

*St. George Tucker - St. Memin Engraving, 1807*
*Courtesy of the College of William and Mary in Virginia*

*Profiles*

# St. George Tucker: The American Blackstone

*by*
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**[Editor's note: The *Profiles* section of the *Virginia Bar News,* begun in the October 1983 issue, features articles on past and present Virginians who have contributed notably to the justice system either in the state or elsewhere. Bar members who wish to contribute articles for this section should contact Richard G. Johnstone, Jr., Managing Editor, *Virginia Bar News,* Suite 1622, 700 Building, Richmond 23219.]**

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Decades after its publication in 1803, St. George Tucker's edition of Blackstone's *Commentaries* was described as "a work of great ability, and necessary to every student and practitioner of law in Virginia."[1] Having taught the common law for some time at the College of William and Mary, that same year Tucker was appointed judge of the Court of Appeals of Virginia.

Anyone skeptical of the enduring importance of Tucker's Blackstone might consider that Justice Black, joined by Justice Douglas, concurring in *New York Times Co.* v. *Sullivan* (1964), found in this work "the general view held when the First Amendment was adopted and ever since."[2] "St. George Tucker, a distinguished Virginia jurist, took part in the Annapolis Convention of 1786, sat on both state and federal courts, and was widely known for his writings on judicial and constitutional subjects."[3]

## I. Individual Rights Favored

Justice Black recalled Tucker's words that representative democracy cannot exist "whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it."[4] This broad construction of the federal Bill of Rights in favor of individual rights, currently undergoing rediscovery, pervades Tucker's writings.[5]

The lengthy appendix by Tucker in his edition of Blackstone has been characterized as "the first disquisition upon the character and interpretation of the Federal Constitution, as well as upon its origin and true nature."[6] Since it includes a clause-by-clause legal commentary on the U.S. Constitution, and was for years a textbook in Virginia and other states in the early republic,[7] Tucker's Blackstone is today useful for any litigator or scholar concerned with constitutional issues. But Tucker's message is for every citizen: "A bill of rights may be considered, not only as intended to give law, and assign limits to a government about to be established, but as giving information to the people. By reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding may learn his own rights, and know when they are violated...."[8]

## II. A Time of Turmoil

St. George Tucker's early career bears out the fact that preservation and improvement of common-law rights was the chief objective of the American Revolution. Born in 1752 in Bermuda, at age 19 St. George sailed to Virginia, where he enrolled at the College of William and Mary. He studied the common law under George Wythe, and was admitted to practice in the county courts in 1774. By the time Lord Dunmore signed Tucker's certificate of admission to the bar of the General Court the following year, the colonies were in chaos, leaving little room for the practice of law.[9]

Tucker heard Patrick Henry's famous "Liberty or Death" speech, and left one of only two detailed accounts of that debate.[10] Before returning briefly to Bermuda, Tucker informed Thomas Jefferson and Peyton Randolph of the existence of a lightly guarded ammunition depot on his native island. In the summer of 1776, ships crews from Virginia and Charleston seized the contents of the depot. When the Tories suspected Tucker of participation in this famous "Gunpowder Plot," he fled back to Virginia. From there, at the request of Patrick Henry, who replaced Lord Dunmore as governor, Tucker shipped indigo to the West Indies and exchanged the cargo for arms and ammunition, which he smuggled into Virginia in fast-moving ships.[11]

When not fighting Redcoats with his independent militia company, St. George had time for love, and married Frances Bland. Their first child, Henry St. George, would become president of the Court of Appeals of Virginia and a distinguished legal mind.[12] When Henry was barely a week old, Tarleton's raid in Virginia compelled the family to flee to a more remote part of the state. St. George was soon appointed major of the Chesterfield militia, which he led to join General Greene in North Carolina. With sword and pistol, he dashed about on his horse Hob at the Battle of Guilford Court House, rallying the wavering militiamen and taking a bayonet wound in the leg.

In the midst of war and a smallpox epidemic, St. George had the humorous frustration to write his wife Fanny: "Among the plagues the British left in Williamsburg, that of flies is inconceivable. It is impossible to eat, drink, sleep, write, sit still or even walk about in peace on account of their confounded stings."[13] Tucker would be promoted to lieutenant colonel of a troop of horsemen in the Virginia militia, and was actively involved in the siege of Yorktown when Cornwallis surrendered.

### III. Law Practice at Last

Tucker at last began a regular law practice at a time when no will had been probated or deed recorded for years. He also wrote political essays, and his publication on the encouragement of commerce led to his appointment, along with James Madison and Edmund Randolph, to the Annapolis Convention of 1786. That convention led to the Philadelphia Convention of 1787, which framed the federal Constitution. However, Tucker was known to have joined with George Mason and Patrick Henry in opposing its adoption without a bill of rights.[14] In 1788, as the nation debated the proposed federal Constitution, Tucker was appointed judge of the General Court of Virginia.

In 1796, Tucker published *A Dissertation on Slavery: With a Proposal for the Gradual Abolition of it, in the State of Virginia.* In this widely acclaimed work, Tucker emphasized the incompatibility of human bondage with the words of the Virginia Declaration of Rights that "all men are by nature equally free and independent...." His Blackstonian reduction of

"civil rights" to the rights of personal security, personal liberty and private property remains of jurisprudential interest.[15]

## IV. Tucker's View of the Courts' Duty

Judge Tucker adhered to the then-incipient view that the courts are duty bound to declare statutes contrary to the constitution as void. In a General Court case decided in 1793, Tucker opined that the Virginia Constitution of 1776, being the sovereign act of the people and hence the supreme law, "is a rule to all departments of the government, to the judiciary as well as to the legislature...."[16] And in his appendix to Blackstone's *Commentaries,* Tucker elaborated as follows:

> If, for example, a law be passed by congress, prohibiting the free exercise of religion, according to the dictates, or persuasions of a man's own conscience; or abridging the freedom of speech, or of the press; or the right of the people to assemble peaceably, or to keep and bear arms; it would, in any of these cases, be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused from any penalty which might be annexed to the breach of such unconstitutional act.... The judiciary, therefore, is that department of the government to whom the protection of the rights of the individual is by the constitution especially confided, interposing its shield between him and the sword of usurped authority, the darts of oppression, and the shafts of faction and violence.[17]

The above doctrine would be adopted by the U.S. Supreme Court in *Marbury* v. *Madison* in 1803.[18] Not surprisingly, Chief Justice John Marshall, author of that opinion, held Tucker in high esteem.

## V. Common Law Authority

Tucker's contributions are equally noteworthy in still another constitutional development. In his edition of Blackstone, Tucker asked whether the common law of England is the law of the federal government. In an elaborate dissertation, he argued that the authority of the common law "must depend solely upon the constitutional or legislative authority of each state respectively; as contained in their several bills of rights, constitutions, and legislative declarations....which, being different in different states, and wholly independent of each other, cannot establish any uniform law, or rule of obligation in all the states."[19]

Tucker's view was initially rejected by the U.S. Supreme Court.[20] Finally, in *Erie Railroad Co.* v. *Tompkins* (1938), using language remarkably similar to Tucker's, the Court would conclude: "There is no federal general common law."[21]

## VI. Tucker's Political Outlook

In 1790, Judge Tucker succeeded George Wythe as professor of law at the College of William and Mary, from which he continued to ride the circuit. John Randolph Tucker, himself a distinguished legal mind,[22] wrote of his grandfather: "In politics, of which he was very fond, he was a zealous republican, and attached to the Jefferson school, and to the Resolutions and Report of 1798-'9."[23] Tucker resented the civil liberties violations inherent in the Alien and Sedition Acts, which the Virginia and Kentucky Resolutions denounced. When Jefferson was elected President, the cheering students who marched through Williamsburg stopped at the Tucker house for glasses of wine, compliments of the judge.

In 1803, the same year he published Blackstone's *Commentaries,* Tucker resigned his professorship to become judge of the Court of Appeals of Virginia. Tucker's reliance, in his opinions in Virginia's highest court, on his English mentor reinforces his image as "the American Blackstone." Nine volumes of Virginia Reports (vols. 8-16) include opinions by Judge Tucker. As Judge Armistead Dobie of the Fourth Circuit has noted: "There were legal giants on our Court of Appeals in those days; but Tucker more than held his own among them."[24]

## VII. His Later Years

After resigning from the Court of Appeals in 1811, Tucker spent two years tending his garden in retirement. In 1813, President Madison appointed Tucker U.S. District Judge for the District of Virginia, which he reluctantly accepted, in part out of a sense of public service to a country again beset with British invasion. Tucker served on the federal bench until 1825, and on most important cases he sat with Chief Justice Marshall, who almost invariably wrote the opinion.

St. George Tucker took a last look at the pecan trees which Thomas Jefferson had helped him plant many years before. It was 1827, and Jefferson, with whom he frequently corresponded, had died the year before.[25] The old judge left Williamsburg for his summer home, never to return, for his time had come too.[26] Yet, like his English counterpart, the "American Blackstone" would leave to his countrymen a legacy of unabashed defense of human freedom.

## FOOTNOTES

1. Daniel Call, *Biography of the Judges,* 8 Va. (4 Call) xxvi, xxviii (1827).

2. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 296 (1964).

3. *Id.* at 296 n.2.

4. *Id.* at 297, citing 1 Tucker, Blackstone's *Commentaries,* 297 (1803) (editor's appendix). Tucker's Blackstone was reprinted in 1969 by Augustus M. Kelley Publishers, but is now no longer available. The work deserves permanent availability.

5. In his view that Bill of Rights freedoms are "absolute," Justice Black again reflects Tucker's civil libertarianism. Black, *The Bill of Rights,* 35 NYUL Rev. 865, 873 (1960).

6. J. Randolph Tucker, *The Judges Tucker of the Court of Appeals of Virginia,* 1 Va. L. Reg. 789, 794 (1896).

7. *Id.* at 793.

8. 1 Tucker, *supra,* Footnote 4, at 308.

9. Biographical facts about Tucker are derived chiefly from J. Tucker, *supra,* Footnote 6, and from Mary H. Coleman, *St. George Tucker: Citizen of No Mean City* (Richmond 1938).

10. Moses Tyler, *Patrick Henry,* 137 (1887; reprinted New York, 1980).

11. M. Coleman, *supra,* Footnote 9, at 32-35; J. Tucker, *supra,* Footnote 6, at 790.

12. Two of Henry St. George Tucker's best works are *Commentaries on the Laws of Virginia* (Winchester 1831) and *A Few Lectures on Natural Law* (Charlottesville 1844). He was counsel for the winning party in *Martin* v. *Hunter's Lessee,* 1 Wheat, 304, 315 (1816), became a member of the U.S. Congress, and later resigned his judgeship to become professor of law at the University of Virginia.

13. M. Coleman, *supra,* Footnote 9, at 67.

14. Madison to Jefferson, Oct. 14, 1787, in 12 Boyd, *Papers of Thomas Jefferson,* 287 (1961).

15. Tucker, *A Dissertation on Slavery,* 49-50 (Philadelphia 1796).

16. *Kamper* v. *Hawkins,* 1 Va. Cases 20, 79 (1793).

17. 1 Tucker, *supra,* Footnote 4, at 357.

18. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803).

19. 1 Tucker, *supra,* Footnote 4, at 432.

20. *Swift* v. *Tyson,* 41 U.S. (16 Pet.) 1 (1842).

21. *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64, 78 (1938).

22. See J. Tucker, *Constitution of the United States* (1899).

23. J. Tucker, *supra,* Footnote 6, at 795.

24. Hon. Armistead M. Dobie, *Federal District Judges in Virginia before the Civil War,* 12 FRD 458, 460 (4th Cir. 1951).

25. M. Coleman, *supra,* Footnote 9, at 150-51.

26. *Id.* at 124, 182-83.





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