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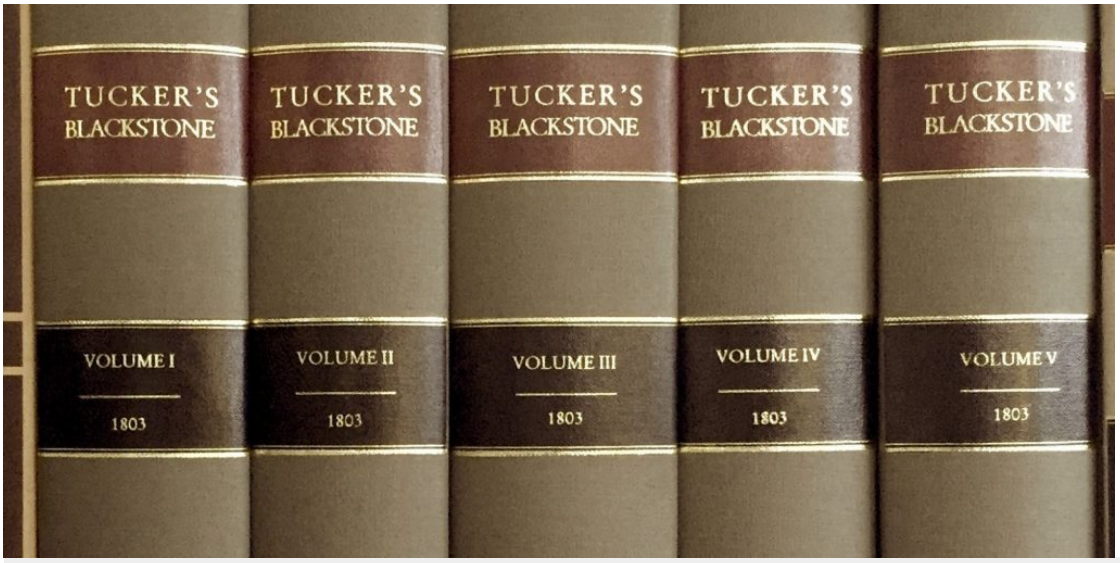
St. George Tucker's Jeffersonian Constitution

by ALLEN MENDENHALL



St. George Tucker, *Commentaries on Blackstone*. Image: St. George Tucker Society.

One could argue that there are two basic visions for America: the Hamiltonian and the Jeffersonian. The former is nationalist, calling for centralized power and an industrial, mercantilist society characterized by banking, commercialism, and a robust military. Its early leaders had monarchical tendencies. The latter vision involves a slower, more leisurely and agrarian society, political decentralization, popular sovereignty, and local republicanism. Think farmers over factories.

Both have claimed the mantle of liberty. Both have aristocratic elements, despite today's celebration of America as democratic. On the Hamiltonian side we can include John Adams, John Marshall, Noah Webster, Henry Clay, Joseph Story, and Abraham Lincoln. In the Jeffersonian camp we can place George Mason and Patrick Henry (who, because they were born *before* Jefferson, could be considered his precursors), the mature (rather than the youthful) James Madison, John Taylor of Caroline, John C. Calhoun, Abel Upshur, and Robert Y. Hayne. The Jeffersonian Republicans won out in the early nineteenth century, but since the Civil War, the centralizing, bellicose paradigm has dominated American politics, foreign and monetary policy, and federal institutions.

St. George Tucker falls into the Jeffersonian category. *View of the Constitution of the United States*, published by Liberty Fund in 1999, features his disquisitions on various legal subjects, each thematically linked. Most come from essays appended to his edition of Sir William Blackstone's *Commentaries on the Laws of England*.

Born in Bermuda, Tucker became a Virginian through and through, studying law at the College of William and Mary under George Wythe, whose post at the law school he would eventually hold. On Tucker's résumé we might find his credentials as a poet, essayist, and judge. He was an influential expositor of the limited-government jurisprudence that located sovereignty in the people themselves, as opposed to the monarch or the legislature, which, he believed, was a surrogate for the general will in that it consisted of the people's chosen representatives.

Tucker furnished Jeffersonians with the "compact theory" of the Constitution:

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> *The constitution of the United States of America . . . is an original, written, federal, and social compact, freely, voluntarily, and solemnly entered into by the several states of North-America, and ratified by the people thereof, respectively; whereby the several states, and the people thereof, respectively, have bound themselves to each other, and to the federal government of the United States; and by which the federal government is bound to the several states, and to every citizen of the United States.*

Under this model, each sovereign, independent state is contractually and consensually committed to confederacy, and the federal government possesses only limited and delegated powers—e.g., "to be the organ through which the united republics communicate with foreign nations."

Employing the term "strict construction," Tucker decried what today we'd call "activist" federal judges, insisting that "every attempt in any government to change the constitution (otherwise than in that mode which the constitution may prescribe) is in fact a subversion of the foundations of its own authority." Strictly construing the language of the Constitution meant fidelity to the binding, basic framework of government, but it didn't mean that the law was static. Among Tucker's concerns, for instance, was how the states should incorporate, discard, or adapt the British common law that Blackstone had delineated.

Tucker understood the common law as embedded, situated, and contextual rather than as a fixed body of definite rules or as the magnificent perfection of right reason, a grandiose conception derived from the quixotic portrayals of Sir Edward Coke. "[I]n our inquiries how far the common law and statutes of England were adopted in the British colonies," Tucker announced, "we must again abandon all hope of satisfaction from any *general theory*, and resort to their several charters, provincial establishments, legislative codes, and civil histories, for information."

In other words, if you want to know what the common law is on this side of the pond, look to the operative language of governing texts before you invoke abstract theories. Doing so led Tucker to conclude that parts of English law were "either obsolete, or have been deemed inapplicable to our local circumstances and policy." In this, he anticipated Justice Holmes's claim that the law "is forever adopting new principles from life at one end" while retaining "old ones from history at the other, which have not yet been absorbed or sloughed off."

What the several states borrowed from England was, for Tucker, a filtering mechanism that repurposed old rules for new contexts. Tucker used other verbs to describe how states, each in their own way, revised elements of the common law in their native jurisdictions: "modified," "abridged," "shaken off," "rejected," "repealed," "expunged," "altered," "changed," "suspended," "omitted," "stricken out," "substituted," "superseded," "introduced." The list could go on.

The English common law, accordingly, wasn't an exemplification of natural law or abstract rationalism; it was rather the aggregation of workable solutions to actual problems presented in concrete cases involving real people. Sometimes, in its British iterations, it was oppressive, reinforcing the power of the king and his agents and functionaries. Thus it couldn't fully obtain in the United States. "[E]very rule of the common law, and every statute of England," Tucker wrote on this score, "founded on the nature of regal government, in derogation of the natural and unalienable rights of mankind, were absolutely abrogated, repealed, and annulled, by the establishment of such a form of government in the states."

Having been clipped from its English roots, the common law in the United States had, in Tucker's view, an organic opportunity to grow anew in the varying cultural environments of the sovereign states. In this respect, Tucker prefigured Justice Brandeis's assertion in *Erie Railroad Company v. Tompkins* (1938) that "[t]here is no federal general common law." Tucker would have agreed with Brandeis that, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."

In fact, summarizing competing contentions about the Sedition Act, Tucker subtly supported the position that "the United States as a federal government have no common law" and that "the common law of one state . . . is

not the common law of another." The common law, in Tucker's paradigm, is bottom-up and home-grown; it's not a formula that can be lifted from one jurisdiction and placed down anywhere else with similar results and effects.

By far the most complex essay here is "On the State of Slavery in Virginia," which advocated the gradual extirpation of slavery. With admirable clarity, Tucker zeroed in on the hypocrisy of his generation:

> *"Whilst we were offering up vows at the shrine of Liberty, and sacrificing hecatombs upon her altars; whilst we swore irreconcilable hostility to her enemies, and hurled defiance in their faces; whilst we adjured the God of Hosts to witness our resolution to live free, or die, and imprecated curses on their heads who refused to unite us in establishing the empire of freedom; we were imposing upon our fellow men, who differ in complexion from us, a slavery, ten thousand times more cruel than the utmost extremity of those grievances and oppressions, of which we complained.*

Despite his disdain for the institution of slavery, Tucker expressed ideas that are racist by any measurable standard today—for instance, his notion that slavery proliferated in the South because the climate there was "more congenial to the African constitution."

On the level of pure writing quality and style, Tucker had a knack for aphorism. "[T]he ignorance of the people," he said, "is the footstool of despotism." More examples: "Ignorance is invariably the parent of error." "A tyranny that governs by the sword, has few friends but men of the sword."

Reading Tucker reminds us that for most of our country's formative history the principal jurisprudential debates were not about natural law versus positivism, or originalism versus living constitutionalism, but about state versus federal authority, local versus national jurisdiction, the proper scale and scope of government, checks and balances, and so forth. To the extent these subjects have diminished in importance, Hamilton has prevailed over Jefferson. Reading Tucker today can help us see the costs of that victory.

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