo quidem mutari queat. Quanquam enim immensa est Dei potentia, dicit tamen quaedam possunt ad quae se illa non extendit, quia quae ita dicuntur, dicuntur tantum, sensum autem qui rem exprimat nullum habent; sed sibi ipsis repugnant: Sicut ergo ut bis duo non sint quatuor ne a Deo quidem potest effici, ita ne hoc quidem, ut quod intrinseca ratione malum est malum non sit» ([41]).

Although this conception rejected the idea that god could subvert the world at will, it implied nonetheless a theological basis for each particular system of laws and informed, through its authority, both the principles of physical and moral systems. Jefferson retained this same persuasion throughout his entire life

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[40] On Grotius' debt towards Scholasticism see Franco TODESCAN, *Le radici teologiche del giusnaturalismo laico*, vol. 1, cit. especially pp. 43-77; as well as Brian TIERNEY, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*, Scholars Press, Atlanta, 1997, pp. 316-342.

[41] Hugo GROTIUS, *De iure belli ac pacis libris tres*, *in quibus ius naturae et gentium item iuris publici praecipua explicantur*, edited by Bernardina J.A. De Kanter-Van Hettinga Tromp, Brill, Leiden, 1993, re-edited by Robert Feenstra and Caroline E. Persenaire, Scientia Verlag, Aalen, 1993, pp. 35-36.

and came to conceive god not simply as the «fabricator of all things», but as «their preserver and regulator», the spirit who maintained beings in their present form and who, by regenerating them, propelled them «into new and other forms», while remaining, of «necessity», the «superintending power» which secured «the Universe in its course and order» ([42]).

All this led Jefferson «away from the incomprehensible jargon of the Trinitarian arithmetic» and compelled him to search for the primitive moral teachings of Jesus Christ, those principles of elementary and universal «benevolence» towards others that were most consistent with the unchanging laws of nature and constituted the common essence of all orderly human societies ([43]). According to Jefferson, in fact, Jesus had not

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[42] Thomas JEFFERSON, *letter to John Adams*, *11 April 1823*, cit., p. 592.

[43] See Thomas JEFFERSON, *letter to Timothy Pickering*, *27 February 1821*, in ID., *Jefferson's Extracts from the Gospels, «The Philosophy of Jesus» and «The Life and Morals of Jesus»*, cit., p. 403. The full passage reads: «No one sees with greater pleasure than myself the progress of reason in it's advances towards rational Christianity. when we shall have done away the incomprehensible jargon of the Trinitarian arithmetic, that three are one, and one is three; when we shall have knocked down the artificial scaffolding, reared to mask from view the simple structure of Jesus, when, in short, we shall have unlearned every thing which has been taught since his day, and got back to the pure and simple doctrines he inculcated, we shall then be truly and worthily his disciples: and my opinion is that if nothing had ever been added to what flowed purely from his lips, the whole world would at this day have been Christian. I know that the case you cite, of Dr Drake, has been a common one. the religion-builders have so distorted and deformed the doctrines of Jesus, so muffled them in mysticisms, fancies and falsehoods, have caricatured them into forms so monstrous and inconceivable, as to shock reasonable thinkers, to revolt them against the whole, and drive them rashly to pronounce it's founder an imposter. had there never been a Commentator, there never would have been an infidel. in the present advance of truth, which we both approve, I do not know that you and I may think alike on all points. as the Creator has made no two faces alike, so no two minds, and probably no two creeds. we well know that among Unitarians

impressed himself onto men for his miraculous subversion of natural laws, but rather for the determination of his spiritual resistance to the challenges posed by history ([44]). This was true to the point that what distinguished Jefferson's harmonization of the Gospels, in both *The Philosophy* and *The Life and Morals of Jesus,* was the elision of all passages on miracles ([45]). This same

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themselves there are strong shades of difference, as between Doctors Price and Priestley for example. so there may be peculiarities in your creed and in mine. they are honestly formed without doubt. I do not wish to trouble the world with mine, nor to be troubled for them. these accounts are to be settled only with him who made us; and to him we leave it, with charity for all others, of whom also he is the only rightful and competent judge», see *ibid*., pp. 402-403. *Had there never been a Commentator, there never would have been an infidel* wrote Jefferson in his attack against the artificial divisions brought by dogmatism. Grotius had similarly indicted theology for its divisive definition of dogmas and «remarked that theologians would do well to follow the examples of lawyers, who as a rule were very well aware of the danger of too many definitions […] *Omnem in iure definitionem periculosam esse tradunt Iuris auctores. De theologicis idem quis merito dixerit, vetus enim esse sentantia, 'de Deo etiam vera dicere periculosum est'*», see See Jan-Paul HEERING, *Hugo Grotius as Apologist for the Christian Religion. A Study of his Work De Veritate Religionis Christianae (1640)*, cit., p. 71 and note 32. See also Thomas JEFFERSON., letter to William Short, 4 August 1820, in *ibid*., p. 369.

[44] The first of these challenges being the reformation of previous moral doctrines. See Thomas JEFFERSON, *Syllabus of an Estimate of the Merit of the Doctrines of Jesus compared with Those of Others*, enclosed in his *letter to Benjamin Rush*, *21 April*, 1083, in ID., *Jefferson's Extracts from the Gospels, «The Philosophy of Jesus» and «The Life and Morals of Jesus»*, cit., p. 334: «[Jesus'] moral doctrines relating to kindred and friends were more pure and perfect, than those of the most correct philosophers, and greatly more so than those of the Jews. And they went far beyond both in inculcating universal philanthropy, not only to kindred and friends, to neighbors and countrymen, but to all mankind, gathering all into one family, under the bonds of love, charity, peace, common wants, and common aids. […] The precepts of Philosophy, and of the Hebrew code, laid hold of actions only. He pushed his scrutiny into the heart of man; erected his tribunal in the region of his thoughts, and purified the waters at the fountain head. The taught, emphatically, the doctrine of a future state: which was either doubted or disbelieved by the Jews: and wielded it with efficacy, as an important incentive, supplementary to the other motives to moral conduct».

[45] See See Eugene R. SHERIDAN, *Introduction*, cit., p. 4-12.

elision had defined, about ten years earlier, the interpretation given to Jesus by another eminent reader of Grotius, Georg Wilhelm Friedrich Hegel (1770-1831). Hegel had composed in 1795 a work on the life of Jesus, a work he had not published and was not presented to the public at large until 1844, when Karl Rosencranz described its content in his biography of Hegel, insisting on its abstraction from all physical manifestation of miracles ([46]).

This coincidence between *Das Leben Jesu* and Jefferson's edited versions of the Gospels could be thought of as unique only by reading these works in isolation from the common Grotian tradition they interpreted ([47]). Their closeness does reveal an essentially shared understanding of Jesus as the

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[46] See Karl ROSENKRANZ, *Hegels Leben*, Duncker & Humbolt, Berlin, 1844, translated in Italian by Remo Bodei as *Vita di Hegel*, Bompiani, Milano, 2012, pp. 171-185, see especially p. 175 on Hegel's reading of Grotius, and p. 181 on Hegel's abstraction from miracles in *Das Leben Jesu*. I am unaware of any English translation of Rosenkranz's biography. Hegel's *Das Leben Jesu* has instead been translated in English, see Georg W.F. HEGEL, *Three Essays, 1793-1795. The Tübingen Essay, Berne Fragments, and The Life of Jesus*. edited by Peter Fuss and John Dobbins, University of Notre Dame Press, Notre Dame, 1984.

[47] See Henk NELLEN, *Hugo Grotius. A Lifelong Struggle for Peace in Church and State, 1583-1645*, cit., p. 427: «[…] it is important to detect the dawn of a new age in *De veritate*. The miracles of Christ and his Apostles functioned as an essential piece of evidence in Grotius' argument, but by stressing the exceptional nature of the New Testament miracles, he underplayed the importance of miracles in later ages down to his own day. This was the beginning of a tradition that continued down to the Enlightenment». See also Karl ROSENKRANZ, *Vita di Hegel*, cit., pp. 177- 179 for a review of the several lives of Jesus that were composed in the late 18th century, along with the numerous comparisons of his teachings to the doctrines of ancient masters of morality. Jefferson himself sketched one of these comparisons, see Thomas JEFFERSON, *Syllabus of an Estimate of the Merit of the Doctrines of Jesus compared with Those of Others*, cit., pp. 332-336. He also prompted Joseph Priestly to expand the comparison further, see Eugene R. SHERIDAN, *Introduction*, cit., pp. 20-30.

exemplary human embodiment of moral agency ([48]). To borrow the notation Enrico de Negri advanced in his seminal study on Hegel's philosophy, Jesus incarnated, for both Hegel and Jefferson, the very possibility of realizing morality «nella vita quotidiana dell'uomo» ([49]), because the actions of his life challenged all forms of tyranny over the body and mind of men, beginning with the historical tyranny exercised by a pharisaic priestcraft that had subjugated man's conscience to the enforcement of its arbitrary and divisive dogmas ([50]). Thus, the example set by Jesus ignited for Hegel and, with shades of different color and intensity, for Jefferson as well «quel *pathos* […] per la *Wirklicheit*» that turned conscience into action and effected the revolution of society by emancipating each individual's *religio* from the external compulsions of a tyrannical jurisdiction ([51]).

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[48] See Karl ROSENKRANZ, *Vita di Hegel*, cit., p. 181.
[49] See Enrico DE NEGRI, *Interpretazione di Hegel*, Sansoni, Firenze, 1969, p. 15.
[50] For Hegel see *ibid*., p. 29. As for Jefferson's hostility to priestcraft and pastoral government see Thomas JEFFERSON, *letter to Elbridge Gerry*, *29 March 1801*, in The Papers of Thomas Jefferson, vol. 33, 17 February to 30 April 1801, edited by Barbara B. Oberg *et al*., Princeton University Press, Princeton, 2006, pp. 490: «The mild and simple principles of the Christian philosophy, would produce too much calm, too much regularity of good, to extract from it's disciples a support for a numerous priesthood, were they not to sophisticate it, ramify it, split it into hairs, and twist it's texts till they cover the divine morality of it's author with mysteries, and require a priesthood to explain them».
[51] Remo BODEI, *La civetta e la talpa. Sistema ed epoca in Hegel*, Il Mulino, Bologna, 2014, p. 32.

2. The distinction between spiritual and temporal jurisdictions

Jefferson understood that securing religious freedom by exempting the individual conscience from outward compulsions could be achieved only by limiting the purview of external jurisdictions and distinguishing them from the spiritual jurisdiction that each individual enjoyed over his own beliefs. This realization came early on and animated his effort to implement the «free exercise of religion» that had been proclaimed in 1776 by the Virginia *Declaration of Rights* ([52]).

The wording chosen by the *Declaration* to acknowledge this particular right had represented in itself a powerful swerve in the history of religious freedom. Whereas the original draft of the *Declaration* had simply called for toleration in matters of religious beliefs, qualifying the right to profess a particular creed as a concession granted freely by the state, the final wording of the *Declaration* incorporated in its text an amendment drafted by James Madison recognizing the equal entitlement inherently held by all men to profess their own beliefs according to the dictates of their conscience alone. This shift from «the language of toleration» to «the language of entitlement», recently emphasized by Jack Rakove in an essay exploring the authoritative background of Jefferson's advocacy

[52] For the drafting history and the text of the Virginia *Declaration of Rights* see *The George Mason Papers*, edited by Robert A. Rutland, vol. 1, *1725-1792*, The University of North Carolina Press, Chapel Hill, 1970, pp. 287-289.

for the separation of church and state, perfected a conception of religious rights that had been developing in American societies for about a century ([53]).

The several 17th and 18th century American declarations of rights had, in fact, acknowledged the existence of a higher law, inherent in the human condition, binding municipal legislators. This law stood, according to a fascinating essay published in 1895 by Georg Jellinek (1851-1911), over and against positive law and compelled states to secure its effectiveness by transposing its principles within their legislation. Leading to the acknowledgement that «the principle of religious liberty [had] acquired constitutional recognition [firstly] in America», Jellinek argued that protecting religious liberty required «establishing by law a universal right of man» ([54]). American municipal jurisdictions had recognized in their several charters the existence of a freedom that transcended their own laws because they had been willing to yield to the conviction, arising from the great religious and political movement of reformation out of which American democracy was coming to light, that there existed «a right not conferred upon the citizen» but held by each man *in scrinio pectoris*, and that «acts of conscience and

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[53] Jack RAKOVE, *Beyond Locke, Beyond Belief. The Nexus of Free Exercise and Separation of Church and State*, in *Religion, State, and Society. Jefferson's Wall of Separation in Comparative Perspective*, edited by Robert Fatton, Jr. and R.K. Ramazani, Palgrave, Macmillan, New York, 2009, p. 38.

[54] Georg JELLINEK, *Die Erklärung der Menschen- und Bürgerrechte. Ein Beitrag zur modernen Verfassungsgeschichte,* Duncker & Humbolt, Leipzig, 1895, translated in English as *The Declaration of the Rights of Man and of Citizens. A contribution to Modern Constitutional History*, edited by Max Farrand, Henry Holt and Company, New York, 1901, p. 59,

expressions of religious convictions» stood «inviolable over [and] against the state as the exercise of a higher right» not enacted by the state, but rather proclaimed by the Gospel ([55]).

This conviction had far-reaching consequences, as it increasingly persuaded men like Madison and Jefferson of the existence of a realm of human activity removed from the sway of external authorities, over which «government could no longer be allowed to regulate» ([56]). The most immediate consequence this conviction generated, once the adoption of the *Declaration of Rights* had been finalized, was the wide-spread determination with which several parties within Virginia's society began to challenge the establishment of the Anglican church. Since before the Revolution, dissenting Presbyterians and Baptist had protested against the prosecution of their ministers and had petitioned the Virginia assembly to extend to their benefit the Parliamentary *Act of Toleration* of 1689 ([57]). As these petitions increased once the *Declaration* had been adopted, Jefferson resolved himself, «with a fervor that, if itself not religious, at least expressed a powerful moral and political commitment», to champion the cause of disestablishment ([58]).

Serving on the Committee on Religion in his capacity as member of the Virginia legislative assembly, Jefferson drafted a *Resolution for Disestablishing the Church of England and*

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[55] *Ibid*., pp. 74-75.
[56] Jack RAKOVE, *Beyond Locke, Beyond Belief. The Nexus of Free Exercise and Separation of Church and State*, cit., p. 43.
[57] See *ibid*., p. 39.
[58] *Ibid*.

Repealing Laws Interfering with Freedom of Worship in November of 1776 ([59]). Many of his preparatory works are still extant and have been published in *The Papers of Thomas Jefferson* along with the characteristically shorthanded *Outline of Argument* that summarized his general doctrine on religious freedom ([60]). As Bernhard Fabian argued back in 1955, in the edition of Jefferson's *Outline* he prepared by expanding its original abbreviations and inserting the missing words that had left out from the notes, the thoughts condensed in this working paper were meant by Jefferson to be shared with fellow committee members in support for the *Resolution* on disestablishment and, once this *Resolution* failed to win a majority of the vote in the Virginia legislature, they informed Jefferson's later *Bill for Establishing Religious Freedom,* drafted in 1779 and ultimately approved in 1786, as well as query XVII of Jefferson's *Notes on the State of Virginia*, which had been written to address the religious mores of the commonwealth ([61]).

Jefferson began his *Outline* by reviewing the several English Parliamentary and Virginia assembly acts that had criminalized

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[59] Thomas JEFFERSON, *Rough Draft of Jefferson's Resolutions for Disestablishing the Church of England and Repealing Laws Interfering with Freedom of Worship*, in *The Papers of Thomas Jefferson*, vol. 1, cit. pp. 530-531.

[60] Thomas Jefferson, *Outline of Argument*, in *The Papers of Thomas Jefferson*, vol. 1, cit., pp. 535-539.

[61] Bernhard FABIAN, *Jefferson's Notes of Virginia: The Genesis of Query XVII. The Different Religions Received into that State?,* in *The William and Mary Quarterly*, vol. 12, n. 1, 1955, pp. 124-138.

over time particular religious practices and beliefs ([62]). His emphasis fell especially on the repeal of those norms that had criminalized heresies. His preparatory works reveal, in fact, an acute interest both in the normative definition of heresy and in the historical review of the main Christian heresies, which Jefferson mostly associated with early Antitrinitarian denominations ([63]). To this end, he had compiled a separate set of notes on heresies, on which he relied in drafting his *Outline* ([64]). By drawing attention to the systematic prosecution of heretical movements, Jefferson was determined to prove to his colleagues and to the public writ-large that the state itself, in its public capacity, had adopted a particular religious creed and had consistently reverted to its coercive powers to enforce religious

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[62] See Thomas JEFFERSON, *Outline of Argument*, in Bernhard FABIAN, *Jefferson's Notes of Virginia: The Genesis of Query XVII. The Different Religions Received into that State?,* cit., p. 126: «Before entering on [the subject of] proper redress, [let us] see what is [the] injury [to] the status of religious liberty. […]». See also Thomas JEFFERSON, *List of Acts of Parliament and of Virginia Assembly, 1661-1759, Concerning Religion*, in *The Papers of Thomas Jefferson*, vol. 1, cit., pp. 539-541; as well as ID., *Notes on Acts of Parliament and of Virginia Assembly Concerning Religion*, in *ibid*., pp. 541-544.

[63] See Thomas JEFFERSON, *Outline of Argument*, cit., p. 126: «Heresy <1.El.c.1.> [De] heretic combur[endo]. [The] state has adopted [the] Athanasian creed: [the] Arians [are] therefore heretics. Either civil or ecclesiastical [authorities may] judge in [cases of] burn[ing], [according to] 1.H.P.c.405. 2. Arians [were punishable by beign] burnt in El. And Jac. Socinians».

[64] Thomas JEFFERSON, *Notes on Heresy*, cit., pp. 553-555. On Jefferson's Antitrinitarianism see especially p. 553: «A heretic is an impugner of fundamentals. What are fundamentals? The protestants will say those doctrines which are clearly & precisely delivered in the holy scriptures. Dr. Waterland would say the Trinity. But how far this character [of being clearly delivered] will suit the doctrine of the Trinity I will leave others to determine. It is no where expressly declared by any of the earliest fathers, & was never affirmed or taught by the church before the council of Nice […]».

orthodoxy upon its subjects. Moreover, he identified in the «Athanasian creed» – the first explicitly Trinitarian creed of Christianity, that had been articulated in the aftermath of the Council of Nicaea as an explicit rejection of Arianism ([65]) – the religious profession adopted by the state and thus the standard in force of which either «civil or ecclesiastical» authorities had been, in his assessment, entitled to judge heretics and condemn, in particular, «Arians» and «Socinians» to the stake ([66]).

These considerations led Jefferson to ask whether the state had a right «to adopt an opinion in matter[s] of religion» ([67]). Jefferson did not so much address this question as it would eventually be addressed by Francesco Ruffini in his works on religious freedom. He did not, in other words, raise the question with the intention of proving that the state, as such, possessed no conscience and could not hold therefore any religious belief of its own. The personification of statehood had not yet advanced, in Jefferson's time, to the point of suggesting the absurdity against which Ruffini would ultimately react ([68]). In fact, Jefferson's purpose in raising the question had less to do with the state's personhood, than it had to do with its competence, or rather with the precise definition of the purview within which its

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[65] See Thomas JEFFERSON, *Outline of Argument*, in Bernhard FABIAN, *Jefferson's Notes of Virginia: The Genesis of Query XVII. The Different Religions Received into that State?,* cit., p. 126. On the Athanasian creed see John N. D. KELLY, *The Athanasian Creed*, Harper & Row, New York, 1964.

[66] See Thomas JEFFERSON, *Outline of Argument*, in Bernhard FABIAN, *Jefferson's Notes of Virginia: The Genesis of Query XVII. The Different Religions Received into that State?,* cit., p. 126.

[67] *Ibid*., p. 128.

[68] See Francesco RUFFINI, *Diritti di libertà*, Piero Gobetti Editore, Torino, 1926, re-issued by Edizioni di storia e letteratura, Roma, 2012, pp. 65-85.

powers might be legitimately exercised. Jefferson contended that states did not possess the right to hold opinions in matters of religion not because they lacked a conscience, as they obviously did, but because they lacked the necessary jurisdiction over spiritual affairs. Such jurisdiction had not been conferred to them by individuals entering into political societies, since they themselves, who were indeed entitled to exercise the spiritual jurisdiction over their own consciences, were not however entitled to dispose of it.

«When men enter society», he noted in his *Outline*, «[they] surrender [as] little as possible. Civil rights [are] all that are necessary to civil government. Religious rights [are not necessary [to be] surrendered. [The] individual cannot surrender [them] – [for he is] answerable to God. It [there] is [any] unalienable right, [it] is religious» ([69]).

To corroborate his assertions, Jefferson incorporated in his preparatory notes summarized passages from Locke's *Epistola de tolerantia* ([70]). In these notes, Jefferson maintained, in accordance with Locke, that «the magistrate's jurisd[iction] extend[ed] only to civil rights» ([71]). Such jurisdiction could not extend any further than civil rights, because magistrates enjoyed exclusively the powers that had been conferred to them by the people, and the people had not entrusted to civil magistrates

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[69] See Thomas JEFFERSON, *Outline of Argument*, in Bernhard FABIAN, *Jefferson's Notes of Virginia: The Genesis of Query XVII. The Different Religions Received into that State?,* cit., p. 129.
[70] Thomas JEFFERSON, *Notes on Locke and Shaftesbury*, in *The Papers of Thomas Jefferson*, vol. 1, cit., pp. 544-551.
[71] *Ibid*., p. 545.

«the care of [their] souls» ([72]). Nor could they have, since Jefferson rejected the idea that man could «abandon [the] care of his salvation to another» ([73]). «No man has power to let another prescribe his faith» he went on, nor can any man «conform his faith to the dictates of another», because the very «life & essence of religion consists in the internal persuasion or belief of mind» ([74]). Where Jefferson left off, Locke had carried on and specified that it was in the nature of understanding to not be compelled by any particular outward force.

«Cum autem vera et salutifera religio consistit in interna animi fide, sine qua nihil apud Deum valet, ea est humani intellectus natura, ut nulla vi externa cogi possit» ([75]).

This last passage, on which Jefferson, rested his entire doctrine, articulated a conception of religious freedom which appears to have been strongly, and perhaps even consciously, reminiscent of a formula coined by Cassiodorus (c. 485 – c. 585) to illustrate the conception of religious freedom held by the first Antitrinitarian heresy of Christianity, Arianism: *religionem imperare non possumus, quia nemo cogitur invitus* ([76]). Locke,

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[72] *Ibid*.
[73] *Ibid*.
[74] *Ibid*.
[75] John LOCKE, *Epistola de tolerantia*, *A Letter on Toleration*, edited by Raymond Klibansky, The Clarendon Press, Oxford, 1968, p. 68.
[76] See Diego QUAGLIONI, *«Religio sola est, in qua libertas domicilum conlocavit». Coscienza e potere nella prima età moderna*, in *Religious obedience and political resistence in the early modern world. Jews, Christian and Islamic philosphers addressing the Bible, Obbedienza religiosa e resistenza politica nella prima età moderna. Filosofi ebrei, cristiani e islamici di fronte alla Bibbia*, edited by Luisa Simonutti, Brepols, Turnhout, 2014, p. 51.

who himself had been influenced by modern currents of Antitrinitarianism ([77]), seems not only to have adopted the same understanding of religious freedom underling this formula, but to have done so consistently with its main modern interpretation, which had been provided by Jean Bodin, another Antitrinitarian, in the *Republique* and later in the *Colloquium Heptaplomeres*, to sustain «la neutralità dello Stato nelle dispute religiose» ([78]). In this perspective, it is not surprising that Jack Rakove retraced Locke's influence on Jefferson's doctrine to the political meditations that had been provoked in the 17th century by the revocation of the *Edict of Nantes* ([79]), the cornerstone piece of legislation that had been enacted to settle the Wars of Religion which had torn France and Europe apart a century earlier, as Bodin was attempting «la costruction historique et systématique d'un pouvoir souverain dégagé de tout lien confessionnel» ([80]).

Jefferson reverted to an additional argument to prove the untamable freedom of the individual conscience and its exemption from the external jurisdiction of civil authorities. Regardless of man's actions, God had not chosen «to propagate his religion by temporal [punishments] or civil incapacitation»

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[77] On Locke's indebtedness to Antitrinitarianism see John MARSHALL, *Locke, Socinianism, «Socinianism», and Unitarianism*, in *English Philosophy in the Age of Locke*, edited by Michael A. Stewart, Clarendon Press, Oxford, 2000, pp. 111-182.

[78] Diego QUAGLIONI, *«Religio sola est, in qua libertas domicilum conlocavit». Coscienza e potere nella prima età moderna*, cit., p. 51.

[79] Jack RAKOVE, *Beyond Locke, Beyond Belief. The Nexus of Free Exercise and Separation of Church and State*, cit., p. 43.

[80] Georg ROELLENBLECK, *Jean Bodin et la liberté de conscience,* in *La liberté de conscience (XVIe-XVIIe siècles),* edited by Hans R. Guggisberg, Frank Lestringant, Jean-Claude Margolin, Droz, Genève, 1991, p. 97.

([81]). On the contrary, he had chosen «to extend it by it's [*sic*] influence on reason» ([82]), thereby allowing that matters of religion could be «supra ratione et humanum captum» but never «contra rationem sensumque comunem», as would indeed be claimed centuries later by Socinian movements and more generally by the Antitrinitarians ([83]). So, if God himself had avoided compulsion in matters of religion, how could «fallible men» revert to it instead? ([84]) Jefferson considered compulsion to be so foreign to the relationship between God and his people that it seemed to him, after having read Bayle's *Dictionnaire Hitorique et Critique*, that even within the «Jewish theocracy» there was still room for religious persuasions, such as the one held by the «Sadducees», that contested the very existence and dogma of a «future state» of justice and retribution ([85]).

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[81] Thomas JEFFERSON, *Notes on Locke and Shaftesbury*, in *The Papers of Thomas Jefferson*, vol. 1, cit., p.544

[82] *Ibid*.

[83] See Francesco RUFFINI, *La libertà religiosa. Storia dell'idea*, cit., p. 78.

[84] See Thomas JEFFERSON, *Outline of Argument*, in Bernhard FABIAN, *Jefferson's Notes of Virginia: The Genesis of Query XVII. The Different Religions Received into that State?,* cit., p. 129

[85] See Thomas JEFFERSON, *Outline of Argument*, in Bernhard FABIAN, *Jefferson's Notes of Virginia: The Genesis of Query XVII. The Different Religions Received into that State?,* cit., p. 129. Jefferson was familiar with the debate on the *respublica hebraeorum* as he owned, among the several 16th and 17th century works that debated Jewish republicanism and theocracy, See Emily Millicent SOWERBY, (ed.), *Catalogue of the Library of Thomas Jefferson*, vol. III, cit., pp. 60-61. See Lea CAMPOS BORALEVI, *Classical Foundational Myths of European Republicanism: The Jewish Commonwealth*, in *Republicanism: A Shared European Heritage*, vol. 1. *Republicanism and Constitutionalism in Early Modern Europe*, edited by Martin van Gelderen and Quentin Skinner, Cambridge University Press, Cambridge, 2002, pp. 247-261; as well as ID., *Mitzvoth Beneh Noah: il diritto noaico nel dibattito seicentesco sulla tolleranza*, in *La formazione storica dell'alterità. Studi di storia della tolleranza nell'età moderna offerti a Antonio Rotondò*, edited by Henry Méchoulan, Richard H. Popkin, Giuseppe

Compulsion thus stood at odds with the very notion of religious freedom.

Not only did Jefferson maintain that individual consciences were removed from civil jurisdictions, he also rejected the proposition according to which religion itself would «decline if not supported» by civil authorities ([86]). This was an argument that Jefferson drew directly from John Milton and specifically from the first of his antiprelatical tracts, *Of Reformation in England*, written in 1641 to counter the establishment of the Anglican Church ([87]).

Milton's influence on Jefferson, his specific influence over Jefferson's understanding of the contentious relationship between the spiritual and temporal jurisdictions, has been amply studied by George Sensabaugh ([88]). In an essay published back

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Ricuperati, and Luisa Simonutti, vol. 2, *Secolo XVII*, Olschki, Firenze, 2001, pp. 473-494. The impact of this doctrine on English political thought has been reviewed recently in Eric NELSON, *The Hebrew Republic, Jewish Sources and the Transformation of European Political Thought*, cit. On the Jewish theocracy see more specifically Martin BUBER, *Königtum Gottes*, Scocken Verlag, Berlin, 1932, translated in Italiana as *La regalità di Dio*, Marietti, Genova, 1989, especially, pp. 168-202. And finally Lea CAMPOS BORALEVI and Diego QUAGLIONI, (eds.), *Politeia biblica*, Olschki, Firenze, 2002.

[86] See Thomas JEFFERSON, *Outline of Argument*, in Bernhard FABIAN, *Jefferson's Notes of Virginia: The Genesis of Query XVII. The Different Religions Received into that State?,* cit., p. 129.

[87] See John MILTON, *Of Reformation Thouching Church Discipline in England: And the Causes that Hitherto Have Hindered It*, in ID., *Complete Prose Works of John Milton*, vol. 1, *1624-1642*, edited by Don M. Wolfe, Yale University Press, New Haven, 11953, pp. 514-617. See also, for a commentary, John WITTE, Jr., *Prophets, Priests, and Kings of Liberty: John Milton and the Reformation of Rights and Liberties in England*, in *Emory Law Journal*, vol. 57, 2008, pp. 1527-1604.

[88] See George F. SENSABAUGH, *Milton in Early America*, Princeton University Press, Princeton, 1964, re-printed in 2015.

in 1955, Sensabaugh claimed that Jefferson's *Outline* incorporated within its arguments Milton's historical understanding of Christianity's progressive decay ([89]). According to Milton, «the establishment of Christianity as a state religion under Emperor Constantine» (c. 272 – 337) had led to the corruption of the primitive Christian Church ([90]). Whereas Christianity had flourished with only minor blemishes «during the first three hundred years» of its existence, «once the Christian faith» had become «established by law, once it gained the support of civil authority, degeneration followed apace» ([91]). According to Milton, it had been Constantine who had accelerated the corruption of Christianity by supporting the otherwise exclusively spiritual jurisdiction of the Church through public action. It had been under his reign that the distinction between the two fundamentally polar dimensions of power had been undermined ([92]), to the point that «the temporall and spirituall power» had «close[d] in one beliefe» ([93]). Not only had Constantine «appointed certaine times for Fasts, and Feasts», but he also «built stately Churches», and «gave large Immunities to the Clergie, great Riches and Promotions to Bishops», and moreover «gave and minister'd occasion to bring

[89] See George F. SENSABAUGH, *Jefferson's Use of Milton in the Ecclesiastical Controversies of 1776*, in *American Literature*, vol. 26, n. 4, 1955, pp. 552-559.
[90] *Ibid*., p. 558.
[91] *Ibid*.
[92] On this fundamental polarity between the spiritual and temporal jurisdiction see Diego QUAGLIONI, *Introduzione*, in Dante ALIGHIERI, *Monarchia*, cit., pp. lxxi-lxxix
[93] John MILTON, *Of Reformation Thouching Church Discipline in England: And the Causes that Hitherto Have Hindered It*, cit., pp. 553-554.

in a Deluge of Ceremonies» that «set a gloss upon the simplicity, and plainesse of Christianity» ([94]). Hence, «the Prelates both then and ever since coming from mean, and Plebeyan Life on a sudden to be Lords of stately Palaces […] and Princely attendance, thought the plain and homespun verity of Christs Gospell unfit any longer to hold their Lordships acquaintance […]» ([95]). And so «the Church that before by insensible degrees welk't and impair'd, now with large steps went downe hill decaying» ([96]). Nor did Milton allow, as some did, «that the times of Constantine were unsettled and that therefore the Church needed the strength of temporal authority» ([97]). To these voices, Milton had replied that he did not consider «the Church a Vine in this respect», in other words he did not believe that «she» could not «subsist without clasping about the Elme of worldly strength, and felicity, as if the heavenly City could not support it selfe without the props and buttresses of secular Authoritie» ([98]).

These claims were further sustained by the authority of Dante, whom Milton quoted in support of his argument, first by

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[94] *Ibid*., p. 556.
[95] *Ibid*., pp. 556-557.
[96] *Ibid*., p. 557.
[97] George F. SENSABAUGH, *Jefferson's Use of Milton in the Ecclesiastical Controversies of 1776*, cit., p. 558.
[98] John MILTON, *Of Reformation Thouching Church Discipline in England: And the Causes that Hitherto Have Hindered It*, cit., p. 554.

transcribing a much commented upon tercet from the 19th *Canto* of the *Inferno* ([99]),

> *Ahi, Costantin, di quanto mal fu matre,*
> *non la tua conversion, ma quella dote*
> *che da te prese il primo ricco patre!*

and then by referring to the equally controversial remarks in the 20th *Canto* of the *Paradiso* ([100]):

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[99] *Ibid*., p. 558. On Dante's relation with the Western legal tradition, as well a sample commentary on the quotes passages see Claudia DI FONZO, *Dante e la tradizione giuridica*, Carocci, 2016.

[100] *Ibid*., p. 559. Milton then goes on to quote Petrarch's 108th sonnet and Ariosto's 34th *Canto* of the *Orlando Furioso*, see *ibid*., pp. 559-560: «[…] it may be concluded for a receiv'd opinion even among men professing the Romish Faith that Constantine marr'd all in the Curch. Dante in his 19. Canto of Inferno hath thus, as I will render it you in English blanck Verse
Ah Constantine, of how much ill was cause
Not thy Conversion, but those rich demaines
That the firt wealthy Pope receiv'd of thee.
So in his 20. Canto of Paradise hee makes the like complaint, and Petrarch seconds him in the same mind in his 108. Sonnet which is wip't out by the Inquisitor in some Editions; speaking of the Roman Antichrist as meerly bred up by Constatine.
Founded in chast and humble Povertie,
'Gainst them that rais'd thee dost thou lift thy horn,
Impudent whoore, where hast thou plac'd thy hope?
In thy Adulterers, or thy ill got wealth?
Another Constantine comes not in hast.
Ariosto of Ferrare after both these in time, but equall in fame, following the scope of his Poem in a difficult knot how to restore Orlando his chiefe hero to his lost sense, brings Astolfo the English Knight up into the moone, where S. John, as he feignes, met him. Cant. 34.
And to be short, at last his guid him brings
Into a goodly valley, where he sees
A mighty masse of things strangely confus'd,
Things that on earth were lost, or were abus'd.
And amongst these so abused things listen what hee met withall, under the Conduct of the Evangelist.
Then past hee to a flowery Mountaine greene,
Which once smelt sweet, now stinks as odiously;

L'altro che segue, con le leggi e meco,
sotto buona intenzion che fé mal frutto,
per cedere al pastor si fece greco:

ora conosce come il mal dedutto
dal suo bene operar non li è nocivo,
avvegna che sia 'l mondo indi distrutto.

These references to Dante appear to be the key necessary to unlock Milton's stance on the relationship between the spiritual and temporal jurisdictions. As Milton would later write in his *Commonplace Book*, quoting first Dante's *Monarchia* and then the 16th *Canto* of his *Purgatorio*, not only did «the authority of the king […] not depend upon the Pope» ([101]), but «the combining of ecclesiastical and political government», which according to Milton occurred whenever «the magistrate act[ed] as minister of the Church and the minister of the Church act[ed] as magistrate», was «equally destructive to both religion and the State», as had been showed by «Dante, the Tuscan poet» ([102]):

Soleva Roma, che 'l buon mondo feo,
due soli aver, che l'una e l'altra strada
facean vedere, e del mondo e di Deo.

L'un l'altro ha spento; ed è giunta la spada
col pasturale, e l'un con l'altro insieme

This was that gift (if you the truth will have)
That Constantine to good Sylvestro gave.
And this ws a truth well knowne in England before this Poet was borne, as our Chaucers Plowman shall tell you by and by upon another occasion».
[101] John Milton, *Commonplace Book*, in ID., *Complete Prose Works of John Milton*, vol. 1, cit., p. 438.
[102] *Ibid*., p. 476.

per viva forza mal convien che vada;

però che, giunti, l'un l'altro non teme
[…]

Dì oggimai che la Chiesa di Roma,
per confondere in sé due reggimenti,
cade nel fango, e sé brutta e la soma.

Hence, by following Milton, who had rejected the asserted superiority of the state's civil jurisdiction over the spiritual one of the church, and had found in Dante the most authoritative interpreter of the permanent dualism between the spiritual and secular jurisdiction inherent in the Western legal tradition ([103]), Jefferson articulated his own reflection on the fundamental polarity between the spiritual and temporal dimension of human activity that rejected, what Peter Onuf has called, the «unholy alliance of church and state» ([104]).

«Christianity», wrote Jefferson echoing Milton, «flourished three hundred years without establishment. [As] soon as [it was] established, [it] declined from purity. [It] betrays [a] want [of] confidence in [the] doctrines of [the] church to suspect that reason or intrinsic excellence [are] insufficient without [a] secular prop. [The] gates of hell shall not prevail» ([105]).

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[103] See Diego QUAGLIONI, *Introduzione*, in Dante ALIGHIERI, *Monarchia*, cit., pp. v-lxxix.
[104] Peter S. ONUF, *Jefferson's Religion: Priestcraft, Enlightenment, and the Republican Revolution*, in ID., *The Mind of Thomas Jefferson*, cit., p. 160.
[105] Thomas JEFFERSON, *Outline of Argument*, in Bernhard FABIAN, *Jefferson's Notes of Virginia: The Genesis of Query XVII. The Different Religions Received into that State?,* cit., pp. 130-131.

Of course, whereas Dante had written against the Church's asserted superiority over civil authorities, Jefferson and Milton were committed to challenge civil authority over ecclesiastical and religious affairs. This new authority had been acquired by civil institutions at the turn of the 16th century through that historical process described by Harold Berman as the «spiritualization of the secular» that followed and sustained the confessionalization of European polities ([106]). In so much as Christian confessions were identified with particular states and individual consciences were subjected to external jurisdictions, Jefferson reacted against the contraction of the original dualism of Western jurisprudence, brought about by the Protestant Reformations, and claimed, most forcefully in his *Bill for Establishing Religious Freedom*, that «Almighty God hath created the mind free, and manifested his supreme will that free is shall remain by making it altogether insusceptible of restraints» ([107]).

Should one choose to follow Berman and maintain that the «dualism of spiritual and secular jurisdictions and the pluralism of secular jurisdictions within the same polity», that «were at the heart of the formation of the Western legal tradition», had entered into crisis once the Protestant Reformations had «transferred spiritual authority and spiritual responsibilities to

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[106] Harold J. BERMAN, *Law and Revolution, II. The Impact of the Protestant Reformations on the Western Legal Tradition*, cit., pp. IX-X, see also pp. 61-62, 64.
[107] Thomas JEFFERSON, *A Bill for Establishing Religious Freedom*, in *The Papers of Thomas Jefferson,* vol. 2, cit., p. 545.

the secular lawmakers of the various principalities and nation-states, whose supreme authority now embraced all the jurisdictions that had previously been autonomous», than Jefferson's contribution to the great revolution of the Wester legal tradition brought about in America in the 18th century appears to have been aimed at restoring that compromised dualism ([108]). In truth, Jefferson does not seem to have had any appreciation of the originally medieval separation of the spiritual and temporal jurisdictions. His aversion to all forms of pastoral government was too strong to allow him any recognition of the kind. However, his advocacy for a «wall of separation» between church and state had the effect to restore to the Western legal tradition, albeit on new grounds, the juxtaposition between the individual conscience and the external jurisdiction ([109]).

Hence, Jefferson insisted in his *Bill* that «the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and manifested false religions over the greatest

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[108] Harold J. BERMAN, *Law and Revolution, II. The Impact of the Protestant Reformations on the Western Legal Tradition*, cit., pp. IX-X.

[109] Thomas JEFFERSON, *Letter to the Danbury Baptists*, in *The Papers of Thomas Jefferson*, vol. 35, *1 August to 30 November 1808*, edited by Barbara B. Oberg *et al*., Princeton University Press, Princeton, 2008, pp. 407-409.

part of the world and through all time» ([110]). Consequently, Jefferson argued that «the opinions of men are not the object of civil government» nor are they «under its jurisdiction» ([111]). For, «to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty […]» ([112]). In sum, the *Bill* Jefferson drafted acknowledged that «all men» were «free to profess, and by argument to maintain, their opinions in matters of religion», and that such opinions were in no way grounds to «diminish, enlarge, or affect their civil capacities» ([113]).

Because of this complex genealogy behind Jefferson's understanding of religion, the individual conscience assumed in his doctrine «la natura di ambito non coercibile del potere, anzi di ambito del puro consenso, sottratto al commando e affidato a forme "censorie" di disciplina» ([114]). The freedom each individual enjoyed over his own conscience became, even more than «the paradigmatic individual right» discussed by Rakove ([115]), the «souveraineté du for intérieur» as Hans Guggisberg, Frank Lestringant, Jean-Claude Margolin qualified it in their

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[110] Thomas JEFFERSON, *A Bill for Establishing Religious Freedom*, in *The Papers of Thomas Jefferson,* vol. 2, cit., p. 545.
[111] *Ibid*., p. 546.
[112] *Ibid*.
[113] *Ibid*.
[114] Diego QUAGLIONI, *«Sans violence ny peine quelconque au port de salut», Il problema della libertà di coscienza nella «République» di Jean Bodin*, cit., pp. 170-171.
[115] Jack RAKOVE, *Beyond Locke, Beyond Belief. The Nexus of Free Exercise and Separation of Church and State*, cit., p. 43.

preface to an important collection of essays on the freedom of conscience in the 16th and 17th centuries ([116]). So, in Jefferson's thought, the sovereignty enjoyed by each individual over himself became the foundation of the federated sovereignty of the body politic or, in other words, the seat of spiritual jurisdiction became the foundation of political association: an entirely free association, in which the «difference in religious opinion» supplied the «place [of a] *censor morum*», since the «teachers [of] every [religious] sect» ultimately «inculcate[d]», though through a variety of different precepts, the «same moral principles» expressing the inherent sociability of mankind ([117]).

Because of this teeming plurality of sovereign consciences in matters of faith, Jefferson wondered, back in his *Outline*, whether uniformity of belief could be attainable or even desirable ([118]). He answered both questions in the negative. Echoing the highest voices of European Humanism and their reading of the scholastic revolution in jurisprudence that has been described by Stephan Kuttner in his *Harmony From*

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[116] Hans R. GUGGISBERG, Frank LESTRINGANT, Jean-Claude MARGOLIN, Préface, in *La liberté de conscience (XVI^e^-XVII^e^ siècles)*, cit., p. 9.

[117] Thomas JEFFERSON, *Outline of Argument*, in Bernhard FABIAN, *Jefferson's Notes of Virginia: The Genesis of Query XVII. The Different Religions Received into that State?,* cit., p. 130. Böckenförde has famously contended that the modern state rests on fountations it is not itself capable of guaranteeing. See Ernst-Wolfgang BÖCKENFÖRDE, *Staat, Gesellschaft, Freiheit, Studien zur Staatstheorie und zum Verfassungsrecht Inhalt*, Suhrkamp, Frankfurt am Main, 1976, p. 60 This claim appears perfectly consistent with Jefferson's perspective, given how he maintained that the beliefs supporting political bodies ultimately rested within the incoercibile consciences of its members.

[118] *Ibid*., pp. 129-130.

Dissonance ([119]), Jefferson aspired «a fondare la possibilità di un'unità di fede non nella forzata consonanza, ma nell'armonia che si produce per le dissonanze» ([120]). He strived for a unity of principle that, rather than dissolving each individuality, encompassed each of them into a higher order and, in the words of Shaftsbury that Jefferson approvingly transcribed in his notes, was able to produce from «these contrarieties» a more fulfilling «harmony» ([121]).

[119] Stephan KUTTNER, *Harmony from Dissonance. An Interpretation of Medieval Canon Law,* in *Wimmer Lecture*, vol. 10, 1956, pp. 1-26, now in ID., *The History of Ideas and Doctrines of Canon Law in the Middle Ages*, Variorum Reprints, London, 1980, pp. 1-16.
[120] Diego QUAGLIONI, *«Sans violence ny peine quelconque au port de salut», Il problema della libertà di coscienza nella «République» di Jean Bodin*, cit., p. 167.
[121] Thomas JEFFERSON, *Notes on Locke and Shaftesbury*, in *The Papers of Thomas Jefferson*, vol. 1, cit., pp. 548-549.

5

AN INTEGRATIVE CONCEPTION OF JURISPRUDENCE

4. Law's plurality

In the closing paragraph of the *Bill for Establishing Religious Freedom*, Jefferson pitted the transience of human laws against the perpetuity of natural rights. More specifically, he acknowledged that the freedom of conscience enshrined in the *Bill* had been enacted through an ordinary piece of legislation. As such, it remained within the power of the legislator to amend it or abrogate it altogether. Whereas an «Assembly, elected by the people for the ordinary purposes of legislation» could not «restrain», through the laws it passed, «the acts of succeeding Assemblies», natural rights outlasted the municipal laws enacting them ([1]). Thus, Jefferson concluded his *Bill* by having it declare that the rights it asserted belonged to «the natural rights of mankind» ([2]). As a consequence, any succeeding act repealing or narrowing «its operation» was to be considered void, as it integrated a violation of natural law ([3]).

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[1] Thomas JEFFERSON, *A Bill for Establishing Religious Freedom*, cit., p. 546.
[2] *Ibid*., pp. 546-547.
[3] *Ibid*., p. 547.

The words chosen by Jefferson to articulate the final disposition of the *Bill* suggest that, in his understanding of the American legal experience, law was never reduced to the simple positive enactments of municipal legislators, nor were rights ever held to be the mere expression of an entirely positive obligation. Following Azo, Braton had taught to generations of jurists, and quite possibly to Jefferson himself, who had first read his *De legibus et consuetudinibus Angliae* as a young student ([4]), that law lived in a variety of dimensions and could consequently be defined in several ways: «Ius […] pluribus modi dicitur» he had claimed ([5]). Jefferson did not disagree. He too maintained that rights were the expression of a plurality of different laws, some regarded as higher and unalterable, others as lower and amendable, some consolidated by time and reason, others enacted by the force of a transient majority. And, while the commonwealth was indeed one of the principle sources of the law, Jefferson certainly did not regard it as the exclusive one, for he believed that its most fundamental laws were meant to incorporate and secure the rights proclaimed by a transcendent source, be it nature, or as he further claimed, *nature's God* ([6]).

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[4] See David N. MAYER, *The Constitutional Thought of Thomas Jefferson, cit., p. 10.*

[5] See Henry BRACTON, *De legibus et consuetudinibus Angliae, On the Laws and Customs of England*, cit., p. 26. See also Kenneth PENNINGTON, *The Prince and the Law, 1200-1600. Sovereignty and Rights in the Western Legal Tradition*, cit., p. 122.

[6] See also Thomas JEFFERSON, *letter to Francis Gilmer*, *7 June 1816*, cit., p. 154: «Our legislators are not sufficiently apprised of the rightful limitations of their power: that their true office is to declare and enforce only our natural

This complexity of sources is of particular relevance for the interpreter of Jefferson's thought. It helps overcome those scholarly views that have regarded Jefferson's understanding of rights as confused or inconsistent, in so much as the claims he articulated were drawn from a plurality of different sources, rather than being based on a single, supposedly coherent, one, be it natural, historical, or positive. Such charge has been levied most forcefully by Stephen Conrad, according to whom Jefferson invoked «rights so vastly different in basic conceptualization that, taken as a whole», his doctrine «evince[d] ambivalence and ambiguity to the point of incoherence» ([7]). But where Conrad has seen incoherence, Jefferson appears to have articulated instead an integrative conception of jurisprudence ([8]). His overall doctrine maintained, in fact, that law was a combination of «moral principles derived from reason and conscience», «historically developing» codes of mores, and bodies of rules enacted as «separate and distinct from both morality and history» ([9]). Through the integration of its various sources alone could law actualize justice and give to each his due, thus fulfilling the «reciprocation of rights» without

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rights and duties and to take none of them from us». See, for a broader view on the issue, Pietro PIOVANI, *Giusnaturalismo ed etica moderna*, Laterza, Bari, 1961.

[7] Stephen A. CONRAD, *Putting Rights Talk in its Place. The Summary View Revisited*, cit., p. 269.

[8] See Harold J. BERMAN, *Towards an Integrative Jurisprudence: Politics, Morality, History*, in *California Law Review*, vol. 76, n. 4, 1988, pp. 779-801.

[9] *Ibid*., p. 780.

which law would merely be a set of «arbitrary rules of conduct, founded in force, and not in conscience» ([10]).

2. *Natural law*

While the American Revolution plunged the Founders in the midstream of European political thought, as they argued with the British over the question of sovereignty, their inquiry into the sources of power and the nature of its limitations compelled them to review the moral foundations of modern commonwealths and challenge any tyrannical use of power that disassociated the practice of government from the principles of honesty and justice, inscribed by nature into the hearts of men. So, it is hardly surprising that revolutionaries like John Adams and Thomas Jefferson conceived of sovereignty as the lawful exercise of supreme power.

However, no more than a century earlier, this relationship between morals and politics had been brought into question and severely contested by a number of authors well known to the founders and especially to Jefferson ([11]). Following Montaigne, many, like his pupil Charron, had begun to disregard honesty

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[10] Thomas JEFFERSON, *Notes on the State of Virginia*, cit., p. 142. See also Ari HELO, *Thomas Jefferson's Ethics and the Politics of Human Progress. The morality of a Slaveholder*, cit. p. 139.

[11] The political thought shaped by the wars of the sixteenth century is synthesized in Diego QUAGLIONI, *Il "secolo di ferro" e la nuova riflessione politica*, in Cesare VASOLI, *Le filosofie del Rinascimento*, Bruno Mondatori, Milano, 2002, pp. 326-349; and in Diego QUAGLIONI and Vittor Ivo COMPARATO, *Italy*, cit., pp. 55-101.

and justice as standards of political action ([12]). These moral principles had been shaken too greatly by the religious fanaticism and the civil turmoil that inflamed Europe in the aftermath of the Protestant Reformation to be still of any effectiveness. The political and religious universalism of the Middle Ages had been shattered in the clash of rival allegiances and creeds. And the moral foundation on which European societies had based their collective sense of security and order had been splintered. So, once the Wars of Religion spread through Europe, no law appeared firm enough not to be challenged and no principle high enough not to dragged into controversy. Although none seriously questioned the existence of a natural law, many argued it was beyond men's comprehension. Pascal, Montaigne, and even Bodin – who had incorporated justice in his notion of a republic ([13]) – acknowledged that no two authorities seemed to agree on questions of natural law, «car la justice & raison qu'on dit naturelle, n'est pas tousiours si claire qu'elle ne treuue des aduersaires: & bien souuent les plus grands Iurisconsultes s'y trouuent empeschés, & du tout contrarires en opinions» ([14]). Nor

[12] The political skepticism of the late sixteenth and early seventeenth century is examined in Anna Maria BATTISTA, *Nuove riflessioni su "Montaigne Politico"*, cit. pp. 801-848; Anna Maria BATTISTA, *Alle origini del pensiero politico libertino. Montaigne e Charron*, cit.

[13] See Margherita ISNARDI PARENTE, *Introduzione*, cit., pp. 64-69; Diego QUAGLIONI, *La giustizia nel Medioevo e nella prima età moderna*, cit., pp. 119-129.

[14] Jean BODIN, *Les six livres de la République*, cit., livre 3, chapitre 4, p. 416. See Diego QUAGLIONI, "*Assolutismo laico" e ricerca del diritto naturale*, in *Il pensiero politico*, vol. 25, n. 1, 1992, p. 101. For a discussion on similar remarks in Montaigne, Charron, and Pascal see Anna Maria BATTISTA, *Alle*

could history shed any light on the transcendent principles of a natural order. Despite Machiavelli arguing otherwise ([15]), Montaigne held that historical events established no clear precedent, but offered, to all who studied them, a disarming variety of manners and customs, so inconsistent with each other, no unitary set of principles or norms of conduct could be inferred from them. «Notamment aux affaires politiques, il y a un beau champ ouvert au bransle et à la contestation […]. Les discours de Machiavel, pour example, estoient assez solides pour le subject, si y a-il eu grand' aisance à les combattre : et ceux qui l'ont faict, n'ont pas laissé moins de facilité à combatre les leurs. Il s'y trouveroit tousjours à un tel argument, dequoy y fournir responces, dupliques, repliques, tripliques, quadrupliques, et ceste infinie contexture de debats, que nostre chicane a alongé tant qu'elle a peu en faveur des procez […] : les raisons n'y ayant guere autre fondement que l'experience, et la diversité des evenements humains, nous presentant infinis examples à toutes sortes de forme» ([16]). Thus, because of the

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origini del pensiero politico libertino. Montaigne e Charron, cit., pp. 133-169, and Renée KOGEL, *Pierre Charron*, Librairie Droz, Genève, 1972, p. 132.

[15] See Diego QUAGLIONI, *Machiavelli, the Prince and the Idea of Justice*, in *Italian Culture*, cit., pp. 110-121.

[16] Michel de MONTAIGNE, *Les Essais*. Édition établie par J. Balsamo, M. Magnien et C. Magnien-Simonin, book II, chapter 17, *De la presumption*, Gallimard, Paris, 2007, p. 694. See Anna Maria BATTISTA, *Nuove riflessioni su "Montaigne Politico"*, cit., pp. 833-834. Likewise, John Locke shared several of Montaigne's perplexities and, despite articulating a new idea of morality based on the Grotian persuasion that «principles absolutely necessary to hold society together» did exist, his prevailing attitude towards historical *exempla* of virtue and justice remained one of relativism and caution. «He that will carefully peruse the history of mankind, and look

absence of historical precedents and the remoteness of moral principles, the lawfulness of positive enactments could no longer depend on their consistency with a higher and firmer notion of justice. Government had been progressively disassociated from honesty, or rather *honestas*, and, as a result, the exercise of power seemed to be necessarily unchecked and arbitrary ([17]).

American constitutionalism could not have been conceived had the relationship between morals and politics not been previously mended or, even better, reconstituted on new grounds ([18]). In the *Prolegomena* to the *De iure belli ac pacis* Grotius

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abroad into the several tribes of men, and with indifferency survey their actions, will be able to satisfy himself that there is scarce that principle of morality to be named, or rule of virtue to be thought on (those only excepted that are absolutely necessary to hold society together, which commonly too are neglected betwixt distinct societies), which is not, somewhere or other, slighted and condemned by the general fashion of whole societies of men, governed by practical opinions and rules of living quite opposite the other». John LOCKE, *Essay Concerning Human Understanding*, book I, chapter 3, par. 10, *Men have contrary practical principles*, in ID., *The Works of John Locke in Ten Volumes*, vol. 1, Printed in London for Thomas Tegg; W. Sharpe and Son; G. Offor; G. and J. Robinson; J. Evans and Co.; Also R. Griffin and Co. Glasgow, And J. Coming, Dublin, 1823, reprinted by Scientia Verlag, Aalen, 1963, p. 42. See Paul HAZARD, *La crise de la conscience européenne (1680-1715)*, Boivin et Cie, Paris, 1935, English trans., *The Crisis of the European Mind 1680-1715*, New York Review of Books, New York, 2013, pp. 288-289. Locke's reception of Montaigne is discussed in Carlo Augusto VIANO, *John Locke: dal razionalismo all'illuminismo*, Einaudi, Turin, 1960, p. 339.

[17] The English repercussions of Continental skepticism are analyzed in: Charles H. McIlwain, *Whig Sovereignty and Real Sovereignty*, in ID., *Constitutionalism and the Changing World: Collected Papers*, The Macmillan Company, New York, 1939, pp. 63-64.

[18] In opening his *Commentaries on American Law*, James Kent will eventually claim that «We ought not […] to separate the science of public law from that of ethics, nor encourage the dangerous suggestion, that governments are not strictly bound by the obligations of truth, justice, and humanity, in relation to other powers, as they are in the management of their

had argued that man was naturally inclined to live in well-ordered societies, regulated «pro sui intellectus modo», according to his rational disposition and his capacity to discern right from wrong ([19]). In fact, not only did Grotius believe that natural law was self-evident, «Principia enim eius juris […] per se patent atque evidentia sunt», he also held that men could perceive its principles as clearly as they perceived the world through their outward senses, «ferme ad modum eorum quae sensibus externis precipimus» ([20]). This lesson was not lost on Jefferson, who paraphrased it in many of his writings and claimed that man's moral sense was as much part of his nature «as the sense of hearing, seeing, feeling» and considered it, in keeping with the Grotian moment of European jurisprudence, as «the true foundation of morality» ([21]).

Like any other sense, the moral one needed to be exercised and put into practice. Only by practicing virtue and emulating the great moral *exempla* provided by history or poetry could

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own local concerns». James KENT, *Commentaries on American Law*, vol. 1, part 1, chap. 1, *On the Foundation and History of the Law of Nations*, O. Halted, New York, 1826, re-printed by The Legal Classics Library, Birmingham (Alabama),1986, pp. 2-3.

[19] Hugo GROTIUS, *De jure belli ac pacis libris tres*, *in quibus ius naturae et gentium item iuris publici praecipua explicantur*, cit., p. 7. See Franco TODESCAN, *Le radici teologiche del giusnaturalismo laico*, vol. 1*, Il problema della secolarizzazione nel pensiero giuridico di Ugo Grozio*, cit., pp. 49-50.

[20] *Ibid*., p. 20.

[21] Thomas JEFFERSON to Peter Carr, 10 August 1787, in *The Paper of Thomas Jefferson*, vol. 12, *7August 1787 to 31 March 1788*, edited by Julian P. Boyd *et al.*, Princeton University Press, Princeton, 1955, p. 15. I have borrowed the expression from Diego QUAGLIONI, *Bodin e il "machiavellismo": «conversiones rerumpublicarum» e diritto di guerra*, in ID., *I limiti della sovranità. Il pensiero di Jean Bodin nella cultura politica e giuridica dell'età moderna*, Cedam, Padova, p. 139.

man apprehend the highest principles of justice ([22]). In this sense, Jefferson belonged to a current of thought running throughout Western history that maintained the superiority of moral agency over the abstract knowledge of the good. «L'azione è dunque molto di più del conoscere» would eventually write Giuseppe Capograssi in 1937, «l'azione è proprio la vita che si realizza nella profonda solidarietà delle sue posizioni e delle sue tendenze, è una parola che è detta da tutto lo spirito nella molteplicità delle sue forze e delle sue ricchezze. E appunto il conoscere come tale, il conoscere come fine di conoscere viene dopo l'agire ed ha per suo oggetto l'agire e non ha altro appoggio che l'agire: il conoscere è un agire per così dire impoverito, un agire, nel quale è rimasta viva e attiva solo la consapevolezza, con la quale cerca di fare la storia del drama a cui ha partecipato» ([23]).

However, neither Grotius nor Jefferson could ignore the variety of human customs or the apparent inconsistencies between different notions of virtue and justice held over time by men and societies. Grotius warned that, despite appearances to the contrary, natural law was unchanging, although the objects of its prescriptions could vary according to the circumstances: «cum revera non jus naturae mutetur, quod immutabile est, sed

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[22] See Ari HELO, *Thomas Jefferson's Ethics and the Politics of Human Progress. The Morality of a Slaveholder*, cit., pp. 87-90.
[23] Giuseppe CAPOGRASSI, *Il problema della scienza del diritto*, edited by Pietro Piovani, Giuffrè, Milano, 1962, pp. 144-145.

res de qua jus naturae constituit, quaeque mutationem recipt» ([24]).

David Hume provided an eloquent example of the interplay between fixed natural principles and their transient applications, that Jefferson transcribed in entry thirty-five of his *Literary Commonplace Book*, immediately after Bolingbroke's aforementioned silent paraphrase of Grotius. «The natural reason why marriage in certain degrees is prohibited by the civil laws and condemned by the moral sentiment[s] of all nations, is derived from men's care to preserve purity of manners; while they reflect, that if a commerce of love were authorized between the nearest relations, the frequent opportunities of intimate conversation, especially during early youth, would introduce an universal dissoluteness and corruption. But as the customs of countries vary considerably, and open [a]n intercourse more or less restrained, between different families or between the several members of the same family, so we find that the moral precept, varying with it's cause, is susceptible, without any inconvenience, of very different latitude in several ages and nations of the world» ([25]).

Late in life, Jefferson expanded on his early reading of Hume, Bolingbroke and Grotius in a letter written to John Adams on the 14th of October 1816. Rejecting the Hobbsean

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[24] Hugo GROTIUS, *De jure belli ac pacis libris tres*, *in quibus ius naturae et gentium item iuris publici praecipua explicantur*, cit., p. 36.
[25] David HUME, *The History of England from the Invasion of Julius Ceasar to the Revolution of 1688*, Joseph Ogle Robinson, London, 1833, p. 315, quoted in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, cit., pp. 38-39.

notion that justice was «founded on contract solely» and was therefore entirely disposable by the parties, Jefferson argued that justice belonged to the constitution of man. It was an instinct, an innate sense of morality, endowed to man by a «wise creator» who believed it necessary «in an animal destined to live in society». Most importantly, he contended, in direct opposition to European skepticism, that «the non-existence of justice [could] not to be inferred from the fact that the same act [was] deemed virtuous and right in one society, which [was] held vicious and wrong in another; because as the circumstances and opinions of different societies var[ied], so the acts which [might have done] them right or wrong must [have] var[ied] also: for virtue [did] not consist in the act [itself], but in the end it [was] to effect. If it [was] to effect the happiness of him to whom it [was] directed it [was] virtuous, while in a society under different circumstances and opinions the same act might [have produced] pain, and would [have been] vicious. The essence of virtue [was] in doing good to the others, while what [was] good [might have been] one thing in one society, and it's contrary in another» ([26]). In short, Jefferson condensed in this paragraph the comparative approach towards politics and history taught by Bodin, Montaigne, and Montesquieu, who insisted on the vagaries of municipal societies ([27]); as well as the seventeenth century

[26] Thomas JEFFERSON, *letter to John Adams*, *14 October 1816*, in *The Adams-Jefferson Letters. The Complete Correspondence between Thomas Jefferson and Abigail and John Adams,* cit., p. 492.
[27] See Diego QUAGLIONI, "*Assolutismo laico" e ricerca del diritto naturale*, in *Il pensiero politico*, cit., p. 100; Vincenzo PIANO MORTARI, *Il potere*

struggle to reconstitute the moral and religious foundation of positive laws, first attempted by Grotius in reaction to the feverish proselytism of the sixteenth century, that had inflamed Europe and dissolved its earlier belief system.

Such foundation rested firmly within man's conscience. So, even those «who [wrote] treatise on natural law, [could] only declare what their own moral sense & reason dictat[ed] in the several cases they state[d]». And «[s]uch of them as happened to have feelings & reason coincident with those of the wise & honest part of mankind» should have been, in Jefferson's opinion, «respected & quoted as witnesses of that is morally right or wrong in particular cases» ([28]). Thus, Jefferson incorporated within his doctrine the *a priori* and *a posteriori* demonstrations of natural law envisioned by Grotius ([29]), who Jefferson counted - along with «Pufendord, Wolf, & Vattel» - among the number of the most authoritative witnesses on questions of natural law. Whenever such authorities were in agreement, Jefferson considered they should be followed. But whenever they differed, «& they often differed» as Bodin had

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sovrano nella dottrina giuridica del secolo XVI, Liguori, Napoli, 1973, pp. 99-100; Vincenzo PIANO MORTARI, *Cinquecento giuridico francese. Lineamenti generali*, Liguori, Napoli, 1990, pp. 322, 325; Catherine LARRÈRE, *Montesquieu: l'éclipse de la souveraineté*, cit., pp. 201-202.

[28] Thomas JEFFERSON, *Opinion on the Treaties with France*, cit., p. 613.

[29] Hugo GROTIUS, *De jure belli ac pacis libris tres*, *in quibus ius naturae et gentium item iuris publici praecipua explicantur*, cit., pp. 5-6. See Franco TODESCAN, *Le radici teologiche del giusnaturalismo laico*, vol. 1*, Il problema della secolarizzazione nel pensiero giuridico di Ugo Grozio*, cit., p. 31.

previously noticed, men could only «appeal to [their] own feelings and reason to decide between them» ([30]).

So, if pursuing justice meant fulfilling man's inherent social disposition and effecting the happiness of others, the variety of manners and customs, rather than undermining the existence of a unitary principle of morality, proved how man was naturally inclined to give to each his own. In other words, by assuming «love of others» as the basis of morality ([31]), Jefferson paraphrased and translated in the language of the day the ancient Roman law principle, transcribed by Bracton in his *De legibus et consuetudinibus Angliae*, according to which *iustitia est constans et perpetua voluntas ius suum cuique tribuens* ([32]).

Not unlike Domat ([33]), Jefferson believed it was the heart who directed man's moral actions, for nature «hath implanted» *in scrinio pectoris* «in our breasts a love of others» ([34]). The «feelings of sympathy, of benevolence, of gratitude, of justice, of love, of friendship», in one word, of morality were its

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[30] Thomas JEFFERSON, *Opinion on the Treaties with France*, cit., p. 613.
[31] Thomas JEFFERSON, *letter to Thomas Law*, *13 June 1814*, in *The Papers of Thomas Jefferson*, Retirement Series, vol. 7, *November 1813 to September 1814*, edited by J. Jefferson Looney *et al*. Princeton University Press, Princeton, 2010, p. 414. See Maurizio VALSANIA, *Nature's Man. Thomas Jefferson's Philosophical Anthropology*, cit., pp. 51-58, 102-104.
[32] Henry de BRACTON, *De Legibus et Consuetudinibus Angliae*, cit., p. 23.
[33] See Franco TODESCAN, *Le radici teologiche del giusnaturalismo laico*, II, *Il problema della secolarizzazione nel pensiero di Jean Domat*, Giuffrè, Milano, 1987, especially p. 17.
[34] Thomas JEFFERSON, *letter to Thomas Law*, *13 June 1814*, in *The Papers of Thomas Jefferson*, cit., p. 414.

purview ([35]). And living according to this sentiment of morality was the foundation of an honest conduct.

Peter Onuf and Ari Helo have aptly suggested that «Jefferson's understanding of moral duties was compatible with the Ciceronean notion of […] honesty» ([36]), which strongly influenced Grotius and his neo-stoic refutation of utilitarian conceptions of justice and morality ([37]). Within this Ciceronian tradition, *honestas* had been understood as the obligation to willfully maintain personal and political duties. Hence, the

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[35] Thomas JEFFERSON, *letter to Maria Cosway*, *12 October 1786*, in *The Papers of Thomas Jefferson*, vol. 10, *22 June to 31 December 1786*, edited by Julian P. Boyd *et al.*, Princeton University Press, Princeton, 1954, p. 450.

[36] Peter S. ONUF and Ari HELO, *Jefferson, Morality, and the Problem of Slavery*, in Peter S. ONUF, *The Mind of Thomas Jefferso*n, University of Virginia Press, Charlottesville, 2007, p. 254.

[37] See Diego QUAGLIONI, *La giustizia nel Medioevo e nella prima età moderna*, cit., p. 137. The complex relationship between Grotius and Ciceronian soicism has recently been at the center of Banjamin STRAUMANN, *Roman Law in the State of Nature. The Classical Foundations of hugo Grotius' Natural Law*, Cambridge University Press, 2015, see especially pp. 37-50. Straumann contends that Grotius engaged in a close reading of Ciceronian texts and adopted the Cicerionian brand of stoicism. Moreover, he downplays the influence exercised by other sources. In this sene, perhaps, Michel Villey's view would appear to be more balanced and more attentive to the theological implications of the legal doctrine articulated by Gortius. See Michel VILLEY, *La formation de la pensée juridique moderne*, PUF, Paris, 1968, p. 605: «Synthèse à la mode érasmienne de Cicéron et de l'Évangile. Parce que seul peut refaire l'unité de l'Église chrétienne déchirée, un christianisme simplifié et réinterprété à l'aide de la raison stoïcienne, tout en se voulant évangélique : mais que dominent en fait la raison et la morale stoïcienne». other sources are Honesty was the foundation of natural law according to James Kent as well, who recalled how «[…] Cicero vindicated the truth, and inculcated the value of the precepts, that nothing was truly useful which was not honest». And thereafter added: «In the latter ages of the Roman empire, when their municipal law became highly cultivated, and adorned by philosophy and science, the law of nations was recognised as part of the natural reason of mankind. *Quod vero naturalis ratio inter omnes homines constituit, id apud omnes gentes peraeque custoditur, vocatur que jus gentium, quasi quo jure omnes gentes utuntur*». James KENT, *Commentaries on American Law*, vol. 1, cit., p. 7.

masters of the *ius commune* had interpreted the moral obligation of the sovereign to act honestly as his duty to act within the rule of law ([38]). The laws emanating from the prince, therefore, could only be conceived as a *sanctio sancta, jubens honesta et prohibens contraria* ([39]). This principle had penetrated into the English legal tradition, first of all, through Bracton, who quoted the relevant passage of Azo's *Summa* in his *De legibus et consuetudinibus Angliae* ([40]), and subsequently through Fortescue and Coke, who both recalled Bracton's earlier allegation ([41]).

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[38] Ennio CORTESE, *Il problema della sovranità nel pensiero giuridico medievale*cit., p. 147.

[39] The first formulation of this principle may be read in: M. Tullius CICERO, *De Legibus*, book 1, in ID., *De Re Publica, De Legibus, Cato Maior De Senectute, Laelius De Amicitia*, edited by J.G.F. Powell, Oxford Classical Texts, Oxford, 2006, p. 166: « lex est ratio summa, insita in natura, quae iubet ea quae facienda sunt, prohibetque contraria».

[40] Henry de BRACTON, *De Legibus et Consuetudinibus Angliae*, vol. 2, *Introductio*, *Quid sit lex et quid consuetudo*, cit., p. 22: «*Et licet largissime dicatur lex omne quod legitur, tamen specialiter significat sanctionem iustam, iubentem honesta, prohibentem contraria*». Bracton is paraphrasing Azo, *Summa Codicis, De legibus et consuetudinibus principis C.1.14*: «*Lex autem ponitur quandoque stricte quandoque large, ut cum ponitur stricte pro statuto populi Romani et lex est hoc quod dicitur […] Lex est commune praeceptum virorum prudentium consultum […] Quandoque ponitur pro rationabili large omni statuto. Vnde et dicitur lex est sanctio sancta, iubens honesta prohibens contraria. Et ita regula est iustorum et iniustorum, ut dicitur in translatione greci, ut ff. eodem l.ii (Dig. 1.3.2)*» quoted in Kenneth PENNINGTON, *Lex Naturalis and Ius Naturale*, in *Crossing Boundaries at Medieval Universities*, edited by Spencer E. Young, Brill, Leiden and Boston, 2011, p. 232.

[41] John FORTESCUE, *De Laudis Legum Angliae*, edited and translated with introduction and notes by S.B. Chrimes, Cap. 3, Cambridge University Press, Cambridge, 1949, pp. 6-9; Edward COKE, *The Second part of the Institutes of the Laws of England, Containing the Exposition of Many Ancient, and Other Statutes*, *Statut. De Asportatis Religiosorum, Editum Anno 35 Edw. 1. Apud Carliolen*, Printed by Rawlins, for Thomas Basset at the Georg near St. Dunstan's Church in Fleet-Street, London, 1681, p. 587. The principale is also recalled by Algernon SIDNEY, in his *Discourses on Governmen*t, chap. 3,

It is hard not to imagine that Jefferson had in mind this specific tradition while arguing in the *Summary View of the Rights of British America* that «[t]he whole art of government consists in the art of being honest» ([42]), or when, later in life, writing to Adams he claimed: «[t]his I hope will be age of experiments in government, and that their basis will be founded on principles of honesty, not mere force» ([43]). True, Jefferson retained Montaigne's understanding of the law ([44]), for he believed that laws were «obligatory» in so much as they enacted the «will of the nation», rather than the *iura naturalia* ([45]). Nevertheless, he also acknowledged that municipal laws had full and unlimited power only over morally indifferent matters ([46]), beyond which their authority necessarily yielded to the one of natural law ([47]). Hence, Jefferson could conclude his *Bill*

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sect. xxi, *It cannot be for the good of the people, that the magistrate have a power above the law: and he is not a magistrate, who has not his power by law*.

[42] Thomas JEFFERSON, *Draft Instructions to the Virginia Delegates in the Continental Congress (MS Text of A Summary View, &c.)*, cit., p. 134.

[43] Thomas JEFFERSON, *letter to John Adams*, *28 February 1796*, in *The Complete Correspondence between Thomas Jefferson and Abigail and John Adams,* cit., p. 260.

[44] See Diego QUAGLIONI, *La giustizia nel Medioevo e nella prima età moderna*, cit., pp. 131-133.

[45] Thomas JEFFERSON, *letter to Edmund Randolph*, *18 August 1799*, in *The Papers of Thomas Jefferson*, vol. 31, *1 February 1799 to 31 May 1800*, edited by Barbara B. Oberg *et al.*, Princeton University Press, Princeton, 2004, p. 169.

[46] This idea is largely present in Locke, cf. Luisa SIMONUTTI, *La souveraineté comme problème chez Locke*, cit., pp.141-158.

[47] See Edward S. CORWIN, *The "Higher Law" Background of American Constitutional Law*, in *Harvard Law Review*, vol. 42, n. 2, 1928, pp. 152-153. The «Ambiguity of American law» is further discussed in Gordon S. WOOD, *The Creation of the American Republic, 1776-1787*, cit., pp. 291-305. Jefferson expressly acknowledged that sovereignty, or in his words «[i]ndependence», could be «trusted nowhere but with the people in mass».

Establishing Religious Freedom by reacting against the political skepticism that had ensued in European thought in the aftermath of the great religious wars of the sixteenth century.

3. Municipal law

Jefferson's *Bill for Establishing Religious Freed*om was not an isolated piece of legislation, but belonged to a larger project of revision and consolidation of the law applied in Virginia, that had been undertaken by a committee of the General Assembly, set up between October and November 1776 to adapt the existing body of laws ordering Virginia's society to the principles proclaimed by the *Declaration of Independence* and enshrined in the newly adopted Constitution that had been enacted by the commonwealth only three months earlier ([48]). The committee, had the power to report to the whole Assembly proposed legislation, without having the power to approve it

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«They are inherently independent of all but moral law». Thomas Jefferson to Spencer Roane, 6 September 1819, in Thomas JEFFERSON, *Thomas Jefferson, Writings*, cit., p. 1426. Jefferson trusted only the people with independence since he believed they were «the only safe, because the only honest, depository of public rights» Thomas Jefferson to Adamantinos Koreas, 31 October 1823, quoted in Peter S. ONUF, *Ancients, Moderns, and the Progress of Mankind*, in *Thomas Jefferson, the Classical World, and Early America*, edited by Peter S. Onuf and Nicholas P. Cole, University of Virginia Press, Charlottesville and London, 2011, p. 45.

[48] For a brief but precise reconstruction of the reform put in place by the *Committee of Revisors* see the editorial note entitled *The Revisal of the Laws 1776-1786*, published in *The Papers of Thomas Jefferson*, vol. 2, cit., 1950, pp. 305-324; and Edward DOUMBALD, *Thomas Jefferson and the Law*, cit., pp. 132-143.

autonomously ([49]). So, of the 126 different pieces of legislation that the committee submitted separately to the Assembly, only some were approved immediately. Others were adopted after a long and tortuous parliamentary debate, as was the case regarding the *Bill for Establishing Religious Freedom*. While others still remained dead letter, as happened for instance to Jefferson's *Bill for Proportioning Crimes and Punishments,* that despite long and heated discussions, protracted for several years, end up never being adopted ([50]).

This effort to revise the laws of Virginia, which did not lead to a proper codification, but rather to the compilation of select statutory reforms, that were meant to amend only marginally the continuity of pre-existing common law, has not been read by current legal historiography in relation to the contemporary advancement of codification, prompted throughout continental Europe, by a wide array of voices who found in Cesare Beccaria (1738 – 1794) one of their main references ([51]). Yet, the question of codification was openly discussed by the members of this committee, right from the very first of their meetings. Indeed, the choice of whether or not to codify a new legal order

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[49] See Julian P. BOYD, *The Revisal of the Laws 1776-1786*, cit., p. 314: «Under the Act [for the revision of laws wrote by Jefferson in 1776] the Committee had "full power and authority to revise, alter, amend, repeal, or introduce all or any" of the laws of the state, though the works of the Committee would not have the force of law, in any of its parts until duly passed by the General Assembly».

[50] See Edward DOUMBALD, *Thomas Jefferson and the Law*, cit., pp. 132-143.

[51] See Giovanni TARELLO, *Storia della cultura giuridica moderna*, Il Mulino, Bologna, 2010, p. 470.

was the chief question that the committee had to address before it could embark on any revision of existing laws.

In two reports written between 1809 and 1821, Jefferson reconstructed the work of the committee thusly. According to his testimony, «at the first and only meeting of whole committee (of 5 persons) the question was discussed whether we would attempt to reduce the whole body of the law into a code, the text of which should become the law of the land» ([52]). Jefferson's account did not relate why Pendelton had argued, along with Lee, in favor of repealing all existing law («abolish the whole existing system of laws») and establishing an entirely new code instead («and prepare a new and complete Institute»), but rather detailed the reservations that induce the committee to preserve «[...] the general system, and only modify it to the present state of things» ([53]).

These reservations belonged to two sets of concerns: the misuse of power, on the one hand, and the uncertainty of the law on the other.

The first concern may be easily summarized and, although it suggests a generally conservative attitude of the American Revolution (in itself worthy of note), as well as a propensity for a comprehensive reform of the law, it does not bear particularly rich legal implications. A total repeal of existing law and its replacement with a newly drafted code would have been,

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[52] From Thomas Jefferson's letter to Skelton Jones of July 28, 1809, in Edward DUMBAULD, *Thomas Jefferson and the Law,* cit., p. 134

[53] Thomas JEFFERSON, *Autobiography, 1743-1790*, in ID., *Thomas Jefferson, Writings*, cit., p. 37.

according to Jefferson, «a bold measure», «probably far beyond the views of the legislature», more prone to a gradual and selective reform of the legal system ([54]). It would have been, in short, a task well beyond the mandate given to the Committee by the Assembly and so a task of dubious legitimacy.

The second concern was instead conceptually more complex and if, on the one hand, it fully reflected the cultural climate of the 18th century, largely concerned with the certainty of legal obligations, on the other it reversed one of the most characteristic assumptions of the time ([55]). According to Jefferson, the codification of the law would be fraught with uncertainty and, because of this, should not be undertaken. The adoption of a new code would not only have forced the repeal of pre-existing statutory law, it would have by necessity diminished the relevancy of previous case-law and scholarship. Hence, the reader of the new codification would have found himself devoid of any authoritative guide and could have only relied on a literal interpretation of the depositions, that would soon have revealed itself compromised by the inherent vagueness of language. Drafting a new code, or as Jefferson put it in 1809, composing «a new Institute like those of Justinian and Bracton, or that of Blackstone, which was the model proposed by Mr. Pendelton, would [have reduced law to a text]; and when reduced to a text, every word of that text, from the

[54] *Ibid*., p. 38.
[55] On the 18th century debate over codification see Pio CARONI, *Saggi sulla storia della codificazione*, Giuffrè, Milano, 1998.

imperfection of human language, and it's [*sic*] incompetence to express directly every shade of idea, would [have] become a subject of question & chicanery until settled by repeated adjudication» ([56]). This, Jefferson concluded, «would involve us for ages in litigation, and render property uncertain until, like the statutes of old, every word had been tried, and settled by numerous decisions, and by new volumes of reports & commentaries» ([57]).

Jefferson was adamant in opposing the reduction of the law to a single normative or dogmatic text. Not only did he reject codification, but he was truly skeptical of any attempt to offer a systematic and supposedly exhaustive account of the law. As Edward Dumbauld noted, Jefferson believed that excessive dependence upon the Commentaries [of Blackstone] as the staple of legal education resulted in superficiality» ([58]). «A student finds there a smattering of everything», he wrote to a correspondent in 1812, «and his indolence easily persuades him that if he understands that book, he is master of the whole body of the law» ([59]). Conversely, to appreciate the law in all its complexity and distinguish its effects according to its sources, it was indeed necessary to scour «the deep and rich mines» of Coke and Littleton as well as the complex stratification of

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[56] Thomas JEFFERSON, *Autobiography, 1743-1790*, in ID., *Thomas Jefferson, Writings*, cit., p. 38.
[57] *Ibid*.
[58] Edward DOUMBALD, *Thomas Jefferson and the Law*, cit., p. 9.
[59] Thomas JEFFERSON, *letter to John Tyler*, *17 June 1812*, in *The Papers of Thomas Jefferson*, Retirement Series, vol. 5, *1 May 1812 to 10 March 1813*, edited by J. Jefferson Looney *et al*., Princeton University Press, Princeton, 2008, p. 135.

traditional authorities that constituted a legal system, without pretending to summarize and exhaust in any authoritative canon «the real fountains of the law» ([60]).

Such appreciation for the inherent historicity of law and the plurality of its sources belonged to Jefferson's earliest understanding of the legal science. Among the first extracts he transcribed in his *Legal Commonplace Book* were several extensive passaged taken from Henry Home, Lord Kames's (1696 – 1782) *Historical Law Tracts* ([61]). In the *Preface* to his collection of essays, Kames had, in fact, admonished his readers that law could become a «rational study» only when «traced historically» and had then proceeded to quote himself an extensive passage taken from Boligbroke's *Letters on the Use of History*, a collection of critical essays reviewing the historiographical doctrines of Machiavelli, Guicciardini, Davila, La Mothe Le Vayer, Montainge, and finally of Bodin and his *Methodus ad facilem historiarum cognitionem*. ([62]).

Jefferson put this lesson in practice while drafting his *Bill for Proportioning Crimes and Punishments* ([63]). Along the margins of his draft, in fact, he compiled extensive annotations, commenting on the provisions and referring to a variety of sources drawn from the remaining fragments of Saxon laws, pre-existing English statues, principles and maxims of the

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[60] *Ibid*.
[61] See Henry Home, Lord KAMES, *Historical Law Tracts*, Edimburgh, 1758.
[62] *Ibid*., p. v.
[63] Thomas JEFFERSON, *A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capita*l, in The Papers of Thomas Jefferson, vol. 2, cit., pp. 492-507.

common law, and contemporary scholarship, with particular emphasis on the works of Montesquieu, Pufendorf, and Beccaria. This wide breadth of historical and authoritative references exemplifies Jefferson's appreciation for Kames and his effort to retrace the common legal core «of modern European nations» ([64]). Kames sought to find it in the feudal background of European societies and dedicated much of his *Preface*, and of the following tracts, to urge readers to study feudal law. Jefferson did indeed spend much of his early education studying it, as testified by numerous entries in his *Legal Commonplace Book*, among which one stand out for a direct reference to the *Libri feudorum* ([65]). But what he mostly retained from all this was the persuasion that the mutually binding obligation between lord and vassal, or in other words the *fides* they pledged each other, provided with legal substance their relationship and infused it with what Kames had called «the true sprit of the law» ([66]). This spirit constituted the fundamental political obligation between those who governed and those who were governed that Jefferson had attempted to repair when claiming that «whenever any form of government» became «destructive to» the principles of life, liberty, and the

[64] Henry Home, Lord KAMES, *Historical Law Tracts*, cit., p. VII.
[65] The numerous passages in Jefferson's *Legal Commonplace Book* dedicated to feudal law have yet to be studied systematically, and no particular appreciation has for now been given to Jefferson's suggestive marginal reference to the *Libri feudorum*, which he annotated at the foot of a long extract drawn from Dalrymple's *Essay Towards a General History of Feudal Property in Great Britain*. See Thomas JEFFERSON, *The Commonplace Book of Thomas Jefferson. A Repertory of his ideas on Government*, cit., p. 153.
[66] Henry Home, Lord KAMES, *Historical Law Tracts*, cit., p. XIII.

pursuit of happiness, it was «the right of the people to alter or abolish it, & to institute a new government, laying it's foundation on such principles, & organizing it's powers in such forms, as to them shall seem most likely to effect their safety & happiness» ([67]).

Principles, thus, were key in Jefferson's understanding of law, especially of municipal law. Jefferson's several legislative reforms – his *Bills* on citizenship, religious freedom, criminal law, and education to recall but a few – were aimed overall at introducing within Virginia's legal system principles that had been left out of the newly adopted constitution. As noted by Julian Boyd, the «failure of the Virginia Convention of 1776 to adopt» Jefferson's «proposed Constitution undoubtedly emphasized the need he felt for reform of the laws. For his Constitution had included some provisions that he later incorporated in legislative bills that he thought would form 'a system by which every fiber would be eradicated of ancient or future aristocracy; and a foundation laid for government truly republican'» ([68]).

Though maintaining the distinction between ordinary and constitutional law, Jefferson claimed that if indeed it could be up to ordinary law to declare those substantial principles of constitutional law that had been left out of the constitution itself, then the legislation enacting them should have been written in a

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[67] Thomsa JEFFERSON, *The Declaration of Independence*, in *The Papers of Thomas Jefferson*, vol. 1, cit., pp. 423-424.
[68] Julin P. BOYD, *The Revisal of the Laws, 1776-1786*, in *The Papers of Thomas Jefferson*, vol. 2, cit., p. 305.

broad language, aimed specifically at transposing their main provisions into positive law, without clouding their effects by an overly detailed regulation. According to Jefferson it was best, in such acts, «to lay down principles only» and leave more specific dispositions to separate pieces of legislations ([69]). In this way, he believed that the positive enactment of fundamental principles could have been sheltered from the vicious circle of rapid obsolescence and repeated amendment that would have inevitably concerned any legislative act too focused on articulating specific and detailed provisions. In other words, only a legislation meant to fix principle could hope to stand the test of time.

This distinction between detailed regulation, broad legislation fixing fundamental principles, and constitutional law suggest Jefferson's appreciation for the complexity of positive law and the variety of its sources and effects. Not only was law intrinsically multi-dimensional, but so too was positive law, in so much as it incorporated principles of natural law or was assisted by specific guarantees that rendered it «perpetual», «unalterable», and « transcendent » over the ordinary powers of legislation ([70]).

Jefferson never denied that positive law was free to regulate morally indifferent subjects as it pleased. But he did repeatedly stress that the ultimate purpose of government was the

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[69] Thomas JEFFERSON, *A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital*, cit., p. 495.
[70] Thomas JEFFERSON, *Notes on the State of Virginia*, cit., p. 122.

protection of the fundamental rights enjoyed by the people. Hence, he noted in one of his marginal comments to the *Bill for Proportioning Crimes and Punishments*, it was «wicked», *i.e.* malevolent and therefore tyrannical, «in a legislator to frame laws in opposition to the laws of nature», but it was, even more so, «vain», since those rights constituted the perennial check on human power ([71]).

At the end of the day, Jeffersonian constitutionalism strived to substantiate those checkes and integrate the several strands of the Western legal tradition into a new worldview. It did so through a continuous engagement with the legacy of Western jurisprudence, which shaped Jefferson's legal education throughout his lifetime and prompted him to digest contemporary political experience «attraverso tutto lo scibile della terra» ([72]).

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[71] Thomas JEFFERSON, *A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital*, cit., p. 502.

[72] Cesare PAVESE, *Avere una tradizione è meno che nulla, è solo cercandola che si può viverla*, in ID., *La letteratura americana e altri saggi*, Einaudi, Torino, 1990, p. 88.

Bibliography

Primary sources.

1. *Thomas Jefferson:*

GILREATH, James, and WILSON, Douglas L., (eds.), *Thomas Jefferson's Library: A Catalogue with Entries in his own Order*, The Library of Congress, Washington, D.C., 1989.

JEFFERSON, Thomas, *Letters of Thomas Jefferson Concerning Philology and the Classics*, edited by Thomas Fitzhugh, University of Virginia, Charlottesville, 1919.

JEFFERSON, Thomas, *The Commonplace Book of Thomas Jefferson. A Repertory of his ideas on Government*, edited by Gilbert Chinard, The John Hopkins Press, Baltimore, 1926.

JEFFERSON, Thomas, *Notes on the State of Virginia*, edited by William Peden, The University of North Carolina Press, Chapel Hill and London, 1954, re-issued in 1982.

JEFFERSON, Thomas, *Jefferson's Extracts from the Gospels, «The Philosophy of Jesus» and «The Life and Morals of Jesus»*, edited by Dickinson W. Adams et al., Princeton University Press, Princeton, 1983.

JEFFERSON, Thomas, *Thomas Jefferson, Writings*, edited by Merrill D. Peterson, The Library of America, New York, 1984.

JEFFERSON, Thomas, *Jefferson's Literary Commonplace Book*, edited by Dougals L. Wilson, Princeton University Press, Princeton, 1989.

SOWERBY, Emily Millicent, (ed.), *Catalogue of the Library of Thomas Jefferson*, voll. I- V, The Library of Congress, Washington, D.C., 1952-1959.

The Adams-Jefferson Letters. The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams, edited by Lester J. Cappon, The University of North Carolina Press, Chapel Hill, 1956, re-published in 1987.

The Papers of Thomas Jefferson, voll. 1-42, edited by Julian P. Boyd *et al*., Princeton University Press, Princeton, 1950-2016.

The Papers of Thomas Jefferson, Retirement Series, voll. 1-12, edited by J. Jefferson Looney *et al*., Princeton University Press, Princeton, 2005-2016.

The Republic of Letters, The Correspondence between Thomas Jefferson and James Madison, 1776-1826, voll.1-3, edited by James Morton Smith, W.W. Norton & Company, New York, 1995.

2. Jefferson's books:

BODIN, Jean, *Les Six Livres de la Republique*, a Paris: Chez Iacques du Puys, Paris, 1580, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C.

ERASMUS, Desiderius, *Adagiorum epitome, Ex novissima Chiliadum ceu, ipsorum fontium recognitione excerpta, & multis in locis jam longe accuratius, quam ante emendata. Cum triplici Indice, Authorum, Locorum & Proverbiorum locupletissimo*, Amstelodami: Apud Joannem Janssonium, 1663, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress.

MACHIAVELLI, Niccolò, *Princeps, Ex Sylvestri Telii Fulginatis traductione diligenter emendata. Adiecta sunt eiusdem Argumenti aliorum quorundam contra Machiavellum Scripta de potestate & officio Principium contra Tyrannos*, [n.p.], 1589, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C.

MONTESQUIEU, Charles-Louis de Secondat de, *De l'esprit des loix*, in *Œuvres de Montesquieu, nouvelle édition, revue, corrigée & considérablement augmentée par l'auteur*, tome premier, a Londres: Chez Nourse, 1767, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C.

PATRICK, Simon, *A Preface Giving Some Account of the Author and of the Work*, in Hugo GROTIUS, *The Truth of the Christian Religion, Translated into English with the Addition of a Seventh Book Against the Present Roman Church*, London: Printed by J. L. for Luke Meredith, 1694, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C.

PUFENDORF, Samuel, *Le droit de la nature et des gens, ou Systeme general des principes le plus importans de la morale, de la jurisprudence, et de la politique, traduit du Latin par Jean Barbeyrac*, voll. 1-2, a Londres: Chez Jean Nours, 1740, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C.

SVETONIUS, *De XII Caesaribus*, in ID., *Opera omnia*, Londini: E Typographeo Mariae Matthews, 1718, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C.

VATTEL, Emmerich de, *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite & aux affaires des Nations & des Souverains*, a Amsterdam: Chez E. Van Harrevelt, 1775, Thomas Jefferson Collection, Rare Books and Special Collections Division of the Library of Congress, Washington, D.C.

3. Other sources:

ALIGHIERI, Dante, *Monarchia*, edited by Diego Quaglioni, in ID., *Opere*, vol. 2, published under the direction of Marco Santagata, Mondadori, Milano, 2014.

ARISTOTELE, *A Treatise on Government*, translated by William Ellis, London, 1776.

BARTOLUS A SAXOFERRATO, *Tractatus de tyranno*, in Diego QUAGLIONI, *Politica e diritto nel trecento italiano. Il "De tyranno" di Bartolo da Sassoferrato (1314-1357). Con l'edizione critica dei trattati "De Guelphis et Gebellinis", "De regimine civitatis" e "De tyranno"*, Olschki, Firenze, 1983, pp. 171-213.

BAYLE, Pierre, *Dissertation concernant le livre d'Etienne Junius Brutus, imprimé l'an 1579*, in ID. *Dictionnarie politique et critique*, vol. IV, a Basel: Chez Jean Luois Brandmuller, 1741, pp. 569-577, Special Collection, Società Letteraria di Verona.

BLACKBURNE, Francis, *Memoirs of Thomas Hollis*, London, 1780.

BRACTON, Henry, *De legibus et consuetidinibus Angliae*, Londini: Apud Richardum Tottellum, 1569, Special Collection, Edward Bennett Williams Law Library, Georgetown University Law Center, Washington, D.C.

BRACTON, Henry, *De Legibus et Consuetudinibus Angliae, On the Laws and Customs of England*, edited by George E. Woodbine and translated with revisions and notes by Samuel E. Thorne, Harvard University Press, Cambridge, 1968.

COKE, Edward sir, *Calvin's case*, in *English Reports*, vol. 77, *King's Bench Division*, 6, *Containing Coke, Parts 5 to 13*, Stevens & Sons, London, 1907, pp. 377-411.

CONDORCET, Nicolas de, *Bibliothèque de l'homme public, ou analyse raisonnée des principaux ouvrages François et étrangers, sur la Politique en général, la Législation, les Finances, la Police, l'Agriculture, & le Commerce en particulier, & sur le Droit naturel & public*, Tome premier, a Paris: Chez Buisson, 1790.

CONDORCET, Nicolas de, *Outlines of an Historical View of the Progress of the Human Mind*, London: J. Johson, 1795.

ETIENNE JUNIUS BRUTUS, *Vindiciae contra tyrannos. Tradution française du 1581*, introduced and commented by Arlette Jouanna, André Turnon, Henri Weber, *et al*., Droz, Genève, 1979.

GROTIUS, Hugo, *De iure belli ac pacis libris tres, in quibus ius naturae et gentium item iuris publici praecipua explicantur*, edited by Bernardina J.A. De Kanter-Van Hettinga Tromp, Brill, Leiden, 1993, re-edited by Robert Feenstra and Caroline E. Persenaire, Scientia Verlag, Aalen, 1993.

HALE, Matthew, *The History of the Common Law of England*, The University of Chicago Press, Chicago, 1971.

HEGEL, Georg W.F., *Three Essays, 1793-1795. The Tübingen Essay, Berne Fragments, and The Life of Jesus*, edited by Peter Fuss and John Dobbins, University of Notre Dame Press, Notre Dame, 1984.

HENRY, Patrick, *Virginia Resolves*, in *Journals of the House of Burgessess of Virginia, 1761-1765*, edited by John Pendelton Kennedy, Richmond, 1907.

HUGO, Victor, *Les Misérables*, edited by Maurice Allem, Gallimard, Paris, 1951.

LAVIE, Jean-Charles de, *Abrégé de la République de Bodin*, Tome premier, a Londres: Chez Jean Nourse, 1755.

LOCKE, John, *Two Treatise of Government*, edited by Peter Laslett, Cambridgne University Press, Cambridge, 1988.

MACHIAVELLI, Niccolò, *Opere*, vol. 1, edited by Corrado Vivanti, Torino, Einaudi-Gallimard, 1997.

MADISON, JAMES, *The Paper of James Madison*, vol. 13, 20 January – 31 March 1791, edited by Charles F. Hobson and Robert A. Rutland, University Press of Virginia, Charlottesville, 1981.

MARTA, Giacomo Antonio, *Consilia doctoris Martae svmmi practici : in qvibvs omnes cavsae, qvae svis temporibus in controuersiam vocatae fuerunt, iudicio grauissimo definiuntur, et noua respondendi, & allegandi de iure methodus exhibetur*, Avgvstae Tavrinorvm: Apud HH. Io. Dominici Tarini, 1628, Special Collection, Robbins Collection in Religious and Civil Law, UC Berkeley School of Law, Berkeley, (CA).

MILTON, John, *Of Reformation Thouching Church Discipline in England: And the Causes that Hitherto Have Hindered It*, in ID., *Complete Prose Works of John Milton*, vol. 1, *1624-1642*, edited by Don M. Wolfe, Yale University Press, New Haven, 1953, pp. 514-617.

MILTON, John, John MILTON, *A Defence of the People pf England*, in *Complete Prose Works of John Milton*, vol. IV, *1650-1651*, part 1, edited by Don M. Wolfe, Yale University Press, New Haven, 1966, pp. 285-537.

MILTON, John, *The Tenure of Kings and Magistrates*, in *The Complete Works of John Milton*, vol. 6, *Vernacular Regicide and Republican Writings*, edited by Neil H. Keeble and Nicholas McDowell, Oxford University Press, Oxford, 2013, pp. 135-185.

MONTAIGNE, Michel de, *Les Essais*. Édition établie par J. Balsamo, M. Magnien et C. Magnien-Simonin, Gallimard, Paris, 2007.

PUFENDORF, Samuel, *De iure naturae et gentium libri octo*, vol. II, Francofvrti et Lipsiae, ex officina Knochio-Erlingeriana, 1759.

ROSENKRANZ, Karl, *Hegels Leben*, Duncker & Humbolt, Berlin, 1844, translated in Italian by Remo Bodei as *Vita di Hegel*, Bompiani, Milano, 2012.

ROUSSEAU, Jean-Jacques, *Du Contrat Social, ou Principes du droit politique*, in *Oeuvre Complètes*, vol. 3, edited by Robert Derathé, Gallimard, Paris, 1964, pp. 347-470.

SIDNEY, Algernon, *Discourses Concerning Government*, edited by Thomas G. West, Liberty Found, Indianapolis, 1996.

SIDNEY, Algernon, *Court Maxims*, Cambridge University Press, Cambridge, 1996.

STEINBECK, John, *The Grapes of Wrath*, The Wiking Press, New York, 1939, re-published by Penguin, London, 2006.

STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos, sive De Principis in Populum et Populi in Principe legitima potestate*, Edimburgi, 1579.

STEPHANUS JUNIUS BRUTUS, *Vindiciae Contra Tyrannos: or, Concerning the Legitimate power of a Prince over the People, and of the People over the Prince*, edited and translated by George Garnett, Cambridge University Press, Cambridge, 1994, re-issued in 2003.

TOCQUEVILLE, Alexis de, *De la démocratie en Amerique*, vol. 1, edited by Jacob Peter Mayer, Gallimard, Paris, 1961.

TOCQUEVILLE, Alexis de, *L'Ancien Régime et la Revolution*, edited by Jacob Peter Mayer, Gallimard, Paris, 1967.

Secondary sources.

ADAMS, William Howard, *The Paris Years of Thomas Jefferson*, Yale University Press, New Haven and London, 1997.

ACKERMAN, Bruce A., *Storrs Lectures: Discovering the Constitution*, in *Yale Law Journal*, vol. 93, n. 3, 1984, pp. 1013-1072.

ACKERMAN, Bruce A., *We The People*, vol. 1, *Foundations*, Harvard University Press, Cambridge, 1991.

AMAR, Akhil Reed, *America's Constitution: a Biography*, Random House, New York, 2005.

ARENDT, Hannah, *On Revolution*, The Viking Press, New York, 1963, re-published by Penguin, London, 1990.

ARENDT, Hannah, *What is Authority?* in ID., *Between Past and Future. Eight Exercises in Political Thought*, Viking Press, New York, 1961, re-issued by Penguin, New York, 2006, pp. 91-141.

ARMITAGE, David, *The Ideological Origins of the British Empire*, Cambridge University Press, 2000.

BATTISTA, Anna Maria, *Alle origini del pensiero politico libertino. Montaigne e Charron*, Giuffrè, Milano, 1966.

BATTISTA, Anna Maria, *Nuove riflessioni su «Montaigne Politico»*, in *Studi politici in onore di Luigi Firpo*, edited by Silvia Rota Ghibaudi and Franco Barcia, vol. 1, Ricerche sui secoli XIV-XVI, Franco Angeli, Milano, 1990, pp. 801-848.

BATTISTA, Anna Maria, *La «Germaina» di Tacito nella Francia illuminista*, in *Studi urbinati*, vol. 53, 1979, pp. 93-131, now republished with an introduction by Diego Quaglioni, by Quattroventi, Urbino, 1999.

BAILYN, Barnard, *The Ideological Origins of the American Revolution*, Harvard University Press, Cambridge and London, 1967, re-issued in 1992.

BEAR, Jr., James A., *Thomas Jefferson's Book-Marks*, Charlottesville, 1958, re-issued in 1993.

BECKER, Carl L., *The Declaration of Independence. A study in the History of Political Ideas*, Alfred A. Kopf, New York, 1953.

BENJAMIN, Walter, *Thesis on the Philosophy of History*, in ID., *Illuminations. Essays and Reflections*, edited and with an introduction by Hannah Arendt, Harcourt Brace Jovanovich, San Diego, 1968, re-issued by Schocken Books, New York, 2007, pp. 253-264.

BENNER, Erica, *Machiavelli's Ethics*, Princeton University Press, Princeton and Oxford, 2009.

BERMAN, Harold Joseph, *The Historical Background of American Law*, in *Talks on American Law: a Series of Broadcasts to Foreign Audiences by Members of the Harvard Law School Faculty*, edited by Harold J. Berman, Vintage Books, New York, 1961, pp. 3-17.

BERMAN, Harold Joseph, *Law and Revolution. The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge and London, 1983.

BERMAN, Harold J., *Toward an Integrative Jurisprudence: Politics, Morality, History*, in *California Law Review*, vol. 76, n. 4, 1988, pp. 779-801.

BERMAN, Harold Joseph, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, Harvard University Press, Cambridge and London, 2003.

BERMAN, Harold J., *The Historical Foundation of Law*, in *Emory Law Journal*, vol. 54, 2005, pp. 13-24.

BERNSTEIN, Richard B., *Thomas Jefferson*, Oxford University Press, New York, 2003.

BERNSTEIN, Richard B., *Thomas Jefferson and Constitutionalism*, in *A Companion to Thomas Jefferso*n, edited by Francis D. Cogliano, Wiley-Blakwell, Chichester, 2012 pp. 419-438.

BERTI, Enrico, *Le passioni tra Heidegger e Aristotele*, in *Bollettino della Società filosofica italiana*, vol. 206, 2012, pp. 23-29.

BIROCCHI, Italo, *Alla ricerca dell'ordine. Fonti e cultura giuridica nell'età moderna*, Giappichelli, Torino, 2002.

BLACK, Anthony, *Political Thought in Europe, 1250-1450*, Cambridge University Press, Cambridge, 1992.

BODEI, Remo, *La civetta e la talpa. Sistema ed epoca in Hegel*, Il Mulino, Bologna, 2014.

BOORSTINE, Daniel J., *The Lost World of Thomas Jefferson*, Beacon Press, Boston, 1948.

BOYD, Julian P., *The Disputed Authorship of the Declaration on the Causes and Necessity of Taking Up Arms, 1775*, in *Pennsylvania Magazine of History and Biography*, vol. 74, 1950, pp. 51-73.

BOYD, Julian P., *The Earth Belongs in Usufruct to the Living*, in *The Papers of Thomas Jefferson*, vol. 15, *27 March 1789 to 30 November 1789*, edited by Julian P. Boyd *et al*., Princeton University Press, Princeton, 1958, pp. 384-391.

BOYD, Julian P., *The Declaration of Independence. The Evolution of the text*, revised edition edited by Gerard W. Gawalt, The Library of Congress in association with the Thomas Jefferson Memorial Foundation Inc., University Press of New England, Hanover and London, 1999.

BRADBURN, Douglas, *The Citizenship Revolution: Politics and the Creation of the American Union, 1774-1804*, University of Virginia Press, Charlottesville and London, 2009.

BREWER, Holly, *Beyond Education: Thomas Jefferson's "Republican" Revision of the Laws Regarding Childern*, in *Thomas Jefferson and the Education of a Citizen*, edited by James Gilreath, Library of Congress, Washington, D.C., 1999, pp. 48-62.

BRISON, W. Hamilton, *Census of Law Books in Colonial Virginia*, University Press of Virginia, Charlottesville, 1978.

BUBER, Martin, *Königtum Gottes*, Schocken Verlag, Berlin, 1932, translated in Italiana as *La regalità di Dio*, Marietti, Genova, 1989.

BURGESS, Glenn, *British Political Thought, 1500-1600*, Palgrave Macmillan, London, 2009, pp. 142-152.

BURGESS, Glenn, *Bodin in the English Revolution*, in *The Reception of Bodin*, edited by Howell A. Lloyd, Brill, Leiden and Boston, 2013, pp. 387-415.

BURNSTEIN, Andrew and ISENBERG, Nancy, *Madison and Jefferson*, Random House, New York, 2010.

CALASSO, Francesco, *I Glossatori e la teoria della sovranità. Studio di diritto comune pubblico*, Giuffrè, Milano, 1957.

CALASSO, Francesco, *Autonomia*, in *Enciclopedia del diritto*, vol. IV, Giuffrè, Milano, 1959, pp. 349-356.

CALASSO, Francesco, *«Jurisdictio» nel diritto comune classico*, in *Studi in onore di Vincenzo Arangio-Ruiz nel XLV anno del suo insegnamento*, vol. 4, Jovene, Napoli, 1953, pp. 423-443, also published in Annali di storia del diritto, vol. 9, 1965, pp. 89-110.

CALASSO, Francesco, *Bartolo da Sassoferrato*, in *Dizionario biografico degli italiani*, vol. 6, Istituto della Enciclopedia Italiana, Roma, 1964, pp. 640-669.

CALASSO, Francesco, *Gli ordinamento giuridici del rinascimento medievale*, Giuffrè, Milano, 1965.

CALDWELL, Lynton Keith, *The Jurisprudence of Thomas Jefferson*, in *Indiana Law Journal*, vol. 18, n. 3, 1943, pp. 193-213.

CAMPOS BORALEVI, Lea, *Mitzvoth Beneh Noah: il diritto noaico nel dibattito seicentesco sulla tolleranza*, in *La formazione storica dell'alterità. Studi di storia della tolleranza nell'età moderna offerti a Antonio Rotondò*, edited by Henry Méchoulan, Richard H. Popkin, Giuseppe Ricuperati, and Luisa Simonutti, vol. 2, *Secolo XVII*, Olschki, Firenze, 2001, pp. 473-494.

CAMPOS BORALEVI, Lea, *Classical Foundational Myths of European Republicanism: The Jewish Commonwealth*, in *Republicanism: A Shared European Heritage*, vol. 1. *Republicanism and Constitutionalism in Early Modern Europe*, edited by Martin van Gelderen and Quentin Skinner, Cambridge University Press, Cambridge, 2002, pp. 247-261.

CAMPOS BORALEVI, Lea and QUAGLIONI, Diego, (eds.), *Politeia biblica*, Olschki, Firenze, 2002.

CANNING, Joseph, *The Political Thought of Baldus de Ubaldis*, Cambridge University Press, Cambridge, 1987.

CAPOGRASSI, Giuseppe, *Il problema della scienza del diritto*, edited by Pietro Piovani, Giuffrè, Milano, 1962.

CARCASSONNE, Élie, *Montesquieu et le problème de la constitution française au XVIIIe siècle*, Presses Universitaires de France, Paris, 1927.

CARLYLE, Robert Warrand, and CARLYLE, Alexander James, *A History of Mediaeval Political Theory in the West*, vol. 6, *Political Theory from 1300 to 1600*, William Blackwood & Sons, Edinburgh and London, 1936.

CAYTON, Andrew, *Jefferson and the Native Americans*, in *A Companion to Thomas Jefferson*, edited by Francis D. Cogliano, Wiley-Blakwell, Chichester, 2012, pp. 237-252.

CHAPLIN, Gregory, *Milton Against Servitude: Classical Friendship, Tyranny, and the Law of Nature*, in *Discourses and Representations of Friendship in Early Modern Europe, 1500-1700*, edited by Daniel T. Lochman, Maritere López, and Lorna Hunton, Ashgate, Franham, 2011, pp. 209-223.

CONKIN, Paul K., *The Religious Pilgrimage of Thomas Jefferson*, in *Jeffersonian Legacies*, edited by Peter S. Onuf, University Press of Virginia, Charlottesville, 1993, pp. 19-49.

CRAHAY, Roland, ISAAC, Marie-Thérèse, LENGER, Marie-Thérèse, *Bibliographie critique des éditions anciennes de Jean Bodin*, Académie Royale de Belgique, Brussels, 1992.

COCHRANE, Eric, and KIRSHNER, Julius, (eds.), *University of Chicago Readings in Western Civilization*, vol. 5, University of Chicago Press, Chicago, 1986.

COGLIANO, Francis D., (ed.), *A Companion to Thomas Jefferson*, Wiley-Blakwell, Chichester, 2012.

COHLER, Anne M., *Montesquieu's Comparative Politics and the Spirit of American Constitutionalism*, University Press of Kansas, Lawrence, 1988.

COMPARATO, Vittor Ivo, *Il diritto di natura a Perugia tra la Repubblica romana e l'unità*, in *Annali di storia delle Univeristà italiane*, vol. 18, 2014, pp. 221-241.

CONRAD, Stephen A., *Putting Rights Talk in its Place: The* Summary View *Revisited*, in *Jeffersonian Legacies*, edited by Peter S. Onuf, University Press of Virginia, Charlottesville, 1993, pp. 254-280.

CORTESE, Ennio, *Cittadinanza (diritto intermedio)*, in *Enciclopedia del diritto*, vol. VII, Giuffè, Milano, 1960, pp. 132-140.

CORTESE, Ennio, *Il problema della sovranità nel pensiero giuridico medievale*, Bulzoni, Roma, 1966.

CORTESE, Ennio, *La norma giuridica. Spunti teorici nel diritto comune classico*, vol. 1, Giuffrè, Milano, 1962, re-issued in 1995.

CORTESE, Ennio, *Il diritto nella storia medievale*, vol. 1, *L'alto Medioevo*, Il Cigno Galileo Galilei edizioni, Roma, 1995.

CORWIN, Edward S. *The "Higher Law" Background of American Constitutional Law*, in *Harvard Law Review*, vol. 42, n. 2, 1928, pp. 149-185.

COSTA, Pietro, *Iurisdictio. Semantica del potere politico nella giurisprudenza medievale (1100-1433)*, Giuffè, Milano, 1969.

COSTA, Pietro, *Civitas. Storia della Cittadinanza in Europa*, vol. 1-4, Laterza, Bari, 1999-2002.

COSTA, Piero, *The Discourse of Citizenship in Europe: A Tentative Explanation*, in *Privileges and Rights of Citizenship. Law and the Juridical Construction of Civil Society*, edited by Julius Kirshner and Laurent Mayali, The Robbins Colletion, Berkeley, 2002, pp. 199-225.

COULBOURN, Trevor, *The Lamp of Experience, Whig History and the Intellectual Origins of the American Revolution*, University of North Carolina Press, Chapel Hill, 1965, re-published by Liberty Fund, Indianapolis, 1998.

DE BENEDICTIS, Angela, and PISAPIA, Annamaria, (eds.), *Specula principum*, Vittorio Klostermann, Krankfurt am Main, 1999.

DE NEGRI, Enrico, *Interpretazione di Hegel*, Sansoni, Firenze, 1969.

DEWEY, Frank L., *Thomas Jefferson's Notes on Divorce*, in *The William and Mary Quarterly*, vol. 29, n. 1, 1982, pp. 212-223.

DI BELLO, Anna, *Stato e sovranità nel «De Repubblica libri sex» di Jean Bodin*, preface by Diego Quaglioni, Liguori, Genova, 2014.

DI FONZO, Claudia, *Dante e la tradizione giuridica*, Carocci, Roma, 2016.

DILCHER, Gerhard, *The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization*, in *Rechtsgeschichte, Legal History*, vol. 24, 2016, pp. 20-72.

DIMUNATION, Mark, '*The Whole of Recorded Knowledge': Jefferson as Collector and Reader*, in Robert C. BARON and Conrad EDICK WRIGHT, (eds.), *The Libraries, Leadership, and Legacy of John Adams and Thomas Jefferson*, Fulcrum Publishing, Golden (Colorado), 2010.

DREISBACH, Daniel L., *Thomas Jefferson and the Wall of Separation between Church and State*, New York University Press, New York and London, 2002.

DUMBAULD, Edward, *Thomas Jefferson and the Law*, The University of Oklahoma Press, Norman, 1978.

DURAT, Jean-Pierre, *Le president Jean-Charles de Lavie, critique de l'Esprit des lois*, in *Etudes offertes a Pierre Jaubert. Liber amicorum*, edited by Gérard Aubin, Presses Universitaires de Bordeaux, Bordeaux, 1992, pp. 189-202.

EDWARDS, Charles S., *Hugo Grotius: the Miracle of Hollande. A Study of Political and Legal Thought*, Nelson Hall, Chicago, 1981.

EMERTON, Ephraim, *Humanism and Tyranny. Studies in the Italian Trecento*, Harvard University Press, Cambridge, 1925, reprinted by Peter Smith, Gloucester, 1964.

FABIAN, Bernhard, *Jefferson's Notes of Virginia: The Genesis of Query XVII. The Different Religions Received into that State?*, in *The William and Mary Quarterly*, vol. 12, n. 1, 1955, pp. 124-138.

FAVALE, Rossana, *Tirannide e dispotismo nel dibattito politico tra cinque e siecento. IX giornata Luigi Firpo, Torino 27-28 settembre 2002*, in *Bruniana & Campanelliana*, vol. 8, n. 2, 2002, pp. 533-535.

FELICIJAN, Joseph, *The Genesis of the Contractual Theory and the Installation of the Dukes of Carinthia*, Society of St. Mohor, Klagenfurt,1967.

FONTANA, Alessandro, *Du droit de resistance au devoir d'insurrection*, in *Le Droit de résistance XII^e^-XX^e^ siècle*, edited by Jean-Claude Zancarini, ENS Éditions, Fontanay Saint-Cloud, 1999, pp. 15-33.

FELL, Armand London, *Origins of Legislative Sovereignty and Legislative State*, vol. VI, *American Tradition and Innovation with Contemporary Import and Foreground*, Book 1, *Foundations (to Early 19th Century)*, Praeger, Westport, 2004.

FOUCAULT, Michel, *«Il faut défender la société». Cours au Collège de France (1975-1976)*, edited by Mauro Bertani and Alessandro Fontana, A. Gallimard, Paris, 1997, translated into English as *«Society must be defended». Lectures at the Collège de France*, 1975-1976, Picador, New York, 2003.

GABRIELI, Vittorio, *Introduzione*, in *Tommaso Moro, Storia di Re Riccardo III*, edited by Vittorio Gabrieli, Edizioni di storia e letteratura, Roma, 2005, pp. VII-LXXXIX.

GIERKE, Otto von, *Political Theories of the Middle Age*, translated with an introduction by Frederic William Maitland, Cambridge University Press, Cambridge, 1958.

GIERKE, Otto von, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstherrien. Zugleich ein Beitrag zur Geschichte der Rechtssystematik*, Breslau, 1880, translated in Italian as *Giovanni Althusius e lo sviluppo storico delle teorie politiche giunaturaliste*, edited by Antonio Giolitti, Einaudi, Torino, 1943, re-published in 1974.

GOODSPEED, Edgar J., *Thomas Jefferson and the Bible*, in *The Harvard Theological Review*, vol. 40, n. 1, 1947, pp. 71-76.

GORDON-REED, Annette, and ONUF, Peter S., *«Most Blessed of Patriarchs». Thomas Jefferson and the Empire of the Imagination*, Liveright, New York, 2016.

GORLA, Gino, *Commento a Tocqueville. "L'idea dei diritti"*, Giuffrè, Milano, 1948.

GORLA, Gino, *«Iura naturalia sunt immutabilia»: I limiti al potere del "Principe" nella dottrina e nalla giurisprudenza forense tra I secoli XVI e XVIII*, in *Diritto e potere nella storia europea. Atti in onore di Bruno Paradisi*, vol. 2, Olschki, Firenze, 1982, pp. 629-684.

GORLA, Gorla, "*Ius libertatis" e diritto "naturale" di libertà di espatrio, in un celebre caso discusso in Italia tra i secoli XVI e XVII (per un raffronto con i "diritti dell'uomo" dal 1789 a oggi)*, in *Scritti in onore di Massimo Severo Giannini*, vol. 2, edited by Paolo Pistone, Giuffrè, Milano, 1988, pp. 225-250.

GORLA, Gino, *«Iura Naturalia Sunt Immutabilia»: Limits to the Powers of the 'Pinceps' (as Sovereign) in Legal Literature and Case Law between the 16th and 18th Centuries*, in *Italian Studies in Law*, vol. I, edited by Alessandro Pizzorusso, Martinus Nijhoff Publishers, Dordrecht, Boston, and London, 1992, pp. 55-70.

GRANDLER, Paul F., *Giacomo Antonio Marta: Antipapal Lawyer and English Spy, 1609-1618*, in *The Catholic Historical Review*, vol. 93, n. 4, 2007, pp. 784-814.

GREENBLATT, Stephen, *The Swerve. How the World Became Modern*, WW. Norton & Company, New York, 2011.

GREY, Thomas C., *Origins of the Unwritten Constitution: Fundamental Law in American Revolution Theory*, in *Stanford Law Review*, vol. 30, 1978, pp. 843-893.

GRINDE Jr., Donald A., *Thomas Jefferson's Dualistic Perceptions of Native Americans*, in *Thomas Jefferson and the Education of a Citizen*, edited by James Gilreath, Library of Congress, Washington, D.C., 1999, pp. 193-208.

HAYES, Kevin J., *The Road to Monticello: The Life and Mind of Thomas Jefferson*, Oxford University Press, New York, 2008.

HAZARD, Paul, *La crise de la conscience européenne (1680-1715)*, Boivin et Cie, Paris, 1935, English trans., *The Crisis of the European Mind 1680-1715*, New York Review of Books, New York, 2013.

HEERING, Jan-Paul, *Hugo Grotius as Apologist for the Christian Religion. A Study of his Work De Veritate Religionis Christianae (1640)*, Brill, Leiden and London, 2014.

HELO, Ari, *Thomas Jefferson's Ethics and the Politics of Human Progress. The Morality of a Slaveholder*, Cambridge University Press, New York, 2014.

HIRST, Francis W., *Life and Letters of Thomas Jefferson*, Macmillan, New York, 1926.

HOBSON Charles F., and RUTLAND, Robert A., *Madison's Rebuttal to «the Earth Belongs to the Living»*, in *The Paper of James Madison*, vol. 13, 20 January – 31 March 1791, edited by Charles F. Hobson and Robert A. Rutland, University Press of Virginia, Charlottesville, 1981, p. 18.

HOFFMANN, Hasso, *Repräsentation. Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert*, Duncker & Humbolt, Berlin, 2003, translated in Italian as *Rappresentanza-Rappresentazione. Parola e concetto dall'antichità all'Ottocento*, Giuffrè, Milano, 2007.

HOLDSWORTH, William S., *A History of English Law*, vol. 9, Methuen & co., London, 1926.

HUGELIN, Thomas O., *Early Modern Concepts for a Late Modern World. Althusius on Community and Federalism*, Wilfrid Laurier University Press, Waterloo, 1999.

INGRAVALLE, Francesco, and MALANDRINO, Corrado, (eds.), *Il lessico della «Politica» di Johannes Althusius. L'arte della simbiosi santa, giusta, vantaggiosa e felice*, Olschki, Firenze, 2005.

ISNARDI PARENTE, Margherita, *Introduzione*, in Jean BODIN, *I sei libri dello stato*, vol. 1, Utet, Torino, 1964, pp. 11-100.

ISNARDI PARENTE, Margherita, *L'educazione del principe cristiano di Erasmo da Rotterdam*, in ERASMO DA ROTTERDAM, *L'educazione del principe cristiano*, edited my Margherita Isnardi Parente, Morano, Napoli, 1977, pp. 9-46, now collected in ID., *Rinascimento Politico in Europa*, edited by Diego Quaglioni e Paolo Carta, Cedam, Padova, 2008, pp. 23-55.

ISNARDI PARENTE, Margherita, *Per la storia della traduzione italiana di J. Bodin, «Les six livres de la République»*, in *Jean Bodin a 400 anni dalla morte. Bilancio storiografico e prospettive di ricerca*, edited by Artemio Enzo Baldini, Leo S. Olschki, Firenze, 1997, pp. 159-168, now re-issued in ID. *Rinasimento politico in europa*, edited by Diego Quaglioni e Paolo Carta, Cedam, Padova, 2008., pp. 187-197.

ISNARDI PARENTE, Margherita, *Jean Bodin su tirannide e signoria nella «République»*, in *La «République» di Jean Bodin. Atti del convegno di Perugia, 14-15 novembre 1980*, Firenze, Olschki, 1981, pp. 61-77, now collected in ID., *Rinascimento politico in Europa*, edited by Diego Quaglioni e Paolo Carta, Cedam, Padova, 2008, pp. 131-149.

JELLINEK, Georg, *Die Erklärung der Menschen- und Bürgerrechte. Ein Beitrag zur modernen Verfassungsgeschichte,* 1895; *The Declaration of the Rights of Man and of Citizens. A contribution to Modern Constitutional History*, translated by Max Farrand, Henry Holt and Company, New York, 1901.

JENNINGS, John M., *The Library of the College of William and Mary, 1693-1793,* The University Press of Virginia, Charlottesville, 1968.

KATOROWICZ, Ernest H., *The King's Two Bodies. A Study in Medieval Political Theology,* Princeton University Press, Princeton, 1957, re-issued in 2016.

KELLY, John N. D., *The Athanasian Creed*, Harper & Row, New York, 1964.

KETTNER, James H., *The Development of American Citizenship, 1608-1870,* University of North Carolina Press, Chapel Hill, 1978.

KIMBALL, Fiske, *Thomas Jefferson Architect*, Riverside Press, Cambridge, 1916.

KIRSHNER, Julius, *«Civitas sibi faciat civem»: Bartolus of Sassoferrato's Doctrine on the Making of a Citizen*, in *Speculum*, vol. 48, 1973, pp. 694-713.

KIRSHNER, Julius, *Rewiew of Paolo Prodi, Il sacrametno del potere: Il giuramento politico nella storia costituzionale dell'Occidente*, in *American Historical Review*, vol. 98, n. 5, 1993, pp. 1582-1583.

KOCH, Adrianne, *Jefferson and Madison: The Great Collaboration*, Alfred A. Kopf, New York, 1950.

KONIG, David T., *Jefferson and the Law,* in *A Companinon to Thomas Jefferson,* edited by Francis D. Cogliano, Wiley-Blakwell, Chichester, 2012, pp. 349-363.

KRAMNICK, Isaac, *Bolingbroke and His Circle: The Politics of Nostalgia in the Age of Walpole*, Cornell University Press, Ithaca and London, 1968.

KUTTNER, Stephan, *Harmony from Dissonance. An Interpretation of Medieval Canon Law,* in *Wimmer Lecture*, vol. 10, 1956, pp. 1-26, now in ID., *The History of Ideas and Doctrines of Canon Law in the Middle Ages*, Variorum Reprints, London, 1980, pp. 1-16.

LA CROIX, Allison, *The Ideological Origins of American Federalism, Harvard University Press*, Cambridge and London, 2010.

LAGI, Sara, *The Formation of a Liberal Thinker: Georg Jellinek and his early Writings (1872-1878)*, in *Res Publica*, vol. 19, n. 1, 2016, pp. 59-76.

LAGI, Sara, *Georg Jellinek, a Liberal Political Thinker against Despotic Rule (1885-1898)*, in *The Hungarian Historical Review*, vol. 5, n. 1, 2016, pp. 103-120.

LA PERGOLA, Antonio, *Residui "contrattualistici" e struttura federale nell'ordinamento degli Stati Uniti*, Giuffè, Milano, 1969.

LARRERE, Catherine, *Les typologies des gouvernements chez Montesquieu, in Revue Montesquieu*, n. 5, 2001, pp. 157-172.

LARRERE, Catherine, *Montesquieu: l'éclipse de la souveraineté?*, in *Penser la souveraineté à l'époque moderne et contemporaine*, vol. 1, edited by Gian Mario Cazzaniga and Yves Charles Zarka , Edizioni ETS, Pisa, 2001, pp. 199-214.

LASKI, Harold J., *Historical Introduction*, in *A Defence of Liberty Against Tyrants, a Translation of the Vindiciae Contra Tyrannos by Junius Brutus*, Bell & Sons, London, 1924, pp. 1-60.

LASKI, Harold J., *The Foundations of Sovereignty and Other Essays*, Yale University Press, New Haven, 1921, re-issued in 1931.

LEE, Daniel, *Popular Sovereignty in Early Modern Constitutional Thought*, Oxford University Press, Oxford, 2016.

LEE, Daniel, *Citizenship, Subjection, and Civil Law: Jean Bodin on Roman Citizenship and the Theory of Consensual Subjection*, in *Citizenship and Empire 200-1900. The Antonine Constitution after 1800 years*, edited by Clifford Ando, Franz Steiner Verlag, Stuttgart, 2016, pp. 113-134.

LIBELER, Francis, *The Manual of Political Ethics*, vol. 1, William Smith, London, 1839.

LLOYD, Howell A., (ed.), *The Reception of Bodin*, Brill, Leiden and Boston, 2013.

MAIER, Pauline, *American Scripture. Making the Declaration of Independence*, Knopf, New York, 1997, re-issued by Vintage Books, New York, 1998.

MAITLAND, Frederic, *Select Passages from the Works of Bracton and Azo*, Bernard Quaritch, London, 1895.

MALOY, Jason S., *The Colonial American Origins of Modern Democracy Thought*, Cambridge University Press, Cambridge, 2008.

MARONGIU, Antonio, *Diritto e potere nell'inghilterra del seicento*, in *Diritto e potere nella storia europea. Atti in onore di Bruno Paradisi*, Olschki, Firenze, 1982, pp. 543-565.

MASTELLONE, Salvo, *Storia ideologica d'Europa da Savonarola a Adam Smith*, Sansoni, Firenze, 1979.

MATSON, Cathy, *Review of Principle and Interest: Thomas Jefferson and the Problem of Debt by Herbert Sloan*, in *The William and Mary Quarterly*, vol. 54, n. 3, 1997, pp. 669-671.

MATTHEWS, Richard K., *The Radical Philosophy of Thomas Jefferson: An Essay in Retrieval*, in *Midwest Studies in Philosophy*, vol. 28, 2004, pp. 37-57.

MARSHALL, John, *Locke, Socinianism, «Socinianism», and Unitarianism*, in *English Philosophy in the Age of Locke*, edited by Michael A. Stewart, Clarendon Press, Oxford, 2000, pp. 111-182.

MAYER, David N., *The Consitutional Thought of Thomas Jefferson*, University of Virginia Press, Charlottesville and London, 1994.

MAYER, Jacob Peter, *Jefferson as Reader of Bodin. Suggestions for Further Studies*, in ID., *Fundamental Studies on Jean Bodin*, Arno Press, New York, 1979, pp. 2-32.

MCLEAN, Iain, *The Paris Years of Thomas Jefferson*, in *A Companion to Thomas Jefferson*, edited by Francis D. Cogliano, Wiley-Blakwell, Chichester, 2012, pp. 110-127.

MERLINO, Antonio, *Montesquieu's Legal Thought. The Separation of Powers*, in *The Milestones of Law in the Area of Central Europe*, Comenius University in Bratislava, Bratislava, 2015, pp. 445-450.

MIGLIETTI, Sara, *Reading from the Margins: Some Insights in the Early Reception of Bodin's Methodu*s, in *The Reception of Bodin*, edited by Howell A. Lloyd, Brill, Leiden and Boston, 2013, pp. 193-217.

MILLER, James, *Rousseau. Dreamer of Democracy*, Yale University Press, New Haven and London, 1984.

MOMIGLIANO, Arnaldo, *Historicism in Contemporary Thought*, in *Rivista storica italiana*, vol. 73, 1961, pp. 104-119, re-published in ID., *Studies in Historiography*, Harper & Row, New York, 1966, pp. 221-238.

MONTGOMERY, Henry C., *Thomas Jefferson Admirer and User of Roman Law*, in *Synteleia Vincenzo Arangio Ruiz*, edited by Antonio Guarino and Luigi Labruna, Jovene, Napoli, 1964, pp. 170-175.

MORSE, Suzanna W., *Ward Republics: The Wisest Invention of Self-Government*, in *Thomas Jefferson and the Education of a Citizen*, edited by James Gilreath, Library of Congress, Washington, D.C., 1999, pp. 264-277.

NELSON, Eric, *The Hebrew Republic. Jewish Sources and the Transformation of European Political Thought*, Harvard University Press, Cambridge and London, 2010.

NELSON, Eric, *The Royalist Revolution. Monarchy and the American Founding*, Harvard University Press, 2014.

NELLEN, Henk, *Hugo Grotius. A Lifelong Struggle for Peace in Church and State, 1583-1645*, Brill, Leiden and Boston, 2014.

ONUF, Perter S., (ed.), *The Mind of Thomas Jefferson*, University of Virginia Press, Charlottesville and London, 2007.

ONUF, Peter S., *Ancients, Moderns, and the Progress of Mankind*, in *Thomas Jefferson, the Classical World, and Early America*, edited by Peter S. Onuf and Nicholas P. Cole, University of Virginia Press, Charlottesville and London, 2011, pp. 35-55.

ONUF, Peter S., *Jefferson and American Democracy*, in *A Companion to Thomas Jefferson*, edited by Francis D. Cogliano, Wiley-Blakwell, Chichester, 2012, pp. 397-418.

PARADISI, Bruno, *Il pensiero politico dei giuristi medievali, in Storia delle idee politiche, economiche e sociali*, vol. 2, *Ebraismo e Cristianesimo. Il Medioevo*, book 2, edited by Luigi Firmo, Utet, Torino, 1983, pp. 211-366.

PARKINSON, Robert G., *The Declaration of Independence*, in *A Companion to Thomas Jefferson*, edited by Francis D. Cogliano, Wiley-Blakwell, Chichester, 2012, pp. 44-59.

PAVESE, Cesare, *La letteratura americana ed altri saggi*, Einaudi, Torino, 1990.

PENNINGTON, Kenneth, *Henry VII and Robert of Naples*, in Jürgen MIETHKE, *Das Publikum politischer Theorie in 14. Jarhundert*, R. Oldenbourg Verlag, München, 1992, pp. 81-92.

PENNINGTON, Kenneth, *The Prince and the Law, 1200-1600. Sovereignty and Rights in the Wester Legal Tradition*, University of California Press, Berkeley, 1993.

PERSANO, Paola, *La catena del tempo. Il vicolo generazionale nel pensiero politico francese tra Ancien Régime e Rivoluzione*, Eum, Macerata, 2007.

PETERSON, Merrill D., *Thomas Jefferson and the New Nation: a Biography*, Oxford University Press, Oxford, 1970, re-issued in 1975.

PETERSON, Merrill D., *Mr. Jefferson's «Sovereignty of the Living Generatioin»*, in *Virginia Quarterly Review*, vol. 52, n. 3, 1976, pp. 437-447.

PETERSON, Merrill D., and VAUGHN, Robert C., (eds.), *The Virginia Statute for Religious Freedom. Its Evolution and Consequences in American History*, Cambridge University Press, New York, 1988.

PIOVANI, Pietro, *Giusnaturalismo ed etica moderna*, Laterza, Bari, 1961.

PIOVANI, Pietro, *Linee di una filosofia del diritto*, in ID., *Per una filosofia della morale*, Bompiani, Milano, 2010.

POCOCK, John G. A., *The Ancient Constitution and the Feudal Law*, Cambridge University Press, Cambridge, 1987.

PRICE, Polly J., *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, in *Yale Journal of Law and Humanities*, vol. 9, n. 1, 1997, pp. 73-146.

PRODI, Paolo, *Una storia della giustizia*, Il mulino, Bologna, 2000.

QUAGLIONI, Diego, *Politica e diritto nel trecento italiano. Il "De tyranno" di Bartolo da Sassoferrato (1314-1357). Con l'edizione critica dei trattati "De Guelphis et Gebellinis", "De regimine civitatis" e "De tyranno"*, Olschki, Firenze, 1983.

QUAGLIONI, Diego, *Il modello del principe cristiano. Gli «specula principum» fra Medio Evo e prima Età Moderna*, in *Modelli nella storia del pensiero politico*, edited by Vittor Ivo Comparato, Olschki, Firenze, 1987, pp. 103-122.

QUAGLIONI. Diego, *Le radici teoriche della dottrina bartoliana della cittadinanza*, in ID., «*Civilis sapientia*». *Dottrine giuridiche e dottrine politiche fra medioevo ed età moderna. Saggi per la storia del pensiero giuridico moderno*. Maggioli, Rimini, 1989, pp.127-144.

QUAGLIONI, Diego, *I limiti della sovranità. Il pensiero di Jean Bodin nella cultura politica e giuridica della modernità*, Cedam, Padova, 1992.

QUAGLIONI, Diego, "*Assolutismo laico" e ricerca del diritto naturale*, in *Il pensiero politico*, vol. 25, n. 1, 1992, pp. 96-106.

QUAGLIONI, Diego, *Sovranità e autolimitazione. (Rileggendo la «Dottrina generale del diritto dello Stato» di G. Jellinek)*, in *Crisi e metamorfosi della sovranità*, edited by Maurizio Basciu, Giuffrè, Milano, 1996, pp. 271-282.

QUAGLIONI, Diego, *«Les Citoyens envers l'Etat»: The Individual as a Citizen from Bodin's Republique to Russeau's Contract Social*, in *The Individual in Political Theory and Practice*, edited by Janet Coleman, Carendon Press, Oxford, 1996, pp. 269-280.

QUAGLIONI, Diego, *Il pensiero politico dell'assolutismo*, in *Il pensiero politido. Idee teorie dottrine*, vol. 2, *Età moderna*, edited by Alberto Andreatta and Artemio Enzo Baldini, Utet, Torino, 1999, pp. 99-125.

QUAGLIONI, Diego, *«Rebellare idem est quam resistere». Obéissance et résistance dans les gloses de Bartolo à la constitution «Quoniam nuper» d'Henri VII*, in *Le Droit de résistance XII^e^-XX^e^ siècle*, edited by Jean-Claude Zancarini, ENS Éditions, Fontanay Saint-Cloud, 1999, pp. 35-46.

QUAGLIONI, Diego, *Il "secolo di ferro" e la nuova riflessione politica*, in Cesare VASOLI, *Le filosofie del Rinascimento*, Bruno Mondatori, Milano, 2002, pp. 326-349.

QUAGLIONI, Diego, *La sovranità*, Laterza, Bari, 2004.

QUAGLIONI, Diego, *Tyrannis*, in *Il lessico della "Politica" di Johannes Althusius. L'arte della simbiosi santa, giusta, vantaggiosa e felice*, edited by Francesco Ingravalle and Corrado Malandrino, Olschki, Firenze, 2005, pp. 325-337.

QUAGLIONI, Diego and COMPARATO, Vittor Ivo, *Italy*, in *European Political Thought, 1450-1700. Religion, Law and Philosophy*, edited by Howell A. Lloyd, Glenn Burgess, and Simon Hodson, Yale University Press, New Haven and London, 2007.

QUAGLIONI, Diego, *«A ciascuno il suo»: libertà religiosa e sovranità in Francesco Ruffini*, in *Pólemos*, vol. 2007, n. 2, 2007, pp. 33-43.

QUAGLIONI, Diego, *Dal costituzionalismo medievale al costituzionalismo moderno*, in *Annali del seminario giuridico*, vol. 57, 2008, pp. 55-67.

QUAGLIONI, Diego, *Il problema della sovranità negli studi di Enzo Sciacca*, in *Studi in memoria di Enzo Sciacca*, vol. 1, *Sovranità, democrazia, costituzionalismo*, edited by Franca Bionda Nalis, Giuffrè, Milano, 2008, pp. 23-28.

QUAGLIONI, Diego, *Costituzione e costituzionalismo nella tradizione giuridica occidentale*, in *La Costituzione Francese, La Constitution Française. Atti del convegno biennale dell'Associazione di Diritto pubblico comparato ed europeo, Bari, Università degli Studi, 22-23 maggio 2008*, edited by Marina Calamo Specchia, Giappichelli, Torino, 2009, pp. 7-16.

QUAGLIONI, Diego, *Presentazione dell'edizione italiana*, in BERMAN, Harold J., *Diritto e rivoluzione II. L'impatto delle riforme protestanti sulla tradizione giuridica occidentale*, Italian edition edited by Diego Quaglioni, Il mulino, Bologna, 2010.

QUAGLIONI, Diego, *Quale modernità per la «Politica» di Althusius?*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, vol. 39, 2010, pp. 631-647.

QUAGLIONI, Diego, *«Dominium», «iurisdictio», «imperium». Gli elementi non-moderni della modernità giuridica*, in *Gli inizi del diritto pubblico, Die Anfänge des öffentlichen Rechts,* vol. 3, *Verso la costruzione del diritto pubblico tra medioevo e modernità, Auf dem Wege zur Etablierung des öffentlichen Rechts zwischen Mittelalter und Moderne*, edited by Gerhard Dilcher and Diego Quaglioni, Il Mulino, Bologna, Duncker & Humblot, Berlin, 2011, pp. 663-677.

QUAGLIONI, Diego, *Machiavelli e la lingua della giurisprudenza*, in *Il pensiero politico*, vol. 32, n. 1, 1999, pp. 171-185, now collected in ID., *Machiavelli e la lingua della giurisprudenza. Una letteratura della crisi*, Il Mulino, Bologna, 2011, pp. 57-75.

QUAGLIONI, Diego, *«Sans violence ny peine quelconque au port de salut», Il problema della libertà di coscienza nella «République» di Jean Bodin*, in *La formazione storica della alterità. Studi di storia della tolleranza nell'età moderna offerti a Antonio Rotondò*, vol. 1, *Secolo XVI*, Olschki, Firenze, 2001, pp. 361-373, now re-published as *Bodin: sovranità e libertà di coscienza*, in ID. *Machiavelli e la lingua della giurisprudenza. Una letteratura della crisi,* Il Mulino, Bologna, 2011., pp. 161-175.

QUAGLIONI, Diego, *Sovereignty Versus Tyranny in Medieval and Early Modern Political Thought*, in *In the Footsteps of Herodotus. Towards European Political Thought*, edited by Janet Coleman and Paschalis M. Kitromilides, Olschki, Firenze, 2012, pp. 65-75.

QUAGLIONI, Diego, *«Quant tyranie sormonte, la justice est perdue». Alle origini del paradigma giuridico del tiranno*, in *Tiranni e tirannidi nel Trecento italiano*, edited by Andrea Zorzi, Viella, Roma, 2013.

QUAGLIONI, Diego, *The Italian Readers of Bodin, 17th-18th Centuries: The Italian "Readers" out of Italy - Alberico Gentili*, in *The Reception of Bodin*, edited by Howell A. Lloyd, cit., pp. 371-386.

QUAGLIONI, Diego, *Machiavelli, the Prince and the Idea of Justice*, in *Italian Culture*, vol. 32, n. 2, 2014, pp. 110-121.

QUAGLIONI, Diego, *«Religio sola est, in qua libertas domicilium conlocavit». Coscienza e potere nella prima età moderna*, in *Religious Obedience and Political Resistance in the Early Modern Wrold. Jewish, Christian and Islamic Philosophers Addressing the Bible*, edited by Luisa Simonutti, Brepols, Turnhout, 2014, pp. 33-51.

QUAGLIONI, Diego, «*Omnes sunt cives civiliter». Cittadinanza e sovranità fra storia e diritto*, in *Dallo status di cittadino ai diritti di cittadinanza*, edited by Fulvio Cortese, Gianni Santucci, and Anna Simonati, Università degli Studi di Trento, Trento, 2014, pp. 5-14.

QUAGLIONI, Diego, *Bartolus a Saxoferrato*, in *Encyclopedia of Diplomacy*, edited by Gordon Martel, Wiley-Blackwell, Chichester, forthcomming

RAGOSA, John, *Religious Freedom. Jefferson's Legacy, America's Creed*, University of Virginia Press, Charlottesville and London, 2013.

RAKOVE, Jack, *Beyond Locke, Beyond Belief. The Nexus of Free Exercise and Separation of Church and State*, in *Religion, State, and Society. Jefferson's Wall of Separation in Comparative Perspective*, edited by Robert Fatton, Jr. and R.K. Ramazani, Palgrave, Macmillan, New York, 2009, pp. 37-52.

RAY, Kristofer, *Thomas Jefferson and A Summary View of the Rights of British North America*, in *A Companion to Thomas Jefferson*, edited by Francis D. Cogliano, Wiley-Blakwell, Chichester, 2012, pp. 32-43.

REID, John P., *Constitutional History of the American Revolution*, vol. 1, *The Authority of Rights*, University of Wisconsin Press, Madison, 2003.

ROGGERO, Federico, *Giacomo Antonio Marta*, in *Dizionario biografico degli italiani*, vol. 71, Istituto dell'enciclopedia italiana, Roma, 2008, pp. 24-29.

ROMANO, Santi, *L'instaurazione di fatto di un ordinamento costituzionale e sua legittimazione*, in *Archivio giuridico*, vol. 68, 1901, re-published in ID., *Scritti minori*, vol. 1, *Diritto costituzionale*, edited by Guido Zanobini, Giuffrè, Milano, 1990, pp. 131-201.

ROMANO, Santi, *Frammenti di un dizionario giuridico*, Giuffrè, Milano, 1947, re-published in 1983, pp. 220-233.

RUFFINI, Francesco, *La libertà religiosa*. vol. 1, *Storia dell'idea*, Fratelli Bocca Editori, Torino, 1901.

RUFFINI, Francesco, *Diritti di libertà*, Piero Gobetti Editore, Torino, 1926, re-issued by Edizioni di storia e letteratura, Roma, 2012.

SALMON, John H. M., *The French Religious Wars in English Political Thought*, The Claredon Press, Oxford, 1959.

SALMON, John H. M., *Tyranny, Theory of*, in *Europe, 1450 to 1789: Encyclopedia of the Early Modern World*, vol. 6, *Tasso to Zwingli; Index*, edited by Jonathan Dewald, Charles Scribner's Sons, New York, 2004, pp. 84-87.

SALVEMINI, Gaetano, *La teoria di Bartolo da Sassoferrato sulle costituzioni politiche*, in ID., *Studi Storici*, Tipografia galileiana, Firenze, 1901, re-printed ID., *La dignità cavalleresca nel comune di Firenze e altri scritti*, edited by Ernesto Sestan, Feltrinelli, Milano, 1972, pp. 331-350.

SALVEMINI, Gaetano, *The Concepts of Democracy and Liberty in the Eighteenth Century*, in *The Constitution Reconsidered*, edited by Conyers Read, Columbia University Press, New York, 1938, re-published by Harper & Row, New York, 1968, pp. 105-119.

SAUER, Elizabeth, *Milton, Toleration, and Nationhood*, Cambridge University Press, New York, 2014.

SBRICCOLI, Mario, *Crimen laesae maiestatis. Il problema del reato politico alle soglie della scienza penalistica moderna*, Giuffrè, Milano, 1974.

SCIACCA, Enzo, *Interpretazione della democrazia*, Giuffè, Milano, 1988.

SCHULTZ, Fritz, *Bracton on Kingship*, in *The English Historical Review*, vol. 60, n. 237, 1945, pp. 136-176.

SCOTT, Jonathan, *Algernon Sidney and the English Republic, 1623-1677*, Cambridge University Press, Cambridge, 1988.

SENSABAUGH, George F., *Jefferson's Use of Milton in the Ecclesiastical Controversies of 1776*, in *American Literature*, vol. 26, n. 4, 1955, pp. 552-559.

SENSABAUGH, George F., *Milton in Early America*, Princeton University Press, Princeton, 1964, re-printed in 2015.

SHERIDAN, Eugene R., *Introduction*, in Thomas JEFFERSON, *Jefferson's Extracts from the Gospels, «The Philosophy of Jesus» and «The Life and Morals of Jesus»*, edited by Dickinson W. Adams et al., Princeton University Press, Princeton, 1983, pp. 3-42.

SHERIDAN, Eugene R., *Liberty and Virtue: Religion and Republicanism in Jeffersonian Thought*, in *Thomas Jefferson and the Education of a Citizen*, edited by James Gilreath, Library of Congress, Washington, D.C., 1999, pp. 242-263.

SIMONUTTI, Luisa, *La souveraineté comme problème chez Locke*, in *Penser la souveraineté à l'époque moderne et contemporaine*, vol. 1, edited by Gian Mario Cazzaniga and Yves Charles Zarka , Edizioni ETS, Pisa, 2001, pp. 141-158.

SLOAN, Herbert E., *«The Earth Belongs in Usufruct to the Living»*, in *Jeffersonian Legacies*, edited by Peter S. Onuf, University Press of Virginia, Charlottesville, 1993., pp. 281-315.

SLOAN, Herbert E., *Principle and Interest: Thomas Jefferson and the Problem of Debt*, Oxford University Press, New York, 1995, re-published by University Press of Virginia, 2001.

STAROBINSKI, Jean, *Montesquieu par lui même*, Seuil, Paris, 1953.

STEELE, Brian, *Thomas Jefferson and American Nationhood*, Cambridge University Press, Cambridge, 2012.

STRAUMANN, Banjamin, *Roman Law in the State of Nature. The Classical Foundations of hugo Grotius' Natural Law*, Cambridge University Press, 2015.

TIERNEY, Brian, *Bracton on Government*, in *Speculum*, vol. 38, n. 2, 1963, pp. 295-317.

TIERNEY, Brian, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*, Scholars Press, Atlanta, 1997.

TESTONI BINETTI, Saffo, *Il pensiero politico ugonotto. Dallo studio della storia all'idea di contratto (1572-1579)*, Centro editoriale toscano, Firenze, 2002.

THOMSON, Peter, and ONUF, Peter S., (eds.), *State and Citizen, British America and the Early United States*, University of Virginia Press, Charlottesville and London, 2013.

TODESCAN, Franco, *Le radici teologiche del giusnaturalismo laico*, vol. 1, *Il problema della secolarizzazione nel pensiero giuridico di Ugo Grozio*, Giuffè, Milano, 1983.

TODESCAN, Franco, *Le radici teologiche del giusnaturalismo laico*, vol. 2, *Il problema della secolarizzazione nel pensiero di Jean Domat*, Giuffrè, Milano, 1987.

TOMLINS, Christopher, *Freedom Bound. Law, Labour, and Civic Identity in Colonizing English America, 1580-1865*, Cambridge University Press, Cambridge, 2010.

TUCK, Richard, *The Sleeping Sovereign. The Invention of Modern Democracy*, Cambridge University Press, 2015.

TUTINO, Stefania, *Huguenots, Jesuits and Tyrants: Notes on the Vindiciae Contra Tyrannos in Early modern England*, in *Journal of Early Modern History*, vol. 11, n. 3, 2007, pp. 175-196.

ULLMANN, Walter, *Law and Jurisdiction in the Middle Ages*, edited by George Garnett, Variorum Reprints, London, 1988.

VALSANIA, Maurizio, *Nature's Man. Thomas Jefferson's Philosophical Anthropology*, University of Virginia Press, Charlottesville and London, 2013.

VASOLI, Cesare, *Il metodo ne La République*, in ID., *Armonia e giustizia. Studi sulle idee filosofiche di Jean Bodin*, edited by Enzo Baldini, Olschki, Firenze, 2008, pp. [•].

VILLEY, Michel, *La Justice harmonique selon Bodin*, in *Jean Bodin. Verhandlungen der internationalen Bodin Tagung*, edited by Horst Denzer, Beck, Munich, 1973, pp. 69-86.

VIVANTI, Corrado, *NiccolòMachiavelli. I tempi della politica*. Donzelli, Roma, 2008.

WALTZER, Michael, *The Revolution of the Saints. A Study in the Origin of Radical Politics*, Harvard University Press, Cambridge and London, 1982.

WHITE, G. Edward, *Law in American History*, vol. I, *From the Colonial Years through the Civil War*, Oxford University Press, New York, 2012.

WHEELER, Harvey, *Calvin's Case (1608) and the McIlwain-Schuyler Debate*, in *The American Historical Review*, vol. 61, n. 3, 1956, pp. 587-597.

WILSON, Douglas L., *Sowerby Revisited: The Unfinished Catalogue of Thomas Jefferson's Library*, in *The William and Mary Quarterly*, vol. 41, n. 4, 1984, pp. 615-628.

WILSON, Douglas L., *Thomas Jefferson's Early Notebooks*, in *The William and Mary Quarterly*, vol. 42, n. 4, 1985, pp. 433-452.

WILSON, Douglas L., *Introduction*, in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, edited by Douglas L. Wilson, Princeton University Press, Princeton, 1989, pp. 3-20.

WILSON, Douglas L., *The Handwriting of the Literary Commonplace Book*, in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, cit., pp. 191-207.

WILSON, Douglas, L., *Register of Authors*, in Thomas JEFFERSON, *Jefferson's Literary Commonplace Book*, edited by Dougals L. Wilson, Princeton University Press, Princeton, 1989, pp. 155-187.

WILSON, Douglas L., *Jefferson's Books*, Monticello Monograph Series, Monticello, 1996.

WOOD, Gordon S., *The Creation of The American Republic: 1776-1787*, The University of North Carolina Press, Chapel Hill and London, 1969, re-issued in 1998.

WOOD, Gordon S., *Empire of Liberty: A History of the Early Republic*, Oxford University Press, New York, 2011.

WOOLF, Cecil Nathan Sidney, *Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought*, Cambridge University Press, Cambridge, 1913.

WRIGHT, Louis B., *The First Gentlemen of Virginia. Intellectual Qualities of the Early Colonial Ruling Class*, The Huntington Library, San Marino (California), 1940.

ZAGREBELSKY, Gustavo, *La sentenza n. 1 del 2014 e i suoi commentatori*, in *Giurisprudenza costituzionale*, vol. 54, n. 3, 2014, pp. 2959-2988.

ZARKA, Yves Charles, *La mutation du droit de résistance chez Grotius et Hobbes, du droit collectif du peuple au droit de l'individu*, in *Le Droit de résistance, XII^{e}-XX^{e} siècle*, edited by Jean-Claude Zancarini, ENS Éditions, Fontanay Saint-Cloud, 1999, pp. 139-151.

ZARKA, Yves Charles, *Le tournant rousseauiste ou la reinvention de la souveraineté du peuple,* in *Penser la couveraineté à l'époque modern et contemporaine,* edited by Gian Mario Cazzaniga and Yves Charles Zarka, Ets-Vrin, Pisa and Paris, 2001, pp. 287-302.

ZARKA, Yves Charles, *Rousseau and the Sovereignty of the People, in Rousseau, Between Nature and Culture. Philosophy, Literature, and Politics*, edited by Anne Deneys-Tunney and Yves Charles Zarka, De Gruyter, Berlin, 2016, pp. 137-150.

ZENDRI, Christian, *La legislazione pisana di Enrico VII: Problemi filologici e interpretativi*, in *Enrico VII, Dante e Pisa a 700 anni dalla morte dell'imperatore e dalla Monarchia (1313-2013)*, edited by Giuseppe Petralia and Marco Santagata, Longo, Ravenna, 2016, pp. 337-357.