Radical Jurisprudence in Constitutional Text-Making: Jefferson's Writings and Rewritings

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I. Introduction

Famous, or perhaps infamous, for a uniquely American political idealism, contempt for the dead weight of tradition, outright dismissal of history, and a desire to move as far away as possible from the inherited model of the British Constitution, Thomas Jefferson was actually a far more historical and institutional thinker than has previously been recognized. Unique among his fellow "founders," Jefferson continued largely until the end of his life to understand constitutions in the style characteristic of what Charles McIlwain identified as "ancient constitutionalism," as a historical assemblage of custom, practices, and statutes, rather than the "modern" sense of a single, fundamental text.[1] Such eccentricity, and Jefferson's adventures in theorizing American constitutionalism, need to be understood in the context of his keen awareness of the dependence of legal and constitutional authority on historical representation, and the central role of written texts and the means of organizing and studying them had in communicating that representation in time. It was the context of a rich world of textual and temporal multiplicity that conditioned the tools with which Jefferson could think creatively about the edifice of law.

Jefferson was widely recognized in his day as unequaled draftsman of legislative, constitutional, and political text, but it is important to see that his self-understanding of such efforts was literally as an assembler and drafter, a scribe, and not as an author. Indeed, it is difficult to ascribe authorship in the contemporary sense of sole creation of an original publication to any text, published or not, that Jefferson ever produced. As Pauline Maier has shown, the Declaration of Independence was not only written in committee, but took inspiration from similar contemporary declarations and a century and a half of declaring legal rights in

[1] Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1947)

Britain.[2] Jefferson himself, while he took credit for authorship on his gravestone, wrote in a late letter that the Declaration was not meant to advance an original position, but express the "common sense" of the subject as it had been present in political argument at the time. His Manual for Parliamentary Procedure for the US Senate was an assemblage of fragmented notes taken from seventeenth and eighteenth century histories of the British Parliament and English constitutionalism, originally composed by taking notes on assembly practices on cards and attaching them together at the junctures of related points, folding over or rewriting etchings as the project progressed. Most importantly for us, the *Notes on the State of Virginia* were answers to queries and were not originally intended for publication at all, and they are indeed notes and tabulations of and from a variety of different materials.[3] His drafts of legislation and constitutions were carefully woven pieces that came out of his immense reading in the history and theory of law. This was part and parcel of a writing practice characterized by reading, collecting, assembling and reassembling in the process of composing a text, as well as continuously coming back to the text to revise add, rework, or otherwise augment.

Jefferson's textual practices in the area of law and constitutionalism during and immediately after the American Revolution point to what was ultimately a fragile vision for the relationship between revolutionary political life and the design and practice of constitutions and institutional structures. This vision entailed a recognition of the historically assembled character of authoritative institutional arrangements and texts, a corresponding situating of the social and individual subjects of constitutionalism as themselves the products of multiple histories, an effort to inscribe these conditions into the design of American constitutions, and a critical apparatus focused on unveiling the contingency behind unitary representations of constitutional history, prompting purposive engagement with the pieces with which such representations are made. Out of the experience of fragmentation in the continuous temporality of legal knowledge and authority, Jefferson crafted a jurisprudence and constitutionalism of fractured time.

Now, it is not the goal of my project to reconstruct a neo-Jeffersonian constitution for implementation today, nor to prop up a useable Jefferson for our time. My analytical tools are not smelling salts and a shovel. The goal instead is to offer a conceptual archaeology of

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[2] Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Knopf, 1997)

[3] See Robert A. Ferguson, "Mysterious Obligation: Jefferson's Notes on the State of Virginia," *American Literature* Vol. 52, No., 2 (Nov., 1980), 381-406

constitutional imagination, and in doing so restore to visibility lost moments, failures, alternatives, or roads not taken in the history of thinking about making and maintaining constitutions. Jefferson's vision of a constitutional text that represents its own assemblage to its readers, and a constitutional practice that assumed a historical dynamism and temporal multiplicity as a natural part of the life of political institutions, was the product of his capacity to imagine what Roberto Unger calls alternative institutional futures.[4] But imagination, as Raymond Geuss configures it, always takes place in the context of action, and it is important to see acts of political and institutional imagination in time as critically engaged responses to inherited concepts and practices at work in a particular political situation.[5] In the case of Jefferson, we can see this aspect of constitutional imagination embodied in the purposive practice of assembling and reordering the materials of the legal past. It is the possibility for understanding constitutionalism as at once a historically situated and self-aware analytical ethos, as well as dynamic collective action in reinterpreting and putting to use fragments of an inherited body of texts, concepts, and practices that make up a constitution that warrants remembrance today. Recovering the messy, material of world of Jefferson as a critical assembler of histories in the form of legal and constitutional text has the potential to free up conceptual space for a more truly democratic, dynamic, and redemptive framework for the actions of constitutional life and the situating of these actions in a deep, complex, and multifaceted understanding of constitutional time.

II. The Textual Basis of "Jeffersonian Skepticism"

In the context of a written, fundamental constitution, questions of legitimacy and questions of interpretation are inseparable. How one should read legal and constitutional text has never been able to escape the question of who wrote that text, what authority they had to do so, and what relevance such questions might have to accessing the continued authority of the text through time. This culminates in what Frank Michleman calls the "authority-authorship syndrome," where faced with the threat of infinite regress in locating the moment of foundational legitimacy, we are forced to invent the figure of the author as an explanatory framework for the

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[4] Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (London: Verso Books, 1996)

[5] Raymond Geuss, *Politics and the Imagination* (Princeton: Princeton University Press, 2010), *x-xi*, 5, 14

temporal extension of constitutional authority.[6] Exemplifying attempts to grapple with the "authority-authorship syndrome," Dworkin suggests that law has to be seen as "created by a single author- the community personified."[7] Jed Rubenfeld's argues that "the people" of democratic constitutionalism must be thought of as a singular, "collective and temporally extended agent," continually living up to textually inscribed foundational commitments over time.[8] Keith Whittington, defending an originalist position, attempts to resolve the paradox on its face: "the written text is identical to the author's intent; there can be no logical separation between them and thus no space for an autonomous text capable of adopting new contexts." "In fact," he continues, "textuality is meaningful only if the originating agent is not truly absent from the text."[9] But if that is the case, then our felt need for a singular authorial grounding in interpretation will have a very difficult time explaining a history of sometimes fundamental political change, and what is more, the general need for a singularly authoritative narrative of textual meaning or interpretive method will cover up more than it reveals of the multiplicity of texts and voices that get retrospectively absorbed by a constitutional tradition.

Understanding the intellectual experience behind Jefferson's revolutionary theorizing on constitutions puts us in a position to comprehend thinking and acting anew in relation to constitutional text. In the context of a discussion of collective generational limits on debt, Jefferson asserted to Madison in 1789 that the "earth belongs in usufruct to the living, that the dead have neither powers nor rights over it," that "by the law of nature, one generation to another is as one independent nation to another," and that this had direct implications for law: "on similar ground," he wrote, "it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation."[10] We can read this as fitting with his later comment to Samuel Kercheval that "some men look at constitutions with sanctimonious reverence, and deem them, like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they

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[6] Frank I. Michelman, "Constitutional Authorship," *Constitutionalism: Philosophical Foundations*, Larry Alexander, ed. (Cambridge: Cambridge University Press, 1998), 64-98
[7] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1987), 224
[8] Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (New Haven: Yale University Press, 2001)
[9] Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999), 94
[10] Jefferson to James Madison, 6 September 1789, *Writings*, 959, 963

did to be beyond amendment."[11] For Jefferson, original authorship alone was an insufficient historical framework to explain the passing of a legal text across time.

Common law thinking, reasons David Strauss, provides a definitive answer to what he accurately identifies as Jeffersonian skepticism, which might be thought of as a radical answer to the authority-authorship problem, as outlined above.[12] Strauss argues that precisely because a common law explanatory framework can account for cumulative change over time in the form of legislation and adjudication while not abandoning fundamental commitments or principles, it survives the rather absurd idea that democracy and the temporal extension of constitutional order are incommensurable. Robert Tsai, who has much more time for Jefferson's ideas about the necessity of democratically informed legal renewal, nevertheless steps back from taking what he sees as Jefferson's description of such renewal as an absolute new beginning, a kind of planned and perpetual reversion to a clean slate or state of nature.[13] In what follows, I hope to retrieve thinking that sought to live with and in rather than ultimately resolve the paradox of constitutional authority in a democratic polity outlined above. That the earth, and with it the constitution, belonged to the living was not at all what Stephen Holmes calls an anti-constitutionalism, but a constitutionalism and jurisprudence that took its potential and its limits seriously enough to build them into the design of institutions.[14]

In the summer of 1776, while serving in Philadelphia, Jefferson was busy composing a draft of a new republican constitution for Virginia. The text was radical in parts, although moderate to conservative in others, but along with Jefferson's contributions to the subsequent project of collecting and reforming the body of Virginia laws, it contained several unusual proposals. Chief among these is the suggested extension of juries to all cases, including a newly constituted Court of Chancery, placing a jury in the fact-finding and if deemed necessary interpretive office of the Chancellor. Jefferson also severely circumscribed executive power. An executive along with members of a Senate were to be appointed annually by a likewise annually elected House of Representatives. The voting franchise was to be extended to all white males

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[11] Jefferson to Samuel Kercheval, 12 July 1816, *Writings*, 1401
[12] David A. Strauss, "Common Law, Common Ground, and Jefferson's Principle," *Yale Law Journal* Vol. 112, No. 7 (May, 2003), 1717-1755
[13] Robert Tsai, *Eloquence and Reason: Creating a First Amendment Culture* (New Haven: Yale University Press, 2008), 159
[14] Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995), 140-146

who held 25 acres of landed property or the rough equivalent in wealth, and each white male citizen who did not have sufficient land or wealth was to be given 50 acres of farmable land by the state government. The constitutional draft also sought to liberalize naturalization of immigrants, immediately banned the slave trade, guaranteed the freedom of religion, secured the freeman's right to arms on his property, and equalized the rights of women to hold property (but not to vote). Citizenship and property were inseparable, to the extent of a right to private property. The draft assumes a neo-classical understanding of the rights and liberties of the arms-bearing male citizen as grounded in the security and economic independence of freely holding property, made familiar to us by the work of J.G.A. Pocock.[15]

Jefferson concluded by outlining the means of amending the constitution. "None of these fundamental laws and principles of government shall be repealed or altered, but by the personal consent of the people on summons to meet in their respective counties on one and the same day," and given a two thirds majority of the people present, "such repeal or alteration shall take its place among these fundamentals and stand on the same footing with them, in lieu of the article repealed or altered."[16] This would be the fist of many attempts on Jefferson's part to maintain open space for the deliberative public councils of revolutionary political experience. As his observations of the necessity of such principles intensified over time, so did the audacity of his proposals, culminating most famously in the "ward system," a plan for dividing the state and counties up into wards, or hundreds.

Jefferson saw much of his proposals for legal and constitutional reform as restorative of "ancient principles" friendly to "public liberty," inspired the quasi-mythical Anglo-Saxon constitution that existed in England before the Norman Conquest.[17] In his enthusiasm for "our Saxon ancestors," Jefferson was whether consciously or not intensifying the racialized character of Anglo-American narratives of constitutional liberty, as well as displaying a kind of wistfully unhistorical nostalgia that subsequent commentators have found embarrassing. None other than the pre-eminent American legal historian Morton Horwitiz, ironically in an article looking to articulate a more democratic narrative of and relationship to fundamental law, pronounced

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[15] J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 2003)
[16] Jefferson, "Draft Constitution for Virginia- Fair Copy" *ibid*, 345
[17] Jefferson to Edmund Pendleton, 13 August 1776, *Writings*, 751-754

Jefferson a "legal fundamentalist and Whig originalist," a forerunner to the "static originalism" to which American jurisprudence is regrettably prone.[18]

A closer look at the textual practices and multivalent conceptual vocabularies with and in which Jefferson was working reveal a much deeper experience and theorization of history than has previously been recognized. His enthusiasm for the ancient constitution was not so much a simple return to the past as a putting to new usage the contingent origins of the legal tradition of which he was a subject. To appreciate what I call Jefferson's experience of something akin to fragmentation in the temporality of law and politics, a fractured constitutional time, we need to appreciate the mode of relating to civil history that informed the world in which Jefferson read: what has been called a "Renaissance sense of the past," and its corresponding medium, the commonplace book.[19] In addition to a literary commonplace book, Jefferson kept two legal commonplace books, one devoted to English common law precedent and procedure as well as broader histories of European legislative or assembly bodies, and a much larger but less studied commonplace book of theory and precedent in equity.

The practice of filing commonplace books, of assembling pieces of historically inflected legal theories and narratives of civil government shaped how Jefferson thought through the drafting of constitutional text and thereby the design of institutions. When a special committee was appointed to take stock of the laws of Virginia and propose reform bills to the General Assembly, the members debated whether to propose reform bills or produce a new *Institutes* along the lines of that of Justinian, the more reformist members inclined to the former, fearing the fixed status a foundational text of fundamental law would come to play in subsequent legal and constitutional disputes. As Jefferson wrote in the query on laws in the *Notes*, "it was thought

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[18] Morton J. Horwtiz, "Foreword: The Constitution of Change, Legal Fundamentality without Fundamentalism," 107 *Harv. L. Rev.* 30 1993-1994, 48

[19] Peter Burke, *The Renaissance Sense of the Past* (London: Edward Arnold, 1969), on Renaissance legal humanism, see Quentin Skinner, *Foundations of Modern Political Thought* (v. 1), *The Renaissance* (Cambridge: Cambridge University Press, 1978), Donald R. Kelley, *The Human Measure: Social Thought and the Western Legal Tradition* (Cambridge: Harvard University Press, 1990), J.G.A. Pocock, "The Origins of the Study of the Past," *Political Thought and History: Theory and Method* (Cambridge: Cambridge University Press, 2009), 145-186, on commonplace books, 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

dangerous to reduce it [the common law] to a text."[20] This would seem to be in the same spirit of the closing lines of Jefferson's original draft constitutional proposal, that "the laws heretofore in force in this colony shall remain in force, except so far as they are altered by the foregoing fundamental laws, or so far as they may be hereafter altered by acts of Legislature."[21] In other words, for all of the leaping into the new and flight from history we traditionally associate with Jefferson, and perhaps with the American Revolution more generally, in his mind, a polity reconstituted as a revolutionary republic required not an absolute new beginning but the adoption of a new framework for using inheritance in so for as it had been handed down as tradition. And it is important to remember that for Jefferson and his comrades, the past of the law and the legal security of property were inescapably transmitted and embodied in texts. An obsessive collector of Virginia's colonial legal manuscripts, Jefferson thought the publicly funded printing of these laws and subsequent legislative activity, such as the report of the committee on law reform, was an essential component of enabling democratic constitutionalism. The public had to be able to get its hands on the law when it gathered in its councils to deliberate on fundamental law as written.

In a sense, Jefferson's revolutionary constitutionalism can be thought of as an attempt to inscribe and thereby institutionalize an opened sense of history, to keep constitutional order as grounded in constitutional text less like fundamental, sacred law and more like the transparently secondary, assembled character of a collection of historical commonplaces. This vision in turn entailed an understanding of the constituted citizen as a subject of multiple histories of legal, civil, and even natural character. Such an understanding Jefferson drew from his reading of *The Spirit of the Laws* by Montesquieu, where laws were described as the necessary relationships that arise from the nature of things, the nature of things being understood not simply as the eternal divine and natural laws of God and the universe, but as the systems of complex relationships that had developed historically in human society.

Jefferson devoted extended attention to Montesquieu in his legal commonplace book, particularly to the analysis of the adaptation of appropriate laws given the principles at work in

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[20] Jefferson, *Notes on the State of Virginia*, William Peden, ed. (Chapel Hill: University of North Carolina Press, 1952), 137

[21] Jefferson, "Draft Constitution for Virginia- Fair Copy," *Writings*, 345

the diverse constitutions of different types of polity.[22] In complex modern societies, constitutions were mixtures of the monarchial, aristocratic, and republican or democratic elements. The condition of being in civil society and subject to systems of civil law did not isolate citizens and their governments from broader contexts of natural history, most notably geographical distribution, climate, and their effects on the population. For Montesquieu, and for Jefferson, the citizen was thereby the subject of multiple strands of what Jefferson would go on to call "history, natural and civil." A political analysis and constitutionalism aware of such historical multiplicity would need to be exercised through methods of study that could enable the analyst to see and take stock, to represent to himself and others, the multifaceted spatial and temporal field on view. "He had been a great reader," Jefferson wrote of Montesquieu to William Duane in 1810, "and had commonplaced everything he read. At length he wished to undertake some work into which he could bring his whole Commonplace book in a digested form. He fixed on the subject of his Spirit of laws, and wrote the book."[23] Great value is placed here on the assembled, commonplace character of the text Montesquieu composed, and a similar spirit governed Jefferson's composition of his own work, the *Notes on the State of Virginia*.

On the one hand, Jefferson's *Notes* can be seen as a paradigmatic example of the early modern discipline of chorography, a kind of economic, political, social, and natural survey of a particular area, usually done by a minister or agent of the State for the accumulation of knowledge on which to construct a rationalized governance. Elements of a scientific and juridical discourse of reason of state can indeed be traced through Jefferson's text. On the other hand, the *Notes* are truly unique and in many ways bizarre in the blurring between civil and natural historical analysis as well as in the intermixture of self-narrative and political criticism, providing what Leo Marx aptly calls a "naturalistic basis for utopian reverie."[24] In a reorganized series of answers to the queries of his French correspondent, the Marquis de Marbois, Jefferson laid out a geographical, demographic, and historical survey of Virginia, and used that survey as a jumping off point for theorizing and criticizing the constitutional politics of the state.

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[22] Jefferson, *Legal Commonplace Book*, #775-885, on Montesquieu and the subject of multiple laws, see Sheldon Wolin, *The Presence of the Past: Essays on the State and the Constitution* (Baltimore: Johns Hopkins University Press, 1989), 104

[23] Jefferson to William Duane, 10 August 1810, *Papers of Thomas Jefferson: Retirement Series* (v. 3), J. Looney ed. (Princeton: Princeton University Press, 2006), 6

[24] Leo Marx, *The Machine in the Garden: Technology and the Pastoral Ideal in America* (Oxford: Oxford University Press, 1964), 120

True to form, Jefferson went about his project by blending a neo-Roman concern for the inevitability of corruption in the constitution of the commonwealth with a Scottish vocabulary of the situational, contextual, sensory aspects to the cultivation of ethics. This amounted to a concern for fixing the material basis of a healthy republic in an equitable distribution of property, and preserving the economic dependence that enabled civic virtue and a healthy moral sense by keeping the majority of citizens occupied in agricultural pursuits on land of their own possession. "Our rulers will become corrupt, our people careless," Jefferson feared. From the moment the revolution ended, Jefferson reasoned, "we shall be going downhill. It will not then be necessary to resort every moment to the people for support. They will be forgotten, therefore, and their rights disregarded. 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." Now was the time for "fixing every essential right on a legal basis," for many of the "shackles" Americans had thought they were getting rid of by achieving independence would continue, and even grow, until "our rights shall revive or expire in a convulsion."[25] The first object of constitutionalism for Jefferson was to secure conditions and means for enabling the people in their collective duty of historically informed political judgment.

In Jefferson's mind, one of the most egregious failures of the first state constitutional convention in 1776, and the second one in 1783, was the failure to adopt his plans for a codified right to basic economic security and free access to public education, which he proposed "to be chiefly historical." History would enable students "to judge of the future; it will avail them of the experience of other times and other nations; it will qualify them as judges of the actions and designs of men."[26] If it was true that "every government degenerates when trusted to the rulers of the people alone," and that therefore "the people themselves are its only safe depositories," than embedding of law and politics in an institutional setting of an actively engaged populace armed with a conceptual museum for their own thinking and actions. The last part of Jefferson's recommendations for further law reform not adopted by General Assembly was for a public library and gallery, "laying out a certain sun annually in books, paintings, and statutes" to further allow for solid material bases of shaping and practicing judgment, of using books and other media of transmitting historical memory to "impress" the minds of the young. Or, as Raymond

[25] Jefferson, *Notes on the State of Virginia*, 161
[26] Jefferson, *Notes on the State of Virginia,* 148

Geuss suggests: "a museum should in some sense be a jumble, because the world is in some sense a jumble and a museum should be, among other things, a place to learn to exercise judgment."[27] An archive presented as an assemblage would inform a critical legal and civic ethos. Historical representation that presented itself never fully codified led to a political representation that was likewise assembled but never made whole.

Critical citizenship, then, rested on the capacity to judge, and this capacity was an artificial product of one's self-awareness of participating with others in history. Collective judgment on the part of the mass of the citizenry, of course, was not always an orderly, schoolhouse affair. The use of a language of an almost natural "convulsion" to describe political upheaval parallels language used to describe not only the shocking sublimity of nature elsewhere in the text, but anticipates his famous letters to Abigail Adams and James Madison that rebellions now and then are a good thing, "and as necessary in the political world as storms are in the physical." The language of natural cyclicality to the life of constitutions bears markers of influence by the Greek historian Polybius in his analysis of the Roman constitution, as well as the language of Francis Bacon. "Shepherds of people had need know the calendars of tempests in the state," Bacon had counseled, and "if fames were the relics of seditions past," they were "no less indeed the preludes of seditions to come." No doubt taking up Bacon's suggestion that "the first remedy or prevention is to remove by all means possible the material cause of sedition whereof we speak; which is, want and poverty in the estate," Jefferson not only sought to formulate a constitutionalism capable of comprehending periodic unrest, but of planning and even seeking to encourage it into malleable, open institutional channels.[28] In this, Jefferson can be said to participate in a kind of rethinking through rereading and ultimately rewriting of deeply anti-republican political concepts, appropriating and re-describing these concepts into the framework of a democratic constitutionalism. Constitutionalism then was practiced and enabled by a citizenry constituted in its capacity to use the material representations of civil history put into their hands by a well-founded commonwealth for the purposes of continual attentiveness to the commonweal.

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[27] Geuss, *Politics and the Imagination*, 115

[28] Francis Bacon, "Of Seditions and Troubles," *The Essays of Counsels Civil and Moral* (1625) in *The Major Works*, Brian Vickers ed. (Oxford: Oxford University Press, 2002), 366, 368

If civil memory, individual and collective, was the key to judgment, then the tortured and deeply conflicted approach to race exhibited in the *Notes* has to be seen as the limits inherent in the Jeffersonian constitutional vision as it was formulated in its context. To the reader, the text reveals its own contradictions and conceptual parallels to an extent of which the composer could not have been fully aware. While a careful student of Native American languages as well as remaining artifacts, he confesses not being aware of any "monuments," or evidence that various tribes had enough of a consciousness of their history to inscribe it.[29] This denial of the historical and therefore civic consciousness and development on the part of Native Americans was a trope of Enlightenment conjectural narratives of civil society and empire, and in Jefferson's case, the treatment of Native Americans in the *Notes* aided in a transition from a diffuse confederacy of multiple polities involved in a diverse array of histories, or a kind of temporal multiplicity and legal plurality, to an aggressively linear and progressive concept of time that underwrote the temporality of expansion in Jefferson's "empire of liberty."[30] Indeed, when Jefferson wrote to Duane about Montesquieu in 1810, it was to recommend the translation of Destutt de Tracy's commentary on *The Spirit of the Laws*, which among other things sought to refute the idea of the incommensurability of extensiveness and republican government.

In approaching the even more pressing matter of slavery and the presence of African Americans in Virginia, Jefferson again in the *Notes* was plotting a framework within which the radical attention to history that characterized his understanding of citizenship could be seen as not inherently inclusive of an entire race of people. Seeing this race, as he does in the *Notes* with every other race, including his own, "as subjects of natural history," Jefferson configures the perceived inferiority of African Americans as "fixed in nature," but elsewhere suggests that the argument of natural inferiority is partial at best, given the overwhelming evidence for universality of the human species.[31] Nevertheless, Jefferson describes Africans as by nature overly passionate, ardent, and thus incapable of rational judgment. In a sense, while the citizen was the subject of multiple histories, natural and civil, the slave is a subject of, perhaps subject to, only one "naturally" circumscribed history.

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[29] Jefferson, *Notes on the State of Virginia*, 92-107
[30] On histories of empire in the eighteenth century, see J.G.A. Pocock, *Barbarism and Religion* (v. 4) *Barbarians, Savages, and Empires* (Cambridge: Cambridge University Press, 2005)
[31] Jefferson, *Notes on the State of Virginia*, 143

Crucially, it is on the issue of memory that the question of the potential for African American citizenship turns. Whites and Blacks, Jefferson reasons, will never be able to cohabit in the same nation, simply because the collective memory of servitude on the part of former slaves will forever block amelioration of sentiment, even if amelioration of condition takes place over time. Emancipation, at least in theory, was an immediate necessity, for the continued dependence of the legal order on the holding of human beings as property increased the likelihood of a massive and successful slave revolt. In precisely parallel terms of a political upheaval so sudden it borders on the sublime, and can justly be described in natural terms as a convulsion, and in the Polybian and Baconian sense, predictable at the same time, Jefferson feared that "considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation, is among possible events," and indeed, "that the Almighty hath no attribute which can take side with us in such a contest." Tellingly, Jefferson shirks away from the implications of this parallel to which his own analysis has brought him: "it is impossible to be temperate and to pursue this subject through the various considerations of policy, of morals, of history natural and civil. We must be contented to hope they will force their way into every one's mind."[32] Confronted with the reality of African Americans collectively exercising their faculties of memory and accurately judging the situation they found themselves in, the rhetoric surrounding Jefferson's articulation of this possibility suggests an uncomfortable and for him an impossible truth had been unearthed in the course of his inquiries: that not only would a slave revolt be predictable, understandable, and perhaps just, it could be understood, in a sense, as an act of constitutionalism.

Ultimately, Jefferson's *Notes* can be read a piece of constitutional criticism and an example of theorizing the conditions for the maintenance of a free state. For Jefferson, such maintenance implied not simply a fundamental constitutional order that recognized popular sovereignty, but required instead a diffusion of sovereignties across a polity, or what he called "several bodies of magistracy."[33] A polity created through the unraveling and fragmenting of an authoritative legal system would need to prove faithful to its revolutionary origins by diffusing sovereignty in the distribution of powers throughout society. This was not the simple inscription of the people as constituted and singular entity as the theoretical sovereign, in the place of the

[32] Jefferson*, Notes on the State of Virginia*, 163
[33] Jefferson, *Notes on the State of Virginia*, 120

monarch, but rather the toppling of the structure of sovereignty in favor of a complex but never unitary fabric. That the constitution enacted in 1776 copied in miniature the British model of parliamentary sovereignty, with all powers legislative, executive, and judicial flowing from the constituted legislature that thereby could in itself alter the fundamental laws of the constitution, Jefferson saw as a grave danger for "elective despotism," a body, perhaps united in a single figurehead, capable of anything because it carried the stamp of popular legitimacy at a single moment in time and the continued "acquiescence" of the people. To codify as fundamental and unchangeable "a temporary organization of government" to Jefferson was to forget the revolutionary, even dangerous circumstances in which the act of forming a constitution was carried out in 1776. Certainly, it overlooked the presence of popular assemblies, "which were as much vested with all the powers requisite for resistance" to Britain "as the conventions were."[34] This resulted in an inescapable contradiction: if constitution meant what was the law, as Jefferson understood it did, than either the text of a constitution has to be legislated by a higher delegated power than an ordinary legislature for it to be "perpetual and unalterable," or the constitution had to be recognized as somehow fundamental in a non-fundamental or foundational way.

It was simply not possible to accept what Jefferson understood to be the theory behind written fundamental law: "to get rid of the magic supposed to be in the word *constitution*, let us translate it into definition as given by those who think it above the power the of the law, '...We, the ordinary legislature, establish an act *above the power of the ordinary legislature*."[35] The authors of such an imagined fundamental and unchanging constitution, Jefferson wrote, "had been seduced in their judgment by the example of an ancient republic, whose constitution and circumstances were fundamentally different." For Jefferson, the way to avoid "tumults" and upheavals that would result in the undoing of the republic, the trusting of sovereignty to one figure out of temporary emergency, was to place rule in a "plurality of hands," to allow for the institutionalizing of revolutionary public spirit in the form of deliberative councils where the energy of a citizenry prepared to judge on matters of public concern could be made manifest. This, in turn, implied an understanding of constitutional authorship that surrendered authorial control at the moment of enactment. "On every matter of construction," Jefferson wrote to

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[34] Jefferson, *Notes on the State of Virginia*, 123
[35] Jefferson, *Notes on the State of Virginia*, 124

William Johnson in 1823, "let us carry ourselves back to the time when the Constitution was adopted, and recollect the spirit manifested in the debates."[36] Authoritative text had to be read as the product of a contested discussion rather than a singular will, and it was fidelity to that spirit rather than the perceived inalterable quality of fundamental law that would characterize jurisprudence and constitutional politics in a republic.

III. Conclusion

There was a textual basis to the radical and seemingly unworkable vision implied by Jeffersonian skepticism. The interpretive authority of the text of the constitution and laws as written were always in the hands of readers and users rather than the authors, to such an extent that the liberty exercised by citizens could in large part be understood as the right to participate in the freedom of reading, writing and rewriting. A constitutionalism appropriate to a democratic polity would need to secure the means for the public exercise of judgment by empowering it with a civic, historical subjectivity communicated by a rich world of the materials of historical representation.

Jefferson's vision as outlined above certainly runs counter to contemporary understandings of the "living constitution," or an "ongoing dialogue," even if that dialogue is imagined, as in the case of Bruce Ackerman, as a "punctuated by successful exercises in revolutionary reform."[37] Rather than a progressive and developmental explanatory framework, where gradual inclusion of previously excluded groups occurs through a retrospective tapping of the founding promise of equal rights, Jefferson exhibited and recognized a dynamism and multidirectional character to constitutional history. This was a vision that saw history not as progressively fulfilling a single fundamental principle, but one where groups of citizens recognize the tensions or failures of constitutional order, and seize on fragments of the inherited universe of legal, political, and historical texts and put them to democratic use, wrenching them from their context as only parts of authoritative tradition or inheritance, refusing to allow constitutional politics to be circumscribed to rare moments of sanctioned higher politics, and

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[36] Jefferson to William Johnson, 12 June 1823, *Writings*, 1469-1477

[37] Bruce Ackerman, *We the People* (v. 1) *Foundations* (Cambridge: Harvard University Press, 1991), 19

exercising the enormous power as well as responsibility inherent in their capacity as participatory authors and adjudicators of meaning.

Jed Rubenfeld has argued that much of contemporary constitutional theory exhibits a jarring dismissal or forgetting of the constitution as written. Against what he sees as the punctuated constitutional time of Ackerman, Rubenfeld seeks to use the written character of constitutional text to stitch over these punctuations and realize the fullness of time. Against the deep past of successive moments of higher lawmaking activity described by Ackerman, Rubenfeld posits the unity of that history through the cumulative and collective reading of constitutional text over time.[38] The historical perspective offered by a focus on Jefferson's theorization and practices in the area of how law and legal knowledge get transmitted across time, however, suggests that at least in so far as we experience it, time, especially constitutional time, is irredeemably punctuated by the cracks and fissures inherent in histories transmitted and represented in texts. Particularly in specific contexts of revolutionary politics, of situations where the determinacy of authoritative meaning is in question, the transmission of constitutional text can be shown to be a much more dynamic and uncertain affair than we have previously been prepared to recognize.

Constitutional theory would do well to allow for institutions and cultures that nurture the councils where public acts of reading, writing, and rewriting can take place. Somewhat against the unified fulfillment of textual commitment on the part of a community over time described by Rubenfeld, and strongly against the sacred moment of absolute founding and fixed textual meaning supposed by contemporary originalists, a Jeffersonian understanding of constitutionalism points the way to a deep textualism, where constitutional text is read as bursting at the seams with the political experience, social worlds, and elements of inter-textuality that produced and continue to produce meaning in time. The astonishing power of historical agency and subjectivity understood as capacities for potentially redemptive re-description is a force that contemporary constitutional philosophy ignores or forgets at its peril.

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[38] Rubenfeld, "Legitimacy and Interpretation," *Constitutionalism: Philosophical Foundations*, 214