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Introduction

“in the course of human events. . .”

Novelists and their readers, or perhaps poets, painters, performers and their audiences, might move back and forth between the distant and the recent past, playing with time as a way of making it both alien and tangible. Politicians, lawyers, judges, or the general public might seek to robe themselves in the comfort and majesty of a monumental past and put a particular figure, image, or quotation to use in the legitimation of particular interests and ideas in the present. Historians will generally think of themselves as doing something very different from either of these activities, distancing themselves from the power of the playful, the idolatrous, and the cynically manipulative in a wider culture of seemingly uncritical historical consciousness. The intensely felt and powerful assumption informing that distancing would be that of a clear line separating the study of history from its use. Even to acknowledge that all history is a history of the present, as many historians might, would reinforce this basic and almost instinctual sense of what it is historians tell themselves they are doing when they do history. The same could be said for any student-scholar engaged in a kind of critically reflective, historically inflected and focused mode of intellectual practice.

If the legitimating assumption of contemporary humanistic practice is an equally passionate opposition to the mere use of historical material and to questions about the use of the humanities, then the work of study, in this assumption, gets constructed as a kind of policing of the boundaries of collective currency in the language and imagery of the past. It is one of the primary goals of this book to use Thomas Jefferson as a way of *questioning* that assumption, and to clear some conceptual space for understanding historical practices as particular modes of use.

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Use, I want to suggest, goes all the way down. Jefferson is useful for efforts to rethink history and historiography because his self-conscious and purposeful, if wandering, exploration of the use of history in law and politics puts questions of use at the center of inquiry, where, at least for the time being, such questions belong.¹ Historians use the past to ask questions, to make arguments, to find themselves, to justify themselves, to make political arguments, to bother lawyers, political theorists, and literary critics with pesky points about context, to insist that certain things should be remembered, and last but certainly not least to get jobs, money, better jobs, and to impress each other and their audiences. There is nothing wrong with any of that, except insofar as it all goes unacknowledged as use, as use of history, and as a particular mode or modes of use among many possible others. As has become increasingly clear from recent scholarship, the study of history and the study of law have been and in many ways continue to be mutually constitutive of one another. They share a history rooted in the conjoined trajectories of early modern empire, legal humanism, and historical and political thought. In his own practices of self-formation and his thinking about the nature of law and constituted authority in a republic, Jefferson put himself in that shared history. His thinking, his awareness of his own self-situating in material histories of bodies, words, and things, grants us a unique vantage point on the history of the relationships between legal, political, and historical thought. He anchored himself in the intellectual history of early modern legal humanism, and he marshalled that inheritance, and ideas about inheritance, in an effort to think about the use of history in constructions of law, race, and civic identity.

In this book I take up these anchoring and marshalling activities as pieces of a wider history of intellectual and constitutional change. I see these activities as distinctive instantiations of what can be called the art of recollection, of seeing and working with the presence of histories as contexts, some chosen, others not, and so as productive environments from which collective life gets made and remade in time. History practiced as recollection in this particularly civic and material sense, and as distinct

¹ On this point and a few others I take up and build on the work of Giorgio Agamben, *The Highest Poverty: Monastic Rules and Form-of-Life*, Adam Kotsko, trans. (Stanford: Stanford University Press, 2013), and *The Use of Bodies*, Adam Kotsko, trans. (Stanford: Stanford University Press, 2016); on conceptualizations of intellectual practice and use in the present, see also Paul Rabinow, *The Accompaniment: Assembling the Contemporary* (Chicago: University of Chicago Press, 2011); Hayden White, *The Practical Past* (Evanston: Northwestern University Press, 2014).

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from the weighty valences of the term in the western philosophical canon, would be the art of attending to the availability of the past to the present. My goal here is to recollect Jefferson's thinking and the histories in which he acted and helped construct, to make them available, and to offer my own thinking about what the uses of this kind of activity are, have been, and might be.

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The history of Thomas Jefferson's thinking is useful, but in contrast to what scholars have made of his, James Madison's, James Wilson's, or John Marshall's thought, it is not always particularly edifying. Nor, it should be said, has it always been taken to be in histories of legal and constitutional thought, where Jefferson remains a somewhat marginal figure.² Just two years before his death in July 1826, Jefferson wrote to British radical John Cartwright as part of a dialogue on constitutional politics in their respective countries. Turning to what in 1776 had become his own nation's history, Jefferson suggested the following comparison with the English Glorious Revolution of 1688:

Our Revolution commenced on more favorable ground. It presented us an album on which we were free to write what we pleased. We had no occasion to search into any musty records, to hunt up royal parchments, or to investigate the laws and institutions of a semi-barbarous ancestry. We appealed to those of nature, and found them engraved on our hearts.³

² It is the very strangeness of Jefferson's thinking, and the fruit it can bear for historical understanding when rubbed against the grain, that warrants attention here; see Mary Sarah Bilder, "James Madison, Law-Student and Demi-Lawyer," *Law and History Review*, Vol. 28, No. 2 (May 2010), pp. 389–449; David Thomas Konig, "James Madison and Common-Law Constitutionalism," *Law and History Review*, Vol. 28, No. 2 (May 2010), pp. 507–14; their notes on law and legal reading show Madison and Marshall, for example, to have had in many ways more typical legal minds, but we should not take that to mean they were simply legal and historical in a way that Jefferson's in fact far more wide-ranging and deep reading in law, legal history, and legal theory was not; see John Marshall, *Accounts and Law Notes*, 39:1 M34 M-105 Box 8, Swem Library Special Collections, College of William and Mary, 1776; while it is possible to locate thinkers more committed to concepts of unified popular sovereignty in politics, Jefferson's attentions to the local availability of the law as text to be touched and handled by its users was, once again, unique, and radically so; see Christopher Tomlins, "Republican Law," in *The Oxford Handbook of the American Revolution*, Edward G. Gray and Jane Kamensky, ed. (Oxford: Oxford University Press, 2012), pp. 540–59.

³ Thomas Jefferson to Major John Cartwright, June 5, 1824, *Writings*, Merrill D. Peterson, ed. (New York: Library of America, 1984), p. 1491. Jefferson's language evoked the natural rights rhetoric of the late imperial crisis and outbreak of the American

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Forty-eight years after the Declaration of Independence, Jefferson comfortably denied the importance of a legal culture of historical texts and manuscripts, and thus apparently of history, to American revolutionary thought, but the passage betrays its author’s narrative. With the use of the pronoun “those” in the last sentence, Jefferson imported the language of civil history, “laws and institutions,” into the supposedly separate domain of nature, which he in turn valorized as antithetical to being bogged down by civil history. Likewise, he retained a language that was thoroughly textual to describe the apparent absence of texts in American revolutionary political action: “an *album* on which we were free to *write* what we pleased.” While the Whigs of the Glorious Revolution had to make due with inked-up folios of history, so the argument went, the Americans could open a new book and start at the top of an empty first page. Jefferson’s forthright declaration was complete nonsense, but in this as in many other cases it is important to try and get at what Jefferson was not able, or willing, to see about himself and the histories in which he found himself, and why.

Certainly, this rhetorical naturalization of the collective historical experience of one polity and the assumption of its consequent superiority to that of others was an important part of legal justifications for conquest.⁴ The putting aside of the assemblage of historical record and representation that made up complex bodies of inherited concepts and materials allowed the organizer to locate themselves in a unique position of power and authority. Practices of representing legal history were part of wider histories of law and empire, histories of which Jefferson was keenly aware. In his own practices of historical representation and his thinking about the politics of such practice, he participated in these histories and played a significant role in their transformation. There was a strong link between ways of recognizing and forgetting the constructed character of historical, civic identity on the one hand and the intensification and expansion of power on the other.

Revolution and, either consciously or unconsciously, rehearsed nearly exactly the words of Alexander Hamilton’s 1775 pamphlet, *The Farmer Refuted*, depicting American colonial opposition to metropolitan policy as having stood on an uncontested foundation; see Alexander Hamilton, “The Farmer Refuted,” in *The Revolutionary Writings of Alexander Hamilton*, Richard B. Vernier, ed. (Indianapolis: Liberty Fund, 2008).

⁴ See James Tully, *Public Philosophy in a New Key, Volume II: Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008), pp. 246–56. Tully sees modern, mainstream liberal constitutionalism as an outgrowth of precisely this kind of theory and its applications. Critique of empire and the modern state, then, begins with decoupling historical edifices of law from their image as natural or logically necessary, see Tully, *ibid*, pp. 257–309.

That being said, Jefferson as liberal optimist and the plotter of settler colonialism and commercial empire in the American west is not the only image with which a look at his life of legal and political theorizing leaves us. Leading up to and during the revolution, Jefferson was a ringleader of efforts to “search into any musty records,” “hunt up royal parchments,” and “investigate the laws and institutions” of what he considered a “semi-barbarous ancestry.” He was a vociferous collector of the manuscript copies of the Virginia Company records and the Laws of the Assembly. From the estate of Peyton Randolph, Jefferson acquired pieces of the library of his father Sir John Randolph, who had been the King’s Attorney in Virginia and had assembled a collection for the purpose of writing a history and constructing an English colonial jurisprudence for Virginia. These included notes on English decisions regarding Virginia, the elder Randolph’s commonplace book, and records from the establishment of Virginia as a royal colony in 1624. From the estate of Richard Bland, another noted collector of Virginia legal manuscripts, Jefferson acquired records of the Virginia Company from as early as 1606 and 1607, when English colonizers first successfully landed at Jamestown, records that included manuscript copies of the original charters and subsequent laws passed by the General Assembly. Jefferson also acquired personal manuscripts and early printed editions of Virginia laws from his peers, including a manuscript copy of Thomas Mathew’s contemporaneous history of the rebellion of western settlers led by Nathaniel Bacon in 1676.

Jefferson rescued other manuscript copies of laws and other records from neglect in county court houses and even from the trash heaps of taverns, where he found handwritten copies of Virginia laws being used as scrap paper, copies which bear doodles of stick figures and horses by an anonymous illustrator, or perhaps several.⁵ The assembled archive represented the continuous history of legal government in the provincial context and as such was the material guarantee of property and legal status of the subjects there, documenting as it did the establishment of English colonialism in North America and the rigid binding of indentured servitude and chattel slavery. And yet the dispersed, fragile, and fragmented character of these palimpsests, and their material history of variable uses, from the most authoritative to the most profane, was not lost on Jefferson, and the manifest tensions inherent in such practices of historical

⁵ Thomas Jefferson Papers, Library of Congress Special Collections, Manuscripts Division, Series VIII, Manuscript Vol. 9.

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representation would prove to play an enormous role in his thinking about law and constitutionalism in a republic.

The fate of these manuscripts is a fitting testament to their place in the trajectory of Jefferson’s thinking and the wider history of which it was a part, becoming as they did a part of his property, property burdened with not only a complicated history but with Jefferson’s heavy debts, his failed efforts to alleviate those debts, and his reluctance to surrender the illusion of masterly independence and self-possession. Even so, Jefferson spent a good deal of energy over the course of his life trying to secure external funding for the printing and public distribution of his private manuscript collections, assuming as he did that widespread access to textual records of law was a critical component of constitutionalism in any republican polity. He experimented with instituting a constitutional order where law was understood as an assembled archive of text and use, and as only safely held in the hands of a properly cultivated laity. Jefferson was the principal inheritor of efforts on the part of elite legal actors in Virginia over the course of the previous century to collect the legal and constitutional history of the colony. The purpose guiding this project was to make possible the articulation of a civil history that balanced metropolitan constitutional inheritance and a distinctly provincial identity, and in so doing secure a narrative of legitimate and stable Anglicization within the contested and increasingly uncertain constitution of early modern empire in the British Atlantic world. It was from the failure of that project during the imperial crisis of the mid- to late eighteenth century that Jefferson’s peculiarly material, historical, and textual sense of constitutional design and practice sprang. And it was in his thinking about such material constitutional culture that Jefferson found it necessary to turn his attention to thinking about thinking as material and embodied practice, as reading and writing, as collecting and recollecting. He went on to expand his concern with the design of texts and institutions to include the habits and practices of the people whose responsibility it was to use those texts and contexts well.

Convinced as he was of the necessity of widely constituted participation in the formation of legal and political judgment in such a polity, Jefferson’s project became the institution of a particular kind of citizen, a mode of legal and historical subjectivity that conceived of the citizen as a cultivated user and shaper of inherited materials.⁶ It

⁶ On Jefferson as a theorist of subjectivity and history, I am indebted to Lee Quinby, *Freedom, Foucault, and the Subject of America* (Boston: Northeastern University Press, 1991); and Jonathan Elmer, *On Lingering and Being Last: Race and Sovereignty in the*

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was in this project that Jefferson confronted the inextricable plurality of these modes and the histories of which they were made. And that plurality directly challenged his imagined settler subject's form of life, in which self-government rested on self-ownership and mastery. In pursuit of this project and the territory necessary to provide for it, Jefferson gradually reformulated the actively situated participant in the rich textuality of republican law as a more passive member of civil society, whose role in the circulation of words and things was limited to their participation in expanding networks of print culture and commercial exchange. The attempt to secure a particular mode of subjectivity not only carried great costs for those not counted among its subjects but hollowed out the very conceptualization of political life that was meant to be secured. As a retiree, Jefferson returned to many of his early concerns with the politics of humanist intellectual practice, but he did so largely on his own. Only then could Jefferson assert the promise of the American Revolution as driven by its lack of dependence on the troubled inheritance of multiple histories.

We live, I suggest, with and in fragments of these histories, of these efforts to inscribe arts of historical representation within a particular kind of civic thought and practice. This matters to how we might think about ourselves and about history, law, and politics today. Jefferson's historical constructions of legal subjectivity can get us access to the power of such constructions, but they cannot simply be restored or remembered as edifying memorials. Rather, they can be approached as fragments, as material ruins underneath a good deal of our modern conceptual architecture. Jefferson's thinking is available and potentially useful, I want to suggest, but not solely on conditions of his or our own making, not in a vacuum or unattached to other pieces of history, and not without some substantial risk. As the work of Raymond Geuss on political thought and judgment warns, specific constructions of history and politics are powerful tools, even weapons, and they are as often used to harm and kill as they are to persuade, inspire, or assist. To this hard fact of historical and political life Jefferson proves no exception.⁷

New World (New York: Fordham University Press, 2008). While I find a more particular, purposive logic driving Jefferson's interest in historical representation, a work that nevertheless appreciates that interest as eccentric and troubled is Michael Knox Beran, *Jefferson's Demons: Portrait of a Restless Mind* (New York: Free Press, 2003).

⁷ Raymond Geuss, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008), *Politics and the Imagination* (Princeton: Princeton University Press, 2010); see also Friedrich Nietzsche, "On the Uses and Disadvantages of History for Life," in *Untimely*

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Jefferson’s various and consequential occlusions of civic identity grew out of the particular ways in which he thought about historical subjectivity as a key aspect of civic capacity. He described African Americans and Native Americans as lacking in the cultivated capacity to be other than creatures of their conditioned histories. The imagined critically thinking citizen of what we would later call Jeffersonian democracy was thus nervously constructed and creatively secured from its beginning as an exclusionary form of political life. The records of plantation oversight that scholars of Jefferson’s life have used to understand him also illuminate a particular kind of self-management rooted in not only the government but the ownership and mastery of self and others, with all of its attendant tensions, insecurities, and cold calculations of human life caught up in the violence of slavery and conquest on both a personal and continental scale.⁸ American slavery was biopolitics.⁹

Meditations, R.J. Hollingdale, trans., (Cambridge: Cambridge University Press, 1984); Bernard Williams, *In the Beginning Was the Deed* (Princeton: Princeton University Press, 2005), ch. 3. In legal theory, the richness of attending to law as a constructed image of the legal and constitutional past has been fruitfully explored in different ways by Norman W. Spaulding, “Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory,” *Columbia Law Review*, Vol. 38, No. 8 (December, 2003), pp. 1992–2051; Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford: Stanford University Press, 2008).

⁸ On slavery at Monticello, see Annette Gordon-Reed, *The Hemingses of Monticello: An American Family* (New York: Norton, 2008); Lucia Stanton, “*Those Who Labor for My Happiness*,” *Slavery at Thomas Jefferson’s Monticello* (Charlottesville: University of Virginia Press, 2012); Annette Gordon-Reed and Peter S. Onuf, *Most Blessed of the Patriarchs: Thomas Jefferson and the Empire of the Imagination* (New York: Liveright, 2016); on a broader scale, in a series of notes to George Washington as Secretary of State, Jefferson calculated the labor costs and productivity of white and enslaved black labor in Virginia, weighting his calculations with his belief that “the negro does not perform quite as much work, nor with as much intelligence.” He went on to estimate comparative labor costs of free and enslaved labor, judging the latter to be more profitable due to assumed natural population growth offering a greater return on the initial higher investment in purchasing the slaves, see Thomas Jefferson, “Notes on Arthur Young’s Letter to George Washington,” June 18, 1792, *The Papers of Thomas Jefferson*, John Catanzariti, ed. (Princeton: Princeton University Press, 1990), Vol. 24, pp. 95–9; see John Chester Miller, *The Wolf By the Ears: Thomas Jefferson and Slavery* (New York: Free Press, 1977); Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, NY: M.E. Sharpe, 1996); Henry Wieneck, *The Master of the Mountain* (New York: Farrar, Straus, and Giroux, 2012).

⁹ On the growth of “biopolitics” in neoliberal economic theory and its origins in the modern form of subjective governmental practice that grew out of the discourse of political economy, see Michel Foucault, *Security, Territory, and Population: Lectures at*

Law and more specifically legal study as a distinct kind of historical practice played a determinative role in these wider historical processes of revolution, founding, and empire. The goal of this book is constructive: to see Jefferson as an engaged theorist of the politics of historical representation and a powerful wielder of those constructions; to suggest at once his distance and his apparent proximity to us, and in short, to take advantage of this situation and put him to work. His unique attentions to the problematically transmitted and assembled quality of law configured law itself as constructed history, or histories, and for this reason legal personhood was a question for Jefferson of imposed conceptions of what it meant to have a history and the freedom to know and use it. This assembled and constructed understanding of law and history was made possible by a historically particular mode of textual practice and the context of that practice in the peripheral reception of English law and British imperial governance in the eighteenth century, but its implications both in its time and ours run deeper than that immediate context would suggest.

Jefferson's construction of the criteria for acknowledging legal and political subjectivity in others builds on this idealized vision of the citizen as a cultivated and self-possessed agent capable of taking the materials of history and submitting them to the possibility of new use. In his revolutionary-era proposals for legal and constitutional reform, Jefferson was determined to hold on to an "ancient" and customary understanding of constitutions as collections of ordinary law as opposed to foundational text.¹⁰ Uniquely among leading figures of the Founding era, Jefferson actively retained a profoundly English understanding of constitutionalism as the history of accumulated use, and his constitutional theorizing in the

the College de France, 1977–1978, Graham Burchell, trans., Michel Senellart, ed. (New York: Palgrave Macmillan, 2007); *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979*, Michael Sennelart, ed., Graham Burchell, trans. (New York: Palgrave Macmillan, 2008); on antebellum slavery as a form of capitalism predicated on the capitalization of the enslaved body, see Walter Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom* (Cambridge, MA: Harvard University Press, 2013); Elizabeth Maddock Dillon, *New World Drama: The Performative Commons in the Atlantic World, 1649–1849* (Durham: Duke University Press, 2014).

¹⁰ J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century, A Reissue with Retrospect* (Cambridge: Cambridge University Press, 1987); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); Jefferson argued against the production of a fundamental code of law for Virginia, as "it was thought dangerous to attempt to reduce" the body of law "to a text: it was therefore left to be collected from the usual monuments of it," *Notes on the State of Virginia*, p. 144.

Notes on the State of Virginia represents an ambivalent radicalization of his own deep reading in the common law tradition. Jefferson railed against the legislature for its assumption of the power to adopt a constitution for the state without calling a convention or canvassing the text among the people.¹¹ His 1776 draft of a constitution for Virginia included proposals to have amendments circulated among citizens called together in their counties to collectively edit the text of the proposed change and send it back to the legislature.¹² Late in life, he wrote to Samuel Kercheval, belittling those “who look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched,” reflecting on a life engaged in exploring a republican, even democratic politics of the availability of constitutional text to the touch of the people.¹³ Political participation was thus framed as a deeply textual experience, and Jefferson’s project amounted to a nervous attempt at a nevertheless radical democratization of an aristocratic mode of reading that came out of the world of legal and historical practice of Jefferson’s own intellectual development.

In Jefferson’s vision, the responsibility and power of judgment was activated by use and found its truest expression in the ability to participate in the making and remaking of the text of the law. That responsibility, in turn, needed to be established and maintained by what he called “a plurality of hands.”¹⁴ He evaluated historical subjectivity as nothing less than a capacity for use – use of language to be sure but at the same time use of land through labor and use of law through interpretation, argument, and judgment. As Jefferson famously put the point to Madison, “the earth belongs in usufruct to the living.”¹⁵ In seeking to relocate the responsibilities and powers of political and even legal judgment into

¹¹ Jefferson, *Notes on the State of Virginia*, pp. 127–36.

¹² Thomas Jefferson, “Third Draft,” *Papers of Thomas Jefferson*, Boyd, ed. (Princeton: Princeton University Press, 1951), Vol. 1, p. 364; Jefferson would later complain to James Madison about the lack of a similar process in the ratification of the US Constitution, “To James Madison from Thomas Jefferson, 20 December 1787,” Founders Online, National Archives (<http://founders.archives.gov/documents/Madison/01-10-02-0210>, ver. 2013-06-26), accessed August 1, 2013.

¹³ Jefferson to Samuel Kercheval, July 12, 1816, *Papers of Thomas Jefferson: Retirement Series*, J. Jefferson Looney, ed. (Princeton: Princeton University Press, 2013), p. 226.

¹⁴ Jefferson, *Notes on the State of Virginia*, p. 133; on the legal and political theory of Jefferson’s constitutional proposals and extended thinking about law and constitutionalism, see Shannon C. Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall* (Princeton: Princeton University Press, 1990).

¹⁵ Jefferson to James Madison, September 6, 1789, *The Papers of Thomas Jefferson*, Julian P. Boyd, ed. (Princeton: Princeton University Press, 1958), Vol. 15, p. 392.