

William & Mary Law Review

Volume 47 (2005-2006)
Issue 4 *Institute of Bill of Rights Symposium: St.
George Tucker and His Influence on American
Law*

Article 2

February 2006

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Repository Citation

Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 Wm. & Mary L. Rev. 1111 (2006), <https://scholarship.law.wm.edu/wmlr/vol47/iss4/2>

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William and Mary Law Review

VOLUME 47

No. 4, 2006

FOREWORD: THE LEGACY OF ST. GEORGE TUCKER

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St. George Tucker was one of the more influential jurists, legal scholars, and legal educators of late-eighteenth- and early-nineteenth-century America.¹ The purpose of this symposium is to examine the impact of Tucker's legal work on the development of American law and its importance to contemporary scholars and courts in understanding the contours of legal thought in the early national period.

Born in Bermuda in 1752, Tucker migrated to Virginia in 1772 to study at The College of William and Mary.² After a brief tenure at the College, Tucker read law under the direction of Williamsburg attorney George Wythe, one of the most eminent lawyers in the American colonies and a mentor to many prominent young men, including Thomas Jefferson.³ Because of the onset of the American

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1. Paul Carrington has written that Tucker "was arguably the most important American legal scholar of the first half of the nineteenth century." Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 540 (1990). Though James Kent and Joseph Story would surely compete for that honor, Tucker was certainly the most important legal scholar in early nineteenth-century America.

2. CHARLES T. CULLEN, *ST. GEORGE TUCKER AND LAW IN VIRGINIA, 1772-1804*, at 3, 5 (1987) (published version of 1971 Ph.D. dissertation).

3. *Id.* at 9-10; Davison M. Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. LEGAL EDUC. 185, 200 (2001). In 1780, Wythe became the first law professor at The College

Revolution, in which Tucker served as a member of the Virginia militia, Tucker did not begin his law practice until 1782. He quickly became one of Virginia's leading lawyers, and in 1788, the state legislature appointed him to a position on the recently reorganized General Court. Tucker served as a judge on the General Court until 1804, when the state legislature elevated him to a seat on the Virginia Court of Appeals. Tucker resigned from the Court of Appeals in 1811, but President James Madison appointed him to the federal district court in Virginia in 1813, a position he held until 1824. Although Tucker was one of the most distinguished jurists of his day, the presence of two Virginians on the United States Supreme Court—Chief Justice John Marshall and Associate Justice Bushrod Washington—likely deprived him of the chance to serve on the nation's highest court.⁴

In addition to his judicial career, Tucker made his mark as an important legal scholar and educator. In 1790, Tucker succeeded Wythe, becoming the second law professor at The College of William and Mary, carrying out his duties between court terms and serving until 1804.⁵ Although he would eventually be eclipsed in prominence by Joseph Story and James Kent,⁶ Tucker was the most significant legal scholar of the early nineteenth century, particularly after publication of his five-volume edition of William Blackstone's *Commentaries on the Laws of England* in 1803.⁷

Blackstone's *Commentaries*, the most authoritative eighteenth-century text on English law, was published in England between 1765 and 1769.⁸ First published in America in 1771, with subsequent republication in 1790 and 1799, Blackstone's

of William and Mary. *Id.* at 200.

4. Paul Finkelman & David Cobin, *Introduction to 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA*, at vi-ix (St. George Tucker ed., Lawbook Exch. 1996) (1803) [hereinafter TUCKER, BLACKSTONE'S COMMENTARIES].

5. CULLEN, *supra* note 2, at 121. In the 1790s, Tucker also served on a commission to revise Virginia's laws that resulted in the publication of the commonwealth's first legal code. Charles F. Hobson, *St. George Tucker's Law Papers*, 47 WM. & MARY L. REV. 1245, 1246 (2006).

6. Robert M. Cover, Book Review, 70 COLUM. L. REV. 1475, 1476 (1970).

7. TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 4.

8. Finkelman & Cobin, *supra* note 4, at i.

Commentaries soon became the most widely read legal text in late-eighteenth-century America—essential reading for any aspiring lawyer.⁹ But each of the American editions of Blackstone was merely a reprint of Blackstone's original work; none offered any consideration of the extent to which American law differed from English law.¹⁰

Tucker's *Blackstone* took an entirely different course. While serving as a law professor at The College of William and Mary during the 1790s, Tucker had his students read Blackstone, but he supplemented that reading with lectures in which he analyzed the ways that law in the United States—and specifically, Virginia—had departed from English legal principles as a result of the American Revolution, the Virginia Constitution, and the United States Constitution.¹¹ These lectures were “the first systematic effort by any figure in American law to describe the contours of the new system created by the amended Constitution.”¹² Drawing extensively on his William and Mary lectures, Tucker's *Blackstone* included eight hundred pages of essays on a variety of legal and political topics and more than one thousand footnotes in which Tucker examined Blackstone in light of American and Virginian law.¹³ Tucker worried about the effect Blackstone's Tory sensibilities might have on his students.¹⁴ He thus emphasized to his students that the American Revolution and its aftermath had produced a revolution “not only in the principles of our

9. *Id.*; 1 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 4, at iv; Douglas, *supra* note 3, at 203; Hobson, *supra* note 5, at 1247.

10. Finkelman & Cobin, *supra* note 4, at i.

11. Douglas, *supra* note 3, at 203-04. Tucker explained to his students that the American Revolution had “produced a corresponding revolution not only in the principles of our government, but in the laws which relate to property, and in a variety of other [laws] ... irreconcilable to the principles contained in the *Commentaries*.” Michael Grossberg, *Citizens and Families: A Jeffersonian Vision of Domestic Relations and Generational Change*, in THOMAS JEFFERSON AND THE EDUCATION OF A CITIZEN 19 (James Gilreath ed., 1999) (quoting 1 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 4, at iv-vi). For example, Tucker noted that the United States had rejected English notions of the nature of sovereignty, claiming that the exercise of political authority was conditioned on the right of participation by the people. Cover, *supra* note 6, at 1477-79.

12. Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1147 (2006).

13. Finkelman & Cobin, *supra* note 4, at i; Cover, *supra* note 6, at 1475-76.

14. Grossberg, *supra* note 11, at 19.

government,” but in a variety of legal principles, such as the law of inheritance, that reflected the new nation’s republican values and that rendered Blackstone an unreliable guide to certain aspects of American law.¹⁵

Tucker’s edition of Blackstone’s *Commentaries*, known as “America’s Blackstone,” soon became the leading legal text in the United States, enjoying wide circulation throughout the country.¹⁶ Indeed, Tucker’s *Blackstone*, the first major legal treatise on American law, was one of the most influential legal works of the early nineteenth century and the most comprehensive treatise on American constitutional law until around 1820.¹⁷ Not surprisingly, it was also one of the legal texts most frequently cited by the United States Supreme Court and relied upon by lawyers appearing before the Court during the first few decades of the nineteenth century.¹⁸ As Saul Cornell notes in his contribution to this symposium,

15. 1 TUCKER, BLACKSTONE’S COMMENTARIES, *supra* note 4, at iv; Grossberg, *supra* note 11, at 19. Of these legal changes that reflected “a desire to conform” the nation’s laws “to the newly adopted principles of republican government,” Tucker cited

the ABOLITION of entails; of the right of *primogeniture*; of the preference heretofore given to the *male* line, in respect to real estates of inheritance; and of *jus accrescendi*, or right of survivorship between *joint-tenants*; the *ascending* quality communicated to real estates; the *heretability* of the *half-blood*; and of *bastards*; the *legitimation* of the latter, in certain cases; and many other instances in which the rules of the COMMON LAW, or the provisions of a statute, are totally changed.

1 TUCKER, BLACKSTONE’S COMMENTARIES, *supra* note 4, at x-xi. Tucker offered a republican rationale for many of these changes. Of the abolition of entail, for example, Tucker explained that

when the revolution took place, a different mode of thinking succeeded; it was found that entails would be the means of accumulating and preserving great estates in certain families, which would, not only introduce all the evils complained of in England, but be utterly incompatible with the genius and spirit of our constitution and government.

3 *id.* at 119-20 ed. n.14. See generally Grossberg, *supra* note 11, at 19-22 (describing the republican focus of Tucker’s *Blackstone*).

16. See Hobson, *supra* note 5, at 1247. According to Michael Grossberg, “Tucker’s *Blackstone* quickly became a staple of the antebellum bar. Law students were weaned on it, established practitioners relied on it.” Grossberg, *supra* note 11, at 21.

17. David Thomas Konig, *St. George Tucker and the Limits of States’ Rights Constitutionalism: Understanding the Federal Compact in the Early Republic*, 47 WM. & MARY L. REV. 1279, 1280 (2006). See generally G. EDWARD WHITE, 3-4 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, at 86-95 (1988).

18. CULLEN, *supra* note 2, at 162-63.

“Tucker was one of the leading legal thinkers of the Founding Era, and his magisterial study of Blackstone’s *Commentaries* was an influential work of constitutional theory that helped shape the terms of constitutional discourse in the early republic.”¹⁹ Because Tucker wrote many of the essays that appeared in his edition of *Blackstone* during the early 1790s, and was quite familiar with the ratification controversy and the contemporary debates over the Bill of Rights, his essays on the Constitution offer a fascinating eighteenth-century perspective on the meaning of our central constitutional texts.²⁰

Tucker’s *Blackstone* would continue to be read and cited by lawyers and jurists as an authoritative treatment of certain aspects of American law until after the Civil War.²¹ Even today, it remains “an indispensable source for understanding American law and the Constitution in their formative era.”²² The United States Supreme Court, for example, has cited Tucker’s *Blackstone* in more than forty cases as authority for eighteenth-century understandings of certain points of law²³—including recent cases addressing state sovereign immunity and the ability of states to impose term limits on members of Congress.²⁴ Tucker’s *Blackstone* was republished in 1969 and again in 1996.²⁵

Tucker’s importance to legal historians, however, goes beyond the publication of his edition of *Blackstone*. During his more than thirty years as a state and federal court judge, Tucker kept copious notes on the hundreds of cases on which he ruled. These include his papers as a state court judge from 1788 to 1811 and as a federal court judge from 1813 to 1824. In total, Tucker preserved his notes,

19. Cornell, *supra* note 12, at 1124.

20. *Id.* at 1125.

21. Cover, *supra* note 6, at 1476.

22. Hobson, *supra* note 5, at 1247.

23. Finkelman & Cobin, *supra* note 4, at v-vi.

24. See, e.g., *Alden v. Maine*, 527 U.S. 706, 778 n.18 (1999) (citing Tucker for the eighteenth-century concern that states have immunity from suit in federal court); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 799, 824 n.34 (1995) (discussing Tucker’s criticism of state laws that add additional qualifications for service in Congress); *Harmelin v. Michigan*, 501 U.S. 957, 977 (1991) (citing Tucker for eighteenth-century understandings of proportionality in punishments).

25. See TUCKER, *BLACKSTONE’S COMMENTARIES*, *supra* note 4. Tucker’s *Blackstone* is also available online at <http://www.heinonline.org/HOL/Index?index=beal/bctv&collection=beal>

legal memoranda, and opinions from nearly eleven hundred cases.²⁶ Given the paucity of officially reported judicial decisions in the late eighteenth and early nineteenth centuries, these papers are valuable sources of judicial decision making in the early republic. In his contribution to this symposium, Charles Hobson explores the significance of these legal papers, describing them as a “legal archive that is virtually unsurpassed as a source for documenting the ‘Americanization’ of the common law as it unfolded in the republican Commonwealth of Virginia in the decades following the American Revolution.”²⁷

Tucker’s views on certain legal issues—as set forth in his edition of *Blackstone*, his judicial opinions, and other writings—are of particular interest to contemporary scholars. The contributors to this symposium explore Tucker’s views on a variety of issues, including the Second Amendment, states’ rights, slavery, judicial review, and the status of women.

Saul Cornell’s article probes Tucker’s views on the Second Amendment—and criticizes the view held by many scholars that Tucker supported an individual rights theory of the Amendment.²⁸ Cornell argues that Tucker’s views on the Second Amendment must be seen in the context of the late-eighteenth-century debate between Federalists and Anti-Federalists over the scope of federal power.²⁹

Tucker’s earliest commentary on the Second Amendment does not support the individual rights view [of the Amendment]. Indeed, in his unpublished law lectures, Tucker not only explicitly described the Second Amendment as a right of the states, but he noted that its inclusion in the Constitution was designed to assuage Anti-Federalists’ fears about the Constitution’s power over the militia.... Tucker’s earliest

26. Hobson, *supra* note 5, at 1250-51.

27. *Id.* at 1276.

28. Cornell, *supra* note 12, at 1125.

29. *Id.* at 1131. Cornell argues, for example, that for Tucker—and Joseph Story—“the Second Amendment had been part of a compromise between Federalists and Anti-Federalists designed to reaffirm state control of the militia and neutralize the fear that the militia might be disarmed.” *Id.* at 1132.

writings about the Second Amendment challenge the often-repeated claim that the states' rights theory of the Second Amendment is a modern invention quite alien to the Founding Era.³⁰

Cornell goes on to note that Tucker's views on the Second Amendment evolved over time. Ultimately, concludes Cornell, "[h]is writings fit neither the modern collective or individual rights models [of the Second Amendment].... [I]n his more mature writings, Tucker approached the right to bear arms as both a right of the states and as a civic right."³¹

The issue of states' rights was clearly central to Tucker's concerns. Robert Cover has appropriately described Tucker as "the first of the states' rights commentators upon the Constitution."³² Although in his article for this symposium David Konig concedes that such a "states' rights" characterization of Tucker is appropriate, he argues that the meaning of "states' rights" for Tucker is far more complex than many scholars have assumed.³³ Konig notes that the conventional portrait of Tucker is "as an unyielding champion of states' rights constitutionalism and a jurist whose writings laid the basis for secession as the remedy for violations of the federal compact."³⁴ Konig disputes that view and offers a revisionist account, arguing that Tucker's

thinking about the federal compact and the delegation of powers to the federal government was more complex and nuanced than the uses to which others put it decades later, and that dissolution of the union—while theoretically available as a right of the states—was so disturbing to him as a practical matter that he made every effort to urge alternative constitutional remedies for abuses of federal authority.³⁵

Kurt Lash, in his contribution to this symposium, probes another aspect of St. George Tucker's thoughts about the relationship

30. *Id.* at 1125.

31. *Id.* at 1126.

32. Cover, *supra* note 6, at 1488.

33. Konig, *supra* note 17, at 1282.

34. *Id.* at 1279.

35. *Id.*

between the states and the federal government in the context of Tucker's rule of strict construction of federal power.³⁶ Lash summarizes this view:

Tucker ... saw the Constitution as a compact entered into by the independent sovereign people of the several states.... As independent sovereigns, any agreements entered into by the states [such as the U.S. Constitution] should be read with the presumption that the states retained their sovereign powers in all matters not expressly delegated to the federal government.³⁷

In taking that view, Tucker relied on the Ninth and Tenth Amendments to the Constitution, which he believed "worked together as co-guardians of a federalism-based concept of popular sovereignty."³⁸ Lash's article on Tucker's rule of strict construction should bring continued attention to the Ninth Amendment and its role in American constitutional jurisprudence.³⁹

Tucker is also of interest as one of the only southerners of his generation to offer a specific plan to eliminate slavery.⁴⁰ In 1796, Tucker wrote *A Dissertation on Slavery; With a Proposal for the Gradual Abolition of It, in the State of Virginia*,⁴¹ which he presented to the state legislature. Michael Kent Curtis and Paul Finkelman, in their contributions to this symposium, examine that plan, which the legislature ignored, and Tucker's views on slavery.⁴²

Though a slaveowner himself, Tucker recognized the horrors of slavery:

Whilst America hath been the land of promise to Europeans, and their descendants, it hath been the vale of death to millions

36. Kurt T. Lash, "Tucker's Rule": *St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343 (2006).

37. *Id.* at 1349-50.

38. *Id.* at 1350.

39. Lash builds on his recent work on the Ninth Amendment. See Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004).

40. Paul Finkelman, *The Dragon St. George Could Not Slay: Tucker's Plan to End Slavery*, 47 WM. & MARY L. REV. 1213, 1216 (2006).

41. CULLEN, *supra* note 2, at 149.

42. Michael Kent Curtis, *St. George Tucker and the Legacy of Slavery*, 47 WM. & MARY L. REV. 1157 (2006); Finkelman, *supra* note 40.

of the wretched sons of Africa.... Whilst we were offering up vows at the shrine of liberty ... we were imposing upon our fellow men, who differ in complexion from us, a *slavery*, ten thousand times more cruel than the utmost extremity of those grievances and oppressions of which we complained. Such are the inconsistencies of human nature⁴³

Tucker went on to claim “how perfectly irreconcilable a state of slavery is to the principles of a democracy, which, form the *basis* and *foundation* of our government.”⁴⁴ Despite these obvious tensions between slavery and the central principles of democratic government, Tucker did not favor immediate emancipation and did not emancipate his own slaves.⁴⁵ Instead, he put forth a gradual plan whereby slavery would not end in its entirety for more than a century and freed slaves would not enjoy the same civil rights as whites.⁴⁶ For Tucker, immediate emancipation and full equality were not practical: “Unfit for their new condition, and unwilling to return to their former laborious course, they would become the caterpillars of the earth, and the tygers [sic] of the human race.”⁴⁷ As Curtis notes, Tucker therefore sought “a middle course between immediate emancipation and full equality on one hand and continuance of chattel slavery on the other.”⁴⁸ Both Curtis and Finkelman probe the inherent contradictions in Tucker’s life and thought on the issue of slavery.

Tucker also played a role in the development of judicial review. In the famous case of *Commonwealth v. Caton*,⁴⁹ in which the Virginia Court of Appeals employed judicial review to strike down a Virginia statute as inconsistent with the state constitution in

43. St. George Tucker, *On the State of Slavery in Virginia*, in 2 TUCKER, BLACKSTONE’S COMMENTARIES, *supra* note 4, ed. app. at 31 [hereinafter Tucker, *State of Slavery*].

44. *Id.* ed. app. at 54.

45. Finkelman, *supra* note 40, at 1221-22, 1236-39.

46. CULLEN, *supra* note 2, at 151.

47. Tucker, *State of Slavery*, *supra* note 43, ed. app. at 70.

48. Curtis, *supra* note 42, at 1166.

49. 8 Va. (4 Call) 5, 8 (1782) (striking down a Virginia statute dealing with the issuance of pardons as inconsistent with the Virginia Constitution, noting that if the “whole legislature ... should attempt to overleap the bounds, prescribed to them by the people [in the constitution], I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and hither, shall you go, but no further”).

1782, Tucker appeared as an amicus, urging the court to exercise judicial review.⁵⁰ In his contribution to this symposium, Charles Hobson discusses Tucker's subsequent exercise of judicial review.⁵¹ In *Kemper v. Hawkins*,⁵² a case before the Virginia General Court in 1793, Tucker and the four other members of the court issued opinions in which they concluded that the court was obligated to exercise judicial review when a state statute violated the Virginia Constitution. Tucker described a constitution as "a rule to all the departments of the government, to the judiciary as well as to the legislature"⁵³—language evocative of that which Chief Justice John Marshall would deploy in his 1803 opinion in *Marbury v. Madison*.⁵⁴ Ironically, as Hobson notes, one of the lawyers who argued *Kemper v. Hawkins* before the General Court was Marshall.⁵⁵ In 1800, in another General Court decision, *Woodson v. Randolph*,⁵⁶ Tucker again exercised judicial review, finding that Congress exceeded its powers under Article I of the U.S. Constitution when it enacted legislation requiring that bonds be issued on stamped paper.⁵⁷ Hence, as other scholars have noted, judicial review did not originate with the Supreme Court's *Marbury* decision.⁵⁸

Finally, Mark McGarvie, in his article for this symposium, examines various cases in which Tucker construed the rights of women to hold and convey property as well as some of Tucker's unpublished writings on the topic.⁵⁹ McGarvie concludes that Tucker's "personal and judicial expressions of women's rights evince

50. CULLEN, *supra* note 2, at 36; Hobson, *supra* note 5, at 1274. For a discussion of Tucker's view on judicial review, see William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 522-29 (1994).

51. Hobson, *supra* note 5, at 1276.

52. 3 Va. (1 Va. Cas.) 20 (1793).

53. Hobson, *supra* note 5, at 1274.

54. 5 U.S. (1 Cranch) 137 (1803).

55. Hobson, *supra* note 5, at 1275.

56. 3 Va. (1 Va. Cas.) 128 (1800).

57. Hobson, *supra* note 5, at 1275-76. Tucker wrote in dissent; a majority of judges held the legislation within Congress's power to lay and collect taxes and to make all laws necessary and proper for exercising its enumerated powers. *Id.*

58. For a summary of the evidence for the acceptance of judicial review prior to *Marbury*, see Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1113-17 (2001).

59. Mark Douglas McGarvie, *Transforming Society Through Law: St. George Tucker, Women's Property Rights, and an Active Republican Judiciary*, 47 WM. & MARY L. REV. 1393 (2006).

an unusually progressive perspective that places him in the vanguard of social and legal reform in the early republic."⁶⁰ In putting forth this thesis, McGarvie challenges the conclusions drawn in earlier works on Tucker⁶¹ and challenges scholars of the early republic "to reconsider the profundity of legal reform actually achieved by the Republican leadership."⁶²

St. George Tucker has been eclipsed in prominence by other nineteenth-century jurists and legal scholars, but his contributions to the development of American law are nevertheless significant. This symposium seeks to renew scholarly interest in one of the more compelling jurists, legal scholars, and legal educators of early America.

60. *Id.* at 1393.

61. *Id.* McGarvie challenges, for example, the views expressed in Christopher Doyle, *Judge St. George Tucker and the Case of Tom v. Roberts: Blunting the Revolution's Radicalism from Virginia's District Courts*, 106 VA. MAG. HIST. & BIOGRAPHY 419 (1998).

62. McGarvie, *supra* note 59, at 1395-96.