

Republicanism and its 'gentle wings' (Ode to Joy). The Republican Dignity to be Governed, not Mastered as Founding Rational Legitimacy

ULRIKE MÜRIG

I. Introduction

«Your magic reunites what was split by convention, and all men become brothers where your gentle wings are spread», wrote Friedrich Schiller in his 1785 *Ode to Joy*¹. Seven years later, the young Beethoven declared his intention to set the poem to music, although it would take another three decades before his Ninth Symphony, part of which comprised the Ode, premiered in Vienna. The moral superiority of ancient republican heroes over despots and tyrants is a common topic in German classical literature. It is no coincidence that the legends of Virginius' tyrannicide and the fall of the Tarquinian monarchy of Lucius Tarquinius Superbus at the hands of Lucius Junius Brutus (510/509 BCE) became a favourite motif. Lessing used it in *Emilia Galotti* (1772), as did Schiller in *Fiesco's Conspiracy at Genoa* (1783). As important as this was, so too was the historical knowledge concerning Marcus Iunius Brutus Caepio,

who assassinated Julius Caesar on the Ides of March in 44 BCE to defend the ideal of the old republican senatorial liberty (*libertas*). The literature on republicanism is vast, spanning centuries and even millennia; more often than not, however, this research focuses on the republic as a *form* of government alone². The key aspect of this standard reading of republicanism is the rejection of monarchy, and indeed there is an omnipresent reduction to a dichotomy between republic and monarchy.

By examining republicanism through a functional approach³, though, its essence becomes clear: republican citizens (*cives*) could be governed, but not mastered as mere subjects; the standing, in which a citizen is one's own master, is the core element of republican self-rule, as contrasted to subjection under top-down power. As far as the founding rational legitimacy is concerned, the conditions of citizenry and *res publica* logically coincide, reliant upon the very dignity of 'being an end in himself', contributing to and participating in the

commonwealth. It is the first goal of this essay to explain the republican values and traditions in their historical functionality.

As early as the Italian Renaissance and the Machiavellian *vivere libero* that specified republican values and traditions⁴, it was clear that the republican virtue of the *vir civilis* was not intended as an abstract humanistic canon, but the functional nucleus of creating a rational legitimacy outside the traditional legitimacy categories (such as 'empire' or 'church')⁵. The step that transformed the *res civilis/civium* into the *res publica*⁶ was the organisation of legal power use in a 'non-legitimate dominion' whose rational legitimization is only created as a constituted corporation. Traditionally, legitimization was derived from the idea that power was ordained from heaven; (urban) civil corporation, by contrast, starts as a non-legitimate dominion. The rational legitimized founding of a corporation and the legality of its power use (having started as a non-legitimate dominion whose legitimacy was created rather than inherited from on high) are the two functional pillars of republicanism, which 'met the law' throughout time and space. At the outset of my line of arguments that reread republican values and traditions in their historical functionality is the following: any republic (be it the form of government or the use of sovereignty in the sense of the Kantian republican spirit) is grounded in the need to *create* its own rational form of legitimacy by the consensual establishment of legality⁷.

The two pillars of republicanism – the grounding of rational legitimacy and the creation of legality in the consented community – both intersect with the law

at certain junctures. The ancient concept of *res publica* referred principally to the community, and was independent of the form of government that that community adopted. This meant that the *res publica* concerned the affairs of the people as a whole, while the *res populi* were those of common use. The interest of the people was the yardstick for any rule, while the Aristotelian constitutional degenerations – tyranny, oligarchy, and ochlocracy – were its antipodes. This value-orientated ancient concept of *res publica* first became judicialized in its coincidence with medieval canon corporation theory (*quod omnes tangit*); this interpreted the citizenry as a constituted association with legal capacity. Legitimization of corporation, however, is only one part of the republican story.

The equation of the citizenry (*civitas*) and the republic through the medieval doctrine of corporation was weakened with the elevation of sovereignty as one of the key considerations of the state (as exemplified by Bodin in his *Six livres* of 1576). With this second 'meeting with the law', the appropriation of state and republic emerged, even more so when Bodin formalized and functionalized sovereignty as a supreme legislative power, thus making it available to the sovereign. As opposed to concentrating power in one hand, the social contract emerged with the natural law doctrine for explaining the legality in a consented community; in this second meeting with law, the common good became synonymous with the purpose of republicanism as a whole. As expounded by John Locke, this concept of republicanism was ultimately that which influenced its emergence in the fledgling United States.

This essay contributes to the polysemic awareness of republicanism; it focuses on case studies of English, American, and French republicanism, with the acknowledgement that further forms of contemporaneous republicanism existed that diverged from these models⁸. Indeed, the different meanings of the term 'republic' were reflected already in the eighteenth century by James Madison in *Federalist* 39⁹. Neither the differentiation between unitary and collective government, nor the conflict between hereditary and elected power structures, can be considered a guiding framework for the republic; the functional pillars of rational legitimization and organized legality are independent from the form of government. This is especially clear for the 'republican monarchy' models of the French reformist voices of the eighteenth century as well as its idealization in the Kantian concept of 'rightful republicanism'.

This is not to deny that the republic as a form of government plays *no* role here. Indeed, in revolutionary America and modern France, the two meetings of the *res publica* with the law merged together and formed a common ground for the republic to be considered as a mere concept for the form of state. Yet limiting the republic to the conceptual interconnectedness with the concrete historical state excludes the experiences of Polish and English republicans, not to mention the German cosmopolitan discourse influenced by Immanuel Kant; in all the latter variations the republic was tied not to state but to society. In addition, this limitation renders nonsensical the pronouncement of Novalis that «[t]here will come a time and soon when it will generally be acknowledged

that no king can exist without a republic, and no republic without a king, for both are indivisible, like a body and a soul»¹⁰. This essay seeks to not to ignore any one of these discourses, but to unite both those that accentuated the state and those that tied the republic to society. The republican attribution to society is represented by English republicanism, which grounded the legality of a consented commonwealth in the rational legitimacy of the common law as consented custom since time immemorial.

If republican dignity is the linchpin for the logical coincidence of citizenry and commonwealth, another aim of this essay is to elaborate the conclusions from the founding function of republican dignity. This reveals the immanent tension between republican freedom (as nondomination and self-mastery) and equality within the organized legality of consented self-rule. Thus, republican dignity is the predecessor of human dignity, not only in regard to the rational legitimatory function (as the draft of Art. 1 of the German Basic Law declared, 'the state is there for the sake of man'), but also in regard to the irreconcilability of freedom and equality and the dependence on a social relationship. These aspects could all – even if provocatively – be termed as the republican content of 'human dignity'.

The republican concept of virtuous citizenship is a decisive path for human dignity; it is less the civic humanism that matters but more the fact that freedom and equality are irreconcilable ideals that is the essence of what I call the republican dignity. Consequently, this essay examines the founding function of the republican dignity, which I explain as the 'republican dilemmas.' The core of all shortcomings

lies precisely where the persuasive power of the idea of human dignity has its roots: namely in the idea of the unique subjectivity and distinctiveness of the individual, which, having taken root, was translated into a universal characteristic¹¹. Dignity is predominantly seen as a quality and a condition of being, namely a quality or characteristic of the individual, at least as a measure of the individual's achievement, but more recently as an inherent quality. On the contrary, I argue dignity in the *legal* sense is not a concept of substance, quality, or performance; instead, dignity is based on relationship, and more precisely on communication. In this reading, dignity is the respect for another according to their conditions, in short: the tolerance of ambiguity.

If related to a state-based recognition community, the tolerance of ambiguity translates human dignity into a justiciable category. The decisive strength of the tolerance of ambiguity lies precisely in the fact that it can explain the tension between freedom and equality, both in the republican historical context but also beyond in the clashes of egalitarian-democratic and individual-free strands of legitimacy of human rights (as derivatives of human dignity, itself concluded from republican dignity). This does more than add a new 'continental page' to the groundbreaking research of Pocock and Skinner on the impact of community-related renaissance-republican thinking (Leonardo Bruni, Machiavelli, Guicciardini, Gianotti) on the rising liberal-individualistic theories of the Anglo-Saxon discourse (Hobbes, Locke). Instead, it opens up the civic participatory line (consented legitimation for rational legality), illustrating that the growth of

republicanism had roots beyond those that came about through the development of liberalism. Moreover, it points to the legitimacy function of the inviolability of human dignity in modern law – above all, ontologically substantive interpretations¹². Commonly, the inviolability of human dignity is explained as an abstract philosophical idea that emerged in the aftermath of the Second World War and the horrors of the Nazi terror. This reading denies the importance of the human rights declarations on the fringes of the American and French Revolutions, on the grounds that the kinds of dignities that existed in these discourses were neither unitarian nor universal. By contrast, this essay argues, as its fourth goal, that there is a thus-far unseen and unacknowledged historical connection of human rights and human dignity, due to the immanence in the legitimacy function of republican dignity for modern constitutionalism. This continuity with republican dignity becomes all the more convincing when taking into account that inviolability presupposes respect, and respect is always connected with the tolerance of ambiguity.

1. *English Republican Discourse: Identity of Political and Civil Liberty*

Whereas Continental discourses around universal authorities (pope and wordly monarchies) were forced by the rise of individual autonomy, be it via the conciliar movement (Nikolas von Kues)¹³ or the protestant ideas of individual access to the scripture (as holy reason-*logos*), to depart from their late scholastic corporate entity

thinking, the grounding of the English empire terminology by John Dee¹⁴ and the (coincident) shift of Parliament from council to legislature¹⁵ was intimately linked from the beginning with the idea of the commonwealth. One of its most prominent explanation is *De Republica Anglorum*¹⁶, written by Sir Thomas Smith in 1562–5, when he was Queen Elizabeth's ambassador to France. Smith's experience as a statesman in Elizabeth's court, and especially at a time when England undertook a serious reorientation of its geopolitical positioning, speaks to his works being not merely theoretical, but rather of practical application in statecraft. Indeed, just half a decade after Smith completed *De Republica Anglorum*, the Queen entrusted him with the mission to colonise Northern Ireland. This initiative coincided with the foundation of a central prerogative court in Dublin in the same year.

According to Smith, «[a] commonwealth is called a society of common doing of a multitude of free men collected together and united by an accord and covenants among themselves, for the conversation of themselves aswell in peace as in warre»¹⁷. Here, the specific importance is placed on custom; the equation of custom and consent¹⁸ made the early modern «commonwealth or policie» of the *Republica Anglorum* «according to the nature of the people»¹⁹. The Bractonian tradition that it is the law that makes the king (*rex de lege dicitur*) and the consequent coincidence of any power's objective restraints and subjective rights of the subjects made the English discourse particularly open for the civic virtues of the Machiavellian *Discorsi*. They also promoted the republican 'participation in magistracy'

to be an essential part of civic freedom²⁰. The identity of public (that is to say, political) and civil liberty, inherent in this, characterized Montesquieu's famous praise of the English constitution in his *De l'Esprit des Lois* (XI, 6)²¹. The two argumentative lines of the English commonwealth – government through consent, and the primacy of custom – came together in the republican explication of civic liberty as political liberty. In the unique setting of the English constitutional environment, common law equated to custom, which was consent, which therefore was both natural and reasonable. Consequently, there was neither scope for the Ulpian division of private law and public law, nor for any regal understanding that the binding force of positive law springs from the command and will of the one commanding.

Instead, while other European powers saw a distinction between objective and subjective law, in England they were intimately tied to one another as an indivisible whole. Such was made clear by Edward Coke in his reasoning in the 1607 *Prohibitions del Roy* case, when he declared that «the Law was the Golden metwand to measure to try the Causes of the Subjects; and which protected his Majesty in Safety and peace». This made clear that the common law – that is, the law common to all – provided the subjects' protection but also the crown's limitation. In this sense, common law liberties are both civic and political, meaning that human rights as a distinct entity in and of themselves had no room to arise, and common law liberties did not require augmentation with the need for legal equality (as denoted above as the essence of human dignity). On the other hand, common law itself created a

framework where its customary evolution reflected the *res* (will of the community) and fostered the *publica* (the general interest of the community).

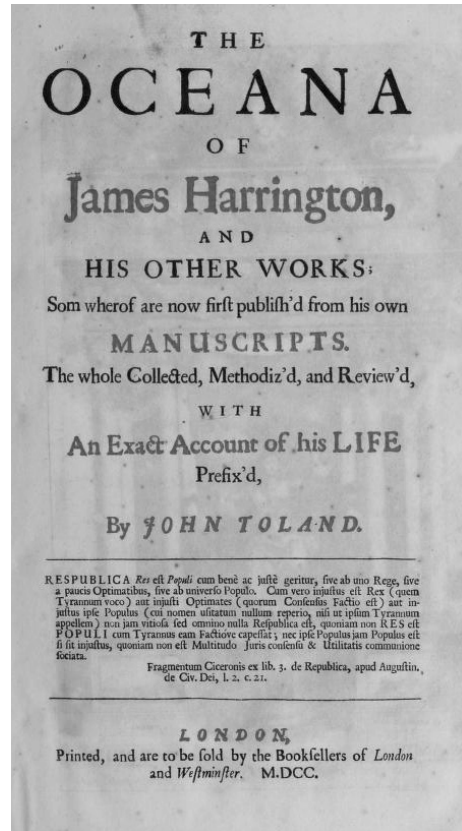
This was the English stage, where the classical vision of Italian Renaissance humanists is said by the Cambridge School of Pocock and Skinner to have been adapted in the seventeenth century, and it was from there that it re-entered political discourses elsewhere. The principal guide to antique republicanism was Machiavelli, the *Discourses* being published in English in 1636, followed by *The Prince* in 1640. On the one hand, Machiavelli still operated with the non-secular concept of *fortuna*, which in Livius, Sallust, or Tacitus meant the opposite of individualism, namely the predetermination of individual life and its integration into an unchangeable natural order. At the same time, his writings articulate a conviction that is based on influencing fate (the luck of the brave) and give high priority to the (personal) responsibility of the political actor. In addition, Machiavelli's republicanism still favours the primacy of the community²², but rejects traditional Christian moral concepts in politics, while his reason of state-concept acknowledges a realistic positioning of the individual and his interest in self-preservation²³. The civic virtue that the *Discorsi* preach is beyond human perfection or sacrifice of private interests for the common good. Machiavelli offers only an implicit transition to individualistic thinking and not yet a sophisticated concept of individual autonomy. «History to republicans was the beginning of political wisdom»²⁴. John Pocock's and Quentin Skinner's²⁵ master narrative about the influence of republican

thought, running from the northern Italian urban republics of the Renaissance to the English Revolution onto the American Revolution was meant to stress also the republican tradition and its specific concept of freedom against the overwhelming Whig interpretation of the Glorious Revolution as a mere extension of liberalism and its 'negative' concept of freedom of non-interference²⁶. The republican concept of freedom, however, concentrates on the independence of citizens from the arbitrary rule of others²⁷. In the wording of Algernon Sidney freedom is the «independency upon the will of another»²⁸. *Cato's Letters* (1720-1723) to Trenchard's and Gordon's reader in the British colonies idealize the English government to be a 'free government' by the statement, that «Liberty is, to live upon one's own terms; slavery is, to live at the mere mercy of another»²⁹. The Machiavellian civic virtue were translated into the aims that every citizen should be his own master (*sui juris*) and not the slave, another's ward (*alieni juris*)³⁰, or in John Milton's description of the 'free commonwealth' as the corresponding. Thus, the republican concept of freedom is directly linked to a specific political constitution, the Republic, which guarantees this independence and encourages citizens to act virtuously and in the common good in order to maintain it³¹. The free commonwealth is the corresponding normative status of the republican citizenry³².

English republicanism developed as a 'language'³³ to dismiss the radical individualism expounded by Hobbes, but it never became a specific 'programme' to question the foundations and legitimacy of the English monarchy, in the way that continental republicanism did. Early

republican thinkers, such as Marchamont Nedham, John Milton, and James Harrington never held the existence of the English monarchy to be constitutionally invalid. Even Nedham, celebrating the abolition act in 1650³⁴, did not claim that Englishmen had lived «in times past under an unlawful magistrate»³⁵. They criticised tyrants rather than kings, following the Aristotelian and Ciceronian equation of true kingship with law and justice and reason³⁶. The exemplar of the tyrant to be resisted was the Hobbesian Leviathan (which Hobbes explained in the eponymous work in 1651), whose sovereignty was authorised by universal submission rather than acquiescence. In escaping the war of all against all (*bellum omnium contra omnes*), in which individuals pursued their own unrestricted wants and desires against others (*homo homini lupus*), humanity's subservience to the Leviathan would be absolute and provide no recourse in the case of any injustice to the contracting individuals³⁷. The Hobbesian ambiguity between the claims of the individual and the collective community are eradicated by the fact that his ('methodological') individualism paradoxically postulates – as a war of all against all – the *de facto* abandonment of individual rights in favour of the welfare, security, and stability of the state. This methodological individualism is found in the intact natural right to self-preservation, which the state has to enforce, thus devolving the safeguarding of basic individual rights to the collective (or, rather, to the sovereign state, which acts in the stead of the collective).

Harrington's *Oceana* (1656), by contrast, was a repudiation of Hobbes and his *de facto* abandonment of individual



Front page of *The Oceana* of James Harrington: and his other works, printed in London in 1700.

rights, in favour of the Machiavellian political philosophy³⁸. At the heart of Harrington's doctrine of balance was the equation of political to economic balance, economic power being the driving force behind the law. Later, David Hume admired Harrington for having «made property the foundation of all government»³⁹. *Oceana* formulated a general critique of the natural individualism and voluntarism of Hobbes and, with reference to Livius and Aristotle, emphasized the liberty of the

community and the rule of law instead of the individualistic (negative) freedom⁴⁰.

Equality was never an absolute aim of English republicans. 'Equal' could mean 'more equal', or it could mean an equality 'proportionate' to merit according to the Aristotelian principle of distributive justice. An 'equal' commonwealth might be one where the principle of rotation ensured a fair distribution of office-holding⁴¹. So, the English republican adaption of 'equality' were two principles of political prudence: The first is opposed the extremes in wealth and poverty, which were enemies to both virtue and stability. The second, somewhat related, was based on the Aristotelian nothing in excess (*meden agan*). Virtue was to be found in 'mediocrity' or the 'middle sort', and this happened to fit quite nicely to the balance of the three principles of government borrowing from Polybius and Aristotle. Neither the rule of the one, of the few and of the many should be excessive.

Consequently, Harrington and his contemporaries opposed the evils of 'absolute monarchy'⁴² by contrasting it with the 'mixed', 'limited', or 'legal monarchy'⁴³. Influenced by the failure of parliamentary opposition in 1679-81, Algernon Sidney's *Discourses concerning Government* (1681-1683) contained a plea for resistance and tyrannicide, with a clear preference for a mixed government in which aristocracy is predominant. Not only monarchy had been restored in 1660; so, had the House of Lords. Therefore, Algernon Sidney's ideal nobility was not the Norman but the Saxon one as natural leader of the freeholder class, of the people⁴⁴.

During the political crisis of 1675-1683, and especially surrounding the so-called Popish Plot, when fears of absolute

monarchy and a Catholic succession amounted to the threat of a renewed civil war, the republican 'mouthpieces' 'discovered' and presented the ancient liberties of the common law as consented custom since time immemorial. In this way, both Sydney and Henry Neville were adjutants of Locke's Natural Law of Justice⁴⁵. Their decisive differentiation concerns the distinction between government imposed from above and that derived from consent⁴⁶. Dynastic government occupied itself with the interests of the crown as 'a separate and distinct interest' from that of the people; it could therefore not satisfy the interest of the whole, being the commonwealth. Similarly important was the distinction of the rule of men and the rule of law. Borrowing from Sir Edward Coke, the republican discourse took up the idea of law as the embodiment of reason; a commonwealth where law prevailed, whether monarchic or not, was a 'free state', contrasting with a tyranny⁴⁷. The 'free state' was thus not synonymous with the kingless commonwealth (although it could be a kingless commonwealth). Instead, it was defined such that «the interest of Kings, and of their people is the same»⁴⁸. The republican reading of the 'ancient constitution' of England, and the traditions and customs inherent in the common law since time immemorial, also argued for virtues of independence in the face of the threat of popery and a standing army. In republican thinking, the *Magna Carta* was one of the hallmarks of ancient liberties, and it embodied a 'reasonable' argument that no people could have surrendered rights that were inherent and inalienable to them⁴⁹, and that the state need only to be limited to the extent required for peaceful

coexistence. The decisive principle underscoring every political community was the natural freedom enjoyed by man; this could only be given up voluntarily and for a higher purpose⁵⁰. The legitimate political order could only emerge from this uncoerced decision to exercise individual freedom by choosing to invest it in that order; violence, by contrast, could not be a lawful basis, as violence was antithetical to legal relations⁵¹. In principle, such an order could be established at any time, if this were done for the general advantage in a situation of original equality, which would preserve the principles of natural reason that emerged from the same origin as freedom⁵².

Where the English adaptation of Machiavelli broke from the original source material was in the fact that English thinkers saw no reason why liberty (*libertas*) and empire (*imperium*) must be irreconcilable. This apparent dichotomy had first been handed down by Sallust, who saw the Roman Republic's thirst for greatness (*grandezza*) as having been achieved only at the cost of liberty⁵³. Venice was able to remain internally stable by waiving expansion in favour of their citizens' liberty. If London was to be the new Rome, as many imperialists envisioned, then it could not risk the loss of liberties through military conquest, but rather combine the customary liberties of England with the commercial success of Venice (and other commercial republics). Charles Davenant set the tone when he declared that «[a]n empire of the seas could provide *grandezza* without the need for large armies, extended military commands, or the takeover of civilian government by over-mighty generals. Instead, maritime empire could enrich the nation, render it

stable in the arena of international politics, and offer greatness without endangering liberty»⁵⁴. Henry Parker attributed the combination of liberty and empire by commerce to the influence of merchants in commercial republics⁵⁵, as «industry has its first foundation in liberty»⁵⁶. According to the demands of trade, the nation's military needs were upheld by sailors, not by soldiers, who might turn into tools in the hands of tyrants (This anxiety concerning soldiers was also evident prior to the Glorious Revolution). Britain's mercantile commitments guaranteed that English liberties would find success in the competition for commercial greatness, whereas Spain and other «despotic monarchs, though infinitely powerful at land, [...] could never rival Neptune, and extend their empire over the liquid world»⁵⁷.

As the British colonial empire gained traction at the expense of both France and Spain after the signing of the Treaty of Utrecht, it also attracted re-evaluation. In his *The Idea of a Patriot King* (1738), the Treaty's English author, the Tory statesman Henry St. John, Viscount Bolingbroke proposed a model of kingship that was committed above all to the common good. The king would act as the holder of balance between the political parties, while his external policies would acknowledge the interests of Britain as an island nation, and hence a commercial republic. Resources would be concentrated upon the navy, which would fulfil the role of Britain's 'guardian of liberty' and, in this way, Britain would in turn embody a neo-Roman combination of both empire and liberty. Bolingbroke explained the uniqueness of the British commonwealth

by the lack of any public law 'distinct and autonomous'⁵⁸ from the common law. He concluded that 'constitution', which defined 'the limitations of sovereignty', was «that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of good, that compose the general system, according to which the community hath agreed to be governed»⁵⁹.

This is also not to say that English republicanism was monolithic. Bolingbroke may have done much to define imperial republicanism for the generations that followed, including the nineteenth-century prime minister Benjamin Disraeli, but he also attracted a number of detractors. William Gladstone, Disraeli's most prominent contemporary opponent, was rather less impressed. Gladstone recognised that Bolingbroke's words were more propaganda than a pragmatic standard for monarchical rule in the mirror-for-princes tradition, when he pithily summed up the rhetoric as «Liberty for ourselves, Empire over the rest of mankind»⁶⁰.

Montesquieu, too, saw Machiavelli as an anachronistic model for imperial growth. In the *Considérations sur les causes de la grandeur des Romains et de leur décadence* (1734), Montesquieu explained that Rome's fall came about because its greatness grew too quickly, and as a result «[s]he lost her liberty, because she completed her work too soon»⁶¹. Trade, for Montesquieu, not only rendered Machiavelli obsolete, it made the irreconcilability of his categories harmless. Montesquieu held that Britain was the only nation whose constitution aimed for 'public liberty', which would foster commerce. Britain retained its liberty at home by the equilibrium of monarchic ruling of the

one, the aristocratic ruling of the few, and the democratic ruling of the many, and maintained its integrity abroad by avoiding overseas conquest, instead planting colonies to extend commerce more than domination.

Scottish republicans like David Hume and Adam Smith also doubted the applicability of Machiavellian republicanism to the world of commercial modernity. Hume saw great empires as suffering a natural pathology of expansion⁶²; similar to Bolingbroke, he saw Rome's decline as being due to «an ill modelled government, and the unlimited extent of conquests»⁶³. As David Armitage notes, Hume's worldview was also slanted by the advent of global commerce, in which Britain would become a world leader: «Commerce may have fundamentally altered reasons of state [...] but Hume maintained the argument that territorial empire presented the greatest threat to liberty [...] at least until the spectre of French universal monarchy had been exorcised by Britain's victories in the Seven Years War»⁶⁴. At the end of this war, in 1763, Adam Smith explained to his students the difference between 'a defensive republic' and 'a conquering republic'. Here, he borrowed the terminology pioneered in Machiavelli's *Discorsi*, which described the Greek city-states (*poleis*) to be defensive, while Rome and Carthage were conquering republics⁶⁵. Hume and Smith revised Sallust and Machiavelli's explanations of Rome's declension in the light of the new maxims of political propriety, economy, commerce, and refinement. Hume, in his essay *Idea of a Perfect Commonwealth* (1752), proposed an imaginary model of government to combine the stability of classical republic for preservation with the

expansiveness of the modern territorial state: «no large state, such as FRANCE OR GREAT BRITAIN, could ever be modelled into a commonwealth, but that such a form of government can only take place in a city or small territory»⁶⁶. The same argument was employed by James Madison⁶⁷ in the Federalist papers: federalism offered the distinctly modern solution to the ancient dilemma of liberty and empire by consecrating an extended representative commercial republic under the law.

Summary, English Republicanism: The legacy of seventeenth-century republicanism was a civic humanism, which claimed the 'participation in magistracy' to be an essential part of civic freedom⁶⁸. This was articulated by David Hume (*Essays and Treatises on Several Subjects*, 1758) and Adam Ferguson (*An Essay on the History of Civil Society*, 1767). While 'liberty' was an integral part of the English discourse, this liberty did not necessarily include equality in the sense that it was used and continues to be used in human rights discourse. Liberty was intimately tied to Britain's growing influence as a commercial, imperial power, whereby Britain's «blue-water commercial and colonial policies»⁶⁹ would allow it to remake London as an imperial metropole in line with a neo-Roman *civitas*. This *civitas* would base itself on two key distinctive points: firstly, it would be a maritime power that used its own status as an island to protect itself via its own natural moat; secondly, it could rely on the common law as a distinct national myth of liberty, a «Gothic society of free landed proprietors» that acted as an alternative narrative to standing armies, Popish Catholicism, and Stuart absolutism⁷⁰.

II. *The American Federal Representative Republic and the Democratization of the Common Good*

The key issue facing early American republicans was that the «Empire of Liberty», as Thomas Jefferson had termed it in 1780⁷¹, appeared as a contradiction in terms. Classical republicanism had dug its heels in the dichotomy 'empire or liberty'⁷², and America seemed set to have to determine whether its path was one of empire or liberty. However, instead of seeing exclusive alternates, the foundation of the union 1787 sought to reframe them through the principles of 'union and non-denomination'. This brought republicanism into a 'practical sphere'⁷³, and at the same time struck at the heart of the traditional understanding of republican freedom functioning only in small, well defined polities; as Leopold von Ranke noted a century later, this amounted to a «complete reversal of the principle [...] after it had formed a state»⁷⁴.

What was new about the American federal republic? Not the origins; the entire intellectual material for the confrontation with London came from Europe. The protest against domination by Westminster borrowed from the merging of the Athenian and Aristotelian tradition of freedom being defined by participation in self-government, together with the Roman idea that the people of the empire were co-members, rather than vanquished inferiors. Aristotle's ideas of the communal self (*zoon politikon*) had been resuscitated by the European Enlightenment, together with the idea of the autonomous self (with the voluntarily contracting identity); these too made the journey across the Atlantic.

The innovation was not in the *philosophical* foundations of the republic, but in the *practical implementation* of that philosophy. America's remoteness from the 'old continent' – as even Goethe contrasts Europe with the independent United States⁷⁵ – meant that the democratization of the common good (*res publica*) served the practicalities. Indeed, America already had a limited tradition of political autonomy. Before 1763, legislative self-government was taken for granted by settler communities bound in the common law traditions, and laws passed in the colonies only required approval by the Privy Council or Board of Trade⁷⁶. In addition, because of the ubiquitous requirement of land ownership as a prerequisite for electoral suffrage, the wide dispersion of ownership in the colonies enabled broad access to active voting rights (around three quarters of the settlers by the end of the eighteenth century)⁷⁷, while the comparative lack of great social differences between rich and poor⁷⁸ was noted by Adam Smith in his *Inquiry into the Nature and the Causes of the Wealth of Nations*. Published in the same year as the Declaration of Independence, *The Wealth of Nations* argued that republicanism was fuelled by this relative social parity: «Their manners are more republican, and their governments, those of three of the provinces of New England in particular, have hitherto been more republican too»⁷⁹. Thus, the democratization of ballots or the local self-government tradition of institutionalized process to reach consent among the settlers were well established in the colonies, and far from pioneering turns; rather, it was their endangerment that provided the proximate catalyst for revolution.

While the concept of union is one that is highlighted in the existing historiography as a novel development in the foundational story of America⁸⁰, I propose that republican dignity provides a window into the processes of revolution, independence, and foundation, and here requires addressing. Republican dignity describes the constitutional framers' use of the republic as a means to justify their breaking from their bond with the English crown, on the grounds of having been discriminated against their English compatriots⁸¹. It combined both a representative reframing of popular government and a concurrent rejection of (unlimited) democracy. Seen from the functional approach, the American discourse is governed by a close association of property with individual dignity, meaning an independent (male) livelihood under common law property titles⁸². In common law terminology this meant having the rank of a free subject of the English crown; as late as 1774, the Sullivan Draft of a declaration of rights included the stipulation that Americans were to be 'respected' as brethren subjects of the same king as the English⁸³. Central to this republican dignity were autonomy, self-mastery and sovereignty, all rooted in property rights enshrined in common law: to sue somebody for conversion⁸⁴ focuses – in a functional assessment – on a person's ability to resist intrusions into his own affairs.

Here it is worthwhile to note that republican dignity is distinct from any liberal notion of freedom as non-interference. Republican dignity exists only in relation to others, and not as an *a priori* freedom in any natural state. Part of this republican dignity, notably present in the realization of the American federal republic

in practice, is the autonomous (that is, self-determined) participation in and commitment to the commonwealth of all. This commonwealth is not predetermined through static virtues, but develops through dispute, debate, and competition, instituted in a democratic way; republican freedoms to contest are therefore not the basis for egalitarianism, but for plurality. This also means that, while dignity is a vital element of the republic, it is not equally apportioned. Instead, special dignity is afforded to those who guard the 'genius of the people', here personified by the elected president with the features and powers of a 'replacement king', the top selected representatives (who are selected by their achievements, not only in terms of their performance but with regard to their financial resources to win election campaigns in vast territories), and to the judges as quasi-aristocratic wellsprings of constitutional precedence. To adequately examine republican dignity, however, requires a frank and functional reinterpretation of the conventional American constitutional and republican source materials, notably (but not limited to) the *Federalist Papers*, in order to answer the following questions: for what purposes were republican arguments used? What were the contexts of taking offence about intrusions in colonial affairs?

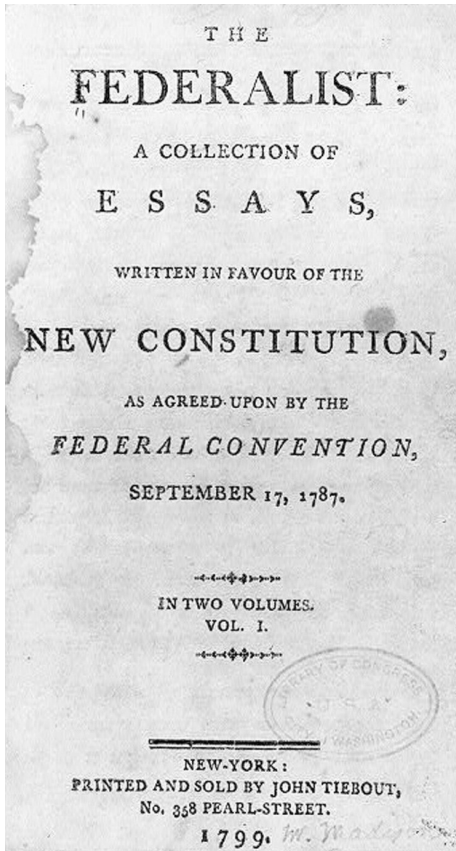
1. *How to use the Republican Ticket to depart from England?*

a. *The Philadelphian Scenery*

At the beginning of the struggle for the new American concept of a republic are the Articles of Confederation. Through their rati-

fication, the United States came into being in 1781, originally as a classical (loose) confederation between the individual states⁸⁵. These states endeavoured to retain as many of their own decision-making competences for themselves as possible; as a result, the Congress that was convened was an assembly of envoys, in which each of the thirteen states had the same voting weight regardless of size. Such an organizational structure lacked the effectiveness to pay the bill for the War of Independence. As early as 1785, the Confederation was no longer able to meet its obligations to serve the debts to foreign and domestic lenders⁸⁶.

The individual states had withheld the right to levy taxes from the federal level, neutering the national response to this rising financial crisis⁸⁷. In May 1787, on the combined initiative of five member states, a Federal Convention was invited to Philadelphia to fundamentally revise the Confederation Articles⁸⁸. Except for the parliament of Rhode Island, dominated by fears of a conspiracy to overthrow the established government, delegates from all other states took part. Soon, it became clear that a revision of the confederation format would not save the union. Therefore, the delegates started drafting a federal constitution by deliberately exceeding their narrow mandates of revising the Articles⁸⁹. Discussions about the structure and power design of the future central government dominated Philadelphia; small and large states disagreed over the allocation of seats in the two chambers of the central legislation; northern and southern states disagreed over slavery. After tough negotiations a draft constitution⁹⁰ was adopted on 17 September 1787 and guaranteed «to every State in



Front page of *The Federalist*. A collection of essays written in favour of the new constitution, printed in New York in 1799

this Union a Republican Form of Government»⁹¹. Its approval by the Confederation Congress paved the way for the ratification process in the individual states, which nobody expected to be a guaranteed success⁹². This brought the federalists in favour of the constitution and their antagonists, the antifederalists as the 'true republicans'⁹³, into the picture.

b. *Traditional Republicanism of the Anti-Federalists*

Defining the resistance against the federal union as true republicanism⁹⁴ permitted the anti-federalists to conceive of civic virtues (such as public spirit, bravery, diligence, honesty, discipline, and modesty) to be constituent for republican socialization, which in turn allowed them to conceptualise a 'good life' in a corporate sense. The elimination of any deliberative competition of self-interests tallied with the anti-federalist ideal of virtuous self-government, since their greatest concern was that the body politic could be led astray by particular interests at the expense of the common good⁹⁵. Anti-Federalist fears orbited among the power misuse by the federal government, too remote from the people. The stability of the republic was thought to depend on the willingness of its citizens to live and act virtuously⁹⁶. The anti-federalists' republicanism, therefore, 'lived' in the 'manageable' context of a classical republic to enable the learning and exercise of civic virtues, and would be ruined by the complex expansiveness of the union in the 'Philadelphia design'. Moreover, history appeared to be on their side; all ancient republics, the medieval maritime republics and the Swiss and Dutch republics owed their success to smaller, more manageable territories. Anti-federalism held that a republican government was possible only on the state level, within the narrow confines of these territorial borders, but not on the much more expansive, national level. Therefore, only a confederation of the individual states could protect the nation's liberty and freedom. The idealization of traditional republicanism as being best suited for the

republican virtue of civic patriotism prizing the common good above private interests, met the old dilemma of the competition between greatness and individual freedom. The decisive question, as it emerged in the struggle for ratification of the American constitution, was in fact an old one: How could the republic ideal of self-government be reconciled with the natural freedom and equality that were enshrined in the Declaration of Independence of 1776? Put another way: was it possible for virtuous citizens to love both the commonwealth and, simultaneously, their own personal freedom?

c. Connecting Republican Self-governing with Popular Sovereignty

To answer these questions, the federalists proposed an idea of representation that combined republican self-governing with popular sovereignty⁹⁷. James Madison's understanding of a republic was that of a representative system of government in which political representation ensured the true expression of the self-government of the people. A republic derived all its power directly or indirectly from what Madison called the «great body of the people of the United States»⁹⁸. This was in spite of the fact that there was no united American people, only the people of the thirteen individual states of the Union. On what, then, was this constituent popular sovereignty based – a sovereignty that had already been claimed in the Declaration of Independence in 1776, even though then the Americans could even less claim to be united and democratic? Popular sovereignty (real or supposed) demonstrated a clear and fundamental departure from British constitu-

tional practice and the sovereignty of the king in parliament. This is not to say that republicanism was unknown to the English, nor that English republicanism was unknown to the Americans. On the contrary, English republicanism had crossed the Atlantic⁹⁹, together with the understanding of the common law, Magna Carta, and the Bill of Rights as the bases of legal predictability and fairness¹⁰⁰. This is not the point. Rather, the republicanism of the «New Order of the Ages» – proclaimed on the reverse side of the Great Seal in 1782¹⁰¹ – was a clear break from the mother country. A new idea of representation organized the legality of a consented commonwealth, and popular sovereignty was the new founding rational legitimacy; not only were these elements for the relevant functions of republicanism changed, but their connection was new: representation of the people was henceforth intimately linked to the republican orientation on public good. The 'representative republic' was therefore the federalists' novelty to bring private and civic rights together¹⁰², allowing two hearts to beat in the one chest of any virtuous citizen: the love for their personal freedom combined with the love for the commonwealth. The innovation of this connection between representation and public good is emphasized by both Madison and Alexander Hamilton who, in recalling Montesquieu¹⁰³, championed a «Confederate Republic as the expedient for extending the sphere of popular government and reconciling the advantages of monarchy with those of republicanism»¹⁰⁴. Last but not least, the link to popular sovereignty was also a tactical manoeuvre. As the federal constitution might well have been scuttled in the state legislatures, where many state political

leaders stood to lose power, the ratification of the constitution through 'the people' was more likely.

d. *A New Idea of Representation*

The federalists' representative reframing of republicanism created a new idea of representation: a democratic mandate instead of a paternalistic trust, and a real delegation of will instead of the imaginary identity of interests. The British hereditary-corporative context that the founding fathers left behind was encapsulated in its definition by Edmund Burke in 1792: «Virtual representation is that in which there is a communion of interests and a sympathy in feelings and desires between those who act in the name of any description of people and the people in whose name they act»¹⁰⁵. The 'corporate or collective capacities' of the states under the Articles of Confederation are also «contradistinguished from the individuals of whom they consist» in Hamilton's complaining about the «insufficiency of the present confederation to preserve the Union»¹⁰⁶.

The Federal Constitution of the United States provided for universal, free, and equal elections of all representative bodies (House of Representatives, Senate, President) and thereby for an unbroken chain of legitimation by the people¹⁰⁷. Against the criticism about the lack of identity of interests between the population and the House of Representatives¹⁰⁸, Hamilton argued that the condition for such a representation of interests would be the constitutional anchoring of a class franchise right to vote¹⁰⁹. If the voters decide in general and free elections who

they consider most suitable for their representation, there is a tendency to elect those candidates who share the same interests and thus appear as natural representatives. According to Hamilton, however, legitimate representation does not follow from the identity of interests, but rather from the fact that voters regularly authorize their representatives to make decisions¹¹⁰. In Madison's argumentation, the importance of free and universal suffrage for legitimate representation becomes even clearer, irrespective of any identity of interests. Rather, in every form of government those who best promote the common good should be empowered. In this reading, the special point of the republic is that those who are best suited to serve the common good are chosen by the people themselves: «No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgement or disappoint the inclination of the people»¹¹¹. Representation is a mandated proxy relationship. Confidence must be constantly updated and reaffirmed through regular elections. In order for decisions to be made responsibly, therefore, the decision-makers needed to be clearly identified in a transparent and public way; only in this fashion could they be held accountable for their actions¹¹².

e. *Common Good as Discursive Asymptote*

The main goal of this process of representation is for decisions to be achieved through reason and rationality¹¹³. Three deliberative aspects, fostered through competition and contest, are intended to institutionalize the common good as the most reasonable

solution (leaving aside, of course, the fact that a people can behave unreasonably and irrationally). First of all, special concerns must be brought into a public communication process, leading to a refinement of informed opinions¹¹⁴. In this way, individual interests are bundled and oriented towards the common good, because they can only survive in public discourse if they can be generalized to serve a broader need¹¹⁵. Secondly, the federalists expected that, by enlarging the basis for discussion, interests would conversely be rationalised. A greater input, necessitated by a broad electoral base, would mean that individual interests would lose their importance; in order to be championed, interest groups would be forced into coalitions that would frequently change their complexions according to the balance of those interests and the circumstances of the state and society¹¹⁶. Thirdly, the process of representation would enable a 'reflection loop'¹¹⁷, a rethinking from different perspectives, especially in interaction with decision-making in the separation of powers¹¹⁸. The outcome is a generally recognised balance of interests which takes into account as many points of view as possible and is rational due to the procedure, and not through absolutizing any argumentative truth. The 'interests of the community' (where the federalists' use of the plural 'interests' is telling and instructive) may, in certain cases, even be contrary to the common good. Thus, there is no objective common good¹¹⁹. Rather it takes the form of a discursive asymptote¹²⁰, whereby the decision-making process of the various democratically legitimated representatives can approach by consensus without actually reaching it¹²¹.

2. *The Double Twist: Reshifting Republic in a Democratic Language by parallel Discrediting Pure Democracy*

The colonies' quest to govern their own affairs is constitutional, as guided by the 'good of the whole', whereas George III dominating rule is unconstitutional, as guided by 'the good of the sovereign'. A programmatic American discourse of 'republicanism' as a «revolution in style and manner of thinking»¹²², which is 'constitutional' due to the guiding principle of «the public good, or the good of the whole» instead of «the good of the sovereign, or of one man»¹²³ is traceable via the popularity of Thomas Paine's *Common Sense* (1776). Paine's widespread publication was instrumental in shifting republicanism into the language of democracy, since advocating American independence would have been ineffective as a project of the elites. Reframing republicanism within the (natural law) prerequisite of the political equality of citizens was an innovation precisely because it constituted a break with the classical republicanism of Aristotle and Cicero, as well as the neo-Roman republicanism advocated by Machiavelli or Harrington. For ratifying the Republic there was no sense in limiting republican virtues to a few within the traditional aristocratic reading, as both English and Polish republicans had done. Instead, the public became synonym with 'popular government', taking into account the «genius of the people»¹²⁴. This connection was made explicit in the thirty-ninth Federalist Paper, penned by Madison: «We may define a republic to be [...] a government which derives all its power directly or indirectly from the great body of the people, and is administered by persons holding their offic-

es during pleasure, for a limited period, or during good behaviour»¹²⁵. For Madison, the essential element is that political power emanates from the entire *demos*, and not just one prominent class. However, this was not intended as a blow in favour of democracy. Rather, popular government served as a solution to a specific republican problem. Thus put, the constitutional framers were not democrats so much as republicans, and their aim was not to institute democracy but to use it for republican ends¹²⁶.

a. *The Imperfectness of Pure Democracy for the Common Good*

Madison's words hint at an equality of the people. This equality, however, is not generalized across all arenas. Indeed, as he made clear in the tenth Federalist Paper, «perfect equality in their political rights» does not make citizens «perfectly equalized and assimilated in their possessions, their opinions, and their passion»¹²⁷. There was no way to deny the democratization of the electoral franchise, nor its connection to the legitimation of the sovereign, but a majority without property would lead to a tyranny of the majority, undermining property rights as a key element of the guaranteeing of personal freedom and republican dignity. Thus, «a pure democracy [...] is incompatible with personal security or the rights of property»¹²⁸. The tension between the legitimation of the republic through democratic suffrage on the one hand, and its protection against the tyranny of the majority on the other gives Madison's summary of the Philadelphia Convention greater relevance:

The right of suffrage is a fundamental Article in Republican Constitutions, [but] ... a task of peculiar delicacy. Allow the right exclusively to property, and the rights of persons may be oppressed. The feudal polity alone sufficiently proves it. Extend it equally to all, and the rights of property or claims of justice may be overruled by a majority without property, or interested in measures of injustices¹²⁹.

Madison's fear was that society as a whole was easily seduced by despotism, in the style of the Greek *ostrakismos* or in the hands of caesarian despotism; as David Hume had argued, the masses were usually more sensitive to authority than to reason. In the context of the common good, this made them irresponsible. As Madison asked: «Can a democratic assembly, who annually revolve in the mass of the people, be supposed to pursue the public good?»¹³⁰. At the heart of Madison's criticism of 'pure' democracy was the constant danger of a 'tyranny of the majority', to which the rights of the individual would be exposed without any defence. Hence, «democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property»¹³¹.

b. *Squaring the Circle by Mixing Popular Legitimation with Aristocratic Communication about the Commonwealth's Trustees*

The tension between the republic and democracy could only be resolved by an innovative response. For the federalists, the representative republic squared the circle: the reference to the people as the wellspring of legitimacy asserted that the political system of the United States derived from popular sovereignty, but the

institutionalization of a politically-defined common good in the hands of a political elite – the representatives – was kept away from the dangers of a direct, democratic tyranny. Compared to the idea of pure democracy, representation in the republic was to bring stability to the community: «A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking»¹³². It was not necessary for the institutional mechanisms of implementing popular government to be purely democratic themselves. It was sufficient, however, that «the persons administrating it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified»¹³³. By equating direct and indirect elections on the one hand with election-limited and unrestricted offices on the other, democratic and aristocratic mechanisms were combined¹³⁴; an elite would be entrusted with the government, but that elite would emerge from the outcome of democratic votes on the different levels of the federal constitution. This allowed the paradox to reshift the virtuous electability of the few (as in ancient republics) by expanding it with a democratically broadened right to vote for many, but at the same time it narrowed the outcomes of the decisions of the sovereign people in an aristocratic theory of politics to an answerable elite. By inseparably combining popular sovereignty with representation, every elected representative was to be regarded as a representative of the whole nation. The federalists' brand of republicanism attached only secondary importance to virtues; there was no need

for an individual acting out of selfishness or self-interest to be converted to virtuous behaviour. Instead, it was sufficient to steer the egoisms of the liberal economic and social order institutionally in the right direction.

To be fair, the federalists were by no means the first to recognize an inherent incompatibility of pure direct democracy and republicanism; indeed, Aristotle had contrasted the ochlocracy (direct democracy) with representative democracy as a form of good government¹³⁵. For ratifying the federal republic, though, discrediting pure democracy as incapable of providing public good was only the first stroke. The double strategy of the federalists combined the disavowing of the democratic absolutism of the majority with the expanding of republicanism beyond the territorial narrowness of their historical predecessors. But this was not simply a linear enlargement of republicanism. The decisive transformation of republicanism meant the reframing of the republic as free republic only in a vast expansive territorial state¹³⁶, the institutional tool being again representation. Thus, while others had seen expansion as fatal to republicanism, the federalists built expansionism into their model of the republic as a necessary precondition for its success.

3. *Expanding Republicanism to Territorial Expansiveness*

In arguing that a large republic would counterbalance various political interest groups vying for power, Madison believed that the rivalry of the individual interest groups

would ensure that political factions would keep each other in check; no one could rise to a majority that dominated the community¹³⁷. This turned the anti-federalist arguments against the republic embracing a large area to its head; while the anti-federalists saw the growing territory of the fledgling United States as a reason why the United States could not be republican, the federalists used the same territorial expansion as a reason in favour of the republic. For them, only in a vast expansive territorial state the interests and attitudes are so plural, that particular factions hold each other at bay:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the most easily they concert and execute their plans of suppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of citizen¹³⁸.

The link between the best possible discursive asymptote to the common good and greatest varieties of interests was, again, representation. The 'representative correlation' between self-interest and republican dignity – the desire to be one's own master – formed in the «federal Constitution [...] a happy combination of [...] great and aggregate interests being referred to the national, the local and particular to the State legislatures»¹³⁹. Representation offered the federalists the means to institutionalize the republican pride of active local self-government, such as township meetings, conventions¹⁴⁰, but on a dem-

ocratically correct, broader federal scale. Madison praised the Union as a federal representative republic by emphasizing its size: «[T]he same advantage which a republic has over a democracy in controlling the effects of faction is enjoyed by a large over a small republic»¹⁴¹. This advantage was to be secured through the republic's novel features: «[F]irst, the delegation of the government... to a small number of citizens elected by the rest, secondly, the greater number of citizens and greater sphere of country over which the latter may be extended»¹⁴². For the federalists, federalism was a distinctly modern solution to solve (or, in fact, avoid) the aforementioned ancient dilemma of liberty and empire¹⁴³, as it allowed an 'aristocratic consecrating' of an extended representative commercial republic under the law. Here, 'aristocratic' is euphemistic rather than technical; in applying their concept of federalism, the federalists consecrated institutional elements of the republic that were in fact not based within a gentry, as in the Old World, but nevertheless founded an institutional elite that hindered the direct rule of the democratic majority, while still tracing the founding rational legitimation back to the people. The institutional implementation of the representative republic allowed the transformation of Montesquieu's «virtuous republic»¹⁴⁴ into a popular government veiled in the disguise of democracy. Virtue as «passion for the public good»¹⁴⁵ presented the means to understand virtue through a 'democratically modernized' lens¹⁴⁶. In the same way, John Adams, the first vice president and second president, linked the republic as a form of government together with virtue: «If there is such a form of government, then, whose principle

and foundation is virtue, will not every sober man acknowledge it better calculated to promote the general happiness than any other form?»¹⁴⁷. In addition, Madison presupposed a certain virtuous standard for self-government¹⁴⁸.

The United States Constitution translated the moderations of and restrictions on democratic majorities into an institutionalised system of horizontal and vertical checks and balances, together with non-imperative mandates and relics of the mixed constitution. Within the federal institutional arrangement, the president embodied the 'monarchical' and the Senate the 'aristocratic' structural principle. By outsourcing to the institutional sphere, the moderations of popular sovereignty did not question the legitimizing role of sovereignty itself. In addition, this transfer allowed the individual dignity of all electors to be derived from the republican dignity of the elected. According to the federalists, «the capacity of mankind for self-government»¹⁴⁹ rested on the capacity of the electors to assess the representatives and the capability of the representatives themselves. Thus, even when the representative political order rests on the «total exclusion of the people in their collective capacity»¹⁵⁰, it is dependent on their individual abilities to choose their representatives¹⁵¹. The interaction between the electors and the elected from the viewpoint of republican dignity demonstrates that federalist republicanism cared about non-domination and self-mastery on local levels because the federalists themselves cared about individual dignity. Regardless of institutional precautions against the democratic tyranny of the majority, the federalists' republican representation differed from the old estate

representation insofar that the represented were empowered not to be dominated and, therefore, that they enjoyed individual dignity because it was fostered by republican dignity.

4. *Institutional and Normative Chains for Democratic Majorities*

Whereas popular government offered the republic its founding rational legitimacy, in the Constitution (as the founded system) the moderation of the majority will is paramount. There is no question that the representatives are elected by the people of the individual states¹⁵². Thus, to counter universal suffrage without property qualifications, the people's influence in the House of Representatives was to be limited by the dual strategy of introducing the largest possible constituencies and limiting the number of representatives to sixty-five. Madison openly admitted that the 'aristocratization' of those in charge of the legality of the consented commonwealth was an intended feature: «Large districts are manifestly favorable to the election of persons of general respectability, and of probable attachment to the rights of property, over competitors depending on the personal solicitations practicable on a contracted theatre»¹⁵³. This closed the circle to the advantages of the extended republic: It is precisely in the extended republic that the most capable and virtuous were to become representatives, since only they could convince the public of the correctness of their arguments in view of the diversity of interests in a large-scale community¹⁵⁴. Moreover, the mechanism of indirect elec-

tion of members of the Senate should ensure that only representatives of a kind of natural aristocracy were assembled there. The way the presidential head of the executive «squinted towards monarchy», as the outspoken anti-federalist Patrick Henry noted¹⁵⁵, was simultaneously felt a counterbalance to the pitfalls of democracy¹⁵⁶.

Another form of aristocratisation was legal aristocracy: The territorial constitutional discourses by the late 1770s and early 1780s first differentiated between fundamental and statutory law. The idea of constitutional precedence as a barrier against 'democratic tyranny' accompanied the federal constitutional formation after its ratification¹⁵⁷, its coming into force¹⁵⁸ till it was augmented by its interpretation in *Marbury v. Madison* (1803)¹⁵⁹. The rise of the ordinary jurisdiction of the Supreme Court to measure the statutory law against the 'higher will of the people' (that is, the Constitution) was thought also to counter-balance democratic errors. The popular will as the 'ultimate court of appeal' in politics for Americans forged the supremacy of the United States' Constitution as the legal benchmark for all political powers to protect freedom and property, in conjunction with the Constitution operating as a guarantee for the existence of the Union.

5. *How to Protect the Political Combat of the Fittest against Excesses of Power and Transgressions of Competence?*

Even if the best representatives in the extended republic prevailed in the competition, it was still possible that they might succumb to the allure of power and, through

this, make misguided decisions. Therefore, it was also necessary that political action be subject to controls. The federalists recognised that human weakness existed, and formulated their checks and balances accordingly; as Madison termed it, «ambition must be made to counteract ambition»¹⁶⁰. The institutional system of separation of powers motivated the political bodies to jealously guard the spheres of competence assigned to them: «The interest of the man must be connected with the constitutional rights of the place»¹⁶¹. Competing interests and conflicting opinions guaranteed that the rights of control and veto would be exercised effectively.

The 'pursuit of happiness', enshrined in the first article of the Declaration of Independence, was the result of one's own performance and ability, and continues to lie at the heart of the American dream. The protection of these abilities was 'the government's highest goal'. This rationality of Enlightened self-interest legitimized social differentiation: Madison explicitly mentioned the 'different abilities' of people to acquire property, indicating that the equality into which every man is born was not intended as an equality of *means*. Freedom as the origin of plurality was the nexus of federalist democratic republicanism, in the sense of linking republic to popular government; «to prescribe to every citizen the same opinion, the same passions and the same interests» would, according to Madison, be the worst thing that could happen to any popular government, and bring forth the nightmare of tyrannically-established special interests¹⁶².

Particular interests were, to federalists and anti-federalists alike, the enemy of the common good. In the case of the fed-

eralists, therefore, the channelling of state organisation via checks and balances and the counteraction of 'ambition with ambition' was a direct attempt to tackle human deficiencies. In this way, checks and balance were to be oriented towards a concept of the common good, in which the common results primarily from competition with the particular. Thus, the common good was no longer an objective and immovable fact, but a discursive asymptote that could be strived for but not reached. Moreover, as the freedom to compete was conceived as the origin of pluralism, the basis to compete must be withdrawn from competition. From the viewpoint of republican dignity and the prerequisite of its social dependence on relations, where attention and respect are communicated, this can be expressed by the connection of republican dignity and individual dignity. Centuries later, when it is clear that the common good cannot longer be an *a priori* goal (Kantian criticism) and the universalism of human dignity contains an additional safeguard, this might be a hitherto unrealized origin of the primacy of human dignity.

6. No Imminent Basic Rights in the Representative Republic

The federalists linked neither their new ideas of representation nor of democratization of the common good to normative, enforceable basic rights. This does not, though, indicate irreconcilable disparities of republican and liberal influences in the American revolutionary discourse¹⁶³. Rather, the galvanizing effect of the struggle for ratifying the republic forced the

republican and the liberal 'languages' to coexist in the revolutionary discourse. Reflecting the ideas presented here, the decisive novelty of connecting the 'new' idea of representation with popular sovereignty relied on autonomy (not only for the constituent American people, which is thereby 'invented', but also for individuals). On the other hand, the liberal understanding of an unlimited pursuit of individual private interests beyond external interference did not prevail, though it was certainly attractive for early proto-capitalist visions of the constitutional framers. Thus, what is notable here is the heavy but not exclusive republican influence on American constitutionalism, which becomes more apparent through the functional understanding that the «Americans [created] independence as a nation [based on their] autonomy as individuals»¹⁶⁴.

Accordingly, Locke's belief in natural law discernible by reason, grounded in common law¹⁶⁵, had its impact on the American discourse, irrespective of how one measures his advocacy for possessive individualism. Adopting the Lockean social contract, the federalists assumed pre-state and inalienable basic rights, without any need to have these formulated into norms, especially since they still referred to common law freedoms even after 1776¹⁶⁶. Instead, encroachments on freedom were prevented by the separation of powers of the state authorities¹⁶⁷. Independent of the (necessary) state, people had natural rights¹⁶⁸; the fact that these rights were indefensible in the natural state, according to Locke (and thus according to the federalists) made state rule necessary. As Madison noted, «[i]f people were angels they would not need government»¹⁶⁹. Under

state rule, nevertheless, the natural rights of the people had to be protected from the selfish inclinations of the people in the state institutions. This was also recognized by Madison, who saw the «great difficulty» in forming «a government which is to be administered by men over men» as being that «you must first enable the government to control the governed; and in the next place oblige it to control itself»¹⁷⁰. Within the republican framing of the democratization of the common good, it was not a priority to establish the natural rights as federal norms; the federalists relied on the self-reinforcement of the people's positive qualities by their involvement in self-government, and specifically on the relationship¹⁷¹ between the small number of representatives and the 'people at large', though they admitted «a degree of depravity in mankind which requires a certain degree of circumspection and distrust»¹⁷². Madison, at least, was optimistic that this depravity could be outweighed, since «[r]epublican government presupposes the existence of [positive] qualities in a higher degree than any other form»¹⁷³. Hamilton took up this idea again in No. 76, when he explained the appointing power of the executive: «The institution of delegated power implies that there is a portion of virtue and honor among mankind, which may be the reasonable foundation of confidence. And experience justifies the theory»¹⁷⁴. In addition, the standardization of the bill of rights under federal law was mostly absent in both the Philadelphia convention and in the federalists' advocacy for the constitution's ratification, as individual state guarantees of fundamental rights permitted a certain 'relaxation' on the federal level. Before 1791, six of the states had declared a bill of

rights, beginning with Virginia in 1776 (though it still lacked any explicit reference to human rights or organizational rules)¹⁷⁵, and followed by Delaware¹⁷⁶, Maryland¹⁷⁷, North Carolina¹⁷⁸, and Pennsylvania¹⁷⁹, all in 1776, and Massachusetts in 1780¹⁸⁰.

The anti-federalists' most well-known concern was the lack of a bill of rights in the drafted federal constitution. If the federal constitution were to supersede state rights, they argued, then state bills of rights would offer little protection at all, since they would be inferior to a federal constitution that contained no bill of rights at all; consequently, there would be no adequate protections for citizens' rights. It was for this reason that New York, Virginia, Rhode Island, Massachusetts, and North Carolina ultimately insisted that ratification would only take place if accompanied by a federal bill of rights. On 25 September 1789, the First Congress of the United States therefore proposed to the state legislatures twelve amendments to the Constitution that met arguments most frequently advanced against it; on 2 October, President Washington sent a copy of these twelve amendments to each of the states. By 15 December 1791, eleven out of the now fourteen state legislatures ratified Articles 3 to 12, which constitute the first ten amendments of the Constitution, collectively known as the Bill of Rights¹⁸¹. The Americans had quickly learned a key consequence and feature of the amalgamation of republicanism and liberalism in this unique form: by combining the constitutional codification of the *politeia* and the 'constitutionalisation of individual rights'¹⁸², the constitution itself was raised to a greater prominence, such that it took precedence. Henceforth, these

two components governed modern constitutional architecture.

Summary, American Republicanism: Though it took its cues from the Old World, America's republicanism could still lay claim to being something new. Its hastily-formed republican constitutional order, which introduced a strong executive in the form of the president, and a consolidated political elite in the form of the representatives, acted as a counterbalance to self-governed popular sovereignty. This stood in contrast to revolutionary France and its daughter republics, not to mention the older city republics of the old European republican traditions, nor the various confederations that sprang up throughout the European continent. All this made the modern federal state system pioneered by the Americans appear to be a great success; Goethe ascribed this to the fact that the Americans were unencumbered by the 'castles' and 'useless remembering' that plagued the «old continent»¹⁸³. In other words: lacking a feudal heritage, America's distance from Europe was both literal and metaphorical, and this was the basis for its ability to construct a republic in a vast and ever-expanding state.

These events on the other side of the Atlantic acted like a match held to the powder-keg of Europe. This is particularly true in France. Thousands of French soldiers and officers took part in the American fight for independence against the British crown¹⁸⁴. Their experience in North America would later play crucial roles in the French Revolution of 1789. Not the least of these was the Marquis de La Fayette or Lafayette (as he wrote himself from 1790), whose enthusiasm about «the

fellow American republicans»¹⁸⁵ fed into his first draft of the sovereignty of the French Nation¹⁸⁶. Together with America's ambassador in Paris, Thomas Jefferson, he had already drafted a declaration of human and civil rights, which he presented to the general assemblies on 11 July 1789; the claim that 'all men are created equal', echoed the introductory passage that Jefferson himself had written for the Declaration of Independence thirteen years earlier. This offered framing for two events that immediately followed, with significance for Lafayette personally and the course of French republicanism in general: the Bastille fell the very next day and, on 13 July, Lafayette took command of the National Guard.

American republicanism continued to pique French interest well after the Revolution. Sixty years after Independence, and nearly fifty after the French Revolution, Alexis de Tocqueville's seminal work *Democracy in America* (1835) described the United States Constitution as «une constitution complexe»¹⁸⁷ in the overall political, legal, social, historical, and cultural context. Tocqueville argued that the dangers of the tyranny of the majority and a resultant democratic despotism¹⁸⁸ were subdued by a combination of religion, which fostered good morals; civic spirit, which encouraged organization at a local level¹⁸⁹; and the Supreme Court, which acted as a stronghold of a further branch of elite specialists, in this case the quasi-aristocratic jurists¹⁹⁰. His idea of civic spirit closely matches the concept of virtue in classical republicanism. Like Constant, Tocqueville broke with the irreligious tradition of the Enlightenment, and assumed that freedom and religious belief shared a common foundation¹⁹¹.

Moreover, Tocqueville considered political freedom, in its true sense, to be the freedom of citizens to use their own agency. Viewed from this perspective, modern democracy both strengthened and weakened individual rights; while a person would be liberated from the traditional interdependencies, they would also be confronted by a commensurate undermining of communal identity. Individuality was therefore both a benefit and, in its isolationism, a curse¹⁹². In summarizing Tocqueville, John Stuart Mill later noted that democratic sovereignty of the people did not mean 'the government of each individual over himself', but rather «each individual *through* all the rest»¹⁹³ – a crucial distinction and a repudiation of the idea that the American republic represented democratization in its purest sense¹⁹⁴.

The Confederation of the United States, as an entity in which each individual state was effectively its own republic, governed by its citizens, and thus united and unified by the egalitarian «dogma of popular sovereignty», with which Tocqueville contrasts the «strange European» idea of the republic, in which «those [reign] who know the greatest good of the people ... [which] permits one to act in the name of nations without consulting them»¹⁹⁵. Tocqueville saw inherent dangers in American democratic republicanism to be the despotism of majority opinion, and in particular a worse intellectual conformity than in the great European monarchies. The following decades and centuries, it could be argued, may have shown Tocqueville's fears to have been well-founded; the economic – and later imperialist – political reality of America not only fails to select the most virtuous representatives as the «idealized aristocracy, virtuous, able, and

public spirited» (Sheldon Wolin)¹⁹⁶ but also to control the representative (federal) government by a free civil society with competing interest groups.

Whereas American republicanism relied on constitutional checks and balances between clearly separated powers as the institutional backbone of the democratic sovereignty of the people, French republicanism gathered around an estate-based independence of the republic and the normative abstractness of the general will. Neither the French role in the birthing of the American Republic nor any American repercussions on revolutionary France could spoil the 'gallic distinctiveness' of its republicanism, irrespective of the fact that there *was* indeed an American influence on the events of 1789 – far beyond the implied or explicit connections between the republican Americans and the marshalling French revolutionaries¹⁹⁷. The correspondence between the Marquis de Lafayette and Thomas Jefferson is well known, and Jefferson in fact provided input for Lafayette's constitutional works¹⁹⁸. The same is true of Sièyes' contacts with the Washington administration¹⁹⁹. It was above all natural to compare the news from the New World to the situation in the Old: How would the Bourbon monarchy be viewed, when the Americans had classified George III as a 'brutal tyrant'? How could the French state justify massive imposts, when the Americans could rebel against the English imposition of a duty of three silver pennies²⁰⁰ per pound of tea? This essay takes a stand against both Jellinek and Boutmy, by tracing the Rousseauian influence on the 1789 Declaration of the Rights of Man and Citizen and Sieyès' liberal position against a totalitarian legislature on

the one hand, and by explaining Rousseau's challenge to the Hobbesian social contract on the other²⁰¹. It is the unity of the constitutional language due to a common heritage for which the Parisian replica of New York's Statute of Liberty (*La Liberté éclairant le monde*) on the Isle of Swans (*Île aux Cygnes*) is a reminder of the fact that the original was a gift from the people of France to the people of the United States. Just as the iron framework of the Eiffel Tower forms the backbone of the *Dame de fer*, and just as the designer of the Statue of Liberty, Frédéric Auguste Bartholdi, also relied on metal from Gustave Eiffel, so too did the republicanism of France and America share components of the same constitutional architecture, albeit on both sides of the Atlantic.

III. French Republicanism between Nation-Republic-Appropriation and the Specific Legitimatory Claim of the General Will

1. The French Twin Story of Nation and Republic

On 21 September 1792 the newly elected National Convention²⁰² unanimously declared the monarchy to be abolished²⁰³. The victory in Valmy the day before had been that of the nation, and not the king²⁰⁴. In this shift away from monarchy, the Revolutionaries had been remarkably slow to act. Indeed, Louis XVI remained an active participant (and arguably an agent of his own demise) from the storming of the Bastille through to his eventual execution. On 14 July 1790 he had refused to swear an oath alongside Lafayette at the Feast of Fed-

eration²⁰⁵. Between 20 and 21 June 1791 he, along with his family, had attempted to flee in the direction of Austria, making it only as far as Varenne before being captured, returned to Paris, and placed under house arrest. His continued meddling in affairs resulted in the storming of the Tuileries on 10 August 1792 and his suspension as the leading citizen of France. All these led inexorably to his execution on 21 January 1793. Thus, to a certain degree, the downfall of the monarchy was as much engineered (however unwittingly) by the King as it was by the Revolutionaries. Yet not even these acts were the proximate causes for establishing republicanism's foothold in France. Instead, the revolutionary barricades acted as dramatic cover for a much longer lineage of prior republican discourses.

The aristocratic opposition in the pre-revolution around the *parlements* and their rights of remonstrance and registration has already been examined extensively elsewhere²⁰⁶. An exemplar of aristocratic republican ideals and their connection to the legal aristocracy (*noblesse de robe*) is to be found in Henri de Boulainvilliers' *Histoire de l'ancien gouvernement de la France* (1727)²⁰⁷, which echoed memories of the Frankish nobility's feudal government over conquered Gaul²⁰⁸. Such a republican *thèse nobiliaire* touched on the foundations of a monarchy that, despite its pretensions to the contrary, was not in fact absolute²⁰⁹. Yet this lineage does not explain Goethe's declaration in his late *Campaign in France in the Year 1792* (published 1820-21) that «[h]ere and on this day begins a new era of world history»²¹⁰. Accompanying Duke Karl August von Sachsen-Weimar as a correspondent, the great poet had realized that the 'nation' and the 'Republic' had become

deeply intertwined. This equation lies at the heart of French republicanism, even today. Bargaining with the interchangeability of 'French' and 'republican', contemporary politicians 'republicanize' political party names, the most prominent recent example being Emmanuel Macron's *La République en Marche*. The simultaneous identification of France as both the nation and the republic is also prevalent in other settings. The 'je suis Charlie' on Parisian streets after the terrorist attacks on the editorial staff of the satirical magazine *Charlie Hebdo* in January 2015 was complemented by the address of the then-President François Hollande, who declared: «Today, the Republic was attacked. The Republic is freedom of speech. The Republic is culture, it is creation, it is pluralism and it is democracy»²¹¹.

One of the decisive moments of the Revolution was the reorganization of the Estates-General into a National Assembly claiming constituent sovereignty in the summer of 1789. The novelty of the emerging nation-republic appropriation was clear three years later on the battlefield at Valmy, where unexperienced revolutionary volunteers routed the much-fancied Prussian army. Yet the true innovation lay in repackaging republicanism in the skin of national sovereignty, not in the republicanism itself. As the Revolution shaped an anti-monarchical reception of French republicanism, it is crucial to point out that this pairing of republic and nation had already started in the sixteenth century within the monarchical discourse.

2. *The French Chameleon: The Republic in Monarchical Discourses*

a. *The Coincidence of res publica and civitas as both Constituted around the King*

According to one of the French bartolist advocates of a strong monarchy Claude de Seyssel the 'concord' and 'unity' among the citizens depended upon «obedience to the king»²¹². This was the French implementation of the Augustinian tradition that evil necessitates royal domination. Thus, obedience to the king's public power, as derived from divine ordinance, was the natural order of things, embracing the body of citizens with the royal power of the '*Roi très chrétien*' (*Rex christianissimus*). *Res publica* and *civitas* coincided, since both were constituted around the king: the «most civil and best-constituted monarchy of France», in de Seyssel's wording²¹³, unified in 1515, in the very year of the ascension of King Francis I and the advent of concentrating monarchic power. The idea that the *res publica* was a voluntary, common doing of a multitude of free men for the sake of private utility was absent in the French discourse, with the notable exception of de Boulainvilliers' later aristocratic republic, to which Harold Ellis acknowledges familiarity with the English commonwealth thought²¹⁴. The 'public good' in the monarchized 'concord' and 'unity' among the citizens rested for Seyssel upon laws «established in such a way that they can scarcely be broken and annulled»²¹⁵ as the royal power was regulated by three 'bridles': religion, justice, and *the police*²¹⁶.

b. *Republic as Sovereign Monarchy*

This suggested cohesion of the political society with royal dominion became accentuated in Jean Bodin's *Six livres de la république* (1576); Bodin's choice to include 'republic' in the title grounded the synonymy of republic and sovereignty. This became a prevailing topos in French republicanism, explaining the monarchy-state appropriation (prior to the nation-state appropriation). The «striking lability of the [...] term [republic]' has to be highlighted»²¹⁷. French republicanism of the humanist sixteenth century was never limited to the Huguenot resistance against 'royal tyranny' following the St. Bartholomew's Day Massacre of 1572. Distinct from the mixed government claims engendered in the Huguenot programme and articulated in Hotman's *Francogallia* (1573)²¹⁸, Bodin's republican language conceptualised the supreme princely rule as legislative sovereignty²¹⁹. In this way, he reframed the monarchy as the only appropriate form of state: the Republic must be a sovereign state. The monarchy could therefore be praised as the best form of government, only because it embodied the unity of supreme ruling power.

Some authors assume the republic to be the mere French version of the latin *res publica*, synonymous to the state in the Aristotelian *politeia* tradition²²⁰. Instead, the wording of Bodin's sovereignty chapter (I 8) indicates a republican reading as referring to the common normative framework, opposed to the royal interests themselves. Bodin differentiated the (fundamental) laws «concerning the state of the kingdom, and the establishment of it, inasmuch as they are annexed to and united with the crown, the Prince may not derogate from them, as

the Salic law»²²¹, from the alterable ones «which the king can derogate». Although Bodin himself does not use the terminology *lois fondamentales*, his laws «concerning the state of the kingdom» (Latin: *leges imperii*²²²) were functional equivalents and, together with natural law and divine law, constituted the normative framework of the monarchy which was not at the disposition of the ruler *legibus solutus*²²³. At the same time, Bodin reduced the republic to its pacifying effect, after the ruin of the king's peace-making authority (*Königsheil*) as a result of the confessional clashes of the French Wars of Religion and the consequential Monarchomach²²⁴ storm; his combination of the citizen as «a free subject who is under the sovereign power of another»²²⁵ with the definition of ruling as «to be able to impose laws on all subjects without their consent»²²⁶ broke from the Machiavellian republican understanding of the civic, virtue and freedom-oriented position against sovereign statehood. Instead of the Machiavellian dichotomy of 'either republics or monarchies' – as laid down in the *Principe* (1513) – Bodin continued the corporative civic unity in obedience that characterised de Seyssel's previous argument, in order to 'republicanise' the monarchy as the best form of government (that is, in the best interests of all), using sovereignty as the appeasing factor.

3. *Montesquieuan Republic disguised as Mixed Monarchy*

One of the parliamentary aristocrats, the president of the *parlement* de Bordeaux, was Montesquieu²²⁷. In his masterpiece *De*

l'esprit des lois (1748) he designed a «universal taxonomy»²²⁸ of three forms of government – republican, monarchical and despotic (Livre II, chapitre 1)²²⁹. The nomenclature was differentiated according to the seat of sovereignty and the particular, animating principle (virtue, honour, and fear). For Montesquieu, the «republican government is that in which the people as a body, or only a part of the people, have sovereign power»²³⁰ and the republic is activated by 'civic virtue' (*vertu*) – either in the democracy by the democratic virtue of «love of equality» (livre III, chapitre 3)²³¹ or in the aristocracy by the virtue of a «spirit of moderation» (livre III, chapitre 4)²³². As much as Montesquieu claimed the interconnectedness of republicanism and virtue²³³, he was by no means an advocate of French republicanism. In the *Esprit*, he concludes that «The republic is a spoil; and its strength is not more than the power of a few and the license of all»²³⁴. All the preparatory work on the *Causes for the Greatness of the Romans and their Decadence* (1734) deepened Montesquieu's argumentation that republican government as such was largely a 'souvenir' of the past²³⁵, and certainly not France's future. For this Montesquieu favoured the mixed monarchy whose animating principle is that of honour (*honneur*)²³⁶, and «not that of virtue»²³⁷. The ideal monarchy tempered by aristocratic intermediate powers (Chapitre IV, livre II)²³⁸ was based on social and legal inequalities²³⁹. According to Montesquieu, the privileges of the nobility and the aristocracy's social pre-eminence guaranteed political liberty, whereby «[t]he nature of honour [as guiding principle] is demanding preferences and distinctions»²⁴⁰.

These ideas came further to the fore in the famous English chapter of the *Esprit*. Naming England the «one nation in the world whose constitution has political liberty for its direct purpose» (Livre XI, chapitre 5)²⁴¹, Montesquieu analysed the executive power of a hereditary monarch as tempered by «intermediary powers which form their monarchy» (Livre II chapitre 5)²⁴². The monarchical executive's linkage with the legislative power, shared among popular and aristocratic assemblies, is specific in the blending (not separation!) of all three forms of government with distinct principles of legitimation: the authority of a monocratic ruler, the superior knowledge of an aristocratic elite and the sense of solidarity, common bond and *esprit de corps* of a democratic community together with a social balance between the royal, noble and civic ranks²⁴³. Partially in order to make use of an aristocratic republicanism²⁴⁴, his design demonstrated that virtue was not the animating principle of monarchical government; this, in turn, made clear that he dissociated himself from any republican heritage of political balancing of social groups, as articulated by Machiavelli in his reception of Livius. As already demonstrated by Bodin's republic-sovereignty-appropriation, Montesquieu deepened the French rejection of the Machiavellian republican understanding of the civic, virtue and freedom-oriented position against sovereign statehood. The laws thus took on the (republican) role of virtue²⁴⁵.

Crucial to the ideal French monarchy were the safeguards that the *parlements* provided for the fundamental state laws (*dépôt des lois*). Here, too, was to be found the application of Montesquieu in the parliamentary resistance to Bourbon abso-



Charles de Secondat Montesquieu with the scientific cenacle at Castle Clairac, coeval painting

lutism, especially after the administration of Louis XV's skillful chief minister, Cardinal de Fleury, ended in the 1740s. This coincided with France's descent into dire financial straits, due to its multiple doomed military adventures. At the same time, the monarchy had also manoeuvred itself into a fierce confrontation with various provincial *parlements* in the ideological battles over Jansenism.

The radicalisation of parliamentary discourse in the remonstrances between 1753²⁴⁶ and 1788²⁴⁷ made extensive use of the language of Montesquieu's *De l'Esprit des Lois*. The *parlements*' self-understanding as «holy repositories» (*dépôts sacrés*) in the «Great Remonstrances on the Refusal

of the Sacrament»²⁴⁸, their praise as the «depository tribunal of the state of inviolable laws that form the sacred right of the nation»²⁴⁹ or as «respective guardian» (*gardien respectif*) in the *Flagellation session*²⁵⁰, all borrowed from Montesquieu's formulation of the aristocratic balancing function and amounted to the formation of a single corporate entity, led by the Parisian flagship, claiming to be 'representative' for the French nation in its dealings with the court. Their recourse to the fundamental laws (*lois fondamentales*)²⁵¹ and the laws born with the monarchy (*lois, nées avec la Monarchie*)²⁵² was soaked with verbal references to the *Esprit*²⁵³. They channelled the estate protest against absolutist centralisa-

tion ambitions, and it was their demand in August 1788 that led to the convocation of the Estates General for 1 May 1789. In fact, they incorporated the necessary observance of 'fixed and established laws'²⁵⁴ that differentiates the French monarchy from despotism according to Montesquieu's terminology, which went beyond their struggles to maintain their traditional right to examine royal legislation before its registration, which was threatened by the ministerial despotism of Maupeou from 1771 onward²⁵⁵. This is also apparent in the fact that the parliamentary notion of equity was still the same as in the anti-Machiavellianism proffered by Bodin, which did not tolerate any detachment of the sovereign's will from the idea of justness according to natural and divine law²⁵⁶. The indispensability of equity as the product of natural and divine law (*droit*), together with the designation of the hierarchy of competence²⁵⁷, were regarded as fundamental law²⁵⁸. This ultimately formed the basis for Art. 16 of the Declaration of Rights of Man and Citizen of 1789: «Any society in which no provision is made for guaranteeing rights or for the separation of powers has no Constitution»²⁵⁹.

The eleventh book meanwhile, containing the England chapter, is headed: «The Laws which form the political freedom in relation to the constitution»²⁶⁰. In Montesquieu's understanding – and indeed in the understanding that the *parlements* adopted – both arbitrariness and the concentration of political power in the hands of one person infringe freedom²⁶¹.

In spite of the fact that the argument presented here places great weight on the fact that the England chapter was not to be misunderstood as an advocacy for a separation of powers, neither does the *Esprit's*

godparenthood of Art. 16 of the Declaration stand in contradiction to this. Rather, the revolutionary Declaration of 1789 made clear that codification of the whole political order as a legal order had two key elements, being the same elements that govern all modern constitutional architectures: the codification of the bond of justice between state power and the individual (in which the state cannot arbitrarily infringe), and that of state powers with relation to other state powers (whereby state organisational law signifies a separation of power). The constitutionally-secured primacy of the law does not permit sovereignty *above* the law. In this sense, the second 'column' of gallic republicanism is clear: the absoluteness of the general will and, from this, freedom by the partaking in its formation.

4. *The Absoluteness of the General Will and the Complementary Freedom through Participation*

The undivided sovereignty advocated by Jean-Jacques Rousseau, embodied in the law and not in the person of the ruler, necessitates at its heart a democratic monism. By this, any representation is not to be undertaken as it encourages and embodies plurality; for the sake of the unity of the democratic subject, it must be avoided. This fundamental rejection of pluralism, be it in a classical mixed constitution or the liberal constitutional distribution of powers, was comprised within the figure of the general will (*volonté générale*), and became the starting point for the debates in the French Revolution²⁶². Rousseau's equivalent of the common good thus took the form of a bour-

geois civil religion. Justification (of the law) draws the hierarchical model of the rule of law from the assumed normative quality of the law: it binds the other state powers as an expression of the common will.

Crucial to Rousseau's republicanism was the establishment of a republican community through the egalitarian model of a contract. These elements of Rousseau's philosophy—not only the idea of a homogeneous citizenship, but also the social contract itself—were linked to the natural law implications of equality. «[I]n harmony», writes Johnson Kent Wright, «with the entire republican tradition», Rousseau started from «an umbilical connection between individual and collective freedom»²⁶³. Wright's assessment of Rousseau's republican theory uncovers «a normative ideal blending nostalgia for his native Geneva... with Sparta and Rome»²⁶⁴. The context of his civilisatory critique in the *Discourse concerning Inequality* (1755) are decisive to understanding Rousseau's republicanism. What could man be without the denaturation of civilization and the split caused by Christianity in a private-internal and public-external existence? According to Rousseau, the dual nature of man as a being governed by both senses and reason, as well as his (admittedly aimless) ability to learn were the characteristics that unavoidably caused man to be removed from its natural state. The division of labour, agriculture, the presumption of property, dominion, misery and crime corrupted the people who by nature were good, as a result of which they became subjects who blindly obeyed. Indeed, as Rousseau himself noted in his second *Discourse concerning Inequality* (1755): «The first one who had fenced in a piece of land and came up with the idea to

say: this is mine and who found people who were simple-minded enough to believe him was the true founder of bourgeois society»²⁶⁵. The process of human self-alienation corresponded with this preoccupation with property that so obsessed civilization; after the destruction of the ancient harmony of intellectual, religious, social and political life, especially in the idealized Sparta, the completely self-referential natural man turned into the bourgeois, torn between private existence and public civic order. Natural self-love (*amour de soi*) degenerated into vicious selfishness (*amour propre*). This profound dialectical process of atrophy and disintegration was irreversible in Rousseau's critique of natural jurisprudence (which placed him at odds with, most notably, Samuel Pufendorf)²⁶⁶. For Rousseau, and in contrast to Hobbes and Locke, the civic state is therefore not an optimized natural state.

Given this, as well as the fact that the social degeneration identified by Rousseau was, to his mind, irreversible, a *contrat social* was needed to create a new legal equality on a completely new basis²⁶⁷. Returning to nature was no option, as nature was an unattainable ideal in the French Enlightenment. The individual efforts to overcome the degeneration by a 'natural' education of great artificiality—an obvious inconsistency, but none the less propagated in the *Emile* (1762)—should be accompanied by the social possibility of abolishing self-alienation by transforming oneself into a *citoyen*, capable of civil liberty and possession. This could be achieved by means of the new moral-political totality of a comprehensive social contract²⁶⁸. In doing so, the individual would become «a part of a greater whole»²⁶⁹ and, through moral conversion

of his nature, by the «total transfer of each partner with all his rights to the whole community»²⁷⁰, would gain a new wholeness of life. Rousseau believed that it was only through the boundless state power of this new Leviathan that the original freedom of man would be reborn: «Obedience to the law one has prescribed for oneself is freedom»²⁷¹. The individual could, of course, only exercise freedom as a partner in the whole, as a member of the sovereign. At the same time, natural self-love, without being tainted by selfishness, would find new life in the collective form of patriotism.

Rousseau did not conceive of any individual natural rights of freedom that would prevent the indivisible and unrepresentable sovereignty of the people²⁷² to turn into majority despotism. Such rights would be completely incompatible with the presumed overcoming of the natural state by the social state. Rousseau's 'republican' solution for this risk was an abstract statutory state rule (II, 6), limiting the direct expressions of popular sovereignty by the common will to the implementation of general-abstract norms. In this sense, Rousseau called «each state governed by statutes» a «republic»²⁷³, and only a «republican government» was legitimate²⁷⁴. The core of his idea of republicanism was self-domination through self-imposed laws that had been determined through that autonomy: «The statutes are [...] the conditions of the civil association. The people subject to the laws must be the author. It is only up to those who associate to set the terms of the society»²⁷⁵. Rousseau relied on the enlightening strength of the discourse «to make it [the general will] see the objects as they are, sometimes as they should appear to it» and on its ability «to protect [the general will]

from the seduction of particular wills, to bring places and temples closer to her eyes, balancing the attraction of present and sensible advantages with the danger of distant and hidden evils». The generic nature of the general will was constructed by Rousseau on the basis of the generality and abstractness of the norms that would be set in place, in the sense of a supreme public reason. As he noted, «The people themselves always want the good, but of itself they do not always see it. The general will is always right, but the judgment that guides it is not always enlightened»²⁷⁶.

Thus formulated, the unreasoned will of the individual²⁷⁷ would be overcome by the equation of the sovereign general will as generally applicable law, which constituted «the union of understanding and will in the social body, hence, the exact cooperation of the parties, and finally the greatest strength of the whole». This, to Rousseau, «is where the need for a Legislator arises»²⁷⁸; the result was a legitimate republicanism as a legal state order. Therefore, «The law is nothing else than the expression of the general will»²⁷⁹. Consequently, in 1789, Article 6 sentence 1 of the Declaration of the Rights of Man and Citizen followed Rousseau's cues. The rule of the people is the impersonal rule of the law, insofar as its execution is separate from the law-making²⁸⁰ and the law unites «the totality of the will with that of the object»²⁸¹. The generality of the object of legislation meant that the law considered its subjects «as a whole and the actions as abstract, but never a person as an individual or a single action»²⁸². The generality and abstractness of the regulations appeared to be a necessary condition for all to be able to be asked as 'true' citizens for their vote as integrated parts of a whole. Only if

citizens were not affected in a special, personal way by the object of regulation, and only if they were not emotionally distracted as a result, could they contribute to an undistorted answer as to whether or not the forthcoming legislative decisions were beneficial to the common good. For Rousseau, the decision of the whole, assembled independently and equally, on individual cases was equivalent to ignoring the votes of those directly affected who therefore, through their vested interest, could not perceive anything but their own interests. Already, any unjustified exclusion of even a single person harmed 'natural correctness' of the general will (in its tendency towards the public utility)²⁸³ and thereby infringed the general applicability of the law, no matter how general its objective content has been formulated²⁸⁴. Yet the question remained: who constituted the whole? The impersonality of the rule of law, which results from the equation with the general will, vested the personal element of lawful governance in the assembly of citizens. But the assembly of all citizens was utopian in a twofold sense: First, the gathering of all was not possible, as anyone could join the social contract, which is according to Rousseau's ideas open and undefined. Second, the reference to the person in this sense lacked a person to refer to; the nation as emerging entity remained – however libertarian, as Title II Article 2 of the September Constitution 1791 may define naturalization – a community essentially objectively defined by descent or place of birth, not a personal association.

In addition, the correspondence of the 'totality of the will with that of the object' was admittedly not the only prerequisite. Rousseau intended the majority to be an

identity of individual will and *volonté générale*, rather than a collection of individual votes (*volonté de tous*)²⁸⁵. This required civic virtue²⁸⁶ and the exclusion of all factional formations²⁸⁷, though in this Rousseau sounded utopian²⁸⁸; particular factions (*associations partielles*) rendered impossible the purification processes within individual considerations, which were supposed to hold mere individual interests at bay. Instead, factionalism would turn any vote into a competition of particular wills, obscuring the focus on the common good and preventing overruled minorities and others who did not prevail in the voting from recognizing their integration in the majority's will, insofar as they were merely mistaken about the true common interest²⁸⁹. «If there are partial societies, it is necessary to multiply their number and prevent their inequality» claims Rousseau with reference to Solon, «in order to prevent the people from erring about the general will»²⁹⁰.

In this way, Rousseau constructed a cognitive identity of individual wills with the general will, thus avoiding the spectre of total subjugation under a Hobbesian sovereign and reframing the traditional republican «umbilical connection between individual and collective freedom»²⁹¹ in a democratic language addressing social equality and civic solidarity. His idea of the rule of general laws as an exercise of collective autonomy equated political legitimacy with egalitarian participation in public decision-making. Rousseau's democratic republic, inspired by the classical examples of Sparta and Rome, was centred around the general abstractness on two levels. The laws consented to by the people were to be general in regard to addressees and appli-

cation, which guaranteed equality before the law (*égalité devant la loi*). They were also to be general in relation to the legitimacy source – the popular, participatory sovereignty. On this second participatory level, the *assumed* normative quality of the law presupposed three elements, each in its own way unrealistic: first, the ability of the individual to judge all matters concerned reasonably, that is, free from individual special interests; second, the institutional possibility of collectivising individual self-determination through real or virtual participation in the regulation of all matters concerned; and third, the common belief in an order according to abstract rules. These different layers of general abstractness set the scene for the Revolutionary terror that would follow, owing to the framing of the Jacobin public good as the '*suprême être*' paradigm.

Such a radically democratic construction of the law as a general law, based on the authorship of the people, superimposed in the French discourse the juxtaposition of the republic as a concept of state form with the monarchy, even if Rousseau himself has combined his concept of law with a monarchical form of government (as long as the establishment of the monarchy is a one-sided act of the sovereign people that can be revoked at any time). For Rousseau, a monarchy not derived from the sovereign people was despotism. This dichotomy was not unprecedented, though it was new to use the republic as a mere concept for the form of state. The dichotomy was shaped by Machiavelli's *Principe* (1513), which divided all states into principalities or republics. The distinction between autocracy and collective sovereignty was preserved in the pre-revolutionary French discourse of

Montesquieu, who distinguished the forms of state, but who, in accordance with his sociological interest in the law, reassigned value elements to democracy: loyalty to the law, love of the fatherland, and public spirit. It was Rousseau's equation of sovereignty with the *volonté générale* that enabled the formative context for the contrasting formation of republic and monarchy, where one would be characterised by terror, burning barricades and the guillotining of crowned heads, and the other by peace and security in the alliance between throne and altar.

The political republicanism of Jean Jacques Rousseau broke with the classical tradition of a mixed constitution. For him, the republic was not just an expression of the general will; it *was* the general will, governing in the form of statutes, irrespective of the form of government²⁹². In contrast to Montesquieu's equilibrium system, Rousseau's republican rule of law aimed at the superordination of the uniform legislature, based on general elections and framed as the collectivized self-determination of the individual, over the existing monarchical executive power. The *leges imperii* tradition that had been articulated by Bodin was still very much in evidence; so too did Rousseau divide the laws between *loix politiques* and *loix fondamentales*, which laid the basis of the form of government (*qui constiuent la forme du Gouvernement*), as well as differentiating between civil laws (*loix civiles*) and criminal laws (*loix criminelles*). Furthermore, Rousseau formulated a fourth type of law, which for him was the most important: «the veritable constitution of the state [...] within the citizens' hearts: [...] the mores, the customs and the opinion [about the political actors]»²⁹³.

Beyond this monolithic concentration of sovereignty in republican unity constructed around the general will and the legal rule of general laws, the liberal approaches of Sieyès and Condorcet also made their appearances in the constitutional debates from 1789 to 1795, though they did not prevail against the Jacobin understanding of the Republic, with its exaggeration of the immediate real presence of democratic power at all costs. While Rousseau's sovereign people were permanently present and almost identical with the political order, Sieyès limited national sovereignty to the constituent sovereignty (*pouvoir constituant*). Sieyès' distinction between constituent and constituted sovereignty (*pouvoir constitué*) made it clear that, within the constitutional order, sovereignty is exercised by the constituted powers, through representatives of the nation, but not by the sovereign nation itself. Thus, the most important aspect of the liberalization of the republican idea from self-legislation was the introduction of the principle of representation and, as a result, the move away from Rousseau's democratic monism.

5. *Liberalization of the Republican Idea from Self-Legislation by the Legal Construction of the Constituent Nation and the Introduction of the Principle of Representation*

The legal construction of the constituent nation²⁹⁴ transformed the Estates General into a genuine constituent assembly under the leadership of the Third Estate. The monarchy had in fact acceded to the doubling of the representatives of the Third Estate at the end of 1788, tabling the

question of voting by head until the actual meeting of the Estates in May. It was then Sieyès himself who led the way in breaking the impasse that immediately developed over this issue. On 10 June, the Third Estate approved his motion that it should proceed to a verification of credentials alone; and it was on his motion that the Third adopted the title 'National Assembly' on 17 June, inviting members of the other orders to join it. On the other hand, the Tennis Court Oath of 20 June, in which the assembly vowed not to disband «until the constitution of the realm is established and consolidated on a firm foundation» was the work of Jean-Joseph Mounier, who had been the intellectual leader of the Dauphiné revolt against ministerial despotism. The reference to the nation was apt to legitimize the civil war against the *ancien régime*: «La nation existe avant tout, elle est l'origine de tout. Sa volonté est toujours légale, elle est la loi elle-même» ('The nation exists before all, it is the origin of everything. Its will is always legal and it is the law itself')²⁹⁵. This acted as the harbinger of the modern republicanism that would emerge from 1792.

Breaking with the privileges of the first two estates and the medieval assumption of representing the traditional divisions of society, the Third Estate declared itself the National Assembly, and claimed the exclusive representation of the nation construed as the sovereign. The synonymy of political order, people and nation was formulated in Sieyès' *Contre la Ré-Totale* (1792) thus: «Une société politique, un peuple, une nation sont des termes synonymes»²⁹⁶. In this way, Sieyès distanced his concept of society from any Leviathan-type absolutist submission²⁹⁷. This legal construction

of the nation²⁹⁸, with the fiction that the nation's will is always lawful, excluded any absolutist political power by the immanent differentiation between constituent assemblies and ordinary legislative bodies (*pouvoirs constitués*)²⁹⁹. Political power (*le pouvoir politique*) was limited by the political object of the society (*l'objet politique de la société*)³⁰⁰; the latter had the same meaning as Locke's extra-statutory natural law as an immanent limit on every exercise of power with the freedom guarantee of the common law before the prerogative³⁰¹. Sièyes' pamphlet *Limites de la souveraineté* declared the protection of liberties and rights as the political objective of any societal association. In this reading, the majority's decision became law³⁰². If the constitution did not exist before the majority's decision, then it fell within the mandate of the association contract conducted under the unanimous will of the people. Therefore, constituent sovereignty was under control by means of the personal veto of every dissenting individual. Even if constitutional decisions had to be taken for practical reasons by the majority, the guarantee of the minority resided within the act of the association and therefore within the legal text of the constitution decided upon in the constituent national assembly. This integral guarantee was the equivalent of the *bonum commune* of the ancient political philosophers, particularly Aristotle, and bars the sovereignty exercised by the majority from unifying all the political powers, from disorganizing them, and from reframing their constitutional organization³⁰³. For Sièyes, this guarantee was the safeguard of personal liberty, secured by means of constitutions. As a result, despotism could be avoided by the moment legally construed when the or-

dinary legislative body (deciding on statutory law by the representing majority) was established as *pouvoir constitué* and therefore differentiated from the constituent power³⁰⁴. In differentiating between the decision on a constitution and the passing of ordinary legislation, Sièyes positioned himself expressly against Rousseau: «representation can never be a direct act, and under the constitution it is always divided, never accumulated and always dependent on the constitutional laws»³⁰⁵.

6. *The Republican Monarchy of the September Constitution between a Strong Legislative and a Mere Suspensive Royal Veto*

The National Assembly's main goal upon undertaking the Tennis Court Oath on 20 June 1789 was to write the constitution of France. In the time that it sat, it did much more than the September constitution 1791. As J.M. Roberts notes, «it revolutionised the whole structure of France»³⁰⁶. The confiscation of Church lands and the end of land-related feudal dependencies necessitated the 'geometric' segmentation into the *départements*, *arrondissements*, *cantons*, and *communes*, which even today shapes France's administrative map. Legislative projects like the judicial organizational statute of 16-24 August 1790³⁰⁷ initiated the end of judicial estate privileges, and material legal unity and equality was on its way through the preparatory work for the *code civil*. The liberties of opinion (Art. 10) and press (Art. 11)³⁰⁸ became legally actionable by the incorporation of the 1789 *Declaration of the Rights of Man and Citizen* as the constitutional preamble; the former-

ly absolutist monarchic power claims were transformed into a constituted kingship 'of the French'³⁰⁹, and the creation of a strong unicameral representation of the people, while not removing the monarchy totally, reduced royal legislative involvement to a mere suspensive royal veto.

None of these, however, at least, not in the eyes of constitutional framers such as Sièyes, was possible without the constitution in the first place. This, in turn, required the precise definition of where sovereignty lay. In Title III, Art. 1, the September Constitution of 1791 stated that «[t]he sovereignty [is to be] ... unique, indivisible and non-susceptible to time-barring. It only belongs to the nation». The third sentence connected national sovereignty to legal equality: «No part of the people and no singular person can appropriate its exercise»³¹⁰. The monarch was disempowered, but not abolished, as *pouvoir constitué*. The executive power remained vested in the king and his ministers (Tit. III, Art. 4)³¹¹. In contrast to the American text, the French September Constitution of 1791 constituted the monarchy, leaving the republican experiment for the Convention Constitution to come in 1793. The nation of the September Constitution of 1791 (Tit. III, Ch. II Sec. I, Art. 2)³¹² consisted of people and monarch, with the latter acting as a protection against the dangers of civil disorder. The provocative thesis of François Furet and Ram Halévi³¹³, which posits a republican monarchy from 1789 to 1792 – in essence a republic headed by a former absolutist – is unconvincing, as the royal inviolability and sanctity, the lack of an electoral principle, and the orientation of the executive towards the monarch

made the king more than just a decorative accessory. It was the constitutional practice of the suspensive royal veto in the legislative process that combined the strength of legislation rooted in popular sovereignty with a remaining monarchical element.

Sièyes, together with the Girondist barrister and president of the Constituent National Assembly Jacques Guillaume Thouret³¹⁴, as well as the Jacobin Antoine Barnave³¹⁵, had opposed monarchical participation in the legislation in vain, denying even a suspensive veto of the king. Sièyes' manuscript *Représentation et Élections* (1791) made it very clear that this «would be divided into two branches, in a national will and a hereditary monarchical will»³¹⁶. The 'September design' of a strong representation of the people and a surmountable royal legislative involvement was quite singular within European constitutions around 1800. Its impact, too, was surprisingly limited. Apart from the Norwegian constitution of Eidsvoll³¹⁷, echoes of the French September Constitution of 1791 made their way only into the short-lived Constitution of Cádiz³¹⁸. Far from having an explosive impact on constitutional history, the September Constitution's impact was limited. Instead, it was left to the German reception, mainly via Immanuel Kant, that emphasized the parliamentary position as the representative of the nation.

7. *The Anti-Monarchical Turn of French Republicanism and the Consequent Swing of the Pendulum back to Monarchization of the Republics*

By 1791 the king had gambled away the goodwill that had supported him in the early Revolution and was discredited as an anti-revolutionary. By the summer 1792, a Parisian insurrection overthrew the monarchy and led to the summoning of the Convention to draw up a new and, this time, republican constitution (in the non-monarchical sense). National sovereignty was explicitly redefined as popular sovereignty. The revolutionary army's victory at Valmy on 20 September 1792 and the Convention's vote for the execution of the king in January 1793³¹⁹ initiated republican antagonism against monarchy – which, ever since, is a characteristic customarily attributed to French republicanism. Until 1804, revolutionary France became an experimental constitutional hotspot: from the democratic constitution on the basis of popular sovereignty (the Jacobin Constitution, or *Acte constitutionnelle*, of 1793, which never came into force) to the strict separation of powers under the Directoire Constitution of 1795 which did not hold up the monocratic concentration of executive power, followed by the *coup d'état* of 1799 that made Napoleon Bonaparte first consul, and the corresponding elevation of Bonaparte to first consul for life in 1801. Finally, the imperial crowning of Napoleon brought about a constitutional hereditary monarchy with dictatorial powers in 1804.

These French constitutional waystations – 1795 (Directorate)³²⁰, 1799 (Consulat)³²¹ and 1804 (First Empire)³²² are of specific interest here due to the swing of the

pendulum away from the Jacobin reign of virtue and terror. This, however, is hardly a new reading. What is much more fascinating is the legal modernism enshrined in French constitutional practices, beginning in 1789. The formal abolition of feudalism, legal privilege, and theocratic absolutism, the individualist and secular foundations of legislative participation, and equal access to public offices, were at the heart of the 'principles of 89' that were then distilled in the Declaration of the Rights of Man and Citizen that prefaced the September Constitution of 1791. Legal equality and the legal protection of individual rights, the separation of Church and State and religious toleration were their expressions. The derivation of political authority from national sovereignty acting through a unified National Assembly, before whose legislation no privilege of locality or group could stand, was the basis of the juridification of the whole political order. The French Revolution as a locomotive of legislative power is something to be both admired and distrusted; even the old currency, based on units in the Carolingian ratios of 1:20:12 (*livres, sous, and deniers*) gave way to a decimal system of francs and centimes, just as the chaos of old-fashioned weights and measures was replaced by the metric system. Not by chance, the original metre is stored in Paris.

It was beyond question that the legislative sovereignty³²³ and modernizing uniformity engendered in the Revolution was also attractive to monarchs. The prospect of a centralized administration applying common laws uniformly to all citizens over the whole territory was naturally enticing to crowned heads. What is more, «by sweeping aside the entire museum of antiquated state structures in

Europe, from the Holy Roman Empire to the Republic of Venice, the revolutionary armies cleared much of the ground for the administrative reforms of the nineteenth century»³²⁴.

8. *Consolidation of republican guiding principles and liberal rearticulation: republic and democracy by Constant and Tocqueville*

After the revolution and in the first half of the nineteenth century, republicanism was put on the defensive with the imperial coronation of Napoleon and the subsequent monarchical restoration. Recourse to the concept of virtue seemed largely discredited by the Jacobin *terreur*, while particular interests increasingly asserted themselves as a legitimate motivational basis of political order against the Rousseauist paradigm. The liberalisation of republican thinking received an important boost through Benjamin Constant's criticism of Rousseau. His modification of democratic notions of sovereignty took place in the light of the minority rights that had become central after the *terreur* and the potential tyranny of the majority. Sovereignty, according to Constant, existed only in a limited and relative way³²⁵, regardless of whether that sovereignty was vested in the prince or the people. Constant's famous combination of the rights of the old and the rights of the modern formulated a paradoxical situation of tension, in which the validity of liberal defensive rights for the protection of the individual private sphere remained dependent on the fact that citizens must become politically active precisely in order not to lose their protective rights to a degenerating state power that

through its degeneration becomes despotic. In addition to the rationalist legitimacy of law, the monarch embodied, through his historicity, a traditional element of legitimacy with which the community was traced back to its origins, while keeping the latter symbolically present³²⁶. In a similar fashion, Constant viewed religion as a moderator.

A similar resistance to the totality of the general will could be found in the works of Alexis de Tocqueville, whose *Democracy in America* (*Republique democratique*, 1835-40) was guided by what de Tocqueville conceived as the contrast or tension between democratic equality and republican freedom. Democratic monism is to be parried by particular individual participation in the popular self-government (especially on the communal level). Therefore, he highlighted the French July Monarchy (1830-1848), where Louis Philippe I as King of the French (*Roi des Français*) emphasised the popular origins of his reign; on the other hand, the 'Natural state of the Americans' was the republicanism of the individual states, while the federal union was only a legal construction made chiefly due to a historical accident³²⁷. Republican freedoms existed at the provincial and municipal levels³²⁸. In explaining America as such, Tocqueville also grappled with the question of the extent to which republicanism was democratic. To him, democracy was based on the fundamental equality of conditions. The Confederation of the United States, as an entity in which each individual republican state was governed by its citizens, was thus united and unified by the egalitarian 'dogma of popular sovereignty', with which Tocqueville contrasted the 'strange European' idea of the republic: a republic in which

«those [reign] who know the greatest good of the people ... [which] permits one to act in the name of nations without consulting them»³²⁹.

9. *From the Third Republic to the Republican Discourse of the Fifth Republic*

France's second foray into explicitly republican governance – the Second Republic of 1848 – was even shorter-lived than the republic of the 1789 Revolutionaries. By 1851, Louis-Napoleon Bonaparte had refashioned himself as Emperor Napoleon III, and the Republic morphed into the Second Empire. Two decades later, the Republic rose again, this time in its third iteration, though its ascent was tainted by the fact that its genesis was found in the French defeat by combined German forces at Sedan. The period stretching from the crushing of the Paris Commune (1871) to the First World War gave rise to a move of the republican value system as presentable to a consensual centre of French politics. The bourgeois 'Opportunist Republic' of the 1880s and 1890s around Jules Ferry and Léon Gambetta relied on the heritage of the Revolution, which had moulded the nation, and French leadership of a specific global understanding of the rights of man applicable to all people³³⁰.

Although not an unbroken continuum, with even its more recent lineage interrupted by two world wars and the change from the parliamentary to the presidential constitution of Charles de Gaulle, the republic continues to form an important normative basis of political order in France today. It was only after de Gaulle's depar-

ture that Claude Nicolet's *L'idée républicaine en France* (1982)³³¹ led to a renaissance of the rich history of republican ideas. On the basis of this, the permanent embodiment of sovereignty is identified as a blind spot of revolutionary republicanism, which thus did not dispose of the authoritarian potentials of the monarchical order. Thus, returning to the republican reading of Bodin's sovereign monarch offers a new means of understanding the variant forms of French republicanism, as both a constant and a variable, over the centuries.

Summary, French Republicanism: Conservative readings of French republicanism often placed the emphasis on the revolutionary dichotomy of republic and monarchy. The initial character of the French Revolution, though, sought stability, not radical change, and it began with the convocation of the Estates-General, an institution medieval in origin. Only gradually did the central political question become whether one was for or against the Revolution. The transformation of the Estates-General into a National Assembly claiming constituent sovereignty in the summer of 1789 was thus a truly revolutionary moment; only this heralded the departure of the Revolution from the Aristotelian conception of the state as being equally legitimately grounded in monarchy, aristocracy, or democracy.

The same conservative tendency is also true for the famous watchwords of the French Revolution *liberté, égalité, fraternité, ou la mort!* The clause demanding death when liberty, equality, and fraternity are not present, was later elided because of its associations with the *terreur*, leaving *liberté, égalité, fraternité* as the national motto of the French Republic to this day. Yet, for all

its ubiquity, the phrase has never been set in stone. Indeed, the drafted 1793 amendments to the Declaration of the Rights of Man and Citizen, penned by Robespierre, refer instead to *égalité, liberté, sûreté, propriété* (equality, liberty, security, property), with no mention whatsoever of the brotherhood (*fraternité*). During the Second World War, the collaborationist Vichy regime redefined the guiding principles of France (presumably, since liberty, equality, and brotherhood were tacitly impossible in a country ruled by a puppet government under the Nazi heel), promising instead *travail, famille, patrie* (work, family, fatherland).

The republic, in the French reading, has very rarely meant representation, elections, and votes. Instead, the central core of the republic was to be found in unity. In Bodin's conception, the republic could be helmed by a monarch with (broadly) undisputed powers, acting within the interests of all. With variations, this theme has permeated through the French legal, political, and popular consciousness across centuries, occasionally with apparent contradictions. Montesquieu conceived of the main body of the population as a collection of individuals, whose interests must be served and serviced for a truly beneficial republican society. Rousseau, arguably the most radical of all French-language Enlightenment republican thinkers (though he himself was Swiss) argued for the complete submission of individual particular interest to the general will, thus prioritising the collective. Later thinkers, such as Constant and de Tocqueville, attempted to balance Rousseau's deeply utopian (and, it must be said, naïve) understanding of human nature with a blended model encompassing both a generalised will and individual interests.

The grand innovation in the foreground of the French Revolution, and that which binds all of these republican concepts together, is the equation of France and its people with the nation. With the formulation of national sovereignty, this introduced a vital and novel element to French constitutionalism, whereby an act conducted in the name of France is also, by necessity, conducted in the name of the people, in the same way that an act against the people is an act against France as a geographical expression, and the Republic as a social, legal, and political order. To this end, it is not a *democratic* identity that binds France together, but a *republican* one.

Conclusion

Far from being an idea with a set and universally-applicable definition, republicanism has historically worn many faces. For this reason, one iteration has often been historically difficult to reconcile with others. The anti-monarchism is not, as it turns out, central to the republic in the first place. Ultimately, where republican movements converged was in an essence that here has been termed 'republican dignity': the translation of the ideal of the *res publica* into a workable polity by political and legal means, emphasizing the civic mastery over one's self by consenting in self-imposed laws.

Of all the examples of European republicanism, none has been so obscured by the anti-monarchical understanding of the republic as England's. In regard to the founding function of republican dignity, civic consciousness in England could never develop in a vacuum, instead, it was framed

within the historic continuity of common law, that initiated (in the Bractonian sense) a territorial and jurisdictional monarchy. The latter's remarkable centralization was largely owed to legal institutions, such as the old common law courts in Westminster. Common law was custom and rested on a presumed immemoriality that dated to (and indeed *predated*) the Norman Conquest of 1066. This defined the existence of property, local administration, and government by law and, by their connection to common law, also placed their origins in time immemorial. Within this framework of customs, jurisdictions and liberties, individual self-mastery evolved in the form of possession rights and properties. Conceptualizing the English public realm as a (neo-Roman) *civitas*, the seventeenth century 'transition' from kingdom to commonwealth relied on the success of Britain's rising 'blue-water' commercial and colonial empire and on the national mythification that cast common law as a 'charter of liberties'. As early as Magna Carta, common liberties addressed 'free landed proprietors'; whereby property, and neither dignity nor equality was at the forefront of the civic consciousness. Even in the reading of the Cambridge School of Pocock and Skinner, who identified the 'Machiavellian Moment' in the seventeenth century, dignity did not count among the relevant *topoi* of republican language. The decisive republican impetus, instead, was the discursive identity of political and civil liberty. The republican reading of the English 'ancient constitution', linked to customs inherent in the common law precedence since time immemorial, did not argue for a kingless commonwealth; it established congruency between the king's and the people's interests in order

to explain the British empire's greatness by delivering 'English liberties'. In this, the English situated themselves as the antipode of Spanish imperial despotism, and Dutch resistance to the Spanish inspired a great deal of English sympathy. This antagonism was not only due to colonial competition, but especially to the fears of Catholic invasions, even more aggravated by the proximity of Ireland, which was not only majority Catholic but, by legend and tradition, held historical ties to Spain.

American independence and the creation of the American 'representative republic' brought republican ideas of the European Enlightenment into practice. This practical implementation in an expansive union exceeded the inherent limitation of classical republicanism to small polities, which had been one of the major concerns of the antifederalists. It was realizable due to the settlers' acquaintance with local political autonomy, as well as the readiness for general involvement in politics via representation, due to the wide dispersion of ownership as point of reference for electoral suffrage. The idea that the formative discourse of the American Republic made the republican idea great is not only figurative; rather, it allowed the specific practical American interconnection of private and civic rights. So understood, the virtuous American citizen was constructed to love both his personal freedom (at the individual level) and the commonwealth (at the communal level). At the same time, the representative republic, built on the new idea of a democratic mandate instead of the paternalistic trust that had been ubiquitous in the British hereditary-corporative parliamentary tradition was the federalists' means to keep popular sovereignty away from what

they considered to be the dangers of a direct, democratic tyranny. Representation was the institutional tool to create legality in the consented community and expansionism became a necessary precondition for the republic's success. The federalists' idea of representation combined republican self-governance with popular sovereignty. This connection (representation with popular sovereignty) relied on autonomy (not only for the constituent American people, which is thereby 'invented', but also for individuals). This again fostered the specific American interconnection of private and civic rights: the creation of American independence as a nation based on the autonomy of the American people as individuals. In regard to the founding function of republican dignity, it became clear that the American struggle for independence used it to justify breaking from the English crown, on the grounds of the American colonists having suffered discrimination as opposed to their English compatriots. Fundamentally, and in accordance with the prevalent common law terminology, the American resistance against Westminster was focused on whether the Americans maintained the rank of free subjects of the English crown. As late as 1774, the Sullivan Draft of a declaration of rights included the stipulation that Americans were to be 'respected' as brethren subjects of the same king as the English. Central to these historical roots of American republican dignity were self-mastery and sovereignty rooted in property rights enshrined in common law. Consequently, this dignity, which was also a vital element of the self-determined participation in and commitment to the commonwealth of all, was not equally apportioned. Instead, special dignity was afforded to those who

guarded the 'genius of the people', in this case being the president, the parliamentary representatives, and the judges.

Whereas American republicanism relied on constitutional checks and balances between clearly separated powers, French republicanism's origins were to be found in the coincidence of *res publica* and *civitas*, both of which were constituted around the king. Bodin's concept of legislative sovereignty strengthened the (specifically French) equation of republic and sovereign state. The republic as a mixed monarchy, as championed by Montesquieu, is a prime example of the involvement of Enlightenment thought in the 'republicanisation of monarchy', which found a revolutionary expression in '*la monarchie républicaine*' from 1789 to 1792. In the French discourse, republicanization referred to perfecting the form of government; the enlightened focus lay on the origin of power in the normative abstractness of the general will (Rousseau) or in national sovereignty (Sièyes). Rousseau allowed that monarchical government was possible if it were based on the general will³³², and Sièyes' constituent nation was the legal concept to explain the monarchy as constituted power³³³. The republic, in the French connotation, has very rarely meant representation, elections, and votes; instead, it signified unity, and this unity has permeated the French legal, political, and popular consciousness across centuries. The national sovereignty was the crucial phrase of French constitutionalism, which indicated that any act conducted in the name of France was an act conducted in the name of the people of France. It is the *republican* identity, that matters for the social and political cohesion of contemporary France.

- ¹ Schiller's approach to republicanism and the French Revolution is a complex one. From his initial sympathy for of the Dutch general states' resistance against the Spanish Habsburg monarchy of Philip II Schiller turned against the French Revolution after the execution of the French king. He called for an 'aesthetic state' and declared that political freedom could only be achieved through aesthetics, through art. The early Romantic environment of Jena took up this line despite its rejection of the Weimar Classicism and the animosities between Schlegel and Schiller.
- ² Among many C. Laborde, *Republicanism*, in M. Freedman et al. (eds.), *The Oxford Handbook of Political Ideologies*, Oxford, Oxford University Press, 2013, pp. 513-535; F. Lovett, *Republicanism*, in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Stanford, Summer 2018 Edition, <<https://plato.stanford.edu/entries/republicanism/>>, 30 July 2020; M. van Gelderen, Q. Skinner (eds.), *Republicanism. A Shared European Heritage*, vol. I: *Republicanism and Constitutionalism in Early Modern Europe*, vol. II: *The Values of Republicanism in Early Modern Europe*, Cambridge, Cambridge University Press, 2002.
- ³ Explained in length in U. Müßig, *Reason and Fairness. Constituting Justice in Europe. from Medieval Canon Law to ECHR*, Leiden, Brill/Nijhoff, 2019, pp. 28 f. The inspiration for this essay goes back to my talk at the Central and Eastern European Legal History Conference in Vienna at September 2019 about 'Travelling Republicanism'.
- ⁴ Jakob Burckhardt summarised these works in his praise of Florence in the nineteenth century. J. Burckhardt, *Die Kultur der Renaissance in Italien. Ein Versuch* (1860), repr. Stuttgart, Kröner, 1966, p. 70; O. von Gierke, *Das deutsche Genossenschaftsrecht*, 2 volumes, Graz, Akademische Druck- und Verlagsanstalt, 1954, pp. 820 ff. Kritisch zur Wertung mittelalterlicher Stadtherrschaft als vormoderne Staatlichkeit H. Hofmann, *Repräsentation. Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert*, Berlin, Duncker & Humblot, 2003, pp. 207 ff. On the European impact all representative literature is accessible via G. Bock, Q. Skinner, M. Viroli (eds.), *Machiavelli and Republicanism*, Cambridge, Cambridge University Press, 1993. Cf. Cambridge School of Intellectual History: J.C.A. Pocock, *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition*, Princeton/Oxford, Princeton University Press, 2003 (Connecting lines between ancient Aristotelianism and Florentine republicanism) and Q. Skinner, *The Foundations of Modern Political Thought*, vol. 1: *The Renaissance*, Cambridge, Cambridge University Press, 2010, vol. 2: *The Age of Reformation*, Cambridge, Cambridge University Press, 2013. Pocock's claim for the centrality of republicanism corresponds with the claimed insignificance of John Locke's liberalism.
- ⁵ Weber here makes it clear that urban republics also included medieval German cities, which he calls 'non-legitimate dominions'. M. Weber, *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie*, 5th ed., Studienausgabe, Tübingen, Mohr, 1972, pp. 727 ff.
- ⁶ To paraphrase the Ciceronean categories of *res populi*, *res publica*.
- ⁷ H. Hofmann, *Die versprochene Menschenwürde*, in «Archiv des öffentlichen Rechts», n. 118, 1993, p. 373; H. Hofmann, *Die Legitimität der Legalität und deren Verwaltung*, in «Zeitschrift für Rechtssoziologie», n. 13, 1992, Heft 2.
- ⁸ Among others: J. Israel, *Empires and entrepôts. The Dutch, The Spanish Monarchy and the Jews, 1585-1713*, London, Hambledon Press, 1990; J. Israel, *The Dutch Republic. Its Rise, Greatness and Fall 1477-1806*, Oxford, Clarendon Press, 1995. Another piece on Polish and German Republicanism will be published in a second essay.
- ⁹ Such as in Holland, Venice, Poland, England. See J. Madison, Art. 39 (*The Conformity of the Plan to Republican Principles*), in A. Hamilton, J. Madison et al. (eds.), *The Federalist Papers*, New York, Mentor, 1999, p. 208.
- ¹⁰ Novalis, *Glauben und Liebe*, Fragment 22 (1798), in G. Schulz (edited by), *Novalis Werke*, München, C.H. Beck, 1981, p. 359.
- ¹¹ G. Pico della Mirandola, *De hominis dignitate* (1486); Ge. tr. *Über die Würde des Menschen*, Zürich, Manesse, 1988; cf. also Skinner, *The Foundations of Modern Political Thought*, vol. 1, cit., pp. 97 f.; E.-W. Böckenförde, *Das Bild vom Menschen in der Perspektive der heutigen Rechtsordnung*, in E.-W. Böckenförde (ed.), *Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, Frankfurt am Main, Suhrkamp, 1991, pp. 58ff. Cf. also E. Bloch, *Naturrecht und menschliche Würde*, Berlin, Suhrkamp Verlag, 2008. Critical in regard to the universality P. Häberle, *Die Menschenwürde als Grundlage der staatlichen Gemeinschaft*, in J. Isensee, P. Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. 2: *Verfassungsstaat*, Heidelberg, C.F. Müller, 2004, § 22 (pp. 317 ff.). The tolerance of ambiguity is commonly known; originally, the godfathering "intolerance of ambiguity" has been developed by Else Frenkel-Brunswik, *Intolerance of Ambiguity*, in: Idem, *Selected Papers*, eds. Nanette Heiman and Joan Grant, New York: International University Press, 1974, pp. 261 ff.
- ¹² J. Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, in «Metaphilosophy», n. 41/4, 2010, pp. 464-480.
- ¹³ According to Kielmansegg's research, the decisive impulse emanates from Nikolaus von

Kues, with whom the conciliar movement reached a climax and conclusion, as it were. P. Graf Kilmansegg, *Volkssouveränität. Eine Untersuchung der Bedingungen demokratischer Legitimität*, Stuttgart, Klett, 1977, pp. 65 ff.

- ¹⁴ In one of several treatises written by Dee in the 1580s to encourage British exploratory expeditions in search of the Northwest Passage, he coined the term 'British Empire'. In 1577 Dee published *General and Rare Memorials pertayning to the Perfect Arte of Navigation. Annexed to the Paradoxical Cumpas, in Playne: now first published: 24. yeeres, after the first Intention thereof*, London, 1577, a work setting out his vision of a maritime empire and alleged English territorial claims on the New World.
- ¹⁵ B. Sordi, *Public Law before 'Public Law'*, in H. Pihlajamäki, M.D. Dubber, M. Godfrey (eds.), *The Oxford Handbook of European Legal History*, Oxford, Oxford University Press, 2018, pp. 705 ff., 720 f. Thomas Smith's *De Republica Anglorum* argued for a supreme power of king, lords and commons to be vested in a Parliament (Sordi, *Public Law before 'Public Law'* cit., pp. 720 f.); Parliament asserted an increasingly independent power as a representative assembly. According to Smith, the Parliament of England «representeth and hath the power of the whole realme both the head and the body», i.e. «from the Prince (be he King or Queene) to the lowest person of Englande». T. Smith, *De republica Anglorum. The maner of gouvernement or policie of the realme of England, compiled by the honorable man Thomas Smyth, Doctor of the ciuill lawes, knight, and principall secretarie vnto the two most worthie princes, King Edward the sixt, and Queene Elizabeth. Seene and allowed*, London, printed by Henrie Middleton for Gregorie Seton, 1583, Middleton edition, Book II, chap. 1, p. 34. «The most high and absolute power of the realme of Englande,

consisteth in the Parliament. For as in warre where the king himself in person, the nobilitie, the rest of the gentilitie, and the yeomanrie are, is parliament force and power of Englande»; for peace Smith continues to describe the consultation and «mature deliberation» of «everie bill of lawe» and defines the consent of the «Prince himselfe in presence of both the parties (=houses)» as law: «That which is done by this consent is called firme, stable, and sanctum, and is taken for lawe». (Smith, *De republica Anglorum* cit., p. 35).

- ¹⁶ *The manner of Gouvernement or policie of the Realme of England*; the edition used here is the 1583 one by Henrie Middleton, in Cambridge King's College Manuscript Keynes D. 3.52, repr., Amsterdam, Theatrum Orbis Terrarum Ltd-Da Capo Press, 1970.
- ¹⁷ Smith, *De Republica Anglorum* cit., Book I, chap. 10: *What is a commonwealth*, p. 10.
- ¹⁸ Müßig, *Reason and Fairness* cit., pp. 142 ff.
- ¹⁹ Smith, *De Republica Anglorum*, Book I, chap. 15: *That the commonwealth or policie must be according to the nature of the people*, p. 17.
- ²⁰ J. Harrington, *The Commonwealth of Oceana*, in J.G.A. Pocock (ed.), *The Political Works of James Harrington*, Cambridge, Cambridge University Press, 1971, p. 277.
- ²¹ U. Müßig, *Montesquieu's mixed monarchy model and the indecisiveness of the 19th century Constitutionalism between monarchical and popular sovereignty*, in «Historia et ius», n. 3, 2013, paper 5 <http://www.historiaetius.eu/uploads/5/9/4/8/5948821/mussig_finale.pdf>, 30 July 2020.
- ²² On the association of the Republic with the promotion of the common good, see N. Machiavelli, *Discorsi sopra la prima Deca de Tito Livio* (1513-1519); Ge. tr. *Staat und Politik*, Frankfurt am Main, Insel-Verlag, 2000, II 2, p. 182.
- ²³ H. Münkler, *Machiavelli, Die Begründung des politischen Denkens*

der Neuzeit aus der Krise der Republik Florenz, Frankfurt am Main, Fischer, 1984, pp. 87, 97-105.

- ²⁴ J.H. Burns, M. Goldie (eds.), *The Cambridge History of Political Thought 1450-1700*, Cambridge, Cambridge University Press, 1991, p. 446.
- ²⁵ J.G.A. Pocock, *The Machiavellian Moment, Florentine Political Thought and the Atlantic Republican Tradition*, Princeton, Princeton University Press, 1975. Q. Skinner, *Liberty before Liberalism*, Cambridge, Cambridge University Press, 2012.
- ²⁶ Pocock, *The Machiavellian Moment* cit., and Skinner, *Liberty before Liberalism* cit.; and P. Hölzing, *Republikanismus: Geschichte und Theorie*, Stuttgart, Steiner, 2014.
- ²⁷ Q. Skinner, *A Third Concept of Liberty*, in «Proceedings of the British Academy», n. 117, 2002, pp. 237-268.
- ²⁸ A. Sidney, *Discourses concerning government (1681-1683)*, edited by T. Hollis, J. Robertson, London 1772, p. 18.
- ²⁹ J. Trenchard, T. Gordon (eds.), *Cato's Letters, or Essays on Liberty, Civil and Religious, and Other Important Subjects*, vol. 2, London 1723, pp. 249 f.
- ³⁰ Skinner, *Liberty before Liberalism*, cit.
- ³¹ Q. Skinner, *Die Idee der negativen Freiheit. Machiavelli und die moderne Diskussion*, in Q. Skinner (hrsg.) *Visionen des Politischen*, Frankfurt am Main, Suhrkamp, 1984, pp. 135-172.
- ³² P. Pettit, *Two Republican Traditions*, in A. Niederberger, P. Schink (eds.), *Republican Democracy*, Edinburgh, Edinburgh University Press, 2013, p. 173.
- ³³ According to Pocock in his edition (with introduction) of *The Political Works of James Harrington* cit., p. 15.
- ³⁴ *Act Abolishing the Office of King of 17 March 1649*, in D. Willoweit, U. Seif (=Müßig) (hrsg.), *Europäische Verfassungsgeschichte*, München, Beck, 2003, pp. 207 ff.

- ³⁵ M. Nedham, *Mercurius Politicus, Comprising the Sum of All Intelligence, with the Affairs and Designs Now on Foot in the Three Nations of England, Ireland, & Scotland: in Defence of the Commonwealth*, London, Cornmarket Press, 1971, vol. I, p. 322.
- ³⁶ Burns, Goldie (eds.), *The Cambridge History of Political Thought 1450-1700* cit., p. 448.
- ³⁷ T. Hobbes, *Leviathan or, The Matter, Form, and Power of a Commonwealth, Ecclesiastical and Civil*, in W. Molesworth (ed.), *The English Works of Thomas Hobbes*, vol. III, London 1839, Reprint Aalen, Scientia, 1962, pp. 134, 139, 168.
- ³⁸ The Hobbesian are eradicated by the fact that his ('methodological') individualism paradoxically postulates – as a war of all against all – the de facto abandonment of individual rights.
- ³⁹ Burns, Goldie (eds.), *The Cambridge History of Political Thought 1450-1700* cit., p. 451.
- ⁴⁰ J. Harrington, *The Commonwealth of Oceana*, in Pocock (ed.), *The Political Works of James Harrington* cit., p. 30.
- ⁴¹ More details in the Burns, Goldie (eds.), *The Cambridge History of Political Thought 1450-1700* cit., pp. 463 ff.
- ⁴² Harrington, *The Commonwealth of Oceana*, in Pocock (ed.), *The Political Works of James Harrington* cit., p. 401.
- ⁴³ More details at Burns, Goldie (eds.), *The Cambridge History of Political Thought 1450-1700* cit., p. 447.
- ⁴⁴ Sidney, *Discourses concerning Government* cit., pp. 127 ff.
- ⁴⁵ Müßig, *Reason and Fairness* cit., pp. 173 ff.
- ⁴⁶ Henry Neville, trans. Niccolò Machiavelli, *The History of Florence* (London 1675), Nicolas Machiavelli's 'Letter' p. 4: «Why should I be condemned ... for preferring a Commonwealth before a Monarchy? ... [having] concluded that a Democracy founded upon good orders is the ... most excellent Government ... none ... would oppose me, [but] such as will wrest Aristotle, and even Plato to himself, and make them write for Monarchy». Influence of the consent-oriented preferences (contrary to imposed government) can be identified from Protestant resistance theorists of the later sixteenth century and the conciliar movement, which reached a climax and conclusion with Nikolaus von Kues (Graf Kilmansegg, *Volkssouveränität* cit., pp. 65 ff.).
- ⁴⁷ Sidney, *Discourses concerning government (1681-1683)* cit., p. 160: «Nothing is farther from my intention than to speak irreverently of kings».
- ⁴⁸ N. Machiavelli, *Lettera a Zanobi Buondelmonti* (1520): En. tr. Nicholas Machiavelli's Letter to Zanobius Buondelmontius in vindication of Himself and His writings, in *The works of the famous Nicolas Machiavelli citizen and secretary of Florence*, London, 1675, p. 4.
- ⁴⁹ Sidney, *Discourses concerning government (1681-1683)* cit., pp. 13, 25, 55, 337, 424, 464. This is the argument of Burns, Goldie (eds.), *The Cambridge History of Political Thought* cit., p. 471 with more references.
- ⁵⁰ Sidney, *Discourses concerning government (1681-1683)* cit., chap. 2, sec. 2, p. 25.
- ⁵¹ Ivi, chap. 2, sec. 11, p. 13.
- ⁵² Ivi, chap. 2, sec. 20, p. 55.
- ⁵³ According to Machiavelli Rome had built its territorial expansion on military commands, which inevitably led the Roman people into servitude: Sulla's and Marius' dictatorship, which Salust witnessed as contemporary, preceded the tyranny of Julius Caesar and the loss of popular liberty under the emperor (N. Machiavelli, *Discorsi sopra la prima deca di Tito Livio*, Milano, Rizzoli, 1984, III, 24 pp. 529-530). The following argumentation owes the references to D. Armitage, *Empire and Liberty. A Republican Dilemma*, in M. van Gelderen, Q. Skinner (eds.), *Republicanism. A Shared*
- European Heritage*, vol. II: *The Values of Republicanism in Early Modern Europe*, Cambridge, Cambridge University Press, 2002, pp. 31 ff.
- ⁵⁴ C. Davenant, *The Political and Commercial Works of Charles Davenant*, edited by C. Whitworth, London, 1771, reprint 1967, vol. I, p. 30; vol. II, p. 275.
- ⁵⁵ H. Parker, *Of a Free Trade. A discourse seriously recommending to our Nation the wonderful benefits of Trade especially of a rightly Governed, and Ordered Trade*, London, 1648, pp. 3 f.; cit. according to Armitage, *Empire and Liberty* cit., vol. II, p. 40.
- ⁵⁶ Davenant, *The Political and Commercial Works of Charles Davenant* cit., vol. II, p. 35; C. Davenant, *An Essay upon Universal Monarchy*, in Id., *Essays upon I. The Ballance of Power, II. The Right of making War, Peace and Alliances, III. Universal Monarchy*, London, 1701, p. 288.
- ⁵⁷ J. Trenchard, T. Gordon, *Cato's Letters, or Essays on Liberty, Civil and Religious, and Other Important Subjects*, vol. I, London 1737, pp. 442, 445 ff.
- ⁵⁸ Sordi, *Public Law before 'Public Law'*, cit., pp. 705 ff., 722.
- ⁵⁹ H. Bolingbroke, *A Dissertation of Parties (1733-34)*, in D. Armitage (ed.), *Political Writings*, Cambridge, Cambridge University Press, 1997, Letter X, p. 88; Müßig, *Montesquieu's mixed monarchy model and the indecisiveness of the 19th century Constitutionalism between monarchical and popular sovereignty* cit., p. 5.
- ⁶⁰ U. Müßig, *Summum ius, summum iniuria - Zur Korrekturbedürftigkeit des strengen Rechts in deutschen und englischen Rechtsquellen*, in U. Müßig (ed.), *Ungerechtes Recht*, Tübingen, Mohr Siebeck, 2013, pp. 23-65; U. Müßig, *Si iudex non facit iustitiam - Equity (aequitas, billichkeit) reconsidered*, in L. Laccchè, E. Calzolaio (eds.), *Justice and unjusticiability: perspectives and issues between history and comparison*, Münster, LIT-Verlag, 2019, pp. 42-76.

- ⁶¹ Montesquieu, *Considerations sur les causes de la Grandeur des Romains et de leur Decadence*, chap. IX, *Oeuvres complètes, texte présenté et annoté par Roger Cailliois*, Paris, Gallimard, Pléiade-edition, 1951, vol. II, p. 120: «Elle perdit sa liberté, parce qu'elle acheva trop tôt son ouvrage».
- ⁶² D. Hume, *Of the Balance of Power*, in E.F. Miller (ed.), *David Hume. Essays Moral, Political and Literary*, Indianapolis, Liberty Classics, 1985, p. 341.
- ⁶³ D. Hume, *Of Refinement in the Arts*, in ivi, p. 276.
- ⁶⁴ Armitage, *Empire and Liberty* cit., vol. II, p. 44: J. Robertson, *Universal Monarchy and the Liberties of Europe. David Hume's Critique of an English Whig Doctrine*, in N. Philipson, Q. Skinner (eds.), *Political Discourses in Early Modern Britain*, Cambridge, Cambridge University Press, 1993, pp. 349 ff., 351-356.
- ⁶⁵ Armitage, *Empire and Liberty* cit., vol. II, p. 44.
- ⁶⁶ D. Hume, *Idea of a Perfect Commonwealth*, in Miller (ed.), *Essays Moral, Political and Literary* cit., p. 527.
- ⁶⁷ Armitage, *Empire and Liberty* cit., vol. II, p. 46. He points out, that the connection between Hume's *Idea of a Perfect Commonwealth* and the Federalists was first articulated by G. Marshall, *David Hume and Political Skepticism*, in «Philosophical Quarterly», n. 4, 1954, pp. 247 ff., 255 f. and D. Adair, «That Politics May Be Reduced to a Science»: *David Hume, James Madison and the Tenth Federalist*, in «Huntington Library Quarterly», n. 20, 1957, pp. 343 ff., 348-357.
- ⁶⁸ J. Harrington, *The Commonwealth of Oceana*, in J.G.A. Pocock (ed.), *The Political Works of James Harrington*, Cambridge, Cambridge University Press, 1971, p. 277.
- ⁶⁹ Armitage, *Empire and Liberty* cit., vol. II, p. 41.
- ⁷⁰ J.G.A. Pocock, *Politics, Language and Time. Essays on Political Thought and History*, New York, Atheneum, 1971, p. 146.
- ⁷¹ Thomas Jefferson to George Rogers Clark, 25 December 1780, in J.P. Boyd et al. (eds.), *The Papers of Thomas Jefferson*, vol. 4, Princeton NJ, Princeton University Press, 1951, pp. 237 f.
- ⁷² Modification of the title 'Empire and liberty', how David Armitage headed his leading essay on British republicanism before David Hume. The full title adds 'A Republican Dilemma' and is edited in van Gelderen, Skinner (eds.), *Republicanism. A Shared European Heritage* cit., vol. II, pp. 29-46.
- ⁷³ Borrowed from title of L. Banning, *The Practical Sphere of a Republic: James Madison, the Constitutional Convention, and the Emergence of Revolutionary Federalism*, in R. Beeman, S. Botein, E.C. Carter (eds.), *Beyond Confederation: Origins of the Constitution and American National Identity*, Chapel Hill, The University of North Carolina Press, 1987, pp. 162-187.
- ⁷⁴ In his lectures before the future King Maximilian II of Bavaria 1854 Ranke states (in full length): «a greater revolution than had ever been seen before in the world, it was a complete reversal of the principle [...]. Only now did the theory of representation take on its full meaning after it had formed a state». L. von Ranke, *Über die Epochen der neueren Geschichte. Vorträge dem Könige Maximilian II. von Bayern im Herbst 1854 zu Berchtesgaden gehalten*, hrsg. v. A. Dove, Leipzig, Duncker & Humblot, 1888, pp. 215 f. Cf. also K.H.L. Pölitiz, *Die Staatensysteme Europa's und Amerika's seit dem Jahre 1783, geschichtlich-politisch dargestellt*, vol. 1, Leipzig, 1826, p. X: «that political ideas which otherwise belonged only to the world of writers [entered] the real world of the internal and external life of states».
- ⁷⁵ «America, you are better off than Our continent, the old ...» (J.W. von Goethe, *Zahme Xenien: Den vereinigten Staaten*, in *Nachgelassene Werke*, vol. XVI, Stuttgart-Tübingen, Cotta, 1842, p. 96).
- ⁷⁶ Eight royal colonies, three owners' and two charter colonies. On the classification of the colonial charters as 'constitutional state framework' (*Verfassungsstaatlichkeit*), even if not constitutions in the modern sense see H. Fenske, *Der moderne Verfassungsstaat, eine vergleichende Geschichte von der Entstehung bis zum 20. Jahrhundert*, Paderborn, Ferdinand Schöningh, 2001, p. 87. Cf. Müßig, key note *Networkers of the Constitutional Discourses in 18th c. Europe – The British American discursive common law community at the BLHC*, July 2017.
- ⁷⁷ C. Williamson, *American Suffrage: From Property to Democracy 1760-1860*, Princeton NJ, Princeton University Press, 1760; H. Dippel, *Die Amerikanische Revolution 1763-1787*, Frankfurt am Main, Suhrkamp, 1985, p. 24.
- ⁷⁸ This was especially true in the northern and eastern colonies, less so in Virginia and South Carolina. The abolition of the fideicommissum and primogeniture during the War of Independence reinforced this tendency.
- ⁷⁹ A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, New York, Modern Library, 1937, p. 552.
- ⁸⁰ G.S. Wood, *The Creation of the American Republic 1776-1787*, Chapel Hill, University of North Carolina Press, 1969.
- ⁸¹ Hamilton, Art. 15: *Are we even in a condition to remonstrate with dignity?*, in A. Hamilton, *The Federalist* No. 15, in A. Hamilton, J. Madison, J. Jay, *The Federalist Papers*, edited by Clinton Rossiter with a *New Introduction and Notes by C. R. Kesler*, New York, Mentor, 1999, p. 74.
- ⁸² The close association of property rights with individual dignity in the minds of the farmers is mentioned by Chafee, p. 2 with reference to Amendment IV (Z. Jr. Chafee (ed.), *Documents on Fundamental Human Rights*, vol.

- I., Harvard, Harvard University Press, 1951).
- ⁸³ U. Müßig, key note *Networkers of the Constitutional Discourses in 18th c. Europe – The British American discursive common law community* at the BLHC, July 2017.
- ⁸⁴ Diss. U. Seif (=Müßig), *Der Bestandsschutz besitzloser Mobiliarsicherheiten im deutschen und englischen Recht*, Tübingen, Mohr, 1997, pp. 148 ff.
- ⁸⁵ A confederation of states oriented towards common defence and foreign policy, the regulation of disputes between states and intergovernmental cooperation.
- ⁸⁶ R. Middlekauff, *The Glorious Case. The American Revolution 1763-1789*, Oxford-New York, Oxford University Press, 2005, p. 616.
- ⁸⁷ This is matched by the controversy about an economic interpretation of the US founding following Charles A. Beard's work in 1913, who claimed that the founding fathers' interests were guided more by their needs as mercantilists, slave owners and speculators than by historical and cultural heritage (C.A. Beard, *An Economic Interpretation of the Constitution of the United States*, reprint New York, Free Press, 1965). Against him R.E. Brown, *Charles Beard and the Constitution. A Critical Analysis of the Economic Interpretation of the Constitution*, Princeton, Princeton University Press, 1956.
- ⁸⁸ Wood, *The Creation of the American Republic 1776-1787* cit., pp. 465 ff.
- ⁸⁹ J. Heideking, *Die Verfassung vor dem Richterstuhl, Vorgeschichte und Ratifizierung der amerikanischen Verfassung 1787-1791*, Berlin-New York, de Gruyter, 1988.
- ⁹⁰ The Constitution was presented to the convention on September 12; except for Edmund Randolph, George Mason and Elbridge Gerry all other delegates signed the approval of the constitution on 17 September 1787.
- ⁹¹ Art. IV sec. 4 of the American constitution 1787; Willoweit, Müßig (hrsg.), *Europäische Verfassungsgeschichte*, cit., n. 34, p. 275.
- ⁹² B. Bailyn (ed.), *The Debate on the Constitution. Federalist and Antifederalist Speeches, Articles and Letters During the Struggle over Ratification*, two volumes, New York, Library of America, 1993. The battle for ratification was especially vital in Virginia and New York, states with ardent opposition and yet indispensable for the Constitution's successful launch.
- ⁹³ B. Bailyn, *The Ideological Origins of the American Revolution*, Cambridge-London, Harvard University Press, 1992, p. 331.
- ⁹⁴ J. Ketelhut, *Federalists, Anti-Federalists and das Ringen um die Ratifikation der amerikanischen Bundesverfassung*, in R. Lhotta (ed.), *Die hybride Republik, Die Federalist Papers und die politische Moderne*, Baden-Baden, Nomos, 2010, pp. 19, 24 ff.
- ⁹⁵ G.S. Wood, *Empire of Liberty. A History of the Early Republic 1789-1815*, Oxford-New York, Oxford University Press, 2009, p. 20.
- ⁹⁶ A. Kupersmith, *Montesquieu and the Ideological Strain in the Antifederalist Thought*, in W.C. McWilliams, M.T. Gibbons (eds.), *The Federalist, the Antifederalists, and the American Political Tradition*, Westport, Greenwood Press, 1992, pp. 47 ff., 60; M.I. Meyerson, *Liberty's Blueprint. How Madison and Hamilton Wrote the Federalist Papers, Defined the Constitution, and Made Democracy Safe for the World*, New York, Basic Books, 2008, p. 176.
- ⁹⁷ Madison, *The Federalist* No. 10, in Hamilton, Madison, Jay, *The Federalist Papers* cit., p. 49; Madison, *The Federalist*, No. 39, in Hamilton, Madison, Jay, *The Federalist Papers* cit. p. 208 (differentiation from Holland, Venice, Poland, England), 209. Whereas Art. 10 lectures on the difference between the expanded representative republic and direct democracy, art. 39 concentrates on the novelties, representation and popular sovereignty. If not indicated otherwise, further page references in regard to Federalists' quotations refer to the Mentor-Edition, and are stated with the name, art. and page.
- ⁹⁸ Madison, *The Federalist* No. 57, in Hamilton, Madison, Jay, *The Federalist Papers* cit. p. 319.
- ⁹⁹ English republicanism with its entanglement by the mixed constitution balance ideal and the virtual representation in a conciliar body with noble interaction. Cf. John G.A. Pocock has argued that the American Revolution was strongly influenced by republicanism thinking in the wake of James Harrington, with reference to the work of Jack Pole, Bernard Bailyn and Gordon Wood. At its core was the narrowing of the American Revolution to a liberalism only in succession to John Locke (e.g. A. Kalyvas, I. Katznelson, *The Republic of the Moderns: Paine's and Madison's Novel Liberalism*, in «Polity», n. 38, 2006, pp. 447-477).
- ¹⁰⁰ U. Müßig, *A New Order of the Ages. Normativity and Precedence*, in U. Müßig (ed.), *Reconsidering Constitutional Formation II: Decisive Constitutional Normativity. Form Old Liberties to New Precedence*, Cham, Springer, 2018, pp. 1-97; therein *The Constitutionality of the Colonies' Legal Argumentation Conducting their Case like a Common Law Litigation*, pp. 9 ff.-33; *Establishing Constitution as Law*, pp. 33 ff.
- ¹⁰¹ Details in Müßig, *A New Order of the Ages. Normativity and Precedence* cit., p. 4.
- ¹⁰² Madison, *The Federalist* No. 10: American virtuous citizens are «equally the friends of public and private faith and of public and personal liberty» in Hamilton, Madison, Jay, *The Federalist Papers* cit., p. 45.
- ¹⁰³ For Montesquieu, one of the most widely read authors in the discourse of early America, it is the aristocratic intermediate powers that best embody the republican virtues for the good of the people (cf. C. de Montesquieu, *De l'Esprit des Lois – Défense de l'Esprit des*

- Lois, tome 1, Paris, Gabalda, 1909, liv. II, chap. IV, pp. 22 ff.; Müßig, Montesquieu's mixed monarchy model and the indecisiveness of the 19th century Constitutionalism between monarchical and popular sovereignty cit.); For Montesquieu the aristocracy seems to be an imperfect democratic republic, while *Cato's letter* of John Trenchard and Thomas Gordon make the republican virtue of patriotism, to sacrifice private interests for the greater good of the Republic, available to readers in the British colonies in idealization of the ancient Roman republican tradition. The newspaper essays (1720-1723) written by the publicists Trenchard and Gordon (six editions in the years 1733-1755) were an effective way of presenting the English system of government as a free government J. Trenchard, T. Gordon, *Cato's Letters, or Essays on Liberty, Civil and Religious, and other Important Subjects. In Four Volumes*, vol. 1-4, London 1755.
- ¹⁰⁴ Hamilton, *The Federalist No. 9*, in Hamilton, Madison, Jay, *The Federalist Papers* cit., p. 42. Cf. also Madison, *The Federalist No. 39*, in *ivi*, pp. 211 ff.
- ¹⁰⁵ E. Burke, *Letter to Sir Hercules Langrishe, On the Subject of the Roman Catholics of Ireland and the Propriety of admitting them to the elective Franchise, consistently with the Principles of the Constitution, as established at the Revolution (1792)*, in E. Burke, *The Works*, Boston, Little, Brown & co., 1884, Vol. IV, pp. 241 ff., 293. Quote traced via B. Brunhöber, *Die Erfindung "demokratischer Repräsentation" in den Federalist Papers*, in Lhotta (hrsg. v.), *Die hybride Republik*, cit., pp. 59 ff., 64.
- ¹⁰⁶ Madison, *The Federalist No. 10*, in Hamilton, Madison, Jay, *The Federalist Papers* cit., p. 76.
- ¹⁰⁷ Art. I sec. 2 cl. 1, 2, sec. 3 cl. 1; Art. II sec. 1 cl. 2 (Willoweit, Seif (=Müßig) (hrsg.), *Europäische Verfassungsgeschichte* cit., n. 34, pp. 255 ff., 267). It was the most egalitarian voting system of this time (B. Brunhöber, *Die Erfindung "demokratischer Repräsentation" in den Federalist Papers*, Tübingen, Mohr Siebeck, 2010, pp. 115-120.
- ¹⁰⁸ Letter from Brutus to the New York Journal of 18 October 1787, in H.J. Storing Herbert (ed.), *The Complete Anti-Federalist*, vol. 2, Chicago-London, University of Chicago Press, 1981, p. 369.
- ¹⁰⁹ Hamilton, *The Federalist No. 35*, in Hamilton, Madison, Jay, *The Federalist Papers* cit., p. 182.
- ¹¹⁰ Ivi, p. 183. Cf. also Madison, *The Federalist No. 57* cit., pp. 319 f.
- ¹¹¹ Ivi, p. 319.
- ¹¹² Madison, *The Federalist No. 48*, p. 279; Madison, *The Federalist No. Art. 57*, p. 384; Madison, *The Federalist No. Art. 63*, p. 355; Hamilton, *The Federalist No. Art. 70*, p. 397; Hamilton, *The Federalist No. Art. 77*, p. 429. More extensively, Brunhöber, *Die Erfindung "demokratischer Repräsentation" in den Federalist Papers* cit., pp. 148-158.
- ¹¹³ The following three steps are developed by Beatrice Brunhöber (Brunhöber, *Die Erfindung "demokratischer Repräsentation" in den Federalist Papers*, in Lhotta (hrsg.), *Die hybride Republik, Die Federalist Papers und die politische Moderne* cit., pp. 59 ff., 69).
- ¹¹⁴ Unlike in Hume's multi-level government, the representatives in Madison are on equal levels.
- ¹¹⁵ Madison, *The Federalist No. 10*, cit., p. 46.
- ¹¹⁶ Ivi, p. 51.
- ¹¹⁷ H. Buchstein, *Repräsentation ohne Symbole – die Repräsentationstheorie des „Federalist“ und von Hanna F. Pitkin*, in G. Göhler et al. (eds.), *Institution – Macht – Repräsentation: Wofürpolitische Institutionen stehen und wie sie wirken*, Baden-Baden, Nomos, 1997, pp. 376 ff., 396.
- ¹¹⁸ Madison, *The Federalist No. 10* cit., pp. 51 f.; Madison, *The Federalist No. 57*, cit., p. 318.
- ¹¹⁹ Brunhöber, *Die Erfindung "demokratischer Repräsentation" in den Federalist Papers*, in Lhotta (hrsg.), *Die hybride Republik, Die Federalist Papers und die politische Moderne* cit., p. 70. On this contra B. Zehnpenning, *Einleitung* in A. Hamilton, J. Madison, J. Jay, *Die "Federalist Papers"*, Darmstadt, Wissenschaftliche Buchgesellschaft, 1993, pp. 1 ff., 12 (Remains of a substantial common good preserved); R.A. Dahl, *A Preface to Democratic Theory: How does popular sovereignty function in America?*, Chicago, University of Chicago Press, 1956-2006, pp. 152 ff., 159 f.
- ¹²⁰ The constitutional normativisation can span the discursive field (remaining within the mathematical metaphor as between x and y axis), if one agrees with its discourse dependency as explained by ReConFort, <www.reconfort.eu>.
- ¹²¹ Brunhöber, *Die Erfindung "demokratischer Repräsentation" in den Federalist Papers*, in Lhotta (hrsg.), *Die hybride Republik, Die Federalist Papers und die politische Moderne* cit., p. 74 makes a transfer to J. Habermas, *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*, Frankfurt am Main, Suhrkamp, pp. 161, 600 ff.
- ¹²² G.S. Wood, *Democracy and the Constitution*, in R.A. Goldwin, W.A. Schambra (eds.), *How democratic is the constitution?*, Washington D.C., American Enterprise Institute, 1980, p. 47; Cf. also G.S. Wood, *The Creation of the American Republic 1776-1787* cit.
- ¹²³ Th. Paine, *The Rights of Man (1792)*, in P.S. Foner (ed.), *The Complete Writings of Thomas Paine*, vol. 2, New York, Citadel Press, 1945, pp. 345 ff., 369 ff. Paine's republicanism, as egalitarian democratic counter-proposal against the illegitimate feudal rule of the English king over the colonies, starts the 'democratization' of the American republicanism and made the *Common Sense* (1776) programmatic fanal of the American independence movement. His idea of the social contract as a historically anchored founding

act of rational legitimacy requires the consent and agreement of the citizens, instead of Burke's sole attachment to tradition.

¹²⁴ Madison, *The Federalist No. 39* cit., p. 208.

¹²⁵ Ivi, p. 209.

¹²⁶ G.S. Wood, *The Creation of the American Republic 1776-1787* cit., p. 562; J. Tolbert Roberts, *Athens on Trial. The Antidemocratic Tradition in Western Thought*, Princeton, Princeton University Press, 1994, p. 186.

¹²⁷ Madison, *The Federalist No. 10* cit., p. 49.

¹²⁸ *Ibidem*.

¹²⁹ J. Madison, *Note to his Speech on the Right of Suffrage (1821)*, in M. Farrand (ed.), *The Records of the Federal Convention of 1787*, vol. III, New Haven, Yale University Press, 1937, p. 450.

¹³⁰ Ivi, p. 299.

¹³¹ Madison, *The Federalist No. 10* cit., p. 49.

¹³² *Ibidem*.

¹³³ Madison, *The Federalist No. 39* cit., p. 209.

¹³⁴ The Federalists' democratic use of republicanism mixes the founding rational legitimacy by popular government with the republican communication of the legality of the consented commonwealth (as distinct from purely democratic!).

¹³⁵ Plato's ideal state is equal opportunity for all citizens (perfect democracy), selection of the best through training and renunciation of private happiness: rule of the best, educational dictatorship for the actual well-being of all through censorship of poetry, music and art as well as through eugenics to promote the good and beautiful (Plato rejects Homer's poetry as not conducive). After comparing 158 constitutions, Aristotle declares that the constitution must be based on concrete needs and historical conditions, because politics is applied ethics, *man a zoon politikon*. The good forms of government include (representative) democ-

racy, monarchy and aristocracy, the degenerate forms ochlocracy (direct democracy), tyranny and oligarchy.

¹³⁶ D. Jörke, *Die Transformation des Republikbegriffs in den Federalist Papers*, in Lhotta (hrsg.), *Die hybride Republik – Die Federalist Papers und die politische Moderne* cit., pp. 39 ff., 45; E.G. Lee, *Representation, Virtue, and Political Jealousy in the Brutus-Publius Dialogue*, in «Journal of Politics», n. 59, 1997, pp. 1073-1095; D.J. Siemers, *Ratifying the Republic. Anti-Federalists and Federalists in Constitutional Time*, Stanford, Stanford University Press, 2002.

¹³⁷ Madison *The Federalist No. 10* cit., pp. 51 f.

¹³⁸ *Ibidem*.

¹³⁹ *Ibidem*.

¹⁴⁰ G.S. Wood, *Interests and Disinterestedness in the Masking of the Constitution*, in R. Beeman, S. Botein, E.C. Carter II (eds.), *Beyond Confederation. Origins of the Constitution and American National Identity*, Chapel Hill-London, The University of North Carolina Press, 1987, pp. 69-109 and A. Gibson, *Impartial Representation and the Extended Republic: Towards a Comprehensive and Balanced Reading of the Tenth Federalist Paper*, in «History of Political Thought», n. 22, 1991, pp. 263-304 stress the radical democratic practice of the people-out-of-doors; this is spotted by D. Jörke, *Die Transformation des Republikbegriffs in den Federalist Papers*, in Lhotta (ed.), *Die hybride Republik – Die Federalist Papers und die politische Moderne* cit., pp. 39 ff. even in Madison's pamphlet *Vices of the Political System of the United States* (1787). Thus, the uprising of over-indebted small farmers in 1789, known as the Shays Rebellion, was the decisive impetus for the convening of the Constitutional Convention of Philadelphia.

¹⁴¹ Madison, *The Federalist No. 10* cit., p. 52.

¹⁴² Ivi, p. 50. Similar Madison, *The Federalist No. 39* cit., p. 209. Cf. also Madison, *The Federalist No. 65* cit., p. 354: «The difference most relied on between the American and other republics consists in the principle of representation», unknown to the Ancient republics.

¹⁴³ Armitage, *Empire and Liberty: A Republican Dilemma* cit., vol. II, p. 46. He points out, that the connection between Hume's *Idea of a Perfect Commonwealth* and the Federalists was first articulated by G. Marshall, *David Hume and Political Skepticism*, in «Philosophical Quarterly», n. 4, 1954, pp. 247 ff., 255 ff. (literal similarities) and D. Adair, *That Politics May Be Reduced to a Science*, in «Huntington Library Quarterly», n. 20, 1957, pp. 343 ff., 348-357.

¹⁴⁴ Ch. de Montesquieu, *Oeuvres complètes, texte présenté et annoté par Roger Caillois*, Paris, Gallimard, 1951, Pléiade-edition), vol. II, p. 251, 254.

¹⁴⁵ Madison, *Note to his Speech on the Right of Suffrage (1821)* cit., p. 450.

¹⁴⁶ *Ibidem*.

¹⁴⁷ Ch.F. Adams (edited by), *The works of John Adams, Second President of the United States*, Boston, 1851, vol. IV, p. 194.

¹⁴⁸ Madison, *The Federalist No. 55*, p. 314: «that there is not sufficient dignity among men for self-government».

¹⁴⁹ Madison *The Federalist No. 39* cit., p. 208.

¹⁵⁰ Madison, *The Federalist No. 63* cit., p. 355.

¹⁵¹ Madison, *The Federalist No. 57* cit., p. 319: «We are to presume that in general they will be somewhat distinguished also by those qualities which entitle them to it, and which promise a sincere and scrupulous regard to the nature of their engagements».

¹⁵² Art. 1 Sec. 2 American Constitution 1787 reads: «The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors

in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature» (Willoweit, Seif, *Europäische Verfassungsgeschichte* cit., n. 34, p. 255 ff.).

¹⁵³ Madison, *Note to his Speech on the Right of Suffrage* (1787, reproduced 1821) cit., p. 454. See also M. Schmidt, *Demokratietheorien. Eine Einführung*, 4. Aufl. Wiesbaden, VS Verlag für Sozialwissenschaften, 2008, p. 105; W. Brugger, *Freiheit, Repräsentation, Integration*, in J. Bohnert et al (hrsg), *Verfassung – Philosophie – Kirche, Festschrift für Alexander Hollerbach zum 70. Geburtstag*, Berlin, Dunker & Humblot, 2001, pp. 515 ff., 525.

¹⁵⁴ G.S. Wood, *The Creation of the American Republic 1776-1787* cit., pp. 506 ff; Brunnhöber, *Die Erfindung "demokratischer Repräsentation" in den Federalist Papers* cit., pp. 215 ff.

¹⁵⁵ F. Muß, *Präsident und Ersatzmonarch – Die Erfindung des Präsidenten als Ersatzmonarch in der amerikanischen Verfassungsdebatte und Verfassungspraxis*, München, Utz, 2013; More details also in J.M. Roberts, O.A. Westad, *The Penguin History of the World*, London, University of Oxford Press, 2013⁶, pp. 729 ff.

¹⁵⁶ Madison, *The Federalist No. 14*, in Hamilton, Madison, Jay, *The Federalist Papers* cit., pp. 69 f.

¹⁵⁷ Art. VII American Constitution 1787 (Willoweit, Müßig, *Europäische Verfassungsgeschichte* cit., n. 34, p. 277) specified a quorum of nine. By January 9, 1788, five states of the nine necessary for ratification had approved the Constitution – Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut. In February, with Federalists agreeing to recommend a list of amendments amounting to a bill of rights, Massachusetts ratified by a vote of 187 to 168. With South Carolina's acceptance of the Constitution in May New Hampshire (with a reconvened ratifying convention)

became the ninth state to ratify in June 1788. North Carolina and Rhode Island refused their approval and initially stayed away from the Union, only in 1789 the former joined and in 1790 (29 May 1790) Rhode Island became the thirteenth state. Majorities in favour of the Constitution had been quite small: only 19 votes in Massachusetts, only 11 in New Hampshire, only 10 in Virginia, only 3 in New York.

¹⁵⁸ National elections were held in late 1788 and early 1789, and the new government began operations in spring 1789. On 4 March 1789 the first congressional session of the new federal government convenes under the U.S. Constitution.

¹⁵⁹ G.S. Wood, *The Creation of the American Republic 1776-1787* cit., p. 275 ff.; Müßig, *A New Order of the Ages. Normativity and Precedence*, in Müßig (ed.), *Reconsidering Constitutional Formation II* cit., pp. 1 ff., 40 ff. When Jefferson's secretary of state, James Madison, refused to deliver a last-minute Federalist judicial appointment to William Marbury, the latter sued the first. In writing the decision for a unanimous court, Marshall, a Federalist himself, asserted for the first time the court's prerogative of judicial review, to invalidate part or all of legislation that it found inconsistent with the Constitution. Moreover, the unanimous 'opinion of the Court' was itself a major innovation; initially, the Supreme Court had started with copying the British practice of 'seratim' opinions whereby each justice wrote a separate opinion in every case.

¹⁶⁰ Madison, *The Federalist, No. 51*, in Hamilton, Madison, Jay, *The Federalist Papers* cit., p. 290.

¹⁶¹ Ivi, p. 290.

¹⁶² All quotes Madison, *The Federalist No. 10* cit., pp. 45 ff.

¹⁶³ Following the stock-taking by James T. Kloppenberg prominent titles are L. Hartz, *The Liberal Tradition in America: An Interpretation*

of America Political Thought since the Revolution, New York, Harcourt, Brace & World, 1955; D. Boorstin, *The Genius of American Politics*, Chicago, Chicago University Press, 1953; B. Bailyn, *The Ideological Origins of the American Revolution*, Cambridge MA-London, Belknap Press of Harvard University Press, 1992; G.S. Wood, *The Creation of the American Republic 1776-1787* cit.; H.F. May, *The Enlightenment in America*, New York, Oxford University Press, 1976; M. White, *The Philosophie of the American Revolution*, New York, Oxford University Press, 1978; G. Wills, *Inventing America: Jefferson's Declaration of Independence*, Garden City, Doubleday, 1978; D.H. Meyer, *The Democratic Enlightenment*, New York, Putnam, 1976; the essays collected in the issue J. Ellis, *An American Enlightenment*, Editor's Introduction, in «American Quarterly», n. 28, 1976, pp. 147-293.

¹⁶⁴ J.T. Kloppenberg, *The Virtues of Liberalism, Christianity, Republicanism, and Ethics in Early American Political Discourse*, in «The Journal of American History», n. 74, 1987, pp. 9 ff., 23. Sorting out the competing interpretations more deeply would require more research on the influences of the Scottish philosophers Francis Hutcheson and Thomas Reid, whose ideas reflect Kantian lines of arguments. In a further section here, the Kantian interlinkage between reason-gifted autonomy and self-government by self-determined laws clear will become clear. Also a re-reading of Smith's *Wealth of the Nations* in regard to market mechanisms as means to a moral end is a desideratum for further publications. Cf. A. Smith, *The Theory of Moral Sentiments*, New Rochelle NY, Cambridge University Press, 1969, p. 47: «How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happi-

ness necessary to him, though he derives nothing from it, except the pleasure of seeing it».

¹⁶⁵ Müßig, *Reason and Fairness* cit., pp. 173 ff.

¹⁶⁶ Esp. Hamilton, *The Federalist No. 84*, in Hamilton, Madison, Jay, *The Federalist Papers* cit., p. 478: «the other is that the Constitution adopts, in their full extent, the common and statute law of Great Britain, by which many other rights not expressed in it are equally secured».

¹⁶⁷ Madison, *The Federalist No. 51*, in ivi, p. 288 ff.

¹⁶⁸ J. Jay, *The Federalist No. 2* cit., p. 5: «Nothing is more certain than the indispensable necessity of government; and it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite power».

¹⁶⁹ Madison, *The Federalist No. 51* cit., p. 290.

¹⁷⁰ *Ibidem*.

¹⁷¹ Madison, *The Federalist No. 55*, pers cit., p. 312: «...I must pronounce that the liberties of America cannot be unsafe in the number of hands proposed by the federal Constitution».

¹⁷² Ivi, p. 314; the quote continues: «so there are other qualities in human nature which justify a certain portion of esteem and confidence».

¹⁷³ Ivi, p. 314.

¹⁷⁴ Hamilton, *The Federalist No. 76*, cit., p. 426.

¹⁷⁵ The Virginia Declaration of Rights, 5 July 1776, <<https://www.archives.gov/founding-docs/virginia-declaration-of-rights>>, 05 August 2020; cf. also Z. Chafee (ed.), *Documents on Fundamental Human Rights*, New York, Atheneum, 1963, vol. I, Nr. 46, pp. 205 ff.

¹⁷⁶ Delaware Declaration of Rights, 11 Sept. 1776, <http://press-pubs.uchicago.edu/founders/documents/bill_of_rights4.html>, 03 August 2020; cf. also Chafee, *Documents on Fundamental Human*

Rights cit., vol. I, Nr. 48, pp. 207 ff.

¹⁷⁷ Constitution of Maryland, <<https://msa.maryland.gov/msa/mdmanual/43const/html/00dec.html>>, 03 August 2020, cf. also Chafee, *Documents on Fundamental Human Rights* cit., vol. I, Nr. 49, pp. 210 ff.

¹⁷⁸ Section A Declaration of Rights Art. I – XXV, Constitution of North Carolina, 18 December 1776, <https://avalon.law.yale.edu/18th_century/nc07.asp>, 03 August 2020; cf. also Chafee, *Documents on Fundamental Human Rights* cit., vol. I, Nr. 50, pp. 216 ff.

¹⁷⁹ Constitution of Pennsylvania, 28 Sept. 1776, <https://avalon.law.yale.edu/18th_century/pa08.asp>, 03 August 2020.

¹⁸⁰ Art. I-XXX Constitution of Massachusetts, 1780, <<http://www.nhinet.org/ccs/docs/ma-1780.htm>>, 03 August 2020; cf. also Z. Chafee (ed.), *Documents on Fundamental Human Rights*, Cambridge MA, Harvard University Press, 1951, No. 57, pp. 237 ff. Massachusetts was the first to make a demarcation between the fundamental rights part and the part of the state organization and it was the first to codify the primacy of the constitution.

¹⁸¹ Article 2 concerning “varying the compensation for the services of the Senators and Representatives” was finally ratified on May 7, 1992 as the 27th Amendment to the Constitution. The first amendment, which concerned the number of constituents for each Representative, was never ratified. In the 1790s, some Federalists argued that the entire Bill of Rights protected only citizens and not aliens, but the broader interpretation prevailed, particularly after the Civil War.

¹⁸² G. Stourzh, *Vom Aristotelischen zum liberalen Verfassungsbegriff*, in H. Lutz, G. Klingenstein, F. Engel-Janosi (hrsg.), *Fürst, Bürger, Mensch. Untersuchungen zu politischen und soziokulturellen Wandlungsprozessen im vorrevolu-*

tionären Europa, Wien, Verlag für Geschichte und Politik, 1975, pp. 97 ff., 118–122, and in G. Stourzh, *Wege zur Grundrechtsdemokratie, Studien zur Begriffs- und Institutionengeschichte des liberalen Verfassungsstaates*, Wien-Köln u.a., Böhlau, 1989, pp. 1–36.

¹⁸³ *Zahme Xenien* (1827): *Den vereinigten Staaten*, in J.W. von Goethe, *Nachgelassene Werke*, vol. XVI, Stuttgart-Tübingen, Cotta, 1842, p. 96.

¹⁸⁴ France supported the colonists with clandestine joy against the hereditary enemy England.

¹⁸⁵ He shares with Washington and the army the hardships of the winter at Valley Forge, assisting the general as envious and scheming men pursue his deposition. Lafayette becomes a kind of unofficial foreign minister for Washington and experiences a triumphal procession when he returns to Paris in the spring of 1779 on his behalf. Over the next few weeks he advocates the deployment of a French expeditionary corps under Count Rochambeau.

¹⁸⁶ Lafayette is to talk of the principle of the nation later on in his pre-draft on the declaration of human and citizen rights of July 11, 1789, cf. here No. 3 and AP, Vol. VIII, BN, Microfilm M-11174(4): AP, Vol. VIII, p. 222 [11 juillet 1789]. Malouet criticises in his *Opinion sur l'acte constitutionnel*: «Tel est donc le premier vice de votre Constitution, d'avoir placé la souveraineté en abstraction» (cit. in F. Furet, R. Halévi (éd. par), *Orateurs de la Révolution française*, Paris, Callimard, édition Pléiade, 1989, vol. I, p. 503).

¹⁸⁷ A. de Tocqueville, *De la démocratie en Amérique*, vol. 1, Paris, 1835, reprint Paris, Callimard, 1986, p. 110.

¹⁸⁸ «The majority's power is the essence of democratic governments...» (Tocqueville, *De la démocratie en Amérique*, cit., vol. 1, part 2, chap. 7, p. 369). This majority, reinforced and supported by public opinion, represents the

- greatest threat to freedom in an egalitarian society.
- ¹⁸⁹ The sovereignty of the people secured in the constitution is stabilized in the habits: In local political institutions, communities, associations, juries, and the local press – the so-called 'elementary schools of freedom' – Americans acquire the customary civic virtues that animate both the state and the federal constitutions. «Without community institutions a people can give itself a free government; but it does not possess the spirit of freedom», *ivi*, part 1, chap. 5, pp. 112 f.
- ¹⁹⁰ Its *force morale* and *pouvoir d'opinion* makes the Supreme Court the most influential interpreter of the spirit of the laws (*ivi*, vol. 1, pp. 218 and 234).
- ¹⁹¹ *Ivi*, vol. 1, p. 90.
- ¹⁹² A. de Tocqueville, *L'ancien régime et la révolution* (1856); Ge. tr. *Der Alte Staat und die Revolution*, München, DTV, 1978, pp. 138 f.
- ¹⁹³ J.S. Mill, *On liberty* (1859); Ge. tr. *Über die Freiheit*, Stuttgart, Reclam, 2006, p. 9. Emphasis mine.
- ¹⁹⁴ *Ibidem*.
- ¹⁹⁵ S.S. Wolin, *Tocqueville, between two worlds. The making of a political and theoretical life*, Princeton NJ-Oxford, Princeton University Press, 2001, p. 380.
- ¹⁹⁶ Wolin, *Tocqueville, between two worlds cit.*, p. 291.
- ¹⁹⁷ Yorktown was the retaliation for defeat at the hands of the British in the Seven Years War, and to deprive the English their Thirteen Colonies was some compensation for the French loss of India and Canada. There may be little more than temporal coincidence to the fact that the Estates-General assembled only a week after George Washington's inauguration on 5 May 1789.
- ¹⁹⁸ See n. 186 *supra*.
- ¹⁹⁹ Sieyès eulogized Benjamin Franklin in a letter to Washington in early 1789.
- ²⁰⁰ J. Volo, *The Boston Tea Party. The Foundations of Revolution*, Santa Barbara, ABC CLIO, 2012, p. 29.
- ²⁰¹ D. Kelly, *Revisiting the Rights of Man: Georg Jellinek on Rights and the State, Law and History*, in «Review», n. 22, 2004, pp. 493 ff., 506, highlighting Jellinek's context of the German legal state theory (*Staatsrechtslehre*).
- ²⁰² The National Convention took its orders from Robespierre's extremist Jacobins, in contrast to the moderate constitutionalists (Mirabeau) of the National Assembly (1789-91) and the republican Girondins of the Legislative Assembly (1791-2). Starting point of the radicalisation was the self-denying ordinance, proposed by Maximilien Robespierre and passed by the National Constituent Assembly on May 16th 1791, which forbade all sitting members of the National Constituent Assembly from standing as candidates for the Legislative Assembly.
- ²⁰³ F.-A. Hélie, *Les Constitutions de la France, ouvrage contenant outre les constitutions, les principales lois relatives au culte, à la magistrature, aux élections, à la liberté de la presse, de réunion et d'association, à l'organisation des départements et des communes, avec un commentaire*, Paris, Ainé, 1875, p. 342.
- ²⁰⁴ For more details U. Müßig, *Juridification by Constitution. National Sovereignty in Eighteenth and Nineteenth Century*, in U. Müßig, *Reconsidering Constitutional Formation I: National Sovereignty. A Comparative Analyses of the Juridification by Constitution*, Cham, Springer Open Access, 2016, p. 13.
- ²⁰⁵ Returned to Paris in disgrace, the king signed the September Constitution as prepared by the National Assembly. At the altar of the fatherland, built in the middle of the Champ de Mars, Louis XVI was to take the oath to the nation and the law at Lafayette's side, framed by representatives of the National Assembly, not of his court. The oath to be taken by the King on law and nation was intended to put the past and thus
- also the breach of the past in 1789 in relation to the present. Louis is said not to have left his place to take the oath before the altar, which probably accelerated the republican impulse of the revolution.
- ²⁰⁶ More details Müßig, *Reason and Fairness cit.*, pp. 82-106, also to the leading role of the Parlement de Paris in the pre-revolution.
- ²⁰⁷ (La Haye, 1727), *cit.* according to J.K. Wright, *The Idea of a Republican Constitution in Old Régime France*, in van Gelderen, Skinner (eds.), *Republicanism. A shared European Heritage*, vol. 1 *cit.*, pp. 289 ff., 292.
- ²⁰⁸ His idea of a sovereign assembly also included the authority to elect an executive monarch.
- ²⁰⁹ U. Müßig, *Absolutism*, in S.N. Katz (ed.), *The Oxford International Encyclopedia of Legal History*, Oxford-New York et al., Oxford University Press, 2009, vol. 1, pp. 6-9; in length pre-revolution in Reason and Fairness, France chapter.
- ²¹⁰ J.W. von Goethe, *Die Kampagne in Frankreich*, in *Goethes sämtliche Werke. Jubiläums-Ausgabe*, vol. 28: *Kampagne in Frankreich*Belagerung von Mainz*, Stuttgart, Cotta, 1902, p. 60.
- ²¹¹ He continued: «This is what the assassins were aiming at. It is the ideal of justice and peace that France carries everywhere on the international scene». And Obama was ready to share this echo of the French republic as a guardian of universal values and ideas. As Barack Obama put it, «this is an attack not just on Paris, it's an attack not just on the people of France, but this is an attack on all of humanity and the universal values that we share», <<https://www.diplomatie.gouv.fr/en/the-ministry-and-its-network/news/article/attack-against-charlie-hebdo>>, 07 August 2020.
- ²¹² C. de Seyssel, *La Grande Monarchie de France et deux autres fragments politics* (éd. par J. Foujol), Paris

- 1541, ND. Paris, Librairie d'Argences, 1961, pp. 127, 167.
- ²¹³ La Grande Monarchie de France (in Latin C. Sesellius, *De Republica Galliae et regnum officis*, Strasbourg (Argentorati), Rihelius, 1548), here in the J. Foujol, Paris, 1961-edition.
- ²¹⁴ H.A. Ellis, *Boulainvilliers and the French Monarchy: Aristocratic Politics in the Early Eighteenth-Century France*, New York, Ithaca, 1988.
- ²¹⁵ De Seyssel, *La Grande Monarchie de France* cit., pp. 120, 99-100, 115.
- ²¹⁶ Ivi, pp. 127, 167.
- ²¹⁷ Wright, *The Idea of a Republican Constitution in Old Régime France* cit., pp. 289 ff., 290 f. Cf. also C. Nicolet, *L'Idée républicaine en France, Essai d'histoire critique*, Paris, Gallimard, 1982, pp. 17 f.: the word 'republic' is a 'mot voyageur'. Fundamental for the analysis of the French republican discourse D. Schulz, *Die republikanische Tradition in Frankreich*, in T. Thiel, C. Volk (Hrsg.), *We the People*, Baden-Baden, Nomos, 2016, pp. 209-228.
- ²¹⁸ F. Hotman, *Francogallia*, R.E. Giesey (ed.), J.H.M. Salmon (translated by), Cambridge, Cambridge University Press 1972; The *Francogallia* reads as a constitutional history of the Germanic Franks and Romanised Gauls forming an entity distinctively French, esp. due to Council that according to Hotman rightfully held ultimate power within the state.
- ²¹⁹ Müßig, *Absolutism* cit., pp. 6-9.
- ²²⁰ H. Mohnhaupt, D. Grimm, *Verfassung. Zur Geschichte des Begriffs von der Antike bis zur Gegenwart*, Berlin, Duncker & Humblot, 2002², p. 36.
- ²²¹ J. Bodin, *Six livres de la république. avec une Apologie de Rene Herpin*, Paris 1583, reprint Aalen, Scientia, 1977, p. 137.
- ²²² The latin version (J. Bodin, *De Republica libri sex*, Francofurti, 1622, cit. according to Mohnhaupt, Grimm, *Verfassung* cit., p. 38) reads: «Quantum vero ad imperii leges attinet, cum sint cum ipsa maiestate coniunctae, Principes nec eas abrogare, nec iis derogare possunt: cuiusmodi est lex salica, regnis huius firmissimum fundamentum».
- ²²³ The monarch is also subject to the agreements of his predecessors.
- ²²⁴ Protestant Huguenote and Catholic Jesuit monarchomachs alike (T. Stammen, *Hauptwerke der politischen Theorie*, Art. Jean Bodin, Stuttgart, Kröner, 2007, p. 71).
- ²²⁵ Bodin, *Six livres de la république* cit., p. 11.
- ²²⁶ Ivi, p. 50.
- ²²⁷ For more details Müßig, *Montesquieu's mixed monarchy model and the indecisiveness of the 19th century Constitutionalism between monarchical and popular sovereignty* cit., paper 5.
- ²²⁸ Wright, *The Idea of a Republican Constitution in Old Régime France* cit., pp. 289 ff., 293. Also the following arguments rests on Wright's management of ideas.
- ²²⁹ Montesquieu, *Oeuvres complètes* cit., vol. II, p. 239.
- ²³⁰ *Ibidem*; the quote continues: «the monarchical government is that of the one, but according to fixed and established laws. In despotic government one alone, without law and without rule, draws everything along by his will and his caprices».
- ²³¹ Ivi, p. 251.
- ²³² Ivi, p. 254.
- ²³³ It is in this distinction that virtue is not the decisively guiding principle of the monarchical government that Montesquieu precises the civic passions for the common good: «love for the homeland, desire of real glory, self-renunciation, the sacrifice of the dearest interests, and all the [Homeric] heroic virtues». Ivi, p. 255.
- ²³⁴ Ivi, p. 252.
- ²³⁵ Montesquieu further promoted the French departure from the classical republicanism by limiting a virtue-based polity to the small-scale antiques *politei* (Greek city-states).
- ²³⁶ Montesquieu, *Oeuvres complètes* cit., vol. II, Chapitre VI, livre III, p. 256.
- ²³⁷ As he heads the chapitre 5 of the livre III, ivi, p. 255.
- ²³⁸ Ivi, p. 247.
- ²³⁹ Müßig, *Montesquieu's mixed monarchy model and the indecisiveness of the 19th century Constitutionalism between monarchical and popular sovereignty* cit., paper 5.
- ²⁴⁰ Montesquieu, *Oeuvres complètes* cit., vol. II, Chap. VII, livre III, p. 257.
- ²⁴¹ Ivi, p. 396: «Il y aussi une nation dans le monde qui a pour objet direct de sa constitution la liberté politique».
- ²⁴² Ivi, p. 248: «Les Anglois, pour favoriser la liberté, ont ôté toutes les puissances intermédiaires qui formoient leur monarchie».
- ²⁴³ Müßig, *Montesquieu's mixed monarchy model and the indecisiveness of the 19th century Constitutionalism between monarchical and popular sovereignty* cit.
- ²⁴⁴ Kent, *The Idea of a Republican Constitution in Old Régime France* cit., pp. 289 ff., 293: «a republic disguised as a monarchy»; 294: «thèse nobiliaire very close to that of Boulainvilliers».
- ²⁴⁵ «Les Loix y tiennent la place de toutes ces vertus, don't on n'a aucun besoin»; chapitre 5 livre III, Montesquieu, *Oeuvres complètes* cit., vol. II, p. 255.
- ²⁴⁶ *Grandes Remontrances 1753*, in J. Flammermont, *Remontrances du Parlement de Paris au XVIII^e Siècle*, vol. I: 1715-1753, p. 526: *lois fondamentales de l'État*. Cf. *Grandes Remontrances 1753* cit., p. 568: «monarchies sustain themselves only by observation of an invariable order in the administration of justice» / *Les monarchies ne se soutiennent, Sire, que par l'observation d'un ordre invariable dans l'administration de la justice*.
- ²⁴⁷ *Arrêté du parlement 1788*, in J. Flammermont, *Remontrances du Parlement de Paris au XVIII^e Siècle*, vol. III : 1768-1788, Paris, 1898, pp. 745 f.

- ²⁴⁸ *Grandes Remontrances 1753* cit., pp. 568 f.
- ²⁴⁹ [T]ribunaux dépositaires par état des lois inviolables qui forment le droit sacré de la Nation. Remontrance du Parlement de Paris du 26.12.1763 (26 December 1763), in J. Flammermont, M. Tournoux, *Remontrances du Parlement de Paris au XVIII^e Siècle*, vol. II : 1755-1768, Paris, 1895, p. 417.
- ²⁵⁰ *Flagellation Session 1766*, in J. Flammermont, M. Tournoux, *Remontrances du Parlement de Paris au XVIII^e Siècle*, t. II. 1755-1768, Paris, 1896, p. 557.
- ²⁵¹ *Remontrances sur l'État du Parlement de Bretagne et sur les violences commises à l'égard de divers membres de cette classe du parlement* (6 September 1765) in Flammermont, Tournoux, *Remontrances du Parlement de Paris au XVIII^e Siècle* cit., p. 522 (hereafter *Remontrances de Bretagne 1765*).
- ²⁵² *Remontrances de la Chalotais 1766*, in Flammermont, Tournoux, *Remontrances du Parlement de Paris au XVIII^e Siècle* cit., pp. 663 f.
- ²⁵³ René-Louis de Voyer de Paulmy, Marquis d'Argenson, *Mémoires et journal inédit du marquis d'Argenson, ministre des Affaires étrangères sous Louis XV*, publiés et annotés par M. le marquis d'Argenson, Tome V (Jannet 1858) p. 149: «The president Montesquieu has increased eloquence in this topic, and everybody imitates him with success». Cf. U. Müßig, *Recht und Justizhoheit. Historische Grundlagen des gesetzlichen Richters in Deutschland, England und Frankreich*, Berlin, Duncker & Humblot, 2009², pp. 121 f. (n. 231) for further details.
- ²⁵⁴ Chap. II, livre II, Montesquieu, *Oeuvres complètes*, vol. II, p. 239.
- ²⁵⁵ The *Edit portant création des conseils supérieurs* (1771) redigated by Maupeou abolished the parlements. They were reinstalled by the *Edit portant rétablissement des anciens officiers du parlement de Paris* (1774), albeit without the right of complaint (*droit d'opposition et de remontrance*). For the first, see A.J.L. Jourdan, Décrusy, F.A. Isambert, *Recueil Général des Anciennes Lois Françaises depuis l'an 420 jusqu'à la révolution de 1789*, Tome XXII: 1^{er} janvier 1737-10 mai 1774, Paris, Belin-Leprieur, 1830, reprint Ridgewood NJ, Gregg, 1964, pp. 512 f.; for the second, see A.J.L. Jourdan, Décrusy, F.A. Isambert, *Recueil Général des Anciennes Lois Françaises depuis l'an 420 jusqu'à la révolution de 1789*, Tome XXIII: De mai 1774-20 mai 1776, Paris, Belin-Leprieur, 1826, reprint Ridgewood NJ, Gregg, 1964, pp. 43 f.
- ²⁵⁶ Bodin, *Six livres de la république* cit., liv. I chap. VIII, 155.
- ²⁵⁷ *Remontrances sur le Grand Conseil 1768*, in Flammermont, Tournoux, *Remontrances du Parlement de Paris au XVIII^e Siècle* cit., p. 867.
- ²⁵⁸ «[T]he fundamental laws of the state are only a cumbersome yoke, an imaginary title for the legitimate liberty of citizens» / *les lois fondamentales de l'État qu'un joug incommode, la liberté légitime des citoyens qu'un titre imaginaire*. *Grandes Remontrances 1753* cit., 522.
- ²⁵⁹ Willoweit, Seif, *Europäische Verfassungsgeschichte* cit., n. 34, p. 254.
- ²⁶⁰ Montesquieu, *Oeuvres complètes*, cit., vol. II, p. 393.
- ²⁶¹ U. Müßig, *Montesquieu*, in *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. IV, pp. 1603-1607, Berlin, Erich Schmidt Verlag, 2015².
- ²⁶² B. Manin, *Principes du gouvernement représentatif*, Cambridge, Cambridge University Press, 1997.
- ²⁶³ Wright, *The Idea of a Republican Constitution in Old Régime France* cit., pp. 289 ff., 297. Wright refers to the grounding works of Maurizio Viroli (*Jean-Jacques Rousseau and the 'Well-Ordered Society'*, Cambridge, Cambridge University Press, 1988), Helena Rosenblatt (*Rousseau and Geneva: Form the First Discourse to the Social Contract 1749-1762*, Cambridge, Cambridge University Press, 1997) and Robert Wokler (*Rousseau*, Oxford, Oxford University Press, 1995).
- ²⁶⁴ Wright, *The Idea of a Republican Constitution in Old Régime France* cit., pp. 289 ff., 296.
- ²⁶⁵ The quote continues: «How many crimes, wars, murders, how many hardships and miseries and how many horrors would have been spared to the human race if he had pulled out the stakes or filled in the ditch and shouted to his fellow men: "Beware of listening to this deceiver; you are lost if you forget that the fruits belong to all and the earth belongs to no one"», *Discourse concerning Inequality*, J.-J. Rousseau, *Diskurs über die Ungleichheit. Discours sur l'inégalité*, Paderborn u.a., Schöningh, 1997⁴, p. 173.
- ²⁶⁶ The argumentation follows my student manual according to H. Hofmann, *Einführung in die Rechts- und Staatsphilosophie*, Darmstadt, WBG, 2011⁴, pp. 162 ff.
- ²⁶⁷ J.J. Rousseau, *Oeuvres complètes*, vol. III: *Du Contrat social – Écrits politiques*, Paris, Gallimard, 1964 (Pléiade-edition), p. 378: «Par le pacte social nous avons donné l'existence et la vie au corps politique». Whereas the natural state is lawless, the civil state comprises the rights fixed by the law: «Il n'en est pas ainsi dans l'état civil où tous les droits sont fixés par la loi». Wright identifies a closeness to contract theorists (*The Idea of a Republican Constitution in Old Régime France* cit., p. 296).
- ²⁶⁸ Rousseau, *Oeuvres complètes* cit., vol. III, pp. 364 f.
- ²⁶⁹ Ivi, p. 381: «de transformer chaque individu, qui par lui-même est un tout parfait et solitaire, en partie d'un plus grand tout don't cet individu reçoive en quelque sorte sa vie et son être».
- ²⁷⁰ Ivi, p. 360: «l'aliénation totale de chaque associé avec tous ses droits à toute la communauté».

- ²⁷¹ Contract 1762, book I chap. 8; Rousseau, *Oeuvres complètes* cit., vol. III, p. 365: «l'obéissance à la loi qu'on s'est prescrite est liberté».
- ²⁷² Ivi, p. 429: «La Souveraineté ne peut être représentée, par la même raison qu'elle ne peut être aliénée; elle consiste essentiellement dans la volonté générale, et la volonté ne se représente point: elle est la même, ou elle est autre; il n'y a point de milieu».
- ²⁷³ Ivi, p. 379.
- ²⁷⁴ Ivi, p. 380.
- ²⁷⁵ *Ibidem*.
- ²⁷⁶ «De lui-même le peuple veut toujours le bien, mais de lui-même il ne le voit pas toujours. La volonté générale est toujours droite, mais le jugement qui la guide n'est pas toujours éclairé». Ivi, p. 380, cf. also ivi, p. 371, p. 373.
- ²⁷⁷ «Individuals see the good that they reject: the public wants the good that it does not see. All need guides likewise: some must be forced to conform their wills to their reason; others must be taught to know what they want» (Ivi, p. 380).
- ²⁷⁸ The whole quotation reads: «Il faut lui faire voir les objets tels qu'ils sont, quelquefois tels qu'ils doivent lui paroître, lui montrer le bon chemin qu'elle cherche, la garantir de la séduction des volontés particuliers, rapprocher à ses yeux les lieux et les tems, balancer l'attrait des avantages présents et sensibles, par le danger des maux éloignés et cachés. Les particuliers voyent le bien qu'ils rejettent: le public veut le bien qu'il ne voit pas. Tous ont également besoin de guides: Il faut obliger les uns à conformer leurs volontés à leur raison; il faut apprendre à l'autre à connoître ce qu'il veut. Alors des lumières publiques résulte l'union de l'entendement et de la volonté dans le corps social, de-là exact concours des parties, et enfin la plus grande force du tout. Voilà d'où naît la nécessité d'un Législateur» (*Ibidem*).
- ²⁷⁹ Ivi, p. 430. He continues «[I]l est clair que dans la puissance Législative le Peuple ne peut être représenté».
- ²⁸⁰ Ivi, p. 395, 396, 399; book III, chapt. 4, p. 404. Ivi, p. 430: «mais il peut et doit être dans la puissance exécutive, qui n'est que la force appliqué à la Loi». Ivi, pp. 432 f.
- ²⁸¹ Ivi, p. 380; ivi, p. 374. Cf. also n. 282.
- ²⁸² Ivi, p. 379: «Quand je dis que l'objet des loix est toujours général, j'entends que la loi considère les sujets en corps et les actions comme abstraites, jamais un homme comme individu ni une action particulière».
- ²⁸³ Ivi, p. 371: «Il s'ensuit de ce qui précède que la volonté générale est toujours droite et tend toujours à l'utilité publique».
- ²⁸⁴ Ivi, pp. 373 f.
- ²⁸⁵ Ivi, p. 371: «Il y a souvent bien de la différence entre la volonté de tous et la volonté générale; celle-ci ne regarde qu'à n'est qu'une somme de volontés particulières: mais ôtez de ces mêmes volontés les plus et les moins qui s'entre-détruisent, reste pour somme des différences la volonté générale».
- ²⁸⁶ It reads as the willingness to relate oneself to the common conservation and to the public good. (Ivi, p. 437: «Le bien commun se montre par tout avec évidence, et ne demande que du bon sens pour être aperçu»).
- ²⁸⁷ Ivi, p. 371.
- ²⁸⁸ Ivi, p. 438.
- ²⁸⁹ Ivi, pp. 438 f.
- ²⁹⁰ Ivi, p. 372.
- ²⁹¹ Wright, *The Idea of a Republican Constitution in Old Régime France* cit., p. 297.
- ²⁹² J.K. Wright, *A Classical Republican in Eighteenth-Century France. The Political Thought of Mably*, Stanford CA, Stanford University Press, 1997; Kent, *The Idea of a Republican Constitution in Old Régime France* cit., pp. 289 ff., 297 f.
- ²⁹³ Rousseau, *Oeuvres complètes* cit., vol. III, pp. 393 f.
- ²⁹⁴ See n. 186 *supra*.
- ²⁹⁵ E.J. Sieyès, *Qu'est-ce que le tiers état?*, (éd. par R. Zappieri), Genève, Librairie Droz, 1970, p. 180.
- ²⁹⁶ 284 AP 5 doss. 1 (1), cit. also in P. Pasquino, *Sieyès et l'invention de la constitution en France*, Paris, Éditions Odile Jacob, 1998, p. 175. The following arguments develop from my considerations in Müßig, *Reconsidering Constitutional Formation* II cit., pp. 52 ff.
- ²⁹⁷ «And in him consisteth the essence of the Commonwealth; which, to define it, is: one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all as he shall think expedient for their peace and common defence. And he that carryeth this person is called sovereign, and said to have sovereign power; and every one besides, his subject», Th. Hobbes, *Leviathan*, part II (*Of commonwealth*), chap. XVII (*Of the Causes, Generation, and Definition of a Commonwealth*), in W. Molesworth (edited by), *The English Works of Thomas Hobbes*, vol. III, London 1839, Reprint Aalen, Scientia-Verlag, 1962, p. 172.
- ²⁹⁸ Discours sur le projet de constitution et sur la jurie constitutionnaire. — Moniteur du 7 thermidor an III (25 juillet 1795) = P. Bastid (édité par), *Les discours de Sieyès dans les débats constitutionnels de l'an III (2 et 18 thermidor)*, Paris, Hachette, 1939, p. 20. Cf. also Émile Boutmy's interpretation of the constitution as decision (*acte impératif de la nation*): «une décision qui crée le droit positif, et renvoie à une conception de la constitution» (a decision which creates the positive law and leads back to a conception of the constitution). E. Boutmy, *Études de droit constitutionnel. France-Angleterre-États-Unis*, Paris, Colin, 1885 (3^e éd. 1909), p. 241; Sieyès manuscript *Limites de la Souveraineté* (limits of the sovereignty), 284 AP 5 doss. 1 (4), cit.

- also by Pasquino, *Sieyès et l'invention de la constitution en France* cit., pp. 177 f.
- ²⁹⁹ Sieyès often calls the pouvoirs constitués «pouvoirs commettants», especially when they have been voted for; *Préliminaire de la constitution française*, pp. 35 et seq.; Id., *Quelques idées de constitution applicables à la ville de Paris*, pp. 30 et seq. Realized by Pasquino, *Sieyès et l'invention de la constitution en France* cit., p. 65, n. 58.
- ³⁰⁰ «Il y a une grande différence entre un pouvoir absolu/total, complet, et le pouvoir politique. Celui-ci pris même dans son intégrité est déjà borné par l'objet politique de la société»; 284 AP 5 doss. 1 (4), cit. also by Pasquino, *Sieyès et l'invention de la constitution en France* cit., p. 177.
- ³⁰¹ Cf. Müßig, *Recht und Justizhoheit* cit., pp. 210 f.
- ³⁰² «Ainsi donc la toute-puissance n'appartient point au souverain, il est souverain de l'association et non maître des associés. ... L'acte d'association est donc une convention tacite ou formelle de reconnaître pour loi la volonté de la majorité des associés». 284 AP 5 doss. 1 (4), cit. also by Pasquino, *Sieyès et l'invention de la constitution en France* cit., p. 178.
- ³⁰³ «La garantie de l'acte d'association, et de la minorité réside donc dans sa constitution. Les philosophes et surtout ceux de l'Antiquité diront que cette garantie est dans les mœurs et dans la bonne volonté du peuple. Mais comme la bonne volonté est ambulatoire et ne peut trop aux ordres des passions, comme les mœurs se dépravent ou changent par le seul avancement des arts et la progression des richesses, je dis que c'est à la constitution à nous garantir notre liberté». Ivi, pp. 178 f.
- ³⁰⁴ «Le despotisme doit être rendu impossible avant qu'on se permette de faire une loi à la majorité». Ivi, p. 179.
- ³⁰⁵ «Donc, la représentation et non l'action directe; donc la représentation divisée, sous la constitution, et non accumulée et rendue indépendante de ses lois constitutives». Ivi, p. 179.
- ³⁰⁶ J.M. Roberts, *The Penguin History of Europe*, London, Penguin, 2004, p. 735. The indicated list inspired the following argumentation.
- ³⁰⁷ For more details see Müßig, *Reason and Fairness* cit., pp. 109 ff.
- ³⁰⁸ In reality, however, as early as 1797 all newspapers were placed under police supervision, then the Parisian press was reduced from over 75 titles to four by 1811 (W. Reinhard, *Geschichte der Staatsgewalt. Eine vergleichende Verfassungsgeschichte Europas von den Anfängen bis zur Gegenwart*, München, Beck, 1999, p. 395).
- ³⁰⁹ Chap. II, Sec. 1, Art. 2, Willoweit, Seif (=Müßig) (hrsg.), *Europäische Verfassungsgeschichte* cit., n. 34, p. 310.
- ³¹⁰ Cited by Id., p. 299.
- ³¹¹ Cited by Id., p. 300.
- ³¹² Cited by Id., p. 310.
- ³¹³ F. Furet, R. Halévi, *La monarchie républicaine, La constitution de 1791*, Paris, Fayard, 1996.
- ³¹⁴ 1746-1794.
- ³¹⁵ Together with Adrien Duport and Alexandre Lameth, Antoine Barnave was called the "Troika" in the constituante. He supported Sieyès, though in favour of the suspensive monarchic veto, and was, apart from Mirabeau, the rhetoric protagonist at the National Assembly. His passionate dispute with Mirabeau and Jacques Antoine Marie de Vazalès on the question of whether the King had the right to decide on war or peace (May 16-23, 1791) is deemed one of the most notable scenes in the history of the National Assembly.
- ³¹⁶ «Suivant le comité le corps législatif se divise en deux branches, l'Assemblée et le roi. Dans ce cas le pouvoir législatif est formé de deux volontés, la volonté nationale exercée par le système temporaire des élus et la volonté royale héréditaire». And he closes this rarely known manuscript

with the polemic, that the king is not a minister in the national interest next to the national assembly, therefore he is not a legislative representative: «Le roi n'agit que comme ministre de l'intérêt national auprès de l'Assemblée, il n'est pas représentant législatif». 284 AP 4 doss. 12, cit. also in Pasquino, *Sieyès et l'invention de la constitution en France* cit., p. 173.

³¹⁷ Of May 31, 1814. Cited in K.H.L. Politz, *Die europäischen Verfassungen seit dem Jahre 1789 bis auf die neueste Zeit. Mit geschichtlichen Erläuterungen und Einleitungen* (The European Constitutions from the year of 1789 to the modern age, Including historical Explanations and Introductions), Leipzig, Brockhaus, 1833², vol. III, pp. 92 ff.

³¹⁸ After the Constitution of 1820 was forced to be accepted due to a coup of liberal officers, the Holy Alliance intervened. In 1823, French troops invaded Spain and restored the absolute monarchy. In 1820/21, the adoption of the Cortes-Constitution failed in the Empire of Both Sicilies.

³¹⁹ Cf. the testament of Louis XVI c/o Maisiat, Paire de panneaux tissés, Lyon 1827, Louvre-Richelieu-aisle, which should inspire future research.

³²⁰ The Convention won victories and put down insurrection at home. By 1795, the Terror had been left behind, and the republic was ruled by the Directorate, a five-member committee. According to the Directory Constitution of the Year III (2 November 1795) a bicameral legislature known as the *Corps Législatif* consisted of the Council of Five Hundred (*Conseil de Cinq-Cents*), with 500 delegates (30 years and older), and the Council of Ancients (*Conseil des Anciens*), consisting of 250 delegates, 40 years old and over, who had the right to veto any legislation proposed by the first. The Ancients also nominated the executive, the Directorate, from lists proposed by the Five Hundred. A Direc-

tor had to be at least 40 years old and to have formerly served as a deputy or minister; a new one was chosen each year, on rotation. The Directors chose government ministers, ambassadors, army generals, tax collectors, and other officials. However, though nominally inheriting many of the centralized powers of the former Committee of Public Safety, they had no funds to finance their projects or courts to enforce their will.

³²¹ On 9 November 1799 it was overthrown by Napoleon Bonaparte in the Coup of 18 Brumaire, and replaced by the French Consulate, which was to give its name to the final four years of the French Revolution.

³²² The monarchisation of the republics culminated in Napoleon's empire in 1804: «The government over the republic is entrusted upon an emperor who accepts the title "Emperor of the French"», starts the Organic Senatus-Consultum its establishment of the First French Empire. Such a 'renaissance' of the monarchy in the early constitutionalism corresponds to a change in the understanding of the republic: imitated in northern Italy 1802-1805 and in the Netherlands in 1806; (Art. 1) *Sénatus-consulte organique du 28 floréal an XII*, cited in L. Duguit, H. Monnier (éd. par), *Les Constitutions et les principales lois politiques de la France depuis 1789, collationnées sur les Textes Officiels, précédées de Notices historiques et suivies d'une Table Analytique détaillée*, Paris, 1925⁴, pp. 144 ff.

³²³ The National Convention passed 11.250 decrees in just over three years.

³²⁴ N. Davies, *Europe. A History*, Oxford, Oxford University Press, 1996, p. 715.

³²⁵ B. Constant, *Principes de politique. Applicable à tous les gouvernements représentatifs et particulièrement à la Constitution actuelle de la France 1815*, in M. Gauchet, *Écrits poli-*

tiques / Benjamin Constant; textes choisis, présentés et annotés, Paris, Gallimard, 1997, pp. 303 ff., 313.

³²⁶ Constant, *Principes de politique cit.*, pp. 303 ff., 386.

³²⁷ A. de Tocqueville, *Démocratie en Amérique* (1835), En. tr. *Democracy in America*, Chicago IL, University of Chicago Press, 2000, p. 378.

³²⁸ Tocqueville, *Democracy in America cit. tr.*, p. 380.

³²⁹ Wollin *Tocqueville, between two worlds cit.*, p. 380.

³³⁰ Cf. T. Stovall, *The Myth of the Liberatory Republic and the Political Culture of Freedom in Imperial France*, in «Yale French Studies», n. 111, 2007, pp. 89-103; Cf. also J. Maerz, *Laizismus und Religionsfreiheit. Das Religionsverfassungsrecht der Dritten französischen Republik im Vergleich mit der Weimarer Republik*, Diss. iur. Passau (supervision UM), 2020.

³³¹ He describes a fundamental ambiguity between the "republic as nation-state" and the "republic as universal value system".

³³² «In order to be legitimate, government must not be confounded with the sovereign, but be its minister; in that case, the monarchy itself is republican». (Contract 1762, book II, chap. 6, note *, Rousseau, *Oeuvres complètes cit.*, vol. III, p. 380.

³³³ Müßig, *Juridification by Constitution cit.*, pp. 22 ff.