View of the Constitution of the United States



View of the Constitution of the United States With Selected Writings

ST. GEORGE TUCKER

Foreword by Clyde N. Wilson

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The cuneiform inscription that serves as our logo and as the design motif for our endpapers is the earliest-known written appearance of the word "freedom" (*amagi*), or "liberty." It is taken from a clay document written about 2300 B.C. in the Sumerian city-state of Lagash.

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Frontispiece photograph of St. George Tucker courtesy of Swem Library, College of William and Mary

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Foreword Foreword

ST. GEORGE TUCKER'S *View of the Constitution of the United States* was the first extended, systematic commentary on the Constitution after it had been ratified by the people of the several states and amended by the Bill of Rights. Published in 1803 by a distinguished patriot and jurist, it was for much of the first half of the nineteenth century an important handbook for American law students, lawyers, judges, and statesmen. Though nearly forgotten since, Tucker's work remains an important piece of constitutional history and a key document of Jeffersonian republicanism.

Two reasons may account for the neglect of Tucker's work and of related, supportive writings. First, his view of the federal government as an agent of the sovereign people of the several states, and not as the judge of the extent of its own powers, was buried by the outcome of the Civil War, the ground for the triumphant views of Abraham Lincoln having been well prepared by Justice Joseph Story of the Supreme Court and lawyer, orator, and Senator Daniel Webster. Second, Tucker's constitutional writings were appended as essays to a multivolume densely annotated edition of Sir William Blackstone's *Commentaries on the Laws of England* that was never reprinted.

St. George Tucker was born in 1752 in the British colony of Bermuda. The Tuckers were a numerous and talented family, many of whom emigrated to the mainland colonies in North America, where several made their fortunes. For example, St. George's brother, Thomas Tudor Tucker, made his way to South Carolina, represented that state in the first two Congresses, and was treasurer of the United States from 1801 until 1828, on appointment of President Thomas Jefferson.

St. George Tucker reached Virginia in 1771. For a year he studied law at the College of William and Mary (as did Thomas Jefferson and John Marshall) under George Wythe, who shortly thereafter became a signer

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of the Declaration of Independence and chief justice of Virginia. Talented, urbane, and sociable, Tucker had no trouble making his way in the best society. In 1775, at the age of twenty-three, he was admitted to the bar. In that same year he was present in Richmond when Patrick Henry made his stirring appeal to "liberty or death!" Tucker then took part in an expedition to Bermuda that gained possession for the colonists of a large quantity of military stores that were of great use to the army of George Washington.

St. George married well, in 1778, to a wealthy widow, Frances Bland Randolph, and acquired large estates in Chesterfield County. He also acquired three stepsons, one of them the five-year-old John Randolph, later to be famous as "Randolph of Roanoke." The relationship between Tucker and Randolph was often tense.

Tucker took an active part in the Revolutionary War. In addition to the expedition to Bermuda, he was elected colonel of the Chesterfield County militia and led them to Nathaniel Greene's army in North Carolina, and is said to have distinguished himself at the Battle of Guilford Court House. During the Yorktown campaign, serving as a lieutenant colonel of horse and an aide to Governor and General Thomas Nelson, he was wounded.

Tucker's letters to his wife during his military service were published in the *Magazine of American History* in July and September of 1881, and, in addition to exhibiting marital felicity, are a valuable source of historical information on the Revolution's last Southern campaign.

After the war, Tucker's law practice flourished. He was appointed one of the committee to revise the laws of Virginia, and he served with James Madison and Edmund Randolph as Virginia commissioners to the Annapolis Convention. Tucker's career as an expounder of the new constitutions of Virginia and of the United States began in 1790 when he succeeded Wythe as professor of law at William and Mary.

Contemplating the necessities of instruction, Tucker decided to use as a text Blackstone's famous *Commentaries on the Laws of England*. Blackstone (1723-80) had for the first time brought the great chaotic mass of statutory and common law into a system that could be approached by students. Published in four volumes, from 1765 to 1769, his work largely supplanted the *Institutes* of Sir Edward Coke (1552–1634) as the premier legal text of the English-speaking world.

Though Blackstone's work was indispensable, for Americans it was problematic because it was suffused with the principles of a monarchial and aristocratic state that Americans had only recently repudiated. Americans had exhibited to the world constitutions in which the people exercised their sovereign authority to create governments that rested specifically on the people's consent at an identifiable moment of history and not on a long growth of authority and precedent. Such governments were delegates rather than masters of the people and were limited to those specific powers which the people had granted them. And, through regular elections—or if necessary a drastic reassertion of sovereignty—the American people could change their government and their governors.

It was necessary, then, to republicanize Blackstone. This task Tucker accomplished by extensive notes to the body of Blackstone's work, and by writing several dozen essays, the longest of which were *View of the Constitution of the United States* and "Of the Constitution of Virginia." These essays appeared as appendices in the various volumes of Blackstone's work, and expanded Blackstone's four volumes to five. Tucker's revised, Americanized Blackstone was published in Philadelphia in 1803 and was widely used thereafter.

While the use of Tucker's work cannot be quantified, all authorities agree that it was influential. Later American editions of Blackstone followed Tucker's method, and there is evidence of the extensive use of Tucker's work in Pennsylvania, South Carolina, and Virginia. Doubtless it was taken westward by young Virginians who emigrated to every state in the nineteenth century.

In addition to *View of the Constitution of the United States*, this book includes seven other essays lifted from Tucker's edition of Blackstone. These are the most important writings in regard to Tucker's political and constitutional thought. A great deal that was more narrowly legal has not been selected.

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In addition to his edition of Blackstone, Tucker published several political pamphlets and articles, sometimes under pseudonyms, as was customary at the time. These included "Reflections on the Policy and Necessity of Encouraging the Commerce of the Citizens of the United States," in *American Museum* (September 1787): 267–74; *Remarks on the Treaty of Amity...Between Lord Grenville and Mr. Jay* (Philadelphia: M. Carey, 1796); *Cautionary Hints to Congress, Respecting the Sale of Western Lands*, by "Columbus" (Philadelphia: M. Carey, 1796); *Letter to a Member of Congress, Respecting the Alien and Sedition Laws*, by "Columbus" (Richmond: 1799); *Reflections on the Cession of Louisiana to the United States*, by "Sylvester" (Washington, D.C.: printed by Samuel Harrison Smith, 1803); and possibly others. The essays on the common law and on slavery that are published here had been printed as pamphlets before they were included by Tucker in his Blackstone.

St. George Tucker was also by avocation a writer of moderately good verse, both patriotic and humorous. These have been collected, with an interesting introduction, in William S. Prince, ed., *The Poems of St. George Tucker of Williamsburg, Virginia, 1752-1827* (New York: Vantage Press, 1977).

In 1803 Tucker became a judge of the highest court in Virginia. In 1813 he was appointed by President James Madison to be the United States district judge for Virginia, an important post in which he had a distinguished career, resigning shortly before his death in 1827. As a jurist Tucker never wavered from the principles he had set forth as a professor of law.

Tucker established a virtual dynasty of legal and constitutional talent that carried on Jeffersonian principles through successive generations. A son, Henry St. George Tucker (1780–1848), served in the state legislature and the U.S. House of Representatives, was chief justice of Virginia, conducted a successful private law school at Winchester, Virginia, declined President Andrew Jackson's appointment as attorney general of the United States, became professor of law at the University of Virginia, and published books on natural law, constitutional law, and the laws of Virginia. Another of Tucker's sons, Nathaniel Beverley Tucker (1784–1851), became professor of law at William and Mary and published three novels and a number of works on political economy and public issues. He is a major figure in the intellectual history of the Old South.

In the next generation, St. George Tucker's grandsons were equally distinguished. John Randolph Tucker (1823–97), son of Henry St. George Tucker, was attorney general of Virginia, professor of law at Washington and Lee University, counsel in numerous major cases before the United States Supreme Court, served in the U.S. House of Representatives from 1875 to 1887, and published, among other works, *The Constitution of the United States* (2 vols., 1899). Another son of Henry St. George was Nathaniel Beverley Tucker (1820–90). He edited an antebellum newspaper in Washington, D.C., was U.S. consul at Liverpool, and served the Confederate States as an economic agent abroad.

St. George Tucker's great-grandson, Henry St. George Tucker (1853– 1932), son of John Randolph Tucker, represented Virginia in the U.S. House of Representatives from 1876 to 1889 and again from 1922 to 1932, carrying on the states' rights, populist, anti–big business tradition of his family and state. He was also professor of law at Washington and Lee University, and published *Limitations on the Treaty-Making Power Under the Constitution of the United States* and *Woman's Suffrage by Constitutional Amendment*.

Given the massive changes in the extent and distribution of political power since the Civil War, and the resulting adjustments in accepted understandings of the Constitution, Tucker's principles of states' rights and limited government are likely to seem strange to Americans today, unless it is remembered that these principles were the prevailing ideas not only during Tucker's time but also for several generations after.

The Constitution that Tucker explicates is the Constitution that was ratified by the people of the several states. It is to be understood as explicated by the ratifiers, including their reservations, some of which were embodied in the first ten amendments, which were a further limitation on the delegated powers of the new general government. For the assumption that the meaning and authority of the Constitution is to be

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found in its ratifiers, and not in the learned discussions of the Framers at Philadelphia, who were, after all, only drafting a proposal for the people's consideration, Tucker has the support of Madison himself. (See Madison's letter to Thomas Ritchie, September 15, 1821.)

Tucker, then, does not stand in awe of the *Federalist Papers*. He recognizes them as special pleadings for the Constitution before ratification and amendment. He finds some things in them admirable, particularly the defense of an independent judiciary, but he quotes them most often in support of the limited nature of the new federal government. Though Tucker is well read in political philosophy, he does not need a long historical exposition of ideas to explain the Constitution. The document is for him generally clear and specific, self-evident to those who ratified it. This is not to suggest, however, that Tucker cannot when necessary call upon Justinian, Grotius, Pufendorf, Vattel, Montesquieu, Locke, Rousseau, or other more nearly contemporaneous writers.

Tucker is the exponent of Jeffersonian republicanism, or what has been called "South Atlantic republicanism," in contrast to the commercial republicanism of New England that has since the Civil War been taken to be the only true form of American philosophy. The political background of Tucker's work is significant. The Constitution had been ratified reluctantly and with reservations by Virginia and New York (and not at all by North Carolina and Rhode Island) only on the understanding that amendments would be made. Twelve such amendments were proposed by the First Congress, and ten of them swiftly were ratified. This "Bill of Rights" was to reassert the limited nature of the new government's powers and their dependence solely on the delegation of the people of the several sovereign states.

Hardly had the federal government gotten under way, however, than the largely Northern political faction gathered under Hamilton and Adams launched an initiative to stretch those powers as far as they would go, and to make light of the limits. Much of this expansion represented a desire to use the government in mercantilist ways—for example, a national bank, a funded national debt, a commercial treaty with Great Britain. All were policies that profited the commercial classes of the North and were burdensome to the free-trade agricultural empire of the South.

Into this domestic conflict burst the French Revolution. The great ideas of revolution and reaction that tore apart Europe could not go unnoticed in the New World, which had just experienced its own revolution and whose leaders were well aware of the power of ideas. The relation of American neutral commerce to the belligerent powers in Europe was a vexing practical issue, and the ideological heat from Europe intensified the intra-American conflict over the nature and powers of the general government.

Thus, for example, the Puritan clergy of New England during the presidential election of 1800 denounced Jefferson as a Jacobin atheist who would set up the guillotine and undermine the moral foundations of American society. Probably the conflict was really cultural, contrasting the highly ordered, communal society of New England—where most of life was regimented under leaders of proper principle—and the easygoing laissez-faire life of the South. It is a curious fact that the bourgeois leaders of the North had visions of imminent uprisings of Jacobin mobs and supported such policies to stifle dissent as the Alien and Sedition acts, whereas the aristocratic leaders of the South declared for the people and for policies of liberality. While Jefferson in Virginia rested among his two hundred slaves, John Adams was barricaded in his Philadelphia mansion against an expected attack of the revolutionary mob.

These differences of culture were also evident in political styles. Plain John Adams rode to his inauguration in a coach drawn by white horses, insisted on being addressed as "His Excellency," and demanded the strictest social protocol. By contrast, the genuinely aristocratic Jefferson walked to his inauguration with the Virginia militia, established the order of pell-mell at leisurely functions in the White House, and sent his messages unostentatiously to Congress in writing rather than appearing in person.

If the Federalists called their opponents Jacobins, the Jeffersonians could reply that the Federalists were dangerously imbued with "monarchical" tendencies. To Jeffersonians, the Federalists did not actually trust

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the people, gave only lip service to republicanism, and wanted a government of large, even unlimited, authority. Both Hamilton and Adams were declared admirers of the British constitution, to which they attributed most of what was valuable in American constitutions. By comparison, in *View of the Constitution of the United States*, Tucker carefully contrasts the British and American constitutions, to the credit of the latter.

Most of what Federalists admired in British principles Tucker considers to be imaginary rationalizations for quite different realities. This is his response to those who he believed over-emphasized the British inheritance. What Americans had deliberately created was superior to what had merely evolved in a system that did not honor the sovereignty of the people.

In 1798 the Federalist Congress passed and Adams signed the Alien and Sedition acts. The Alien Act allowed the president to deport any noncitizen he deemed undesirable. No judicial proceeding was involved. For Tucker and other Jeffersonians this was an assumption by the federal legislature and executive of powers not delegated and also a violation of the separation of powers since it gave the president authority that belonged properly to the judiciary.

Even worse, in Tucker's judgment, was the Sedition Act, which provided for criminal prosecution in federal courts of persons deemed to have made publications that tended to bring the officers of the federal government into disrepute. Several conspicuous prosecutions were made. Tellingly, the Congress that passed the act designed it to expire on the date they would leave office, in case their opponents gained control. For Jeffersonians such as Tucker, the Sedition Act was a violation of individual liberties, an assumption of power that never had been delegated to any part of the government (after all, the states had just ratified the Tenth Amendment), a subversion of state rights, and obviously an attempt to suppress political opposition and criticism of those in power.

The Jeffersonian response was the series of reports and resolutions that came out of the legislatures of Kentucky and Virginia from 1798 to 1800 and which were written by Jefferson and Madison. These resolutions reasserted that the federal government was of specific, limited, and delegated powers, and that the federal government was the agent of the sovereign people of the states and not the judge of its own limits. The resolutions also declared that, when the federal government egregiously overstepped its limits, the states possessed both the right and the duty to interpose their authority and render such usurpations null and void.

The conflict between federal and state power remained theoretical and potential as long as its issues were settled by normal political processes. Jefferson and his party triumphed in 1800 and remained in power for a quarter of a century (during which New England states asserted similar rights in protest of federal commercial and military policies). There was no showdown, but for Tucker and many others, for several generations, the "Principles of 1798" remained a primary text of constitutional discourse.

Tucker takes for granted the option of secession. If the Constitution draws its authority from the consent of the sovereign—which is the people of the several states—then the sovereign may withdraw that consent (not, of course, something to be done lightly). The people's consent to the Constitution is not a one-time event that forever after binds them to be obedient to the federal government. A state's right of withdrawal remains always an open option against a government overstepping its bounds, and is affirmed in the nature of the Constitution itself and in the right of revolution propounded by the Declaration of Independence.

One of Tucker's principal concerns as a legal and political thinker is to affirm the standing of the judiciary as an independent and coequal power with the legislature and executive. This is an American accomplishment, to be supported in state and federal governments both. For him the judiciary is the realm in which individuals may seek relief from the oppressions of government. The judiciary's power and independence are therefore essential.

But by no means does this principle encroach upon the even more fundamental federal principle. Tucker insists that it is the duty of the federal courts to restrain the other branches of the federal government, not to make policy and certainly not to invade the rights of the states. The jurisdiction of the federal courts is rightly limited to the delegated

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sphere of federal power, and carries no imprimatur of supremacy over the state courts and their jurisdictions.

But Tucker sensed the potential for just such extensions of power, something that he and other Jeffersonian jurists were committed to resist. This is reflected in his serious attention to the question of the common law and its application to federal jurisprudence. To infuse the common law into federal jurisprudence would, in his view, give the federal courts power over every question in society. This was the path taken, successfully, by Justice Joseph Story in both teaching and decree, and it is the path that led eventually to the judicial supremacy of the twentieth century. For Tucker there was a clear defense against this possibility: the common law was infused into American law because each of the colonies had adopted such parts of it as were relevant or expedient. Each state was different in this respect, and each state was the judge of its own business. The federal judiciary was created by the people with specific, limited, delegated powers. It was not among those powers to evolve or assume legal principles from some other source. The Constitution and the laws themselves were plain enough, and, unlike the common law, rested upon the consent of the people.

This conviction of states' rights is dismissed conventionally as a rationalized defense of minority interests, particularly in regard to slavery in the antebellum South. Accordingly, Tucker's writings on slavery are especially interesting. In 1796 he published a pamphlet that proposed for Virginia a plan of gradual emancipation, and he included this plan as an appendix to his edition of Blackstone. His reasoning and proposals came to naught, but they show what it was still possible to consider and to discuss in the South of Tucker's time. His time was, of course, before the rise of militant abolitionism in the North, and when the question was for Virginians alone to decide.

Tucker can be seen as prophetic in a number of ways. For instance, one of the chief defects or dangers he finds in the Constitution has to do with the president, and especially with the president's powers in foreign affairs and the military. Tucker would have preferred to have the House of Representatives as well as the president and the Senate to approve treaties. He understands that it would be potentially in the power of a president to bring on war by creating a situation in which the required declaration by Congress would be no more than an after-the-fact recognition.

Tucker remains a valuable expositor of early American republicanism, well worth the attention of any who wish to understand the origins of our system, both in regard to the Constitution and in regard to the larger conception of republican government that underlies it. Scattered through his disquisitions are many gems of quotable aphorism, as when he comments that a prosperous government and a prosperous people are not necessarily the same thing. Perhaps his thinking is most concisely distilled in this statement: "It is the due [external] restraint and not the moderation of rulers that constitutes a state of liberty; as the power to oppress, though never exercised, does a state of slavery."

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\sim Note on the Text

THE TEXTS for all the writings of St. George Tucker published herein are taken from essays he appended to his edition of Blackstone: *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,* 5 vols. (Philadelphia: Published by William Young Birch and Abraham Small. Robert Carr, Printer, 1803). The texts here preserve the original eighteenth-century spelling and punctuation and the liberal use of italics and small capitals common at the time.

It has, however, been necessary to make considerable alteration in Tucker's footnotes. These are voluminous. Many are references to obsolete compilations of laws or to now familiar specific clauses of the Constitution of the United States, which was then a new document. (Blackstone's *Commentaries* was, after all, primarily a reference work for law students.) Tucker's notes were marked by archaic printer's symbols, used generalized rather than precisely specific titles of works, and often cited page references to eighteenth-century editions of classic works that are not likely to be available to readers today.

Many footnotes that seemed no longer useful have been eliminated. In those retained, Tucker's style has been preserved as far as possible. At the end of most essays, a recapitulation of the major works referred to by Tucker has been added. In addition, some new footnotes have been placed in the present edition where it seemed useful for the contemporary reader. In every case, such new material is preceded by the tag *"Editor's note."* All footnotes, new and old, have been renumbered in one series for each essay.

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Note on Tucker's Numbering of the Amendments

A word to the reader who otherwise is likely to be disconcerted by Tucker's manner of labeling the first ten amendments to the Constitution. The First Congress proposed twelve amendments, designed to meet objections raised by Virginia and other states. Two of these amendments, though ratified by Virginia, were never ratified by a sufficient number of states, a fact of which Tucker apparently was not aware when he prepared his edition of Blackstone for the printer. So he refers often to "the twelve articles of the amendments." Even more disconcertingly, he assigns the amendments numbers that do not correspond to later practice. For instance, when he writes "the twelfth article of the amendments," he means the Tenth Amendment. When he writes "the third article of the amendments," he means the First Amendment. Once this peculiarity is grasped the exposition becomes clear. View of the Constitution of the United States

On the Study of Law

"On the Study of Law" was Tucker's "Editor's Preface" to his edition of Blackstone's Commentaries. In it he surveys the conditions for the study of law in the United States. But his chief concern is how to Americanize (or Virginianize) and republicanize a work so essential as Blackstone, yet so suffused with monarchical principles. It is this goal that justifies the numerous appendices that he has added to the work, each an essay on a particular area for which Blackstone is an inadequate guide for American students. Two of the most important essays are those on the Constitution of the United States and the Constitution of Virginia. Tucker stresses that American constitutions are written declarations ratified by the people of the states, and they are to be interpreted through their plain texts and through the instruments of the people's consent, and not by speculative writers on government or by office-holders, the people's delegates. Other important questions for Tucker are to what extent the common law is operative in the United States, and what are the boundaries of federal and state judicial jurisdiction. Finally, Tucker assures fledgling lawyers that, as future framers of law, they must have a knowledge of the constitutions and history of their country, as well as of law itself, if liberty is to be preserved.

WHEN A WORK of established reputation is offered to the public in a new dress, it is to be expected that the Editor should assign such reasons for so doing, as may not only exempt him from the imputation of a rash presumption, but shew that some benefit may be reasonably expected to result from his labours.

Until the COMMENTARIES *on the laws of England* by the late Justice Blackstone made their appearance, the students of law in England, and