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William and Mary Bicentennial Commemoration: Virginia Constitutional Commentaries: The Formative Period, 1776-1803

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This is the fourth in a series of four articles commemorating the bicentennial of American legal education, dating from the establishment of the first chair of law and police, occupied by George Wythe, at the College of William and Mary on December 4, 1779. The colonial antecedents to the College's formal relation to professional legal education may be traced to the career of Sir John Randolph, a student at William and Mary, (1705-1713), who then prepared for the bar at Gray's Inn, London (1715-1717). Randolph's two sons, Peyton ("The Patriot") and John ("The Tory") followed his example, first at the College of William and Mary and subsequently at the Middle Temple. His grandson, Edmund, after study at the College on the eve of the Revolution, read for the bar under his father and uncle. The Randolphs and their cousins, Thomas Jefferson and John Marshall, were prototypes of various leaders of legal and political thought in colonial and early post-Revolutionary Virginia whose efforts "Americanized" English legal institutions and thus created a logical need for a new school to teach this "Americanized" law. This series of articles addresses some aspects of law and procedure and legal thought which were the backdrop for the establishment of the first American law school in 1779.

VIRGINIA CONSTITUTIONAL COMMENTARIES:
THE FORMATIVE PERIOD, 1776-1803*

WILLIAM F. SWINDLER**

PRELUDE: COLONIAL CULTURE BED

The contribution of Virginia, and particularly of alumni of the College of William and Mary, to American constitutional dialogue in the eighteenth and nineteenth centuries was unique both in quantity and quality. In the formative period of the Commonwealth and the nation, roughly the first generation following independence, the discussions that appeared in the proceedings of state conventions, correspondence, pamphlets, and in arguments in litigated cases summarized much of the constitutional theory that gradually had taken articulate form in the preceding seventy-five years of the colonial era. Before considering some representative commentaries expressed in the period between 1776, when the first Virginia constitutional convention was held, and 1803, the date of the publication of St. George Tucker's American annotations to Blackstone summarizing the constitutional thought of the first generation after the Revolution, some attention should be paid to the antecedent colonial period.

The transition of Virginia from a frontier society struggling for survival to the economy of a prosperous plantation system in the generation following the English Revolution laid the foundations for a colonial school of constitutional thought. While a casual or coincidental beginning may be traced to Bacon's Rebellion just a century before the American Revolution—and it is worth noting that both Bacon and his antagonist, Sir William Berkeley, had

* Portions of this paper will appear in the first volume of STUDIES ON THE BICENTENNIAL OF AMERICAN LEGAL EDUCATION, being prepared for publication in 1980-81 as part of the observance of the two hundredth anniversary of the chair of law founded at the College of William and Mary, December 4, 1779.

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been registered at the Inns of Court¹—the maturing of the social and political order under the later Stuarts, and particularly in the time of Queen Anne, encouraged the first colonial inquiries into the nature of British constitutional government.

From the earliest days of settlement under the Virginia Company of London and certainly from the time of the first legislative assembly in 1619, a general familiarity with English common law and parliamentary enactments had been assumed.² But after the great plantations had become manorial enterprises by the end of the century, requiring a more sophisticated knowledge of both public and private law, the plantation libraries began to grow and include basic treatises and "abridgments" of English legal subjects.³ Another sign of changing times was that sons of plantation owners began to go to London to prepare for professional law practice or to study in the colony under those already engaged in the practice.⁴

The coming of Alexander Spotswood as royal governor in 1710 began the "modernization" of the politico-legal structure in Virginia. Among Spotswood's instructions from Queen Anne were several that looked toward reorganization of colonial society into a form closer to that of the mother country. Two of these were to present constitutional questions of first impression. One was the gratuitous extension to the colony of the provisions of the Habeas Corpus Act of 1679,⁵ possibly as a token of sovereign benevolence. The other was the directive to Spotswood to establish a separate

1. E. JONES, *AMERICAN MEMBERS OF THE INNS OF COURT* 11, 16 (1924) [hereinafter cited as E. JONES].

2. See the early directions to the Jamestown Council of the Virginia Company to enact laws or regulations concerning landholding and criminal actions, the two primary practical needs of the new settlement, in accordance with "the lawes within this realme of England."

1 W. HENING, *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 69 (2d ed. New York 1823) (1st ed. Richmond 1809) [hereinafter cited as HENING'S STATUTES]. See also 3 *THE RECORDS OF THE VIRGINIA COMPANY OF LONDON* 12-24 (S. Kingsbury ed. 1933).

3. W. BRYSON, *A CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA* 31-82 (1978). See also 2 HENING'S STATUTES, *supra* note 2, at 246 (containing the colonial assembly's list of law titles to be ordered from England for court use in October 1666).

4. From the last quarter of the seventeenth century until 1775, about two dozen Virginians studied at the Inns of Court in London. Some, like St. George Tucker, were enrolled but never attended. Among William and Mary students, either from the preparatory or university division, were Sir John Randolph, his sons Peyton and John, and the future Supreme Court Justice, John Blair. See E. JONES, *supra* note 1, at 21, 178-80.

5. An act for the better securing of the liberty of the subject, and for prevention of imprisonments beyond the seas, 1679, 31 Car. II, c. 2.

system of criminal (oyer and terminer) courts in Virginia, distinct from the existing judicial system.

In the minds of the legal draftsmen of the instructions, the two provisions were complementary sides of the same coin. Chapter VI of the 1679 statute provided for speedy trials of accused persons before courts of oyer and terminer or gaol delivery,⁶ whereas Chapter X stipulated the areas within Great Britain where the writ was to run.⁷ The colonial bench and bar doubtless was gratified to learn of the extension of the benefits of the statute to the Crown's "Old Dominion." In the constitutional disputes some half a century later, however, questions would be raised as to the right of the Crown in Parliament to suspend a constitutional guarantee once given. This, of course, was argument long after the fact, and its significance here is only as a date when a seed of discord was sown. The writ was received gratefully; the proposal for independent oyer and terminer courts was something else.

Throughout its colonial history, Virginia was able to keep its judicial system fairly simple and economical. Law, equity, and probate jurisdiction all had been vested in a system of local county courts of limited, but steadily broadened, jurisdiction and the General Court with original and appellate jurisdiction.⁸ By the end of the seventeenth century, particular cases that were deemed worth the effort and expense might be appealed to the Privy Council in London on issues of law, whereas ecclesiastical law questions, theoretically at least, were appealable to the ecclesiastical courts of Canterbury, and maritime law issues to the High Court of Admiralty.⁹ But most litigation ended with review in the General Court, and efforts to introduce into the colony various specialized judicial

6. *Id.* See also J. KENYON, *THE STUART CONSTITUTION: DOCUMENTS AND COMMENTARY* 431-32 (1969).

7. *Id.* at 432. For the text of Spotswood's proclamation as published at York Courthouse, see 3 WM. & MARY Q. 150-51 (Ser. I, 1895).

8. Of many acts of the colonial assembly relating to the judiciary, see the initial statute of March 1623-24, 1 HENING'S STATUTES, *supra* note 2, at 125; judicial provisions in the "revisals" of 1661-62, 2 *id.* at 58-87; 1705, 3 *id.* at 287-302; 1710, 4 *id.* at 504-16; 1711, *id.* at 12-35. See also the Code of 1727, *A COLLECTION OF ALL THE ACTS OF ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA* 377-92 (Williamsburg 1733).

9. See generally E. RUSSELL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL* (1915); J. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* (1950). On ecclesiastical process, see O. CHITWOOD, *JUSTICE IN COLONIAL VIRGINIA* 70-71 (1905); and for admiralty, H. CRUMP, *COLONIAL ADMIRALTY JURISDICTION IN THE SEVENTEENTH CENTURY* (1931) and note 11 *infra*.

agencies such as baronial courts and an exchequer court were rebuffed.¹⁰ The subsequent decision of the colonial authorities in London to establish imperial courts of vice-admiralty, with causes removable from the local admiralty jurisdiction, created some of the conflicts leading to the Revolution.¹¹

Throughout most of the seventeenth century, the General Court had exclusive cognizance of criminal jurisdiction over major felonies. With the geographic spread of the colony and the appearance of new criminal causes such as piracy and slave insurrections, however, the colonial assembly beginning in 1692 had undertaken to issue oyer and terminer commissions vesting trial jurisdiction in these causes in the county courts.¹² In October 1710 the Council accommodated Spotswood's instructions by a resolution recognizing that the royal prerogative included the right to grant "*oyer and terminer*" commissions;¹³ but the Council insisted that the judges for such criminal courts should be drawn only from its own membership. Spotswood demurred; he may have remembered that a generation before, another governor, Lord Howard of Effingham, had attempted to create a separate court of chancery that in effect became only a special panel of the General Court.¹⁴ Before the end of the previous century, a separate admiralty judge had been created, but he also was drawn from the Council membership. Spotswood and the Crown obviously intended that the new "O and T" judicial agency should be independent, at least in principle, of the local government.

Nearly eight years of constitutional argument ensued. The governor forwarded the question to the Board of Trade and Plantations in London at the request of the Council, and ultimately the Board sustained Spotswood in his position, bolstering its conclusions with an opinion from Sir Edward Northey, Attorney General of England.¹⁵ Having belatedly won his point, however, the governor was

10. On the charters of Lords Arlington and Culpeper authorizing courts baron and leet, see 2 HENING'S STATUTES, *supra* note 2, at 518-22. On the exchequer court proposal, see 1 EXECUTIVE JOURNALS OF THE COUNCIL OF COLONIAL VIRGINIA 443 (H. McIlwain ed. 1925) [hereinafter cited as EJCCV].

11. C. UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION (1960).

12. 3 HENING'S STATUTES, *supra* note 2, at 178-79, 269-70.

13. 3 EJCCV, *supra* note 10, at 225.

14. 1 *id.* at 398, 420, 510.

15. 3 *id.* at 494, 518.

disposed to let the matter rest; in December 1718 Spotswood advised the Council that in return for his appointing over and terminer judges only from Council membership he "expected a declaration from them that they do not Claim it as their Right to be sole Judges in such Courts."¹⁶ The fact was, however, that in this first constitutional challenge between colonial and imperial authority, the colony lost. The control over its local court structure, which Virginians half a century later would be claiming as one of the "unalienable" rights in the particulars listed in the Declaration of Independence, had been compromised in principle in the second decade of the eighteenth century.

Counterbalancing this was the assertion of a principle of legislative privileges and immunities in 1736, which, tacitly accepted and acted upon by the House of Burgesses in the course of the remaining sessions of the colonial era, would be an even more incendiary constitutional issue in the final crisis with the mother country. It is peculiarly appropriate that in this period of the bicentennial of legal education begun at the College of William and Mary, one of the early students at the institution not only began a tradition of association of the College with professional study for the bar, but was the one to assert the fundamental rights of English subjects in Virginia in his address to the Crown's representative as Speaker of the House in 1736. Although a number of sons of colonial families came to the new institution as soon as it opened its doors and then went on to qualify as attorneys, some by study at the Inns of Court, the branch of the Randolph family represented by Sir John Randolph and his sons and grandson was a prototype. The first John Randolph, later to become the only colonial Virginian to be knighted, entered the College grammar (preparatory) school in 1705 and continued in residence until about 1713. In 1715 he was enrolled at Gray's Inn in London, and two years later was called to the bar "before his time."¹⁷ Sir John's sons, Peyton the Patriot and John

16. *Id.* at 493.

17. This remarkable colonial family, which contributed so significantly to the development of Virginia legal and colonial institutions, was the subject of a doctoral dissertation. See G. Cowden, *The Randolphs of Turkey Island: A Prosopography of the First Three Generations, 1650-1806* chs. 1, 12-14 (June 1977) (unpublished Ph.D. dissertation, College of William and Mary). The record of Sir John's enrollment appears in the Admission Book of Gray's Inn; a photostatic copy of this record is now in the special collections of the Law Library of the Marshall-Wythe School of Law, where the date of his call and payment of his

the Loyalist, would follow their father in study at William and Mary and in legal preparation in England at the Middle Temple.¹⁸ A grandson, Edmund, also would study at the College and then read for the bar under his father and uncle and eventually become the first Attorney General of the new United States.¹⁹

Sir John in the course of his career served as a leader of the colonial bar, attorney general of the colony, and on two occasions agent for the House of Burgesses and the College on missions to England. He began the first manuscript collection of reported cases in Virginia²⁰ and appears to have assembled a useful collection of English legal opinions of relevance to the colony.²¹ In 1734 he was elected first a Burgess from William and Mary and then Speaker of the House.²² In August 1736 upon his re-election to the new session, he made his seminal address. Taking his cue from the practice in Parliament, dating from Tudor and Stuart times, of addressing the Crown, in this case the royal governor as the Crown's representative, Sir John demanded the constitutional guarantee of privileges and immunities of Englishmen assembled in a legislative body. Af-

call fee are marginally noted. His early admission probably was warranted by his having previously read a commonplace book by Benjamin Harrison, a student at the Middle Temple in 1697, and his service as deputy king's attorney, or deputy attorney general, for Charles City, Henrico, and Prince George counties, 1712-15. *Id.* at 508.

18. Peyton Randolph studied at the College, 1733-39, was enrolled at the Middle Temple October 13, 1739, and was called to the bar February 10, 1745. His brother John studied at William and Mary, 1739-45, was enrolled at the Temple April 8, 1745, and called February 9, 1749. Documentary copies of the admissions and calls are in the special collections of the Law Library of the Marshall-Wythe School of Law.

19. Edmund Randolph was a student at the College, 1770 and 1771. He studied for the bar under his father and uncle and was admitted to practice in August 1774. J. REARDON, EDMUND RANDOLPH chs. 5-6 (1975) [hereinafter cited as J. REARDON, RANDOLPH].

20. The original manuscript collection, acquired by Thomas Jefferson, is now in the Jefferson collections in the Library of Congress. From the manuscript Jefferson selected "every case of domestic character" and added them to his own colonial reports. See 1 Va. Reports Ann. (1 Jeff.) 5. These reports first were published in 1829 by a nephew, T.J. Randolph, and reprinted in 1900 by order of the General Assembly. The complete Randolph reports, as well as those of his successor as attorney general, Edward Barradall, were edited and published by Robert Barton in VIRGINIA COLONIAL DECISIONS (2 vols. R. Barton ed. 1909).

21. This manuscript, under the title, "Opinions of Learned Counsel," is in the Jefferson collections of the Library of Congress. It consists of legal opinions on colonial Virginia affairs between 1681 and 1721 and is followed by copies of cases in the Court of King's Bench beginning about 1714. A microfilm copy of this document is included in the Library of Congress Microfilms of Presidential Papers, Thomas Jefferson ser. 8, vol. 4, reel 60.

22. JOURNALS OF THE HOUSE OF BURGESSES 1727-34, 1736-40, at 175 (H. McIlwaine ed. 1710).

ter tracing the historical beginnings of Virginia under the London Company, the Speaker declared:

[I]n July, 1621 [the Company] pass'd a Charter under their Common Seal, which was founded upon Powers before granted by Charters under the Great Seal of *England*; whereby they ordered and declared, That for preventing Injustice and Oppression for the Future; and for advancing the Strength and Prosperity of the Colony, there should be two Supreme Councils; One to be called, *The Council of State*, . . . the other to be called . . . *The General Assembly*: And to have free Power to treat, consult, and conclude, of all Things concerning the Public Weal; and to enact such Laws for the Behoof of the Colony, and the good Government thereof, as from Time to Time should appear necessary or requisite: . . . This was the Original of our Constitution, confirmed by King *James* the First, by King *Charles* the First, upon his Accession to the Throne, and by all the Crown'd Heads of *England*, and *Great-Britain*, successively, upon the Appointment of every new Governor, with very little Alteration. Under it, we are now grown to whatever we now have to boast of. And from hence, the House of Burgesses do derive diverse Privileges, which they have long enjoy'd, and claim as their undoubted Right. Freedom of Speech is the very Essence of their Being, because, without it, nothing could be thoroly debated, nor could they be look'd upon as a Council; an Exemption from Arrests, confirm'd by a Positive Law, otherwise their Counsels and Debates might be frequently interrupted, and their Body diminished by the Loss of its Members; a Protection for their Estates, to prevent all Occasions to withdraw them from the necessary Duty of their Attendance; a Power over their own Members, that they may be answerable to no other Jurisdiction for any Thing done in the House; and a sole Right of determining all Questions concerning their own Elections, lest contrary Judgments, in the Courts of Law, might thwart or destroy Theirs.²³

Although none of Randolph's successors as Speaker repeated in terms his address, to which the governor gave formal assent, his words not only summarized what tacitly had been claimed for the colonial assembly, but would be echoed in specific clauses of state and national constitutions not then dreamed of.²⁴ Only a quarter of

23. *Id.* at 239, 241-42.

24. See U.S. CONST. art. I, §§ 5, 6. VA. CONST. of 1776, cl. 30.

a century later, in the first of his famous Stamp Act Resolves, Patrick Henry generalized the constitutional principle expressed by Randolph as follows:

Resolved, That the first Adventurers and Settlers of this his Majesty's Colony and Dominion of *Virginia* brought with them, and transmitted to their Posterity, and all other His Majesty's subjects since inhabiting in this His Majesty's said Colony, all the Liberties, Privileges, Franchises, and Immunities, that have at any Time been held, enjoyed, and possessed by the people of *Great Britain*.²⁵

The arguments that followed Henry's 1763 declaration are familiar enough to obviate repetition here.²⁶ That famous Randolph cousin, Thomas Jefferson, would reiterate them in 1774 in his *Summary View of the Rights of British America*, as well as in the words he put into the Declaration of 1776. From this colonial culture bed would sprout the seeds of the constitutional arguments of the state and nation soon to be.

CONSTITUTIONAL THOUGHT IN THE EARLY COMMONWEALTH

Great Britain's attempt to reorganize the empire, both politically and economically, after the conclusion of the Seven Years (French and Indian) War in 1763 generally is accepted as the starting point for the long stream of increasingly vociferous constitutional disputes that precipitated the Revolution in 1776. The dissolving of the House of Burgesses in May 1774 led to the first of five extraordinary state conventions between that date and the assembly of June 1776, which drafted the first constitution for the new commonwealth. A flurry of action at the local level, including the action of the magistrates of Northampton County in February 1766 purporting to "nullify" the Stamp Act itself, followed Patrick Henry's resolutions.²⁷ Virginians contributed substantially to the

25. The resolves appear in *JOURNALS OF THE HOUSE OF BURGESSES, 1761-65*, at 360 (R. Kennedy ed. 1907). The Burgesses deleted Henry's last resolutions, denying British authority to veto colonial laws, but pamphlet reprints of the resolves distributed throughout the colonies included them.

26. The Virginia Independence Bicentennial Commission is assembling the most recent and comprehensive collection and will publish it under the series title, *REVOLUTIONARY VIRGINIA, THE ROAD TO INDEPENDENCE* (3 vols. 1973).

27. *Id.* I FORMING THUNDERCLOUDS AND THE FIRST CONVENTION, 1763-1774, at 20-21 (1973).

declarations of the First and Second Continental Congresses in 1774 and 1775²⁸ that made virtually inevitable the final, climactic declaration of July 1776, as well as to the fifth (constitutional) convention that met in Richmond on May 6 of that year.

Jefferson, that indefatigable draftsman of "fundamental constitutions," produced three different versions of a charter for the emerging state in the course of the Richmond convention. Never happy with the final product of that year, he followed these with a proposed new draft in 1783 and "Notes for a Constitution" in 1794.²⁹ From his years of law study from 1762-66 under George Wythe, during which he digressed at considerable length to compose essays on the principles of government,³⁰ to his *Summary View* in 1774 and his *Notes on Virginia* in 1787,³¹ Jefferson's constitutional philosophy together with the expressions of Spencer Roane and St. George Tucker laid the foundations for the "Southern" or "states' rights" school of political thought that would make inevitable the confrontation with another William and Mary alumnus, John Marshall, as Chief Justice of the United States. This controversy continued over a quarter of a century from *Marbury* to *Cohens*³² and provided the threnody of constitutional reform demands that prompted abortive attempts at new constitutional conventions in 1816 and 1825³³ and finally compelled the second state convention in 1829.

A variety of drafts for a Virginia constitution appeared before and during the Richmond convention. From the Continental Con-

28. See JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at I, 14, 23, 58; II, 199; III, 377 (1904).

29. 1 THE PAPERS OF THOMAS JEFFERSON 329-86 (J. Boyd ed. 1950) [hereinafter cited as J. Boyd, JEFFERSON]. See also note 51 *infra*; 8 THE WORKS OF THOMAS JEFFERSON 159 (P. Ford ed. 1904) [hereinafter cited as P. Ford, WORKS].

30. The political ideas in this manuscript volume were edited with commentary by Gilbert Chinard. THE COMMONPLACE BOOK OF THOMAS JEFFERSON (G. Chinard ed. 1926). The Project on the Papers of Thomas Jefferson at Princeton University will publish a complete edition of the volume.

31. T. JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (Williamsburg 1774); T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA (W. Peden ed. 1954) (1st ed. London 1787) [hereinafter cited as JEFFERSON, NOTES].

32. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

33. See generally W. SWINDLER, GOVERNMENT BY THE PEOPLE: THEORY AND REALITY IN VIRGINIA, JAMESTOWN ESSAYS ON REPRESENTATION 29-32 (1962) [hereinafter cited as W. SWINDLER].

gress came two separate drafts by John Adams, the second coming upon an invitation from Wythe. This draft attracted the attention of Richard Henry Lee and led to its prompt publication as a pamphlet,³⁴ copies of which Lee sent to Patrick Henry, Robert Carter Nicholas, and others at Richmond.³⁵ Lee also may have been the author of a slightly different "plan of government" that appeared in Purdie's *Virginia Gazette* in Williamsburg on May 10.³⁶ The markedly "republican" (radical) tenor of the Adams drafts prompted a counterproposal by Carter Braxton, another Virginia delegate to Philadelphia, published under the title, *Address to the Convention of the Colony and Ancient Dominion of Virginia, on the Subject of Government in General, and Recommending a Particular Form to Their Consideration By a Native of the Colony*.³⁷ Lee dismissed this draft as a "Contemptible little Tract"³⁸; but it reflected a conservative viewpoint that had enough supporters to make the final content of the 1776 constitution a disappointment to Jefferson and that a generation later was echoed in the divisive debates in Jefferson's own party during his second presidential administration.³⁹

George Mason, who would win renown for his authorship of a companion constitutional document, the Virginia Declaration of Rights,⁴⁰ drafted his own version of a state charter. In amended form, this charter was influential in the final framing of the 1776 constitution, blending together as it did the fundamental propositions of the Adams and Lee drafts.⁴¹ Jefferson's three drafts, the third and most complete brought by Wythe when he left Philadelphia on June 13 to return to Richmond, had the misfortune of arriving after the convention had settled upon the language of many

34. Published in Philadelphia under the title *Thoughts on Government: Applicable to the Present State of the American Colonies. In a Letter From a Gentleman to His Friend*. See 1 J. Boyd, JEFFERSON, *supra* note 29, at 333.

35. *Id.* at 333-34.

36. *Id.* at 334.

37. *Id.* at 334-35.

38. *Id.* at 335.

39. See D. MALONE, 5 JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT: SECOND TERM, 1805-1809, chs. 3-7 (1974).

40. The Virginia Declaration of Rights was adopted separately on June 12, 1776. It was not incorporated into the state constitution until 1850. See 1 THE PAPERS OF GEORGE MASON 274-91 (R. Rutland ed. 1970) [hereinafter cited as R. Rutland, MASON].

41. *Id.* at 295-99.

parts of the final document. Many of Jefferson's proposals, moreover, were too "republican" for his contemporaries. His labors, however, were not entirely wasted; many of the specific statements in his first draft were copied or remained fresh in memory to be repeated in his writing of the Declaration of Independence.⁴² Signifying the respect his colleagues held for him, the convention, on the eve of the final vote on the document, reopened discussion of Jefferson's proposals and eventually incorporated some portions of them into the final version.⁴³

The differing ideas of what the fundamental law for a new government should contain reflect the coalescing theories of men who had devoted much of the preceding decade to describing the constitutional rights of Englishmen in America and who now were confronted with the practical responsibility for reducing generalities to specifics. The best-read of the leaders throughout the colonies—Adams and Jefferson, Wythe and Mason being prototypes⁴⁴—accepted John Locke's retrospective interpretation of the English Revolution and refined his concept of the "consent of the governed" from their reading of the "social contract" and separation-of-powers theories of the French *philosophes* like Montesquieu and Rousseau.⁴⁵ These leaders also had certain negative principles; they remembered what they had held invalid in the actions of British colonial authorities because these had affected the affairs of local government in America and these grievances later were recited both in the Declaration of Independence and in the lengthy preamble to the Virginia Constitution.

The Richmond convention adopted the final draft on June 29; this draft embodied the Jeffersonian idea of separation of powers, "that neither exercise the Powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time," a blow at the practice of joint officeholding by members of the colonial Council.⁴⁶ The legislature clearly was to be

42. 1 J. Boyd, JEFFERSON, *supra* note 29, at 417, 423.

43. *Id.* at 337.

44. See generally H. JOHNSON, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES 1700-1799 (1978).

45. See generally THE POLITICAL WRITINGS OF THOMAS JEFFERSON (E. Dumbauld ed. 1955); Jefferson's translation of A. DESTUTT DE TRACY, A COMMENTARY AND REVIEW OF MONTESQUIEU'S SPIRIT OF LAWS (Philadelphia 1811).

46. VA. CONST. of 1776, cl. 24.

the dominant branch of government, however separate the several branches might be: both the House of Delegates and the Senate were to be elective and jointly would select the governor, his Privy Council or Council of State, and would appoint all judges and other state officials. To put the new government into effect, the convention authorized itself to "choose a Governour and Privy Council, also such other Officers . . . as may be judged necessary to be immediately appointed." The constitution itself was adopted by ordinance rather than by referral to the electorate.⁴⁷

The 1776 charter, like similar documents rather hastily adopted by several other states, was relatively concise; it did not go into the same detail on the legislative, executive, or judicial powers, or even divide these subjects into separate articles as had Jefferson's third draft.⁴⁸ The rights of suffrage, which were to "remain as exercised at present," left the dominant center of electoral power in the tide-water area in the face of a steady westward movement of population.⁴⁹ For Jefferson, this was a fundamental flaw in the instrument as a charter of democracy. On August 26 he wrote to Edmund Pendleton that he had been "for extending the right of suffrage (or in other words the rights of a citizen) to all who had a permanent intention of living in the country."⁵⁰ Experience under the new form of government in the next several years convinced him that the work of 1776 had been done too hastily and required refinement. By 1783 he read what he believed to be a growing sentiment throughout the state for a new convention, and, not intending to be caught unprepared or at a disadvantage as he had been seven years earlier, devoted most of May and June to drafting a complete, new proposed constitution.

The greatest shortcoming of the 1776 instrument, he concluded, was the virtual monopoly of power in the legislative branch, an "*elected despotism*," as he now called it.⁵¹ Only the previous fall,

47. *Id.* cl. 43.

48. Delaware, New Hampshire, and Pennsylvania each adopted a second constitution; South Carolina adopted a second and third before the end of the eighteenth century. See SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS II, 199, 205; VI, 342, 344; VIII, 277, 286, 462, 468, 476 (10 vols. W. Swindler ed. 1973-79).

49. W. SWINDLER, *supra* note 33, at 29-41.

50. Letter from Thomas Jefferson to Edmund Pendleton (August 26, 1776), *reprinted in* 1 J. Boyd, JEFFERSON, *supra* note 29, at 504.

51. 3 P. Ford, WORKS, *supra* note 29, at 159.

the state General Court had held unconstitutional a legislative pardon approved by one house without the required concurrence of the second; the words of his old mentor and colleague, George Wythe, in the judgment of a divided court, seemed to him a warning:

I have heard of an English chancellor, and it was nobly said, that it was his duty to protect the rights of the subject against the encroachments of the crown; and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely it is equally mine, to protect one branch of the legislature, and, consequently, the whole community, against the usurpation of the other . . . Nay, more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, 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 thither shall you go, but no further.⁵²

Six years later in another issue of judicial review of legislative actions, Jefferson's ideological colleague, Spencer Roane, similarly ruled against the unrestrained exercise of power by the state assembly:

I consider the people of this country the only sovereign power.—I consider the legislature as not sovereign but subordinate; they are subordinate to the great constitutional charter, which the people have established as a fundamental law, and which alone has given existence and authority to the legislature. . . .

But if the legislature may infringe this Constitution, it is no longer fixed; it is not this year what it was the last; and the liberties of the people are wholly at the mercy of the legislature.⁵³

For Jefferson, however, judicial surveillance of any branch of government—the fundamental premise to be enunciated by his fellow Virginian, John Marshall—was not the sound way to establish a system of checks and balances. In his *Notes on the State of Virginia*, Jefferson urged a clarification in the language of the consti-

52. *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 8 (1782).

53. *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 36, 38 (1793); see also *Jones v. Commonwealth*, 5 Va. (1 Call) 482, 484 (1799).

tution itself, "in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one should transcend their legal limits, without being effectually checked and restrained by the others."⁵⁴ It was a specific defense against encroachment set up within the written instrument, rather than a judicial finding that such a defense was inferred, that Jefferson held up throughout his professional career, and indeed throughout his lifetime as a counterargument to the Marshall doctrine.

The move for a new Virginia Constitution in 1784 came to naught as did other efforts in the course of the remaining years of the century.⁵⁵ Meanwhile, the nationwide movement to replace the Articles of Confederation was to give an alternate outlet to the energies of the Virginia commentators.

VIRGINIA COMMENTARY ON THE FEDERAL CONSTITUTION

The new commonwealth, even at the ultimate cost of its own western land claims, vigorously supported the first national constitution, the Articles of Confederation.⁵⁶ Jefferson wrote to Adams in May 1777 that the Articles were "A great and necessary work"⁵⁷; but in the years following their adoption in March 1781 Jefferson and others began to discern their shortcomings. James Monroe initially felt that to suggest any changes would be to jeopardize their admittedly fragile structure. "It has been brought so far without prejudice against it," he wrote in 1785, even as the increasingly moribund Continental Congress was receiving Monroe's own motion to give the national government "the sole and exclusive right and power . . . of regulating the trade of the States, as well as with foreign Nations."⁵⁸ Yet Monroe and others were acutely aware that something had to be done; the Confederation never had been much more than an interparliamentary union, with all of the inadequacies and impotence of such unions, as James Madison would elo-

54. JEFFERSON, NOTES, *supra* note 31, at 120.

55. See generally J. CHANDLER, THE HISTORY OF SUFFRAGE IN VIRGINIA 27 (1901); 7 J. Boyd, JEFFERSON, *supra* note 29, at 360, 401.

56. See M. JENSEN, THE ARTICLES OF CONFEDERATION ch. 10, at 198-210 (1940).

57. Letter from Thomas Jefferson to John Adams (May 16, 1777), reprinted in 2 J. Boyd, JEFFERSON, *supra* note 29, at 18.

58. Letter from James Monroe to Thomas Jefferson (Apr. 12, 1785), reprinted in *id.* at 76, 80.

quently describe in the ratification debates in Virginia and New York.⁵⁹

In commenting on an article about the new United States written by Jean Nicolas Demeunier for a projected *Encyclopedie Methodique* to be published in Paris, Jefferson assured the young Frenchman that the "Confederation is a wonderfully perfect instrument, considering the circumstances under which it was formed" but admitted that there were "some alterations which experience proves to be wanting."⁶⁰ As American minister to France, he had to put the best face on the matter for diplomatic reasons; at home in Virginia, correspondents advised him that sentiment for a general revision, and perhaps total replacement, of the Articles was growing. Edmund Randolph, who attended both the Mount Vernon Conference in 1785 and the Annapolis Convention the following year, lent his voice as the new governor of the state to the calls for a remedial convention. The 1785 conference had been called at the invitation of George Washington to seek resolution of the long series of disputes between Maryland and Virginia over jurisdictional issues in the Potomac basin. The encouraging results of those discussions had led to an attempt to call all of the states together at Annapolis to seek a broader settlement of interstate issues, primarily commercial.⁶¹ Although the poor representation of states at Annapolis made it impossible to reach any effective conclusions, Randolph and others renewed their efforts to bring delegates from all the states into a general convention, a move applauded from Paris by Jefferson.⁶²

Madison, whose meticulous journal of the debates in the Philadelphia convention, advocacy in the Virginia ratification convention, and contributions to *The Federalist* essays in New York earned him the title of "the father of the Constitution," outlined to Jefferson what had been undertaken at Philadelphia soon after the

59. The most useful of many editions is J. COOKE, *THE FEDERALIST* (1961). See also G. DIETZE, *THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT* (1960).

60. For Jefferson's answers to Demeunier's first query, Jan. 24, 1786, see 10 J. BOYD, *JEFFERSON*, *supra* note 29, at 14, 15.

61. On the Mount Vernon and Annapolis meetings, see J. REARDON, *RANDOLPH*, *supra* note 19, at chs. 6-8. See generally *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (5 vols. J. ELLIOTT ed. 1836) [hereinafter cited as J. ELLIOTT, *DEBATES*].

62. Letter from James Madison to Thomas Jefferson (Dec. 4, 1786), reprinted in 10 J. BOYD, *JEFFERSON*, *supra* note 29, at 574.

delegates rose on September 17. He added that "[t]he Convention is equally in the dark as to the reception which may be given it on its publication."⁶³ Jefferson, stranded in Paris now as in 1776 he had been stranded in Philadelphia while the Virginia Constitution was being drafted, wrote to Adams that "there are things in it which stagger all my dispositions to subscribe to what such an assembly has proposed"; but to Madison, two months later, his words seemed more conciliatory: "I like much the general idea of framing a government which should go on of itself peaceably, without needing continual recurrence to the state legislatures."⁶⁴ He also liked the three-part division of the proposed structure of government, something he had recommended in his proposed third draft to the Virginia convention of 1776.⁶⁵ He definitely disliked "the omission of a bill of rights providing clearly and without the aid of sophisms" for numerous individual guarantees, as well as the absence of a required "rotation in office, and most particularly in the case of the President."⁶⁶

George Mason, who had been appointed to both the Mount Vernon and Annapolis gatherings and had refused to attend either, yielded to Washington's urgings and agreed to go to Philadelphia. Once there, he went on record in support of Governor Randolph's submission of the "Virginia Plan" which went immediately to the matter of replacing the Articles with a whole new instrument of government.⁶⁷ Mason supported several other key proposals in the course of the ensuing weeks and prepared an elaborate critique of the report of the Committee of Detail when debate on the committee draft began in August.⁶⁸ Like Jefferson, however, he found things in the final draft to "stagger [his] dispositions" and on September 16, on the eve of final convention action, drew up his famous "Objections to this Constitution of Government." Foremost was his protest that "[t]here is no Declaration of Rights, and the

63. Letter from James Madison to Thomas Jefferson (Sep. 6, 1787), *reprinted in* 12 *id.* at 102-03.

64. Letter from Thomas Jefferson to John Adams (Nov. 13, 1787), *reprinted in id.* at 350-51; letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in id.* at 439.

65. See note 48 *supra* & accompanying text.

66. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 12 J. Boyd, JEFFERSON, *supra* note 29, at 440.

67. 3 R. Rutland, MASON, *supra* note 40, at 887.

68. *Id.* at 934-48.

laws of the general government being paramount to the laws and constitution of the several States, the Declarations of Rights in the separate States are no security."⁶⁹ He then joined Randolph in declining to sign the new instrument and announced that he would oppose Virginia's ratification unless substantial changes were made, presumably by a reconvened session of delegates. The unauthorized publication of his "Objections" brought upon him a storm of abuse. Randolph, who also suffered denunciations, found it expedient upon his return to Richmond to publish a "Letter" in pamphlet form explaining his position.⁷⁰

Richard Henry Lee, author of a series of "Letters from a Federal Farmer" to the *New York Republican*, which were reprinted in pamphlet form a few weeks after the convention rose, also supported Mason and Henry, who hoped to enlist Randolph as well. Lee echoed Randolph's objections—because only eleven states had endorsed the work of the convention, it could not be submitted to the states as the unanimous sense of the delegates⁷¹—and, with Mason and Henry, Lee expressed grave fear of the paramount power of a central government.⁷² Such influential expressions certainly rallied anti-Federalist forces in Virginia; but against this group was coalescing another force including Washington (who did not participate in the Richmond meeting), Madison, Wythe, a young lawyer named John Marshall, and at the end, in a stunning surprise to Mason and Henry, Governor Randolph.

The Richmond ratifying convention opened June 2, 1788 and finally adjourned on June 27, having ratified the Constitution by a narrow majority.⁷³ The arguments of Henry, Madison, Mason, and Monroe predominated and reiterated their fears and hopes in a remarkable point-counterpoint. Henry declared that the public mind was "extremely uneasy" about the proposal for creation of a new national government, "a proposal that goes to the utter annihila-

69. *Id.* at 991.

70. A Letter of His Excellency, Edmund Randolph, Esq., on the Federal Constitution (Richmond 1788). See J. REARDON, RANDOLPH, *supra* note 19, at ch. 10.

71. Rhode Island never was represented at the Philadelphia Convention. Two of New York's three delegates withdrew early in the sessions, leaving Alexander Hamilton's signature on the final draft as merely a personal endorsement. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 664 (rev. M. Farrand ed. 1937).

72. Lee's "Letter" is reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 279-325 (P. Ford ed. 1888).

73. The final vote on June 25 was 89 to 79. 3 J. Elliott, DEBATES, *supra* note 61, at 653-54.

tion of the most solemn engagements of the states." He wanted nothing more than a strengthened confederation and objected to the Philadelphia draftsmen presuming to suggest that the people of the United States rather than the states, "the characteristics and soul of a confederation," could be the source of authority for a charter of national government.⁷⁴ He pleaded for an unspecified amount of time to debate in exhaustive detail every feature of such a charter; because "if the other states who have adopted it have not been tricked, still they were too much hurried into its adoption."⁷⁵ This new government, Henry declared in reply to an argument by Madison, was a "national government" without "a single federal feature in it," and if it were ratified, there would be no need to maintain "two hundred legislators in Virginia, when the [power of] government is, in fact, gone to Philadelphia or New York."⁷⁶

Madison's arguments were essentially the same as those incorporated into his contributions to *The Federalist* essays being solicited and published by Hamilton in the course of the ratification struggle in New York. He drew upon European history from classical Greece to the more recent Dutch, German, and Swiss confederations to demonstrate the essential weaknesses of such interstate or interparliamentary systems; he soothed the fears of those who saw potential federal usurpation by distinguishing between state and national sovereignties and by denying that a national "militia" might impose its will on local governments; he extolled the checks and balances built into the separation of legislative, executive, and judicial powers.⁷⁷ Mason essentially echoed Henry, and Monroe echoed Madison.⁷⁸ Mason indicated that he might support a properly revised Constitution and pointed to the Act of Union between England and Scotland as a model: as that act preserved the rights of the people of Scotland, he asked for assurance that the new national charter likewise would protect the rights of the people of the states.⁷⁹ What if officials of the new government, despite the restraints supposedly built into the instrument, should disregard

74. *Id.* at 21-22.

75. *Id.* at 63.

76. *Id.* at 395.

77. *Id.* at 129-33, 259, 378, 424, 494, 530-32.

78. *Id.* at 378, 402, 415, 441, 521.

79. *Id.* at 271. For the Act of Union (1706), see 6 Anne, c. 11; for amendments to the Act (1707), see 6 Anne c. 40.

these and abuse their power? Replying to this fear with unknowing prescience, John Marshall then made his only major contribution to the debates. On June 20, speaking of the judicial article, Marshall endorsed "[the] tribunals appointed for *the decision of controversies* which were before either not at all or improperly, provided for [in the Articles]."⁸⁰ When these controversies involved acts not sanctioned by the Constitution, Marshall continued, the new national judiciary would declare them void.⁸¹

In the end, the convention ratified and followed this business with approval of the stipulations of Mason and others that the first Congress to meet after the new government went into effect should prepare and submit to the states a series of amendments. The Virginia convention's ratification was technically unnecessary; the required ninth state, New Hampshire, already had acted favorably, although that news did not reach Richmond before the final vote. But the approval of both Virginia and New York, as a matter of practical politics and economic geography, was essential if the new union was not to be hopelessly split into three parts. New York ratified a month later. Jefferson, writing to Madison before he knew of either Virginia's or New York's final actions, accepted the fact: "I sincerely rejoice at the acceptance of our new constitution by nine states. It is a good canvas, on which some strokes only want retouching."⁸² He described this touching-up of the new portrait in writing to Monroe on August 9, still unaware of the Virginia or New York vote; the new charter provided "a basis which is good, but not perfect." He wanted a Bill of Rights and regretted the failure of the convention to limit the tenure of office for members of Congress and the President, a flaw that "is as universally condemned in Europe, as it is universally unanimator on in America."⁸³

In an ironic finale to the eighteenth-century debates on the national Constitution and the control of national affairs under it, three of the Virginia principals were to assume roles which, for two of them at least, in the light of their later activities on the national

80. 3 J. Elliott, *DEBATES*, *supra* note 61, at 551.

81. *Id.* at 553.

82. Letter from Thomas Jefferson to James Madison (Jul. 31, 1788), *reprinted in* 13 J. Boyd, *JEFFERSON*, *supra* note 29, at 442.

83. Letter from Thomas Jefferson to James Monroe (Aug. 9, 1788), *reprinted in id.* at 489-90.

scene, would seem strangely reversed. In the course of the French Revolution, the Adams administration sought desperately to keep the United States from being drawn into the deadly struggle between England and the unstable and volatile French governments. To resolve remaining issues from the 1783 treaty of peace with England, Adams sent Chief Justice John Jay to London; but the resulting treaty, with its niggardly concessions to the American case, made Federalists unenthusiastic and anti-Federalists rabid with criticism. Adams then sent a secret (XYZ) mission to France to seek to mollify French reaction to the allegedly pro-British treaty; John Marshall, together with Charles Cotesworth Pinckney and Elbridge Gerry, comprised this commission. When it reported back its failure and Adams made public the correspondence, the country flew into a wild debate. The Federalists united in condemnation of France while the anti-Federalists polarized at the opposite extreme. The Adams administration panicked and overreacted, pushing through Congress a series of emergency statutes to become known collectively as the Alien and Sedition Acts.⁸⁴

Convinced that the Sedition Act, at least, was unconstitutional, Jefferson and Madison organized to meet the issue. The new Supreme Court had made some generalized pronouncements on matters of judicial review,⁸⁵ as Marshall in the Richmond convention had suggested would be its responsibility. Jefferson, however, as he had behaved in the face of Virginia opinions by Wythe and Roane,⁸⁶ proceeded now on the theory that a higher sovereign action should be invoked. Accordingly, he prepared a solemn declaration for passage by the Kentucky legislature while Madison, not as independent of the Jefferson leadership as he would become in later years, drew up a comparable declaration for the Virginia assembly. These statements, to be known in constitutional history as the Kentucky and Virginia Resolutions, called upon the sovereign states to pronounce the congressional enactments void as subverting "the general principles of free government, as well as the

84. See generally J. SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956). The legislation is found at Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798) and Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798).

85. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

86. See notes 52 & 53 *supra*.

particular organization and positive provisions of the Federal Constitution."⁸⁷ Although the reaction of the other states was strongly negative, Jeffersonian forces in Kentucky succeeded in passing a second Resolution on February 22, 1799 affirming the right of the states to invoke "nullification" if and when a majority could be mustered on this or future questions.⁸⁸

The century thus was ending on divisive notes that did not appear to bode well for the accomplishments of the past generation of constitution making both in Virginia and the nation. The Federalists soon were to pass into oblivion as a national party, in part because of the dissensions fomented by Jay's Treaty and the Alien and Sedition Acts. Thomas Jefferson would, within two more years, gain the Presidency after an election thrown into the House of Representatives, and John Marshall would at the same time become Chief Justice of the United States.

EPITOME OF A GENERATION: ST. GEORGE TUCKER'S COMMENTS

St. George Tucker, the second law professor at William and Mary (1790-1804), was born in Bermuda in 1757. When he came to Virginia in 1771, he intended to take some of the university-division work at the College and then go to London to study at the Middle Temple.⁸⁹ Having met George Wythe in the course of his first year in Williamsburg and having determined that he would make his permanent home in the colony, he wrote his father for permission to read for the bar in Virginia. His father consented, "as you are like to be under so good a Tutor."⁹⁰ The "Americanizing" of English law had well advanced on the eve of the Revolution, and the final reformation of the legal system that was to be proposed by the Committee of Revisers appointed by the new commonwealth in 1776, even though over the remainder of the century the proposals were to be adopted only in part,⁹¹ made it logical to establish an American chair of law and police (government organization and administration) when Jefferson led the reorganization

87. 4 J. Elliott, *DEBATES*, *supra* note 61, at 528.

88. *Id.* at 544.

89. See generally C. Cullen, *St. George Tucker and Law in Virginia, 1772-1804* (June 1971) (unpublished Ph.D. dissertation, University of Virginia) [hereinafter cited as Cullen].

90. Letter from Henry Tucker to St. George Tucker (Aug. 1, 1772) (Tucker-Coleman Collection, Earl Gregg Swem Library, College of William and Mary).

91. See generally 1 J. Boyd, *JEFFERSON*, *supra* note 29, at 525-652.

of the William and Mary curriculum in 1779.⁹²

In his first years of teaching, Wythe relied on general English "abridgements" and the current edition of *Blackstone's Commentaries on the Laws of England*, with specific citations to more relevant and distinguishing principles in Virginia law.⁹³ When Tucker succeeded to the professorship, while retaining his judgeship with the General Court, he decided at the outset to rely on *Blackstone* as his basic text, supplementing it with a stiff set of readings in classical and contemporary writers.⁹⁴ By this time, however, a substantial amount of statutory and case law in Virginia and the phenomenon of written constitutions that the state and federal courts were called upon to interpret and apply led Tucker to begin a series of essays and notes on variations from the rules set out in the *Commentaries*.⁹⁵ Early in his teaching, Tucker already had written and published separate pamphlets on current ethical and legal problems.⁹⁶ In 1797, the Philadelphia publishing house of William Burch and Abraham Small issued a prospectus for a five-volume set of an "American edition of Blackstone's Commentaries, with notes and references to the Constitution and laws of the federal government of the United States, and of the Commonwealth of Virginia; with an appendix to each volume, containing tracts upon such subjects as appeared necessary to form a systematic view of the laws of Virginia as a member of the Federal Union."⁹⁷

92. Bridge, *The Rev. John Bracken v. The Visitors of William and Mary College: A Post-Revolutionary Problem in Visitatorial Jurisdiction*, 20 WM. & MARY L. REV. 415 (1979).

93. See Swindler, *John Marshall's Preparation for the Bar—Some Observations From his Law Notes*, 11 AM. J. LEGAL HIST. 207 (1967).

94. Cullen, *supra* note 89, at 169, 171.

95. In his first volume dealing with constitutional subjects, Tucker included essays on the following: Note A. Of Sovereignty and Legislation; Note B. Of the Several Forms of Government; Note C. Of the Constitution of Virginia; Note D. Of the Constitution of the United States; Note E. Of the Unwritten, or Common Law, of England, and [its] Introduction into, and Authority within, the United American States; Note F. Of the Lex Scripta, or Written Law, of Virginia. See also Cullen, note 89 *supra*, at 177.

96. Jefferson acknowledged receipt of the renowned essay on slavery in the summer of 1797. Letter from Thomas Jefferson to St. George Tucker (Aug. 28, 1797), reprinted in 8 P. FORD, WORKS, *supra* note 29, at 334.

97. For volume one, see note 95 *supra*. Essays included by Tucker for the remaining volumes are as follows: Volume Two, Note G. Of the Right of Conscience; And of the Freedom of Speech, and of the Press; Note H. Of the State of Slavery, in Virginia; Note I. Abstract of the Bill for the more General Diffusion of Knowledge in Virginia; Note K. Of the Right of Expatriation; Note L. Of the Rights of Aliens; Note M. Summary View of the Laws Relative to the Glebes, and Churches in Virginia. Volume Three; Note A. Concerning the

Tucker's "American Blackstone," as it would be known for the next generation of students and practitioners, incorporated such a large number of notes within the main text and appendices that it eventually ran to 3,438 pages as contrasted with the 2,007 pages of the eleventh London edition.⁹⁸ Accordingly, it was a totally "Americanized" edition of the "systematical view" of the common law and thus a major contribution to American law and legal education; not until Chancellor James Kent of New York began publication of his commentaries on American law in 1826 would its influence throughout the United States be challenged.

Blackstone's introductory sections, "Of the Study, Nature, and Extent of the Laws of England," manifestly required Tucker to make detailed comparisons and distinctions of the "nature and extent of the laws" of Virginia and the United States. In the appendix essays, more than in the distinguishing footnotes to Blackstone's text, Tucker's own form of Jeffersonian philosophy manifested itself, and in his constitutional commentaries in the third and fourth of these essays, on the Virginia and Federal Constitutions respectively, he strikingly summarized and recapitulated the expressions on state and national constitutionalism that had become current coin in Virginia public affairs in the generation since independence. The first two essays, "Of Sovereignty and the

Tenure of Lands in Virginia and the Mode of Acquiring Them Under the Former and Present Government; Note B. Discourse concerning the several Acts directing the Course of Descents, in Virginia; Note C. Of the Right of Aliens to Purchase and Hold Lands; with a View of the Laws concerning Escheats and Forfeitures from British Subjects, passed in Virginia, during the Revolutionary War; Note D. The Manner of obtaining Grants of Land, under the Commonwealth of Virginia, and from the United States; Note E. Of Slaves, considered as Property, in Virginia; Note F. Concerning Usury. Volume Four, Note A. Summary View of the Judicial Courts of the Commonwealth, and of the United States, in Virginia; Note B. Of the Proceedings, upon Petitions for Lapsed Lands, under the former Government; And upon Caveats; Note C. Of the Commencement and Process, in Civil Suits at Common Law, in the Judicial Courts of Virginia; Note D. Of Appearance and Pleading; Note E. Of Proceedings upon Motions for Judgments in a Summary Way, in certain Civil Cases; Note F. Of the Trial by Jury, in Virginia. Volume Five, Note A. Of the Cognizance of Crimes and Misdemeanors; Note B. Concerning Treason; Note C. Summary View of the Courts possessing Criminal Jurisdiction within the Commonwealth of Virginia. 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* (Philadelphia 1803) [hereinafter cited as *TUCKER'S BLACKSTONE*].

98. See E. BAUER, *COMMENTARIES ON THE CONSTITUTION, 1790-1860*, at 175 (1952) [hereinafter cited as E. BAUER].

Legislature" and "Of the Several Forms of Government,"⁹⁹ not only exemplify the probable nature of Tucker's teaching but also echo the basic Jeffersonian credo that in written constitutions "the powers of the several branches of government are defined, and the excess of them, as well in the *legislature*, as in the *other* branches, finds limits which cannot be transgressed without offending against that greater power from whom all authority, among us, is derived; to wit, the PEOPLE."¹⁰⁰

Tucker distinguished, at least in theory, between sovereignty, which he considered to reside exclusively in the people, and government, which he preferred to call the "administrative authority of the state." Citing Rousseau, he declared:

The right of governing can, therefore, be acquired only by consent, originally; and this consent must be that of at least a majority of the people.

Since no person possesses any inherent right to govern, or rule over, the rest; and since the few cannot possess, naturally power enough to subdue the many; the majority of the people, and, much more the whole body, possess all the powers, which any society, state, or nation, possesses in relation to its own immediate concerns.¹⁰¹

Thus from the outset, Tucker reasserted the "compact" theory of the federal-state relationship that had been so dear to men like Henry and Jefferson and would nurture the seeds of the theory of "reserved" powers in the states that would spring up in the constitutional crises half a century later. He then proceeded to describe forms of government from ancient to contemporary European history. Conceding that "simple democracy must necessarily be confined to a very small extent of territory," he concluded that a more practical democratic structure was a representative government under a formal constitution.¹⁰² Tucker described the unwritten British constitution as "mixt," an amalgamation of the concept of sovereign authority vesting in the crown with representative power in the lower house of Parliament.¹⁰³

99. I TUCKER'S BLACKSTONE, *supra* note 97, app. nn.A & B.

100. *Id.* app. n.A, at 4.

101. *Id.* app. n.B, at 7, 8.

102. *Id.* at 22, 25.

103. *Id.* at 55-59.

With these prefatory essays as background, Tucker turned to the history and actions of the Richmond convention of 1776, with frequent reference to Jefferson's 1794 draft of a revision that had been incorporated into the 1787 *Notes on Virginia*.¹⁰⁴ "The constitution of this commonwealth was formed at a time, when the spirit of equality was at its utmost height," he began, "and under circumstances which contributed greatly to augment that natural jealousy of executive power, to which all free states are prone, and for which, the convention then saw the most just and cogent reasons." Like Jefferson, he warned that the existing document "has not provided those barriers which may be deemed indispensably necessary to prevent the several departments from transcending their legal limits, without being effectually checked and restrained by the others."¹⁰⁵ In the absence of a stipulated restraint in the constitution, the jurist-professor, quoting in detail from an opinion by Judge William Nelson in *Kemper v. Hawkins*,¹⁰⁶ accepted judicial review. In the legislative provisions of the constitution, Tucker assembled elaborate census statistics to demonstrate the propriety of the Jeffersonian argument for a more equitable electoral representation;¹⁰⁷ in the executive provisions, he reiterated his belief in the safeguards of circumscribed authority.¹⁰⁸ It was in reference to the judicial power, not particularly spelled out in the instrument itself, that the sitting judge brought this essay to a climax—quoting at length from Nos. 78 and 79 of *The Federalist* on judicial independence and suggesting in detail his recommendations for a general reorganization of the state court system.¹⁰⁹

When he turned to the Federal Constitution, Tucker had an opportunity to sum up all of the issues and fears articulated in the Commonwealth since 1788. One of the most fundamental issues—how to prevent a limited national power from becoming unlimited—he covered in a complementary fifth appendix note,¹¹⁰ in

104. See note 31 *supra*.

105. I TUCKER'S BLACKSTONE, *supra* note 97, app. n.C, at 79, 81.

106. Tucker claims that he is quoting from a "Judge Wilson"; he actually quotes from Judge William Nelson, a William and Mary alumnus. *Id.* app. n.C, at 92-95. See also 3 Va. (1 Va.Cas.) at 22, 24-29.

107. I TUCKER'S BLACKSTONE, *supra* note 97, app. n.C, at 102-08.

108. *Id.* at 118-25.

109. *Id.* at 127-35.

110. Letter from James Monroe to St. George Tucker (July 12, 1800), reprinted in 3 THE WRITINGS OF JAMES MONROE 192 (S. Hamilton ed. 1900). See also letter from Thomas Jeffer-

which he echoed Jefferson's concern that development of a federal common law would effect the expansion of federal jurisdiction as historically it had brought about the supremacy of the royal power in England. As a jurist, Tucker acknowledged that common law maxims and rules of construction and procedure were necessary when the courts were implementing congressional enactments vesting jurisdiction in explicit cases; he insisted, however, that jurisdiction could not be vested by reliance on the common law itself.¹¹¹ As for his definition of the powers of government established by the work of the Philadelphia convention, he devoted more than thirty opening pages to the proposition that the Federal Constitution was a compact, clearly defining the powers granted to the national government and those reserved by the states.¹¹²

Adverting to another argument that would be supported fervently by the states' rights school of constitutionalism thereafter, Tucker contended that because the states were created by virtue of their joint declaration of independence, expressed in a Continental Congress called upon their initiative, the national government was by definition a product of state consent.¹¹³ As he had done in his first essay, distinguishing between sovereignty and the administration of government as created by that sovereignty, he sought to identify an ultimate restraining power upon government by distinguishing between the states and the people of the states. The state, or body politic,

was competent to bind itself so far as the constitution of the state permitted; but not having power to bind the people, in cases beyond their constitutional authority, the assent of the people was indispensably necessary to the validity of the compact, by which the rights of the people might be diminished, or submitted to a new jurisdiction, or in any manner affected. From hence, not only the body politic of the several states, but every citizen thereof, may be considered as parties to the compact, and to have bound themselves reciprocally to each other, for the due observance of it

¹¹⁴

son to Edmund Randolph (Aug. 18, 1799), reprinted in 9 P. Ford, *WORDS*, *supra* note 29, at 73 (decrying federal courts' claim to review rules of decision in state courts).

111. E. BAUER, *supra* note 98, at 177.

112. I. TUCKER'S *BLACKSTONE*, *supra* note 97, app. n.D., at 140-72.

113. *Id.* at 150-57.

114. *Id.* at 169-70.

It would remain for Chief Justice Marshall, declaring nearly fifteen years later that the national Constitution was the creation of the people of the United States,¹¹⁵ to neutralize the option of sovereignty that Tucker in 1803 had sought to establish. If the Declaration of Independence of 1776 created two entities, the states and the people of the states, for Marshall, the Constitution of 1787 created two independent entities, the United States and the people of the United States. When the fourteenth amendment finally stated the dual character of the American people,¹¹⁶ Marshall's concept would prevail.

For Tucker, summing up the predominant theories of his own state in these essays, the United States consisted of a nation of "united republics":

The federal government, then, appears to be the organ through which the united republics communicate with foreign nations, and with each other. Their submission to [its] operation is voluntary, [its] councils, [its] engagements, [its] authority are theirs, modified, and united. [Its] sovereignty is an emanation from theirs, not a flame by which they have been consumed, nor a vortex in which they are swallowed up. Each is still a perfect state, still sovereign, still independent, and still capable, should the occasion require, to resume the exercise of [its] functions, in the most unlimited extent.¹¹⁷

This statement of constitutionalism dominated Virginian and Southern thought generally for the remainder of the nineteenth century and much of the twentieth. In the test of strength of constitutional ideas that was about to begin in John Marshall's Court, it was ironic that the "American Blackstone" should have been published in the same year as *Marbury v. Madison*.

The Tucker commentaries fairly and accurately reflected the ascendant constitutional view of the Jeffersonians. Even though its dominance on the national scene was curtailed substantially in the sectional crisis from the mid-1850's to the end of the Reconstruction era, it revived in variant form in the half-century of *laissez-*

115. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819).

116. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." U.S. CONST. amend. XIV, § 1. See also E. BAUER, *supra* note 98, at 265-66.

117. I TUCKER'S BLACKSTONE, *supra* note 97, app. n.D., at 189.

faire economic and constitutional thought that began with the post-Reconstruction interpretation of the due process clause of the fourteenth amendment.¹¹⁸ Although the constitutional revolution that began with the New Deal and the Second World War applied the final *coup de grace*, the Virginia school of thought epitomized in St. George Tucker's commentaries nevertheless left an indelible imprint on American history

118. St. George Tucker's grandson, John Randolph Tucker, expressed the Southern viewpoint in J. TUCKER, *THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT AND INTERPRETATION* (2 vols. 1899).