

Thomas Jefferson, Legal History, and the Art of Recollection. By MATTHEW CROW. Cambridge Historical Studies in American Law and Society. Cambridge: Cambridge University Press, 2017. 294 pages. Cloth, ebook.

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Historians often find it difficult to grasp the legal dimension of Thomas Jefferson—what he thought about the law and what he did with it. This difficulty arises from a twofold intellectual challenge. Not only must historians bridge the disciplinary divide between law and history, but they also must span the equally daunting divide separating law of the period 1765–1826 from modern law. That pair of difficulties may explain why the two best books on Jefferson and the law, up until now, have been the work of lawyers rather than historians.¹ That the law—especially that of two and a half centuries ago—can be a very alien intellectual world also may explain why biographers of John Adams and Alexander Hamilton similarly treat their legal careers and legal thought with delicate nervousness, as digressive distractions from the main arc of their lives and careers.

The task of understanding Jefferson's legal thought becomes even more formidable when we move past legal doctrines and the outcomes of cases to the jurisprudential realm of understanding what Jefferson thought that law was for. What purposes did it serve? What functions did it perform? These questions require us to understand law as more than a mechanism for resolving disputes between parties; reconciling competing claims to property; enforcing contracts; seeking to order the future via wills, trusts, and estates; and defining and punishing crimes. They require us to understand law as Jefferson did—as a constitutive force, both embodying and defining the core principles of the polity. And they require us to see how this constitutive function of law became even more important when a polity such as Virginia moved rapidly through a series of identities: from a British colony to a newly independent commonwealth in a fragile American confederation, and then to a state in the American Union under the U.S. Constitution in which the balance of power and authority between the nation and the states was still fiercely disputed. That process of contestation—both as a shaper of law and as shaped by law itself—had profound consequences for law's constitutive function and its everyday operations.

In *Thomas Jefferson, Legal History, and the Art of Recollection*, Matthew Crow, assistant professor of history at Hobart and William Smith Colleges, seeks to answer these questions, achieving notable success. In his nuanced

¹ Edward Dumbauld, *Thomas Jefferson and the Law* (Norman, Okla., 1978); Frank L. Dewey, *Thomas Jefferson, Lawyer* (Charlottesville, Va., 1986).

analysis of Jefferson's understanding of the relationship between law and history—central to which was his evolving perception of law's constitutive function—Crow demonstrates that Jefferson saw law as essential to the definition, defense, and development of American nationalism.

Crow examines a full range of issues concerning Jefferson's engagement with the law, connecting them with Jefferson's efforts to contextualize and develop the Virginian and American legal enterprises. Beginning with a road map of his book's argument, Crow shows that, before American (and Virginian) independence, Jefferson conceptualized the British Empire as a structure based on and giving expression to law. This understanding drove his effort to set Virginian law within its British context. For Jefferson, the history of that law was critical to a correct understanding of it, and the surviving pleadings and arguments from his days as a practicing lawyer testify to his insistence on understanding law through the prism of history. Crow closely examines Jefferson's preoccupation with law books and manuscripts as both tools and subjects of his legal education, enabling him to map the intellectual world of colonial Virginia law. Jefferson knew this world well, for he emerged from and drew his leading clients from the colony's great planters, who were deeply engaged with it. We learn to see Jefferson as a proud legal professional within the British imperial world. As Crow shows, he worked to place a historical account of Virginian law and constitutionalism within that framework, plugging into the mother country's conceptions of liberty and law while making room for colonial self-government. In this context, Crow's analysis would have benefited from an examination of the pleadings and arguments by Jefferson in the Virginia case of *Bolling v. Bolling* (1771); Jefferson ably parsed an astonishing range of English law reports and treatises, in the process addressing the historical sweep of English common-law jurisprudence and the merits and defects of a host of revered common-law authorities. He thus mapped his own approach to studying and evaluating those authorities.²

In devising a "foundational histor[y]" (33) for Virginia, however, Jefferson had to confront its clashes with the foundational history of the English constitutional and legal system. Jefferson, like many of his contemporaries in other colonies, could not reconcile these English and colonial accounts, and he came to understand that such foundational histories were brittle, problematic bases for devising a new colonial Virginian commonwealth within the British Empire. In an intellectual and historical version of the constitutional principle that there could not be "imperium in imperio" (that is, that one polity could not exist within another), Jefferson saw that framing a foundational history for colonial Virginia within a British imperial context would produce a fatally flawed "useable past," as well as constitutional and legal conflicts.

² For a scholarly edition of these documents, see Bernard Schwartz, Barbara Wilcie Kern, and R. B. Bernstein, eds., *Th: Jefferson and Bolling v. Bolling: Law and the Legal Profession in Pre-Revolutionary America* (San Marino, Calif., 1997).

That recognition prepared Jefferson for one of the key tasks he faced during the American Revolution—assisting in the creation of a revolutionary Virginia constitutionalism. Crow finds Jefferson's 1776–79 project of legal and constitutional reform for Virginia critical to his intellectual development, emphasizing his chairmanship of the law reform committee that proposed a full recodification of the laws of Virginia. This project produced some of Jefferson's most creative efforts at framing laws, including his proposal for reforming the state's criminal law, his attempt to revise the state's educational system, his plan to abolish primogeniture and entail, and, most famously, his Virginia Bill for Religious Freedom. Central to Crow's inquiry is Jefferson's struggle to draft a new constitution for Virginia. As Crow writes, Jefferson recognized that "a republican constitution demanded a republican subject possessed of the cultivated capacity for participation in it" (33).

Following hard on the heels of his projects for legal and constitutional reform, Jefferson began to write *Notes on the State of Virginia* (1785), his only full-length book. As Crow notes, this shift from constitution-making and law-making to authorship marked a natural transition from doing to explaining what he and Virginia had done so his readers could learn from the Virginia experiment. Further, Crow demonstrates how important *Notes* was to Jefferson's ongoing efforts at devising for the new commonwealth a vision of politics grounded in law. In particular, Jefferson recognized that the racially and ethnically diverse Virginia generated a set of plural and seemingly incompatible legal histories, each linked with a different people inhabiting the state. Jefferson saw that the profusion of demographic groups carried with it an equal number of foundational histories. He recognized the need to choose which would form the core of Virginia's new legal system and understood that the selection process would determine the social and political status of the populations making up the Virginian commonwealth. His choices ultimately sought to protect the primacy of the white settlers of Virginia. To that end, he devised a racialized and genderized conception of the borders of "civic identity" (33)—one in which property-owning white males would occupy the top rung of the ladder, giving direction to and exercising authority over those (women, Native Americans, and African Americans) below them. Thus, Crow reaches beyond simple invocations of racism and sexism to provide a distinct and persuasive explanation for the aspect of Jefferson's philosophy that has most often drawn the criticism of posterity.

This controversial component of Jefferson's legally inflected ambitions for the new state permeated his engagement with questions of national identity and values. During his service as secretary of state (1790–93), vice president (1797–1801), and president (1801–9), Jefferson had to confront the competing claims of Native American nations and white American settlers for land in the North American context. Based on the circumscribed

understanding of civic identity that he had devised for Virginia, he constructed a legal theory for dispossessing Native American nations of their claims and reassigning the disputed lands to white American settlers taking possession under the authority of the relevant national or state legal regime.

Crow caps his account with a subtle examination of Jefferson as a legal thinker in retirement. Crow's thoughtful and rigorous approach to the subject eclipses the affectionate, almost worshipful treatment that Dumas Malone gave to this topic.³ As a surviving revolutionary and an American founder, Jefferson was all too aware of his oracular identity in the eyes of a younger generation. He therefore took seriously his obligation to address the continuing issues of legally inflected nationalism, especially federalism, democratization, and preserving his hierarchical understanding of Virginian (and American) society. Here he was fighting an intellectual rearguard action, maintaining his understanding of a white man's country against the forces of social and demographic change pushing toward greater democratization and diversity. His championing of ward republics, which has seemed an odd eccentricity to previous scholars, and his efforts to promote civic education reemerge in Crow's treatment as mechanisms for preserving white sovereignty over newly occupied and newly cultivated lands. Further, Jefferson's advocacy of his version of democratic constitutionalism countered the baleful influence of his intellectual foes, the philosopher David Hume and the legal commentator Sir William Blackstone. Jefferson opposed their skepticism of democracy, their insistence on historical complexity (rather than the neat vision of history so dear to him because he saw it as clearly pointing to his vision of democracy), and their championing of tradition, which Jefferson saw as a means to oppress humanity in favor of the quasi-feudal, aristocratic English legal and social order. His opposition to Hume and Blackstone and to those Americans who would be guided by them fits neatly with Jefferson's lifelong quest for a vision of law that he deemed suitable for the Virginian and American situations.

Crow concludes by urging his readers to think beyond Jefferson in devising our own understandings of the constitutive function of constitutionalism and law. That project, he argues, would also entail devising a politics and legal regime truer to an inclusive form of democracy, rather than to the exclusive one that Jefferson produced through his lifelong engagement with law and constitutional thinking.

Crow's argument repays close study, despite at times descending into abstruse density. Some readers may find Crow's invocations of modern and postmodern thinkers irritating; others may balk at the sometimes forbidding

³ See also Dumas Malone, *The Sage of Monticello* (Boston, 1981). It is the concluding volume of Malone's *Jefferson and His Time*, 6 vols. (Boston, 1948–81). For the reviewer's essay on Malone, see R. B. Bernstein, "The Perils of Definitiveness: Dumas Malone and *Jefferson and His Time*," in *Jefferson's Lives*, ed. Robert M. S. McDonald (Charlottesville, Va., 2019).

vocabulary of his analysis. Even so, Crow uses those theorists' insights and that technical language to cast new and unexpected light on Jefferson's engagement with law and national identity; they are not distracting substitutes standing in for engaging with Jefferson himself. And yet one of Crow's favorite terms—*subjectivity*—may cause confusion for unwary readers. Most readers would understand subjectivity to mean the opposite of objectivity—that is, the quality of thought that does not recognize the need to separate one's own perspective from the issue or problem that one is seeking to study. Instead, Crow means by subjectivity the quality of being a subject of one or another legal regime, but he never makes this matter clear. The murkiness of his usage of subjectivity exemplifies how Crow's vocabulary—which some readers might dismiss as jargon—can unintentionally obstruct his arguments.

Nonetheless, students of Jefferson and of American law and constitutionalism in his time will benefit from Crow's innovative and challenging study, which complements Hannah Spahn's *Thomas Jefferson, Time, and History*.⁴ Like Spahn, Crow illuminates (to borrow a phrase from Captain Ahab) the "little lower layer" of intricacy in Jefferson's thought, lurking beneath the lucid and accessible surface of his prose.⁵ And again like Spahn, Crow reminds us why the study of Jefferson is an intellectual enterprise without end.

⁴ Hannah Spahn, *Thomas Jefferson, Time, and History* (Charlottesville, Va., 2011).

⁵ Herman Melville, *Moby-Dick; or, the Whale* (New York, 1851), 181.