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TRANSFORMING SOCIETY THROUGH LAW:  
ST. GEORGE TUCKER, WOMEN'S PROPERTY RIGHTS,  
AND AN ACTIVE REPUBLICAN JUDICIARY

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Few people in America in the 1790s considered women to be equal to men legally and socially. Believers in gender equality were even rarer among elite southern males who lived in a society that relied upon patriarchal authority and prescribed roles, behaviors, and attitudes for its social leaders. In this context, St. George Tucker's personal and judicial expressions of women's rights evince an unusually progressive perspective that places him in the vanguard of social and legal reform in the early republic. This directly rebuts Christopher Doyle's assertions in his examination of Tucker's commitment to gender equality and social reform.<sup>1</sup> It also raises interesting questions regarding limits on judicial reform in the early republic, especially those reforms sought by Republican judges.

In 1794, St. George Tucker had an opportunity, while a judge on the district court for Accomack and Northhampton Counties on the Eastern Shore of Virginia, to address, in *Tom v. Roberts*, an area of law that he perceived to constitute a great injustice.<sup>2</sup> The *Roberts* case concerned the right of a wife, whose loyalist husband had fled Virginia during the American Revolution, to dispose of her property in slaves.<sup>3</sup> Women's property rights had been the focus of extensive

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\* J.D., Ph.D. Teaches at the University of Richmond. Special thanks to Dave Douglas for organizing the symposium on St. George Tucker and inviting me to participate. I also appreciate the help given to me in the research and redrafting of this Article by Brent Tarter, Doug Winiarski, Terri Halperin, John Grigg, Marion Winship, Phillip Schwartz, John Pagan, Carl Tobias, Hamilton Bryson, and the other participants in the symposium.

1. 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) (asserting that the role in which scholars place St. George Tucker as an early national reformer for Jeffersonian Republicans is contradicted by his strong affinity for patriarchal social and political traditions).

2. *Id.* at 426.

3. *Id.* at 425-26.

post-Revolutionary reform in Virginia by 1794, but women had been given no appreciable increase in their rights to hold property in slaves.<sup>4</sup> During the same year that *Roberts* came before him, Tucker wrote and lectured on the inappropriateness of old colonial laws on slavery that restrained liberal reform of property laws in the early republic.<sup>5</sup> His notes provide new insights into his seemingly reactionary decision in *Roberts*.

Women's rights and slavery were integrally related in the early republic. An expansion of women's rights challenged the white male control of southern society that justified and perpetuated slavery.<sup>6</sup> In addition, perceptions of the black man as an untamed sexual predator served to reinforce the societal need for slave control and male protection of female virtue.<sup>7</sup> Generations of Americans, beginning with his contemporaries, have lauded Tucker for his outspoken condemnation of slavery. Tucker has been credited for his assertiveness on this issue while Thomas Jefferson has been condemned for his laxity,<sup>8</sup> despite the fact that both men proposed similar plans for eliminating the institution.<sup>9</sup> Yet, in discussing slaves, Tucker exhibits a racist attitude against which Jefferson's "suspicion ... hazarded with great diffidence" that blacks were "inferior to whites in the endowments of both mind and body" appears mild.<sup>10</sup>

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4. *Id.* at 434-38.

5. See 1 St. George Tucker, Notes on Slavery in Virginia as Relating to a Species of Property, nbk. 8, at 13-19 (1794) [hereinafter Tucker, *Species of Property*] (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary).

6. See STEPHANIE MCCURRY, *MASTERS OF SMALL WORLDS: YEOMAN HOUSEHOLDS, GENDER RELATIONS, AND THE POLITICAL CULTURE OF THE ANTEBELLUM SOUTH CAROLINA LOW COUNTRY* 213-25 (1995); EDMUND S. MORGAN, *AMERICAN SLAVERY—AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 164-69, 304-05 (1975).

7. See JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 136-45 (1972); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 28-40 (1968).

8. See Mark D. McGarvie, "In Perfect Accordance with His Character": Thomas Jefferson, Slavery, and the Law, 95 IND. MAG. HIST. 142, 157 (1999).

9. See *id.* at 163; see also ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA (Negro Univs. Press 1970) (1796) [hereinafter TUCKER, DISSERTATION ON SLAVERY]. Tucker and Jefferson independently proposed the public purchase of slaves to protect slaveholders' property interests and removal of the slaves to Africa.

10. McGarvie, *supra* note 8, at 157 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF

In one of his many writings on slavery, however, Tucker asserts an evil associated with the institution that escaped the notice of others, including other attorneys. In a notebook containing teaching notes written in 1794, Tucker argued that the peculiar laws through which people were regarded as property impeded the realization of liberal Republican law reform, especially the ability of women to hold and inherit property.<sup>11</sup> Tucker referred to a law of 1727 that confirmed the status of slaves as real property and pronounced that the "right of a Feme covert to a slave shall vest in the husband absolutely; that of a feme sole, on her marriage."<sup>12</sup> He proceeded to criticize this law as absurdly denying women their equal rights:

The laws respecting them [slaves] are not always founded in perfect Justice: A man marries a woman possessed of slaves in her own Right; they become *his* instantly upon the marriage; they may be taken in exemption to satisfy *his* previous Debts; if he dies in the Lifetime of his wife, she shall have the *use of one third* part of her *own* slaves, *only*, during *her* Life. [I]f he is indebted, she shall have the use *only* of one third of the *surplus* of them, *if there be any*, after payment of *his* Debt. She should not presume to move them out of the State under penalty of forfeiting her whole Dower. It is easy to perceive that these provisions were not enacted by a female Legislature.<sup>13</sup>

In this writing, Tucker evinces a remarkable attitude toward women's rights and compels all students of the early republic to

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VIRGINIA 150 (Frank Shuffeltan ed., Penguin Books 1999) (1787)). Tucker wrote that freed blacks "[are] not remarkable for their Industry.... They appear to have no ambition for civil rights." 1 St. George Tucker, Notes on the State of Slavery in Virginia, nbk. 7, at 100 (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary). Of his plan for removing black people from America, Tucker states:

This plan may savour strongly of prejudice[]; I confess I am not wholly exempt from its influences; I wish to discourage the residence of negroes [and] mulattoes among us: by denying them the most valuable privileges which civil government affords, I would wish them to seek another climate more favourable to their rights.

*Id.* at 102; see also TUCKER, DISSERTATION ON SLAVERY, *supra* note 9, at 92-94.

11. Tucker, Species of Property, *supra* note 5, at 13-19.

12. *Id.* at 15. A feme sole is an unmarried woman whereas a feme covert is a married woman. Under the law of 1727, the need for her husband's consent limited a feme covert's ability to convey property, and in some instances, even to hold it. *Id.*

13. *Id.* at 19.

reconsider the profundity of the legal reform achieved by the Republican leadership. Writing 130 years before women were given the right to vote, Tucker certainly entertains the idea of female lawmakers and castigates the legislature for making laws that are unjust solely because they are biased to favor men.<sup>14</sup> While liberal reforms were being made to Virginia's property laws by both legislative and judicial action, the defensiveness that already existed around the issue of slavery precluded liberal reform from addressing that institution.<sup>15</sup> Virginians could conceive of women owning and inheriting property, so long as that property did not take the form of slaves. In this context, Tucker condemned the institution for impeding the progress of the legal reform that was necessary to create a more liberal society.<sup>16</sup>

In 1999, Michael Grossberg published an essay in which he described how Jeffersonian Republicans transformed Virginia law after the Revolution to embody revolutionary ideals.<sup>17</sup> He argues that reforming the inheritance law constituted one of the greatest successes in bringing about radical change in American society.<sup>18</sup> Laws of 1776 and 1785 abolished entail and primogeniture, opening

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14. *Id.* This writing is consistent with Tucker's call for suffrage rights for unmarried women who pay taxes. See Edward Christian, *Note, in* 2 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 445 (St. George Tucker ed., Lawbook Exch. 1996) (1803). Elsewhere, Tucker is quoted: "I fear there is little reason for a compliment to our laws for their respect and favour to the female sex." LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 137 (1980).

15. Tucker, *Species of Property*, *supra* note 5, at 19 (indicating that the institution of slavery was more sacred than life or liberty).

16. *Id.* (attacking the institution of slavery and the right of men to hold slaves as property).

17. Michael Grossberg, *Citizens and Families: A Jeffersonian Vision of Domestic Relations and Generational Change*, in THOMAS JEFFERSON AND THE EDUCATION OF A CITIZEN 3, 3-27 (James Gilreath ed., 1999) [hereinafter Grossberg, *Citizens and Families*]; see also MARK DOUGLAS MCGARVIE, *ONE NATION UNDER LAW: AMERICA'S EARLY NATIONAL STRUGGLES TO SEPARATE CHURCH AND STATE* 74-76 (2004). The common law's embrace of liberalism in the early republic, expressed through the will theory of contract law, is a consistent theme throughout Grossberg's work. See, e.g., MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA* 20-24 (1985) [hereinafter GROSSBERG, *GOVERNING THE HEARTH*] (noting that nineteenth-century contract law succumbed to laissez-faire economics and liberal politics, which led to the creation of a will theory of contracts).

18. Grossberg, *Citizens and Families*, *supra* note 17, at 3-4, 17.

up land for use by its present holders.<sup>19</sup> This reform certainly reflects the early republic's commitment to encouraging economic development. The abolition of entail benefited creditors and debtors by facilitating borrowing and debt collection.<sup>20</sup> Land became an economic resource that was useful in commerce.<sup>21</sup> To ideologues like Jefferson, however, the essence of this reform was the recognition of all children, male and female, as legal equals. Recognition of the wife or widow as a legal individual, who should not be dependent upon or a burden to her children, but who should be able to hold and convey the property of her deceased husband in her own right, logically followed.<sup>22</sup>

St. George Tucker, an ardent Republican devoted to Jefferson, addressed the ideology at the root of these legal changes and professed the importance of the law of 1776 in his writing, teaching, and judicial decisionmaking.<sup>23</sup> He presents compelling evidence of how broadly Jeffersonian reformers in the post-Revolutionary Era defined the ideal of legal equality and conceived of it as a transformative device in shaping economic, social, and sexual relationships in the new republic.<sup>24</sup> Tucker considered entail to be "the offspring of feudal barbarism and prejudice"<sup>25</sup>—a system of thought that was wiped out "when the Revolution took place [and] a different mode of thinking succeeded."<sup>26</sup> He referred to post-Revolutionary law as "our" law and contrasted it with earlier colonial laws: "whereas the rule of our law, comprehends the whole of a man's children, or other descendants without regard to sex or

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19. *Id.* at 11-13.

20. *Id.* at 11.

21. *Id.* at 14-15.

22. *Id.* at 10, 12-14.

23. *Id.* at 19-23.

24. *Id.*

25. St. George Tucker, *Discourse Concerning the Several Acts Directing the Course of Descents, in Virginia*, in 3 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 ed. app. 1, 19 (St. George Tucker ed., Lawbook Exch. 1996) (1803) [hereinafter Tucker, *Descents in Virginia*].

26. 3 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, *supra* note 25, at 119 ed. n.14 [hereinafter TUCKER, BLACKSTONE'S COMMENTARIES].

primogeniture."<sup>27</sup> In teaching about the meaning of this change, he used an example. In the early republic in Virginia, if a man died intestate with a son, daughter, and grandchildren by both the son and the daughter, all would inherit without sexual distinction, whereas under colonial law, only the son or his issue would inherit.<sup>28</sup> Yet, Tucker's record as a judge evinces a position that was just as important to Tucker and which mitigated his ability to act on his own beliefs—the Republican perspective that judges should not legislate from the bench.<sup>29</sup>

Statutory reform in post-Revolutionary Virginia encountered limitations imposed by strong public opinion rooted in acceptance of an established slaveholding hierarchy.<sup>30</sup> Certainly, single women in turn-of-the-century Virginia were free to hold slaves, but married women were not.<sup>31</sup> This legal distinction provides evidence of the South's retention of premodern patriarchal ideas that served to legitimize the institution of slavery and to subordinate women to their husband's, father's, or even son's, control. Holly Brewer, discussing the law of 1727, asserts that entailing slaves to land may have mitigated some of the growing denunciations of slavery, for "if slaves could not be separated from an estate, they need not fear what many considered the worst part of slavery—sale."<sup>32</sup> She also noted that

if slaves were personal property, they would be divided among the children .... The heir then would have to pay his younger siblings for their value instead of being able to protect and help them while retaining both land and slaves as rightful head of the family.... [A]n explicit part of the justification of entail—of both slaves and land—was the assumption that the elder son was head over his siblings [as well as the protector of the mother].<sup>33</sup>

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27. Tucker, *Descents in Virginia*, *supra* note 25, ed. app. at 20.

28. *Id.*

29. See *infra* notes 119-31 and accompanying text.

30. Holly Brewer, *Entailing Aristocracy in Colonial Virginia: "Ancient Feudal Restraints" and Revolutionary Reform*, 54 WM. & MARY Q. 307, 341-43 (1997).

31. See *supra* note 4 and accompanying text.

32. Brewer, *supra* note 30, at 339-40.

33. *Id.* at 340.

This paternalism conflicted with the prevailing understanding in the early republic that individuals are equal, free, and autonomous actors—an idea ultimately expressed in the widespread adoption of contract law as a means of defining social relationships. Brewer, in fact, contends that prerevolutionary legislators intended to “introduce into Virginia a type of feudalism” and that many Virginia planters still preferred an old world societal model to the individualistic reforms of the early republic.<sup>34</sup>

Other legal historians have noted how Virginia’s judges hindered the commonwealth’s full adoption of contract law principles. F. Thornton Miller argues that the South resented and fought the imposition of contract law as potentially destructive of its premodern economy.<sup>35</sup> Contract law gave the courts power to overcome provincial considerations in asserting human equality and property rights, implicitly including the right to sell one’s own labor.<sup>36</sup> In the North, it served as a major force in breaking down the communitarianism of colonial society and imposing a rights-based individualism in the early republic.<sup>37</sup> Echoing Miller, Timothy Huebner notes that well into the early republic “the principle of community interest informed southern judicial thinking about law and the economy.”<sup>38</sup> For example, as late as the early 1800s in Virginia, Judge Spencer Roane stated that a corporation had no reason to exist if its purpose was “merely private or selfish, if it [was] detrimental to, or not promotive of, the public good.”<sup>39</sup> In fighting for a greater appreciation of the property rights for Virginia’s women based on contract law principles, Tucker confronted an antagonistic judiciary and a society fearful of the full repercussions of adopting Jeffersonian liberalism.

Colonial laws generally affirmed social hierarchies and their concomitant imposition of responsibilities and obligations.<sup>40</sup> Legal

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34. *Id.* at 339-40.

35. F. THORNTON MILLER, JURIES AND JUDGES VERSUS THE LAW: VIRGINIA’S PROVINCIAL LEGAL PERSPECTIVE, 1738-1828, at 6-7, 12-33, 119 (1994).

36. *See id.* at 119.

37. *See id.*

38. TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890, at 5 (1999).

39. *Id.* at 5-6 (quoting *Currie’s Adm’rs v. Mut. Assurance Soc’y*, 14 Va. (4 Hen. & M) 315, 347-48 (1809) (Roane, J.)).

40. *See Doyle, supra* note 1, at 424.



prescriptions combined with moral duties to compel social "betters" to provide care for the needy, while simultaneously reinforcing the decisionmaking authority to which their "inferiors" deferred.<sup>41</sup> This paternalism, specifically in regard to society's protection of women, was codified in the property law of Virginia in 1674.<sup>42</sup> A married woman's property could not be conveyed unless she and her husband executed a joint deed, and the wife, in a private examination in court, acknowledged that she freely desired the transfer.<sup>43</sup> Into the early nineteenth century, Virginia's laws on conveyance evinced the persistence of the notion that women must be protected from harm, thereby subordinating them to the protection and authority of male judges. In 1797, Chief Justice Pendleton of the Virginia Supreme Court found that "[a] feme covert can't pass her legal title without a deed, accompanied by a privy examination, to evince that she does not do it under her husband's influence."<sup>44</sup> In 1810, the fact that a conveyance was supported only by a deed executed by a deceased woman's husband, with the record bereft of any evidence of her private examination, formed a sufficient basis for the court to void the transaction.<sup>45</sup> The Court held that the woman "must be presumed to have been under the coercion of her husband, without any direct evidence to the contrary."<sup>46</sup>

To some degree, Virginia's legal protection of women through the restriction of conveyances must be seen as anomalous. Marylynn Salmon finds that the early republic generally produced "an increase in women's autonomy with regard to property."<sup>47</sup> An

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41. MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 18 (1986). Salmon relies upon 2 *THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619*, at 317 (William Waller Hening ed., 1969) [hereinafter *STATUTES AT LARGE*]. A recent work disputes the generally held assertion that women in colonial Virginia were subordinate to men, finding that many women exerted their agency in running businesses, owning property, and managing their own lives, often with support from courts of equity, which mitigated the harshness of colonial laws. LINDA L. STURTZ, *WITHIN HER POWER: PROPRTIED WOMEN IN COLONIAL VIRGINIA* (2002).

42. SALMON, *supra* note 41, at 18.

43. *Id.* at 18-19.

44. *Id.* at 21 (quoting *Countz v. Geiger*, 5 Va. (1 Call) 191, 193 (1797)). The 1674 enactment in Virginia was a copy of a sixteenth-century English statute. *Id.* at 18.

45. *Id.* at 20-21.

46. *Id.* (quoting *Harvey v. Pecks*, 15 Va. (1 Munf.) 518, 524, 528 (1810)).

47. *Id.* at xvi.

individualistic and rights-oriented ideology fueled the American Revolution, and this same ideological perspective influenced the laws and institutions that the new nation created. William Nelson asserts that, "[a]lthough little legal change occurred during the war itself, the attempts of the revolutionary generation to explain and justify the war and its political results set loose new intellectual and social currents which ultimately transformed the legal and social structure of the new state."<sup>48</sup> Salmon identifies three specific changes the Revolution produced in the property rights of women: two regarding inheritance and one regarding divorce.<sup>49</sup>

Perhaps no personal legal matter better illustrates the change in values in late-eighteenth-century America than does marriage. First, the decision to marry became less a concern of family economics and more a consideration of personal desire.<sup>50</sup> Second, during the Revolutionary Era and the early republic, laws reflected a greater liberality to granting divorces.<sup>51</sup> Marriage remained a sacred union, but this understanding was tempered by protecting, in the words of a 1775 magazine article, the "reasonable liberty" of the two parties to the marriage "contract."<sup>52</sup> A marriage contract, like all other contracts, had to be a voluntary agreement between two equal parties. Michael Grossberg, explaining the Jeffersonian transformation of family law, refers to Sir Henry Maine's theory of societal progress, which predicts that society moves from being status based to contract based. He quotes Maine on this point, saying that, "the individual was 'steadily being substituted for the family as the unit of which civil laws take account.'"<sup>53</sup>

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48. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 5 (1975).

49. SALMON, *supra* note 41, at xv.

50. GROSSBERG, *GOVERNING THE HEARTH*, *supra* note 17, at 5-6.

51. See generally Nancy Cott, *Divorce and the Changing Status of Women in Eighteenth-Century America*, in *THE AMERICAN FAMILY IN SOCIAL-HISTORICAL PERSPECTIVE* 115 (Michael Gordon ed., 2d ed. 1978) (detailing the expanded use of divorce in Massachusetts).

52. *One Cause of Uneasiness in the Married State*, 1 PA. MAG. 602, 602-04 (1775).

53. Grossberg, *Citizens and Families*, *supra* note 17, at 17 (quoting SIR HENRY MAINE, *ANCIENT LAW* 140 (J.H. Dent & Sons 1972) (1917)); see also SALMON, *supra* note 41, at 58-80 (describing the early development of American divorce law). The Virginia legislature approved a divorce in 1803. See RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 157 (1988) (stating that "the first divorce, by an act of the legislature, was decreed in 1803"). But see THOMAS E. BUCKLEY, *THE GREAT CATASTROPHE OF MY LIFE: DIVORCE IN THE OLD DOMINION* (2002) (arguing that divorce in antebellum Virginia continued

The revolutionary era's abandonment of primogeniture allowed daughters to inherit real and personal property, while the reforms to intestacy laws recognized the rights of widows and widowers as nearly equal.<sup>54</sup> Certainly, these changes support Grossberg's assertion that revolutionary-era Americans defined people as individuals, rather than by their roles in a family. Yet, they also indicate the attempt by Americans of this era to break down social hierarchies and eliminate artificial preferences, such as aristocracy, monopolies, and established churches. An egalitarian spirit infused much of the legal reform of the early republic. In the process of recognizing a greater equality of rights, Americans also eliminated the social duties and expectations attached to hierarchically defined status. Each individual became a free actor, able to make decisions based on her or his own self-interest. In according greater respect for the rights of daughters and widows, legal reform limited the impositions upon sons to care for their sisters, mothers, or stepmothers.<sup>55</sup>

Tucker felt that Virginia's laws on slavery frustrated this type of legal reform, that is, legal reform rooted in Enlightenment conceptions of equal rights. Tucker wrote numerous essays on slavery, testaments to his interest in the institution's history. He wrote about the inconsistency of retaining slavery in the age of revolution, its effects on Virginia society, and the nature of the slaves themselves. In his edited version of Blackstone's Commentaries, which were revised to be useful to American law practitioners, Tucker addressed the legal concern at the root of the injustice he wrote about in 1794.<sup>56</sup>

Tucker begins his essay on the laws concerning slaves as property in Virginia by distinguishing between "real" and "personal" property.

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to be viewed as a major personal tragedy).

54. SALMON, *supra* note 41, at xvi.

55. Despite the Jeffersonian reforms, Virginia was not a leader in asserting women's property rights. In fact, Virginia did not pass a married women's property act until 1877. See Suzanne D. Lebsack, *Radical Reconstruction and the Property Rights of Southern Women*, 43 J. S. HIST. 195, 197 (1977).

56. St. George Tucker, *Summary View of the Laws Concerning Slaves, as Property in Virginia*, in 3 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 26, ed. app. at 73-97 [hereinafter Tucker, *Slaves as Property*].

The primary object of real property is land; whatever is permanently annexed to, or connected with it, or arises out of it, or issues from it, are considered as secondary objects of the same nature; because whilst they remain in such a state of connexion with it, they are regarded as a part of the land itself; but when severed from it, they cease to be considered as the objects of real property.

The primary, and almost universal objects of personal property are all things of a moveable and transitory nature; which may attend the person of the owner wherever he goes.<sup>57</sup>

He then asserts that the essential difference between real and personal property is “founded in the nature of the objects themselves.”<sup>58</sup> Yet, what he refers to as the “*incidents* to real and personal property”—those items that are annexed or connected to the land—have their status determined by “*juris positivi*”—positive law—“as good policy may require.”<sup>59</sup> This argument forms the basis of Virginia’s property laws on slavery, as Tucker demonstrates:

Thus an estate in lands, if limited for any number of years, even a thousand, is regarded as a chattel; whilst an estate in the precarious life of a villein [peasant tied to the land, similar to a serf] might be an inheritance in fee simple, and as such, considered as a real estate.... These instances demonstrate that the incidents to real and personal property, respectively, are merely creatures of the *juris positivi*, or ordinary rules of law concerning them; and may be altered and changed to suit the circumstances, convenience, interest and advantages of society.... Thus in England it might be for the benefit of commerce to consider a lease for a thousand years, in lands, as a mere chattel; and in Virginia it might have been equally for the advantage of agriculture to consider the slave who cultivated the land as real estate. And probably the rule of law might be applied with as little difficulty in the one case, as in the other.<sup>60</sup>

The distinction between real and personal property was significant only in relation to other laws. Real property required written

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57. *Id.* ed. app. at 73.

58. *Id.*

59. *Id.* ed. app. at 73-74.

60. *Id.* ed. app. at 74.

documentation to sell or otherwise alienate, could be more easily protected from creditors, and was subject to special treatment under inheritance laws. For instance, Virginia's 1785 Statute of Descents and Distributions provided that an intestate's real property descended to his heirs, while his next of kin inherited his personal property.<sup>61</sup> A wife's dower interest was a lifetime estate in real property.<sup>62</sup> Accordingly, defining slaves as real, rather than personal, property influenced a significant number of business transactions and personal relationships, including those between husband and wife, father and daughter, and brother and sister.

In 1705, the Virginia colony enacted a law that provided that "*all* negroe, mulattoe, and Indian slaves ... within this dominion shall be held, taken, and adjudged to be real estate, and not chattels, and shall descend unto the heirs and widows of persons departing this life according to the manner and custom of lands of inheritance held in fee simple."<sup>63</sup> A subsequent enactment provided that slaves tending a crop when their intestate owner died must continue in that labor until the following December 25, when harvesting presumably would have been completed.<sup>64</sup> This law appears to address slaves working for tenant farmers, or those loaned or leased by their owners. It did little to affect the property status of slaves, other than to raise a possible question regarding those slaves who did not work their owner's land: could they ever be considered personal property? A law enacted in 1727 addressed this issue in considerable detail. According to Tucker, the law declared that the 1705 legislation "had been found by experience very beneficial to the colony, yet, that mischiefs had arisen from the various constructions, and contrary judgments and opinions given upon it."<sup>65</sup> The legislation, then, in pertinent part, proceeded to clarify the rights of slaveowners to dispose of their slaves through sale, bequest, gift, or other means, as if they were personal property, reserving the status of slaves as real property to certain situations.<sup>66</sup> Tucker understood

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61. 12 STATUTES AT LARGE, *supra* note 41, at 138-40.

62. *Id.* at 140.

63. Tucker, *Slaves as Property*, *supra* note 56, ed. app. at 74-75 (quoting Act of 1705, ch. 3).

64. *Id.* ed. app. at 81 (quoting Act of 1711, ch. 2, §§ 17-18).

65. *Id.* ed. app. at 82 (discussing the Act of 1727, ch. 4).

66. *Id.* ed. app. at 83-85 (quoting Act of 1727, ch. 4). Relying upon the Act of 1727, Tucker articulates the situations in which slaves are to be treated or regarded as real property:

the law to create slaves as “a kind of special *assets*, which may not be touched until all *personal assets* are completely exhausted.”<sup>67</sup>

Obviously, Virginians struggled to define slaves as property at least as early as 1727. Yet, their concerns focused less on the conception of human beings as property than on the ramifications of this conception on various aspects of Virginia society. Colonial-era legislatures struggled with this problem, and the lawmakers and judges of the early republic inherited it. The effects of colonial-era

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SECT. 5. Infants above the age of eighteen years may bequeath any slave whereof they may be possessed, by will in writing.

SECT. 6. Declares that slaves shall not be liable to forfeiture except in such cases, where lands, would be liable thereto.

SECT. 7. And that *no executor or administrator hath, or shall have*, any power to sell or dispose of any slave or slaves, of his testator, or intestate, except for the payment of his just debts; and then only, where there is not sufficient of the personal estate to satisfy and pay such debts; and, in that case, it shall and may be lawful for the executor or administrator to sell and dispose of such slave or slaves, as shall be sufficient to raise so much money as the *personal estate falls short* of the payment of the debts.

SECT. 8. A mother dying intestate and leaving slaves other than of her dower, the heir shall be accountable to the younger children for their proportion of the value....

SECT. 11. And whereas the true design of the said act, and the policy thereof was, and is to preserve slaves for the use and benefit of such persons to whom lands and tenements shall descend, be given, or devised for the better improvement of the same, which cannot be done according to the custom of the colony, without slaves, and therefore it may be very advantageous to estates to establish a method for settling slaves and their *increase*, so as they may go and descend with lands and tenements: to which end,

SECT. 12. It is further enacted that any person may by deed or will annex slaves and their increase to lands and tenements in fee tail, or for life or lives; and thereupon, the slaves so annexed shall descend, pass and go, as a part of the freehold and inheritance, in possession, reversion, and remainder, with such lands and tenements; And any slaves settled, conveyed or devised with the same limitations, and in the same deed or will with lands, shall be considered as annexed to, and shall descend, pass and go *therewith*, from time to time, as before mentioned.

SECT. 13. Authorizes any tenant in tail of lands to annex slaves to his estate therein, which shall descend under the like limitations, as if such settlement had been made when the estate was first created.

SECT. 14 and 15. Provide that any slaves so annexed as aforesaid, and their increase shall, notwithstanding, “be liable to be taken in execution, and sold, for the satisfying and paying the just debts *of the tenant in tail for the time being*; and such sale shall be good and effectual against him, or her, and his or her issue, and all other persons whatsoever, claiming under such settlement.”

*Id.*

67. *Id.* ed. app. at 85.

laws addressing slavery proved particularly troubling to Tucker, as he sought to reform post-Revolutionary Virginia into a liberal republic. Mark Tushnet contends that, despite desires to do so, the South was unable to keep its slavery laws separate from its other laws.<sup>68</sup> The premises upon which slave laws and non-slave laws rested were so inconsistent that the ultimate integration of slave laws into the jurisprudence of the South produced a distinctive form of American law. As American law became more rational and objective, endorsing a rights-oriented individualism, slave laws were rooted in sentiment and subjectivity, and they protected a paternalistic communitarianism. American law generally protected rights and liberties, whereas slave laws did not. Instead, slave laws reinforced old ideas of deference, hierarchy, and social duty. Slave laws subordinated individual freedoms and property rights to colonial-era conceptions of social order.<sup>69</sup> Southern women could not help but be restrained by these legal constructions, their rights and liberties subordinated to the prevailing standards of southern society.

The provisions of the Act of 1727 that provoked Tucker's ire provide excellent support for both Tushnet's argument and the effect of slave laws upon women. Section 4 of the Act of 1727 provides:

And where any slave hath been, or shall be conveyed, given, or bequeathed, or hath, or shall *descend* to any feme covert, the absolute right, property and interest of such slave is thereby vested, and shall accrue to, and be vested in, the husband of such feme covert; and where any feme sole, is or shall be possessed of any slave, as of her own property, the same shall accrue to, and be absolutely vested in the husband of such feme, when she shall marry.<sup>70</sup>

By this provision, any single woman who owned slaves prior to marriage lost her interest in those slaves to her husband upon marriage. Subsequent sections limited a wife's interest in her slaves to her dower interest, allowing the sale of the slaves, even those

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68. See generally MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981).

69. *Id.* at 37, 157.

70. Tucker, *Slaves as Property*, *supra* note 56, ed. app. at 83 (quoting Act of 1727, ch. 4, § 4).

affixed to the land, to satisfy her husband's debts.<sup>71</sup> Lastly, the Act provided that a widow who believed herself aggrieved by the effects of her deceased husband's will that grants land and slaves to an heir—usually a male son—could choose a life interest in the dower interest in that land and those slaves.<sup>72</sup> This allowed the widow, in Tucker's words, only to "enjoy [such slaves] during her natural life," but not to sell or otherwise alienate the property of the designated heir.<sup>73</sup>

Liberal changes to Virginia's laws on inheritance and marriage, which generally granted greater freedoms and property rights to women, were limited, and in some instances completely overridden, by the Commonwealth's laws on slavery. The prioritization of social order, stemming from concerns over slavery and its threats of violence and racial mixing, compelled the retention of slave laws clearly at odds with the legal reforms of the early republic. In writing his version of Blackstone's *Commentaries*, Tucker granted himself the discretion to be quite critical of Virginia for retaining these old laws:

[I]t seems impossible to assign any good reason, why the claim of a woman, whose whole property hath probably vested in her husband, and which may constitute the whole of the property which he leaves, should be postponed to the claims of other creditors, founded upon considerations neither more strictly legal, nor equitable. This construction which I have given to the law, has, I believe, been generally rejected; though I cannot but think that it has been rejected without reason. For, in addition to what I have just advanced, it may be urged, that the construction which I give to the act may be reconciled to the justice due to legal creditors, as well as with justice to the widow, who is in a moral light, a creditor of an higher grade, and certainly may be regarded as a creditor for a valuable consideration, both at law, and in equity. For, as the right of dower does not extend beyond the life of the widow, the slaves which survive her might, after her death, and after satisfying her just claims, be applied to the payment of ordinary creditors, for their just debts; whereas if the ordinary creditor's claim be preferred to that of the widow, the

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71. *Id.* ed. app. at 83-85 (quoting Act of 1727, ch. 4, §§ 4, 7, 17-19).

72. *Id.* ed. app. at 85 (quoting Act of 1727, ch. 4, §§ 20-21).

73. *Id.*



latter will be forever barred, and precluded from any satisfaction for her claims, however just and equitable.<sup>74</sup>

What "claims" might a widow have to her deceased husband's estate? Tucker clearly endorsed the new conception of marriage as a legal contract, to which a woman's dower rights serve as consideration.<sup>75</sup>

Virginia further amended its slave laws in 1730. Tucker found that "[t]his act is but of little importance, except [as evidence of] ... the frequent doubts and difficulties which occurred in the construction of the former acts."<sup>76</sup> The legislature made other attempts to clarify slaves as a form of property in 1744, 1748, and 1752.<sup>77</sup> The artificial and contrived definitions of slaves as a form of property proved problematic by the mid-eighteenth century, and Tucker found the problems only to increase over time.<sup>78</sup>

The American Revolution and the succeeding years did not produce liberal reform in Virginia's slave laws. In fact, Tucker describes the Act of October 1776 as asserting that husbands of women who possessed only interests as "tenants in tail" in lands to which slaves were annexed would have "an absolute estate in such slaves, independent of the former right of the wife."<sup>79</sup> Legislative enactments in 1792 and 1794 declared slaves to be both "personal estate"<sup>80</sup> and "a kind of special assets," both undoing and confirming the Act of 1727 at once.<sup>81</sup> The law addressing wills that was enacted in 1794 gave "to the widows of persons dying intestate, a life estate only in the third part of the surplus of the slaves of their husbands, after funeral debts and just expenses paid."<sup>82</sup> It also "still impose[d] the forfeiture of all her dower in her husband's estate, if any widow

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74. *Id.* ed. app. at 86-87.

75. *Id.* ed. app. at 86. Tucker notes that "dower [is] both a legal and an equitable right, founded upon a valuable consideration in law, namely, the marriage, and often upon a further valuable consideration, in fact, namely, the portion of the wife." *Id.*

76. *Id.* ed. app. at 89.

77. *Id.* ed. app. at 89-92.

78. *Id.* ed. app. at 89-90.

79. *Id.* ed. app. at 92.

80. *Id.*

81. *Id.*

82. *Id.*

remove[d], or permit[ed] [the removal of slaves] out of the common-wealth."<sup>83</sup>

The Virginia legislature's complicated and often confusing attempts to define slaves as a form of property troubled Tucker, and historians even today struggle to understand why generations of legislators throughout the colonial and Republican eras went through such elaborate legal machinations. Judicial interpretations of the various laws provide minimal clarification. In *Walden v. Payne*, Judge Lyons noted that "[s]laves from their nature are chattels.... The law made them real estate only in particular cases, such as descents, [and others]."<sup>84</sup> Expressing the benevolent paternalism used to justify slavery in the nineteenth-century South, Judge Lyons found that the rationale for such laws was to "protect[] slaves from distress, or sale, where there is a sufficiency of other personal assets to pay debts or levies."<sup>85</sup>

In writing his edition of Blackstone's *Commentaries*, Tucker almost appears to surrender in his attempts to make sense of the legislation—a serious and troubling position for a judge and professor of law to take.

From the preceding abstract of the various laws relating to slaves as property, it is difficult to assign to them any determinate place, either under the head of real, or personal property. The exceptions contained in the acts declaring them to be real estate, sufficiently demonstrate that the legislature were [sic] aware of the difficulty of imparting to them all the properties of real estate; and the provisions still retained in the act which declares them to be, *now*, personal estate, equally shew the aversion of the legislature to restore to them, completely, all the properties and incidents of personal chattels.<sup>86</sup>

Of particular interest is the fact that, despite the complicated statutory history, which defined slaves first as real estate in 1705 and later as a type of chattel in 1792, the one constant is the limitation upon married or widowed women to own slaves as property. Tucker notes this fact and the proscriptions on a

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83. *Id.*

84. *Walden v. Payne*, 2 Va. (2 Wash.) 1, 7 (1794).

85. *Id.*

86. Tucker, *Slaves of Property*, *supra* note 56, ed. app. at 96-97.

woman moving slaves from Virginia in his version of Blackstone's *Commentaries*.<sup>87</sup> In this more formal writing, he softens the condemnations that he freely asserted in his notebook in 1794, asserting only that "[i]t seems difficult to reconcile these provisions to the principle of mutual and reciprocal justice."<sup>88</sup> Yet, in both writings, Tucker asserts that justice required treating men and women equally with regard to their property rights, even if it did not require abolition. One of Tucker's primary criticisms of the slave code was its perpetuation of gender inequality within white society.

St. George Tucker's domestic life appears relatively consistent with his progressive attitude regarding the legal rights of women. The American Revolution constituted not only a change in government, but also the embrace of a cultural value system premised upon Enlightenment ideals. Tucker's republicanism embodied a philosophical approach to life, of which representative government was one part and domestic relations another.

In the Tucker household, surprisingly little distinction was made between male and female children. Republican parenting emphasized individuals within the family and promoted egalitarianism. Nathaniel Beverley Tucker said of his childhood in the Tucker household: "I was brought up among people who despised kings ... and disclaimed authority of all sorts except the authority of laws."<sup>89</sup> During the revolutionary era and the early republic, the nuclear family provided the greatest role in childrearing, as children's ties to more distant relatives and the community lessened.<sup>90</sup> Parenting emphasized affection over authority, and mothers and fathers worked together as partners in raising virtuous Republican citizens.<sup>91</sup> Linda Kerber writes that motherhood achieved a new stature during this period, "almost as if it were a fourth branch of

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87. *Id.* ed. app. at 97.

88. *Id.*

89. Linda Clark Wentworth, *Childrearing in the Early Chesapeake: The Tucker Family and the Rise of Republican Parenthood* 51 (1984) (unpublished M.A. thesis, The College of William and Mary) (on file with Earl Gregg Swem Library, The College of William and Mary).

90. *Id.* at 30.

91. *Id.* at vi, 26. Tucker boasted that not only had he never used a rod on his children, but he had never even given them a slap with his hand. Letter from St. George Tucker to Elizabeth Tucker Coalter (Aug. 12, 1825) (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary).

government.”<sup>92</sup> Tucker’s first wife, Frances, brought three sons to the marriage, all of whom Tucker embraced as his own.<sup>93</sup> Together they added more children to the family.<sup>94</sup> Frances regularly communicated with her husband while he was away from home, updating him on the children’s learning, play, values, and disciplinary problems.<sup>95</sup> Her desire to write letters may have been one reason why Tucker’s daughter, Fanny, was instructed to do the same.<sup>96</sup> Letter writing constituted an important part of a young man’s education and a gentleman’s behavior.<sup>97</sup> Engaging in an active correspondence was more unusual for women in the South, even among the gentry.<sup>98</sup> Tucker, in part because of his frequent absences from the home, deferred to Frances in most matters concerning the plantation, and in particular, the slaves.<sup>99</sup> In 1785, Frances’s brother noted the unusual need to consult with the woman of the house to buy some slaves: “[these] offers ... perhaps would have been with more propriety made to Mr. Tucker but as he informed me the proposal of hiring or buying [slaves] came from you.”<sup>100</sup> The domestic relations between the Tuckers as husband and wife confirm the sincerity with which Tucker advocated the increasing legal equality for women in Virginian society.

Tucker remained steadfast in his acceptance of women’s legal and social rights, even when doing so jeopardized his relationship with his stepsons, Richard and Jack Randolph. In 1792, Nancy Randolph, sister-in-law of Tucker’s stepson Richard and once-intended wife of Theo, another of Tucker’s stepsons, suffered either a miscarriage or

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92. KERBER, *supra* note 14, at 200.

93. Wentworth, *supra* note 89, at 51-52.

94. *Id.* at 51.

95. *Id.* at 55-56, 61.

96. *See id.* at 3.

97. STEPHEN STOWE, *INTIMACY AND THE POWER IN THE OLD SOUTH: RITUAL IN THE LIVES OF THE PLANTERS* 142-45 (1987).

98. Wentworth, *supra* note 89, at 3.

99. MELVIN PATRICK ELY, *ISRAEL ON THE APPOMATTOX: A SOUTHERN EXPERIMENT IN BLACK FREEDOM FROM THE 1790S THROUGH THE CIVIL WAR* 29 (2004); PHILLIP HAMILTON, *THE MAKING AND UNMAKING OF A REVOLUTIONARY FAMILY: THE TUCKERS OF VIRGINIA, 1752-1830*, at 59-61 (2003).

100. Letter from Theodorick Bland to Frances Tucker (Jan. 9, 1785) (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary).

an abortion.<sup>101</sup> In responding to the scandal that resulted from discovery of the incident, Tucker assumed a prominent role as advisor to Nancy, Richard, and Judith, who was Richard's wife and Nancy's sister.<sup>102</sup> In addition, Tucker orchestrated legal actions to vindicate the reputations of those implicated in the scandal and attempted to influence public opinion by publishing accounts of the legal actions in newspapers and by corresponding with Virginia's leading citizens.<sup>103</sup> His writings provide a clear indication of his acceptance of women as autonomous legal and social actors.<sup>104</sup>

During a visit to Glentivar, home of Mary and Randolph Harrison, who were close friends of Richard and Judith Randolph, the unmarried Nancy became ill and retired early one evening.<sup>105</sup> That night, Richard carried a fetus, almost certainly fathered by Theo, out of the home and disposed of it.<sup>106</sup> The presence of blood, both on Nancy's bed linens and outside of the home, alerted others to that evening's events.<sup>107</sup> Because of his presence in Nancy's room that evening and his role in disposing of the fetus, Richard's reputation suffered, and he was ultimately forced to defend himself against criminal charges.<sup>108</sup> People surmised that Richard may have had sexual relations with his young sister-in-law and may have either aborted the unborn child or killed it at birth to hide evidence of his affair.<sup>109</sup>

In May 1793, following Richard's acquittal on all criminal charges, Tucker published an account of the court proceedings in local newspapers to clear the names of those involved.<sup>110</sup> He also circulated the written account among Virginia's elite.<sup>111</sup> Tucker's written account surprisingly included letters from Judith to her older sister, Elizabeth, asserting that Richard's behavior and

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101. See generally CYNTHIA A. KIERNER, SCANDAL AT BIZARRE: RUMOR AND REPUTATION IN JEFFERSON'S AMERICA (2004) (exploring the legal and social reactions to Nancy Randolph's miscarriage or abortion).

102. *Id.* at 32, 38, 40-42, 52-53.

103. *Id.* at 52-53, 77-80.

104. *Id.* at 77-80.

105. *Id.* at 1, 3-4.

106. *Id.* at 4-6.

107. *Id.* at 4, 6, 38.

108. *Id.* at 52-60.

109. *Id.* at 6.

110. *Id.* at 77-80.

111. *Id.* at 80.

integrity were beyond reproach.<sup>112</sup> As Professor Kierner insightfully notes,

Tucker's version of the [story at the Bizarre plantation] challenged conventional wisdom about relations between the sexes in post-revolutionary America. In Tucker's tale, Richard Randolph, a twenty-three-year-old white man, the master of a large plantation and its corps of slaves, was the pitiable victim of gossip and intrigue, while his young wife Judith was his foremost protector.<sup>113</sup>

In subsequent years, Judith experienced financial woes, and Nancy encountered ostracism and attacks upon her virtue from Virginia's planter society.<sup>114</sup> After Richard's untimely death in 1796, Tucker continued correspondence with both women, hosted them at his home in Williamsburg, Virginia, and contributed financial and emotional support to them.<sup>115</sup> Each woman regarded Tucker as a father, and his support and defense of Judith and Nancy exacerbated tensions between him and another stepson, Jack.<sup>116</sup> Jack agreed to run Bizarre, the widow Judith's plantation, following Richard's death. By the early 1800s, Judith and Jack quarreled frequently about plantation management. In 1809, Jack pressed Judith to sell the property and she turned to Tucker for advice. Tucker advised her that her financial problems were less severe than Jack presented and that she could retain her plantation by leasing the revenue-producing land to Jack, while continuing to reside in the manor home.<sup>117</sup> In addition, when Jack found it politically advantageous to distance himself from Nancy by slandering her, Tucker took Nancy's side, publicly defending her against his stepson's attacks.<sup>118</sup>

The scandal and subsequent financial difficulties involving his stepsons, Judith, and Nancy Randolph compelled Tucker to act. Many people in similar situations sacrifice abstract principles for

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112. *Id.* at 79-80.

113. *Id.* at 80.

114. *Id.* at 108, 132.

115. *Id.* at 32, 101, 132.

116. *Id.* at 32, 114-16.

117. *Id.* at 132.

118. *Id.* at 114-17.

social standing, family ties, or political expediency, but Tucker did not. Despite being a man in the public view, he defended unpopular women by asserting their autonomy, a view shared by only a small minority of his peers. He knowingly elevated Judith's social role by positioning her first as her husband's protector and second as an autonomous and capable landowner who was competent to reject a man's financial advice. In both instances, the status of Tucker's own stepsons was marginally diminished by the assertion of Judith's strength and ability. In his defense of Nancy, he more implicitly tolerated or forgave her youthful indiscretions and once again seemed to value the need to protect her ability to pursue personal happiness over the interests of one of his stepsons.

Tucker brought this appreciation of women's abilities and the justness of their legal and social autonomy to his role as judge. The extent to which he could rely on his own perceptions of right and wrong was limited by his acceptance of judicial restraint, however. Tucker, along with Jefferson, detested the idea of judges legislating from the bench.<sup>119</sup> During the early republic, many judges perceived their duties as more than merely applying existing law to the facts before them. They actively shaped and modified the law to influence the design of their society to more closely align society with Republican ideals.<sup>120</sup> Many of these judges were Jeffersonian Republicans who promoted a liberalization of American society that was compatible with the political platform of their party's leader.<sup>121</sup> Yet, Jefferson castigated judges who allowed their personal political sentiments to influence their decision making. He wrote in 1785: "[r]elieve the judges from the rigour of text law, and permit them, with pretorian discretion, to wander into its equity, and the whole legal system becomes incertain."<sup>122</sup> Earlier, he had advocated that judges should render "strict and inflexible" rulings, acting as "mere

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119. St. George Tucker, *Of the Several Forms of Government*, in 1 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 26, ed. app. at 18-19 [hereinafter Tucker, *Several Forms of Government*].

120. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 11-18 (1977).

121. See, e.g., Grossberg, *Citizens and Families*, *supra* note 17, at 22-23 (providing an example of the Virginia Supreme Court of Appeals, including St. George Tucker, incorporating Jeffersonian ideas when interpreting legislation).

122. Letter from Thomas Jefferson to Philip Mazzei (Nov. 1785) in 9 THE PAPERS OF THOMAS JEFFERSON 67, 71 (Julian P. Boyd ed., 1954) (footnote omitted).

machine[s]."<sup>123</sup> Jefferson accepted the legislature as a regularly elected body, expressive of the will of the people and uniquely able to make laws.<sup>124</sup> Tucker shared Jefferson's commitment to popular sovereignty and the derivative importance of the popular will. He devoted extensive attention to it in his edition of Blackstone's *Commentaries*.<sup>125</sup> He also believed that each branch of the government was vested with distinct and exclusive powers, asserting that "[t]he powers of government, both by the federal and state constitution, are distributed under three heads, the Legislative, Executive, and Judiciary; and these three departments the state constitution expressly declares shall be separate and distinct so that neither exercise the powers properly belonging to the other."<sup>126</sup> Judges, as "public functionaries," were given a public trust that they exercise their power only in legitimate and circumscribed ways:

[I]f in a limited government the public functionaries exceed the limits which the constitution prescribes to their powers, every such act is an act of usurpation in the government, and, as such, treason against the sovereignty of the people, which is thus endeavored to be subverted, and transferred to the usurpers.

Inseparably connected with this distinction between limited and unlimited governments, is the responsibility of the public functionaries, and the want of such responsibility. Every delegated authority implies a trust; responsibility follows as the shadow does its substance. But where there is no responsibility, authority is no longer a trust, but an act of usurpation. And every act of usurpation is either an act of treason, or an act of warfare.<sup>127</sup>

As a professor of law and as a judge, Tucker was perhaps especially sensitive to the need for judges in the early republic to adhere to law and respect the democratic process. Yet, he had few qualms, when not on the bench, with criticizing Virginia's policies

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123. Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), in 1 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 122, at 503, 505.

124. *Id.*

125. Grossberg, *Citizens and Families*, *supra* note 17, at 22 (discussing Tucker's version of Blackstone's *Commentaries*).

126. St. George Tucker, *View of the Constitution of the United States*, in 1 *TUCKER, BLACKSTONE'S COMMENTARIES*, *supra* note 26, ed. app. at 187-88.

127. Tucker, *Several Forms of Government*, *supra* note 119, ed. app. at 18-19.



limiting women's property rights.<sup>128</sup> In his judicial rulings, he consistently looked for lawful means to conform Virginia's practices to the liberal legal reform initiatives. As a judge, Tucker used the Jeffersonian changes in Virginia's law on inheritance "to create a society opposed to aristocratic privilege and inherited distinctions yet committed to filial equity, testamentary freedom, and enlightened morality."<sup>129</sup> For example, in *Stones v. Keeling*, Tucker wrote that the intent of the 1785 law addressing inheritance was "to establish the most liberal and extensive rules of succession to estates, in favour of all, in whose favour the intestate himself, had he made a will, might have been supposed to be influenced."<sup>130</sup> When the law to be applied in a case was clear and incontrovertible, however, Tucker saw it as his duty to give the legislature's enactment its full intent.<sup>131</sup>

As a judge, Tucker viewed the 1727 laws on property in slaves as binding. In his role as a judge, he did not have the freedom that he enjoyed in the classroom to criticize the law. One of Virginia's most interesting cases concerning women's property rights in slaves arose in 1809 when Tucker sat on the Supreme Court of Appeals of Virginia—the court of last resort at that time. The case of *Tabb v. Archer* concerned branches of the rich and powerful Randolph family, to which Tucker had connections through marriage, and involved attorneys Daniel Call, John Wickham, and Edmund Randolph.<sup>132</sup> The court reporter allowed himself a colorful digression, unusual even for that era, in describing the case:

Few cases have occurred in which mere judicial proceedings have been clothed in such eloquent language as was displayed in the bills and answers in these causes. Much property was involved in the contest; men of great talents were interested; and it was one of those family dissensions which was well

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128. KERBER, *supra* note 14, at 137, 277.

129. Grossberg, *Citizens and Families*, *supra* note 17, at 22.

130. *Id.* (citing *Stones v. Keeling*, 9 Va. (5 Call) 143, 144-45 (1804)).

131. Even Justice Joseph Story, an advocate of judicial positivism, recognized that judges were restrained in shaping the law by immutable principles of reason, morality, and order. R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 96-97 (1985). Legislative enactments that conformed to the Constitution could be similarly restraining.

132. *Tabb v. Archer*, 13 Va. (3 Hen. & M.) 399, 399-404 (1809); Wentworth, *supra* note 89, at 51.

calculated to excite the passions and enlist the feelings of those concerned.<sup>133</sup>

*Tabb* allowed Tucker to push legal reforms aimed at encouraging women's property rights while still respecting existing law. The case concerned a widow and mother who held firm convictions about her family and its property. Although Tucker devotes little attention in his decision to the case's complicated facts, they do provide an interesting context for the ruling. In 1800, eighteen-year-old Mary Tabb accepted Bathurst Randolph's marriage proposal, pending approval by her mother, Frances Tabb.<sup>134</sup> Mary's father, John, was deceased.<sup>135</sup> Mrs. Tabb initially consented to the marriage, but shortly thereafter asked the prospective groom to relinquish any interest in property that Mary would bring to the marriage.<sup>136</sup> Randolph discussed the matter with Mary, who expressed "decided opposition" to the idea.<sup>137</sup> On the day before the scheduled marriage, Mrs. Tabb presented Randolph with a contract in which he would relinquish all interest in "estate both real & personal to which [Mary] is entitled as one distributee of her late father."<sup>138</sup> The contract, on its face, secured Mrs. Tabb's family property for her daughter and their heirs, preventing Randolph from selling or otherwise alienating it during his lifetime.<sup>139</sup> Randolph signed the contract, though he later claimed to have read it hastily.<sup>140</sup>

The next year, Dr. John Randolph Archer proposed to another one of the Tabb girls, Frances Cook Tabb.<sup>141</sup> Mrs. Tabb objected to this

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133. *Tabb*, 13 Va. (3 Hen. & M.) at 401. For Tucker's handwritten text of this decision, see ST. GEORGE TUCKER, 5 BOUND CASEBOOKS 696-713 (n.d.) (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary).

134. Brief of Petitioner-Appellant at 1, *Randolph v. Randolph* (unreported), *rev'd sub nom. Tabb*, 13 Va. (3 Hen. & M.) at 399 (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary) (providing a summary of the facts in the unreported case of *Randolph v. Randolph*, which on appeal was combined with *Tabb v. Archer*).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 2.

139. *Id.* at 1.

140. *Id.*

141. Daniel Call, *Randolph v. Randolph*, Deposition Summary (n.d.) (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary).

marriage, but ultimately assented on the condition that Archer sign marriage articles similar to those signed by Mary's husband.<sup>142</sup> The contract, drawn up by Attorney William B. Giles, was presented to Archer before the wedding, and after examining it closely, he signed it.<sup>143</sup>

Mrs. Tabb's intention in having the prospective sons-in-law sign the marriage articles was, in the words of attorney Daniel Call, "to vest the property [brought to their marriages by the Tabb girls] in trustees, for the benefit of the wife, and the issue ... and failing such issue, for the benefit of the next of kin to the wife ... [to] the exclusion of the husband and his representatives."<sup>144</sup> Call also wrote that the Tabb property was to "be held as an inviolable *fund* ... for the use and benefit of the wife and her heirs, in the same manner as if the intended marriage should never take effect."<sup>145</sup>

The articles, executed on February 17, 1801, provided that all of Frances's property, real and personal, which consisted of several plantations, slaves, horses, cattle, sheep, hogs, furniture, and sundry other items, were to belong to her and her heirs alone.<sup>146</sup> Dr. John Archer committed never to sell, otherwise dispose of, or alienate the property, but rather to hold it as "*an inviolable fund* for the support and maintenance of the said *John* and *Frances*, and *their issue*."<sup>147</sup> Frances's heirs were further protected. In case John died and she remarried, her children from that marriage could inherit her property. Moreover, if she predeceased him and they left no offspring from their marriage, her estate would revert to "her *next legal* representatives."<sup>148</sup> John was given a life estate in the property once children were born to Frances.<sup>149</sup>

Within a year, Archer and Randolph prevailed upon their wives to support them in an elaborate scheme to transfer title in the properties to the two men. Conveyances, in which the wives participated, were made to third parties, who then sold the properties to Archer and Randolph, eviscerating their respective wives'

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Tabb v. Archer*, 13 Va. (3 Hen. & M.) 399, 401-03 (1809).

147. *Id.* at 415.

148. *Id.*

149. *Id.* at 403.

interests and evading Mrs. Tabb's intentions.<sup>150</sup> On April 20, 1802, John and Frances Archer sold the entire estate Frances brought to the marriage for a sum of \$20,000 to Needler Robinson.<sup>151</sup> On May 21, 1802, for the token sum of five shillings, Bathurst and Mary Randolph conveyed the whole of Mary's estate to Richard Meade, who the next day sold it to Bathurst Randolph.<sup>152</sup> Mrs. Tabb instigated the lawsuit on behalf of her grandchildren and herself. At the trial court, the case was dismissed.<sup>153</sup>

In 1809, when the case reached the Supreme Court of Appeals of Virginia, Tucker credited Tabb for her concern and her assertion of power within the family:

I shall only observe, that Mrs. *Tabb's* conduct, from the evidence, not only seems to me to stand above every possible imputation of impropriety, but to have been highly laudable and proper, and such as every prudent and affectionate parent, whether father or mother, would have done well to have pursued in such a case.<sup>154</sup>

Judge Tucker wrote the lead decision for the Supreme Court of Appeals, reversing the lower court's ruling and upholding both marriage articles.<sup>155</sup> In this decision, Tucker upheld the articles as binding contracts upon the parties and protected women's rights to property, even when that property included slaves. His reasoning rested not only upon the articles as contracts, but also upon marriage itself as a contract between equal parties.<sup>156</sup>

Tucker's ruling in the *Tabb* case rested on contract law theory, which formed the backbone of liberal reform during the early republic. Dealing with contracts allowed Tucker and other Republican judges the freedom to work within the common law, whereas in

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150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 404. The small sums involved in the transactions indicate that the conveyances were intended merely as a rearrangement of title, similar to the barring of an entail to give the life tenant the full ownership. Parents tried to tie up their property; children tried to free it. In her desire to protect the family property for future generations, Mrs. Tabb may have distrusted her daughters as much as she distrusted her sons-in-law.

154. *Id.* at 405.

155. *Id.* at 435.

156. *Id.* at 406-19.

most cases before him, Tucker had to rely on statutory language. Sometimes Tucker agreed with a law's statutory proscriptions, and sometimes he clearly resented them.

In 1808, Judge Tucker and the Supreme Court of Appeals of Virginia addressed the rights of female and illegitimate children to inherit property in *Rice v. Efford*. The issue was whether an illegitimate child, whose parents ultimately married, could be recognized by her father's will and receive the benefits of a subsequently enacted statute.<sup>157</sup> The daughter in question was born prior to her parents' marriage in 1776. Effective January 1, 1787, the Revised Code of Virginia provided that, "[w]here a man having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognised by him, shall be thereby legitimated."<sup>158</sup>

Ann Efford, daughter of Richard Rice and Judith Shurley, brought suit to secure her inheritance. Her father died in 1799, leaving a will that provided that his son, Thomas, would inherit his land and that if he should die without an heir, the land would descend to Ann.<sup>159</sup> When Thomas died, leaving a widow, counsel for the defendant-appellants argued that the statute could not be retroactively applied and that it only applied to male children, especially as it might be used to adjudicate matters concerning real property.<sup>160</sup> Tucker cut this latter argument to ribbons by asserting that "[t]he widow of the son was not entitled to administration in preference to the daughters,"<sup>161</sup> thereby affirming the lower court decision granting Ann her share of her father's lands.<sup>162</sup>

In another case decided that same year, however, specific statutory language constrained Tucker from issuing what was likely his preferred opinion. In *Moore's Administrator v. Dawney*, eight slaves given by a father to his daughter as a wedding present became the property of the daughter's husband.<sup>163</sup> Tucker held that the husband was free to sell them at his will.<sup>164</sup> Although the law in

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157. *Rice v. Efford*, 13 Va. (3 Hen. & M.) 225, 225-26 (1808).

158. *Id.* at 227 n.1 (quoting VA. REVISED CODE, vol. 1, ch. 93, § 19).

159. *Id.* at 225.

160. *See id.* at 226 (describing the appellants' argument to the district court and on appeal).

161. *Id.* at 228 n.1 (citing his notes on *Stones v. Keeling*).

162. *Id.* at 229.

163. *Moore's Adm'r v. Dawney*, 13 Va. (3 Hen. & M.) 127, 127 (1808).

164. *Id.* at 133.

Virginia denied married women—feme coverts—the right to own slaves, single women—feme soles—faced no such restriction.<sup>165</sup> For example, in *Braxton v. Gaines*, Tucker overturned a decision rendered by his former professor, George Wythe, and held that a single woman could legally hold slaves independent from her father.<sup>166</sup> Tucker also awarded interests in slaves to daughters when language in testators' wills appeared subject to differing interpretations.<sup>167</sup>

Tucker decided *Thomas, a Negro v. Edward Roberts*<sup>168</sup> years before he rendered the aforementioned rulings from the Supreme Court of Appeals of Virginia. He heard the case on October 10, 1794,<sup>169</sup> apparently at about the same time as he penned notes on women's property rights in his notebook.<sup>170</sup> In addressing the case, Christopher Doyle notes an existing historiography that considers the championing of liberal reform in the early republic to have produced a "battle in ... Virginia between insurgents seeking a more professional, accountable, and just judiciary and conservatives who defended the prewar system."<sup>171</sup> He rejects such a clear division, but still places Tucker among the defenders of southern patriarchy, thereby implicitly positioning Tucker as challenging the assertions of several historians who write that Republican district court judges of the era were advocates for reform.<sup>172</sup> Doyle openly asserts that Tucker held a "contradiction in ... outlook ... profess[ing] devotion to

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165. See *supra* notes 11-13 and accompanying text.

166. *Braxton v. Gaines*, 14 Va. (4 Hen. & M.) 151, 151-55 (1809).

167. See *Reno's Ex'rs v. Davis*, 14 Va. (4 Hen. & M.) 283 (1809) (discussing whether a slave's children passed with a will written prior to their birth); *Bates v. Holman*, 13 Va. (3 Hen. & M.) 502 (1809) (revoking a will).

168. Tucker referred to the case by the name *Tom* in his notes. See 1 St. George Tucker, *Notes on Cases in the General Court, District Court, and Court of Appeals in Virginia 1786 to 1811*, nbk. 1, at 19-24 (Oct. 10, 1794) [hereinafter *Tucker, Case Notes*] (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary).

169. *Id.*

170. See Tucker, *Species of Property*, *supra* note 5, at 19.

171. Doyle, *supra* note 1.

172. *Id.* at 420 (citing CHARLES T. CULLEN, *ST. GEORGE TUCKER AND LAW IN VIRGINIA, 1772-1804* (1987) (published version of 1971 Ph.D. dissertation)); MILLER, *supra* note 35, at 24-33. The theory that Republican judges acted as forces for reform is strongly made by Michael Grossberg. See generally GROSSBERG, *GOVERNING THE HEARTH*, *supra* note 17.

revolutionary liberty and equality but often desir[ing] deference and hierarchy."<sup>173</sup>

*Tom v. Roberts* concerned far more than a wife's ability to hold a legal interest in slaves. Other issues included the commonwealth's interest in loyalist property and a master's ability to manumit slaves.<sup>174</sup> Once again, the facts provide insights into Tucker's society and an interesting context for his ruling. Roberts, a loyalist, left Virginia in 1775,<sup>175</sup> presumably for England, leaving behind his wife Anne and three children for the duration of the American Revolution.<sup>176</sup> In 1782, Anne Roberts granted freedom to all of the family's slaves who had reached the age of majority.<sup>177</sup> She also made provisions for the younger slaves to be freed upon reaching adulthood—the males at age twenty-one and the females at age eighteen.<sup>178</sup> Upon Humphrey's return to Virginia in 1783, he rescinded the promises to free the minor slaves and sold one of them, Thomas, to Edward Roberts. Thomas later sued for his freedom upon turning twenty-one in 1793.<sup>179</sup>

Doyle astutely notes that the decision "threatened a rancorous public debate and a hostile precedent for slave property, patriarchal domestic ideals, and deferential politics. Therefore, attorneys on both sides and Judge Tucker continuously appealed to community opinion to support their view[s] of the suit."<sup>180</sup> Yet, he omits consideration of arguably the most important indication of community opinion, at least to a Republican such as Tucker—the legislature's recent enactments. *Roberts* involved the disposal of property of loyalists condemned by the commonwealth; but, just as importantly, the case concerned the right of a wife to alienate her husband's property. No change had been made in a wife's ability to hold, sell, or free slaves, despite a host of liberal reforms that ultimately concerned the property interests in the case at issue. In addition to the property reforms already noted, the American Revolution also produced sentiments leading to a liberalization of Virginia's slave

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173. Doyle, *supra* note 1, at 423.

174. 1 Tucker, Case Notes, *supra* note 168, nbk. 1 at 19-24.

175. *Id.* at 19.

176. *Id.*

177. *Id.*

178. *Id.* at 19-20.

179. *Id.* at 20.

180. Doyle, *supra* note 1, at 434.

laws in the decade immediately following the war. Virginians limited the importation of slaves, allowed manumission, and even permitted slaves to sue for their freedom *in forma pauperis*.<sup>181</sup>

In the context of these reforms, the legislature's refusal to expand a woman's property interest in slaves is both noteworthy and consequential. Not surprisingly, the defense attorneys highlighted the statutory law, including limitations on the rights of a feme covert to possess slaves in her own right or to dispose of property jointly held.<sup>182</sup> Tucker cited the defense's argument with approval and had no discretion to rule to the contrary.<sup>183</sup> He found that although the Act of 1779 allowed the commonwealth to condemn loyalist property, no confiscation occurred in instances in which loyalist property was necessary to support a wife or children.<sup>184</sup> This Act, therefore, did not require Roberts's estate to be confiscated.<sup>185</sup> The Treaty of Peace and the Act of 1783 allowed a returning loyalist to become a citizen and to have his rights restored.<sup>186</sup> When addressing a wife's ability to dispose of property during the war, Tucker was forced to rely on Chapter 4 of the Act of 1727, which prescribed that a husband takes the benefit of his wife's slave property "exclusively in him."<sup>187</sup> Tucker then asserted that during the war, Anne served as her husband's "Trustee or Agent" and therefore had no power to sell, alienate, or change his property.<sup>188</sup> Accordingly, Tucker had to rule that Roberts controlled the destiny of his slave, Thomas.<sup>189</sup>

Tucker faced the conundrum of "how to impose the Revolution on a patriarchal heritage."<sup>190</sup> Christopher Doyle resolves this quandary by discounting Tucker's commitment to reform, arguing that Tucker's support for the oligarchical southern way of life constituted a greater commitment: "[s]ympathetic to revolutionary ideals, he remained nonetheless suspicious of democratic demagoguery in politics,

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181. 9 STATUTES AT LARGE, *supra* note 41, at 471-72; 11 STATUTES AT LARGE, *supra* note 41, at 39-40; 12 STATUTES AT LARGE, *supra* note 41, at 681.

182. 1 Tucker, Case Notes, *supra* note 168, nbk. 1 at 20-21.

183. *See id.*

184. *Id.* at 22 (discussing Act of 1779, ch. 14).

185. *Id.*

186. *Id.* at 23 (discussing Act of 1783, ch. 17).

187. *Id.* at 21.

188. *Id.* at 23.

189. *Id.* at 23-24.

190. Doyle, *supra* note 1, at 441.



egalitarian domestic trends, and free blacks.”<sup>191</sup> It is certainly possible that Tucker’s racism presented a stronger motivating force than his desire for women’s property rights, but this supposes that Tucker felt free to inject his personal biases into his decisions. It also raises the question of why, in his own private papers, Tucker would write so passionately about the inconsistency and unfairness of slave laws denying rights to women. Moreover, his personal relationships with Frances and the Randolph sisters counter Doyle’s assertion that Tucker was “suspicious of ... egalitarian domestic trends.”<sup>192</sup>

Without a doubt, Doyle is correct in asserting that “public opinion” influenced Tucker, which helped to form “a uniquely southern response to the Revolution, ... buttress[ing] domestic and political patriarchy.”<sup>193</sup> Doyle, however, places Tucker in service to those social interests as part of both the southern oligarchy that frustrated liberal reform and the southern judiciary that “reined in” the radical potential of the Revolution.<sup>194</sup> In this sense, Doyle fails to give credence to the possible sincerity of a committed Republican who felt restrained by both existing law and principles of egalitarian democracy from judicially imposing his viewpoint of a social ideal contrary to the expressed attitudes of Virginians through their legislature.

Tucker’s unpublished essay on women’s property rights and the limitations imposed on them by Virginia’s slavery laws compels a reconsideration of Doyle’s conclusions regarding Tucker’s actions in *Tom v. Roberts*. In writing in his own notebook, Tucker had no reason to inflate artificially his commitment to legal reform and the liberal Jeffersonian ideology behind it. Rather than exhibiting Tucker’s intellectual contradictions, *Tom v. Roberts* might better be viewed as evidence of his commitment to the liberal Republican ideals that celebrate both legislative enactment of the laws and judicial restraint in overcoming expressions of popular will. Tucker’s adherence to the statutory law that he professed to despise follows the sentiment of a Revolution that elevated law above men. As a Republican judge, Tucker acted more powerfully to transform his

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191. *Id.*

192. *Id.*

193. *Id.* at 442.

194. *Id.* at 441.

society than if he had vested authority in himself to make law for the Commonwealth.

Tucker's advocacy of women's social autonomy and legal rights raises several additional issues. In recent years, legal historians Michael Grossberg, Marylynn Salmon, Christopher Tomlins, and Mark Tushnet have convincingly argued that America was transformed during the early republic into an individualistic rights-oriented society by Republican judges that decided private law disputes in state courts.<sup>195</sup> Yet, party leaders, including Jefferson and many of these state court judges, spoke disparagingly of judicial activism and saw it as a threat to democracy.<sup>196</sup> Tucker's decisionmaking offers insights into the positive role of law in the early republic. Further analysis of Tucker's jurisprudence and its consistency with his worldview may help historians who work to resolve the apparent paradox between Republican understandings of legislative supremacy and the judicial activism of the early republic.<sup>197</sup>

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195. See GROSSBERG, *GOVERNING THE HEARTH*, *supra* note 17; SALMON, *supra* note 41; CHRISTOPHER L. TOMLINS, *LAW, LABOR AND IDEOLOGY IN THE EARLY REPUBLIC* (1993); TUSHNET, *supra* note 68.

196. For an excellent development of this issue in New Hampshire during the early republic, see JOHN PHILLIP REID, *CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE* (2004).

197. Discussion of these issues will form the thesis of the author's next book, a biography of St. George Tucker to be published by Northern Illinois University Press.