

Jefferson, Pocock, and the Temporality of Law in a Republic

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I

RECALLING HIS WORK ON THE COMMITTEE APPOINTED for the revival of Virginia laws between 1776 and 1779, Thomas Jefferson wrote to his colleague and former law professor George Wythe that his “researches” into colonial legal history had led him to discover the deplorable state of the manuscript copies of the laws. Jefferson describes combing the county clerk offices of the oldest counties along the James River looking for handwritten copies of legislative records that would have been given to every county by the General Assembly, expecting to find them buried in the offices of the clerks or “in the hands of careful and curious individuals.” Confronted with the negligence of Virginia’s antiquarian legal culture, Jefferson vowed to collect all that he could so that some day the public “should advert to the magnitude of their loss in these precious monuments of our property, and our history,” and could take consolation that a few fragments, which were worthy of “attention and preservation,” had been “saved from the wreck.”¹ The objects of these letters to Wythe were proposals for not only another round of revival to the legal code, but a printed edition of the laws to be distributed at the public expense and for public use. Understanding Jefferson’s place in a larger history of jurisprudence and republicanism in the

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¹ Thomas Jefferson to George Wythe, 16 January 1796, in *The Papers of Thomas Jefferson*, ed. John Catanzariti (Princeton, NJ: Princeton University Press, 2000), 28:583.



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early modern Atlantic world can begin with the simple if surprising image of Jefferson himself, slave-owning planter, aristocrat, soon to be governor and already author of the Declaration of Independence, digging through the trash heap of a tavern in Charles City County, Virginia, looking for one more fragile piece of legal history.

In these efforts at preservation, Jefferson was not so much concerned with ensuring the continuity and authority of the history of land tenures underwriting property rights as he was in ensuring recourse to the assembled, historical, and thereby changeable character of that history. Set in the context of multiple traditions of law and political language, as well as uncertainty in the material and conceptual transmission of those traditions, the textual practices of Thomas Jefferson reflect an experience and usage of what I will call “fractured” constitutional time. Jefferson practiced a distinctly radical politics of reading, collecting, and working on authoritative texts of history, recognizing and teasing out discontinuity, rupture, and constituent moments where others sought solidity in the rationalization of authority. His efforts to resist the transformation of the conceptual bases and practices of political life into static traditions or systems of reconstituted authority grew out of a careful, virtuosic approach to reading and assembling histories of legal systems. This radical politics appears most clearly in his commonplace books, early legal arguments and drafts of constitutions, manuscript collections, and in the open, multidirectional, yet conflicted composition of the *Notes on the State of Virginia*. Contrary to the oft-depicted image of an almost inspirationally naïve political idealist, Jefferson was critically aware of the relationship between the design and practice of political institutions and the modes of historical understanding that underlay their continued authority. Rupture in the order of historical self-understanding informed the articulation of a fragmented, never fully ordered constitutional politics.

Jefferson’s engagement with history was jurisprudential rather than strictly legal or political: his various activities pointed at the situated, institutional framework within which everyday adjudicative and political processes took place. His education and reading life were rooted in the history of the law and constitutions, and his most creative and important interventions in the political struggles of his day focused on restructuring written constitutions to maintain revolutionary public spirit. As this particular concern for jurisprudence indicates, the subject configured in Jefferson’s republican constitutional thought was just as much if not more what French jurist Alain Supiot has called “*homo juridicus*,” as the *zoon politikon* of classical political philosophy or the rights-bearing individual producer of Lockean theory.² His sense of a rational self was instituted by its place in historically developed laws and institutions, both civil and natural. As Shannon Stimson has pointed out, Jefferson was unique among his founding cohort in that he retained a “British,” customary understanding of constitutions and the role of juries and legislatures in constitutional frameworks: rather than a singular fundamental text, constitutions were the accumulated mass of applicable laws.³ From this historical definition, Jefferson drew radical consequences. Laws and institutions, inherited from the past, were as such rightfully subject to the interpretive powers of democratic bodies of legal actors in the present and future. This was part and parcel of a wider historical, jurisprudential awareness that guided much of Jefferson’s political thought and designs for the structure and practice of revolutionary, republican institutions. An experience of unraveling and fragmenting in the fixed lines of sovereignty and institu-

² Alain Supiot, *Homo Juridicus: On the Anthropological Function of the Law*, trans. Saskia Brown (London: Verso Books, 2007).

³ Shannon C. Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall* (Princeton, NJ: Princeton University Press, 1990), 89.

tional authority gave Jefferson the intellectual equipment to consider the assemblage of histories out of which his own identity and that of his polity had grown.

In its concern for how both individuals and societies relate themselves to their place in historical time, this article takes no small amount of inspiration from the collective work of J. G. A. Pocock. More than any scholar of history, law, or politics in recent memory, Pocock has illuminated the embeddings of action, texts, and thought in deep histories of the transmission and articulation of political language. The awareness of a past, Pocock writes, is fundamentally a social awareness, and because of this inextricably historical linkage between subject and society, “we may suppose that the preservation of statements from the past has in various ways the function of ensuring continuity, and that awareness of the past is in fact society’s awareness of its continuity.”⁴ So conceived, the historical study of awareness of the past commits Pocock to the delineating of images, mind-sets, or languages across time. Examples from his corpus include the development and long life of a “common-law mind” in English jurisprudence from the late sixteenth to late eighteenth centuries, the varied pathways of a neoclassical republican vocabulary of civic virtue, and more recently, a concordant and particularly neo-Roman historiographical tradition of a dialectic of liberty and empire set in the context of decline and fall.⁵ It was in the assertion that such continuities and concerns for preservation extended across the Atlantic and characterized much of the intellectual world of the American founding that Pocock gained the dedicated attention of American scholars, engendering a now defunct debate between the relative merits of historical or natural, backward-looking or forward-looking, and republican or liberal characterizations of politics.⁶ My aim in this article is to enjoin the work of Pocock on the history of historical consciousness not to find yet another tradition, or even collection of traditions, but to question the integrity of the linkage between an awareness of the past and the continuity of that awareness or that past, or in other words, to subvert the historiographical tendency to think in terms of a linear temporality made of continuities, paradigms, or traditions.

Traditions are histories organized to establish particular continuities, but like any histories, traditions are made and remade by their actors. This may not take place under conditions freely chosen, as Marx reminds us, but that does not change the condition of human beings as makers of histories, constantly enmeshed in seemingly endless processes inherited from the past and yet acting not only in the context of the past, but irrevocably on the past. Histories are written, which means they are read, which means they are rewritten. The past is always incomplete, always being acted out, and always subject to new reading. In his methodological work, particularly in his critique of the hermeneutic primacy of authorial intent, and in his concerns to retain a notion of sovereignty, understood as the capacity of a society to “narrate, re-narrate, and inter-

⁴ J. G. A. Pocock, “The Origins of the Study of the Past: A Comparative Approach,” in *Political Thought and History: Essays on Theory and Method* (Cambridge: Cambridge University Press, 2009), 148.

⁵ J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century, a Reissue with a Retrospect* (Cambridge: Cambridge University Press, 1987); *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975); *Barbarism and Religion: The First Decline and Fall* (Cambridge: Cambridge University Press, 2003).

⁶ On the question of historical consciousness in particular, see Joyce Appleby, “What Is Still American in the Political Philosophy of Thomas Jefferson?” *William and Mary Quarterly* 39, no. 2 (1982): 287–309; Appleby, “Republicanism in Old and New Contexts,” *William and Mary Quarterly* 43, no. 1 (1986): 20–34; Appleby, *Without Resolution: The Jeffersonian Tensions in American Nationalism: An Inaugural Lecture Delivered at the University of Oxford, 25 April 1991* (Oxford: Oxford University Press, 1992); and J. G. A. Pocock, “States, Republics, and Empires: The American Founding in Early Modern Perspective,” in *Conceptual Change and the Constitution*, ed. Terrence Ball and J. G. A. Pocock (Lawrence: University Press of Kansas, 1998), 55–77.

pret its history,” Pocock has himself been aware of the indeterminacy of the use of inherited language.⁷ However, historical practice might also be carried out to an extent that rather than accepting the task of narrating and adjusting an evolving history, the historically aware subject might discover cause for interrogating the very processes of narration and re-narration, as well as the politics of claiming for these processes a singular historical development, and this interrogation might arrive at alternative narrations that, in investigating the cracks in inherited historical frameworks, allow subjects to think historically outside of the bounds of sovereignty. Such investigation can begin with locating in history practices of thought that provide space for historians to reconsider their own investments in the definition of what constitutes historical thinking, of the cleanliness of the boundaries and procedures for delineating relations between the past, the present, and the future.

One of the leading men among the “Founding Fathers” may seem an odd subject through which to carry out quests for alternative modes of narrating the history of law and constitutionalism. Especially in light of the work of Pocock on awareness of the past in history, however, the figure of Thomas Jefferson deserves renewed attention. Jefferson, in an astonishing variety of forms and contexts, was an obsessive preserver of statements and images from the past. This fact warrants being brought to bear in reading Jefferson’s own texts, in configuring the wider history of intellectual transformation in the founding of the American Republic, as well as in considering the historical character of civil identity. Jefferson’s education in law and politics and his early drafts of legal and constitutional text are suggestive of the importance that ways of organizing knowledge have for the meaning and authority of authoritative narratives and foundational texts. What made Jefferson’s revolutionary republicanism so radical was his profound awareness of the historicity of law and politics, awareness enabled and purposefully explored through reading, selecting, deconstructing, and reactivating pieces of constituted, foundational histories. His experience of the period from the outbreak of the imperial crisis in Virginia around 1765 to the resolution of the War of Independence between 1781 and 1783 consisted of his education, career as an attorney, draftsman of the Declaration of Independence and proposals for legal and constitutional reform in his home state, as well as the writing of the *Notes on the State of Virginia*. Jefferson’s responses to this particular revolutionary moment dramatically illuminate the connections between historical awareness and law and political thought in ways that have not been fully appreciated by scholars.

Intellectual biographers of Jefferson have noted and studied the commonplace books and their contexts, but have understandably been reticent about using these and other collections of Jefferson’s notes from the period as tools for understanding the development of his political thought.⁸ Yet Jefferson himself was very aware of the implications of reading and writing prac-

⁷ See J. G. A. Pocock, “Languages and Their Implications: The Transformation of the Study of Political Thought,” in *Politics, Language, and Time* (Chicago: University of Chicago Press, 1989), 3–41; preface to Pocock, *Political Thought and History*, x.

⁸ Dumas Malone, *Jefferson the Virginian* (Boston: Little, Brown, 1948), 62–74, 169–79; Merrill D. Peterson, *Thomas Jefferson and the New Nation* (Oxford: Oxford University Press, 1970), 16–20, 56–68; Kevin J. Hayes, *The Road to Monticello: The Life and Mind of Thomas Jefferson* (Oxford: Oxford University Press, 2008), 73–101. Peterson links Jefferson’s reading of English constitutional history to his political thought in the years preceding the Revolution, but finds this interest in “law as a form of history” to be prefatory to the development of a more mature commitment to the philosophy of natural rights; see Peterson, *ibid.*, 56–57. On the commonplace books in general, see Douglas L. Wilson, “Thomas Jefferson’s Early Notebooks,” *William and Mary Quarterly* 43, no. 4 (1985): 434–52; on legal notes and education in late colonial Virginia, see the pathbreaking work of Mary Sarah Bilder, “James Madison, Law-Student and Demi-Lawyer,” *Law and History Review*, Vol. 28, No. 2 (May 2010), pp. 389–449.

tices for meaning in law and politics, so we can approach this problem by paying attention to not only what he read but how he read and used it. Similarly, students of Jefferson's historical thought, and of historical thought in the American Revolution more generally, have by and large restricted their analyses to an extended paradigm of an English Whig sense of history, but this traditional interpretation has failed to take much account of the complexity and diversity of not only the subjects of Jefferson's historical interests, but the scenes of practice in which those interests were acted out.⁹ Indeed, the example of Jefferson points to the insufficiency of a historiography of paradigms for writing histories of politics. Jefferson's own radical efforts in making histories, and his concerns for the capacity of citizens to continue to do so, warrant closer study than has been done to date.

If it is true that he was able to seize on a crisis of historical subjectivity to explore new directions in comporting self and society in time, it is also true that Thomas Jefferson was less a fully independent actor-analyst than a register and conduit of the tensions involved in instituting the revolutionary opening of historical subjectivity in which he found himself. Just as he explored the multiplicity of histories of which he and his fellows were subjects, he was an instrumental force in ultimately reorganizing the histories of the peoples with whom he shared the North American continent in the service of a projected "empire of liberty," of codification, national unification, and expansion over constituency and multiplicity, and of commercial political economy over jurisprudence. Thus the figure of Thomas Jefferson did not escape the desire to make appear natural and whole what had been revealed as assembled, open, and uncertain. But perhaps we can say that he remained sufficiently aware of the futility of such a desire to leave rhetorical, institutional, and aesthetic reflections of his inquiries into a fractured temporality. What we can learn from the study of these fragments is the radical potentiality inherent in historical being and its representations in historical practice. Jefferson theorized, politicized, played with, and in many ways tried to control the open quality that characterizes historical subjectivity, and did so to an extent that challenges our own historiographical preferences for reconstructing traditions, extended languages, and continuous paradigms. As Jefferson's engagements with legal texts suggest, the history of republicanism in America is inseparable from its origins in the purposive amalgamation and disassembling of multiple conceptual, institutional, and social lines of experience, as well as the flight from open recognition of those very processes.

Pocock has referred to the American relationship with its revolutionary founding as not only a foundationalist but a fundamentalist one, which I take to mean a constitutional culture based on a return to the perceived authoritative purity of founding text, in many cases nothing less than a rejection of history.¹⁰ Admittedly, this insight may carry with it a good deal of truth. But Pocock's emphasis on continuity and tradition leads to a premature denigration and generalization about the supposedly and inherently fundamentalist legal epistemology of moments of revolt and founding, and inexorably, the project of interpreting and narrating these events in the present. The historicity and contingency of reading and writing text, particularly legal and con-

⁹ Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (Chapel Hill: University of North Carolina Press, 1966); David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville: University of Virginia Press, 1994).

¹⁰ J. G. A. Pocock, "America's Foundations, Foundationalisms, and Fundamentalisms," *Orbis* 49, no. 1 (2005): 37-44. This reading of the use of the term "fundamentalist" comes from Pocock's descriptions of the "absolutist" or "fundamentalist" character of radical historical consciousness in contrast to the common law or civic humanist traditions. On the English Levellers in particular, see Pocock, *Ancient Constitution and the Feudal Law*, 124-27; "Origins of the Study of the Past," 164.

stitutional text, get a short shrift as a result. Indeed, the traditions in which foundations are situated and taken up have been and always are sites of contestation. These histories can be subject to what is identified in the work of Michel Foucault and Giorgio Agamben as counterpractice, an archaeological practice of recovering the contingency of origins, restoring the moments of emergence to these constituted histories, and reinterpreting and reactivating their constituent pieces in ways that are not bound by the sovereignty of those same foundational narratives, or even the history of interpreting them.¹¹ Jefferson's experience and theorization of something akin to this radical historical sensibility, manifested most clearly in interpretive methods of reading and writing law, was the bedrock of his hopes for ensuring that a thoroughly modern and constitutional republic could remain a revolutionary one.

II

The textual practices of Thomas Jefferson took place in the context of the material culture of a free, semiprivate sphere of reading and writing that characterized the intellectual world of the Virginia gentry. Semiprivate, because while individuated practices of reading and note taking took place in the privacy of a gentleman's library, an inner world of the appropriation of the law and history one read, the purpose governing these usages of books was the formation of a self conditioned and disciplined by customary education for the exercise of public, political authority. Leading Virginians were constantly in the process of balancing their desire for maintaining their identity as transplanted Englishmen while developing a collective consciousness rooted in the process of deciding just what that Atlantic transplantation really meant. Crucial to the balancing act that constituted Virginian efforts at self-definition was the extent to which not only the English common law but also the structuring rules of English constitutional culture applied in the colony.

This project in itself was fraught with uncertainty. It remained so up until and even beyond the outbreak of the American Revolution. Given this situation, attorneys, judges, and legislators in eighteenth-century colonial Virginia constructed their place in a continuum of British constitutionalism and legal precedent very carefully, declaring in both public and private their freedom to legislate beyond English common and statute law when compelled by the necessity of their differing condition, all the while participating in a legal culture heavily dependent on English legal treatises, case reports, and broader narratives of the philosophy of the common law.¹² To that

¹¹ Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language*, trans. A. M. Sheridan Smith (New York: Pantheon, 1982); "Politics and the Study of Discourse" and "Questions of Method," in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991), 53–86; Giorgio Agamben, *Potentialities: Collected Essays in Philosophy*, ed. and trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1999); *The Signature of All Things: On Method*, ed. Kevin Atell, trans. Lucia D. Santo (New York: Zone Books, 2009).

¹² Perhaps the greatest exemplars are Sir John Randolph (1693–1737), William Byrd II (1674–1744), and Richard Bland (1710–76); manuscript material in all of their private libraries, including case reports and legislative records dating to the founding of the colony, came into Jefferson's possession through the estate sales of Peyton Randolph and Bland, or the personal bequest of the other Randolph sons, Edmund and John. See Richard Beale Davis, *Literature and Society in Early Virginia: 1608–1840* (Baton Rouge: Louisiana State University Press, 1973); Louis B. Wright, *The First Gentlemen of Virginia* (Charlottesville, VA: Dominion Books, 1964); Jack P. Greene, *Negotiated Authorities: Essays in Colonial Political and Constitutional History* (Charlottesville: University of Virginia Press, 1994), chaps. 8, 10–11; Emory G. Evans, *A Topping People: The Rise and Decline of Virginia's Political Elite, 1690–1790* (Charlottesville: University of Virginia Press, 2009).

end, property, in land, in slaves, and in books, was the fundamental mechanism of fixing and securing the legitimacy of the social and constitutional order in Virginia as well as the place of its political actors in the institutional history of English liberty. This order depended on the maintenance of an image of law that could respond to the novel demands of a provincial society with slaves while allowing for the building of a British-American identity rooted in the continuum of legal authority.

Sir Edward Coke's 1628 commentary on Thomas Littleton's fifteenth-century tract on Norman English land tenures, the first volume of his *Institutes of the Laws of England*, shaped the past of the law for Virginians; indeed, it was the most widely owned law book in the colony.¹³ Coke was essential for legal practice in Virginia throughout the eighteenth century because his heroic narrative of the antiquity of English law provided a conceptual plane where legal actors could establish provincial continuity with the legal traditions of the mother country. Uniquely for Jefferson, what mattered most in the reading of Coke was the actual means of representing the legal history Coke performed in the constitution of his text. As John Aubrey recorded, "the world expected from [Coke] a Commentary on Littleton's Tenures; and he left them with his Common-place book."¹⁴

The form of the commonplace book registered the understanding of the law as an immense artifice, as a historical achievement that was built up layer upon layer over time. Jacob Soll has called the neo-Ciceronian practice of collecting rhetorical commonplaces for formation and argument in law, politics, and ethics one of "material rhetoric," a kind of writing transparently constituted through the reassembling of other writings.¹⁵ The commonplace book provided Jefferson with a plane of collecting, assembling, and taking apart narratives of the law that allowed for careful consideration of its palimpsest character, practicing reading as a kind of writing, or rewriting.¹⁶ Thomas Jefferson's legal commonplace book exhibits a process of gradual unraveling of the governing confines of a strictly legal research and an explosion of reading into the historical building blocks of the legal edifice and eventually a plethora of histories of law, government, and politics, particularly regarding the origins of constituted authority in collective assembly practices.¹⁷ Jefferson's reading began with notes from case reports and major legal treatises, including the third and fourth parts of Coke's *Institutes*, alongside the King's Bench case reports of William Salkeld and Sir Thomas Raymond on norms of legal remedies and court procedures as well as principles of common law adjudication.

¹³ William Hamilton Bryson, *Census of Law Books in Colonial Virginia* (Charlottesville: University of Virginia Press, 1978).

¹⁴ John Aubrey, *Aubrey's Brief Lives* (New York: Penguin, 1949), 163.

¹⁵ Jacob Soll, *Publishing the Prince: History, Reading, and the Birth of Political Criticism* (Ann Arbor: University of Michigan Press, 2005), 13.

¹⁶ As Kirstie McClure suggests, "the practice of commonplacing encouraged the decomposition of printed texts into fragments and their reassemblage," in "Between the Castigation of Texts and the Excess of Words: Political Theory in the Margins of Tradition," Areyh Botninick and William E. Connolly, ed. *Democracy and Vision: Sheldon Wolin and the Vicissitudes of the Political* (Princeton: Princeton University Press, 2001), 199. On the importance of the commonplace book in early modern educational theory and practice, see Ann Moss, *Printed Commonplace Books and the Structuring of Renaissance Thought* (Oxford: Clarendon Press, 1996); Bradin Cormack and Carla Mazzio, *Book Use, Book Theory: 1500–1700* (Chicago: University of Chicago Library, 2005), 70–73.

¹⁷ Probably begun in 1763, concurrent with the start of his legal education under George Wythe; see Douglas L. Wilson, "Jefferson's Early Notebooks," *William and Mary Quarterly* 42, no. 4 (1985): 434–52.

The central themes of the earlier part of the legal commonplace book were English legal principles governing property transmission and disputes, and the application of English common law and the power of English courts in the American colonies. These were questions of direct relevance to Jefferson's eventual legal practice as well as his broader thinking about the nature of legislative authority in the colony of Virginia. In entry #231 of the legal commonplace book, Jefferson recorded a line from the 1705 decision in *Smith v. Brown & Cooper*: "the laws of England do not extend to Virginia, which being a conquered country, their law is what the King pleases." In this case, Chief Justice Holt declared that a suit to recover debt for a slave transported through England needed to be amended by the plaintiff to reflect that the slave was in Virginia rather than London at the time of sale; as the reporters transcribed, "as soon as a Negro comes into England, he becomes free: one may be a villein in England, but not a slave."¹⁸ The brief entry is telling in a number of ways. It registers a large part of the socioeconomic context of slavery to the disjunction between the application of law in England and in its plantations abroad. It also signifies the emergence of Jefferson's awareness, confirmed by contemporary historical analysts of the British American situation (Raynal, for instance), that the English common law applied in the legal practices of the colonies by the civil and common law logic of prescription, made authoritative only by long-established practice.¹⁹

Just as important as the imperial context was the development of a certain legal imagination in the colony that took root after the 1705 revisal of the slave code making tenured possession of slaves more secure by redefining slaves as real estate rather than chattel. The shift entailed a transference of the "feudal" laws of property holding and transmission described by Coke to the logic of maintaining a race-based slave regime in eighteenth-century Virginia. In his own collection of case reports from cases before the General Court of Virginia, Jefferson reported on an October 1768 case, *Blackwell v. Wilkinson*, in which the continuum from the early modern image of medieval English law to Virginia implied by this transference served as the basis for deciding specific issues relative to the problematic legal status of slaves. The court found for the defendant that slaves needed to be specifically annexed to the land to be subjects of entail; both arguments from attorneys took as given the parallel between feudalism and slavery. This was despite the legal disjunctions not only between contemporary English practice and that of Virginia, but between the feudal villein and the plantation slave. As a denizen of England, even as a peculiar kind of property, the villein had a legal personage before the eyes of the common law and en-

¹⁸ Thomas Jefferson, *Legal Commonplace Book*, Thomas Jefferson Papers, ser. 5, Library of Congress Manuscripts Division, Washington, DC, #231; *Smith v. Brown & Cooper*, in *Reports of Cases Adjudged in the Court of King's Bench . . .*, by William Salkeld (London, 1721), 666. On this and other decisions as precursors to Justice Mansfield's more famous *Somerset's Case* decision of 1772, see Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 16.

¹⁹ The application of common law constraints to property ownership and inheritance was a gradual, never fully completed product of the development of a relatively independent court structure in the colony, particularly after the restoration of the Stuart monarchy in 1661. As Jefferson's researches into the charters and legal origins of the colony would indicate within the decade, and as he would argue in his 1774 memo to the delegates of the Continental Congress (published without permission as "A Summary View of the Rights of British America"), land had been distributed to settlers by the Crown in the form of "allodial" holdings, or in absolute dominion, in the King's realm. See "The Sentiments of a Foreigner on the Disputes of Great Britain with America" (Philadelphia, 1775), translated, extracted, and circulated from Raynal's *L'Histoire philosophique et politique des établissements et commerce des Européens dans les deux Indes* (1770); Thomas Jefferson, "A Summary View of the Rights of British America," (Philadelphia, 1774).

joyed the protection of basic rights dating back to “time immemorial.”²⁰ The slave in Virginia, by and large recognized as naturally possessing the basic qualities of personhood, all the same had no legal personage at all. Indeed, as the Virginia slave codes indicated, the accidental killing of a slave that occurred during punishment for resistance would result in no punishment for the responsible master or overseer, “as if such accident had never happened.”²¹ That slaves had the right to appear in court in disputes with their masters before 1705 only further emphasizes the conceptual work involved in appropriating a timeless image of the continuity of law to remove slaves from the plane of legal and thereby historical subjectivity.

One of Jefferson’s own cases provided a medium for him to begin probing not only the legal framework for Virginia’s slave system, but also the temporal continuity implied by the authority of any instituted legal framework. In an April 1770 case, *Howell v. Netherland*, Jefferson took a case on behalf of the grandchildren of a mulatto slave woman bound by the 1705 slave laws to serve until the age of thirty-one; her owner had claimed the same right over the lives of the offspring. Jefferson sought their freedom with the overarching logic that “under the law of nature, all men are born free.”²² Pointing to the fact that the 1705 slave law formalizing a shift from patrimonial to matrimonial transmission of servitude was a pact between the legislature and churchwardens over ownership of descendents of slave relationships, Jefferson, citing Pufendorf, stipulated that, since servitude was a condition of compact rather than nature or conquest, the terms of the compact did not extend to the grandchildren of the slaves in 1705. The argument was ineffective at best; Jefferson was not allowed to finish his argument before the judges interrupted and decided the case for the opposing side. He could not have been surprised, for in his argument he had broached a number of fundamental components of the jurisprudence prevalent in eighteenth-century Virginia, engaging a language of natural jurisprudence and equity to admit the children of slaves to legal subjectivity, and historicizing the reach of laws and contracts, in this case relating to property in land and people. While over the course of his life Jefferson would become reluctant to express—much less act upon—antislavery sentiment, this tendency to focus on the constant making and remaking of legal authority through time would become increasingly central to Jefferson’s thought in his career as a lawyer and as a critic and draftsman of legal and constitutional text.

²⁰ Indeed, as Charles M. Gray has shown, chancery provided an increasing path of access to legal protection and action on the part of villeins and copyholders as the authority of manorial custom declined relative to courts of common law from the fifteenth to the early seventeenth centuries (*Copy-Hold, Equity, and the Common Law* [Cambridge, MA: Harvard University Press, 1963]).

²¹ “An Act Concerning Slaves and Servants” (A.D. 1705, XXXIV), in *A Collection of all the Acts of Assembly, now in force, in the colony of Virginia . . .* (Williamsburg, 1733), 226. On the distinction between natural and legal personage in colonial Virginian legal practice and its influence on the U.S. Constitution, see Malick W. Ghachem, “The Slave’s Two Bodies: The Life of an American Legal Fiction,” *William and Mary Quarterly* 60, no. 4 (2003): 809–42. For larger background on the failures of Wythe and Jefferson regarding the question of slavery in revolutionary era legal reforms, see John T. Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (Berkeley: University of California Press, 2002), 29–65. While Noonan points to the political and constitutional possibilities for greater action on slavery and the failures of Wythe and Jefferson to tackle the issue, even after admitting of the possibilities and expressing the desirability of major reform, his depiction of especially Jefferson as a crafter of a masked, magisterial image of law, power, and rule overlooks important parts of Jefferson’s jurisprudence and constitutionalism. Indeed, Jefferson’s actions with regard to the status of African Americans in the new nation stem not from his submitting them to the rule of law, but in his racist inability to fully extend to them the complex field of legal subjectivity of which he was otherwise such a careful as well as radical student and practitioner.

²² Thomas Jefferson, *Reports of Cases Determined in the General Court of Virginia, 1730–1740, 1768–1772* (Charlottesville, VA: Carr, 1829), 92.

Like his legal commonplace book, Jefferson's collections of reports of cases that had occurred before the General Court of Virginia, some his own and others much earlier, when taken in sum demonstrate an unfolding of legal reporting and research into primarily historical and political, critical approaches to the law. Laws concerning slavery and religion were the areas that most engaged Jefferson's legal reading and writing. In an October 1771 case, *Godwin v. Lunan*, Jefferson reported on his own disagreement with Wythe over the nature of his advocacy for lay members suing under the ecclesiastical jurisdiction of the General Court for the forced dismissal or punishment of their priest. Wythe and Jefferson both represented the plaintiffs, but Jefferson was skeptical of the power of the court qua ecclesiastical court to decide on such matters, as "visitation and deprivation are no parts of the office of an ecclesiastical judge." On these grounds, Jefferson launched into a historical investigation, for his own use, "into the first establishment of Christian churches in Great Britain, to develop their several kinds and constitutions, to see who is entrusted with their care and visitation; and to apply the principles which this inquiry would evolve to the parochial churches of our own country."²³ In that vein, Jefferson carried out an inquiry into the origins and division of church structures in England, making use of his extensive collection of books concerning ecclesiastical law and church history, elucidating the growth of different legal types of parish. Donatives originated from the situation of churches on the manors of feudal lords; to these lords the tenants of the land would tithe, and from them they would receive support for land, buildings, and clerics. With Blackstone, Jefferson delineated two further classifications of churches that grew out of donatives over time: presentatives, where the bishop in charge of the parish claimed a right of review over the appointment of a cleric to the parish on the land of a lord, and collatives, in which a parish stood on land no longer owned by a lord, and control of it thereby naturally rested with the local bishop. In donatives, the patron of the church, whomever or whatever that might be, retained rights of visitation and removal beyond the sphere of ecclesiastical power assigned to the bishops by the development of ecclesiastical courts alongside the common law.

The law that governed donative patronage, reasoned Jefferson, did not therefore rest in ecclesiastical law, but in the particular set of customs and practices on the manor that the patron (and through him his tenants) recognized, as protected by the foundations of the common law on *lex non scripta*. "When any ecclesiastical Judge doth usurp the temporal law, . . . the interest or cause of the subject is drawn in *aliud examen* [from all review] (*viz.*) to be decided and determined by the ecclesiastical law; and this is truly said *contra coronam et dignitatem regiam*" (against the crown and royal prerogative).²⁴ Only with the immemorial custom of the bishop's right of visitation recognized in presentatives, and following upon that the jurisdiction of ecclesiastical courts, would the General Court in its sometime capacity as an ecclesiastical court have power over the fate of the cleric. "But our parishes pretend to no immemorial existence, for that would make them older than our government itself: they have been created by acts of Assembly long within memory, to be found by any one who will recur to our records," Jefferson concluded.²⁵

For Jefferson, who was again arguing for the power to remove the priest, this removal was illegitimate if carried out under the jurisdiction of ecclesiastical law. Having launched into a historical essay on the origins of ecclesiastical law in order to undo its power over particular cases in

²³ *Ibid.*, 97.

²⁴ *Ibid.*, 102; William Coke, "Premunire," *The Reports of Sir Edward Coke* (London, 1727) 12:38; William Blackstone, *Commentaries on the Laws of England* (Oxford, 1766), 2:22–25.

²⁵ *Ibid.*, 103.

Virginia, Jefferson reached a conclusion far outside the bounds that governed the responses of Wythe and Randolph, the attorney general arguing for the defendant: “the truth is, the parish is erected, the church and its soil given, and also the endowment, by the legislature, or in other words, the people they represent. Now that is a civil, not an ecclesiastical body. The churches are therefore of lay foundation.”²⁶ Absent native laws particularly granting the parish and the parishioners exclusive authority over the cleric, patronage of the parish rested in the figure of the King; the parish itself, under the constitutional structure of the British Atlantic empire, sat in the King’s dominion, and the laws were that of the local legislative power acting in his stead. Needless to say, suggesting the secular, legal, and democratic origins of the church and its legal authority, and seeking to restore those origins to political practice in Anglican Virginia, was a radical interpretation, and it relied on the further practical assumption that widespread and critically engaged recourse to the fundamental laws of the land was not only acceptable but necessary for the maintenance of jurisdictional dispute settlement in a republican polity.

In filling his legal commonplace book, Jefferson included another even more involved essay on the history of the law and the historicity of its intertwinement with religious authority, an essay that he later edited slightly and bound with his volume of case reports. The essay, “Whether Christianity Is a Part of the Common Law?,” began with an older particular English case in which a similar question arose as to the duty of the common law to respect the alternate ecclesiastical law. The defendant, Bishop of Lincoln, asserted that common law courts were bound to defer to his rights over a parish as recognized by ecclesiastical law because Christianity was a part of the common law. The reporter of the case interpreted the law-French of the argument that the necessary place of Christianity in the common law was made clear in “*ancien scripture*,” as “holy scripture,” “*covient a nous a donner credence*” (requiring us to give our assent).²⁷ But Jefferson hit upon the error in this transcription from the argument, for this phrase “can only mean the ancient laws of the church,” for while it was true that the ecclesiastical law drew its authority from its recognition by the common law, the common law did not thereby grant legal authority to the scriptures or admit of its grounding in sacred authority. Littleton and Bracton, Jefferson reasoned, recognized no such place of Christianity in the common law, for if the power of ecclesiastical law grew out of the common law, judges of common law courts comprehending both courts ecclesiastical and of admiralty, then ecclesiastical law itself was “not founded on the Law of God, but subject to the modification of the law-giver.”²⁸ If the law is subject to augmentation, it is a product and an affair of the temporal word and human hands, not the imposition of God, nor that of ecclesiastical power constituted in God’s name.

Asserting the supremacy of the common law over other branches of English jurisprudence, Jefferson then undermined the powerful image of the common law that this project required by stringing together the transmission of the above error in common law authorities. The assumption that Christianity is part of the common law had become a commonplace by the seventeenth and eighteenth centuries: “thus we find a string of authorities, when, examined to the beginning,

²⁶ *Ibid.*, 105.

²⁷ Thomas Jefferson, “Whether Christianity Is a Part of the Common Law?,” appendix to *Reports of Cases*, 137. See also Jefferson, *Legal Commonplace Book*, #873, later included in letter of Thomas Jefferson to Thomas Cooper, 10 February 1814, in *Writings*, ed. Merrill D. Peterson (New York: Library of America, 1984), 1321–29.

²⁸ Jefferson, “Whether Christianity Is a Part,” 140.

all hanging, on the same hook; a perverted expression, . . . or on nothing,” Jefferson wrote.²⁹ He went on to discuss the earlier ages of the law, the definition of the common law as *lex non scripta*, but agreed with Hale’s *History of the Common Law* that while the common law ends at the Magna Charta where statute law begins, nevertheless the evidence for the substance of the common law exists in records insofar as it is transmitted through the opinions of judges and cases, “for all these laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty.”³⁰ The problem, for Jefferson, in reference to the immutable authority claimed by religious institutions, was that “our judges have piously avoided lifting the veil under which it was shrouded.” Having used the antiquarian scholarship of the earlier law reporters and David Houard’s *Traites sur les coutumes Anglo-Normandes* (1776) to illustrate the absence of the legal recognition of Christian authority in the early Anglo-Saxon period, he noted that editions of the Laws of King Alfred were subsequently copied with a preface of four chapters of Exodus and two verses from the Acts of Apostles. The summation of the essay called particular attention to the “fabrication” processes by which the divergent aspects of constitutional history are stitched together to form a singular, totalizing image of authority in the very composition of the texts that transmit the legal knowledge underpinning that very authority.

To return to the legal commonplace book, Jefferson’s reading and extraction patterns point us to the groundwork for a critical mode of historical practice carried out in full awareness of the stitched together character of legal knowledge constructed in the manner of continuity and tradition. As his reading began to include histories of English law, he turned particularly to those that challenged Coke’s antedating of what had become known as feudal tenures in the dissent of property to the pre-Conquest period, namely the works of the seventeenth-century royalist Sir Henry Spelman, Matthew Hale’s *History of the Common Law*, and John Dalrymple’s *An Essay Towards a General History of Feudal Property in Great Britain*. This reflected Jefferson’s sense that in fact the positing of the continuity of the ancient constitution from the Anglo-Saxon period was a myth, and demonstrably so. His selections from more broadly framed legal treatises included Obadiah Hulme’s *An Historical Essay on the English Constitution* (1771), which was written to trace the concept of the “elective power of the people” to the Saxon period and consequently justify the power of Parliament in its representative capacity to tax the colonists; and Sir John Fortescue’s fifteenth-century *De Laudibus Leges Angliae*, a theoretical account of the long history and superiority of the English common law relative to alternative jurisdictions within England and the legal traditions of other constitutions of Europe. From these, Jefferson extracted the historical scholarship on the constituent assembly practices in which customary legal frameworks gained widespread legitimacy, focusing on origins, but again, not in any attempt to legitimate subsequent institutional development and codification. He did so, rather, in the context of outspoken, sometimes riotous political activity on the part of increasing numbers of subjects during the imperial crisis, to realize and rethink customary legal frameworks, with renewed interest in the origins of political sovereignty and law.³¹

²⁹ *Ibid.*, 138. See Sir Matthew Hale, *The History of the Common Law of England*, ed. Charles M. Gray (Chicago: University of Chicago Press, 1971), chaps. 1–2.

³⁰ Jefferson, “Whether Christianity Is a Part,” 139.

³¹ Michael A. McDonnell, “Class War? Class Struggles during the American Revolution in Virginia,” *William and Mary Quarterly* 63, no. 2 (2006): 305–44.

Especially crucial here are the references to Hulme or to the Anglo-Saxon *witen* (or the *witena gemot*), the institutional and theoretical basis for parliamentary sovereignty in the British Constitution, and “where their principal power was lodged, annually moveable, and entirely subject to the elective power of the people,” while giving a “more fixed state to executive authority, . . . confined within a certain sphere of action,” and “prescribed by law.”³² Likewise, Fortescue’s delineation of the origins of political rule in the “Embrio” of the people would come to inform Jefferson’s legal and constitutional thought. From a manuscript compilation of Fortescue’s writings, eighteenth-century lawyer John Fortescue-Aland published a collection, *The Difference between an Absolute and Limited Monarchy* (1714). Its preface was the source of a great number of the entries on Fortescue in the legal commonplace book. In the preface, Fortescue-Aland summarizes Fortescue’s historical work on the origins of the common law as predating King Alfred’s compilation, generally presumed to be the original of the common law. As Fortescue-Aland demonstrates, Fortescue had sought to prove that the common law of England, in its antiquity and its independent continuity, was not only the equal but the superior of the European civil law inherited from Rome. For Fortescue, the foundations of this continuity were the sustained participation of people other than the King in the process of making law: “in the Body Politic, the first thing, which lives and moves, is the intention of the People, having in it the Blood, that is, the Prudential Care and Provision for the Public Good, which it transmits and communicates to the Head, as the Principal Part, and to all the rest of the Members of the said Body Politic, and whereby it subsists and is invigorated.”³³ This entailed a synchronic understanding of the temporality in which legislation and adjudication took place, for any laws that did not register with the “intention of the legislators” could “immediately be amended or repealed . . . with the same Consent and in the same Manner as they were first enacted into a Law,” that is to say, the original process of law making in an assembly was considered a constant presence in constitutional history, reenacted each time a law was made, either through representative institutions or the people themselves.³⁴

Jefferson was coming to differ from Fortescue in his refusal to see historical moments of actually making law as solid threads in a longer continuum of legal development. In the eyes of the colonists, they were confronting a constitutional arrangement where legislative sovereignty had been forcibly removed to the locus of a nonrepresentational, alien political institution. Thus Jefferson’s isolation of the constituent process of law making at the (historically informed) theoretical origins of law and political society was part of a process of gathering past exemplary moments as means of thinking outside inherited narratives of sovereignty.

By far Jefferson’s largest commonplace book, and perhaps consequently his least appreciated one, was his notebook on theory and precedent in chancery, or equity jurisprudence, and it is in this book that we can see most clearly the experience of rupture and fragmentation in the

³² Jefferson, *Legal Commonplace Book*, #803; Obadiah Hulme, *An Historical Essay on the English Constitution* (London, 1771). See also William Blackstone, *Commentaries on the Laws of England* (Oxford, 1769), 4:405–6.

³³ Sir John Fortescue, *De Laudibus Legum Angliae, . . . translated into English, illustrated with the notes of Mr. Selden* (London, 1737), 22. On Fortescue, his context, and his place in subsequent history, see Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642* (Cambridge: Cambridge University Press, 2006), 1–32; Thomas Garden Barnes, *Shaping the Common Law: From Glanvill to Hale, 1188–1688* (Stanford: Stanford University Press, 2008), 61–78.

³⁴ *Ibid.*, 35.

authority of law as a system of knowledge.³⁵ In turn, and as we will see, it is around the exploration and use of the concept of equity in the history of legal thought and institutions that the radicalism of Jefferson's designs for a revolutionary constitution for Virginia would be built. In eighteenth-century English legal theory, equity as practiced in the Court of Chancery was a dangerous business. During the rise of chancery jurisdiction under the respective Tudor governments, equity had been considered the "King's conscience," and therefore the conscience or spirit of the law, a corrective to the rigidity of the common law. For Francis Bacon, a hero of Jefferson's, his time as the chancellor saw the installation of chancery as a check on the supremacy of the law over royal prerogative and sovereignty articulated at the time by the chief justice of King's Bench, Sir Edward Coke. By the eighteenth century, many jurists decried the potential for decision in equity cases to rest on little but the conscience of the particular judge. While chancery practice had played an important role in getting around the feudal constraints of common law rules regarding real property and inheritance, it was in part out of concern for the growing power of this alternative jurisdiction that Blackstone and Chief Justice Mansfield began defending the legitimacy of common law judges interpreting the law with the assistance of principles of equity as part of their projects for conservative law reform.³⁶ Indeed, for Blackstone, it was imperative for him to deemphasize the distinctions between equity and common law, at some length discussing the strict rules by which equity jurisprudence was bound and the liberality of interpretation that had always been a component of common law adjudication. As Fortescue-Aland put it, "to have no rule to decide controversies, but the rule of Equity, is to begin the World again, and make of a choice of that Rule, which out of mere necessity was made use of in the Infancy of the State, and Indigency of Laws, and to set up this Rule, after Laws are established, to relieve hard Cases, and leave the Matter at large, is it not rather to unravel, by Unperceived Degrees, the fine and close Texture of the Law, which has been so many hundred years in the making?"³⁷

Given Jefferson's ideological contempt for any supposed remnants of the Tudor or Stuart monarchs, and particularly given his later quite forceful critique of judicial power in confrontation with the Marshall Court, equity seems a bizarre place for Jefferson's interest. And yet, in the passage from Fortescue-Aland just quoted, we can see an intellectual project that would have caught Jefferson's eye: an opportunity to theorize the "unraveling" of the "Texture of the Law," woven carefully and tightly over so many centuries. By far the largest number of entries in the equity commonplace book are from Scottish jurist Lord Kames's *Principles of Equity*, and if taken

³⁵ The only specific treatment of Jefferson's Equity Commonplace Book is a descriptive outline of the text by Judge Edward Dumbauld, "Thomas Jefferson's Equity Commonplace Book," *Washington and Lee Law Review* 48 (1991): 1257–83. On the influence of the juridical concept of equity on Jefferson and the wider history of American law and constitutionalism, see Peter Charles Hoffer, *Law's Conscience: Equitable Constitutionalism in America* (Chapel Hill: University of North Carolina Press, 1990).

³⁶ William Blackstone, *Commentaries on the Laws of England* (Oxford, 1768), 3:428–42. See Thomas Jefferson to Philip Mazzei, November 1785, in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton, NJ: Princeton University Press, 1954), 9:67–72; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (Cambridge: Cambridge University Press, 1989), chaps. 3, 6–7. On earlier debates over developments in equity, see G. W. Keeton, *An Introduction to Equity* (London: Pitman, 1961); *The Concept of Equity: An Interdisciplinary Assessment*, ed. Daniela Carpi (Heidelberg: Winter, 2007), 7–20, 83–168, 185–208; Bradin Cormack, *A Power to Do Justice: Jurisdiction, English Literature, and the Rise of the Common Law, 1509–1625* (Chicago: University of Chicago Press, 2007), chap. 2.

³⁷ John Fortescue-Aland, preface to *The Difference between an Absolute and Limited Monarchy . . .*, by Sir John Fortescue (London, 1714), xii.

with the passages from Kames's *Historical Law-Tracts* in the legal commonplace book, Kames on law and legal history emerges as one of the most cited and copied sources in Jefferson's reading life. While Blackstone nervously sought to check the near legislative power of equity adjudication, Kames was busy using his position as Scotland's chief justice to openly carry out legal reform from the bench, bringing about significant reform surrounding his two pet projects: undoing feudal restraints on property, particularly landed property, and reformation of the criminal law.³⁸ Both of these aims would be pillars of Jefferson's own proposals for a new constitution and law reform in the newly declared Commonwealth of Virginia.

The centerpiece of Jefferson's inspiration from Kames was not merely practical legal reform goals, it was the methodology and language that conditioned the possibility for thinking anew about what the law had been, what it was, what it would be. Indeed, Kames's dictum, citing Bolingbroke, that one could not study the law without studying it historically, without comparing it to other systems of jurisprudence, and without understanding the social and governmental contexts in which law had developed, was perhaps the single most important idea shaping Jefferson's approach to learning in the area of the law.³⁹ Likewise, Kames's definition of equity as comprehending "every matter of law that by the common law is left without remedy" gave Jefferson language to think with in the crisis of legal legitimacy and legal suspension that characterized constitutional experience of the outbreak of revolution in the colonies.⁴⁰

The project of tracing principles of jurisprudence to "human nature" was not a turn away from history to nature, but a historical project in and of itself, entailing a history of how social, economic, and political conditions had affected human ethics over time. Natural jurisprudence was not antithetical to history; in fact, natural law, like the human mind and human laws, developed and was to be studied historically. For Jefferson in particular, natural law would come to be part of a natural history that confronted and mixed with civil and legal history, blurring the distinction between nature and history, between *physis* and *nomos*: a way of thinking in history about the deep context and the historical fragility of law simultaneously, as a text such as the *Notes on the State of Virginia* demonstrates dramatically.⁴¹ In terms of connecting Jefferson's methods of reading in the area of the law to his collection, composition, and writing of legal and constitutional text for revolutionary Virginia, what matters principally is the configuration of equity as a caesura in the temporal continuity of the law, and precisely the all too direct calling up of the origins of law and sovereignty, the "unraveling," fragmenting, or fracturing in the temporality underwriting law that critics of equity feared.

³⁸ Projects informing and informed by his historical work, "Of the Introduction of the Feudal Law into Scotland," in *Essays upon Several Subjects Concerning British Antiquities* (Edinburgh, 1757); "History of the Criminal Law," in *Historical Law-Tracts* (Edinburgh, 1758). See David Lieberman, "The Legal Needs of a Commercial Society: The Jurisprudence of Lord Kames," *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, ed. István Hont and Michael Ignatieff (Cambridge: Cambridge University Press, 1983), 203–34.

³⁹ Henry Home, preface to *Historical Law-Tracts*, by Lord Kames (Edinburgh, 1758).

⁴⁰ Thomas Jefferson, *Equity Commonplace Book*, Huntington Library Special Collections, Manuscripts Division, San Marino, CA, #1077; Lord Kames, *Principles of Equity* (Edinburgh, 1767), 1:38–55.

⁴¹ On the fundamental character of the divide between these categories, see Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1990). For a challenge to how absolute this division has been in Western legal philosophy, see Ernst Bloch, *Natural Law and Human Dignity*, trans. Dennis J. Schmidt (Cambridge, MA: MIT Press, 1987).

III

Blackstone defined equity as the “reason and spirit of the law,” guiding the judge, in the instance of uncertainty, to ascertain the intent of the original legislator as the key interpretive principle.⁴² He wrote in contrast to Francis Bacon, who construed equity jurisdiction as taking over at the limits of common and statutory law and as being part of the royal prerogative, and to Kames, who construed equity as arising where the common law failed and as resting in the power of the judge. For Blackstone, this gesture was part of the larger philosophical and constitutional goals of his magisterial tome: to foreclose the legitimacy of alternative sources or traditions of law, particularly appeals to natural right and the ancient constitutionalism associated with radical and Whig politics since the English Civil War. That is not to say that Blackstone ignored or wrote off these traditions, but he configured them as more perfectly embodied in the gradual, continual development and perfection of the common law itself. In other words, the instituting, constitutional, founding moments of law, the actual creation of law, the historical moment anterior to its codification, its antifoundational origin, was circumscribed by interpretive rule to a past recoverable only through the mediation of law’s naturally authoritative continuity through time. It was precisely this solidity against which Jefferson’s textual practices and the constitutional vision such practices informed were ultimately directed.

That equity was a critical part of Jefferson’s republican and even democratic vision for constitutionalism is apparent not only from the sheer immensity of his engagement with it as a student, but also in the shaping of some of his most crucial political texts surrounding the emergence of the independence movement in the middle to late 1770s. The “Summary View,” after all, was a final appeal to the King’s conscience, “a humble and dutiful address presented to his majesty,” in the midst of a situation that would require the surrender of “not only the principles of common sense, but the common feelings of human nature,” and after the failure of legal and constitutional arguments grounded in the applicability of the common law rights of Englishmen to colonial subjects.⁴³ More radically, the Declaration of Independence made similar recourse to natural right and natural rights, laying out a list of grievances prefaced by a claim to the rights of the people to renegotiate or dissolve legal bonds which had become injurious to the ends for which those bonds were made in the first place. No doubt, the Declaration, like the founding era itself, bears the markers of “multiple traditions” of legal and political thought, including the translation of Locke’s “life, liberty, and estate,” into “life, liberty, and the pursuit of happiness.”⁴⁴ But the form of the argument Jefferson sought to make becomes clearer when seen not in the light of a grand, retrospectively conceived “liberal” and social contract tradition drawn from Grotius, Hobbes, and Locke, but in the practice of legal argumentation appropriate to the corrective use of principles of equity as applied to covenants and contracts between people and peoples.⁴⁵ That in Jefferson’s formulation, the people themselves are in the interpretive place of

⁴² Blackstone, *Commentaries on the Laws of England*, 3:III, p. 429.

⁴³ Thomas Jefferson, “A Summary View of the Rights of British America,” in *Writings*, 105, 111.

⁴⁴ John Locke, “Second Treatise on Government,” in *Locke: Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 323; Thomas Jefferson, “Autobiography,” in *Writings*, 19.

⁴⁵ The “multiple traditions approach” is meant to encompass the range of different traditions to which scholars have attributed the origins of the American Revolution and the founding of the republic. See Alan Gibson, *Interpreting the Founding* (Lawrence: Kansas University Press, 2006), chap. 6. On the “liberal” interpretation in its confrontation with the “republican synthesis,” in reference to the Declaration, see Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Vintage, 1922); James T. Kloppenberg, “The Virtues of Liberalism:

the chancellor, is a sign of the radical constitutional theory coming to play, one predicated on the sudden reemergence of the people in their capacity as critical components of the actual making and defining of law.⁴⁶

In Jefferson's case, it was not simply the ideas of law and sovereignty that come into question, but that the written, composed, textual character of law had ceased to appear whole. Indeed, Jefferson's unique attention to the physicality of law and legal knowledge as writing was an essential aspect of the development of his revolutionary constitutional criticism and method, growing as it did out of his concern for the representation of historical and conceptual authority in the presentation of text in the form of the book. In the fourth volume of his commentaries, Blackstone hailed the composition of the Laws of King Alfred out of the disparate assemblage of local laws: Alfred's codification had been "a most great and necessary work," aiming at no less than to "new-model the constitution; to rebuild it on a plan that should endure for ages; and, out of its old discordant materials, which were heaped upon each other in a vast and rude irregularity, to form one unified and one connected whole."⁴⁷ Whatever undesirable elements had been woven into the texture of the law by periodic conquests and abrupt revolutions, the feudal constraints introduced by the Norman Conquest, for example, were so "interwoven in the body of our legal polity, that they cannot now be taken out without a manifest injury to the substance."⁴⁸ In a letter to an inquiring student sent sometime in the early 1770s, Jefferson advised a student on commonplace books of law, urging him to make use of Coke and the earlier legal treatises of Bracton and Glanville "when tracing the history of particular portions of the law," warning against relying on more recent texts, such as the surveys of Matthew Bacon and Blackstone, which had been produced more out of a need to organize into a unified body the "voluminous" development of law in the eighteenth century than to provide a history.⁴⁹ Likewise, in the 1803 preface to his edition of Blackstone's *Commentaries*, Jefferson's friend and ally, St. George Tucker, echoed Coke's description of legal study in his critique of Blackstone: "with the appearance of the Commentaries, the Laws of England, from a rude chaos, instantly assumed the semblance of a regular system. . . . The crude and immethodical hours of Sir Edward Coke were laid aside, and that rich mine of learning, his Commentary upon Littleton, was thought to be no longer worthy of the labor requisite for extracting its precious ore."⁵⁰ An attentiveness to the composition of text on the part of these elite Virginia legal minds existed not only in their approach to authoritative treatises that organized legal knowledge, but in the writing of law and constitutions themselves.

While the Second Continental Congress approached and made its decision to declare independence, Jefferson, its newest member, was just as concerned, if not more, with the writing of a new state constitution for Virginia. Since 1774, when Lord Dunmore, then the royal governor of the colony, had dissolved the House of Burgesses and in so doing closed the courts of law in

Christianity, Republicanism, and Ethics in Early American Political Discourse," *Journal of American History* 74, no. 1 (1987): 9–33; Appleby, *Without Resolution*.

⁴⁶ On popular pressures in elite politics during the Revolution in Virginia, see Michael A. McDonnell, *The Politics of War: Race, Class, and Conflict in Revolutionary Virginia* (Chapel Hill: University of North Carolina Press, 2007). On the cultural assumption of "popular constitutionalism" in the common law and American Revolution, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004).

⁴⁷ Blackstone, *Commentaries*, 4:403–4.

⁴⁸ *Ibid.*, 410–11.

⁴⁹ Thomas Jefferson to Bernard Moore, date unknown, later enclosed to John Minor, 30 August 1814, in *Writings*, 1558–59. See Julia S. Waterman, "Jefferson and Blackstone's Commentaries," *Illinois Law Review* 27 (1932–33): 629–59.

⁵⁰ St. George Tucker, preface to *Blackstone's Commentaries on the Laws of England* (Philadelphia, 1803).

response to the growing intensity of the imperial crisis, Virginia, like many of the other colonies, went without recognizable constitutional government for an extended period of time. It was not until Congress issued orders to all the colonies to form new state governments after the Crown had declared them illegitimate that political ground existed for constitutional conventions.⁵¹ In Jefferson's constitutional draft of 1776, which was passed over in favor of that of George Mason, the temporality of this foundational moment was built into the text itself. An extended preface anticipated the legal argument against the Crown that would later surface in the text of the Declaration, but in the case of the constitutional text the criticism led directly into the design and practice of new institutional structure. Declaring the illegitimacy of the royal governance in the colonies and performing a textual dethroning of the King's rule, Jefferson further stated that this might not be enough, that it would "become further necessary to re-establish such ancient principles as are friendly to the rights of the people and to declare certain others which may cooperate with and fortify the same in the future." He then proceeded to outline a model of state government in the name of "the authority of the people."⁵² As far as accessing a development of Jefferson's legal and constitutional thought, there are a couple of things that stand out in the draft constitution of 1776: the separation of the judiciary and the upper house of the legislative power; an astonishingly weak executive; an "administrator," who would be elected along with a deputy annually by the lower house of the legislative assembly; and a liberalization of property qualifications for voting, including all male (white) persons who owned land, a quarter of an acre in town or twenty-five acres in the country. This was not a terribly radical move until one read on to the fourth section on public and private rights, where it is provided that "every person . . . shall be entitled to an appropriation of 50 acres or to so much as shall make up what he owns or has owned 50 acres in full and absolute dominion."⁵³ Furthermore, Jefferson tried to dramatically expand the importance of juries in state-level courts, expanding trial by jury to "all causes, whether of Chancery, Common, Ecclesiastical or Marine law," and provided a provision for banning the importation of slaves and the status thereof, a plan of statewide public education, a ban on standing armies, a guarantee of the right to keep arms on one's property, a generous naturalization process, a replacement of primogeniture and entail with laws of *gavelkind*, an extension of equal property rights to women, and total freedom of religious conscience.

The provisions for religious liberty, the immediate end of the slave trade, expanding the power and use of juries, and the socialized distribution of property were proposals unique to Jefferson's constitutional draft, and were decisive factors in its defeat. But the project of restoring "such ancient principles as are friendly to the rights of the people," in Jefferson's eyes, entailed a grander series of reforms, reforms that he had the opportunity to propose when selected as a member of the special committee appointed by the General Assembly, at Jefferson's urging, for the revisal of the Virginia legal code in October 1776, which included Edmund Pendleton,

⁵¹ On the ideologies of state constitution making, see Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*, trans. Rita and Robert Kimber (Chapel Hill: University of North Carolina Press, 1980). On the role of the concept of popular sovereignty, see Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition before the Civil War* (Cambridge: Cambridge University Press, 2008).

⁵² Thomas Jefferson, "Third Draft of Constitution for Virginia, 1776," in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton, NJ: Princeton University Press, 1950), 1:357.

⁵³ *Ibid.*, 362–63.

George Wythe, George Mason, and Thomas Ludwell Lee.⁵⁴ Their goal as stated by the assembly was to collect and read over the entire of body of law that had prevailed in the colony, including applicable English laws as well as laws passed in Virginia, and to make a report of what should be kept and what should not.

Well known for his deep reading and study of Virginian as well as English legal history, Jefferson was assigned the review of the application of the common law and statutory law through to the founding of the colony. Lee and Mason having dismissed themselves on account of not being qualified, Pendleton took subsequent Virginia law, and Wythe took subsequent British law. According to Jefferson's autobiography, as he had been assigned the English origins of common law rules of descent and the criminal law, he sought the guidance and permission of the committee to develop bills of total reform in these as well as other areas of the law. Out of the final report submitted by the committee, which amounted to 90 pages of 126 individual bills reforming, eliminating, or condensing previous legal material and an even more substantial abbreviation, Jefferson later isolated four fundamental components of the revisal report that he deemed particularly important for "forming a system by which every fibre would be eradicated of antient [*sic*] or future aristocracy; and a foundation laid for a government truly republican."⁵⁵ These included the abolition of entail, or common law rules of descent written to preserve the integrity of elite landed estates over time; the similar abolition of the law of primogeniture; the freedom of religion and the disestablishment of the Anglican Church in Virginia; the consequent outfitting of the College of William and Mary as a public university, which the chair of divinity of being converted into a chair of "law and police," a seat occupied first by Wythe; and finally, the introduction of trial by jury into the chancery courts, the separation and independence of which was further provided for in the report of the revisers in 1779.⁵⁶ Out of these, only the abolitions of entail and primogeniture were entirely successful, and these with great controversy and heated debate. The total disestablishment bill failed and was not passed until 1786, and the idea for juries in equity cases failed outright. Jefferson's other pet project, a reform of the criminal law, also met overwhelming resistance.

That these proposals were reflective of Jefferson's perception of fracture in the temporality of constitutionalism and a subsequent prompting to creative engagement with legal history can be partly observed in the fears surrounding his proposals. Indeed, Edmund Pendleton remained skeptical of both the repeals of entail and primogeniture, fearing the consequences of a disbanding of the propertied bases or Virginia's old political elite for the order and security of the new commonwealth. Carter Braxton, an heir of the wealthy Carter family and a signer of the Declaration, opposed both reforms vociferously in the assembly as well as in print. Anticipating the constitutional convention of 1776 in the spring of that year, Landon Carter, a justice of the peace for the county of Richmond, wrote in his personal diary that "if our form of Government is changed I hope some divine Inspiration will possess our rulers to establish the common Law of England amongst us. Otherwise, I cannot see what encouragement [*sic*] People of my age can have in America for improving our possessions since it is the Common Law of England alone that estab-

⁵⁴ See Malone, *Jefferson the Virginian*, 251–85; Edward Dumbauld, *Thomas Jefferson and the Law* (Norman: University of Oklahoma Press, 1978), chap. 7.

⁵⁵ Jefferson, "Autobiography," 44.

⁵⁶ On republican constitutionalism and the concept of the police as public supervisory power in Jeffersonian thought, see Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993), 43–59, 81–89.

lishes the descent in our posterity.”⁵⁷ The linkage between the English common laws’ rules of descent and the identity of the elite landed colonist had remained solid throughout the colonial period in Virginia because of the sense of historical continuity provided by the transmission of status, rule, and responsibility through the continued inheritance of property. Men like Pendleton and the sons of the Carter family quite rightly feared that Jefferson’s constitutional project posed a serious threat to that linkage that was so important not only to the estates of Virginia’s ruling elite, but to the psychological grounding of such men in the temporality of landed property and its common law descent.

Jefferson has been justly accused, both in his day and in ours, of having at best an idealized image of the Anglo-Saxon ancient constitution, of succumbing all too easily to the golden age myth so prevalent not only in English Whig political discourse, but in seventeenth- and eighteenth-century republican legal and political thought in general. All the same, it would be a mistake to dismiss at least Jefferson’s early interest in ancient Britain as merely a naïve uptake of ethnic mythology or a paradigmatic example of mainstream English Whig historical consciousness.⁵⁸ The context of jurisprudence and law making allows us to see another aspect of this interest, for what drove the constant referral to language of restoration or reestablishment, what appears to have interested Jefferson about these periods so much, was their represented character as founding, legitimating moments of law and its subsequent history. In his drafting of constitutional and legal text, as in his commonplace book attentiveness to the presentation of history in writing, what concerned Jefferson most was what was gained and what was lost at the moment when antifoundational constitutional experience became inscribed for posterity in the form of a singular, authoritative text. Like Blackstone in his historical summation of the laws of England, Jefferson took up as an exemplar the ninth-century codification of English laws under the efforts of Alfred the Great, but he did so not, as was typical of the period, as a primordial origin point beyond which historical memory could not venture with much legitimacy, but as a constituent building block of the history of the British Constitution as presented by Blackstone and others, and therefore as a fragment.

Indeed, in his correspondence with Edmund Pendleton and in his autobiography, when Jefferson spoke of restoration with regards to the ancient constitution, he referred to the eighth rather than the ninth century, to the collective historical experience behind the composition of the Laws of King Alfred, its being taken up as a legitimating document of subsequent constitutional authority, and the narrative of unbroken descent that legitimated this authoritative vision of legal history.⁵⁹ This moment of British constitutionalism struck Jefferson precisely when he confronted a fracturing and open moment for the constitutionalism of his own polity, the very identity and existence of which was unthinkable without an assemblage of transmitted histories

⁵⁷ *The Diary of Landon Carter*, vol. 2, 13 April 1776, ed. Jack P. Greene (Charlottesville: University of Virginia Press, 1965), 1017.

⁵⁸ On Anglo-Saxon interest as a racial myth, see Laura Doyle, *Freedom’s Empire: Race and the Rise of the Novel in Atlantic Modernity, 1640–1940* (Durham, NC: Duke University Press, 2008); Peter Thompson, “Judicious Neology: The Imperative of Paternalism in Thomas Jefferson’s Linguistic Studies,” *Early American Studies*, Fall 2003, 187–224. The classic thesis on the predominance of English Whig historiography among the founders is Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (Chapel Hill: University of North Carolina Press, 1965); for a critique of Colbourn along similar lines, see Jessica Lorraine Walker, ‘Our Anglo-Saxon Ancestors’: *Thomas Jefferson and the role of English History in the Building of the American Nation* (University of Western Australia, Ph.D. Thesis, 2007).

⁵⁹ Thomas Jefferson to Edmund Pendleton, 13 August 1776, in *Papers of Thomas Jefferson*, 1:492.

of English law and empire, and yet at the same time found itself in a moment where those histories as assembled and practiced had ceased to be authoritative. When the committee for the revisal of the laws met for the first time, Jefferson would later report, the first question they tackled was whether to augment and revise applicable English and colonial principles and statutes, or to produce an entirely new and fully authoritative code, “a new Institute like those of Justinian and Bracton.” Interestingly enough, it was Pendleton, the conservative, who pushed for a new Institute, and Wythe, Mason, and above all Jefferson who favored a collaborative revisal of the laws as they had been practiced. Not only would the task of writing be “an arduous undertaking,” but, Jefferson reflected, the new code, “when reduced to a text, every word of that text, from the imperfection of human language, and its incompetence to express distinctly every shade of idea,” would become the object of questioning and endless turning over in adjudication of subsequent cases.⁶⁰ In other words, reducing the law to a singular text that aimed for systematic comprehensiveness was not only foolhardy, it was dangerous to liberty. Once the constitution and the law, in all of their textuality, had been reduced to a unified text, the conditions of possibility for the open reading and practicing of law and legal history in the antifoundational mode would fade from the memory of not only lawmakers and judges, but the people themselves.

Jefferson’s revolutionary drafting and design of laws and constitutions can be seen as a concerted effort to forestall the process of sealing off the law and constitutional history from alternative readings and the reactivation of forgotten or minor jurisprudences, existing as potentiality within the assemblage of texts from which the law was continually made. When read with this context in mind, previous aspects of Jefferson’s early constitutional thought that have been dismissed as merely frittering or sloppy thinking can begin to be understood as products of fracturing in constitutional time. The proposal for the reform of the criminal law, for example, was written with the main text of the law running down the center of the page while marginalia consisting of historical footnotes that referenced ancient precedents and developments in both civil and common law as well as political theory decorated all sides of the page. One legal scholar has dismissed the bill as “anachronistic, haphazard, incomplete, and altogether disappointing,” its writing “the contemporary equivalent of playing with fonts and margins and footnotes,” or as merely an imitation of Coke’s legal treatises.⁶¹ The difference, of course, was that this was not a treatise; it was a bill, and a potential law that Jefferson submitted to the committee for reporting and publication as written. Sure enough, the crime bill preserves a surprising amount of corporal punishments for major theft and sexual crimes, as well as capital punishment for murder and treason alone. Later in life, Jefferson himself expressed disappointment in the bill, explaining that it had been his desire to completely abolish capital punishment and the *lex talionis*, but that the guidelines provided for the committee, for his task in particular, as well as the politics of the time, did not allow for such reforms. Inspired by the historically developed legal theories of Lord Kames and Cesare Beccaria, which tied legal change to wider shifts in the social and political conditions of society and the resulting changes in moral sentiment, Jefferson provided for this history in the marginal footnotes.⁶² What that meant was that when the legislator, the judge, and

⁶⁰ Jefferson, “Autobiography,” 38.

⁶¹ Markus D. Dubber, “‘An Extraordinarily Beautiful Document’: Jefferson’s Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment,” *Modern Histories of Crime and Punishment*, ed. Markus D. Dubber and Lindsay Farmer (Stanford: Stanford University Press, 2007), 115–50.

⁶² “Report of the Committee for the Revisal of the Laws, Bill No. 64,” in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton, NJ: Princeton University Press, 1950), 2:492–507.

the citizen read the law, they would encounter not simply a table of gradation matching crimes and punishments, but the multitude of theories and histories of law and the challenge of punishment to the law that both informed and could be used to criticize or undermine the law presented. This was law written to help ensure that law never be written in stone. What Jefferson intended in the eccentric composition of his document was for the process of critical reading of law and legal authority to continue after the founding of the new commonwealth.

Likewise, in the context of centuries of debates over the rise and power of chancery jurisdiction, Jefferson's proposal to provide for juries in these cases can be seen as institutionalizing, inscribing in the fabric of the law, precisely the kind of unraveling and open interpretation of cases that critics of equity feared. Symbolically, the proposal augmented the tradition of the King's conscience with the discretion of an expanded definition of the people actively present at the trial, and provided a deliberative check to the power of the single judge. The proposal died a soft death, as juries were allowed only by the consent of both parties and the judge (and as Jefferson explained, no party would start off a civil case by suggesting the incompetence of the bench).⁶³ However, this along with other seemingly minor aspects of Jefferson's early thought point to the emergence of a radical jurisprudence and constitutionalism that to this day challenges our own narratives of the origins of American law and political thought. Jefferson's draft of the bill for religious freedom, for example, concluded by acknowledging its limits and suggesting that the current assembly had no right to bind the actions of later assemblies, that while the repeal of the act would be an "infringement of natural right," such a declaration on the part of the authors would have no effect in law. That law, in being communicated and transferred in texts, and therefore authorized, interpreted, reinterpreted, and reauthorized over time, was also the spirit guiding Jefferson's infamous proposals of the regular convening of constitutional conventions for legal renewal, and the desirability of collaborative, popular participation in these processes. If the Revolution had seen the reemergence of the opportunity for founding, in the fragmenting of the foundations of British constitutionalism, law, and sovereignty in the colonies, then it was Jefferson's concern, not simply to found well, but to safeguard against the solidification of founding texts into monuments of order and singular foundational authority by planning for the people, in juries, in conventions, in suffrage, and perhaps in democratic-revolutionary politics, to share in the interpretation, and thereby the renewal and new writing, or rewriting, of law.

When Jefferson wrote James Madison over the course of his time in Paris during the 1780s, he suggested limiting the legitimacy of not only constitutions but private debts to the period of twenty years, as no generation had the right to tie another to its laws and legal bindings. When Shays's Rebellion broke out in western Massachusetts in 1786, Jefferson wrote to Madison and Abigail Adams that such reassertions of public right were an important corrective to constituted authority, and "as necessary in the political world as storms are in the physical."⁶⁴ Rather than the

⁶³ "Report of the Committee for the Revisal of the Laws, Bill No. 90," in *Papers of Thomas Jefferson*, 2:566–69; Jefferson, "Autobiography," 33, 45. On Jefferson's conceptions of the boundaries of jury powers, see Jefferson to Arnoux, 19 July 1789, *Papers of Thomas Jefferson*, 15:282–83. While Jefferson retains a distinction between the law-finding powers of the judge and the fact-finding powers of the jury, he further stipulates the power of the jury to overcome this division of labor should it find the judgment the product of any "bias." As Shannon Stimson argues, Jefferson saw juries as one among many avenues for a wider, political and educational relationship between law and the citizenry, to be distinguished from a strictly legal vision that would circumscribe this relationship to jury participation, *The American Revolution in the Law*, 87–89.

⁶⁴ Thomas Jefferson to James Madison, 6 September 1789, 30 January and 5 February 1787, in *The Republic of Letters: The Correspondence between Jefferson and Madison, 1776–1820*, ed. James Morton Smith (New York: Norton, 1995), 631–33, 461. See also Thomas Jefferson to Abigail Adams, 22 February 1787, in *Writings*, 889–90; Herbert A. Sloan,

whimsical asides of a naïve idealist, these proposals were the products of a method of reading and practicing constitutional law and politics that originated in Jefferson the law student's commonplace books. What lent such urgency to his efforts to collect and publish the laws at public expense and for public use was the fear of legal and constitutional text becoming removed from the eyes, ears, and hands of an informed, if in his day and in his mind restricted, citizenry.

Beginning after the Revolution, Jefferson wrote in his *Notes on the State of Virginia*, the country as a whole would be in trouble because "it will not then be necessary to resort every moment to the people for support." Not only would government forget the people, but "they will forget themselves, but in the sole faculty of making money, and will never think of uniting to effect a due respect for their rights." Such ossification of the legal and political order could continue unabated until "our rights shall revive or expire in a convulsion."⁶⁵ Better to devise a constitutionalism that did its best to ensure that the people in their constituent power and the government in its rule never forgot one another. On economic inequality, Jefferson wrote Madison just two years before the federal constitutional convention that the consequences of growing inequality would be predictably bad, therefore "legislators cannot invent too many devices for subdividing property," for "whenever there are in any country uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labor and live in." If politics did not see fit that there was equitable distribution of the fruits of appropriation, "the fundamental right to labor in the earth returns to the unemployed."⁶⁶ This was part and parcel of a mode of constitutional analysis and criticism that sought always to keep the constituent processes, the makings of law, in mind. Upon receiving news of the constitutional convention from Madison, Jefferson voiced his concerns regarding the lack of a bill of rights and the general lack of public deliberation, noting that the fears sparked by Shays's Rebellion and other rebellious events misunderstood the situation, for "the only way to prevent disorder is to render them uninteresting by frequent changes." Perhaps ratification should await the text being "duly weighed & canvassed by the people," and having the convention edit and rewrite in response to suggestions that arose from such a collaborative process, granting the people that their role "will be a great addition to the energy of the government."⁶⁷ Founding and the making of fundamental law, for Jefferson, was at once a singularly open opportunity and an event to never be totally forgotten or circumscribed to a single moment in time. Out of his concerns for the richness and the dangers of politics carried out in a polity constituted "on words," to use H. Jeffer-

Principle and Interest: Thomas Jefferson and the Problem of Debt (Charlottesville: University of Virginia Press, 2001). As David Konig points out, stating that the earth belonged by usufruct to the living was a direct departure from the common law dictum, grounded in a legal fiction, that "the body politic is a body in fiction of law that endureth in perpetual succession," and is best understood in this jurisprudential context; Sir Henry Finch, *Law or a Discourse Thereof in Four Books* (London, 1759), 87, quoted in David Thomas Konig, "Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common Law Adjudication," in *The Many Legalities of Early America*, ed. Bruce H. Mann and Christopher Tomlins (Chapel Hill: University of North Carolina Press, 2000), 97–117.

⁶⁵ Thomas Jefferson, *Notes on the State of Virginia* (1787), ed. William H. Peden (Chapel Hill: University of North Carolina Press, 1954), 161.

⁶⁶ Jefferson to Madison, 28 October 1785, in *Correspondence between Jefferson and Madison*, 390. See Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (Chicago: University of Chicago Press, 1990); and here Jefferson goes beyond Locke, "Second Treatise," *ibid.*, 291.

⁶⁷ Jefferson to Madison, 20 December 1787, in *Correspondence between Jefferson and Madison*, 513–14.

son Powell's phrase,⁶⁸ Jefferson himself experienced and theorized a mode of practicing a constitutional subjectivity of fragments, of a kind of antifoundationalism, the promise and limits of which would wrap the mind of Thomas Jefferson for the rest of his life.

IV

Decades after the events surrounding the American War of Independence, Jefferson found himself and his polity mired in contradiction. The proximity of the people as an active substance of politics to their government dissipated as an increasingly commercial republic spread across the continent, defined by Jefferson as an "empire of liberty" (supposedly breaking out of Montesquieu's problematic of extensive republics), a republic not only expanded, but one that saw continual expansion as a necessary part of its national identity.⁶⁹ To this we can add the presence of Native Americans, the greatest victims of a shift from a diffuse confederacy of multiple temporalities to an aggressively linear, progressive national time. Likewise, there is the fundamental paradox of African Americans, enslaved or marginalized by force of law in the new republic, whom Jefferson, in the course of his *Notes on the State of Virginia*, would dismiss as barely human by way of mixed processes of nature and collective experience. At the same time he admitted of their right to revolution, as natural a "convulsion" as that of dispossessed white farmers or one of the storms he watched from his mountaintop plantation home.⁷⁰ All of these failures, tragedies, and contradictions, as Hannah Arendt has pointed out, framed the context wherein Jefferson returned in retirement to his revolutionary-era idea of popular participation in politics through what he came to call the maintenance of "ward-republics" within the state.⁷¹ It was only after the revolutionary pressures and presences of the people on politics faded that Jefferson and others could perhaps take stock of what was being forgotten, and in Jefferson's view, constitutional reforms needed to be undertaken to institutionalize while still barely memorable "the direct action of the citizens" in the affairs of the government. "The elementary republics of the wards, the county republics, the States republics, and the republic of the Union would form a gradation of authorities, standing each on the basis of law," Jefferson wrote in 1816, for when every man "feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day, when there shall not be a man in the State who will not be a member of some one of its councils," then it will be unlikely for the people themselves to allow for the emergence of tyrannical threats to liberty.⁷²

⁶⁸ H. Jefferson Powell, *A Community Built on Words: The Constitution in History and Politics* (Chicago: University of Chicago Press, 2002). See also Robert L. Tsai, *Eloquence and Reason: Creating a First Amendment Culture* (New Haven, CT: Yale University Press, 2008).

⁶⁹ Jefferson to Madison, 27 April 1809, in *Correspondence between Jefferson and Madison*, 1586. On Jefferson and the critique of Montesquieu by Destutt de Tracy, see Thomas Jefferson to William Duane, 12 August 1810, in *The Papers of Thomas Jefferson*, Retirement Series, ed. J. Jefferson Looney (Princeton, NJ: Princeton University Press, 2006), 3:5–25.

⁷⁰ Jefferson, *Notes on the State of Virginia*, 163. See Jonathan Elmer, "The Archive, the Indian, and Jefferson's Convulsions," *Diacritics* 28, no. 4 (1998): 5–24; Hannah Spahn, *Thomas Jefferson und die Sklaverei: Verrat an der Aufklärung?* (Berlin: JFK Institut, 2002); William G. Merkel, "To See Oneself as a Target of a Justified Revolution: Thomas Jefferson and Gabriel's Uprising," *American Nineteenth Century History* 4, no. 2 (2003): 1–31.

⁷¹ Hannah Arendt, *On Revolution* (New York: Penguin Books, 1963), 233–36.

⁷² Thomas Jefferson to John Taylor, 28 May 1816, in *Writings*, 1392; Jefferson to Joseph C. Cabell, 2 February 1816, *ibid.*, 1380.

Thomas Jefferson operated under the influence of a multiplicity of what contemporary historians of political thought recognize as observably distinct historical vocabularies of law and politics. These included, but were not limited to: a neoclassical concern for the independence and virtue of the citizen along with the fear of corruption in the state; a discourse of the natural character of revolutions within states and constitutions Polybian and Baconian in inspiration; English radicalisms of both Harringtonian and Lockean qualities; a Scottish concern with the history of customs, or increasingly manners and sentiments, cast in the frameworks of jurisprudence; and increasingly, political economy, a French attempt at a natural history of laws and institutions, which aimed at comprehensive theories of man and citizen, or “history, natural and civil,” in Jefferson’s terms. So too the ancient constitutionalism inherited from constitutional struggles in seventeenth-century England, and an idealistic language of the participation of the common people in politics to which many continue to attach the adjective “Jeffersonian.” Given this vast and (some would say) downright haphazard amalgamation, it is no wonder then that contemporary tracings of historically rooted traditions of republican politics from Europe to the American founding have tended take up John Adams as the exemplary figure,⁷³ cultivating the image of a distinction between Adams’s adherence to a conservative theory of freedom growing out of a neo-Tacitist, Machiavellian, and Harringtonian historical pessimism and Jefferson’s ahistorical, Pollyanna-like faith in the people and their progress, so prototypically American, and that in the worst way.

The goal of this essay has not been simply to rescue Jefferson from such an appraisal, but to reconstruct an experience and a theorization of temporality in the area of law and constitutionalism that challenges our own investments in thinking of the history of legal and political thought in the paradigm of traditions. This focus on historical consciousness takes up the vital insight of J. G. A. Pocock that as “what we call historical consciousness is social and subjective in its origins,” and “a developed form of man’s awareness of himself as existing and acting in a continuous context of social relationships,” it “must therefore begin with his awareness of a particular social continuity to which he himself belongs.”⁷⁴ But pointing to Jefferson’s experience of fragmentation and fracturing, of discontinuity, also points to the limits of conflating historical consciousness and historical practice with the assumption of continuity. That is not to say that continuities do not exist or should not be looked for in scholarship. It is to say that the lesson of drawing attention to the social, and thereby historical, character of our notions of time is not that the articulations of historical actors in the realm of the political can be shown to be shaped, and even bound, by prior traditions of framing civil history. Rather, that the spinning of continuities and traditions out of the textual materials of history is always a project retrospectively conceived and practiced: reading always implies writing and rewriting, and the indeterminacy of such processes demand a certain level of attentiveness. If the historical subject of a polity is constituted in pre-

⁷³ J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975), 507, 512, 526–57; Annabel Patterson, *Early Modern Liberalism* (Cambridge: Cambridge University Press, 1997), chap. 8; see also Jacob Soll’s excellent contribution to Patterson’s volume. On this portrayal of Jefferson, see Gordon S. Wood, “The Trials and Tribulations of Thomas Jefferson,” in *Jeffersonian Legacies*, ed. Peter Onuf (Charlottesville: University of Virginia Press, 1993), 395–417; Jack N. Rakove, “Our Jefferson,” in *Sally Hemings and Thomas Jefferson: History, Memory, and Civic Culture*, ed. Jan Ellen Lewis and Peter S. Onuf (Charlottesville: University of Virginia Press, 1999), 210–35. On the Jeffersonian origins of subsequent metanarratives of American history, particularly surrounding expansion, see John M. Murrin, “The Jeffersonian Triumph and American Exceptionalism,” *Journal of the Early Republic* 20 (Spring 2000): 1–25.

⁷⁴ J. G. A. Pocock, “Time, Institutions, and Action,” in *Politics, Language, and Time*, 236.

cisely the (always unstable) transmission of these narratives of law and politics, it might also occur that the self-aware historical actor arrives at the sudden realization of the gaps separating the constituting narratives of their contemporary situation. He or she might then be thrown back into the constituent fragments and processes, particularly at the originating moment of these narratives and the conventions of institution and self that they shape. In this moment of fracture, perhaps of confusion and vertigo in the previous organization of social knowledge, forgotten or unseen connections and experiences can be rediscovered, remembered, and made in radical, unanticipated, and creative ways for law and politics. At his best, such was the case of Jefferson and his articulation of what I have called in this essay a sense “fractured” constitutional time.

A historiography critically aware of breaks and fissures in the institutions and narratives that underwrite modern sovereignty seems preferable as a tool for approaching the dramatic transformations in thought and society that occurred across the “age of democratic revolutions” than one organized around the reconstruction of lineage and pure conceptual categories out of the contingency and messiness of human attempts to describe their history to themselves. This description of Jefferson as theorizing a sense of fragmentation in the temporality of constitutionalism echoes the task of historically inflected democratic theory as described by Hannah Arendt. But in attending to law and legal theory, it does so against current trends in criticism of her work, and somewhat against her own concerns to maintain the specificity of the political as opposed to the social, the economic, or the legal. If in our own era we have lost the comfort of continuity and must confront what Arendt called a “fragmented past which has lost all certainty of evaluation,” then Jefferson emerges as an early interrogator of this condition, and one for whom a radical jurisprudence, a spirit of dynamism in the laws and institutions that nurture civic life, was a necessary component of thinking substantively about democracy.⁷⁵ As this paper has hopefully hinted at, the history of law and legal theory, of jurisprudence broadly conceived, provides a site in which a history and historiography of fragmentation in politics and political thought, broadly conceived, can be practiced most effectively.⁷⁶ The character of law as written culture, as inscribed in text, is constantly being deliberated upon and reinterpreted in light of new cases. Law challenges just as much as it establishes linearity, sovereignty, and foundationalism. A contemporary conceptual distinction, as that made by Pocock, between law and politics, between an “extracivic” tradition of jurisprudence concerned with the social and the administration of things and people’s rights in things, as opposed to a “purely political” and humanist concern with “personal relations entailed by equality and by ruling and being ruled,” breaks down in the case of Jefferson and the jurisprudential and constitutional origins of many of the tools with which he approached the problem of creating and maintaining the modern and democratic republic.⁷⁷ Neither the law nor politics as philosophical categories, nor for that matter those of nature and

⁷⁵ Hannah Arendt, *The Life of The Mind* (New York: Harcourt Brace Jovanovich, 1978), 212. On further discussion of fragments, or “pearls” of the past, see her introduction to Walter Benjamin, *Illuminations: Essays and Reflections*, Hannah Arendt, ed., (New York; Schocken Books, 1968), 1–58; on problematics of Arendt’s discussion of the American Revolution and the powers (and paradoxes) of constituent moments and events as opposed to constituted politics, see Sheldon Wolin, “Hannah Arendt: Democracy and the Political,” *Salmagundi* 60 (1983): 3–19; Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993), chap. 2; and Jason Frank, *Constituent Moments: Enacting the People in Post-Revolutionary America* (Durham: Duke University Press, 2010), chap. 1.

⁷⁶ On this point, see Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and Nicolson, 1990).

⁷⁷ J. G. A. Pocock, “Virtue, Rights, and Manners,” in *Virtue, Commerce, and History* (Cambridge: Cambridge University Press, 1985), 43–44.

history, survives close inspection of the subjective and contingent realm of historical practice in the field of constitutionalism surveyed here.

“Some men,” Jefferson wrote in 1816, “look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched.”⁷⁸ His efforts to ensure that institutions and the constitutional text from which they grew never be ensconced in the innermost sanctum of the Temple of the State can be seen to incarnate and contribute to what Arthur J. Jacobson has identified as the three writings of a dynamic jurisprudence: the inherited and authorizing inscription of the past; the present writing in the form of reading, engagement, and application; and the future writing encompassing the collaboration of the people and the legislator in the constant, never foreclosed project of making and remaking law.⁷⁹ An aristocrat unquestionably, Jefferson was nevertheless possessed of a hope described by Kafka in his brief story, “The Problem of Our Laws,” the creation of a moment in time when “the tradition and our research into it will jointly reach their conclusion, and as it were gain a breathing space,” a space for the widening and opening of the interpretive authority of law so long exercised by a select few, and a constitutionalism that prepares the people to assume their awesome responsibility.⁸⁰ As his massive collection of legal texts and his earnest plans to distribute them as widely as possible nicely crystallize, Jefferson, in his experience and theorization of fracture in the temporality of law, might be said to have been concerned above all with the temporal and spatial conditions of possibility for law never becoming too sacred to be seen or touched. This was a constitutional vision of as many people as possible getting to collectively, physically touch and hold the law, to engage in their own reading, and thus to collectively participate in the making of law’s changing meaning through time. A

⁷⁸ Thomas Jefferson to Samuel Kercheval, 12 July 1816, in *Writings*, 1401.

⁷⁹ Arthur J. Jacobson, “The Idolatry of Rules: Writing Law According to Moses, with Reference to Other Jurisprudences,” in *Deconstruction and the Possibilities of Justice* (New York: Routledge, 1992), 95–141.

⁸⁰ Franz Kafka, “The Problem of Our Laws,” in *The Basic Kafka* (New York: Pocket Books, 1979), 156.

Jefferson officially asked for \$2,500 in funding from Congress, though some sources indicate the expedition ultimately cost closer to \$50,000. Meriwether Lewis was joined by his friend William Clark and 50 others on the journey, including an African-American slave and a female Indian guide named Sacagawea. In a stroke of luck for the United States, Napoleon had abandoned plans to establish a French foothold on America's southern flank and sold the land to the U.S. to subsidize his conquest of Europe. Based on fieldwork examining border porosities between Greece and the Republic of Macedonia this paper outlines the crossings of money, goods and services between the two countries in different temporal contexts. Going beyond the political and symbolic conflict over who has the legitimate right to the name "Macedonia", a conflict which has effectively overshadowed the other levels of interaction and contact since 1991, the ethnographic research in the border area has suggested intensive cross-border activity between the Republic of Macedonia and Greece, motivated by economic reasons, ownership