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# Rights of humans, rights of states: the academic legacy of St. George Tucker in nineteenth-century Virginia

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RIGHTS OF HUMANS, RIGHTS OF STATES: THE ACADEMIC LEGACY OF  
ST. GEORGE TUCKER IN NINETEENTH-CENTURY VIRGINIA

A Dissertation

Submitted to the Graduate Faculty of the  
Louisiana State University and  
Agricultural and Mechanical College  
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in

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by

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## Abbreviations Used in Footnotes

AHS	Alexander Hamilton Stephens
ATB	Albert Taylor Bledsoe
DU	Manuscript and Special Collections Department, William R. Perkins Library, Duke University, Durham, North Carolina.
GFH	George Frederick Holmes
GT	George Tucker
HW	Henry Augustine Washington
HSGT	Henry St. George Tucker
JHH	James Henry Hammond
JRT	John Randolph Tucker
JTC	John Taylor of Caroline
NBT	Nathaniel Beverley Tucker
RLD	Robert Lewis Dabney
SGT	St. George Tucker
SHC	Southern Historical Collection, Wilson Library, University of North Carolina, Chapel Hill, North Carolina
TJ	Thomas Jefferson
TRD	Thomas Roderick Dew
UVA	Special Collections Department, Alderman Library, University of Virginia, Charlottesville, Virginia.
W&M	Special Collections Department, Earl Gregg Swem Library, College of William and Mary, Williamsburg, Virginia.

## Abstract

College professors in the nineteenth-century South lavished a great deal of attention on the issues of slavery and constitutionalism, and they paid careful attention to the connections between these issues and the idea of natural rights. In this dissertation I offer an analysis of the lives and writings of three generations of college professors in nineteenth-century Virginia, focusing especially on St. George Tucker and his descendants. As a contemporary of Thomas Jefferson and as a delegate to the Annapolis convention, Tucker can rightly be considered as one of the founding fathers. But he is best known for inaugurating the academic discourse on the issues of slavery and constitutionalism in his capacity as professor of law at the College of William and Mary. His sons, Henry and Beverley Tucker, and his grandson John Randolph Tucker kept these academic traditions alive for three generations. Members of the Tucker family continuously espoused a modern theory of natural rights based upon a contractual understanding of how people come to exist in society. By the 1850s, however, some professors such as George Frederick Holmes had abandoned the philosophy of modern natural rights in favor of a re-articulation of classic or ancient natural right: a non-contractual conception of the right to rule. This recovery made possible the “positive good” defense of slavery, but it put a strain upon the orthodox theory of constitutional interpretation that had been at the center of Virginian political thought. This dissertation examines how the Tuckers and others strove to keep the philosophy of the founding generation alive throughout the various political upheavals of the nineteenth century.

## Introduction

The people of the United States are proud of their democracy. Indeed they sometimes even try to export their type of government to other parts of the world. But they would do well to remember that without individual rights, and without the rights of groups, democracy can be dangerous. Unfortunately, human rights advocates often scoff at states' rights advocates, and states' rights advocates often return the favor. Although these two ways of protecting the rights of political minorities have been at odds at various times in the history of the United States, it is possible for them to exist in harmony. Indeed, they both stem from the same philosophy, the philosophy of modern natural rights.

My dissertation examines the lives and writings of three generations of college professors in nineteenth-century Virginia and reveals a remarkable shift in the idea of natural rights held by these men. They began by espousing a modern theory of natural rights based upon a contractual understanding of how people come to exist in society. By the 1850s, however, some professors had abandoned these ideas in favor of a re-articulation of classic or ancient natural right: a non-contractual conception of the right to rule.<sup>1</sup> This recovery made possible the “positive good” defense of slavery, but it put a strain upon the orthodox theory of constitutional interpretation that had been at the center of Virginian political thought.

The dominant figure in this dissertation is St. George Tucker. As a member of Thomas Jefferson's generation, Tucker understood the doctrine of equality expressed in the Declaration of Independence in a very restricted sense. To members of this generation equality meant

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<sup>1</sup> The distinction between modern natural rights and classic natural right finds its fullest development in: Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1950).



equality in the state of nature.<sup>2</sup> According to this understanding, a hypothetical state of nature preceded the entrance of the individual into the state of society. In the state of nature, one had complete freedom, but everyone else possessed complete freedom as well. Such a situation produced considerable danger, and humans usually left the state of nature in order to survive. By entering society, the individual gave up some of the liberties that would otherwise have been enjoyed, but thereby secured self-preservation.<sup>3</sup>

As chapter one demonstrates, the violent slave revolt that produced the modern nation of Haiti made it possible for St. George Tucker and other members of his generation to justify the continuance of slavery while still maintaining allegiance to the modern natural rights philosophy. In their defenses of slavery, members of St. George Tucker's generation merely argued that premature abolition would produce a threat to their self-preservation. This early proslavery argument put less strain upon the modern theory of natural rights than has generally been supposed. A properly historical understanding of what the founding generation meant by equality makes this point clear, and chapter one aims to correct popular misconceptions of this issue.

Chapter two offers an analysis of St. George Tucker's constitutional thought. Working as a law professor at the College of William and Mary at the beginning of the nineteenth century, Tucker wrote a seminal series of essays in which he set forth his theory that the Constitution of the United States is a compact between free and sovereign states. Tucker espoused what I call a

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<sup>2</sup> Pauline Maier *American Scripture: Making the Declaration of Independence* (New York: Knopf, 1997), esp. 155, 192.

<sup>3</sup> There exists an immense amount of scholarship on the question of social contract theory and the American founders. I have found the following works useful: Andrew C. McLaughlin, "Social Compact and Constitutional Construction," *American Historical Review* V (1900): 467-490; Thad W. Tate, "The Social Contract in America, 1774-1787: Revolutionary Theory as Conservative Instrument," *William and Mary Quarterly* XXII (1965): 375-391; Ronald J. Pestritto and Thomas G. West, eds., *The American Founding and the Social Compact* (New York: Lexington Books, 2003).

Whig theory of politics: because he feared the power of the state, he argued that constitutions are necessary to keep the state in check.<sup>4</sup> He based this argument upon the philosophy of modern natural rights. Chapter two also describes St. George Tucker's involvement with the events leading up to the drafting and adoption of the United States Constitution. It then carries forward with an explanation of Tucker's views regarding the Virginia Constitution of 1776, his critique of the English legal theorist William Blackstone, and an analysis of how his opposition to the Alien and Sedition Acts led him to oppose a common law jurisdiction for the federal government.

St. George Tucker's sons, Beverley and Henry, would later become professors in their own right, and chapter three describes how they, and other professors of their generation, analyzed the issue of slavery. The pressures of an increasingly democratic society led the professors of this era to doubt the orthodox view of modern natural rights. This generation of the Tucker family flirted with the older theory of classic natural right but never fully abandoned the modern natural rights philosophy of their father. As chapter four demonstrates, they needed this philosophy in order to defend their father's conception of the Constitution from interpretations they regarded as heretical. These interpretations included not only the nationalistic views of Joseph Story and Daniel Webster, but also the nullification doctrine of John C. Calhoun.

Indeed, no one in the Tucker family ever went so far as to adopt the philosophy of classic natural right. In Virginia, the modern natural rights philosophy of slavery manifested in St. George Tucker's writings received no fundamental challenge until the 1850s, when a philosophy professor at the University of Virginia, George Frederick Holmes, put forth a new defense of

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<sup>4</sup> My understanding of what the Virginians of Tucker's day meant by a Whig theory of government has been aided by David N. Mayer's *The Constitutional Thought of Thomas Jefferson* (Charlottesville: University Press of Virginia, 1994).

slavery based upon classic natural right. I analyze this development in chapter five. Holmes called for a “new system of political science” based upon the ancient understanding of human nature, and writers such as George Fitzhugh and professors such as Albert Taylor Bledsoe responded to his call. These men developed a new type of slavery defense: a defense to which they continued to appeal, even after the end of the Civil War.

Scholars have conventionally referred to this defense of slavery as the “positive good argument.” As early as 1935, William Sumner Jenkins placed the origins of this argument in the controversies surrounding the admission of Missouri as a state in the early 1820s. This interpretation has proven controversial, largely because it conflicts with a consistently popular view that the positive good argument emerged in response to the challenge of uncompromising abolitionists, which did not come to the public attention for another decade. More recently, historians have attacked the idea of a positive good defense of slavery in various ways: arguing that southern evangelicals did not make positive good arguments; that such arguments never became popular in Virginia; or, perhaps most controversially of all, that the differences between the two forms of proslavery argument are superficial and misleading.<sup>5</sup>

These studies demonstrate that the search for a positive good defense of slavery can quickly become a pursuit after a red herring. Often, when southerners called slavery a necessary evil they were doing little more than putting a rhetorical flourish upon what was substantively a positive good argument. Nevertheless the distinction between the necessary evil and positive good defenses of slavery remains useful, for it represents a surface manifestation of a deeper

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<sup>5</sup> William Sumner Jenkins, *Proslavery Thought in the Old South* (Chapel Hill: University of North Carolina Press, 1935), 77; Anne C. Loveland, *Southern Evangelicals and the Social Order, 1800-1860* (Baton Rouge: Louisiana State University Press, 1980), x, 186-218; Alison Goodyear Freehling, *Drift Toward Dissolution: The Virginia Slavery Debate of 1831-1832* (Baton Rouge: Louisiana State University Press, 1982), 248 passim; Larry E. Tise, *Proslavery: A History of the Defense of Slavery in America, 1701-1840* (Athens: University of Georgia Press, 1987).

transformation in the political thought of nineteenth-century Virginia. Thinkers in the tradition of modern natural rights could be quite vehement in their defense of slavery; however, a positive good defense generally requires the abandonment of modern natural rights in favor of a resumption of classic natural right or of scriptural literalism. Although the workaday politician or the man in the street might not have concerned himself with such changes in political thought, many college and university professors not only noticed the changes, but indeed worked to make them possible. Thus a study of academic discourse in nineteenth-century Virginia reveals aspects of southern intellectual life that have suffered from comparative neglect by historians.<sup>6</sup>

Some will protest that I do not devote enough space to the racial aspects of the proslavery argument. Although I do not address the issue in this dissertation, it is my belief that the increasing democratization of the nineteenth century caused many Americans to interpret the equality clause of the Declaration in a new way. Believing that everyone should be equal in a literal sense, and holding that no one should be any better off than anyone else, Americans began to have a more difficult time explaining why some people, specifically black people, often lived in slavery. In order to explain this apparent anomaly, some Americans inaugurated a new form of racial discourse, in which they formalized and justified the idea of black inferiority.<sup>7</sup> Yet even among Virginian academicians of the 1850s, strictly racist arguments for slavery were less

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<sup>6</sup> Other scholars of the period have noted that the academicians of the antebellum South did more than simply abandon modern natural rights, but few have developed this insight at any length. Drew Gilpin Faust, *A Sacred Circle: The Dilemma of the Intellectual in the Old South, 1840-1860* (Baltimore: Johns Hopkins University Press, 1977), 94, 119-120; Eugene Genovese, *The Slaveholders' Dilemma: Freedom and Progress in Southern Conservative Thought, 1820-1860* (Columbia: University of South Carolina Press, 1992), 48-54; Michael O'Brien, *Conjectures of Order: Intellectual Life and the American South, 1810-1860* (2 vols., Chapel Hill: University of North Carolina Press, 2004), II: 960-965, 975, 987.

<sup>7</sup> Despite a great deal of recent scholarly work on the evolution of racism, the classics on this topic remain unsurpassed: Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Chapel Hill: University of North Carolina Press, 1968); George D. Frederickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817-1914* (New York: Harper & Row, 1971).

common than arguments that attempted to return to the ancient idea of natural right: a non-consensual, non-contractual view of wisdom as the right to command. A leading scholar has recently argued that “the key to the proslavery argument was race.”<sup>8</sup> This statement probably holds true if one looks at the views of slavery held by the general population of the antebellum South. In explaining academic discourse in nineteenth-century Virginia, however, it is necessary to focus more on rights discourse and less on racial discourse. As I demonstrate, Virginian academicians of the period simply wrote more about rights than they did about race.

I also show that, at root, southerners had to choose between constitutional orthodoxy and classic natural right. Attempts to square the circle on this question have never been fully satisfactory. One twentieth-century scholar has argued that: “Society does not rest on a contract. But the Constitution of the United States does.”<sup>9</sup> While true in a limited sense, to understand the Constitution requires understanding it as it was understood by the men who wrote it and ratified it. And those men adhered to a conventional understanding of modern natural rights theory. As chapter six demonstrates, some Virginian academicians, including St. George Tucker’s grandson, continued to uphold the constitutional orthodoxy of the framers throughout the Civil War and beyond into the latter years of the nineteenth century. St. George Tucker’s legacy survived the end of slavery and the imposition of the Reconstruction Amendments. Indeed, his legacy remains available even today, to anyone who seeks to understand American constitutionalism. His legacy teaches that the rights of humans and the rights of states should be partners, not antagonists.

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<sup>8</sup> Paul Finkelman, *Defending Slavery: Proslavery Thought in the Old South* (New York: Bedford/St. Martins, 2003), 39.

<sup>9</sup> M. E. Bradford, *Remembering Who We Are: Observations of a Southern Conservative* (Athens: University of Georgia Press, 1984), 14.

## Chapter One: Natural Rights and Slavery in St. George Tucker's Virginia

### I.

Although a native of Bermuda, where he was born in 1752, St. George Tucker would come to establish one of the leading academic families in the history of Virginia. His sons Henry and Beverley, his cousin George, and his grandson John Randolph all became professors at Virginia colleges and universities. As a youth in Bermuda, Tucker had grown up hoping to attend law school at the Inns of Court in London. His two older brothers had received their education in Scotland, where they trained to be medical doctors at the University of Edinburgh. Unfortunately for St. George, his brothers' training had proven expensive. When it came time to leave the island to pursue his education, Tucker found that his family had little money left to finance such an adventure.<sup>1</sup>

Hearing that the College of William and Mary could provide affordable legal training, Tucker's father, a prominent merchant, rushed at the chance to plant down some family roots in the Chesapeake. Leaving the island in 1771, Tucker began remedial work with George Wythe in Williamsburg. Wythe was one of the foremost legal minds in the state, and in 1787 he would serve as a member of Virginia delegation at the Constitutional Convention in Philadelphia. Although nominally a part of the William and Mary faculty, Wythe still taught lawyers through the traditional apprenticeship method. His curriculum consisted of three chief components: close reading of the classics of legal thought, non-stop abstracting of the leading law cases occurring

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<sup>1</sup> In composing this sketch I have relied upon: SGT to Richard Rush, 27 Oct. 1813, in "Randolph and Tucker Letters," *Virginia Magazine of History and Biography* XLII (1934): 211-221; Phillip Hamilton, *The Making and Unmaking of a Revolutionary Family: The Tuckers of Virginia, 1752-1830* (Charlottesville: University of Virginia Press, 2003), and Charles T. Cullen, "St. George Tucker and Law in Virginia," (Ph. D. diss., University of Virginia, 1971).

throughout the English-speaking world, and general reading in those disciplines closely related to the law, such as philosophy and history.<sup>2</sup>

In 1779, Thomas Jefferson, then governor of Virginia and himself a former student of Wythe's, pushed through curriculum reforms that established the first legal professorship in the United States at the College of William and Mary. Wythe accepted the chair, and in this capacity worked to create a new academic discipline. Moving beyond the old apprenticeship methods, he established moot court and mock legislative exercises to accompany the more traditional lectures, tutorials, and, as before, supervised reading and abstracting of cases. By the time Wythe brought forth this new approach, Tucker had already graduated, but he would take up Wythe's professorship in 1790. A war for independence had to be fought in the meantime.

Tucker gained admission to the Virginia bar by 1775, but the burgeoning conflict with Britain made it impossible for him prosper as a lawyer at that time. He left for Bermuda in June of that year, vowing to return to Virginia eventually, perhaps after acquiring further legal education in England. Soon after arrival in the islands, Tucker discovered that his pro-American sympathies rendered him suspect in the eyes of the island's governor. The governor had good reason to be skeptical of Tucker, for the young man soon became involved in a successful plot to ship the royal gunpowder stores from Bermuda to Virginia and South Carolina, netting himself a profit in the process. Once word arrived that the Chesapeake was again open to travelers, Tucker disembarked for Virginia, picking up some salt along the way, which he also managed to sell at

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<sup>2</sup> My portrait of Wythe is based on: M. E. Bradford, *Founding Fathers: Brief Lives of the Framers of the United States Constitution*, 2<sup>nd</sup>. ed., (Lawrence: University Press of Kansas, 1994), 157-161; Susan Godson, et. al, *The College of William and Mary: A History* (2 vols., Williamsburg: King and Queen Press, 1993), I:136; Robert Bevier Kirtland, *George Wythe: Lawyer, Revolutionary, Judge* (New York Garland, 1986); E. Lee Shepard, "George Wythe," in W. Hamilton Bryson, ed., *The Virginia Law Reporters Before 1880* (Charlottesville: University Press of Virginia, 1977), 90-95.

profit. Inspired by his own performance, he began to make a career of smuggling indigo into the Caribbean where he traded it for arms to support the revolution.

In 1777, Tucker married a young widow, Frances Bland Randolph, thereby joining the Virginia gentry, and beginning one of the Old Dominion's most remarkable family dynasties. His wife had three children from a previous marriage, one of whom, John Randolph, would become one of the more controversial figures in the political history of Virginia.<sup>3</sup> Tucker and his wife had six more children. As he would later recall, "[m]y life from the period of my marriage until the year 1781, was entirely domestic."<sup>4</sup> The domesticity ended in 1781 when Tucker abandoned his home life in order to join the Virginia militia. Beginning as a major of volunteers, he soon progressed to become a lieutenant colonel. A recent biographer argues that Tucker opted to join the militia for three reasons: for reputation, for adventure, and from a genuine belief that all men are free and independent by nature and that they therefore deserve a government based upon the recognition of this truth.<sup>5</sup>

## II.

In his essay of 1796, entitled *A Dissertation on Slavery: With a Proposal for the Gradual Abolition of It, in the State of Virginia*, St. George Tucker attempted to understand slavery in the light of this truth. In doing so he inaugurated the academic discourse on the question of slavery

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<sup>3</sup> Randolph's fame is perhaps exceeded by two of his early biographers: Henry Adams, *John Randolph* (Boston: Houghton Mifflin, 1882), and Russell Kirk, *John Randolph of Roanoke: A Study in American Politics* (1951; repr., Indianapolis: Liberty Fund, 1997). The standard contemporary biography is Robert Dawidoff, *The Education of John Randolph* (New York: Norton, 1979).

<sup>4</sup> SGT to Richard Rush, 27 Oct. 1813, in "Randolph and Tucker Letters," 216.

<sup>5</sup> Hamilton, *Making and Unmaking*, 44.



and natural rights in Virginia.<sup>6</sup> In this essay, Tucker made manifest his belief in the natural equality of man by appealing to the Declaration of Independence as an example of the American political philosophy. In this document Thomas Jefferson argued that “all men are created equal,” thereby making one of the most famous expressions of modern natural rights thought. This philosophy of natural rights does not, on the face of it, seem hospitable to slavery. Tucker and Jefferson both owned slaves, and they have both been accused, in their own era as well as in each succeeding one, of violating their own principles.<sup>7</sup> These principles, however, have often been insufficiently appreciated or more generally misunderstood.

Ancient and modern political philosophy begin with different premises about man and reach different conclusions about the proper role of authority in society. The most influential political philosophy of the modern era conceives of societal relations as being in a large part contractual; it posits man as originally existing in a “state of nature,” a state that humans leave in order to join society. The ancients, by contrast, viewed humans as incapable of developing properly outside of the city, and therefore argued that only beasts or gods could so live. The ancients would say that insofar as there could be such a thing as a state of nature, it would be humans existing to their full potentiality inside the city. At the base of this distinction lies the choice between wisdom and consent. According to the modern view, consent must take precedence over wisdom, but for the ancients, wisdom took precedence over consent. Both sides

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<sup>6</sup> SGT, *A Dissertation on Slavery: With a Proposal for the Gradual Abolition of It, in the State of Virginia* (Philadelphia: Matthew Carey, 1796); repr. in Clyde Wilson ed., *View of the Constitution of the United States: With Selected Writings* (Indianapolis: Liberty Fund, 1999), 402-446.

<sup>7</sup> Essential works in this tradition include: Robert McColley, *Slavery and Jeffersonian Virginia* (Urbana: University of Illinois Press, 1964); Winthrop Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Chapel Hill: University of North Carolina Press, 1968), 429-81; John Chester Miller, *The Wolf by the Ears: Thomas Jefferson and Slavery* (New York: Free Press, 1977); Paul Finkelman, “Thomas Jefferson and Antislavery: The Myth Goes on,” *Virginia Magazine of History and Biography* CII (1994): 193-228.

have their advantages: no one wants to be ruled against one's consent, just as no one wishes to be ruled by a fool. The issue of what the Virginia professoriate conceived of as wisdom functions as a sort of pivot in the general transformation of their political thought.<sup>8</sup>

Neither Thomas Jefferson nor St. George Tucker invented the modern conception of natural rights. The first premise of such a conception, the idea of a state of nature, has its own peculiar history. Thomas Hobbes, an English philosopher who published all his works in the seventeenth century, was the first to employ the idea of a pre-social state of nature as a major premise in an extended philosophical argument. As a monarchist and thorough-going reactionary, it is ironic that Hobbes would originate what would later become the founding premise of so much revolutionary thought. He used his state of nature idea in an effort to convince his readers of the natural equality of man: nature makes all men equal, thus all the inequalities that exist in the world, including those of "wealth, power, and nobility of birth," must be the creation of "*civil law*." In an example of the startling honesty that pervades his writings, Hobbes states that he has arrived at this understanding of man's "natural state" by looking at humans as if "they had just emerged from the earth like mushrooms and grown up without any obligation to each other...." Of course, this is not the way that humans come into the world, but Hobbes rather impatiently told his readers to forget all that they know on this score.<sup>9</sup>

Hobbes asked his readers to conceive a world in which equality consisted fundamentally at the level of life and death. Counseling them to imagine "how easy it is for even the weakest individual to kill someone stronger than himself," Hobbes noted that even the strongest and most

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<sup>8</sup> Aristotle, *The Politics*, trans. Carnes Lord, (Chicago: University of Chicago Press, 1984), 1253a2-5; Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 140-141.

<sup>9</sup> Thomas Hobbes, *On the Citizen*, trans. and ed., Richard Tuck and Michael Silverthorne (Cambridge: Cambridge University Press, 1998), 22, 102.

skilled warriors could be surprised and murdered in their sleep. In setting forth this argument, Hobbes began with a rather restricted notion of natural equality, one based upon nothing more than any individual's ability to kill another individual. According to this interpretation, the natural state of man is a state of war, "and not simply war, but a war of every man against every man." Since the contestants in this war are equal, it "cannot be brought to an end by victory" and it is thus perpetual. Branding those unwilling to follow his argument as disturbers of the peace, Hobbes set forth his thesis: "If then men are equal by nature, we must recognize their equality; if they are unequal, since they will struggle for power, *the pursuit of peace* requires *that they be regarded as equal*." Like a schoolteacher dealing with recalcitrant students, Hobbes reiterates his lesson: "*everyone should be considered equal to everyone*. Contrary to this law is PRIDE." Thus he quickly moved from his restricted notion of equality to one embracing equality as a general principle.<sup>10</sup>

In putting the necessity of self-preservation at the center of his conception of what he called "natural law," Hobbes made a radical break with traditional political philosophy. Both ancient philosophers (with their conception of natural right) and medieval philosophers (with their conception of natural law) based their philosophy upon an ideal of human flourishing. Both traditions posited a *telos*, or a goal for man. What is a *telos*? The simplest explanation would be an example: an oak tree is the *telos* of an acorn. The development of man to his full potential, indeed the perfection of man, represents the *telos* of man. The ancient philosophers believed man to be a reasoning, indeed a philosophizing being, and they argued that the perfection of man must be found in this direction. They knew that such a creature could not arise outside of an organized society. This ancient conception influenced the medieval philosophers, who set their goal even

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<sup>10</sup> Ibid., 26-30, 50.

higher, by viewing man as the image of God. Hobbes, in the words of one prominent scholar, “tried to maintain the idea of natural law but to divorce it from the idea of man’s perfection.” Hobbes started with a project of radical skepticism, a position from which he could doubt all received truths. Then, using reason, he attempted to construct the world anew. The unmoved mover in Hobbes’s philosophy is the necessity of self-preservation. In Hobbes’s philosophy, “[d]eath takes the place of the *telos*.”<sup>11</sup>

Knowing that his chief enemies would be those who side with traditional philosophers, Hobbes moved to attack the greatest and most influential of their number: Aristotle. Aristotle argued that outside of society man could not develop to his full capacity, and that, therefore, man was by nature a political animal. Hobbes disagreed, accusing the Greek of having a “superficial view of human nature.” Men do not seek out the company of other men because nature tells them to, “but by chance.” Men do not care about friends, but only about the “honor or advantage” that can be accrued from them. According to Hobbes, friendships all take place because people pursue other people for ends: for business deals, for political deals, or for the pleasure of making fun of members of an out group. Hobbes did not think that philosophers were any different from anyone else in this regard; their pleasures, like the pleasures of everyone else, were related either to glory, or to physical sensations. He defined glory as “a good opinion of oneself,” and physical sensations as mere sensuality.<sup>12</sup>

According to Hobbes, in a conflict between the wise and the strong, the strong usually win. In his universe strength triumphs over wisdom. Here again Hobbes went against Aristotle who believed that wisdom represented a title to rule, and that nature dictated rule by the wise.

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<sup>11</sup> Leo Strauss, *Natural Right and History*, 180-181.

<sup>12</sup> Hobbes, *On the Citizen*, 22-24.

This difference marked the fundamental conflict between ancient and modern views of political science. According to the modern view, consent must take precedence over wisdom, but for the ancients wisdom took precedence over consent. Disagreeing with Aristotle, Hobbes found wisdom to be a poor criterion for leadership: “I know that in the first book of *The Politics*, Aristotle asserts as a foundation of all political knowledge that some men have been made by nature worthy to rule, others to serve, as if master and slave were distinguished not by agreement among men, but by natural aptitude, i. e. by their knowledge or ignorance.” Hobbes labels this argument as “not only against reason but contrary to experience. For hardly anyone is so naturally stupid that he does not think it better to rule himself than to let others rule him.”<sup>13</sup>

Hobbes delineated three ways by which one person could acquire dominion over another: through a consensual agreement made in the interest of common defense; through capture in war, whereby, fearing the inability to fight further, one makes an agreement to serve in order to avoid death; and finally, “by generation,” such as the right that parents have over their children. Not every captive of war agrees to become a slave. Their captor can then either kill them or keep them bound and in chains. Such a captive would never have an opportunity to strike at their captor or run away. Hobbes called this kind of slave the “workhouse” slave. He focused less on this variety of slavery, and more on one in which the master trusts the slave sufficiently to give him enough physical liberty to enable not only running away, but even the potential to murder his master. Hobbes argued that this variety of slave had consented to his slavery. Workhouse slaves, by contrast, only labored in order to avoid beatings, not on the basis of an agreement.<sup>14</sup>

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<sup>13</sup> Ibid., 49.

<sup>14</sup> Ibid., 102.

Hobbes's argument for the master's power over the slave represents a microcosm of his argument for the dominion of a king over his subjects. As Hobbes conceives it, a king's realm can come in any size, for "to be a King is simply to have dominion over many persons, and thus a kingdom is a large family, and a family is a little kingdom." A king earns his sovereignty because he provides security, and this security leads men to congregate, for without it they revert to a state of nature. Finding security impossible except through penalties, Hobbes thought agreements alone to be insufficient. In Hobbesian terms the king has the right to punish. Indeed, his very sovereignty comes into being when a group of subjects agreed to side with him against the person who breaks his codes.<sup>15</sup>

According to Hobbes, the sovereign makes the laws, thereby deciding the difference between right and wrong. Theft, murder, adultery —none of these are crimes in the abstract: they only become crimes when the sovereign declares them to be such. As sovereign, the king should invent laws for everyone, making them openly visible, "so that each man may know by them what he should call his own and what another's, what he should call just and unjust, honorable and dishonorable, good and bad; in summary, what he should do and what he should avoid doing in social life."<sup>16</sup>

Anticipating those critics who find the delegation of absolute power unsavory, Hobbes asserted that all founders of commonwealths, even those who instituted limited commonwealths, possessed this power. In every commonwealth, some person or group of persons must have power "which is to be limited only by the strength of the commonwealth and not by anything else." The power of the sovereign, whether slaveholder or king, can only be limited by someone

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<sup>15</sup> Ibid., 78-84.

<sup>16</sup> Ibid., 102.

with a greater power, for “the one that sets the limits must have greater power than the one restrained by limits.” Thus the master can do no wrong to the slave, for the slave has submitted to the master’s will, and therefore, whatever the master does, he does with the consent of his slaves, “and no wrong can be done to one who consents to it.” The case of the “workhouse slave” is somewhat different, and Hobbes gave him the right to revolt against his master to whatever extent he finds available. Yet slaves of either class could possess no property if their master did not want them to do so. Hobbes thus compared slaves to the citizens of a commonwealth, who can possess no property against the will of the commonwealth.<sup>17</sup>

In the Hobbesian discourse, the defense of slavery depends upon the master’s need to protect himself from violent death, and the slave’s implied consent not to murder his master. Without recourse to the fear of violent death, it would be impossible for a strict Hobbesian to defend the practice of slavery. The reality of slave revolts made possible the creation of a proslavery argument within the Hobbesian tradition. The person wishing to defend slavery could make rhetorical appeals to equality, but then refuse emancipation on the grounds that such action would lead to the death of the emancipator. Nearly all proslavery arguments in the modern natural rights tradition resort to this technique. There are, however, thanks to the emendations to the Hobbesian philosophy made by another English philosopher, John Locke, other ways of defending slavery from within the modern natural rights tradition.

### III.

A Hobbesian wolf in sheep’s clothing, Locke made changes that covered over the fundamental radicalism of Hobbesian thought. He spoke of natural law as if he meant the tradition of natural law that had existed before Hobbes, but a close examination reveals that Locke based his

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<sup>17</sup> Ibid., 88, 104.

philosophy on Hobbesian principles. Locke refused to mention Hobbes, but he continually referred to “the judicious Hooker,” thereby implying that he approved of the philosophy of Richard Hooker, another English philosopher. Hooker (1553-1600) was an important conservative thinker who opposed the attempt made by some early Protestants to strip the tradition of reason and natural law out of Christianity in favor of a religion based solely upon the Bible.<sup>18</sup> Hooker’s conception of natural law built upon a tradition going back to the ancients. In taking up the state of nature as fundamental premise, Locke sided with Hobbes against this tradition. Locke did, however, make some changes to Hobbes’s concept. He began a process of historicizing the state of nature, that is to say, of acting as if such a state had actually existed in the past and could be returned to at any time.<sup>19</sup>

Locke began his presentation by depicting the state of nature as somehow Edenic, with peace and plenty available to all, but this pleasant veneer quickly fell away as he progressed, until one notices only superficial differences between the Hobbesian and the Lockean state of nature. Locke appealed to the goodness of the state of nature because he believed in a right of revolution. According to Locke’s articulation of this right, the people should overthrow despotic rulers, even though doing so would throw society back into the state of nature. The people would then remain in a state of nature until they formed a new government.<sup>20</sup>

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<sup>18</sup> Duncan B. Forrester, “Richard Hooker,” in Leo Strauss and Joseph Cropsey, eds. *History of Political Philosophy*, 3<sup>rd</sup>. ed., (Chicago: University of Chicago Press, 1987), 356-365.

<sup>19</sup> H. V. S. Ogden, “The State of Nature and the Decline of Lockean Political Theory in England,” *American Historical Review* XLVI (1940): 21-44.

<sup>20</sup> In the years immediately following independence from Britain, many Americans were so influenced by Locke that they actually debated whether the American Revolution had thrown the colonies back into the state of nature. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), 144-149.



If one only takes into consideration what Locke explicitly said about slavery, he does not seem to say anything different than what Hobbes had said. Like Hobbes before him and Jefferson after him, Locke seems to have been rather conflicted in his opinion of slavery. For instance, the opening line of the first of Locke's *Two Treatises of Government* reads: "Slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation, that 'tis hardly to be conceived, that an *Englishman*, much less a *Gentleman*, should plead for't." These sentiments seem directly opposed to the provision Locke inserted into the Fundamental Constitutions of Carolina that he wrote for the Lords Proprietors of that colony: "Every freeman of Carolina shall have absolute power and authority over his negro slaves, of what opinion or religion soever."<sup>21</sup>

In the second of his *Two Treatises*, Locke followed Hobbes in arguing that a state of nature exists between the master and his slave. Based upon this premise, Locke stated that a slave had a right to disobey his master, even if such disobedience would compel his master to kill him. Following Hobbes's distinction between the workhouse slave and the slave with whom the master has an implicit agreement, Locke stated: "if once compact enter between them, and [they] make an agreement for a limited power on the one side, and obedience on the other, the state of war and slavery ceases, as long as the compact endures."<sup>22</sup>

Defenders of slavery did not quote what Locke explicitly said about slavery. Instead they drew out the implications of a radical innovation in Locke's political thought: his

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<sup>21</sup> John Locke, *Two Treatises of Government*, ed. Peter Laslett, (Cambridge: Cambridge University Press, 1988), 141; Locke, "Fundamental Constitutions of 1669," in William F. Swindler, ed., *Sources and Documents of United States Constitutions*, 30 vols., (New York: Oceana Publications, 1978), VII: 394. James Farr, "'So Vile and Miserable and Estate,' The Problem of Slavery in Locke's Political Thought," *Political Theory* XIV (1986): 263-289.

<sup>22</sup> John Locke, *Two Treatises*, 284-285.

conceptualization of property rights. Some scholars see a semblance of law and duty in Locke's version of the state of nature, particularly concerning property.<sup>23</sup> Locke originated a labor theory of value, according to which objects draw their value from the work one does to them, not from any intrinsic value that an object possesses. Deducing from this premise a natural right to property, and believing that the sovereign cannot take property away from a subject without the consent of that subject, Locke broke with Hobbes.

The earlier thinker had argued that without the command of the sovereign there could be no such thing as property, or even any such thing as right and wrong. Locke stayed within the Hobbesian tradition insofar as he gave the sovereign the right of life or death over his subjects, but he refused to give the sovereign the right to take a subject's property without the subject's consent. For instance, Locke stated that though an officer may have the right of life or death over his men, he could not take even a single penny from them. Locke asserted that the right to self-preservation must not infringe on property rights. For instance, a person has a right to kill an attacking robber, but no right to take the robber's money and send him on his way.<sup>24</sup>

With Locke it became possible to defend slavery on the grounds that abolition would lead not simply to a loss of life, but to a loss of property. Locke's theories concerning property thereby added another tool to the repertoire of the proslavery theorist. As one scholar has pointed out, this combination of natural equality and property rights contained "an uncomfortably large opening for slavery." Already with Hobbes, the slave owner could limit justice by appeals to the necessity of self-preservation, but Locke's political philosophy made it possible "for self-preservation to be defined as self-interest, and for self-interest to be defined as what is

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<sup>23</sup> Paul K. Conkin. *The Four Foundations of American Government: Consent, Limits, Balance and Participation* (Arlington Heights: Harlan Davidson, Inc., 1994), 13.

<sup>24</sup> Locke, *Two Treatises of Government*, 361-362, 390.

convenient and achievable.” Thus, the American planter went from keeping his slaves in bondage from fear that if he set them free they would kill him, to keeping his slaves in bondage “in order to protect his plantation, his children’s patrimony, his flexibility of action, on which his preservation ultimately depends....” Finally the slave-owner could go so far as to decide “that he is entitled to keep his slaves in bondage if he finds it convenient to do so.” According to this reading of Lockean principles, the defense of slavery in the United States was “a radicalization of the principle of individual liberty on which the American polity was founded.”<sup>25</sup>

Although Locke’s teaching concerning private property made possible a defense of slavery based upon more than just a simple fear of violent death, without such a fear the believer in modern natural rights generally opposed slavery. The philosophy of Thomas Jefferson demonstrates this principle in action. Jefferson further altered the natural rights philosophy of Hobbes and Locke. Disagreeing with Hobbes’s idea that morality exists by convention only, Jefferson argued that human beings possess an inherent moral sense. This sense differs in strength from individual to individual, but Jefferson believed that all people shared it to some degree. On the basis of this principle, he thought that the best way to instill morality in young people would be to cultivate their natural sentiments. In giving educational advice to a young man, Jefferson suggested that he avoid lectures in moral philosophy as a waste of time. A “ploughman” can confront moral issues with as much if not greater facility than can a “professor,” because “he has not been led astray by artificial rules.” Jefferson thought young

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<sup>25</sup> Herbert Storing, “Slavery and the Moral Foundation of the American Republic,” in Joseph M. Bessette ed., *Toward a More Perfect Union: Writings of Herbert J. Storing* (Washington, D.C.: American Enterprise Institute Press, 1995), 143-144.

people would be better off simply by reading good novels, “because they will encourage as well as direct your feelings.”<sup>26</sup>

Thomas Jefferson altered Locke’s philosophy as well. Jefferson believed that the rights that Locke claimed existed in the state of nature should continue to exist in civil society. For Jefferson, natural rights had become civil rights. Scholars have had some difficulty in determining what specific rights Jefferson believed fell under this heading, but it certainly included those enumerated in the Declaration of Independence: life, liberty and the pursuit of happiness. In addition, Jefferson probably would have included those rights he emphasized in his *A Summary View of the Rights of British America*: the right of expatriation, the right of religious freedom, and the right to the fruits of one’s own labor.<sup>27</sup>

In those instances where the issue of self-preservation did not easily present itself, Jefferson’s opinions were uniformly antislavery. For instance, in his *Notes on the State of Virginia*, Jefferson seemed especially concerned with the deleterious effect of slavery upon the master. He voiced his thesis right away: “There must doubtless be an unhappy influence on the manners of our people produced by the existence of slavery among us.” Finding the relation between slave and master to be “a perpetual exercise of the most boisterous passions,” Jefferson asserted that passions are an unsuitable centerpiece for a young master’s education. He feared that a young man in such a situation would learn that he need not control his passions when in the company of slaves: “The parent storms, the child looks on, catches the lineaments of wrath,

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<sup>26</sup> TJ to Peter Carr, 10 Aug. 1787, in Merrill D. Peterson, ed., *Thomas Jefferson: Writings* (New York: Library of America, 1984), 902; David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville: University Press of Virginia, 1994), 72-81.

<sup>27</sup> Yehoshua Arieli, *Individualism and Nationalism in American Ideology* (Baltimore: Penguin Books, 1964), 84-85; TJ, *A Summary View of the Rights of British America* in *Thomas Jefferson: Writings*, 105-122.

puts on the same airs in the circle of smaller slaves, gives loose to his worst passions, and thus nursed, educated, and daily exercised in tyranny, cannot but be stamped by it with odious peculiarities.” According to this interpretation, slavery destroys the morality of the white population. Only a “prodigy” could “retain his manners and morals undepraved by such circumstances.”<sup>28</sup>

For Jefferson, the injustice of slavery made it impossible for God to side with the master against the slave. Given the number of slaves in Virginia, Jefferson conceived the possibility that the slaves could be brought to rule the masters. Indeed, he believed that such an event would become “probable” if one took into account “supernatural interference....” Jefferson could not but “tremble for my country when I reflect that God is just.”<sup>29</sup> He feared an uprising among his slaves that would put them into a position of leadership. Until he arrived at this fear of slave insurrection, Jefferson had no means by which to justify slavery. For most of the eighteenth century, western intellectuals such as Jefferson were in favor of modern natural rights theory. This consensus, coupled with the lack of any large-scale slave uprisings, assured that well-read southerners thought of slavery in a manner comparable to Jefferson. The revolution in Saint Domingue changed this consensus.

Saint Domingue was the French name for the western part of Hispaniola, the first island in the new world explored by Columbus. It became a French possession in 1697. By 1789, the island had become the single most important colonial endeavor for France, encompassing nearly two-thirds of that nation’s foreign investments. The island produced all the staples one would expect from a slave-driven colonial economy: sugar primarily, but also coffee, cotton, and

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<sup>28</sup> TJ, *Notes on the State Of Virginia*, in *Thomas Jefferson: Writings*, 288.

<sup>29</sup> *Ibid.*, 289.

indigo. It had a population consisting of 500,000 slaves, 32,000 whites, and 24,000 freed blacks. In 1791, the slaves of Saint Domingue revolted, and shut down the colony. In 1794, in an attempt to keep the colony under French control, the Revolutionary Assembly in Paris abolished slavery in all its dominions. One year later, the Spanish ceded their portion of the island to France. The French then spent the next ten years trying to keep the area under control, as a succession of former slaves plotted to overthrow their rule and murder the white inhabitants.<sup>30</sup>

In 1801, the British allowed Napoleon to try to recapture the island, but his force withdrew after two years. The attempt to maintain French rule of Saint Domingue had been a dismal failure. As summarized by one historian: “Since 1791, some 70,000 European soldiers and seamen had died in the attempt to maintain slavery. Of the few thousand whites who optimistically stayed behind, most died in a series of massacres in the following months.” Many of these 70,000 Europeans died of tropical diseases, but this fact did not lessen the psychological terror the revolt had upon slave owners in Virginia and elsewhere in the new world. In all, thousands of white lives had been lost, and millions of dollars in investments liquidated. With the white people gone, the blacks turned on the mulattoes, and murdered thousands of them as well. Saint Domingue no longer existed; now that part of the island would be known by the name its aboriginal inhabitants used: Haiti.<sup>31</sup>

For years to come, Virginia slaveowners viewed the creation of Haiti as their worst nightmare. As only the second colonial possession in the Americas to declare its independence, Haiti had a claim to be working from the precedent established by the United States. Indeed,

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<sup>30</sup> David Geggus, “The Haitian Revolution,” in Franklin W. Knight and Colin A. Palmer, eds., *The Modern Caribbean* (Chapel Hill: University of North Carolina Press, 1989), 21-50.

<sup>31</sup> *Ibid.*, 47; Carolyn E. Fick, *The Making of Haiti: The Saint Domingue Revolution from Below* (Knoxville: University of Tennessee Press, 1990).

some of the leaders of the revolt were free blacks who had acquired their first military experience as soldiers under French command in Georgia during the American Revolution.<sup>32</sup> Virginian slaveholders generally did not see things this way; they interpreted the activities in Saint Domingue as a simple slave revolt. Yet even in this capacity, the events that made Haiti had set their own precedent.

One historian has identified the creation of Haiti as the first “non-restorationist” of the slave revolts in the New World. By this characterization, Eugene Genovese meant that all previous revolts had as their aim the attempt to return to a way of life the slaves had known in Africa, one in which the conception of society and individual freedom resembled that of traditional societies throughout history. According to this interpretation, the French Revolution set the precedent for the Haitian Revolution; it gave the slaves of the New World an example of a struggle for the new individualistic freedom that had, in much of Europe and America, replaced the older community-based form of freedom.<sup>33</sup> Southern thinkers of the 1850’s would have disagreed with this interpretation, arguing instead, as did one antebellum law professor, that “the mock empire of Hayti, the subject of ridicule and regret, is but a transfer of an African despotism from Ethiopia to the West Indies.”<sup>34</sup>

The uprising that made Haiti, perhaps more than any other event of its time, forced the southern slaveholder to take sides on the issue of slavery, but it also, ironically, gave strength to

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<sup>32</sup> Sylvia R. Frey, *Water From the Rock: Black Resistance in a Revolutionary Age* (Princeton: Princeton University Press, 1991), 96.

<sup>33</sup> Eugene Genovese, *From Rebellion to Revolution: Afro-American Slavery Revolts In The Making of the Modern World* (Baton Rouge: Louisiana State University Press, 1979), 82-92.

<sup>34</sup> Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America: To Which is Prefixed An Historical Sketch of Slavery* (1858; repr., Athens: University of Georgia Press, 1999), cxcvii.

proslavery arguments in the tradition of modern natural rights. Thousands of white masters lost their lives at the hands of their slaves. Thus it became possible for Virginian slaveowners to equate emancipation with violent death, and thereby to declare emancipation and self-preservation as mutually exclusive possibilities. Not surprisingly, Haiti became a constant trope in discussions of slavery from the end of the eighteenth century onwards.<sup>35</sup>

#### IV.

St. George Tucker's *Dissertation on Slavery*, illustrates the moment in time when the pressures of the ongoing events in Saint Domingue interacted with Lockean natural rights arguments to give the proslavery argument a new character. In 1795, Tucker began preparing for the essay by corresponding with Dr. Jeremy Belknap of the Massachusetts Historical Society. Tucker hoped that Belknap could tell him how that state managed the peaceful abolition of slavery.

In his opening letter, Tucker compared slavery to leprosy: Virginians had inherited it, and there was not much that they could do about it. He attached a series of eleven questions concerning slavery in Massachusetts, which can be summarized in the following way: When was slavery introduced? Were slaves imported directly from Africa? Who brought them, Europeans or Americans? When the state had slavery what was the condition of the slaves? How was slavery abolished? When was this abolition complete? Are the freed slaves flourishing? Do they at present have full political rights? Do they behave morally? Are there many intermarriages

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<sup>35</sup> Alfred N. Hunt, *Haiti's Influence on Antebellum America: Slumbering Volcano in the Caribbean* (Baton Rouge: Louisiana State University Press, 1988), 107-146; Tim Matthewson, "Jefferson and Haiti," *Journal of Southern History* LXI (1995): 209-248; James Sidbury, "Saint Domingue in Virginia: Ideology, Local Meanings, and Resistance to Slavery, 1791-1800," *Journal of Southern History* LXIII (1997): 531-552; Charles Adams, *When in the Course of Human Events: Arguing the Case for Southern Secession* (Lanham: Rowman and Littlefield, 2000), 127-147.



between whites and blacks, and if so, “are such alliances more frequent between black men and white women, or the contrary?” Is there general harmony and intercourse between the races?<sup>36</sup>

Dr. Belknap distributed these questions among a number of prominent correspondents, and used their responses to draft a reply to Tucker’s query. The correspondents all seemed to latch on to one or another question, rarely answering them all. Among the various correspondents, however, a general consensus existed that Massachusetts never became a primary destination of the Atlantic slave trade, and that the slaves who did enter the colony probably came from Barbados or from Rhode Island. Some noted that the form of slavery practiced in Massachusetts had generally been rather mild. Most correspondents agreed that a general harmony pervaded relations between the races both before and after emancipation, but one correspondent singled out an exception: “We seldom have contentions, except in houses of ill-fame, where some very depraved white females get among the blacks. This has issued in the pulling down such houses at times, and caused several actions at Justices’ Courts these two years past.” Another correspondent noted that intermarriages seldom occurred, but when they did they were usually between white women and black men. Most agreed that the end of slavery came not with a formal decree, but with the interpretation—or in the view of one correspondent, the “misconstruction”—of the 1780 constitution with its declaration that: “All men are born free and equal, and have certain natural, essential, and unalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties.”<sup>37</sup>

One of the briefest and most remarkable responses came from John Adams. The future president began by saying that he had not given much thought to the issue of slavery, other than

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<sup>36</sup> SGT to Dr. Jeremy Belknap, 24 Jan. 1795, in “Letters and Documents Relating to Slavery in Massachusetts,” *Collections of the Massachusetts Historical Society* III (1877): 375-431.

<sup>37</sup> *Ibid.*, 383, 390.

being involved in a few cases before the Revolution in which black people had sued for their freedom. He noted that in those days the slaves used arguments “arising from the rights of mankind,” just as they did at present. Adams never found such arguments persuasive, for he believed “the real cause” driving abolition came from “the multiplication of labouring white people, who would no longer suffer the rich to employ these sable rivals so much to their injury.” Adams found the same basic forces operating to keep “negro slavery out of France, England and other parts of Europe.” Abolition, according to Adams, arose not from natural rights arguments, but from white populist rage: “The common people would not suffer the labour, by which alone they could obtain subsistence, to be done by slaves. If the gentlemen had been permitted by law to hold slaves, the common white people would have put the negroes to death, and their masters too, perhaps.” According to Adams, the freed blacks possessed moral and social norms comparable to those demonstrated by “the lowest order” of poor whites. Adams seems to have harbored some bitterness toward the white working class for ruining the slaves of Massachusetts: “Their scoffs and insults, their continual insinuations, filled the negroes with discontent, made them lazy, idle, proud, vicious and at length wholly useless to their masters, to such a degree that the abolition of slavery became a measure of economy.”<sup>38</sup>

In preparing a report for Tucker, Dr. Belknap synthesized the various responses he received from his correspondents. Tucker’s letter thanking Belknap for this report contains a summary of many of the points that he would soon make in his essay. Arguing that the British had forced the Atlantic slave trade on Virginia, and that Massachusetts had been fortunate to escape such a curse, Tucker referred to the Belknap’s state as “your country.” Tucker marveled at Massachusetts’ luck in having a mixture of natural, political and moral causes that made

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<sup>38</sup> John Adams to Dr. Belknap, 21 March 1795, in “Letters and Documents,” 401-402.

abolition possible. Specifically addressing the sorts of lower-class prejudices mentioned by Adams, Tucker noted that those views had a very different effect in Virginia: “With us, on the contrary, climate, a baneful policy, and a different operation of the same prejudice which prevented its growth in Massachusetts, have combined to cherish an evil which is now so thoroughly incorporated in our constitution as to render ineffectual, I fear, every attempt to eradicate it, and to make it doubtful whether even palliatives may not operate to increase our distemper.”<sup>39</sup>

Tucker saw Virginia as having two choices, both of which could lead to disaster. She could “persist in the now perhaps unavoidable course entailed upon us by our ancestors, or, copying after the liberal sentiments of the national convention of France, endeavor to do justice to the rights of human nature, and to banish deep-rooted, nay, almost innate prejudices.” Tucker feared that the fate of Saint Domingue awaited Virginia no matter which of the two courses she choose. He did not think that his countrymen would accept emancipation unless it could be coupled with colonization, and he saw colonization as too expensive. The best Virginians could hope to do, would be to ameliorate the condition of the slaves, and indeed, he noted that much progress had been made in liberalizing the slave code.<sup>40</sup>

Five months later, Tucker wrote to Belknap again, only this time he had a plan of abolition that he thought his fellow Virginians might be willing to accept. By proposing a course of action that worked at a glacial pace, Tucker hoped that he could convince the world “that the existence of slavery in this country is no longer to be deemed a reproach to the present generation.” The plan proposed in his letter is fundamentally the same as that Tucker inserted in

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<sup>39</sup> SGT to Dr. Belknap, 29 June 1795, in “Letters and Documents,” 405-412.

<sup>40</sup> *Ibid.*, 406-407.

his *Dissertation on Slavery*, which he published a few months later. Although the *Dissertation* contained this abolition plan at the very end, fundamentally the essay defended slavery within a Lockean framework, driven by a fear for the safety of Virginia's slaveowners sparked by the ongoing events in Saint Domingue.

Beginning his essay with a premise frequently revisited by historians re-examining the conduct of the founding fathers, Tucker sought "to demonstrate the incompatibility of a state of slavery with the principles of our government, and of that revolution upon which it was founded..." He argued that the Englishmen who settled Virginia, "brought not with them any prototype of that slavery which has been established among us." Distinguishing between political slavery and civil slavery, Tucker argued that in the former category the entire state may be under the rule of another, but the individual remains free, while the latter exists wherever "there is an inequality of rights, or privileges, between the subjects or citizens of the same state..."<sup>41</sup>

According to Tucker, the liberalization of the slave codes demonstrated that progress in attitudes towards black people could be made. He pointed out that it was no longer legal to kill a slave while punishing him, or even when attempting to capture a runaway. Tucker seemed rather sardonic in his treatment of sexual relations between the races. Arguing that the aforementioned legal changes manifest the "dawn of humanity" in Virginia, Tucker still saw "dismemberment" as a fit punishment for any black man who attempted to rape a white woman. He noted that while intermarriage between whites and blacks was forbidden in Virginia, the white person officiating the marriage, and the white partner in the union were both subject to arrest and imprisonment, while no punishments were mandated for the African. Tucker noted that this example was the only one "in which our laws will be found more favorable to a negro than a white person." He

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<sup>41</sup> SGT to Dr. Belknap, 27 Nov. 1795, "Letters and Documents," 417-423; SGT, *A Dissertation on Slavery*, 404-408.

then detailed the numerous ways in which the laws discriminated against black people, ending with a list of actions that were not criminal for a white person but which were for a slave. Tucker concluded that the “laws of nature have been set aside in favour of institutions, the pure result of prejudice, usurpation and tyranny.”<sup>42</sup>

After this rhetorical plea to the laws of nature, Tucker surveyed the black population of Virginia. He found 300,000 slaves encompassing about two-fifths of the state’s population. He believed that Virginians had their doubts about the importation of so many Africans: they tried, while still under British rule, to get the king to tax the importation of slaves. Later, in 1772, the House of Burgesses begged the crown to let them block the further importation of slaves and were similarly unsuccessful. In Tucker’s mind, stopping the importation of slaves was “an object sufficient of itself to justify a revolution.” Confidently asserting that the Virginia legislature made sincere efforts to stop the slave trade, Tucker believed that anyone who knew the facts of the story would resist calling Virginians hypocrites.<sup>43</sup>

Like a true Jeffersonian, Tucker enumerated three primary divisions of civil rights: “the right of personal security; the right of personal liberty; and the right of private property.” He believed that slavery abolished the latter two of these rights, and that slavery was therefore “perfectly irreconcilable ... to the principles of a democracy, which form the basis and foundation of our government.” He therefore found it impossible to justify the enslavement of black people “unless we first degrade them below the rank of human beings, not only politically, but also physically and morally.” Unwilling to take this step, Tucker argued that the time had come to “admit the evidence of moral truth....” Virginians needed to “learn to regard them as our

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<sup>42</sup> Ibid., 422-428.

<sup>43</sup> Ibid., 415-418.

fellow men, and equals, except in those particulars where accident, or perhaps nature, may have given us some advantage; a recompense for which they perhaps enjoy in other respects.” This assertion of modern natural rights seems a singularly inauspicious ground from which to defend slavery, but by employing the two loopholes established by Hobbes and Locke, as well as a number of his own innovations, Tucker managed to do just that.

He began with an appeal to the right of self-preservation. The “recent history of the French West Indies,” indicated that mass abolition would be disastrous. Employing the information he acquired in his correspondence with members of the Massachusetts Historical Society, Tucker noted that mass abolition had only been successful in those states with a low ratio of slaves to freemen. According to Tucker, the ratio of slaves to freeman in the states south of Delaware was simply too high; in some districts “it is probable that there are four slaves for one free white man.” Under such conditions the consequence of mass emancipation, according to the Virginian, would be famine or worse.<sup>44</sup>

Tucker then moved onto ground opened up by Locke’s theory of property. Noting that a “great part of the property of individuals consists in slaves,” Tucker strained to come up with an emancipation plan that would not impinge upon the property rights of Virginia slave owners. He employed the Lockean conception of property rights coupled with the general emphasis upon consent employed by all modern natural rights thinkers. The state sanctioned the ownership of this form of property, and Tucker wondered whether the laws could be changed without considering the consent of the slave owners. Believing that few masters would wish to give up their slaves without being paid a “just compensation,” Tucker wondered if the state could find money to pay them. He doubted that any political class in Virginia would agree to be taxed in

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<sup>44</sup> Ibid., 435.

order to reimburse slaveowners. Moreover, he believed that creditors who loaned money “upon the faith of this visible property” would consider themselves defrauded. The laws of society should conform to the laws of nature, but in this case a compromise would be necessary: “If justice demands the emancipation of the slave, she also, under these circumstances, seems to plead for the owner and for his creditor.” Tucker believed that he had an abolition plan that “may be effected without the emancipation of a single slave; without depriving any man of the property which he possess, and without defrauding a creditor who has trusted him on the faith of that property.” Attempting to follow in the tradition of gradual emancipation plans established in New York and Pennsylvania, Tucker proposed a slow-working plan, one which would take over a hundred years for the last slave in Virginia to be freed.<sup>45</sup>

This plan would deny freed blacks their basic civil liberties. To justify such an action, Tucker again referred to Saint Domingue. He argued that the “recent scenes transacted” there “are enough to make one shudder with the apprehension of realizing similar calamities in this country.” Any attempt to “smother those prejudices which have been cherished for a period of almost two centuries” would lead to a similar upheaval in Virginia, according to Tucker. Again taking recourse to modern natural rights philosophy, he argued that men entering “into a state of society,” have a right to “admit or exclude” anyone on based upon whatever criteria they wish. Thus he found it consonant with natural rights to deny freed slaves the basic rights of citizens. Besides, the manumission made in Virginia thus far indicated that, “the emancipated blacks are not ambitious of civil rights.” Finding it impossible to propose a plan of emancipation that did not “either encounter, or accommodate itself to prejudice,” Tucker proposed a middle course between two extremes. Namely, a course that would negotiate “between the tyrannical and

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<sup>45</sup> Ibid., 418-420, 436.

iniquitous policy which holds so many human creatures in a state of grievous bondage,” and one that would “turn loose a numerous, starving, and enraged banditti, upon the innocent descendants of their former oppressors.”<sup>46</sup>

Tucker noted that the British Crown never would have permitted abolition, and that after the revolution, abolition would have been unthinkable until “our newly established governments had been found capable of supporting the fabric itself, under any shock, which so arduous an attempt might have produced.” Now that Virginia had escaped from under the British yoke and established a stable government of her own, however, the time had arrived to consider abolition. Tucker believed in the “necessity of eradicating the evil, before it becomes impossible to do it, without tearing up the roots of civil society with it.” Tucker noted that Virginia had, in 1782, adopted a law removing the old restrictions against emancipation. He believed that in the fifteen years since the passage of that act, nearly ten thousand slaves had been given their freedom. He noted that Virginians, like the ancient Romans before them, had refused to give freed slaves the rights of citizenship. Tucker thought that even without the rights of a freeman, the slave would be better off than before: with freedom, the former slave had freedom of movement, and he could therefore decide whether to “submit to that civil inferiority, inseparably attached to his condition in this country, or seek some more favorable climate, where all distinctions between men are either totally abolished, or less regarded than this.”<sup>47</sup>

With these considerations in mind, Tucker put forth a plan calling for the freedom of all slave women who had reached the age of twenty-eight years. These women would transmit their freedom to all their children born after that twenty-eighth year. Those born prior to that that time

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<sup>46</sup> Ibid., 439-442.

<sup>47</sup> Ibid., 429-433.



would themselves be bound to service for twenty-eight years. The plan provided for “freedom dues” to be awarded to all slaves reaching the age of maturity. These dues would consist of twenty dollars, two suits of clothes, and two blankets. The plan also deprived freed blacks of all basic civil liberties: the right to keep weapons, to serve on juries, to testify against or marry white people, or even to write a will. Tucker hoped that by restricting the civil liberties of freed slaves he might encourage them to leave the state. “There is an immense unsettled territory on this continent more congenial to their natural constitutions than ours, where they may perhaps be received upon more favorable terms than we can permit them to remain with us.”<sup>48</sup>

Tucker correctly predicted that the real challenge to his plan would come not from the slaves themselves, but from the white slaveowners of Virginia. These men believed in their natural right to property, but “shut their ears against this moral truth, that all men are by nature free and equal....” The Virginian also adhered to the idea of property rights, but he doubted that the slave owner had such a right to an unborn child; besides, he argued, the planter would get at least fourteen years of good labor out of every slave born on his plantation. Tucker thought that those skeptical of abolition plans would be surprised with his plan. They would be surprised to learn that under it “the number of slaves will not be diminished for forty years after it takes place; that it will even increase for thirty years; that at the distance of sixty years, there will be one-third of the number at its first commencement; that it will require above a century to complete it; and that the number of blacks under twenty-eight, and consequently bound to service, in the families they are born in, will always be at least as great, as the present number of slaves.”<sup>49</sup>

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<sup>48</sup> Ibid., 442.

<sup>49</sup> Ibid., 444.

Tucker submitted a copy of his essay to each of the two houses of the Virginia legislature. He described the reception it received: “In the House of Delegates, a motion was made to send the letter and its enclosure back to the author, which produced, I believe, a warm debate, which ended with their being suffered to lie on the table.” The Senate, having no power to propose legislation, saw the essay as less of a threat, and responded with a polite letter noting that they had received it. Tucker saw “mistaken self-interest and prejudice” as his primary enemies, and he tried “to elude, rather than invite, their attacks.”<sup>50</sup> The effort had failed; his essay remained virtually unknown. “Nobody, I believe has read it; nobody could explain its contents.” Even if they had read it, Tucker doubted that anyone in the Assembly would have been willing to take a stand on its behalf. That body was “split into factions, debating upon federal politics, and neither side probably wished to weaken its own influence by a division of sentiment among its partisans on any point whatever.”<sup>51</sup>

Tucker also sent a copy of the *Dissertation* to Thomas Jefferson. The future president agreed with Tucker both as to the means of emancipation as well as to the urgency of the question. According to Jefferson, history would decide the question of emancipation for itself, regardless of the answer given by the slaveowners. “Perhaps the first chapter of this history, which has begun in St. Domingo, and the next succeeding one which will recount how all the whites were driven from the other islands, may prepare our minds for a peaceable accommodation between justice, policy and necessity, and furnish an answer to the difficult question: whither shall the coloured emigrants go?” According to Jefferson, the consequences of

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<sup>50</sup> In the letter introducing his essay to the Speaker of the Senate, Tucker stated that men are, by nature, “free and independent.” His refusal to use the more familiar language of the Declaration may have been a part of his attempt to elude the prejudices of his contemporaries. SGT to the Speaker of the Senate of Virginia, 30 Nov. 1796, Tucker Family Correspondence, W&M.

<sup>51</sup> SGT to Dr. Belknap, 14 Aug. 1797, “Letters and Documents,” 427-428.

failing to plan for emancipation would be disastrous: “if something is not done, and soon done, we shall be the murderers of our own children.” The future president saw all of America and Europe as ripe for insurrection, but he noted that only the southern states had to concern themselves with slave uprisings, which “a single spark” could produce at any time. If such an uprising were to come, Jefferson held out little hope that the other states would be of any assistance in putting it down. “There is but one state in the Union which will aid us sincerely if an insurrection begins; and that one may perhaps have it’s own fire to quench at the same time.”<sup>52</sup>

## V.

By the turn of the century Virginia was, as Jefferson had predicted in his letter, ripe for revolution. The census of 1800 recorded that black people had become the majority of Virginia’s population. Most of these people were slaves, but they had begun to conceive of a larger African identity for themselves in addition to the local and tribal identifications held by slaves. Inspired by the revolution in Saint Domingue, Virginia’s slaves began to see “frenchness” as a synonym for revolutionary possibility. As white refugees from Haiti streamed into the state, slave insurrection scares became more common. White Virginians found it very easy to blame slave discontent upon agitation perpetrated by the slaves brought in by the refugees. Very different from their native Virginian counterparts, the slave immigrants from Haiti were nearly all African-born, nominally Catholic in religious observance, and speaking a French-African patois.

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<sup>52</sup> TJ to SGT, 28 Aug. 1797, in Barbara B. Oberg et. al., ed. *Papers of Thomas Jefferson* (30 vols., Princeton: Princeton University Press, 1957-2002), XXIX: 519-520Ibid., 520. It seems likely that the state Jefferson had in mind was South Carolina.

Yet it would turn out that these slaves did not represent the real threat. That threat came from Gabriel, a Virginia-born slave.<sup>53</sup>

Gabriel's first brush with the law occurred near Richmond in 1799, when he, his brother, and another slave tried to steal a pig from a white farmer new to their neighborhood. When the farmer stopped them, a fight ensued and Gabriel bit the farmer's ear off. In addition to the physical prowess implicit in such an action, the slave had strong organizational abilities as well. In recruiting blacks to his revolutionary cause, Gabriel employed techniques he learned from watching white evangelists and politicians. He would plant his followers in the audience, and then ask those who would join him in his fight against slavery to stand up. He hoped, presumably, that others besides those he had planted would rise. Like many slaves of his time, Gabriel only turned to Christianity in the years after mass revivals had shaken the state. The primitive and emotionalistic nature of these revivals appealed to the sentiments of unlettered slaves and lower-class whites. Like many evangelicals, these slaves identified themselves with the chosen people of God and strove to remake their world through revolution.<sup>54</sup>

Gabriel and his co-conspirators revered the Bible and indeed any example they could find of the written word. This reverence, however, was not so much pragmatic as mystical. Gabriel and his co-conspirators had lists containing the names of all those who would fight to overthrow the whites. These lists were a liability, for obvious reasons, yet the conspirators would show them to nearly everyone they met. The slaves fantasized about killing all the white people, or at least all the white people who were not Quakers, Frenchmen or women. Luckily for the whites,

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<sup>53</sup> James Sidbury, *Ploughshares into Swords: Race, Rebellion, and Identity in Gabriel's Virginia, 1730-1810* (Cambridge: Cambridge University Press, 1997), 40-49; Douglas R. Egerton, *Gabriel's Rebellion: The Virginia Slave Conspiracies of 1800 and 1802* (Chapel Hill: University of North Carolina Press, 1993).

<sup>54</sup> Sidbury, *Ploughshares into Swords*, 81.

like almost all attempted slave revolts in the United States, Gabriel's rebellion failed because his own subalterns turned him in to the authorities.<sup>55</sup>

Despite the plot's failures, the danger remained, and it was in this atmosphere that St. George Tucker's cousin, the similarly named George Tucker, began in his writings to confront the problem of slavery. Thomas Jefferson would later appoint George to serve as the first professor of philosophy and belles lettres at the University of Virginia. Before attaining that position George worked as a lawyer and as a man of letters, and his first literary success came from an essay he modeled upon St. George's *Dissertation*. The two cousins had similar biographies as well. Born on Bermuda in 1775, George Tucker resolved at a young age to study the law. Believing that he needed to study in the United States or Britain if he wished to be a successful lawyer, he left the island in July of 1795 and headed for Williamsburg where he could confer with his cousin.<sup>56</sup>

Upon arriving in Williamsburg, George was struck by the "air of decay and dullness" in the former capital of Virginia. This atmosphere produced great "disappointment and depression" in the young man, a feeling compounded by his inability to track down his cousin. Judge Tucker was out on circuit, thus presenting George with a problem: he needed advice, and he needed to borrow money. Setting out after St. George on horseback he rode for several days before finding him at one of the family's plantations in central Virginia. "After reading the letters I brought he gave a most affectionate welcome to Virginia, and, having heard my story, was decidedly of the opinion that, with my views, it would be better for me to remain in Virginia than to go to

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<sup>55</sup> Ibid., 82.

<sup>56</sup> Robert Colin McLean, *George Tucker: Moral Philosopher and Man of Letters* (Chapel Hill: University of North Carolina Press, 1961).

England.” Young George had strong republican sympathies, such that might have gotten him into trouble in the old country, but posed no problem at all in Williamsburg.<sup>57</sup>

The city did, however, present dangers of its own. Despite its drab exterior, Williamsburg possessed, especially for someone with personal connections and a background of wealth, a lively social scene. George recalled that he “found the society of the place so seductive” that he ended up giving no attention to his legal studies. “The only time bestowed on them being while I was in bed before breakfast.” In 1797, he married a sickly Virginia woman. He noted in his biography that he had not intended to get married so soon after arriving in America, but that he did so in order that his new wife might be able to travel with him back to Bermuda where the fair climate could help her to recover. The attempt failed, but the considerable inheritance she left him leads one to wonder what really lay behind this early marriage: “one fourth part of a sugar estate in Antigua . . . , 13,000 acres of land in North Carolina on the Dan River, some small tracts in Virginia and a share in the dismal swamp company.” George later found it impossible to claim the Antiguan lands, but he would profit from the rest of this estate.<sup>58</sup>

While in Williamsburg, George made his first struggling attempts to write for the public. All of these early efforts were, by his own account, failures. What he needed was a fit subject, and he finally found one when the spirit of Haiti came to Virginia in the guise of Gabriel’s Rebellion. An analysis of George Tucker’s essay indicates that he used his cousin’s *Dissertation on Slavery* as his model. Indeed, the two corresponded on the subject. Equally importantly, an

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<sup>57</sup> GT, “Autobiography of George Tucker,” *Bermuda Historical Quarterly* XVIII (1961): 82-159; quotations, 99-101. Tucker finished his autobiography in 1858. He wrote it for his family, and it did not appear in print until 1961.

<sup>58</sup> *Ibid.*, 106.

analysis of George's writing indicates that he was one of the first Virginians of his day to take the first small steps away from the modern natural rights tradition.<sup>59</sup>

According to George Tucker, slavery surrounded white Virginians just as water surrounds a fish: no one notices what everyone sees. If a white Virginian would actually stop to think about it, he would realize that threats confront him on every side, yet this realization "has as little influence on his conduct, and excites as little emotion in his mind, as the belief of rewards and punishments in the next world, influences human conduct in this." In isolating the particular danger confronting Virginia, George focused on "the advancement of knowledge among the negroes of this country." Every year more and more of them learn to read and write, and this "increase of knowledge is the principal agent in evolving the spirit we have to fear." The modern natural rights discourse of late-eighteenth century Virginia had not entirely lost touch with the older way of understanding political matters. Classic natural right recognized wisdom as the highest attribute of a human; to become wise would be to reach one's telos. In addition, according to the pre-Hobbesian standard, wisdom served as the title to rule. If the slaves were to become wise, another justification for keeping them in bondage would be lost. George, however, did not develop his argument in such terms. Instead, he unhesitatingly universalized his culture's rhetoric about freedom, arguing that every human has "the love of freedom" as "an inborn sentiment" and that in the slaves, this new "breath of knowledge kindles it into flame."<sup>60</sup>

Beginning with the premise that black people started far behind white people in their intelligence, George argued that the slaves actually acquired knowledge faster than did white

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<sup>59</sup> Ibid., 102, 109; GT to SGT, 1 Sept. 1800, 20 Nov. 1800, 18 Jan. 1801, Tucker Family Correspondence, W&M. In the lattermost of these letters George segues, without any apparent sense of irony, from a discussion of natural rights principles to questions concerning the day-to-day management of slaves.

<sup>60</sup> GT, *Letter to a Member of the General Assembly of Virginia on the Subject of the Late Conspiracy of the Slaves; with a Proposal for their Colonization* (Richmond: H. Pace, 1801), 5-6.

people. He believed that the example of white civilization, specifically their constant and ongoing dialogue on the question of “natural rights,” worked as a impetus to stimulate the minds of the slaves. To demonstrate their progress, George compared those slaves who rallied to Lord Dunmore’s banner with those who rallied to Gabriel’s: the former fought for freedom “merely as a good,” while the latter “also claim it as a right.” Finding no way to check the material causes “which tend to enlighten the blacks,” George railed against those who argued that slave revolts could be quelled if only the slaves were subjected to harsher discipline. He did not think that Virginia’s safety could be ensured with “a few cautionary laws, joined to a seasonable rigour....” Such laws, he argued, would go against the opinion of the age, and would therefore have little chance of succeeding.<sup>61</sup>

According to George, black ignorance must continue to recede before black knowledge. Those who thought the slaves incapable of large scale organizing had been proven wrong by Gabriel’s Rebellion. “Ignorant and illiterate as they yet are, they have maintained a correspondence which, whether we consider its extent or duration is truly astonishing.” Worse yet, the state had become infected with religious fanaticism, and both blacks and whites were falling under the sway of this new mode of worship. George feared that before long, black and white evangelicals would sense a connecting bond, and work to overthrow the social order. “Do you not, already, sir, discover something like a sympathy between them? It certainly would not

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<sup>61</sup> Ibid., 6-7. On 7 November 1775, Lord Dunmore, the royal governor of Virginia colony, issued a proclamation freeing all able-bodied slaves willing to side with the British against the Americans. This proclamation should be, but generally is not, viewed as the chief precedent for Abraham Lincoln’s much more vaunted proclamation of 1863. The Declaration of Independence refers obliquely to slave insurrections produced by Dunmore’s proclamation in its charge that the King “has excited domestic insurrections among us....” Frey, *Water From the Rock*, 63, 67, 114; Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Knopf, 1997), 146-147.



be a novelty, in the history of the world, if religion were made to sanctify plots and conspiracies.”<sup>62</sup>

Dismissing those who argued that black out-migration from the state would make Virginia secure, Tucker argued that white out-migration occurred at an equally high rate. Furthermore, he found that black population grew at a faster rate than white population. George isolated the causes behind this demographic fact. “Many a black woman is a grandmother when her fair mistress pines in fruitless celibacy.” And why not? The slave had no need to think about tomorrow’s security, and could thus yield “to the impulse of love as soon as she feels it, while, with us, a thousand principles and prejudices either delay the commerce of the sexes, or prevent it altogether.” George counseled those who did not believe him to look to “the approaching census” where they will see “that the ratio of blacks to whites is continually increasing.” He believed that in a time of war, this growing horde would be the natural friend of Virginia’s enemies. Even those slaves that might seem to remain loyal could secretly work as spies. He insisted that Virginia must find a way to remove this weapon from the hands of her enemies.<sup>63</sup>

George saw only two possible remedies, either “emancipation, or transportation.” To implement the former remedy, he considered the possibility of “qualifying the gift of freedom, by denying the negroes some of the most important privileges of a citizen.” Has not the peasantry of Europe, though “admitted to the rights of individual liberty and property” been willing to endure “the deprivation of civil rights?” George suggested that a black middle class might arise out of such a situation, and that this middle class could keep those beneath them in place. But he feared that such a project could have problems. “This project, it must be confessed,

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<sup>62</sup> GT, *Letter to a Member of the General Assembly*, 10-11.

<sup>63</sup> *Ibid.*, 12-13.

has an air of plausibility, which seduces us at first sight.” Yet he thought such a plan untenable: “the negroes, if once emancipated, would never rest satisfied with anything short of perfect equality.” Without such equality he believed they would be querulous and easily manipulated by Virginia’s internal and external enemies: the potential “auxiliaries of domestic faction; or the fit engine of any artful and enterprising leader....” George believed that this danger could only be eliminated through colonization, and he had a plan.<sup>64</sup>

With 300,000 “Blacks and Mulattoes” in Virginia, George predicted an “annual increase” of about 15,000. At a rate of twenty pounds a head to transport them away, total colonization would cost the state, in total, about a million pounds. He did not believe that the state could bear such an expense. Besides, even if the West Indies were “willing to admit so dangerous a body” it was not at all clear that the master class of Virginia would allow their slaves “to be torn from those tender attachments which now soften the miseries of servitude to suffer still greater in a foreign land.” Perhaps the slaves could “be colonized in some part of the American continent.” Finding the “western side of the Mississippi” a good place for freed blacks, George thought that that land should be purchased from the Spanish government. Or perhaps “a purchase of some part of the Indian country, comprehended with the limits of Georgia” could serve the purpose. Such a plan could be paid for by a “poll tax ... laid on every negro and mulatto,” so that “the diminution of slaves would be proportioned to the number, in every part of the state.” Proposing that a cash bounty be given to every master who sent a black woman of child-bearing age out of the state, George reasoned that “when a girl under fourteen or fifteen is sent out of the country, six or eight unborn negroes are probably sent with her.” Confessing that such a traffic would be

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<sup>64</sup> Ibid., 14-15.

“dishonorable,” George nevertheless justified the action upon the fundamental basis of modern natural rights: “the most imperious of all laws, that of self-preservation, authorize it.”<sup>65</sup>

Finding this early “experiment in authorship” to be “rewarded with the public approbation” George Tucker was now able to regard himself as “in the class of men of letters.” In that capacity he spent his mornings reading, or writing the occasional piece for the newspapers, and his evenings playing cards. The state of Virginia, however, did not carry out the plans he had set forth. Their immediate response was to set an armed guard of one hundred men before the state capital building and to pass a law forbidding the nocturnal assembly of black people. In addition, the state publicly executed several of Gabriel’s co-conspirators.<sup>66</sup>

In the wake of Gabriel’s rebellion, St. George Tucker weighed in again on topic of slavery. This time he argued that the new Louisiana territory would be a good place to relocate Virginia’s emancipated slaves. Finding that too much of his and his children’s future rested upon the work of his own nineteen slaves, St. George did not free them. In fact, his most recent biographer notes that he continued to do business with a slave-trader in Petersburg years after writing his emancipation proposal. Despite the evidence that St. George continued to own slaves, he never seems to have felt any need to renounce his essay. He included it as an appendix to his 1803 edition of William Blackstone’s *Commentaries on the Laws of England*, his greatest scholarly effort.<sup>67</sup>

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<sup>65</sup> Ibid., 16-17.

<sup>66</sup> Sidbury, *Ploughshares into Swords*, 118-128.

<sup>67</sup> SGT, *Reflections on the Cession of Louisiana to the United States* (Washington, D. C.: Samuel Harrison Smith, 1803); Hamilton, *Making and Unmaking of a Revolutionary Family*, 82-83; SGT, ed., *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: Birch and Small, 1803).

Indeed as late as 1813, when John Adams had inquired after some biographical information concerning “the poet of Williamsburg,” St. George sent the former president not more of his poetry, but a copy of the *Dissertation on Slavery*. This decision probably proved a wise one. Adams had been impressed with a brief piece of sentimental verse St. George wrote in 1807, entitled simply “Resignation.” Adams asked rhetorically, “Is there in Homer, in Virgil, in Milton, in Shakespeare, or in Pope, an equal number of lines which deserve to be engraven on the memory of youth and age in more indelible characters?” One has reason to speculate that Adams would have been far less impressed with Tucker’s more significant work, “The Probationary Odes of Jonathan Pindar.” These poems, which Tucker published anonymously in a Philadelphia newspaper in 1796, mercilessly satirized Adams, Alexander Hamilton and other Federalists whom he believed were corrupting the administration of George Washington. Indeed, in the first of the odes Tucker denounced Adams as “A Would-be Great Man.” Tucker apologized for submitting his *Dissertation* to Adams, but expressed doubt that either of its previous publications (in 1796 and 1803) had “ever cross’d Hudson’s river....” Tucker hoped that Mr. Adams would find the essay satisfactory. Adams did approve, remarking that he knew “of nothing better said, upon the most difficult subject and the most intricate problem the U.S. have to solve.”<sup>68</sup>

Despite the failure of the two proposals considered thus far, some Virginians continued to hope that colonization would solve the problem of slavery. In the first years of the nineteenth century, Virginia legislators began to attack the 1782 law that had allowed emancipated slaves to

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<sup>68</sup> Adams quoted in the editor’s preface to William S. Prince, ed., *The Poems of St. George Tucker of Williamsburg, Virginia 1752-1827* (New York: Vantage Press, 1977), 13; “Resignation” is reprinted on p. 63, the “Probationary Odes,” on pp. 83-107. SGT to Richard Rush, 27 Oct. 1813, in “Randolph and Tucker Letters,” *Virginia Magazine of History and Biography* XLII (1934): 211-223; William S. Prince, “St. George Tucker: Bard on the Bench,” *ibid.*, LXXXIV (1976): 267-282.

remain in the state. By 1806, the strategy had proven successful and emancipation became conditional upon removal. Unfortunately, since all the states surrounding Virginia had, or soon would have, laws denying permanent residence to free black people from other states, the measure had little practical effect. For the next ten years, the issue fell by the wayside because of the renewed conflict with Britain. By the time Virginians were again able to consider colonization, Louisiana had many white settlers, and Virginians no longer saw it as a suitable place to send emancipated slaves. They began to look to Africa as a suitable home for the freedmen. The American Colonization society held its first meeting in 1817, with a Virginian as its president. The founders of the American Colonization Society believed emancipation impossible without colonization.<sup>69</sup>

## VI.

At about this same time, John Taylor of Caroline formulated a trenchant defense of slavery centered on the modern natural rights tradition. A Virginian of Tucker's generation, Taylor had fought in the Revolution. He had a distinguished career in politics, serving several terms in the General Assembly, and filling out terms in the United States Senate from 1792-1794 and from 1822-1824, but his greatest fame resulted from his writings. Through his essays and books, Taylor became one of principal theorists of the so-called "Old Republican" movement, which aimed to preserve the Jeffersonian conception of political philosophy in its pure form. Despite the admiration that Taylor and Jefferson had for each other, Taylor nevertheless believed it necessary to use the experience of Haiti to refute Jefferson's arguments against slavery. In 1813,

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<sup>69</sup> Alison Goodyear Freehling, *Drift Toward Dissolution: The Virginia Slavery Debate of 1831-1832* (Baton Rouge: Louisiana State University Press, 1982), 85-120.

Taylor published his refutation of Jefferson along with his own counter-thesis in a book entitled *Arator*.<sup>70</sup>

Writing well after the revolution in Saint Domingue, Taylor felt confident that he could dismiss Jefferson's reflections as the products of a more innocent time. To make this point, he set forth some amazingly grandiloquent prose: "Circumstances affect the mind, as weather does beer, and frequently produces a sort of moral fermentation, which throws up bubbles of prismatic splendor, whilst they are played upon by the rays of some temporary effervescence, but destined to burst when the fermentation ceases." According to Taylor, Jefferson wrote his *Notes on the State of Virginia* "in the heat of a war for liberty" at a time when "the human mind was made still hotter by the French revolution..." Taylor therefore stated that it would be unjust to "censure Mr. Jefferson." According to this interpretation, the experience of history had made Taylor wiser than the Jefferson of 1787. The spirit of abolitionism had "attempted to compound a free nation of black and white people in St. Domingo. The experiment pronounced that one people must perish."<sup>71</sup>

Although unwilling to chastise Jefferson, Taylor had no qualms about refuting him. Jefferson had asserted that slavery had a deleterious effect on the master, but history proved him wrong: "Slavery was carried farther among the Greeks and Romans than among ourselves, and yet those two nations produced more great and good patriots and citizens, than, probably, all the

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<sup>70</sup> Robert Shalhope, *John Taylor of Caroline: Pastoral Republican* (Columbia: University of South Carolina Press, 1980); Norman Risjord, *The Old Republicans: Southern Conservatism in the Age of Jefferson* (New York: Columbia University Press, 1965); JTC, *Arator* (1813; repr., Indianapolis: Liberty Fund, 1977). Until the middle 1970s, historians believed that the essays in *Arator* originally appeared in a Georgetown newspaper starting in 1803, but this seemingly simple fact has thus far been impossible to prove. Robert E. Shalhope, "The Arator Essays and the 'Fallacy of the Prevalent Proof,'" *Virginia Magazine of History and Biography* LXXXIV (1976): 283-286; Fredha F. Stoher, "Arator: A Publishing History," *ibid.*, LXXXVIII (1980): 442-445.

<sup>71</sup> JTC, *Arator*, 121, 178.

rest of the world.” Furthermore, the example of Jefferson himself, and the many other prominent Virginians who had made their mark on the national stage, refuted the argument that only moral prodigies could escape the burdens of mastership unscathed. Believing that the children of slave masters found themselves in a situation hospitable to the inculcation of virtue, Taylor took exactly the opposite tact of the former president. He disputed Jefferson’s contention that slaves “inspire furious passions” among their masters, indeed he believed that such passions were “as rare and disgraceful towards slaves as towards horses....”<sup>72</sup>

This horse metaphor casts light upon the natural rights tradition in nineteenth century Virginia. Modern natural rights theory is not based upon the Bible, though students of political philosophy frequently make the mistake of conflating these two distinct traditions of political thought.<sup>73</sup> The Bible granted mankind the dominion over all the other animals on earth, but within the theory of modern natural rights it was not at all clear whether, or to what extent, animals should be subjected to humans. The tensions between the two philosophies can be seen in Thomas Jefferson’s famed “last letter.” In this letter Jefferson remarked “that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God.”<sup>74</sup> Of course, horses are not born with saddles on their backs either. Men have to put them there, just as men have to make and wear spurs if they wish to ride effectively. Jefferson knew this fact, and if pressed he may simply have

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<sup>72</sup> Ibid., 121-122.

<sup>73</sup> A succinct warning against such a method of interpretation can be found in the following essays by Ernest L. Fortin: “Natural Law and Social Justice,” “On the Presumed Medieval Origin of Individual Rights,” and “The New Rights Theory and the Natural Law,” in Fortin, ed., *Classical Christianity and the Political Order: Reflections on the Theologico-Political Problem* (3 vols., Lanham: Rowan and Littlefield, 1996), II: 223-86.

<sup>74</sup> TJ to Roger C. Weightman, 24 June 1826, in *Thomas Jefferson: Writings*, 1516-1517.

referred back to the Biblical injunction giving man dominion over the animals, but it does not seem likely that Jefferson would have been very comfortable basing any of his arguments upon biblical authority alone.

Ancient and medieval thinkers stressed the potentialities of humans in considering what was right by nature for them. Modern natural rights thinkers begin from a different premise; namely, that all humans possess freedom by nature. In seeking to move beyond the classical and Christian understanding of rights, modern natural rights thinkers must come to terms with the rights of animals as well. The leading modern natural rights theorists have long sensed this necessity. For instance, in an odd ending to his chapter on slavery, Hobbes made a brief discourse on the rights of men over animals. The philosopher of Malmesbury argued that the dominion of man over animals came from “the right of nature” and not from “divine positive right.” He held that humans and animals existed in a state of nature towards one another, thus “one may at discretion reduce to one’s service any animals that can be tamed or made useful, and wage continual war against the rest as harmful, and hunt them down and kill them.” According to Hobbes, this right is natural, for even before God told humans they could do it, humans had to do it in order to survive.<sup>75</sup>

Ancient political science presented few challenges for slavery, but slavery occupies a more problematical place in modern philosophical systems. Similarly, Hobbes must have felt some anxiety about humankind’s right to dominion over animals, or else he would not have seen fit to tag it on at the end of a chapter on slavery. Such a tension continues throughout the tradition of modern natural rights thought. Historians and philosophers seeking to explain how ideas of rights change over time might use the example of vegetarianism to make their point.

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<sup>75</sup> Hobbes, *On the Citizen*, 512.



Imagine that at some time in the future, all of mankind were to become vegetarians, and look back with disgust at their ancestors who ate the flesh of animals. Imagine bronze statues of cows, pigs and chickens standing outside the abandoned remains of slaughterhouses, to commemorate their suffering. Just as we visit abandoned concentration camps and mourn man's inhumanity to man, perhaps our descendants might visit these abandoned slaughterhouses and mourn man's inhumanity to animals. And while we today might think extreme animals rights activists and vegetarians rather strange, many of our ancestors looked at abolitionists in the same way.<sup>76</sup> There would be a certain logic at work here, and the roots of it could still be traced back to the modern natural rights philosophy of Hobbes.

Arguments for natural rights face this *reductio ad absurdum* argument concerning animal rights. In arguing that it is as disgraceful to mistreat a slave as it is to mistreat a horse, Taylor merely made the first lunge at what proslavery theorists would come to see as a weakness in the armor of antislavery advocates. He accompanied this first step with a further hint of the possible abandonment of modern natural rights theory: a brief nod to the place of knowledge in the question of who is to rule: "Knowledge manages ignorance with great ease, whenever ignorance is not used as an instrument by knowledge against itself." Taylor suspected that those who wished to free the slaves had designs to appropriate their services for themselves.

Both Jefferson and Taylor agreed that a master had it in his power to lord it over those that he owned, but they drew different conclusions. Taylor believed that a master governed through knowledge, and that his high station made it such that "the slaves are more frequently the objects of benevolence than of rage." When children were present the masters, following the

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<sup>76</sup> I borrow this intriguing although admittedly farfetched thought experiment from Thomas L. Haskell, "Capitalism and the Origins of the Humanitarian Sensibility, Part 1," in Thomas Bender, ed., *The Antislavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation* (Berkeley: University of California Press, 1992), 125-126.

social code of their class, were more “inclined to soothe, and hardly ever suffered to tyrannize” their slaves. In such a society, children came to associate “vicious and mean qualities” not with their parents, but with their slaves. This association had a heuristic value, in that base characteristics “become more contemptible” by this association, as “pride steps in to aid the struggles of virtue.”<sup>77</sup>

Writing after the outrages in Saint Domingue, and setting forth a foreshadow of the restoration of classic natural right, Taylor clearly represented something new in the defense of slavery in Virginia. At least one scholar has argued that Taylor was the first representative of the positive good school of proslavery writers.<sup>78</sup> Such an analysis overlooks Taylor’s recognition of slavery, rhetorically at least, as an evil. Indeed he could be quite trenchant about it: “The fact is, that negro slavery is an evil which the United States must look in the face. To whine over it, is cowardly; to aggravate it, criminal; and to forbear to alleviate it, because it cannot be wholly cured, foolish.”<sup>79</sup> Taking the word “evil” to heart, the best way to understand Taylor’s proslavery argument is in the terms put forward by the scholar M. E. Bradford, who argued that Taylor refused “to treat an argument from definition as if it were an argument from circumstance.” Slavery had established deep roots in Virginia and could not be eliminated without impinging

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<sup>77</sup> JTC *Arator*, 123. Taylor followed an ancient model on this score. The Spartans and Athenians had used the negative example of their slaves as a means to inculcate virtue in their young. Paul Rahe, *Republics Ancient and Modern: Classical Republicanism and the American Revolution* (Chapel Hill: University of North Carolina Press, 1992), 146-147, 192-193.

<sup>78</sup> Keith M. Bailor, “John Taylor of Caroline: Continuity, Change and Discontinuity in Virginia’s Sentiments towards Slavery, 1790-1820,” *Virginia Magazine of History and Biography* LXXV (1967): 290-304.

<sup>79</sup> JTC, *Arator*, 180.

upon the master's right to self-preservation. Therefore, any abstracting of natural rights definitions from actual circumstances would be not only dangerous but foolish.<sup>80</sup>

The proslavery arguments made by Thomas Jefferson in the *Notes on the State of Virginia* and by John Taylor in *Arator* represent the two extremes of proslavery thought available within the modern natural rights tradition of St. George Tucker's Virginia. Tucker himself steered a middle course between these two poles, as did his cousin George Tucker. Yet all four men agreed that the self-preservation of the slaveowner forbade any sort of immediate abolition. It is likely that they all would have concurred with Jefferson's contention regarding abolition: "[j]ustice is in one scale, and self-preservation in the other."<sup>81</sup> Although St. George Tucker was the only one of the four to employ a Lockean appeal to property rights, it seems likely that Jefferson or Taylor would have turned to the same example if they had written essays of a similar length. Virginia's professors would eventually abandon the defense of slavery in terms of modern natural rights in favor of scriptural defenses of the institution and even a return to the classical understanding of political philosophy. Yet a corollary of the modern natural rights understanding of contractual relations would persist throughout the nineteenth century in the professoriate's theory of constitutionalism.

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<sup>80</sup> M. E. Bradford, "A Virginia Cato: John Taylor of Caroline and the Agrarian Republic," in Bradford, ed., *The Reactionary Imperative: Essays Literary and Political* (Peru, IL.: Sherwood Sugden and Company, 1990), 172.

<sup>81</sup> TJ to John Holmes 22 April 1820, in *Thomas Jefferson: Writings*, 1433.

## Chapter Two: The Constitutional Orthodoxy of St. George Tucker

### I.

St. George Tucker made practical as well as scholarly contributions to American constitutionalism. Indeed, he played a small but early role in bringing about the drafting of the United States Constitution. By the summer of 1786, many Americans had come to fear that the union might dissolve. More specifically, many Virginians were worried that New York and New Jersey might form a separate confederation with New England. Sectional spirits had been on the rise ever since May of 1786, when John Jay had made an effort to pass a treaty with Spain that would have closed the Mississippi to American navigation for twenty-five years. The Northern commercial states had supported the treaty but every state from Maryland down to Georgia had opposed it. This talk of disunion played a major role in precipitating action from the General Assembly of Virginia.<sup>1</sup>

Tucker believed that the new union had the prerequisites for greatness, but only if the states made it more hospitable to commerce. He set forth this viewpoint in an article he published in 1787.<sup>2</sup> He had wished to see the Articles of Confederation revised almost as soon as they had been drafted. Already in 1786, Tucker had become convinced that Congress needed the power to protect the commerce of the colonies. In January of that year the General Assembly of Virginia called for a commercial conference of all the states and appointed Tucker as a delegate. History would come to know this meeting as the Annapolis Convention, an important precursor to the more famous convention in Philadelphia one year later. The proceedings of the gathering

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<sup>1</sup> Lance Banning, "Virginia: Sectionalism and the General Good," in Michael Allen Gillespie and Michael Lienesch, eds., *Ratifying the Constitution* (Lawrence: University Press of Kansas, 1989), 261-299.

<sup>2</sup> SGT, "Reflections on the Policy and Necessity of Encouraging the Commerce of the Citizens of the United States," *American Museum II* (1787): 267-274.

indicate that the delegates from New Hampshire, Massachusetts, Rhode Island and North Carolina never arrived, and that the delegates from the other states present were unwilling to proceed to a formal discussion without a quorum. The members present at Annapolis expressed by “unanimous conviction” the opinion that another convention should be called, and that other topics besides commerce should be discussed. Tucker did not attend the resulting convention in Philadelphia, but he followed the events there with great interest. Disappointed that the delegates had been sworn to secrecy, Tucker nevertheless tried to keep informed of what happened there.<sup>3</sup>

Most of the Virginia judiciary came out in favor of the constitution drafted at Philadelphia, but Tucker seems to have changed his mind several times. At first he agreed with Edmund Randolph, an active member of the Virginia delegation who had been one of only three men at the convention who refused to sign the final draft. By October of 1787, Tucker had decided that the dangers of the new constitution outweighed its benefits, although he felt reassured on the grounds that the General Assembly of Virginia had unanimously agreed to put the question of ratification before a special convention. Many Virginians, like Tucker, were uncertain about the new proposed constitution. Unlike the other states where support or opposition followed clear class or interstate geographical lines, in Virginia both proponents and opponents of the new constitution shared similar economic interests. Similarly, the geographical distribution of support and opposition were too tangled to lend themselves to any clear pattern.<sup>4</sup>

The literature of support for and opposition to the constitution, both in Virginia and the other states, comprises some of the most important literature in the history of American political

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<sup>3</sup> Charles T. Cullen, “St. George Tucker and Law in Virginia, 1772-1804,” (Ph. D. diss., University of Virginia, 1971), 71; Henry Lee to SGT, 20 Oct. 1786, SGT to Francis Bland Tucker, 27 Oct. 1787, Tucker-Coleman Collection, W&M; “Proceedings of the Annapolis Convention,” Appendix 4 of George W. Carey and James McClellan eds., *The Federalist*, (Indianapolis: Liberty Fund, 2001), 511-515.

<sup>4</sup> Lance Banning, “Virginia: Sectionalism and the General Good,” 261-262.

thought. The collection of essays collected under the title *The Federalist* is the clear masterpiece of the genre. Scholars and laymen alike, when seeking to interpret the Constitution of the United States, generally reach for a copy of this volume. James Madison, Alexander Hamilton and John Jay (often referred to collectively by their *nom de plume* “Publius”) collaborated to write the eighty-five essays in this volume. Taken collectively, these essays offer a brilliant and thorough explication of the Constitution, but they do, unfortunately, have some faults. For one thing, because the authors wanted to convince their readers to ratify the Constitution, they downplayed the defects and oversights in the instrument. Secondly, and perhaps more importantly, the authors wrote their essays before the addition of the Bill of Rights to the Constitution; indeed they actively opposed the addition of a Bill of Rights.<sup>5</sup>

Like the essays in *The Federalist*, St. George Tucker’s essays also offer a detailed examination of the United States Constitution, but they do not suffer from the same liabilities. Tucker had several advantages over his predecessors. He had spent time both in favor of and in opposition to the Constitution, and he thus had a better chance to evaluate the arguments of both sides. He wrote after the Bill of Rights had been adopted. And perhaps most importantly, he had the example of Publius before him. In writing his constitutional essays Tucker kept Publius’s “very elaborate and masterly discussion of the constitution” constantly in mind. He found these essays of fundamental importance in his quest to understand American constitutionalism, but he disagreed with the authors on certain points. Tucker argued that Publius failed to face “the defects of the constitution” with the same candor with which they developed its “eminent advantages....” Had Hamilton, Madison, and Jay explored the defects of the Constitution as well

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<sup>5</sup> Consider, for instance, Hamilton’s claim that “bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous.” *Federalist*, 445.

as its advantages, Tucker doubted whether it would have been necessary to write anything more. As he put it, the *Federalist Papers* “would probably have saved me the labor of this attempt, if the defects of the constitution had been treated with equal candor, as the authors have manifested abilities in the development of its eminent advantages.” Despite Publius’s oversight in this regard, Tucker ended by recommending the work to anyone wishing “to make themselves perfectly acquainted with a subject so truly interesting to every American citizen, as the federal government of the United States.”<sup>6</sup>

Tucker’s constitutional essays have exercised a considerable influence since their first publication in 1803. American nationalists have always felt it necessary to attack them, while those preferring the partly national, partly federal system proposed by the framers have looked to them for support. Yet despite this influence, St. George Tucker’s essays are not as well known today as they ought to be. The relative obscurity that engulfs them has much to do with their publication history. Although they represent Tucker’s most significant intellectual accomplishment, they have remained, until very recently, tucked away as a series of appendices to Tucker’s heavily annotated five volume edition of William Blackstone’s *Commentaries on the Laws of England*. To the extent that Tucker transcends the immediate debate between Federalists and Antifederalists, he does so because his primary interlocutor was Blackstone, not the proponents and opponents of the Constitution. With Tucker’s essays more easily available it may now be possible for scholars and laymen interested in the Constitution to understand better

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<sup>6</sup> SGT, “View of the Constitution of the United States,” in Clyde Wilson, ed., *View of the Constitution of the United States: With Selected Writings* (Indianapolis: Liberty Fund, 1999), 311.

Tucker's sophisticated and orthodox interpretation of that document and of the tradition from which it arose.<sup>7</sup>

## II.

Tucker grounded his constitutional thought upon Whig principles. In the Whig estimation, freedom must be based upon suspicion of government, not trust in it. As Thomas Jefferson phrased the matter, "free government is founded in jealousy and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power...." Jefferson saw the distinction between Whigs and Tories as something present in all times and places: "Men have differed in opinion, and been divided into parties by these opinions, from the first origin of societies; and in governments where they have been permitted freely to think and to speak. The same political parties which now agitate the U.S. have existed thro' all time." He believed that, as a general principle, the Whigs side with the many while Tories side with the few, but as a Whig partisan Jefferson always kept in mind that governments are the natural enemies of liberty.<sup>8</sup>

Jefferson's belief in the omnipresence of Whig/Tory distinctions in political life has inspired some more recent political thinkers to move to reclaim the Whig legacy. By the early years of the twentieth century, American Progressives had come to see the state as an ally in their

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<sup>7</sup> SGT, ed., *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 volumes, Philadelphia: Birch and Small, 1803). Tucker's edition of Blackstone never went into a second edition, although there have been two scholarly reprints of the work, one in 1970 and another in 1998. These reprints have been exorbitantly priced, putting them outside the price range of most scholars and many libraries. In the interests of accessibility I have employed the Tucker volume cited in n. 6 above whenever possible. This easily available volume has the disadvantage that many of Tucker's footnotes have been removed, but the essays are otherwise unabridged.

<sup>8</sup> TJ, "Draft of the Kentucky Resolutions," in Merrill D. Peterson, ed., *Thomas Jefferson: Writings* (New York: Library of America, 1984), 454; TJ to John Adams, 27 June 1813, in Lester J. Cappon, ed., *The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams* (Chapel Hill: University of North Carolina Press, 1959), 335.



effort to keep business and corporate interests at bay. As a consequence, American libertarians appropriated the Whig rhetoric of Thomas Jefferson. For instance, thinkers such as Albert Jay Nock and F. A. Hayek tried to keep the Whig ideal before their readerships. Both men noted that their ideal of Whiggery had little to do with the seventeenth century English party that went by that name and nothing to do with the nineteenth century American variant. Turning progressive theory on its head, Nock argued that Whigs work from a principle of voluntarism, akin to what one sees in the organizational principle of a corporation. According to Nock, no one has to work for Standard Oil “unless he wishes to do so; he is not conscripted. His acceptance of the Company’s rules is a matter of free contract; he is not coerced; he may leave if he does not like them.” Tories on the other hand, work from a military model, and they design all of their measures to increase the power of the state and to decrease the power of the individual. Nock believed that government social programs, to the extent that they are dependent upon coercively collected taxes, build from a Tory model. In a similar fashion, Hayek famously refused to call himself a conservative; he saw himself instead as a Whig. According to Hayek, the Whig party represented the “party of liberty” and Tories the party of coercion.<sup>9</sup>

Twentieth century Whigs such as Nock and Hayek deserve their claim to the label, and it seems unlikely that anyone will rise to dispute their provenance. Nevertheless, it is clear that these twentieth century Whigs abandoned much of the creed that men like Tucker and Jefferson held sacred. Eighteenth and early nineteenth century Whigs held very specific ideas concerning history, law, and constitutionalism. For instance, they believed that English liberties had their origins in the primitive liberty of the early Germanic tribes. Whig thinkers traced their liberties to

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<sup>9</sup> Albert Jay Nock, “Liberalism, Properly So Called,” in *The State of the Union: Essays in Social Criticism* (Indianapolis: Liberty Fund, 1991), 276-284; F. A. Hayek, “Why I am Not a Conservative,” in Chiaki Nishiyama and Kurt R. Leube, eds., *The Essence of Hayek* (Stanford: Hoover Institution Press, 1984), 281-298.

the “original constitution” established by their early German ancestors; they believed that the principles of Toryism arose later, after the Normans invaded and introduced feudal principles to England.<sup>10</sup>

Early Whigs learned the nature of primitive Germanic society by reading the ancient Roman historian Tacitus and his modern disciples, chiefly the French political philosopher Baron De Montesquieu. In his greatest work, *The Spirit of the Laws*, which he published in 1748, Montesquieu manifested an appreciation for the Germanic contribution to European civilization that one might not expect to find in a Frenchman. He repeatedly referred to “[o]ur fathers the Germans....” Although Montesquieu took pride in the Germanic ancestry of his people, he saw the English as having made off with the best part of the ancient German legacy: their governmental forms. “If one wants to read the admirable work by Tacitus, *On the Mores of the Germans*, one will see that the English have taken their idea of political government from the Germans. This fine system was found in the forests.” American Whigs such as Tucker and Jefferson saw the Revolution of 1688 as a move in the right direction, but they did not think that it had sufficiently restored the original Germanic forms described by Montesquieu.<sup>11</sup>

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<sup>10</sup> Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of The American Revolution* (Chapel Hill: University of North Carolina Press, 1965), 33-34, 37-38, 237-243. It should be noted that this “Saxon myth” is directly at odds with the “Cavalier legend” which later became popular in Virginia. Proponents of the latter view argued that Virginians were descended from English aristocrats of Norman descent, while New Englanders held a more humble Saxon genealogy. Michael O’Brien, *Conjectures of Order: Intellectual Life and the Antebellum South, 1820-1860* (2 vols., Chapel Hill: University of North Carolina Press, 2004), I: 309-322; William R. Taylor, *Cavalier and Yankee: The Old South and American National Character* (New York: George Braziller, 1957).

<sup>11</sup> Montesquieu, *The Spirit of the Laws*, trans. and ed. Anne M. Cohler, Basia C. Miller, and Harold S. Stone (Cambridge: University of Cambridge Press, 1989), 93, 140, 165-166, 243; Julius S. Waterman, “Thomas Jefferson and Blackstone’s Commentaries,” in David H. Flaherty, ed., *Essays in the History of Early American Law* (Durham: University of North Carolina Press, 1969), 465-466; David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville: University Press of Virginia, 1994), 11-17.

Tucker believed such matters to be of more than mere antiquarian interest. He asserted that the constitutional order could only be maintained properly by those who understood the nature of that order, and that such understanding could be had only by those with a proper understanding of the origins of that order. Tucker used a metaphor of an acorn and an oak to explain how primitive Germanic society developed into the society of early nineteenth century Virginia: “Government in this state may be compared to a seedling oak, that has just burst the acorn and appears above the surface of the earth with its first leaves; it advances with civilization, rears its head in proportion as the other increases; and puts forth innumerable branches till it covers the earth with an extensive shade, and is finally regarded as the king of the forest: all behold it with reverence, few have any conception of its magnitude, or of the dimension, or number of its parts; few are acquainted with the extent of its produce, or can compare the benefits derived from its shade, with the loss of soil which it appropriates to its own support.” According to Tucker, only historians and political philosophers could chart the extent of such a society, and these scholars would find their works to be “painful, laborious, and incessant....”<sup>12</sup>

Tucker insisted that scholars learn to look below the surface appearance of things, for the magnificent edifice of the American constitutional order may no longer be what it once was, or what it appears to be: “the roots may be decayed, the trunk hollow, and the monarch of the forest ready to fall with its own rottenness and weight, at the moment that its enormous bulk, extensive branches, and luxuriant foliage would seem to promise a millennial duration.” According to Tucker, the rot at the center of the American system came from the reforms perpetrated upon it by well-meaning but misinformed politicians. “Those who administer it acquire a mechanical

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<sup>12</sup> SGT, “On the Study of Law,” in *View of the Constitution*, 14.

acquaintance with its powers, and often, by a slight alteration of the frame, produce an entire revolution in the principles of its action; to detect the cheat requires a thorough acquaintance with the principles of its original construction, and the purposes to which it was intended to be applied.” The scholar must work against “this mechanical monopoly of knowledge,” and teach the politician the true principles with which to guide the constitutional order. Only proper scholarship can teach the leaders how to keep the system working, and teach the people how to make sure that their representatives behave themselves. “Hence, since the introduction of letters, those nations which have been most eminent in science, have been most distinguished by freedom. Man only requires to understand his rights to estimate them properly: the ignorance of the people is the footstool of despotism.”<sup>13</sup>

As a corollary to their very definite ideas about the origins of free government, eighteenth-century Whigs held a variety of governmental practices to be odious. They placed the existence of a permanent active army—in Whig language a “standing army”—as one of the chief threats to liberty. The 1689 English Bill of Rights, an early and important manifestation of Whig political thought, offered an example of this fear at work. Like the later American Declaration of Independence, the English Bill of Rights contains a formidable list of grievances against a monarch, in this case King James II. One of these grievances involved the King’s “raising and keeping a standing army within this kingdom in time of peace, without consent of Parliament...” This same Bill of Rights made this monarchical trespass illegal: “the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of

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<sup>13</sup> Ibid., 14.

Parliament, is against [the] law.”<sup>14</sup> Virginia Whigs inherited their fear of standing armies directly from their British ancestors. George Mason drafted the Virginia Bill of Rights adopted by the General Assembly on 12 June 1776, and in the thirteenth article he asserted that a “well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State” and that “standing armies in time of peace should be avoided as dangerous to liberty....” Of the sixteen articles in the Virginia Bill of Rights, the thirteenth was one of the few that produced “unquestioned consensus” among the members of the General assembly.<sup>15</sup>

Tucker manifested this same whiggish fear of a standing army. Indeed, his fear lead him to oppose the Constitution of 1787 until it had been properly amended. As he wrote to his wife: “If the new Constitution takes place I believe I must turn cat in pan once more and be a Tory, for I fear it will be down with the Whigs.”<sup>16</sup> Tucker regarded the second amendment as the most important of the ten, referring to it as “the true palladium of liberty.” He thought that the right of the people to arm themselves came not from the state but from God. Such a right existed as a corollary of the “right of self defense” which he called “the first law of nature....” Most governments throughout history had worked “to confine this right within the narrowest limits possible.” Not surprisingly then, most governments had been inhospitable to liberty: “Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any color

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<sup>14</sup> “The English Bill of Rights,” in Bruce Frohnen, ed., *The American Republic: Primary Sources* (Indianapolis: Liberty Fund, 2002), 106-109; Lois G. Schworer, *No Standing Armies: The Antiarmy Ideology in Seventeenth-Century England, 1697-1699* (Baltimore: Johns Hopkins University Press, 1974).

<sup>15</sup> “The Virginia Bill of Rights,” in *The American Republic*, 157-158; Robert P. Sutton, *Revolution to Secession: Constitution Making in the Old Dominion* (Charlottesville: University Press of Virginia, 1989), 33.

<sup>16</sup> SGT to Francis Bland Tucker, 27 Oct. 1787, Tucker Coleman Collection, W&M.

or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.” Tucker considered the various reasons the British Parliament used for restricting the rights of gun ownership and found them all specious. Protecting game, or keeping guns out of the hands of non-Protestants were not, to his mind, sufficient reasons for abridging the fundamental right of self-defense.<sup>17</sup>

Tucker had less enthusiasm for the third amendment. This amendment states that: “No soldier shall in time of peace be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.” Tucker provided only terse commentary on this amendment. He believed standing armies to be dangerous, but he feared that this amendment did nothing to restrict their existence. Therefore, he believed that this amendment “adds nothing to the national security.” According to Tucker, Congress shared the power to arm the militia with the states themselves: “Congress has, moreover, power to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress....” He argued that the second amendment made this area of the Constitution clearer, noting that “the power of arming the militia, not being prohibited to the states, respectively, by the constitution, is, consequently, reserved to them, concurrently with the federal government.” Tucker thought that such a measure of central control would make the militia very useful “whenever the occasion may again require the cooperation of militia of the states respectively.” Due to the lack of organization, and the differing times of enlistment, the militia of the several states had proved a “fruitless expense” during the Revolutionary War. According to the

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<sup>17</sup> SGT “View of the Constitution of the United States,” 239.

professor, the militia must be well-organized, well-trained, and well-armed; for if they are not “it will pave the way for standing armies; the most formidable of all enemies to genuine liberty in a state.”<sup>18</sup>

Considering the power of declaring war, Tucker thought it beneficial that the Constitution restricted such powers to Congress. “The power of declaring war, with all its train of consequences, direct and indirect, forms the next branch of the powers confided to congress; and happy it is for the people of America that it is so vested.” According to the professor, wars arise because the few people who possess power criminally bring them about. Most of war’s victims die innocently: “War would be banished from the face of the earth, were nations instead of princes to decide upon their necessity.” Tucker noted that the president had the power to veto a declaration of war, but not the power to declare war. However, he noted with regret that the president may have the power to provoke a war. He therefore recommended an amendment that the Virginia ratifying convention had proposed: “that no declaration of war should be made, nor any standing army or regular troops be raised or kept up, in time of peace, without the consent of two-thirds of the members present in both houses. And that no soldier should be enlisted for a longer term than four years, except in time of war, and then for no longer term than the continuance of the war.” Upset that the restriction to a two year term for funding the military had not been followed, Tucker thought that a one year term would be preferable, but took solace in the knowledge that representatives could be thrown out after only two years. Tucker admitted admits that navies were, by their very nature, permanent investments.<sup>19</sup>

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<sup>18</sup> Ibid., 214-215. Tucker’s lack of respect for the revolutionary militia should be held in mind by those who agree with Garry Wills’s claim that a mythological reverence for the minutemen underlies all orthodox readings of the second amendment. Garry Wills, *A Necessary Evil: A History of American Distrust of Government* (New York: Simon & Schuster, 1999), 25-41.

<sup>19</sup> SGT “View of the Constitution of the United States,” 211-213.

St. George Tucker and Thomas Jefferson were not only Whigs, they were New Whigs. This modifier “new” signifies that these men faithfully adhered to the modern natural rights philosophy. According to Tucker, the American Revolution had proven wrong all those who doubted the existence of the state of nature and the social contract. Ever since the establishment of independence, the various states had produced written contracts, more commonly referred to as constitutions. Tucker saw the conventions that had produced these constitutions as something new in the history of civilization. Never before had “the original written compact of society” been “formally expressed as the first institution of a state.” The American Revolution made the modern natural rights philosophy real, thereby forming “a new epoch in the history of civil institutions, by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers....” For the first time in history, all could see “an original compact formed by the free and deliberate voices of individuals disposed to be united in the same social bonds....”<sup>20</sup>

Tucker saw the Constitution of the United States as a compact. He presented this thesis with a six part argument: first, the Constitution is a compact, not a charter or a grant, for the contracting parties are equals and none of them grant anything to each other, rather “each stipulates to part with, and to receive the same thing, precisely without any distinction or difference in favor of any of the parties.” Secondly, he described the compact as “federal” in nature. This description arose from the fact that the Constitution created “in fact, as well as in theory, an association of states, or, a confederacy.” According to Tucker, the various state governments “not only retain every power, jurisdiction, and right not delegated to the United States,” they actually compose the “constituent and necessary parts” of the new government.

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<sup>20</sup> SGT, “On Sovereignty and Legislature,” in *View of the Constitution*, 19.



Strictly speaking, Tucker did not believe that the tenth amendment to the Constitution was necessary, for the powers the states delegated to the new government were carefully enumerated, and according to the “ordinary rules of construction” those powers which are not enumerated are retained.<sup>21</sup>

Thirdly, Tucker viewed the new Constitution as “a social compact....” In making this argument he had recourse to the language of natural rights philosophy: “The end of civil society is the procuring for the citizens whatever their necessities require, the conveniences and accommodations of life, and, in general, whatever constitutes happiness: with the peaceful possession of property, a method of obtaining justice with security; and in short, a mutual defense against all violence from without.” Tucker believed that individuals voluntarily joined a society in order to enjoy these benefits.<sup>22</sup>

Fourthly, Tucker saw the Constitution as “an original compact,” in that it “completely dissolved and annihilated” the old relations which existed before it. The manner in which representatives from each state met to amend the Articles of Confederation had “all the features of an original compact, not only between the body politic of each state, but also between the people of those states in their highest sovereign capacity.” Tucker tied his fourth point in with his third point by arguing that the original contract of society consisted of an act of association by which each individual “entered into engagements with all, to procure the common welfare....” Such an association existed to produce “for the citizens whatever their necessities require, the conveniences and accommodations of life, and, in general, whatever constitutes happiness: with

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<sup>21</sup> SGT, “View of the Constitution of the United States,” 92.

<sup>22</sup> *Ibid.*, 95.

the peaceful possession of property, a method of obtaining justice with security; and in short a mutual defense against all violence from without.”<sup>23</sup>

Fifthly, Tucker pointed out that this compact was “a written contract,” one of the first of its kind in history. While some had doubted that such social contracts had ever existed, Tucker believed that the Constitution had proven the skeptics wrong. The individual states had entered into this compact “freely, voluntarily, and solemnly,” with the people of each state ratifying it without any internal or external compulsion. By emphasizing the solemnity with which the people of the various states adopted the Federal Constitution, Tucker put the spotlight upon the highly deliberative nature of the associations that produced and ratified that document. The people came up with and accepted the Constitution only after much discussion “not only by the general convention who proposed, and framed it; but afterwards in the legislatures of the several states, and finally, in the conventions of all the states, by whom it was adopted and ratified.” Therefore the Federal Constitution “is a compact by which the several states and the people thereof, respectively, have bound themselves to each other, and to the federal government.” Thus, “the acceptance of the constitution was not only an act of the body politic of each state, but of the people thereof respectively, in their sovereign character and capacity....” Therefore, “not only the body politic of the several states, but every citizen thereof, may be considered parties to the compact, and to have bound themselves reciprocally to each other ... and, also to have bound themselves to the federal government, whose authority has been thereby created, and established.”<sup>24</sup>

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<sup>23</sup> Ibid., 95-101.

<sup>24</sup> Ibid., 106, 120.

For his sixth and final point, Tucker argued that the Federal Constitution bound the Federal Government “to the several states, and to every citizen of the United States.” Understanding the necessity of keeping the federal government on a tight leash, Tucker argued that the duties of that government had “become the exact measure of its powers; and whenever it exerts a power for any other purpose, than the performance of a duty prescribed by the Constitution, it transgresses its proper limits, and violates the public trust.” This sixth and final point lead to a reiteration of Tucker’s overarching thesis: the Constitution established a government which he described as a “confederated republic, composed of several independent and sovereign democratic states, united for their common defense and security against foreign nations ... each state retaining an entire liberty of exercising ... all those parts of sovereignty which are not mentioned in the constitution...” As the “supreme law of the land” the Constitution was “binding upon the federal government; the several states; and finally upon the citizens of the United States...” Thus the federal government existed as “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 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, as such, in the most unlimited extent.”<sup>25</sup>

Tucker believed that the individual states of the United States had their foundations “in their respective colonial charters,” and with independence from Britain these units “ceased to be colonies, and became independent and sovereign republics, under a democratic form of government.” In the face of their common enemy, these states formed a “confederacy” in which

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<sup>25</sup> Ibid., 120-121, 136.

they renounced some of their “sovereign rights.” With the adoption of the Constitution of 1787 “they formed a closer, and more intimate union than before; yet still retaining the character of distinct sovereign, independent states.” The various state constitutions had gone through many different permutations in the years since independence, but the states themselves continued to exercise the basic sovereignty of the people.

Those who bemoan the career of the later Thomas Jefferson, and speculate, usually with a sad shaking of the head, that the great statesmen would have supported the secession of Virginia in 1861, have missed the point. It is only fitting that the author of the most famous secessionist document in world history would be an advocate of the right of secession in the abstract. Jefferson’s views received a lengthy and scholarly development in the writing of St. George Tucker. Distracted by a continuing string of national conquests and reconstructions, it is all too easy to miss the significance of the failure of the Confederate experiment. A Union based on consent became a Union based on conquest. It is not difficult to imagine how Tucker would have responded to the secession of the southern states; he already had the language prepared: “If the bond of Union be the voluntary consent of the people, the government may be pronounced to be free; where constraint and fear constitute that bond, the government is no longer the government of the people, and consequently they are enslaved.”<sup>26</sup>

An American Empire followed in the wake of the newly restored Union; today that empire controls a standing army that garrisons much of the world. Tucker would most likely have been terrified of such a prospect. He labeled the warning signs that would accompany the end of the American republic: “whenever our evil genius shall prompt us to aspire to the character of a military republic, and invite us to the field of glory: when rapacity, under the less

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<sup>26</sup> SGT, “Of the Several Forms of Government,” 27.

odious name of ambition, shall lead us on to conquest; when a bold, though raw militia shall be exchanged for a well trained, well disciplined and well appointed army; ready to take the field at the nod of an ambitious president, and to believe that the finger of heaven points to that course which his directs; then we may regard the day of our happiness as past, or hastening rapidly to its decline.”<sup>27</sup>

### III.

But Tucker was an idealist. Regarding his constitutional writings, one legal scholar has noted that “[n]o other commentator of such pure Jeffersonian pedigree and persuasion ever wrote.”<sup>28</sup> This statement carries a great deal of truth, for both men espoused a political philosophy based upon Whig political ideals and modern natural rights theories. Nevertheless, a full consideration of the constitutional thought of St. George Tucker must not pass over the differences between the two Virginians. The disagreement between the two men centered on the Virginia Constitution of 1776.

In his *Notes on the State of Virginia*, Jefferson argued that under the 1776 Constitution, all governmental powers including those of the legislature, the executive and the judiciary, “result to the legislative body.” According to Jefferson, by concentrating all these powers in the hands of the legislature, the framers of the Virginia Constitution established a despotic government. “It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice.” Despite this despotic form, Jefferson believed that the Virginia legislature had done a good job of remaining “perfectly upright.” He feared,

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<sup>27</sup> SGT, “View of the Constitution of the United States,” 260.

<sup>28</sup> Robert Cover, [Untitled Review of Tucker’s edition of *Blackstone’s Commentaries*], *Columbia Law Review* LXX (1970): 1476-1494; quotation on p. 1476.

however, that they would not long remain uncorrupted. “Mankind soon learn to make interested uses of every right and power which they possess, or may assume.” Jefferson predicted that in the not so distant future America would be as corrupt as the old country from which she had sought to distance herself. He feared that politicians would work to spread this corruption “through the body of the people”; that they would “purchase the voices of the people, and make them pay the price.” According to Jefferson, Virginia should reform her institutions before the corruption arises: “It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.”<sup>29</sup>

Jefferson thought that the 1776 Constitution lacked validity because it could be altered by the Virginia legislature. At the time the legislature drafted the instrument, they had not yet fully conceived the meaning of independence. Because the men who drafted the 1776 Constitution were not yet thinking of “independence and a permanent republic,” they only desired to create a “temporary organization of government....” According to Jefferson, the 1776 Constitution “pretends to no higher authority than the other ordinances of the same session; it does not say, that it shall be perpetual; that it shall be unalterable by other legislatures; that it shall be transcendent above the powers of those, who they knew would have equal power with themselves.”<sup>30</sup>

Arguing that the Virginia legislature had had the power to oppose Britain, but not the power to found a permanent form of government, Jefferson had little patience with the popular belief that the permanence of the 1776 Constitution could be inferred from the fact that it was not called an “ordinance.” On the contrary, Jefferson believed that “constitution” and “ordinance”

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<sup>29</sup> TJ, *Notes on the State of Virginia*, in *Jefferson: Writings*, 245.

<sup>30</sup> *Ibid.*, 247-248.

were convertible terms: “To get rid of the magic supposed to be in the word *constitution*, let us translate it into its definition as given by those who think it above the power of the law; and let us suppose the convention instead of saying, ‘We, the ordinary legislature, establish a *constitution*,’ had said, ‘We the ordinary legislature establish an act *above the power of the ordinary legislature*.’ Does not this expose the absurdity of the attempt?” The proponents of the 1776 Constitution stated that the people had acceded to this Constitution, thereby giving it authority. Jefferson thought this procedure had established a dangerous principle, and to make his point he employed a *reductio* argument: “On every unauthoritative exercise of power by the legislature, must the people rise in rebellion, or their silence be construed into a surrender of that power to them? If so, how many rebellions should we have had already? One certainly for each session of assembly.”<sup>31</sup>

Tucker disagreed with Jefferson’s arguments. As a foundation for his counter-argument, he returned to the first principles of natural rights theory. Under these principles, as applied by Tucker, the Virginia Constitution existed as an inevitable corollary of Virginia’s declaration of independence. The latter abolished a form of government while the former instituted a new one. “It would therefore have been absurdity in the extreme, in the convention, to suppose it to be the sense of their constituents, that they might cast off their dependence upon Great Britain, and annihilate the government exercised under its authority, without establishing another in its stead; thus leaving the people wholly without government, at the moment when the utmost exertions of

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<sup>31</sup> *Ibid.*, 249-250.

a regular and well organized government were required for the preservation, not of their liberties only, but their lives also, from the hand of the executioner.”<sup>32</sup>

To make his case clearer, Tucker retold the story of Virginia’s move to declare independence: On 15 May 1776, a convention composed of two delegates from each county met in Williamsburg and declared Virginia independent of Britain. Tucker called this “a day ever to be remembered in Virginia....” According to his interpretation, Royal Governor Lord Dunmore’s proclamation played an important role in motivating Virginians to separate from England. He quoted the following from the Virginia declaration: “The King’s representative in this colony, hath not only withheld the powers of government from operating for our safety, but having retired on board an armed ship, carrying on a piratical and savage war against us, tempting our slaves by every artifice to resort to him and training and employing them against their masters.” On the very day of issuing this declaration, the convention appointed the committee that would draft the Virginia Bill of Rights and the 1776 Constitution. This committee had twenty-eight members. The convention approved the committee’s bill of rights draft on 12 June 1776 and the committee’s draft of a Constitution on 29 June 1776. On 5 July 1776 the leaders in the new government took their oaths of office “and then the convention adjourned; leaving the government of the Commonwealth of Virginia, as a independent state, completely organized, as such.”<sup>33</sup>

According to Tucker, it took six weeks of careful deliberation to bring the Virginia Constitution into being. The lawgivers of Virginia examined the ancient constitutions of Sparta

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<sup>32</sup> SGT, “Of the Constitution of Virginia,” in *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*, I: 86-89.

<sup>33</sup> *Ibid.*, 88-90.



and Athens but found them structured for a martial and warlike population and unsuitable for the “peaceable character of an agricultural people” such as those who occupied Virginia. In their search for a precedent the lawgivers took “the democratic part of the British constitution,” and “carefully lopt off from it every germ of monarchy, and feudal aristocracy.” These framers knew that governmental splendor and human happiness were largely incompatible, and that great ages of human history were rarely characterized by a “state of peace.” Historians tend to focus on eras of tumult and bloodshed, but “ambition, tyranny, treachery and revenge,” should not, according to Tucker, be confused with glory. He believed that the procedure that made the Virginia Constitution carried more legitimacy than that employed by the British in 1688 or by the French in 1789: “The convention of Virginia had not the shadow of a legal or constitutional form about it. It derived its existence and authority from a higher source; a power which can supersede all law, dispense with all forms, and whenever it pleases annul one constitution and set up another: namely the people in their sovereign, unlimited and unlimitable authority and capacity.”<sup>34</sup>

Despite their disagreements regarding the nature of the Virginia Constitution, Tucker generally followed Jefferson in seeing and lamenting the legislative dominance of that instrument. He qualified this agreement, however, both by noting that Virginians had established their Constitution “at a time when the spirit of equality was at its utmost height, and under circumstances which contributed greatly to augment the natural jealousy of executive power....” Section five of the Bill of Rights that preceded the Virginia Constitution indicated that the judicial power should be kept separate from the executive and legislative branches. The colonial constitution had been defective in this regard, and the example of royal prerogative over the other branches in the mother country had provided further demonstration of the need for a clear

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<sup>34</sup> Ibid., 91.

separation of powers. According to Tucker, the framers of the Virginia Constitution wanted a government conducive to the happiness of the people, and they wanted that government to have clearly defined executive, legislative and judicial branches.<sup>35</sup>

Jefferson had argued that the Virginia Constitution gave the legislature complete supremacy over both the executive and judicial branches, but Tucker disagreed, noting “that more than one instance might be adduced where the judiciary department have doubted, or denied the obligation of an act of the legislature because contrary to the constitution.”<sup>36</sup> Although he did not make the point, at least one of these acts of judicial review would have been his own. The formative precedent, however, came not from Tucker but from George Wythe. In 1782, in his opinion in the case of *Commonwealth v. Caton*, Wythe argued that even if “the whole legislature ...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 hither shall you go, but no further.” Tucker followed this precedent in 1793, when he delivered his opinion in the case of *Kemper v. Hawkins*. In this case Tucker, using Federalist 78 for his authority, argued that judicial review was the logical outcome of having a constitution superior to mere legislation.<sup>37</sup>

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<sup>35</sup> Ibid. 49, 79.

<sup>36</sup> Ibid., 81.

<sup>37</sup> *Commonwealth v. Caton & al.* 4 Call 634; *Kemper v. Hawkins* 1 Brockenbrough and Holmes 70; F. Thornton Miller, *Juries and Judges Versus the Law: Virginia's Provincial Legal Perspective, 1783-1828* (Charlottesville: University Press of Virginia), 65-67 A further elaboration of Tucker's theory of judicial review can be found in Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990), 25-26, 53-55.

Tucker believed that only the people could change the Constitution; the legislature could not. He asked all Virginians to respect their Constitution until that time that they should see fit to call up a convention fit to alter it. In the meantime, he believed that they could be confident that the framers of that Constitution had intended it to be permanent. If they had not intended permanency, argued Tucker, they would not have included clauses such as the twenty-first which “released and forever confirmed” the boundaries set out by the Charters between Virginia and her neighbors. Yet despite these disagreements about the Virginia Constitution, Tucker and Jefferson were in fundamental agreement about the dangers posed by that document.

For instance, Jefferson had feared that Virginia might become a dictatorship. He noted that in December of 1776 and again in June of 1781, the General Assembly of Virginia had considered a motion to hand control of Virginia over to a dictator. Jefferson noted with chagrin that the measure came within a few votes of being passed, and he argued that a dictatorship would violate “our ancient law...” as well as the “fundamental principle” of Virginia’s government, namely that “the state shall be governed as a commonwealth.” Jefferson conceded that his fellow Virginians had meant well in appealing to the Roman precedent of dictatorship, but that the Old Dominion differed so much from ancient Rome, that the ancient precedent should have no force in Virginia. In Rome “the government was of a heavy-handed unfeeling aristocracy, over a people ferocious, and rendered desperate by poverty and wretchedness....” Virginians, by contrast, were “a people, mild in their dispositions, patient under their trial, united for the public liberty, and affectionate to their leader.” Yet even with Roman precedents cast aside, Jefferson feared that the legislative dominance established by the Virginia Constitution, coupled with that legislature’s ability to set itself a quorum of one, could provide for dictatorship on a wholly domestic model. He therefore called for a convention to establish a constitution with

a real separation of powers, one which would “bind up the several branches of government by certain law, which when they transgress their acts shall become nullities....”<sup>38</sup>

Tucker also worried about the immediate and future dangers that could arise as a result of legislative dominance. Like Jefferson, he believed that the best time for reform would be before the crisis struck. Unlike Jefferson, however, Tucker had the advantage of writing after the ratification of the Federal Constitution. By guaranteeing a republican form of government, the Federal Constitution protected Virginia from the sort of despotism feared by Jefferson. Always keeping the possibility of secession in mind, Tucker provided a different type of motivation for constitutional reform in Virginia: “If by any fatal event the federal union should happen to be dissolved, or broken, there is not a state in the confederacy, that would sooner feel the total inadequacy of its constitution, to support its liberty and independence, as a state, than Virginia.” Despite these grave warnings, as late as 1803, Tucker still found the 1776 Constitution largely serviceable, finding it “to be fully commensurate, in time of peace, to the security and protection of the citizen from domestic violence or oppression either in his person, or his property.”<sup>39</sup>

#### IV.

Although they differed on the topic of the Virginia Constitution, Jefferson and Tucker had similar ideas concerning legal education. Jefferson intended his University of Virginia to be a bastion of Whig political thought. In a letter to James Madison he set forth his criterion for the appointment of a law professor at the new university and argued that while Virginia’s lawyers had been good Whigs before the Revolution, they had degenerated into Tories in the years since. According to Jefferson, few had noticed this slide, for the lawyers “suppose themselves, indeed,

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<sup>38</sup> TJ, *Notes on the State of Virginia*, 252-255.

<sup>39</sup> SGT, “Of the Constitution of Virginia,” 83.

to be Whigs, because they no longer know what whigism or republicanism means.” Jefferson thought that the legal professorship at the new University of Virginia could help change this state of affairs: “It is in our seminary that the vestal flame is to be kept alive; it is thence to spread anew over our own and the sister states.” Jefferson believed that this change in political thought would come about as a result of a change in reading material.<sup>40</sup>

According to Jefferson, young Virginia lawyers before the Revolution had learned proper principles by reading one of the classics of English legal literature, Sir Edward Coke’s *Commentary upon Littleton*, generally known to lawyers simply as “Coke on Littleton,” and first published in 1628. After the Revolution, lawyers began their training with a more recent classic, William Blackstone’s *Commentaries on the Laws of England*. Blackstone based his four volumes of commentaries on lectures he gave at Oxford University beginning in 1753. These lectures were the first lectures in English law ever offered at any university. Blackstone published his first volume in 1765, with the additional volumes following in 1766, 1768, and 1769.<sup>41</sup> Blackstone’s volumes are more comprehensive than those of his predecessor, but this very comprehensiveness made Jefferson uncomfortable. Young lawyers who read all four volumes were apt to become arrogant and think that they had mastered the law. Even “unlettered common people,” can see through this charade, thought Jefferson, for they “apply the appellation of Blackstone lawyers to these ephemeral insects of the law.” Jefferson wanted young Virginians to

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<sup>40</sup> TJ to Madison, 17 Feb. 1826; TJ to John Tyler, 10 Jan. 1810 in Paul Leicester Ford, ed., *The Writings of Thomas Jefferson* (11 vols.; New York: Putnam, 1892-1899), X: 375-376; XI: 142; Julius S. Waterman, *Thomas Jefferson and Blackstone’s Commentaries*,” 461.

<sup>41</sup> Herbert Storing, “William Blackstone,” in Leo Strauss and Joseph Cropsey, eds. *History of Political Philosophy*, 3<sup>rd</sup> ed., (Chicago: University of Chicago Press, 1987), 622-634; James R. Stoner, Jr., *Common Law and Liberal Theory: Coke, Hobbes and the Origins of American Constitutionalism* (Lawrence: University Press of Kansas, 1992), 162-175.

start with Coke, to go through two or three years worth of legal training, and then with this knowledge as a base, approach Blackstone.<sup>42</sup>

Tucker, like Jefferson, believed the teachings of Blackstone inimical to the interests of a free and independent Virginia. Indeed, much of Jefferson's tirade against Blackstone seems to echo, almost word for word, Tucker's introduction to his Blackstone edition. Tucker admitted that Blackstone's scholarship allowed the law of England to emerge "from a rude chaos," and to take on "the semblance of a regular system." This progress, however, brought with it unintended drawbacks, as:

The student who had read the *Commentaries* three or four times over, was lead to believe that he was a thorough proficient in the law, without further labor, or assistance; the crude and immethodical labors of Sir Edward Coke were laid aside, and that rich mine of learning, his *Commentary upon Littleton*, was thought to be no longer worthy of the labor requisite for extracting its precious ore. This sudden revolution in the course of study may be considered as having produced effects almost as pernicious as the want of a regular and systematic guide, since it cannot be doubted that it has contributed to usher into the profession a great number, whose superficial knowledge of the law has been almost as soon forgotten, as acquired.<sup>43</sup>

Like Jefferson, Tucker knew that he could not teach law without having recourse to the four volumes by the Englishman. His edition of Blackstone came about as an effort to make the Englishman's work safe for his law students at the College of William and Mary.

Upon replacing George Wythe as professor of law at that college, Tucker wanted to write his own work, but he knew that time constraints would force him to make Blackstone's *Commentaries* the backbone of his legal curriculum.

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<sup>42</sup> TJ to Madison, 17 Feb. 1826; Mayer, *Constitutional Thought of Thomas Jefferson*, 11; James R. Stoner, "Sound Whigs or Honeyed Tories? Jefferson and the Common Law Tradition," in Gary L. McDowell and Sharon L. Noble, eds. *Reason and Republicanism: Thomas Jefferson's Legacy of Liberty* (Lanham: Rowan and Littlefield, 1997), 103-117.

<sup>43</sup> SGT, "On the Study of Law," 2.

Because he also had to work as a judge, Tucker did not have time to write his own comprehensive guide to the laws of the Anglophone world. He divided the school year into two relatively short semesters: the first ran from the first of December to the twenty-fifth of March and the second ran from the first of July to August 25. During this time he kept his students very busy: they were to read from dawn until 11:00 a.m.; listen to him lecture until 2:00 p.m., and then continue reading until dark. Tucker had his students read a variety of works, but he always kept Blackstone at the center. Never having more than seventeen students at a time, he taught his classes at home, a practice that would later prove controversial with the governing body of the college. Tucker insisted on the practice, however, on the grounds that he needed to have his legal books close at hand. He made extensive marginal notes in his copy of Blackstone and used these notes to lecture to the class. These notes eventually became the basis for his annotated edition.<sup>44</sup> Tucker believed that his annotations aided his students in their comprehension of Blackstone and made it possible for them to apply the relevant parts of the volumes while disregarding the rest: “To a student pursuing a systematical course of study it must be highly important to be delivered from a labyrinth of uncertainty, by casting his eye to the bottom of the page, and there finding whether the statute he is considering still forms a part of, or has been expunged from, that code, which he wishes to understand.”<sup>45</sup>

Tucker’s chief debate with Blackstone hinged on the issues at the root of America’s War of Independence. Blackstone’s thought should not be, *prima facie*, thought of as hostile to the cause of American independence. Edmund Burke, the great English statesman and Old Whig, held a different view of Blackstone than did Tucker and Jefferson. In 1775, he noted: “I hear that

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<sup>44</sup> Charles Cullen, “St. George Tucker and Law in Virginia,” 170-173, 179.

<sup>45</sup> SGT, “On the Study of Law,” 8.

they have sold nearly as many of Blackstone's Commentaries in America as in England." Burke was sympathetic to the complaints of the Americans, and he warned his fellow members of Parliament that they should rightly fear the legal knowledge of the colonists, for reading in the law "renders men acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources." According to Burke, men with such legal knowledge are dangerous, for "when great honors and great emoluments" do not win them "to the service of the state," they can easily become "a formidable adversary to government." The Americans, with their wide reading of Blackstone, learned to "augur misgovernment at a distance; and snuff the approach of tyranny in every tainted breeze."<sup>46</sup>

It is strange that a Tory like Blackstone could have such a strong influence upon Whigs on both sides of the Atlantic. The particular issue upon which Tucker focused did not concern the American independence movement in general, but rather upon the specific issue of sovereignty. Tucker thought that sovereignty rested with the people, and that the people only allowed a government to be sovereign so long as that government continued to serve their interests. Blackstone disagreed; even if the people had once possessed sovereignty, they had, over the course of time, bestowed it upon Parliament. Believing that the sovereignty of Parliament had become irrevocable, Blackstone did not, however, believe that the common law applied to the United States. Instead, the Englishman argued that only those acts of Parliament that specifically mentioned the colonies were binding. He thought that all governments possessed a seat of sovereignty that could not be divided. In the case of England this sovereignty rested with the Parliament. Thus the sovereignty of Parliament, according to Blackstone, could not be

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<sup>46</sup> Edmund Burke, "Speech of Edmund Burke, Esq., On Moving his Resolutions for Conciliation with the Colonies, March 22<sup>nd</sup> 1775," in Ian Harris, ed., *Edmund Burke: Pre-Revolutionary Writings* (Cambridge: Cambridge University Press, 1993), 206-269; quotations pp. 225-226.



undone without destroying all positive law and throwing everyone back into a primitive state of nature.<sup>47</sup>

Although he praised the idea of a separation of powers, Blackstone thought that Parliament must serve as a check on the power of the king, but not vice versa. With the success of the Revolution, Americans thought they knew better: the people could divide their sovereignty among different branches, not necessarily just the legislature, and these branches would hold that sovereignty only conditionally. The English had made an important first step when they had checked the power of the executive with the legislative branch, but how could the people keep the power of this legislature in check? The American Revolution showed the way, and it did so by revolting against Blackstone's notion of sovereignty. The conception of divided sovereignty did not arise out of the Revolution by accident. As one historian has noted, "whatever additional legal, theoretical, or substantive issues divided American from their mother country, what broke apart the empire was an inability to agree on the locus and nature of sovereignty."<sup>48</sup> In the Anglophone political world of the time, the leading authorities regarded divided sovereignty as an impossibility. The British, following Blackstone, believed that there had to be a seat of final and undivided authority somewhere in the Empire.<sup>49</sup>

In establishing a voluntary union of free and independent states, the Declaration of Independence did not fully resolve the problem of divided sovereignty. Instead it set the stage for continued debate on the issue. Most Americans would come to believe that ultimate sovereignty

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<sup>47</sup> Robert Cover, [Untitled Review of Tucker's edition of *Blackstone's Commentaries*], 1478-1479.

<sup>48</sup> Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776-1876* (Lawrence: University Press of Kansas, 2000), 4.

<sup>49</sup> Gordon Wood, *Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), 344-354.

resided in the people of the United States. This seemingly simple solution, however, presents problems of its own. According to the traditional understanding, the essence of sovereignty resides in the making of law, and the people do not, of themselves, make the law. Under the Articles of Confederation, the states clearly exercised the sort of sovereignty described by Blackstone. If all sovereignty had continued to rest with the states, matters would have remained relatively simple, but the Constitution of 1787 marked a complicated innovation in political thought. As one historian puts it: “The Constitution would be a compact not among sovereign states, as was the 1781 Articles of Confederation, nor a Lockean compact between ruler and ruled, nor even a compact of the whole people among themselves. It would be a compact among peoples of different political societies, in their capacities as peoples of the several states.”<sup>50</sup>

An analysis of the Tucker interpretation of the Constitution demonstrates that he did more than simply attach a useful expository essay on the United States Constitution to the back of an edition of Blackstone; instead, he insulated the impressionable minds of his law students from an excessive reverence for the British model of government that one might otherwise acquire from reading the Englishman. Tucker did this out of the belief that “wherever the constitution of the United States departs from the principles of the British constitution, the change will, in an eminent degree, contribute to the liberty and the happiness of the people, however it may diminish the splendor of those who administer it.” Tucker looked with a “jealous eye” at all the parts of the Constitution that “savor of monarchy, or aristocracy, or tend to a consolidated, instead of a federal, union of the states.” He argued that a true friend of the Constitution would always look for problems and propose amendments, before the injury caused

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<sup>50</sup> McDonald, *States' Rights and the Union*, 8-9.

by oversight became too great to be repaired. Tucker heeded his own lesson by comparing all three branches of the Federal Government to their English counterparts.<sup>51</sup>

He began with a discussion of the principles of representation used by the British and American Constitutions in establishing their legislatures. The House of Commons “which forms the democratical part of the British constitution” thereby constitutes “its superior excellence...” He quoted Blackstone on the necessity of representative democracy, but then demonstrated that the British system did not represent people equally. In America, on the other hand, “the representation is in exact proportion to the inhabitants.” According to Tucker, the problem with the English system was that “a borough composed of half a dozen freeholders, sends perhaps as many representatives to parliament, as a county which contains many thousands....” The Framers designed the American system of representation in such a manner as to avoid this abuse, and Tucker defended the three-fifths compromise in the light of this understanding.<sup>52</sup>

Tucker saw the equal representation of each state in the senate as a fundamentally important characteristic of American federalism. The Senate represented the states “in their sovereign capacity, as moral bodies, who as such, are all equal; the smallest republic, as a sovereign state, being equal to the most powerful monarchy upon earth.” Tucker feared that without this equality existing somewhere in the American federal system “the Union could not, under any possible view, have been considered as an equal alliance between equal states.” The equality of state representation in the Senate prevented the smaller states from having to submit to “the most debasing dependence.” Tucker therefore regarded the equal mode of state

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<sup>51</sup> SGT, *View of the Constitution of the United States*,” 310.

<sup>52</sup> *Ibid.*, 138-139, 154-155.

representation in the Senate as “one of the happiest traits” in the Constitution, and one able “to cement the union equally with any other provision that it contains.”<sup>53</sup>

Tucker did not think well of the British counterpart to the American Senate. After noting the qualifications necessary for a seat in the House of Lords, Tucker argued that in America “all are citizens possessing equal rights in their civil capacities and relations; there are no distinct orders among us, except while in the actual exercise of their several political functions.” Dissecting Blackstone’s claim that the class distinctions in the British Constitution helped to create a “laudable ardor” to preserve the country, Tucker argued that such distinctions were unnecessary, for a “pure democracy” produced “VIRTUE.” To define this word, Tucker turned to Montesquieu. The Frenchman found virtue to be nothing less than the love of the republic that engenders in turn love for democracy and love for equality. Taking this thesis to heart, Tucker argued that democracies generally produce more great men than do aristocracies. The ambition excited by virtue “must of necessity be directed to the public good,” while the ambition excited by aristocratic honors “may exist in the breast of a Caesar or a Cataline.” Had nature made “vigor of mind and activity of virtue” hereditary, then one could make an argument for a hereditary aristocracy. Nature, however, often produces sons who are inferior to their fathers. Therefore Tucker believed that aristocracies always posed a threat to liberty.<sup>54</sup>

Tucker compared the relatively few privileges given to senators versus those the English bestowed on members of the peerage. “Happy for America that the constitution and the genius of her people, equally secure her against the introduction of such a pernicious and destructive class of men.” He found the newly made members of the House of Lords serviceable, for their place in

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<sup>53</sup> Ibid., 142.

<sup>54</sup> Ibid., 158, 163-164.

that House rested upon their individual attainments; however, he thought the hereditary members of that House contemptible. Noting that hereditary membership in the House of Lords passed to the first-born son, Tucker turned to the Bible for his argument against primogeniture: “The first born son of the first man, was a murderer.” Abraham’s first born “was an outcast from society...,” and “the first born of Jesse ... was rejected in favor of David the youngest: and the first born of that same David, was by the same providence set aside in favor of Solomon his youngest son.” In those heady pre-seventeenth amendment days, Tucker could argue that Senators were “selected for their probity, attachment to their country, and talents, by the legislatures of the respective states.” He correctly predicted that though the “whole number of senators are at present limited to thirty-two .... It is not probable that they will ever exceed fifty....” The House of Lords had more than two hundred, and Tucker thought that even if they all had the mental attributes of Isaac Newton, they would still “be a mob.” Furthermore, according to Tucker, United States senators existed to represent the interest of their home state, while the peers of England had nothing to represent save their own class interest.<sup>55</sup>

Moving to consider the executive branches of the American and English Constitutions, Tucker noted that a presidential veto could be easily overcome with a two-thirds majority in both houses, while the King’s veto was superfluous in that he could make whoever he wanted into Lord, thereby producing “a sufficient guarantee against the necessity of exercising this unpopular prerogative in the crown.” The King also had the power to dissolve the House of Commons, thereby procuring a body more hospitable to his aims. Although the American president possessed less power in this regard, Tucker believed that his office provided more unity and more responsibility to the executive branch. Under the English system, executive unity “exists

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<sup>55</sup> Ibid., 166-168.

only theoretically, in an individual; the practical exercise of it, being devolved upon ministers, councils, and boards.” Tucker believed that these different bodies diffused responsibility through a “secret conclave,” thereby assuring that the British executive could be neither unanimous nor responsible. In the United States, by contrast, “the unity of the executive authority is practically established, in almost every instance.” From this premise, Tucker concluded that responsibility followed the president at all times, and that a president would be held just as responsible for what he did as for what he did not do. Having to seek election every four years, Tucker found the president both more accountable and more capable of unity than his British counterpart.<sup>56</sup>

Although Blackstone praised the British executive for its perpetuity, Tucker did not agree. He noted that a king “may die, may be an infant in swaddling clothes, a superannuated dotard, or a raving maniac.” In any of these instances the king’s continual rule would be a disadvantage, not an advantage. Tucker noted that the Constitution of the United States forbade a child from assuming the presidency, and he happily noted that impeachment proceedings would quickly dispatch a senile or an insane chief executive. With the United States Constitution “[n]othing is wanting to the perpetuity of the office, but a provision for its continuance in case no president shall be elected at the period prescribed by the constitution.” Tucker believed that such a situation would not arise unless the people were “weary of the present constitution and government” and looking to terminate it. Always keeping an open mind regarding the possibility of secession, Tucker noted that “it is, perhaps, among the recommendations of the constitution, that it thus furnishes the means of a peaceable dissolution of the government, if ever the crisis should arrive that may render such a measure eligible, or necessary.” In addition, the Constitution of the United States forbade a foreign-born citizen from being elected president.

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<sup>56</sup> Ibid., 170, 254.

Tucker extolled the benefits of the constitutional restraint upon the election of foreigners to the office of the chief executive. He approved of this restriction, noting that a foreigner made himself king of Holland to the ruin of that country, and that “the fraternity of crowned heads” in Europe had more than once thrown the continent into crisis in an effort to preserve their interests.<sup>57</sup>

Moving on to the judicial branch, Tucker argued that the United States Constitution provided the courts with both legal independence and constitutional independence. In England, by contrast, the executive and the legislative in combination could overturn the judiciary, but the United States Constitution rendered the judiciary immune to such attacks. This independence arose from the lifetime tenure of judges; from the fact that a federal judge’s salary could not be lowered; from the letter and spirit of the Constitution’s separation of the branches of government; and from the supremacy of the federal judiciary over all lower courts. According to Tucker, the judiciary traditionally formed a part of the executive authority. Under such a form of government judges advise the king, and when they reached a judgment it took the power of the king to carry it out. “But in the United States of America, the judicial power is a distinct, separate, independent, and co-ordinate branch of the government....” Justices swore an oath to the Constitution, not an oath to follow the decrees of the legislature.<sup>58</sup>

## V.

In comparing the differences between the English and American constitutions, Tucker thought himself to be doing much more than engaging in an academic parlor game. He believed that only a proper and orthodox understanding of the United States Constitution could preserve the

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<sup>57</sup> Ibid., 257, 261.

<sup>58</sup> Ibid., 289-291.

liberties that Virginians held dear. Among these liberties, the freedom of speech had always held a pride of place, and Tucker believed that events in the late eighteenth century had put this freedom under attack. In 1798, a Federalist-dominated Congress passed the Alien and Sedition Acts in preparation for an expected war with France. In addition to allowing for the easier deportation of immigrants deemed hostile to the United States, these acts established strict restrictions on criticism of the government. Domestic opponents of the John Adams administration, such as Tucker, rightfully believed that the Sedition Act in particular impinged upon their freedom of speech.<sup>59</sup>

Tucker did not hesitate to spell out what he meant by freedom of speech: “Liberty of speech and of discussion in all speculative matters, consists in the absolute and uncontrollable right of speaking, writing, and publishing, our opinions concerning any subject, whether religious, philosophical, or political; and of inquiring into and, examining the nature of truth, whether moral or metaphysical; the expediency or in expediency of all public measures, with their tendency and probable effect; the conduct of public men, and generally every other subject; without restraint, except as to the injury of any other individual, in his person, property, or good name.”<sup>60</sup> He believed that the United State Constitution existed, in part, to defend this broad conception of freedom.

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<sup>59</sup> Herman Belz, et. al, *The American Constitution: Its Origins and Development*, 7th ed., (New York: W. W. Norton and Company, 1991). 330-337; K. R. Constantine Gutzman, “The Virginia and Kentucky Resolutions Reconsidered: ‘An Appeal to the *Real Laws* of Our Country,’” *Journal of Southern History* LXVI (2000): 473-496; William J. Watkins, Jr., *Reclaiming the American Revolution: The Kentucky and Virginia Resolutions And Their Legacy* (New York: Palgrave Macmillan, 2004).

<sup>60</sup> SGT, “Of the Right of Conscience; And of the Freedom of Speech and of the Press,” in *View of the Constitution*, 376-374.



Tucker thought that such liberty had been universally restricted until his time. Providing an example from English history to make his point, the professor argued that England only acquired some freedom of the press in 1694, and even this freedom only prevented prior restraint of publication. After something had been published one could still be punished for writing it. In addition, the British Constitution assumed the supremacy of Parliament, and the English laws protecting the freedom of speech therefore only shielded the people from the royal power, not the parliamentary power: “They are mere legislative precautions against executive usurpations.” According to Tucker, the United States Constitution protected the freedom of speech not only from executive encroachments, but from legislative encroachment as well. The rights protecting freedom of speech “are secured, not by laws paramount to prerogative; but by constitutions paramount to laws.”<sup>61</sup>

In viewing the political conflicts surrounding the Sedition Act, Tucker noted that as soon as it had passed, the government began carrying out prosecutions, and that these prosecutions “were conducted ... with a rigor, which seemed to betray a determination to convert into a scourge that, which it had been pretended was meant only to serve as a shield.” Not surprisingly then, when the scurrilous journalist James Thompson Callender wrote Tucker from jail, noting that he had been put there by the Sedition Act, Tucker made an effort to help him. Tucker wrote to the future Chief Justice of the United States, John Marshall, and asked his fellow Virginian to intercede on Callender’s behalf with the president. In this letter, Tucker expressed the hope that he and Marshall were still friends despite their “political differences of opinion....” Tucker noted that he was writing “on behalf of a man whom I never saw, not ever had the slightest intercourse or communications with until” receiving his letter the night before. While admitting that the

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<sup>61</sup> Ibid. , 384-385.

president might lose popularity by freeing Callender, Tucker argued that such a course of action would nevertheless be the right thing to do. “And though I am in truth incapable of saying anything which may be considered as offering incense to the President of the United States, I have no hesitation in declaring to my friend John Marshall, that I should feel myself obliged to him for his human interposition on behalf of a man, whom I cannot but consider as suffering an unconstitutional punishment.”<sup>62</sup>

John Marshall replied promptly to Tucker’s plea, noting his contempt for that “intolerant and persecuting spirit which allows of no worth out of its own pale, and breaks off all social intercourse as a penalty of an honest avowal of honest opinions.” He informed Tucker that the president had no control over the prosecution of these matters. “The laws are made, and those who violate them are prosecuted by the proper officer without the knowledge or direction of the President.” Marshall believed that Callender could only be excused if he were “below” the “resentment” of the law. Perhaps he was, but Marshall did not believe this case to merit his interposition with the president. He wished that Callender’s screed against Alexander Hamilton “had never been seen by any person.” In any case, even if he were willing to interpose himself with the president, “I do not think Mr. Adams would take any step in the case while the election is uncertain.” As to the Sedition Act being unconstitutional, Marshall politely left his opinion to one side, merely noting that the “unconstitutionality of the law cannot be urged to the President because he does not think it so.” Marshall noted that other “wise and virtuous men” held the Sedition Act unconstitutional. “Of consequence, whatever doubts some of us may entertain, he who entertains none, would not be, and ought not be influenced by that argument.”<sup>63</sup>

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<sup>62</sup> Ibid., 390; James Thompson Callender to SGT, 4 Nov. 1800; SGT to John Marshall, 6 Nov. 1800, Tucker-Coleman Collection, W&M.

<sup>63</sup> John Marshall to SGT, 18 Nov. 1800, Tucker-Coleman Collection, W&M.

Tucker had no doubt as to the unconstitutionality of the Sedition Act. He argued that the first amendment provided “a positive denial to congress, of any power whatever, on the subject.” He noted that defenders of the Sedition Act generally referred to Article One, Section Eight of the Constitution, the famous “necessary and proper clause.” Tucker followed the orthodox doctrine that this clause did not provide any new powers to Congress but merely made “a declaration, for the removal of all uncertainty, that the means of carrying into execution, those [powers] otherwise granted, are included in the grant.” According to this reasoning, since there is no express power for which the Sedition Act could be construed as a means of enforcement, the Sedition Act was therefore unconstitutional. Tucker did not believe that the power to suppress insurrections could properly be used as a precedent for the Sedition Act. For “it surely cannot, with the least plausibility, be said, that a regulation of the press, and the punishment of libels, are exercises of a power to suppress insurrections.”<sup>64</sup>

According to Tucker, constitutional orthodoxy derived from “the construction which prevailed during the discussions and ratifications of the constitution....” Tucker believed that the consequences of abandoning constitutional orthodoxy on the question of the necessary and proper clause would be severe. He held the orthodox construction to be “absolutely necessary” in order to maintain “consistency with the peculiar character of the government, as possessed of particular and defined powers only; not of the general and indefinite powers vested in ordinary governments.” With the abandonment of constitutional orthodoxy “it must be wholly immaterial, whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers.”<sup>65</sup>

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<sup>64</sup> SGT, “Of the Right of Conscience,” 387.

<sup>65</sup> *Ibid.*, 388.

Tucker firmly believed that freedom of speech implied the freedom of the press. He offered a blueprint for how the press should employ this freedom: “A freedom unlimited as the human mind; viewing all things, penetrating the recesses of the human heart, unfolding the motives of human actions, and estimating all things by one invaluable standard, truth; applauding those who deserve well; censuring the undeserving; and condemning the unworthy, according to the measure of their demerits.” He then demonstrated why a sedition law would be unconstitutional, taking on the argument that the first amendment, like its British predecessors, only offered freedom from prior restraint. Some had argued that the federal government inherited the full jurisdiction of the British common law, but Tucker disagreed: “The United States as a federal government have no common law.” The individual states had adopted parts of the common law tradition, but “the common law of one state ... is not the common law of another.”<sup>66</sup> Tucker believed that giving the federal government a common law jurisdiction would destroy the limited government established by the United State Constitution, and instead establish a government on principles identical to those of the British Constitution.

In making this case Tucker offered a fuller development of arguments first put forth in the Virginia and Kentucky Resolutions. James Madison had penned the Virginian Resolutions while Thomas Jefferson wrote the Kentucky Resolutions. Although drafted as a response to the Alien and Sedition Acts, these resolutions concerned the deeper question of the relationship between the federal government and that of the states, and the source of authority when disputes arose between them. Jefferson’s document was the bolder of the two, arguing as it did that the states, as the original parties in the constitutional compact, had the power to nullify federal legislation which went against the United States Constitution. Madison merely thought that the

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<sup>66</sup> Ibid., 382-384.

states could interpose themselves between the federal government and the unjustly persecuted citizens of a state. Tucker agreed with these resolutions, and he thought it a shame that the other states had largely rejected them: “The general assembly of Massachusetts, alone, condescended to reason with her sister states; the others scarcely paid them the common respect that is held to be due from individuals to each other.”<sup>67</sup>

James Madison headed the committee that reviewed these hostile responses from the other states, and he responded with a review of them. His review of the resolutions, according to Tucker, contained “a train of arguments, and of powerful, convincing, and unsophistic reasoning, to which, probably, the equal cannot be produced in any public document, in any country.” In his defense of constitutional orthodoxy, Tucker had recourse to Madison’s report, which he regarded as “very long,” and “incapable of being abridged, without manifest injury.” Madison not only believed that the first amendment forbade a Sedition Act, he argued that even without the first amendment, the federal government lacked the power to pass such an act. Proponents of the Sedition Act disagreed and put forth an argument that Madison greeted with “astonishment and apprehension;” namely, that the common law, “a law of vast extent and complexity, and embracing almost every possible subject of legislation, both civil and criminal” composed “a part of the law of these states, in their united and national capacity.” Madison conceded that the common law existed in the colonies before the revolution, but that “it was the separate law of each colony within its respective limits, and was unknown to them as a law pervading and operating through the whole, as one society.” The common law existed this way by necessity.

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<sup>67</sup> SGT, “Of the Right of Conscience,” 389

Because no common legislature or court existed, each colony had to propagate or amend the common law on its own.<sup>68</sup>

Madison then moved to consider the effect of the Revolution upon the common law in the colonies. According to his interpretation, the colonies had believed themselves bound to the king, but not to parliament. The American Revolutionaries believed that the “legislative power was ... as complete in each American Parliament, as in the British Parliament.” In Madison’s view, it was the “denial of these principles by Great Britain, and the assertion of them by America, [that] produced the revolution.” The British colonies had tacitly acquiesced in Parliament’s attempts to regulate commerce so long as “this regulating power was confined to the two objects of conveniency and equity....” Once the commerce-regulating power had been “perverted to the selfish views of the party assuming it, then the injured parties began to feel and to reflect; and the moment the claim to a direct and indefinite power was engrafted on the precedent of the regulating power, the whole charm was dissolved, and every eye opened to the usurpation.” Therefore, the future president found the doctrine “that the common law is binding on these states as one society ... repugnant to the fundamental principle of the revolution.”<sup>69</sup>

Perhaps the Constitution of 1787 introduced a common law jurisdiction between the states. Madison admitted that “particular parts of the common law may have a sanction from the Constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government; and so far, also, as such other parts may be adopted by Congress, as necessary and proper for carrying into execution the powers expressly delegated.”

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<sup>68</sup> Ibid., 390-392; James Madison, “Report of the Committee to whom were referred the Communications of Various States, Relative to the Resolutions of the Last General Assembly of this State, Concerning the Alien and Sedition Laws,” in Marvin Meyers, ed. *The Mind of the Founder: Sources of the Political Thought of James Madison* (Hanover: University Press of New England, 1973), 244-245.

<sup>69</sup> Ibid., 246-247.

Madison did not believe, however, that the federal government's common law jurisdiction exceeded these parameters. Those who disagreed, interpreted the second section of Article Three as granting it. This section reads as follows: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." Madison regarded this clause as a reiteration of the Supreme Court's power to decide cases against states that violated the Constitution and to decide cases between citizens of different states or between citizens and a foreigner. Furthermore, Madison interpreted the expression "cases in law and equity" as explicitly forbidding criminal cases. The Supreme Court had appellate jurisdiction, both as to law and as to fact, but criminal cases must be heard before juries; therefore, according to his reasoning, the Supreme Court could not hear criminal cases. In sum "it is evident that this part of the Constitution ... would not include any cases whatever of a criminal nature, and consequently would not authorize the inference from it, that the judicial authority extends to offenses against the common law, as *offenses* arising under the Constitution."<sup>70</sup>

Madison pointed out the two portions of the Constitution that enumerated the laws. He noted that the common law was not mentioned in either. He then listed a number of hypothetical questions for the proponents of common law jurisdiction, most hinging upon the difficulties that must face anyone seeking to determine when to cut off the influence of British statutes. He made a *reductio* argument, noting that if the Constitution established the common law in the United States, then the legislature would have no power to alter it, and that the sedition law would therefore be nullified. On the other hand, if the Constitution did establish the common law and gave Congress the power to amend it, then the Congress would have unlimited power. Similarly,

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<sup>70</sup> Ibid., 248-249.

the president, who has the power to enforce the laws, would see his powers greatly increased. And the Supreme Court would acquire, according to Madison, “a discretion little short of a legislative power.” The fate of such a grant would be to make the laws unknowable by the majority of the citizens. It “would overwhelm the residual sovereignty of the states, and, by one constructive operation, new-model the whole political fabric of the country.” Madison regarded it as an insult to the prudence of the framers of the Constitution to think that they would be so stupid as to give the new government common law jurisdiction.<sup>71</sup>

Tucker followed Madison’s arguments against a common law jurisdiction for the federal government, but he did so in his own way. In analyzing the subject, Tucker broke it into four questions: Did the laws of England travel across the Atlantic with the colonists? To what extent did the colonists adopt them independently? To what extent did the revolution annul these laws? And have these laws “been engrafted upon, and made a part of” the Constitution of the United States? With regard to the first question, Tucker began with the opinion put forth by Blackstone, who argued that the colonies were taken from the natives by right of conquest, and that the common law therefore had no force in them. It would have been easy for Tucker to simply follow Blackstone here, but he did not. Instead, he argued that the only place where Blackstone’s argument held force would be in the colony of New York. In all the other colonies, whether the land had been purchased, conquered or ceded to the people who settled the colony, the Americans living there “were neither the people who were conquered, nor those who were ceded by treaty, to a different sovereignty....” Tucker argued that sovereignty, when acquired through conquest, “is acquired when a nation, having just reason to make war upon another people, reduces them by the superiority of their arms to the necessity of thenceforth submitting to the

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<sup>71</sup> Ibid., 252.



government of the conquerors.” Free Englishmen, who brought with them the common law, settled all of the other colonies.<sup>72</sup>

According to Tucker, the colonists had the same rights and privileges as those who remained at home, and by consequence they “did bring with them that portion of the laws of the mother country, which was necessary to the conservation and protection of those rights.” Existing far from England, and facing numerous dangers from the Indians, which they had to meet almost solely on their own initiative, the colonists continued to have recourse to the laws of the mother country, “until leisure and experience should enable them to make laws better adapted to their own peculiar situation.” When it came time to adapt the common law, Tucker believed that the various states did so in mutually irreconcilable ways. For instance, the professor believed that the legal cultures of the South and New England could never be reconciled. He offered sketches of the laws of each colony to demonstrate just how different they were in their origins and development, and to show the impossibility of establishing a unified common law for the United States.<sup>73</sup>

According to Tucker, the laws of England began to have force in Virginia either with the constitution of the colony in 1607, or with the charter granted to Sir Walter Raleigh in 1584. Either way, early colonists adhered to the law by choice. He demonstrated how these laws extended to mandatory churchgoing for all colonials, and how they restricted anyone not ordained by a bishop in England from becoming a minister. Failure to attend church would resort in a monetary fine, but these fines differed between normal non-attendees and Quakers. “But this general adoption of the laws of England was probably confined to the colony of Virginia, which,

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<sup>72</sup> SGT, “Of the Unwritten, or Common Law of England,” 316; SGT, “View of the Constitution of the United States,” 102-103, 317.

<sup>73</sup> *Ibid.*, 319.

even to the period when the revolution commenced, was distinguished for its loyalty, beyond any other of the plantations.” In Virginia the colonists distinguished between those laws passed before they left the mother country, and those they passed after their arrival in the New World. When Virginia agreed with a law passed by Parliament, the colonial legislature would explicitly adopt it, with alterations if necessary.<sup>74</sup>

Tucker contrasted Virginia’s loyalty with the “spirit of independency” that characterized those who chose to settle in the “savage deserts” of New England. Tucker demonstrated that the New England colonies had their own rules and regulations, noting that “whilst Cromwell was at the head of affairs, he showed them all the indulgence they desired; from 1640 to 1660, they approached very near to an independent commonwealth.” As such, New England established a system of laws, which “instead of making the laws of England the ground work of the their code,” used “the Law of Moses” as a guide. Tucker argued that New Englanders moved away from the common law tradition by expanding the list of crimes that could be punished with the death penalty. Even real estate restrictions seem to have followed biblical law, which forbade “the alienation of lands from one tribe to another.” New England “established an ecclesiastical polity of their own, totally differing from the mother country....” Tucker noted that the entire organization of the colony changed in 1691, in part because the old one was so prejudicial towards “Episcopalians... Baptists, Quakers, and other sectarists....” Under the new system, “[l]iberty of conscience was allowed to all except papists.”<sup>75</sup>

Tucker knew that the seventh amendment explicitly contains the term “common law” and that the other amendments provide for privileges with a common law pedigree, such as the right

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<sup>74</sup> Ibid., 330.

<sup>75</sup> Ibid., 332-355.

of habeas corpus and the right to a jury trial. Yet he compared this borrowing to the British court's occasional employment of the conventions of Roman, canon, and civil law when there were no native precedents available. As to the latter borrowings from common law forms, Tucker believed that they involved only a manner of proceeding. Any actual grant of common law jurisdiction to the federal government would be, according to Tucker, a disaster. It would "at one stroke... annihilate the states altogether ... repeal and annul their several constitutions, bills of rights, legislative codes, and political institutions in all cases whatsoever."<sup>76</sup>

For instance, the Virginia Constitution separated the legislative, executive, and judiciary departments, whereas the common law united them all in one person. The Virginia Constitution also eliminated forfeiture as a penalty in criminal cases, whereas forfeiture "is one of the pillars of criminal jurisprudence, by the common law." Tucker provided other instances where other state constitutions provided rights and privileges beyond those dictated by the common law. Furthermore, according to Tucker, giving the federal government full common law jurisdiction would endanger the continued existence of slavery. All of the state constitutions at the time, except perhaps that of Massachusetts, permitted slavery. "The common law, as understood for many centuries past in England, absolutely rejects slavery. Should a question arise upon that subject in Maryland, Virginia, North Carolina, South Carolina or Georgia, it might be of serious consequence, if the common law were pronounced to be paramount to the laws of the states."<sup>77</sup> Not surprisingly, there were those in the Union who desired to give the federal government exactly these powers, and equally unsurprisingly these people saw Tucker and Madison as their natural enemies. They will be introduced in later chapters.

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<sup>76</sup> Ibid., 361.

<sup>77</sup> Ibid., 355-357.

To those who argue that the federal government received common law jurisdiction by implication, Tucker argued that the tenth amendment should have cleared up any confusion in this regard. He believed that even without the tenth amendment, it would be absurd to think that the Constitution provided the federal government common law powers that the states had explicitly excluded her own courts from having. It would not be correct, even as a general principle, to assume “that sovereign and independent states can be abridged of their rights, as sovereign states, by implication, only.” By definition, a “free nation” is one that cannot “be bound by any law but its own will....” In making this case, Tucker returned to the natural rights rhetoric of self-preservation: “And as every nation is bound to preserve itself, or, in other words, its independence; so no interpretation whereby its destruction, or that of the state, which is the same thing, may be hazarded, can be admitted in any case where it has not, in the most express terms, given its consent to such an interpretation.”<sup>78</sup>

In writing his numerous essays on constitutional themes, Tucker returned again and again to the same natural rights principles that he had used in his essay on slavery. Unlike that essay, however, Tucker’s constitutional essays continued to exercise influence even after the mid-nineteenth century revolt against modern natural rights theory. That revolt turned many Virginians away from the sort of anti-slavery stance that Tucker had expressed. Indeed, even today when adherence to the basic tenets of the natural rights faith remains only nominal, the constitutional thought of Tucker bears considerable similarity, if indeed it does not influence on its own, orthodox interpretations of the Constitution. A comprehensive understanding of the Constitution of the United States must take into account the way that document was understood by the generation that wrote and ratified it. As one of the earliest and most comprehensive post-

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<sup>78</sup> Ibid., 355.

ratification commentaries, Tucker's essays provide an invaluable snapshot of constitutional orthodoxy at the beginning of the nineteenth century, and are thus all but indispensable.

## Chapter Three: Slavery and the Successors of St. George Tucker

### I.

The successors of St. George Tucker discussed in this chapter include not only his relatives who became professors —there were three: his cousin George and his two sons Henry and Beverley— but all Virginian professors who found it necessary to speak and write publicly on the issue of slavery during the first fifty years of the nineteenth century. These men conceived of slavery both in relation to a sectional dispute within the country at large, but perhaps more importantly in terms of a sectional divide in their home state. They lived at a time when Virginia's colleges were turbulent places full of difficult to manage and often even violent students, and in a place that was becoming an ethnically more diverse State. This atmosphere of uncertainty and change influenced the way in which professors viewed the issue of slavery and contributed to the gradual abandonment of modern natural rights theory.

The first of the successors of St. George was his oldest son, Henry St. George Tucker, who was born in 1780. Henry took the baccalaureate degree at William and Mary in 1798, and then stayed for another three years, receiving his law degree in 1801. His father, impressed with some of the judges out in the western part of Virginia, sent his son to practice law in Winchester, a town at the bottom of the Shenandoah Valley, near the border with Maryland. St. George agreed to support Henry for three years, after which, he would be on his own.<sup>1</sup>

In Winchester, Henry found a small town of about 2,700 people. He praised the industry of its citizens, noting their predilection for building their houses of stone, a sign he took to mean

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<sup>1</sup> David M. Cobin, "Henry St. George Tucker: Jurist, Teacher, Citizen." *Winchester-Frederick County Historical Society Journal* VI (1991-1992): 5-6; Phillip Hamilton, *The Making and Unmaking of a Revolutionary Family: The Tuckers of Virginia, 1752-1830* (Charlottesville: University of Virginia Press, 2003), 109. In order to avoid confusion I will often refer to members of the Tucker family by their first names.

that they intended to remain rooted to their locale. Henry specifically contrasted the “punctuality and attention to business” that he found among his fellow Winchesterians to the “sloth and indolence” of the people in his hometown of Williamsburg. He believed slavery to be responsible for many of the differences between the two regions of the state: “The difference, I suppose, proceeds from the large proportion of whites to blacks which in this country is 22,000 to 2,500.” Unfortunately, he also found the regional culture of Winchester to stand in the way of his prosperity as a young lawyer. Many of the citizens of Winchester were of German or Scotch-Irish descent, and Henry found them to be “close and stingy” with their money. He wondered whether “it is better to gain the industrious and notable character” of these immigrants or “to retain that liberality, hospitality, and generosity which has been generally regarded as the peculiar trait of the Virginian.”<sup>2</sup>

St. George Tucker had encouraged his children to own slaves. In 1802, Henry rode out to Winchester with a young slave bodyservant named Johnny. The two did not get along well; Johnny was too “familiar” and his attitude became unbearable when Henry caught Johnny wearing his clothes. The young master sought to sell his slave and move into a boarding house, but St. George did not approve. He sent Henry another slave, this one named Bob. Henry wrote his father a rather surprised note when he discovered young Bob’s homesickness, noting that the young slave had woken him “from a very sound sleep” with “a most piteous lamentation.” Henry called to Bob repeatedly, finally awaking him. After asking him what was the matter, Bob replied that he was dreaming of his mother. Henry professed himself to have been shocked by this reply. He had “regarded this child as insensible when compared to those of our complexion.” He had been wrong: “How finely woven, how delicately sensible must be those bonds of natural

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<sup>2</sup> HSGT to Joseph Carrington Cabell, 26 Aug. 1802, Papers of the Cabell Family, Box 5, UVA..

affection which equally adorn the civilized and savage. The American and African –nay the man and the brute!” After this incident, Henry seemed to find Bob much more malleable than Johnny and usually spoke of him in similarly sentimental yet paternalistic terms.<sup>3</sup>

By 1806, Henry had enough legal work to keep him busy, and he began to consider the advantages that he could accrue from seeking elective office. He believed that time spent in Washington could help him achieve “practical knowledge,” which would compliment what he had learned from the reading of books. He thought that he had already acquired enough practical knowledge of politics to enable him to overcome any youthful idealism he might have previously possessed. He no longer viewed the government with “that admiration and veneration common to very young persons,” and he had become aware “that the contending and conflicting interests, views and ambitions of members of those bodies will mar every project for extending one’s influence, and will teach them to view with jealousy, those exertions to excel which certainly merit a better fate than they usually meet with.” Henry stated that if he were to acquire a seat in the state assembly he would “most probably be a silent member,” and that he would use his time there to acquire practical knowledge; knowledge that he would find useful after he achieved his real goal: becoming a judge. St. George, however, counseled his son against political involvement, and Henry made only a halfhearted attempt to do the sort of campaigning necessary to win political office.<sup>4</sup>

Henry nevertheless ended up serving in the United States House of Representatives from 1815 to 1819. Before retiring from the job, he expressed his feelings to his father in a metaphor:

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<sup>3</sup> HSGT to SGT, 11 Nov. 1802, in Mrs. George P. Coleman ed., *Virginia Silhouettes: Contemporary Letters Concerning Negro Slavery in the State of Virginia* (Richmond: Dietz Printing Co., 1934), 7; Cobin, “Henry St. George Tucker,” 7.

<sup>4</sup> HSGT to Joseph C. Cabell, 10 July 1806, 2 April 1807, Cabell Papers, Box 5, UVA.



“the game is not worth the candle.” Henry thought that “the affairs of the United States are at present in such a state of calm (happily for the people) that there is very little to interest the representatives: and even when any matter occurs which is calculated to excite interest with us, it passes off without a correspondent feeling among our constituents.”<sup>5</sup> Soon after retiring from his seat in the House of Representatives, however, Henry took up a seat in the state senate, where he served from 1819 to 1823. After just having stated that politics was not worth the trouble, Henry rationalized his decision in a series of letters to his father: “It is true I am a candidate for the Senate, chiefly with a view of reviving my old acquaintances in Virginia and of coming to see you.” He did not enjoy being absent from Winchester, but he noted that the “absence from home will not be so serious as in my congressional service: though God knows it will be sufficient.” In another letter he stated that he wished to flee Winchester since everyone there had the whooping cough, further noting that he had become too “aloof from the society of the low country” and that he needed to become reacquainted with his friends from college.<sup>6</sup>

Henry’s biographer has argued that the real reason underlying Henry’s retreat from Congress concerned his being too “thin-skinned” for a life in national politics and that he especially disliked public clashes with his half-brother and fellow congressman John Randolph. The two had had minor clashes on the floor over issues as diverse as slavery in the District of Columbia and constitutional pay raises, but it seems more likely that Henry left Congress for the reasons he described above. He did not fear conflict, and he never hesitated to take an unpopular position, even among his constituents. For instance, he opposed the sentiments of many of his constituents whom he found too prone to “bow down and worship General Jackson.” Henry did

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<sup>5</sup> HSGT to SGT, 22 Dec. 1818, W&M.

<sup>6</sup> HSGT to SGT, 10 Mar., 1819, 9 May 1819, W&M.

not approve of Jackson's conduct in the Seminole War, and when Jackson passed through Winchester, Henry noted: "a dinner was given him which I positively refused to attend." Henry had left Congress, in part, because he thought that that body had no important questions to face. Had he remained in that office, he would have found that the force of events had proven him wrong.<sup>7</sup>

Henry left Washington before the Missouri Crisis began to trouble the Union. His second cousin, however, had just made the journey to Washington to serve in the House of Representatives. George Tucker had struggled as a lawyer in the southern part of Virginia and in Richmond, and had failed to win a seat in the General Assembly in 1813 and again in 1814, before finally having had the good fortune to win election to the United States Congress at exactly the time Henry left that body. Soon after arrival in Washington, he became a partisan on behalf of statehood for Missouri, writing to St. George that slavery must be allowed to move west, for if the institution were contained in the present slave-holding states, "this exclusion must necessarily have the effect of increasing the ratio of black to white population in the slaveholding states...." George believed that such a demographic change would produce the "most dangerous and alarming" effects in less than one hundred years. He noted that he was "desirous of exhibiting my views to the Committee as soon as I can get the floor, which is a matter of some uncertainty." Contrary to his initial expectations, George did not have to wait long.<sup>8</sup>

Not surprisingly, the man who had won his first praise as a man of letters for writing on the dangers that faced the Old Dominion as a result of Gabriel's rebellion, rose to the occasion and penned a speech providing an incisive analysis of the Missouri question. He noted the

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<sup>7</sup> HSGT to SGT, 9 May 1819, W&M; Cobin, "Henry St. George Tucker," 17.

<sup>8</sup> GT to SGT, 12 Feb. 1820, W&M.

criticism made by some in the North that Virginia should have little interest on this subject. On the contrary, George argued that the issue “threatens not only the peace and welfare of Virginia, in common with all the slaveholding states, but their very political existence.” He went on to consider the dubious constitutionality of the constitutional regulation of slavery in Missouri, employing arguments that will be analyzed in the following chapter. Regarding slavery, George noted for rhetorical effect, that were he an inhabitant of Missouri, he would himself oppose the introduction of slavery into his state, but that such decisions should be made by the citizens of that territory, not by congressional leaders in Washington.<sup>9</sup>

George argued from the principles of population growth set forth by Thomas Malthus in his *Essay on Population*, “which I cannot but consider as a work of great ability.” He then set forth some mathematical legerdemain with asides about the importance of looking more than one hundred years into the future before reaching his conclusion: if whites were allowed to leave the slaveholding state but blacks were not, in one hundred years the slaveholding states would have three black persons for every white person. “The wildest political visionary does not think it practicable to amalgamate such discordant materials; we must be in that situation then, in which we can neither safely set them free nor hold them in subjection.” George believed that the inevitable forces of “political economy” would eventually force emancipation upon the slaveholding states. He reasoned that the United States possessed only a finite amount of “wastelands” and that as more of these areas came under cultivation, a point would be reached when labor would decline in value “until at length the cost of bringing up a slave will be more

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<sup>9</sup> GT, *Speech of Mr. Tucker, of Virginia, on the Restriction of Slavery in Missouri. Delivered in the House of Representatives of the United States* (Washington, D. C.: Publisher Unknown, 1820), 1.

than he is worth.” At that point, slaveowners would find themselves desirous of freeing their slaves.<sup>10</sup>

Since he did not think that freed blacks could be amalgamated into white civilization, George considered instead the colonization of slaves into another part of the country. He noted the existence of a “society established for the purpose of colonizing the people of color” but he had “long since abandoned the hope of deriving any remedy for the evil of domestic slavery from this quarter.” According to George’s calculations, the United States had one million slaves producing an annual increase of fifty-one thousand. If one were to pay \$300 for each of them it would take more than fifteen million dollars to buy them from their owners and probably another five million to transport them to Africa. “And this annual expenditure of twenty millions is not to reduce the number, but merely to keep it stationary.” George did not think that amalgamation or colonization could ever be successful. He believed that the only solution would be to allow slaves to migrate west, so that “when the period arrives, as it certainly must, when the self-interest of individuals will burst the bonds of the slave, emancipation will then consist with the tranquillity and safety of the state...” George believed that future tensions in the United States would be more likely to follow an East/West rather than a North/South divide. He thus warned his northern colleagues that it would be in their best interest to help the South, “their natural allies.” In closing his speech, George stated that “the question is not whether we shall have a greater or smaller number of slaves, but whether we shall have the *same* number on the east and west side of the Mississippi.” He admitted to the danger of slave insurrections, but compared the danger to that of “foreign commerce” producing wars. George believed that asking Missouri to

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<sup>10</sup> Ibid. 11-14.

give up slavery would be like asking Maine to give up “foreign commerce.” In other words, it would be absurd.<sup>11</sup>

Previously to this speech, George had always struggled as a public speaker, and he had thus found it difficult to prosper as a lawyer. In this instance, however, he prepared the speech with care, even going so far as to memorize it. George would later recall that though there were only about fifty members present, that nearly all of them listened with rapt attention; all save one, John Randolph, who made a show of getting up and walking out of the hall. George began to notice a pattern: whenever he used his skill with words to defend slavery, he received great compliments. Only Randolph dissented, and George noted that his fellow Virginian said bad things about the speech to anyone who would listen. This campaign failed “and as he was then ill affected towards me, and had endeavored to injure me in the district (which was adjoining to his own) he denounced it because it had won the praises of others —and during the greater part of the time which I served in Congress, I scarcely ever said anything ... which did not provoke his opposition.” George would go on to serve three terms in the House of Representatives before taking up a position as professor at the University of Virginia.<sup>12</sup>

George had argued eloquently in an effort to secure Missouri’s admission as a slave state, but many Virginians would be very unhappy with the conditions that surrounded the famed Missouri Compromise. The admission of Missouri as a slave state was desired by all, the admission of Maine as a free state troubled few, but the restriction of slavery in the territories above the line of 36 degrees, 30 minutes upset many, not the least of them Henry Tucker, who wrote to his father about his disgust with James Monroe, the president who signed the

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<sup>11</sup> Ibid., 15-20.

<sup>12</sup> GT, “Autobiography of George Tucker,” *Bermuda Historical Quarterly* XVIII (1961): 130.

compromise bill: “I have long since set him down as a man who had set his eye upon the presidency, determined to have it at any price and to keep it whatever the sacrifice.” Henry thought that Monroe failed to oppose the compromise out of a fear that doing so would create opposition in his run for a second term. As a result, “the great, the essential, the permanent interests of the South are sacrificed forever.” Henry did not think that any southern man could be put in Monroe’s place in time: “we have embarked our all in this leaky hulk and it is now too late to look for a sounder vessel.” Looking back on the course of action that had brought Virginia to this impasse, Henry stated that Virginia “had been shorn of her strength by the North Western cession,” and he feared that in seeking to regain her proper place Virginia and the South would precipitate “a dissolution of the union before a half a century.”<sup>13</sup>

## II.

George Tucker’s newfound political success did not keep him from continuing to exercise his passion for letters. The summer of 1823, home from service in Washington, he decided to try his hand at a novel. The “extraordinary success of Walter Scott” had excited his ambition. Thinking that every country needed its own Walter Scott, George argued that each distinctive region of the world “afforded abundant materials for this class of writings in the delineation of national manner, habit, and character.” While still managing to dedicate himself full-time to the law, George dashed off, in two months, what would become the first of what critics now call the “Virginia novel.”<sup>14</sup> Traveling to New York, George attempted to interest magazines and

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<sup>13</sup> HSGT to SGT, 8 Mar. 1820, W&M; William J. Cooper, Jr. *Liberty and Slavery: Southern Politics to 1860* (New York: Alfred A. Knopf, 1983), 139-142.

<sup>14</sup> For the history of the Virginia Novel and George Tucker’s part in its development see: Ritchie Devon Watson, Jr., *The Cavalier in Virginia Fiction* (Baton Rouge: Louisiana State University Press, 1985), 71-79; Richard Beale Davis, *Literature and Society in Early Virginia, 1608-1840* (Baton Rouge: Louisiana State University Press, 1973), 233-256.

publishers in the book he called *The Valley of the Shenandoah*. One publisher offered him \$500 for it, if George would remain in New York to supervise the printing. If not, a proofreader would cost George Tucker \$50 off the original payment. Unsatisfied with this deal, George made another with Charles Wiley, the man responsible for the American editions of Scott's novels. The men agreed to print the book "at our joint expense and joint profit." Although it would be translated into German during George Tucker's own lifetime, George's first novel was a failure in the English speaking world. In George's estimation the book failed because "it had the disadvantage of ending unhappily, and its catastrophe was offensive to Virginia pride."<sup>15</sup>

The matter of the ending aside, an examination of the book reveals that by 1824 George had either moved further in favor of slavery or that he made a conscientious effort to appeal to white Virginia's prejudices on the subject. There is no conceivable reason why the treatment of slavery and class relations in the book would offend the upper-class Virginians with the time and inclination to read such a book; indeed it seems likely that the description of slavery in the book set the tone for most novels of plantation life that followed it.<sup>16</sup> Edward Grayson, the chief protagonist of the novel, was completing a degree at William and Mary. He brought home James Gildon, a fellow student from New York. The twenty-three year old Gildon began to fall for Edward's little sister, the eighteen-year-old Louisa Grayson. The sister seemed to like the Yankee as well, and entertained him with her piano playing, after which they discussed poetry and novels. Mrs. Grayson did not seem to mind the young New Yorker courting her daughter, for he was wealthy, and the Graysons had just fallen on hard times, with the death of Colonel Grayson, a planter and hero of the Revolution. After his death, Mrs. Grayson had cut back on

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<sup>15</sup> GT, "Autobiography," 136-7.

<sup>16</sup> On this point I follow the interpretation put forth by Robert Colin McLean, *George Tucker: Moral Philosopher and Man of Letters* (Chapel Hill: University of North Carolina Press, 1961), 188-192.

expenses: “reduced the number of her domestics from eighteen to eight; her carriage horses from four to two, and a house with ten large rooms to six moderate ones.” The new house was the old summerhouse, located out in the Shenandoah Valley.<sup>17</sup>

Through the mouth of Edward Grayson, George provided the reader with a cultural geography of the Shenandoah Valley. His account sounds quite similar to that given by Henry Tucker twenty years earlier in letters to his father. Grayson began with the Germans. Convinced that the characteristics of this group would not dissipate through acculturation, Grayson believed that they would, like it or not, “have some effect in forming the compound that is hereafter to mark our national character.” He resented their “plodding frugality” and their litigiousness. Noting that they complimented their farming and husbandry with crafts practiced by “blacksmiths, wheelwrights, hatters, and the like,” Grayson thought their products acceptable but often quite “deficient in taste.” He described their eating habits, including “sourkroust, an excellent antiscorbutic, and well adapted to counteract the effects of eating salt meat.” He found the Germans insufficiently interested in literature, education, and public affairs. Their usefulness consisted in performing the “coarse but useful labor” required by society.<sup>18</sup>

In George’s portrait, the Scotch-Irish composed a fit counterpart to the Germans. Where the Germans were “cold and phlegmatic” the Scotch-Irish were “ardent and impassioned,” but with an unfortunate tendency to be “idle, indolent, and improvident.” With their hardiness, “they have been the most successful warriors against the aboriginal proprietors of the country, and the advance guard of civilization,” thereby helping the older stock of Cavalier Virginia. In religion they were usually Presbyterian with the “usual pride and intolerance that that sect has been

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<sup>17</sup> GT, *The Valley of the Shenandoah, or Memoirs of the Graysons* (New York: C. Wiley, 1824), 15.

<sup>18</sup> *Ibid.*, 49-52.



thought to inspire.” Unlike the Germans, the Scotch-Irish were politically active. Oddly enough, when they live together in large groups they are usually “good democrats” but when found in small numbers “they are apt to be federalists.” Edward Grayson believed that this anomaly could be explained by the persistence of Anglophobia in the larger communities.<sup>19</sup>

Edward then turned his attention to the slaves of the Valley. His friend from New York felt that the slaves’ presence brought out a part of his character that he had never felt when living in the North: “Don’t you feel Edward, when riding over these vast domains of yours, something like a feudal baron?” Gildon noted his annoyance with the impertinence of those free farmers up north who rented land from his father, and he proposed something of a proslavery argument to the Virginian: “There is something very fascinating ... in this unlimited control, let us fiery republicans say what we will. Indeed what is the love of liberty, but the love of doing what we please? And, consequently, he who is proud of his own freedom, is equally gratified at controlling the freedom of others.” The Virginian denounced this argument as a “sophistry.” According to Edward, the best “system of civil liberty” would be the one that best supplies the desires and needs of all; therefore anyone with “a proper sense of his own rights” should have a proper respect for the rights of others as well. By contrast, Edward argued that the worst government would be one “where only a single person is free, if indeed the fears and dangers that environ him suffer him to be so.”<sup>20</sup>

Despite his praise of liberty, Edward nevertheless defended slavery as well: “We, of the present generation, find domestic slavery established among us, and the evil, for I freely admit it

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<sup>19</sup> Ibid., 56.

<sup>20</sup> Ibid., 60-61.

to be an evil, both moral and political, admits of no remedy that is not worse than the disease.” Continuing with disease metaphor, he noted that no cure existed for slavery, and that the best anyone could hope to do is mitigate its symptoms. According to Edward, emancipation would only lead to another Haiti, and distance coupled with the sheer number of slaves would make colonization impossible. The only possible precedent would be the expulsion of the Moors from Spain, of which there were far fewer Africans with a much smaller distance to traverse. Employing another familiar trope, Edward Grayson noted that the slaves of Virginia were “perhaps better supplied with the necessities of life than the laboring classes of any country out of America.” He believed that much of the humanitarian sentiment directed towards the slave derived from the false premise that the slaves chafed at their bondage the same way free whites would if put in a similar situation. Those who believed such falsehoods forgot that the blacks “were born slaves, and that there is as much difference between their feelings respecting their condition, and those of the white man, as is the privation of sight to one who is born blind, and one who has become so.”<sup>21</sup>

Edward disputed the New Yorker’s charge that masters used slaves to fulfill their power fantasies. If anything, some masters attempted to fulfill their dreams of avarice, but not of power. In this drive for lucre, argued Edward, the slaves usually failed to provide the promise their master imagined, for after deducting the costs necessary for their slaves’ preservation, most planters only met their expenses. Even if the man born to mastership was “very impatient of disobedience or contradiction” he rarely got any more joy out of abusing his slaves than he would in abusing his own children. While having this conversation, the two men moved across the field. They came across a middle-aged white overseer and his crew of slaves. The slaves

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<sup>21</sup> Ibid., 61-64.

were well plied with whiskey and labored at cutting down a field of oats. Many of them came up and shook hands with “Master Edward.” The one slave who skulked away was angry at being banished to the field after impregnating a fourteen-year-old house slave. George Tucker drew the moral: “As the negroes about the mansion-house are better fed, better clothed, and more intelligent, they look upon themselves as the superiors of the crop hands; and no degraded courtier feels deeper mortification than a slave who is thus taken from the house and put in the crop, or sent to the [slave] quarters.” Despite the mortification, this slave came out of his slump when Edward approached him and shook his hand.<sup>22</sup>

Impressed with the efficiency displayed by these slaves, the New Yorker stated that they probably did more work in less time than their free counterparts to the North. Edward disagreed again, stating that the two forms of labor each contained their own positive and negative reinforcements and that they balanced each other out in the end. Edward counted among these incentives pride in their work and competition with the slaves of nearby plantations. According to the Virginian, the economics of slavery did not harm the slaves so much as they harmed the whites themselves, because slavery allowed the whites to label all domestic labor as degrading. A call came from the house for dinner, and the two friends got dressed with the aid of a body servant. Gildon had expected a fancier house and less luxuriant meals, as was the model in his native New York. At first he tried to make reality comport with experience by believing that the lavish meals had been especially prepared for him.

After dinner the young men went out to examine the plantation cornfield and to check in on Granny Mott, an eighty-four year old slave. Her mulatto granddaughter swept her floor each day. Granny spoke of the good old days, when “Bristol beer and London porter, were as common

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<sup>22</sup> Ibid., 66.

then as whiskey is know....” She told a tale of how one of the neighboring families, the Fawknors, came to marry up the social ladder. Their prudence had made it possible for them to buy the lands of the first families, but “they an’t quality after all.” Instead, the rise of the Fawknors illustrated that “[t]here is only a few of the old families left, and they can barely keep their heads above water.” As the young men walked away from her residence, Edwards told Gildon that Granny Mott maintained her affection for the English pageantry she had witnessed as a child, “and consequently, her predilections for rank and official dignity, had given her a distaste for the equality that now prevails, and to those persons who had newly made their fortunes —upstarts as she called them....” George Tucker employs this astonishing character to illustrate the extent to which many slaves adopted the class values of their society.<sup>23</sup>

The year after the publication of the *Valley of the Shenandoah*, Thomas Jefferson offered George Tucker a professorship in “moral philosophy and belles lettres” at the newly-opened University of Virginia. At the time, Tucker was finishing his second term in Congress. Having previously hoped to win an ambassadorship to some foreign country, George deliberated before replying to Jefferson. The job in Charlottesville would offer him “a more congenial society” than what he would have upon returning to Lynchburg, it paid well, and it would enable him “to cultivate letters” an occupation for which he felt strongly inclined. Meeting privately with Thomas Jefferson, the former president painted the life George would lead in such favorable terms, that George accepted without further hesitation. At the age of fifty, he moved into a pavilion at the University of Virginia with his son, three daughters, his sister, and her daughter.

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<sup>23</sup> Ibid., 84-87. Whether such a depiction mirrored reality has long been a topic of interest to students of slavery. As one of the leading scholars of slave society phrases it: “A genuinely aristocratic ethos characterized by something other than a supine quest for identification with the strong emerged among the slaves.” Eugene Genovese, *Roll Jordan Roll: The World the Slaves Made* (New York: Random House, 1974), 113-114.

George felt unqualified for the task, but Jefferson told him not to worry. Ignoring the former president's advice, George made a full-time effort to devote himself to study, so as to make up for his "insufficient acquaintance with the subject on which I was required to lecture...." He would study and write until late in the night, "so as sometimes to apprehend from the grotesque images that floated before my fancy when I retired to rest, that my brain might be seriously affected."<sup>24</sup>

As chapter one demonstrated, George Tucker had used Gabriel's rebellion as his entrée into the Virginia world of letters. Nineteen years later he used the controversy over Missouri to make a mark in the House, and then a proslavery novel to pave the way for an academic career. During his twenty years at the University of Virginia, he wrote two more novels, both of which discussed slavery only briefly, but in a fascinating way. In 1827, he published a novel in which the protagonist, Joseph Atterly, discovered a metal which allowed him to propel himself away from the earth. Atterly used this newfound power to take a voyage to the moon, where he employed his critical powers to narrate a tale resembling the more famous story relayed by Lemuel Gulliver. Among the diverse "Lunarian" peoples, Atterly discovers the Glonglims who possessed no intellect and existed as slaves. George Tucker's *A Voyage to the Moon* did better than its predecessor, the *Valley of the Shenandoah*, selling nearly a thousand copies. George left his next effort at fiction, written in 1841, unpublished. Entitled *A Century Hence: Or, a Romance of 1941*, George set the novel in "Centropolis, Missouri" the new capital of the United States. In this novel George proved remarkably prescient in predicting a technological rivalry between the United States and Russia, but he was far less farsighted in his prediction that the South would

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<sup>24</sup> GT, "Autobiography," 135-6.

have fourteen million slaves.<sup>25</sup>

### III.

One year after George accepted the offer to teach at the University of Virginia Henry Tucker received a similar offer to serve as the first law professor there. He rejected the call to join Virginia's new university on several grounds, chief among them being that he had just established his own law school in Winchester, Virginia. Henry had begun his school with a modest ambition. As he wrote to his father: "I have some thought of a law class to fill up vacant time. What think you of it?" Henry ended up lecturing most of the year and conducting moot courts in June and July, a very busy schedule for someone also involved in a full-time law practice. Yet in a letter to his father, Henry argued that the real reason he turned down the position at Charlottesville concerned the impact that such a move would have upon his family. He especially did not relish trying to raise five young girls in the vicinity of a university, and so he remained in Winchester. Despite his inability to accept the post, Henry expressed great interest in securing the best professor possible to fill the position. He believed that the new university needed a first rate lawyer to teach the law, and he did not think that such a professional could be acquired cheaply. "You cannot command the man you want for a paltry sum: perhaps indeed for no sum, without some other honor than that of a professorship." Henry suggested that the local district court should move its seat to Charlottesville, so that the new law

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<sup>25</sup> GT, *A Voyage to the Moon: With Some Account of the Manners and Customs, Science and Philosophy of the People of Morosofia, and other Lunarians* (New York: E. Bliss, 1827; repr., with a new preface by David G. Hartwell, Boston: Gregg Press, 1975); *A Century Hence: Or, A Romance of 1941*. ed., with an intro., Donald R. Noble (Charlottesville: University Press of Virginia, 1977); McLean, *George Tucker*, 90-94, 104-113, 197.

professor would also be able to serve as a judge. Thomas Jefferson did not approve of this idea, however, and the Board of Visitors failed to act on it.<sup>26</sup>

The new university had eight professors, none of whom had ever worked in that capacity before, and most of whom were foreigners. These men held the erroneous view that if they just made sure the students did their academic work, then everything else would fall into place. George Tucker, although a native of Bermuda, was the most southern-minded of the early faculty. He knew better. Drinking and gambling were, in his estimation, “the rock on which so many youth in Virginia, and in all the slave-holding states, had been wrecked.” If the new university were to succeed, the faculty would have to keep these vices in check. Student rowdiness and violence represented a more immediate problem. The young men of Virginia sometimes ran about the campus in disguises, “inviting and defying the notice of the faculty.” When George and a fellow faculty member attempted to apprehend one of these young men, the students threatened them with violence. George, having some experience with the Southern code of honor, folded his arms and said that the students, who greatly outnumbered him, were welcome to attack him if they were “mean enough” to do so. The students dispersed. The next day the professors tracked down the students responsible for the rioting and dismissed them from the college, thereby creating an even greater spirit of insubordination among the mass of the students. The professors, threatening to resign if the legislature did not offer them more protection, were able to enlist Thomas Jefferson to aid in student discipline, forcing out the names of the ringleaders. George Tucker bemoaned the effects of this riot on the early history of the University: “This riot, in the infancy of the University, had an unhappy influence on its

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<sup>26</sup> HSGT to SGT, 4 Apr. 1824, 1 Dec. 1824 W&M; Joseph C. Cabell to SGT, 9 Jan. 1825, W&M; Cobin, “Henry St. George Tucker,” 19-24; Phillip Alexander Bruce, *History of the University of Virginia, 1819-1919* (5 vols., New York: Macmillan Company, 1922), II: 27-28.

success, and we heard from all quarters of persons who had previously intended to send their sons to it, but had now been induced to change their purpose.”<sup>27</sup>

Henry Tucker knew very well that he needed to ensure proactively that his law students behaved well. His law school attracted students from both Virginia and the deep South, and he took great pride that he could keep them on their best behavior: “We have not yet had a solitary instance of irregular conduct in members of my class, either last year or this year.” Henry kept his students busy, forcing them to take an examination each day. But perhaps more importantly, he sent them to live at different boarding houses throughout the town of Winchester, so that they would not have “the same opportunity for dissipation or the temptations furnished elsewhere.” Within the first year of operation he had twenty-five students studying under these conditions.<sup>28</sup>

In 1831, after turning down another impressive offer, the post of attorney general in the Jackson administration, Henry published his first book, *Commentaries on the Law of Virginia*. When considering slavery in this work, Henry followed a path set before him by other liberals confronted with the slavery problem. According to this theory, if the southern states tried to emancipate their slaves, the inevitable result would be a race war, resulting in the extermination of one side or the other.<sup>29</sup> In making this claim Henry had appealed to the example of Haiti, but

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<sup>27</sup> GT, “Autobiography,” 137-138; Cf. Robert F. Pace, *Halls of Honor: College Men in the Old South* (Baton Rouge: Louisiana State University Press, 2004), 82-97.

<sup>28</sup> HSGT to SGT, 20 Nov. 1825, 15 Sept. 1826, W&M.

<sup>29</sup> HSGT, *Commentaries on the Laws of Virginia: Comprising the Substance of a Course of Lectures Delivered to the Winchester Law School* (2 vols., Winchester: Office of the Winchester Virginian, 1831), I: 74-75. Jefferson probably introduced this theory, but he would have many followers besides Henry Tucker. Cf., TJ, *Notes on the State of Virginia* in Merrill D. Peterson, ed., *Jefferson Writings* (New York: Library of America, 1984), 264; James Fenimore Cooper, *The American Democrat* (1838, repr.; Indianapolis: Liberty Fund, 1981), 222; Alexis de Tocqueville, *Democracy in America* (Chicago: University of Chicago Press, 2000), 343-348.



made no mention of Gabriel's rebellion from thirty years before. As chance would have it, however, Virginia was about to suffer from a much more deadly appeal to the Haitian precedent. That summer, the spirit of Haiti made its return to the Old Dominion. Nat Turner, like his predecessor Gabriel, had found inspiration in Christianity. Some time in the 1820's, he argued, the Holy Ghost visited him, entered his soul, and absolved him of all sinfulness. Originally planning to rise up and murder the whites on 4 July 1831, he waited too long and his plan fell through. Just one month later, however, a strange eclipse of the sun presented Turner with another opportunity. Unlettered Virginians, both black and white, feared that this eclipse beckoned the end of the world, and in their own way they were correct to do so. On that night Turner and his henchmen would murder fifty-five white people, mostly women and children. By the time word of the murderous rampage reached the governor, the slaves were making their final stand. Soon thereafter the white militia caught Nat Turner, and executed him on November 11<sup>th</sup>. At his trial and in his confessions, he testified that he had originated the conspiracy among four of his lieutenants, and that the plan had spread of its own accord.<sup>30</sup>

Governor John Floyd, thought that Turner had lied; he believed that every black preacher east of the Blue Ridge Mountains knew of the rebellion in advance. Born in Louisville in 1783, when it was still a part of Virginia, Floyd was the first governor of Virginia to have been born west of the Alleghenies. He brought to his office a prejudice common in western Virginia, a prejudice against slavery, and he hoped in the wake of Nat Turner's revolt to be able to eliminate slavery from Virginia once and for all. In the wake of the Turner revolt, the white population of Virginia generally blamed the incendiary publications sent south by northern abolitionists more than they blamed the slaves themselves. White Virginians had always feared outside agitators.

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<sup>30</sup> Alison Goodyear Freehling, *Drift Toward Dissolution: The Virginia Slavery Debate of 1831-1832* (Baton Rouge: Louisiana State University Press, 1982), 1-10.

Going back as far as the Declaration of Independence, Thomas Jefferson had argued that George the Third “has excited domestic insurrections amongst us,” and this pattern of accusation continued, but with the agitation coming from a different source. Something had to be done. Just one year before, governor Floyd had begun to intercept all unsolicited abolitionist pamphlets that northern activists had sent into the state. The legislature, following the governor’s lead, had banned all assemblages of free blacks and made it a crime to teach blacks, free or slave, how to read.<sup>31</sup>

Other Virginians thought the remedy could be found in less drastic measures: restricting slaves to their plantations after dark, increasing the amount of men in the militia, and perhaps even sending the freed blacks back to Africa. In the winter of 1831, Virginians held a legislative convention in Richmond to decide what measures to take in the wake of the Nat Turner uprising. The delegates sent to this convention were generally younger and less experienced than those who had come together two years earlier at the Virginian Constitutional Convention of 1829-1830. One of these young representatives was Thomas Jefferson’s grandson, the eponymously named Thomas Jefferson Randolph. This prominent young Virginian proposed a gradual emancipation plan and argued that the General Assembly should submit it to the people in a referendum. Much of the opposition to his plan hinged upon two points: that it violated the Virginia Constitution, and that it would force Virginia gentlemen to become slave traders in order to get rid of all their slaves at profit, before the day of emancipation arrived.<sup>32</sup>

One could find doubts about slavery among the planter elites of the eastern part of Virginia. These men, many of whom were well-read, were continuing in the tradition of St.

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<sup>31</sup> Ibid., 85-89.

<sup>32</sup> Ibid., 123-135.

George Tucker and Thomas Jefferson by applying modern natural rights reasoning in their arguments for emancipation. But another force had arisen in the meantime. Out in the far-western part of the state, the part that would eventually secede during the Civil War and form the state of West Virginia, non-slaveholding whites had begun to oppose their eastern brethren. Although they occasionally called upon the rhetoric of the Founding generation in making their abolitionist claims, the chief scholar of the convention cautions her readers not to be fooled: “traditional humanitarian-moral concerns gave way to pragmatic class interest.” The people of the west, convinced that they had not won enough concessions in the Constitutional Convention of 1829-1830, saw the slavery convention as a way to further their perceived interests. Previous antislavery reformers had viewed the institution as hostile to “political democracy,” now they were also making the case that it was hostile to “economic democracy.”<sup>33</sup> Analyzing the votes by region, 100 percent of the far western delegates voted for emancipation, nearly ninety percent of the Shenandoah Valley, thirty-five percent of the tidewater region and just under eighteen percent of the Piedmont region. The measure thus failed to pass, but demonstrated the strong sectional divide in the state of Virginia. Across the South many had been surprised that the Virginia convention had focused so much upon gradual abolition and so little on means of tightening existing security. The 1831-1832 convention was an anomaly in Southern history, and aside from a debate concerning the use of slaves as soldiers during the Civil War, such an event would never occur again.<sup>34</sup>

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<sup>33</sup> Ibid., 147; I here side with Freehling against Dickson D. Bruce, Jr. who downplays the sectional conflict in Virginia. Bruce instead sees the proslavery “ideology” as a natural flowering of anti-rationalist English conservative thought in America. Dickson D. Bruce, Jr. *The Rhetoric of Conservatism: The Virginia Convention of 1829-1830 and the Conservative Tradition in the South* ( San Marino, CA: The Huntington Library, 1982), 175-207.

<sup>34</sup> Freehling, *Drift Toward Dissolution*, 147; Robert P. Sutton, *Revolution to Secession: Constitution Making in the Old Dominion* (Charlottesville: University Press of Virginia, 1989), 52-71; Robert F.

#### IV.

One way to understand the regional contest between eastern and western Virginia is to examine the professors who best represented the interests and beliefs of their respective sections. The man most representative of the East was professor and latter president of the College of William and Mary, Thomas Roderick Dew. His *Review of the Debates in the Virginia Legislature* was certainly the best-known document to emerge in response to the 1831-1832 convention.<sup>35</sup> Historians have traditionally viewed this document as a landmark in the development of the proslavery argument, one that indicated that Virginia had abandoned its nominally antislavery stance and joined, in sentiment at least, with the lower South. By the 1940s, however, one historian noted that the arguments set forth in the *Review* could not properly be classified as a “positive good” argument in favor of slavery. In the early 1980s another historian went further by arguing that the *Review* maintained a peculiarly Virginian stance: Dew did not argue that slavery should exist perpetually in the Old Dominion; instead he stated that Virginia would eventually become economically more like the Northern states.<sup>36</sup> All of these scholars have made useful points concerning Dew’s best-known work, but a complete understanding of Dew’s

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Durden, *The Gray and the Black: The Confederate Debate on Emancipation* (Baton Rouge: Louisiana State University Press, 2000).

<sup>35</sup> TRD, *Review of the Debate in the Virginia Legislature of 1831 and 1832* (Richmond: T. W. White, 1832); repr. in, *The Proslavery Argument, As Maintained by the Most Distinguished Writers of the Southern States: Containing the Several Essays, on the Subject, of Chancellor Harper, Governor Hammond, Dr. Simms, and Professor Dew* (Philadelphia: Lippincott, Grambo and Co., 1853).

<sup>36</sup> William Sumner Jenkins, *Pro-Slavery Thought in the Old South* (Chapel Hill: University of North Carolina Press, 1935), 88; Kenneth M. Stamp, “An Analysis of T. R. Dew’s Review of the Debates in the Virginia Legislature,” *Journal of Negro History* XXVII (1942): 380-387; Freehling, *Drift Toward Dissolution*, 203-205.

position on slavery requires a consideration of both his life and all his writings, and an overemphasis on the *Review* generally distracts historians from this task.<sup>37</sup>

Born in 1802, Dew began his undergraduate education at the College of William and Mary in 1818. At that time the undergraduate curriculum took three years to complete. After completing his B. A. on schedule, Dew spent another four years pursuing his Masters degree. During these seven years as a student Dew's faculty advisor was John Augustine Smith. Dew would later praise his advisor for his "learning" his "piety" and his "conscientiousness in the discharge of his duties...." Smith, one of the first American professors to teach a class in political science, taught his young student the importance of this new academic discipline.<sup>38</sup>

Dew believed that William and Mary excelled in the teaching of science, especially "moral and political science" in which she provided a course of study "more extensive than any other institution known to us." In 1824, after receiving his Masters degree, Dew traveled to Europe on what Americans then called the "grand tour." When touring in Italy, Dew often stayed at monasteries, which in those days were still able to maintain their ancient tradition of providing hospitality to travelers. Dew found the idea of monastic life unsettling, and in his diary he reflected on Edward Gibbon's contention that monastic life contributed to the fall of the Roman Empire. As a practicing Baptist, it is not surprising that Dew held such a low opinion of the Roman Catholic Church and her traditions. He blamed the "mongrel monster of church and state

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<sup>37</sup> The exception in this regard, as in so many others, is Eugene Genovese, *Western Civilization Through Slaveholding Eyes: The Social and Historical Thought of Thomas Roderick Dew* (New Orleans: Graduate School of Tulane University, 1986); *The Slaveholders' Dilemma: Freedom and Progress in Southern Conservative Thought, 1820-1860* (Columbia: University of South Carolina Press, 1992), 13-19.

<sup>38</sup> TRD, "An Address," *Southern Literary Messenger* II (1836): 763. Indeed Smith published one of the first political science texts: John Augustine Smith, *A Syllabus of the Lectures Delivered to the Senior Student in the College of William and Mary on Government: to which is added, a discourse, by the same author, on the manner in which peculiarities in the anatomical structure affect the moral character* (Philadelphia: Thomas Dobson and Son, 1817).

combined” for assessing such high taxes as to stunt the growth of society. Having an occasion to meet the Pope, Dew was not impressed, finding the man to be near death. He also met a white innkeeper’s daughter who claimed to be the Empress of San Domingo, after marrying a black man from the island named Christophe. The emperor later killed himself, leaving the empress with two mixed-race children. Dew noticed that the empress was prejudiced against him as a Virginian and a slave owner. Dew defended slavery before the empress, using arguments similar to those he would later employ in his *Review of the Debates*.<sup>39</sup>

Dew described the archetypal slave revolt in Haiti as “[t]he bloodiest and most shocking insurrection ever recorded in the annals of history....” He regarded the Haitian revolt as a precedent for the events of the summer of 1831, when “a few slaves, led on by Nat Turner, rose in the night, and murdered, in the most inhuman and shocking manner, between sixty and seventy of the unsuspecting whites of that country.” Knowing the dangers of unguarded talk, Dew argued that only the prudent should be invited to discuss the problem of slavery. Abolitionists could put on a rhetorical show, but only with arguments “of a wild and intemperate character,” for their positions are “subversive of the rights of property and the order and tranquillity of society” and thus portend “the most inevitable and ruinous consequences.” To conquer this menace Dew turned to Aristotle, “the greatest philosopher of antiquity, and a man of as capacious mind as the world ever produced....” Dew pointed out that Aristotle found slavery “reasonable, necessary, and natural” and that he thus thought the best republics would consist of “comparatively few freemen served by many slaves.”<sup>40</sup>

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<sup>39</sup> Stephen S. Mansfield, “Thomas Roderick Dew: Defender of the Southern Faith,” (Ph. D. diss., University of Virginia, 1968), 18-21.

<sup>40</sup> TRD, *Review of the Debates*, 289-306.

Yet Dew proved unwilling to embrace Aristotle's conception wholeheartedly. He preferred the moderns to the ancients and he explained why. He believed that a fundamental difference existed between the ancients and the moderns concerning the question of the state, and he aimed to describe "the difference between the notion universally prevalent in the ancient world, concerning the powers and functions of government, and those prevalent among modern civilized nations." Dew stated that all governments of the ancient world were absolutisms: "The state was everything, the individual only became important through the state." This difference, according to the professor, stemmed from the different principles upon which the ancients and moderns deduced their thoughts about government: the ancients started with the state and deduced all individual relations from that point, whereas the moderns began "with individuals, and deduce the state from them." Consequently, according to Dew, ancient governments never had constitutions that limited the power of the state.<sup>41</sup>

In searching for examples to support his thesis, Dew, not surprisingly, turned to the Spartans. He noted that they had no respect for private property or for personal freedom and that they paid the "same attention to the breeding of men that a Pennsylvania grazier does to breeding cattle." The moderns, by contrast, created the state to preserve their private property and protect their equality. For Dew, ancient liberty "consisted principally in the share a man had *in* the government, not freedom from its action." Thus if all men had the same share, then they all had liberty. "The government might be the most complete despotism on earth, but if each man had his share in that despotism, then he had liberty." In striving for "perfect liberty in perfect equality" the ancients frequently had recourse to the principle of choosing military and civilian

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<sup>41</sup> TRD, *A Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations* (New York: D. Appleton and Company, 1854), 202.

leaders by random chance, in order to “do away [with] as far as possible, the inequality occasioned by talent and virtue.”<sup>42</sup>

According to Dew, the ancients had other problems as well. They had no conception of a small and independent judiciary. The masses thought the right of judging to be too important to part with, and since the mass of men were despots, the judiciary was despotic. The Greek mob felt that it had the right to do whatever it pleased. “They had not yet arrived at that cardinal principle, growing out of feudalism and Christianity, that neither one, the few, nor the many, have a right to do what they please; that unanimous millions have no right to do what is unjust; that absolute power is not for frail, mortal man.” In short, Dew seemed to be saying that the ancients had no conception of natural law. In fact, without explicitly using the language of natural law, he argued that Socrates had possessed the right to escape from prison, but the Athenian did not realize it, for under the regime of that city the individual could conceive of no ability to oppose the state. The state, however, could oppose the individual in any way it wished, notably ostracism. According to Dew, this punishment carried very little opprobrium; indeed the ancients often considered banishment to be something of an honor. Any individual who seemed too excellent and thus a danger to equality would be banished, so that the great mass could rest content in its mediocrity.<sup>43</sup>

Despite his dislike of ancient society, Dew nevertheless thought the classics should remain at the center of the undergraduate curriculum. He expected all undergraduates to read Horace, Cicero, Terence, Juvenal, Livy, and Tacitus in the original Latin and Xenophon, Aeschylus, Herodotus, Euripides, Sophocles, Thucydides and Homer in the original Greek. He

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<sup>42</sup> Ibid., 203.

<sup>43</sup> Ibid., 204.



did not think that any student at college would be a success if he could not read these works “with facility,” as well as explain their meaning and the history referred to within them. The professor also used Spartan tenacity and the ancient conception of wisdom as the title to rule as an example of a proper model for the young slaveholders of the South. For instance, he argued that the children of slaveholders inherited an extra degree of power, a power that brought with it an added responsibility. Dew argued that the person “who governs and directs the action of others, needs especially intelligence and virtue.” He thus called upon his students to use their education to prepare them to be good masters, so that they could carry out the duties of their position with “humanity and wisdom.” They could not help it that the “domestic institutions” of the South “have been called in question by the meddling spirit of the age.” All they could do is strive to be good masters and attempt thereby to hold up the justice of their cause. If an attack should nevertheless come, should outsiders invade and attempt “the overthrow of our institutions,” Dew believed his students would rally “under our principles undivided and undismayed,” manifesting a spirit as “firm and resolute as the Spartan band at Thermopylae....” He argued that “such a spirit, guided by that intelligence which should be possessed by slaveholders, will ever insure the triumph of our cause.”<sup>44</sup>

In 1843, the University of Virginia offered Dew a job as professor of moral philosophy. Ten years before, South Carolina College had offered him a similar position, and he had refused. That job eventually went to Francis Lieber, who became one of the most distinguished professors in nineteenth-century America. In a draft of his letter turning down the position, Dew noted that his primary wish was “to make some impress on my country’s literature and above all ... to do real service to the South and her institutions on which I conscientiously believe much of the weal

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<sup>44</sup> TRD, “An Address,” 760-765.

or woe of our great confederacy depends and upon which the success of our republican institutions may generally be said to hang.” But he was not willing to leave William and Mary to accomplish these goals. “I love her with the fond attachment of a boy for his mother. I had liked to have said of a lover for his mistress. The dearest recollections ... of my life cluster around my alma mater.” Dew continued at this pitch of intensity, at one point comparing his relationship to the college to the hunchback’s relationship to Notre Dame in the novel by Victor Hugo. Within two years the long-term bachelor would finally marry, selling \$2000.00 dollars worth of stock to finance his honeymoon. This sale left him with \$49, 543.40 in securities, making him one of the wealthiest men in Williamsburg. Such earthly blessings were not to last, and the professor died soon after reaching Europe, probably of pneumonia.<sup>45</sup>

## V.

As T.R. Dew was to eastern Virginia and the College of William and Mary so Henry Ruffner was to western Virginia and Washington (later Washington and Lee) College. Descended from those German immigrants that Henry and George Tucker thought to be so different and so strange, Ruffner went and proved them correct by writing one of the most famous antislavery documents to come out of a southern college before the Civil War. Born in 1790, Ruffner grew up in Charleston, Virginia (now West Virginia). His parents owned and operated a prosperous salt mine that supplied much of that preservative to the meatpacking plants of Cincinnati. Ruffner converted to Presbyterianism and decided to become a scholar after attending a newly founded classical academy in Lewisburg from 1809 to 1811. He began his undergraduate work at Washington College in 1812, graduating just a year and a half later.<sup>46</sup>

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<sup>45</sup> Mansfield, “Thomas Roderick Dew,” 181.

<sup>46</sup> Dumas Malone, “Henry Ruffner,” in *Dictionary of American Biography* (20 vols.; New York: Charles Scribner’s Sons, 1943), XVI: 217-218; J. Michael Pemberton, “Introduction” to Henry Ruffner’s, *Judith*

Ruffner eventually became a professor at Washington College, and then, in 1836, he became president of the college. Ruffner took the job with the unanimous approval of the Board of Trustees, something that he found indispensable, given the difficulties he expected in such a position. He noted that he needed to control a group of students from diverse backgrounds, interests, and ages, all congregated “to receive a liberal education.” He pointed out that parents often had trouble controlling their own children, and that professors faced an even greater challenge: not only did they have more young men to deal with, they also “possess neither the legal nor the moral weight of parental authority....” Professors had to “stimulate the indolence, restrain the waywardness, and correct the misconduct of their pupils;” and since their pupils were young men they were “in that critical period of life ... when dangerous passions are most eager, and vice spreads her most insidious lures before the susceptible heart.”<sup>47</sup>

Finding himself in need of the support of the townspeople, Ruffner stated apprehensively that many community members failed to grasp the importance of the rules of the college. In affairs of college discipline, Ruffner believed prevention to be preferable to cure: “Many of the youth who are sent to college, have never been accustomed to the salutary restraints of discipline; nor to any regular employment of their time.” He believed these students to be the victims of their parent’s misplaced self-indulgence, arriving at campus spoiled beyond any hope of redemption. He stated, controversially, that if taken too far the political goods of liberty and equality carry with them a “concomitant evil,” namely a weakening in “the reverence due from youth to age, from children to their parents, and from pupils to their teachers.” He inveighed

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*Bensaddi: A Tale, and Seclusaval: Or the Sequel to the Tale of Judith Bensaddi* (1838; repr., Baton Rouge: Louisiana State University Press, 1984), 1-23.

<sup>47</sup> Henry Ruffner, *Inaugural Address, by Henry Ruffner, President of Washington College* (Lexington: C. C. Baldwin, 1837), 4.

against the “leveling spirit of corrupted democracy; which in its madness, would obliterate all distinctions of persons, destroy all subordination, and introduce universal anarchy.” Ruffner saw the task of managing a college as a branch of political science: “A college ought to be a well-regulated commonwealth in miniature; in which the youth, who are to occupy the chief stations of the country, shall be trained to the government of laws; and imbued with the principles and habits, that will qualify them to diffuse a healthful influence through the whole mass of the community.”<sup>48</sup>

Ruffner isolated three tools for effecting college discipline: philosophy, religion and honor. He found philosophy without religion, however, dangerous. He thought the prevalent idea of honor even worse: “What currently passes for honor with many, is a thing whose quickening spirit is malignant pride, whose disciples are often found at the gaming table and the brothel, whose instruments are the pistol and the dagger, and whose glory is to spurn the fear of God.” Thankfully, Ruffner thought that Christianity had done, and would continue to do good work in taming the spirit of honor. But by praising Christianity, he did not mean to refer to “the peculiar dogmas of any sect or school of theology. “ He believed that the college should direct the students to read “the sacred records to which all Protestants resort for instruction;” but that they should avoid “the discussion of those theological questions, which unhappily divide our religious community.” Ruffner pointed out that Washington College “was not designed to be a theological school.” Instead, it existed “to give instruction in classical literature and science.”<sup>49</sup>

Unwilling to praise the study of the ancient languages to the extent manifested by Dew, Ruffner conceded that the study of foreign languages could help the student to master the

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<sup>48</sup> Ibid., 7.

<sup>49</sup> Ibid., 9-10.

grammar and literature of their own language. Students could take a “partial course” at Washington College without knowing any of the classical languages, but they could not receive full honors without such a study. Ruffner put more emphasis upon mathematics as the truly comprehensive science, on the grounds that “the whole material universe is comprehended in number and space; and in this respect, the whole universe is the subject of mathematical science.” According to Ruffner, mathematics best demonstrated “the great capacity” of the human intellect. He bemoaned the fact that the mental, moral and physical sciences could not reach the sort of certainty he found in his beloved mathematics, yet he conceded that a difference existed between the results of such inquiries and mere “opinion.” He also took on those who believed that all education should serve only an immediate practical purpose: “such an estimate of the worth of knowledge is mean and groveling.” Like many defenders of a liberal education both then and now, Ruffner immediately backed away from defending a liberal education in the abstract, and instead noted that such an education served as a gateway to the professions of “law, medicine, or theology.”<sup>50</sup>

Two years after becoming President of Washington College, Ruffner received an honorary Ph.D. degree from Princeton University in recognition for his theological writings.<sup>51</sup> In 1841, he proposed a public education plan for Virginia. This plan did not please eastern Virginians, who believed that education should generally be reserved for those able to pay for it. In 1870, after the Civil War had destroyed the power of the eastern planters, Ruffner’s son William put a plan similar to his father’s in operation in his capacity as the state’s commissioner

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<sup>50</sup> Ibid., 13, 18.

<sup>51</sup> Some of these writings include: *A Discourse Upon the Duration of Future Punishment* (Richmond: N. Pollard, 1823); *The Predestinarian: A Treatise on the Decrees of God* (Lexington, Va.: V. M. Mason, 1823); *Review of the Controversy Between the Methodists and Presbyterians in Central Virginia* (Richmond: J. Macfarlan, 1829).

of education. Yet Henry Ruffner's most controversial publication came in 1847, when he argued for the end of slavery in what he called, prematurely, "West Virginia."<sup>52</sup>

Ruffner emphasized that he himself owned slaves, and he attempted to distance himself from the abolitionist movement in the North. Still, he bemoaned the insistence of easterners to put the subject of slavery beyond discussion, but he did not blame them for the decision. Instead he placed the blame on "the fanatical violence of those northern anti-slavery men, who have been usually called ABOLITIONISTS." He traced the rise of the "moral insanity" of abolitionism to Great Britain. His hatred of northern abolitionists seems to have been more than a mere rhetorical ploy, for he stated that these people greatly injured the cause of gradual emancipation, arguing that over the previous fifteen years "they have done more... to rivet the chains of the slave, and to fasten the curse of slavery upon the country, than all the pro-slavery men in the world have done, or could do, in half a century."<sup>53</sup>

Ruffner recognized that the eastern part of the state had nearly eight times as many slaves as the western part, and that "[t]he same remedy may not be expedient in such different states of a disease." He only asked for eastern non-interference should the western part of the state decide to eliminate slavery. Ruffner admitted that it would be unprecedented for half of a state to abolish slavery while the other half maintained the institution. Yet he noted that slave and free states "have, during fifty-eight years, lived peaceably and prosperously under one federal government." In addition, he believed that the state constitution could be amended in such a way

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<sup>52</sup> Henry Ruffner, *Address to the People of West Virginia: Showing That Slavery Is Injurious To The Public Welfare And That It May Be Gradually Abolished, Without Detriment To The Rights and Interests of Slaveholders* (Lexington, VA.: R. C. Noel, 1847); William Gleason Bean, "The Ruffner Pamphlet of 1847: An Antislavery Aspect of Virginia Sectionalism," *Virginia Magazine of History and Biography* LXI (1953): 260-282.

<sup>53</sup> Henry Ruffner, *Address to the People of West Virginia*, 8.

as to secure the rights of slaveholders in the east. Under the plan of emancipation Ruffner had in mind, which bore a striking resemblance to that put forward by St. George Tucker fifty years before, it would take nearly forty years for slavery to disappear from western Virginia.<sup>54</sup>

In making his argument for abolishing slavery in the western part of the state, Ruffner promised to “use no theoretical or abstract arguments.” Instead he would base his case solely “upon facts and experience.” Generally speaking, Ruffner kept to this promise, though towards the end of his presentation he did venture briefly into a consideration of the natural rights of man. His emancipation plan stated that it would remain legal to sell slaves out of the state, but children under five years of age could not be sold apart from their parents. The plan proposed that the offspring of the slaves residing in the western part of the state be given freedom upon attaining their twenty-fifth birthday. He hoped that this plan would encourage many slaveowners to leave western Virginia and take their slaves with them, but he believed that it would be in their best interest to stay and let the law take its effect. “If they chose to stay and submit to the operation of the emancipation law, they have the certainty of gaining more by the rise in the value of their lands, than they will lose in the market value of their slaves, in consequence of the emancipation law.” He thought that “thousands” of northerners would immigrate to western Virginia upon the passing of such a law, and he envisioned a land grown rich as west Virginians sold slaves and invested their money in land. In the only appeal to natural rights contained in this essay, Ruffner argued that slaveowners had no right to the children of their slaves. “By nature all men are free and equal; and human laws can suspend this law of nature, only so long as the public welfare

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<sup>54</sup> Ibid., 10.

requires it; that is, so long as more evil than good would result from emancipation.” In other words, Ruffner believed that men had no right to property outside of the social contract.<sup>55</sup>

Overall, Ruffner focused his attention upon United States decennial census information from the years 1790 through 1840. In these years he claimed to see economic stagnation and constant out migration as characteristics of areas with a high slave population, and economic growth and the attraction of immigrants to areas where freedom prevailed. Ruffner placed immigration at the center of his theory concerning prosperity, classing it as the chief index of a states’ “comparative prosperity.” Like a true economist, Ruffner began with an assumption; in this case a rather dubious one, namely, that Virginians, like the people of the other states, multiplied at the rate of 33 and one half percent in ten years, so that if none immigrated, their number “would be increased by one third in that period of time.” With this figure as his base, Ruffner concluded that East Virginians sent over three hundred thousand settlers west from 1830 to 1840. Ruffner scorned those who called Virginia “The Mother of States,” finding himself “grieved and mortified” to think of his state in that way. “Her black children have sucked her so dry, that now, for a long time past, she has not enough milk for her offspring, either black or white.” Ruffner believed that the existence of slavery had driven all the free and industrious white laborers out of eastern Virginia, and that this exodus of talent lay beneath the state’s precipitous decline.<sup>56</sup>

Unlike Thomas Jefferson and other notable Virginians, Ruffner did not fear the big city, nor did he think highly of rural farmers. Ruffner’s vision of a great society consisted of large cities playing host to large scale manufacturing plants. He wanted Virginia, or at least West

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<sup>55</sup> Ibid., 39.

<sup>56</sup> Ibid., 16-17.



Virginia, to be as much like the North as possible. To make this case Ruffner argued that West Virginia—being nearly the same size as Ohio, and possessing even better mineral wealth if not quite as good farming land—should have nearly the same population as that northern state. “But instead of two-thirds, we have not more than one-fourth of her population and wealth.” More to the point, he noticed that western Pennsylvania grew at a much faster rate than did western Virginia, although the former possessed less land area and fewer natural resources. He also compared the Virginia section of the Shenandoah Valley to its northern counterpart, describing the land in Virginia as “slave-sick,” and already “spewing out its inhabitants.” Henry found that lands in western Virginia cost less than their northern counterparts, but that northern immigrants nevertheless passed them by: “rather than buy and cultivate these good cheap Virginia lands, Northern farmers go farther, pay more, and fare worse;—so they do, and so they will. They look upon all Virginia as an infected country;—and so it is.” Ruffner had a very clear goal in mind for western Virginia: “The boast of our West Virginia is the good city of Wheeling. Would that she were six times as large, that she might equal Pittsburgh, and that she grew five times as fast, that she might keep up with her.” He believed that everything that was good about Wheeling came from northern influences, as the town resided quite close to the border. Everything that impaired the town’s growth stemmed from its residing in a state “in which slavery is established by law.”<sup>57</sup>

## VI.

Ruffner’s idealization of northern society differed fundamentally from the critique of that society put forth by Nathaniel Beverley Tucker. Indeed, in many aspects of their political thought the men were mirror images of each other. Born in 1784, just four years after his older brother

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<sup>57</sup> Ibid., 31-33.

Henry, Beverley enrolled as an undergraduate at William and Mary in 1801. In those first years of the nineteenth century the school never had more than thirty students at a time. Many of them, especially the ones that boarded at the Tucker home, were quite dedicated. The College also had its Jacobin contingent, young men sympathetic to the radical wing of the French Revolution, who made a name for themselves by vandalizing the local churches. Young Beverley, already something of a reactionary, despised these students. Overall a rather indifferent scholar, Beverley did however greatly enjoy the opportunity the College offered him to read political philosophy—especially those thinkers belonging to the conservative branch of the Scottish enlightenment: men like William Duncan, Thomas Reid, and Dugald Stewart. He especially enjoyed William Paley’s *Principles of Moral and Political Philosophy* a textbook commonly used at universities in the nineteenth century.<sup>58</sup>

Beverley had planned to give his baccalaureate address on the subject of republicanism and literature, but student rowdiness kept the ceremony from occurring. Beverley told his half-brother, John Randolph, that student lawlessness was worse at the college than it had been when he had briefly attended there in 1792. Since Randolph had been expelled after wounding a fellow student in a duel over a trivial matter, it seems that affairs may indeed have been quite bad. In February of 1802, St. George withdrew his son from the college and gave him a number of legal books to read. Although Beverley’s leading biographer tends to overstate the matter, it is clear that in the four years between beginning his study of law and passing the bar exam in 1806, the young Virginian’s friendship with John Randolph distanced him from his father and from his

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<sup>58</sup> Robert J. Brugger, *Beverley Tucker: Heart Over Head in the Old South* (Baltimore: Johns Hopkins University Press, 1978), 13-17.

brother Henry.<sup>59</sup> St. George wanted Beverley to establish a law practice in Fredericksburg, but Beverley preferred to be near Randolph at the small town of Charlotte Court House in the southern part of the state. Tensions between father and son mounted further when, in 1809, Beverley refused to heed St. George's advice to avoid marriage before becoming fully established in his profession.<sup>60</sup>

In 1815, Beverley set out for Missouri in the hopes of finding success in law and politics. Despite losing his children to disease, he quickly found prosperity as a lawyer, and he became a judge in 1817. He also worked behind the scenes to help Missouri become a state. Beverley thought that Missouri would be the perfect place to establish a slaveholder's utopia. He wrote letters home to this effect and on occasion the Virginia newspapers would print them. Everything went well until a Richmond paper subscribed to by an editor in Missouri printed one of these letters. The letter then ended up in a Missouri paper, complete with sarcastic footnotes. Beverley had spoken of himself as an aristocrat molding public opinion. He considered throwing non-slaveholders across the river into Illinois and made disparaging remarks concerning the influx of foreign immigrants to the territory. This letter probably kept Beverley from being nominated as a delegate to the Missouri Constitutional Convention.<sup>61</sup>

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<sup>59</sup> The Brugger biography offers the most profound and incisive reading of the life and thought of Beverley Tucker. Perhaps more complete, however, is Percy Winfield Turrentine's "Life and Works of Nathaniel Beverly Tucker," (Ph. D. diss, Harvard University, 1952). Turrentine did not live long enough to revise his dissertation for publication, although a descendent of Beverley Tucker took that task upon himself: Beverley D. Tucker, *Nathaniel Beverly Tucker, Prophet of the Confederacy, 1784-1851* (Tokyo: Nan'undo, 1979).

<sup>60</sup> Brugger, *Beverley Tucker*, 22, 34; Robert Dawidoff, *The Education of John Randolph* (New York: W. W. Norton and Company, 1979), 102; The tensions between St. George Tucker and his step-son John Randolph are ably narrated and explained throughout Hamilton's *The Making and Unmaking of a Revolutionary Family*.

<sup>61</sup> Brugger, *Beverley Tucker*, 61-62.

By the late 1820s, Beverley had suffered further misfortune out west. With the death of his wife in 1827, he became more involved with evangelical Christianity, and perhaps more importantly, began to plot a way to return to Virginia. In 1830, the forty-six year old Tucker married a seventeen-year-old girl and vowed to achieve the sort of worldly success that had eluded him up until that time. He conceived a plan to represent Missouri in the House of Representatives, where he could work alongside his beloved half-brother John Randolph. Since the state sent only one representative in those days, Beverley found himself electioneering over the entire wide expanse of Missouri. He did not win the election, but in 1832, with Washington heating up over the nullification crisis, an ailing John Randolph asked Beverley to return to Virginia to be by his side. Randolph died soon thereafter. In the summer of 1834, Beverley Tucker was visiting friends in Richmond when T. R. Dew arrived and gave him an invitation from the Board of Visitors to assume his father's old law professorship at the College of William and Mary. The offer had arrived unexpectedly, but the fifty-year-old Beverley Tucker had finally found his *métier*. He would remain a professor at the College until his death in 1851.<sup>62</sup>

Like his second cousin George Tucker, Beverley inaugurated his professorial career with several novels. The best known of these works, *The Partisan Leader*, made one of the earliest known arguments in favor of southern secession. The preeminent generalist in the field of southern intellectual history, Michael O'Brien, has rightly described the novel as the first work in a new genre he calls the "southern political novel." O'Brien, however, errs by claiming that Beverley evades the issue of slavery in the novel. Although the book said more about secession than it did about slavery, the way in which Beverley treated the peculiar institution in it

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<sup>62</sup> Ludwell H. Johnson, et. al. *The College of William & Mary: A History* (2 vols., Williamsburg: King and Queen Press, 1993) I: 255.

demonstrates some of the dramatic changes that took place in the understanding of slavery between the era of St. George Tucker and the era of Thomas Roderick Dew.<sup>63</sup>

The very dedication of the novel indicates a proslavery stance, and an intriguing one at that. Beverley dedicated the book to the “the honest, brave, hardy, and high-spirited peasantry of Virginia.” Arguing that this class, which historians generally call the yeomanry, was “peculiar to a society whose institutions are based upon domestic slavery,” Beverley believed that slavery kept the yeomanry free from “abject and menial occupations.” The novel begins with a young aristocrat traveling among these yeomen. His name is Arthur Trevor. In the novel the Trevor family bears some resemblance to the Tucker family, and like the real-life Tuckers it is often difficult to keep the various similarly-named individuals straight. Attempting to fit the real life Tuckers with their fictional analogues would only compound the difficulty. My analysis will instead isolate the pronouncements on slavery that seem to be the opinions held by Beverley Tucker. The characters that he portrays in a positive light can properly be construed as his message bearers.

Arthur Trevor is one such character. Arthur claimed that he would learn to live without luxuries just as the slaves learned to adapt themselves to slavery. This young aristocrat bemoaned the northern wish to set the slaves free and to make the yeomen into slaves.<sup>64</sup> The chief protagonist of the novel is Arthur’s brother, the young revolutionary leader Douglas Trevor. In a key scene in the book, Douglas confers with his Uncle, just as the revolution begins.

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<sup>63</sup> Michael O’Brien, *Conjectures of Order: Intellectual Life and the American South, 1810-1860* (2 vols., Chapel Hill: University of North Carolina Press, 2004) II: 770. A comprehensive literary and critical reading of *The Partisan Leader* can be found in John L. Hare, *Will the Circle Be Unbroken?: Family and Sectionalism in the Virginia Novels of Kennedy, Caruthers, and Tucker, 1830-1845* (New York: Routledge, 2002), 107-126.

<sup>64</sup> NBT, *The Partisan Leader: A Tale of the Future* (1836; repr., Chapel Hill: University of North Carolina Press, 1971), 12.

Reintroducing Douglas to the members of his household, the pair comes upon a slave named Tom. This slave had once taught young Douglas how to ride a horse. Uncle Trevor instructed Douglas to call the slave “daddy.” Uncle and nephew then devised a plan to escape from the Yankee soldiers in the area. In hatching their plan, nephew and Uncle take the direction of a shadowy South Carolinian referred to in the text only as “Mr. B\_\_\_.” This stranger told Uncle Trevor to arm his slaves using them as a bodyguard and to avoid telling the neighbors about the plan: “We must show that that which our enemies, and even some of ourselves, consider as our weakness, is, in truth, our strength.” Douglas thought that this plan would fail, but he admitted that his time in the North may have biased him. Counseling Douglas to remember how much he and his brothers and sisters loved and revere their “black Mammy,” the stranger argued that the slaves “are one integral part of the great black family, which, in all its branches, is united by similar ligaments to the great white family.”<sup>65</sup>

Challenging Thomas Jefferson’s arguments examined in chapter one, Beverley Tucker, speaking through the shadowy stranger, argued that white youth rarely lord it over their black brothers: “unless you were differently trained from what is common among our boys, you were taught not to claim any privilege, in a fight, over those who you treated as equals in play.” Defended by the military might of the slaves, the stranger believed that the Trevor family would be able to escape: “There are twenty true hearts which will shed their last drop, before one hair of your uncles’s head shall fall.” The case of arming the slaves would become an actual debate during a real independence struggle less than thirty years later. While the confederacy, as a whole, proved unwilling —until the last minute anyway— to arms its slaves, there were isolated incidents similar to those plotted by the man from South Carolina. As one twentieth-century

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<sup>65</sup> Ibid., 98-99, 203.

historian has pointed out: “White nostalgia for the good old-time darkies who hid the family silver from the hated Yankees has drawn justifiable ridicule in recent years, but it rested on widespread if exaggerated incidents. Slaves and freedmen often rallied to their white folks in time of danger. Since they had always expected protection as well as sustenance in return for labor and loyalty, some readily seized the opportunity to reverse roles and to protect those from whom they had demanded protection.”<sup>66</sup>

Flattering his Virginia audience, Beverley had Mr. B\_\_\_ comment about the difference between Northerners and Southerners. The stranger argued that Northerners could never be made to understand the relationship between the master and his slave, because they could never understand black people. Yankees, with ““their calculating selfishness”” could never be expected to understand such ““disinterested devotion.”” The stranger believed that the differences between Northerners and Southerners preceded slavery, and had their roots in the different regional cultures of the old country. Northerners ““know no more of the feelings of our slaves, than their fathers could comprehend the loyalty of the gallant cavaliers from whom we spring; and for the same reason. The generous and self-renouncing must ever be a riddle to the selfish.”” The only thing the North had been correct about was the South’s degree of attachment to a Union that took more than it could ever give in return. With the aid of Douglas Trevor and his military prowess, the Yankees were about to be proven wrong on that score as well, said Mr. B\_\_\_\_.<sup>67</sup>

Henry Tucker disapproved of his brother’s southern nationalism. In 1841, when the University of Virginia again offered him the law professorship, Henry accepted and had the

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<sup>66</sup> Ibid., 204-209; Robert Durden, *The Gray and the Black*; Eugene Genovese, *Roll Jordan Roll*, 130.

<sup>67</sup> NBT, *The Partisan Leader*, 205.

opportunity to draft a rebuttal to his brother's position. The University hired Henry because they needed someone to replace John A. G. Davis, the former law professor and president of the University, who had been shot to death by a masked student. In a letter to his brother, Henry gave three reasons for accepting the assignment this time around: a college education for his boys, the ability to keep the family together the whole year without needing to go on circuit court duties, and the felt necessity of retiring from the bench while still sound in mind and body. Henry kept the job for only four years. Ill health set in quickly, including an attack of paralysis. In a letter to John C. Calhoun, whose son was attending the University and living with the Tucker family in Charlottesville, Henry expressed the desire to take a position as the U. S. minister to France, since such a position "brings with it a trip across the water" and would be favorable to his position in Charlottesville of "which I am heartily tired, as my health is sinking under it." Yet despite these health complaints, Henry was an active professor at the University and he managed to get much scholarship published during his few years there.<sup>68</sup>

Beverley believed that the slaves would protect their masters, but Henry was not so sure. He feared northern activism on the slavery question and was quite certain that any northern attempt to eliminate slavery would result in the secession of the southern states and a violent civil war. The South would have no choice but to secede, for outside abolition pressures would "place a dagger in the hand of every domestic." He noted that the French author and student of American institutions, Alexis de Tocqueville, had thought the southern states to be the part of the Union whose safety most depended upon the preservation of the Union.<sup>69</sup>

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<sup>68</sup> Cobin, "Henry St.. George Tucker," 30-31; Bruce, *History of the University of Virginia*, III: 66; HSGT to John C. Calhoun, 8 March 1843, in Clyde Wilson, ed., *The Papers of John C. Calhoun* (28 vols., Columbia: University of South Carolina Press, 1959-2003), XII: 117-118.

<sup>69</sup> HSGT, *Lectures on Government* (Charlottesville: James Alexander, 1844), 40.



Henry did not think that the South could win a war for independence because “[o]ne half of our population can never be our defenders; but intrigue and tampering of northern fanatics, when no longer withheld by the trammels of the Constitution and the ties of brotherhood, might make them our deadliest foes.” Henry feared the slaves because he found a fundamental injustice at the very root of slavery. He cautioned his students not to count the silence of the slaves as evidence of their consent. The professor noted that the subjects of the Turkish Sultan as apt to be silent as were the subjects of Queen Victoria. Similarly the ancient Romans were as quiet under their good emperors as under their bad ones: “And coming home to our own institutions we have in the slave states an instance before our own eyes of the facility and the security too with which the organized power of a few may hold in the most abject subjection thousand of living beings until they lose the sense of degradation in the habits of servitude from generation to generation. Let it never be said then when we see a man degraded and oppressed that he is contented and happy, because he is submissive and quiet.”<sup>70</sup>

Despite his dislike of slavery, Henry could barely bring himself to employ the fundamental principles of modern natural rights thought. In a book considering the subject of natural law, Henry delineated the basis of his political philosophy. He defined natural law as the “rule of rectitude which is prescribed to us by the author of our being and pointed out by our reason,” and he placed this law “at the foundation of all wise and salutary systems of positive law.” Aiming to convince his students that such a “rule of rectitude” actually existed, Henry argued that such law was “binding everywhere” and served as “the source from which all human laws derive their validity and value.” To make this case, Henry turned, albeit apologetically, to the state of nature construct. He backtracked and stated that by referring to “what is familiarly

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<sup>70</sup> Ibid., 184-185.

called a state of nature” he did not mean to imply “that such a state has ever had existence.” The natural state for man “has ever been and ever must be a state of society....” Throughout history one may see some societies that are quite primitive in form, but they are societies nevertheless, for society is “coeval with created man.” Why then employ the state of nature concept at all? Henry believed that “in dissecting the human heart and exploring the laws which grow out of our nature and constitution, it serves to simplify our reasonings to proceed upon the favorite hypothesis of a state of nature in the primitive ages of the world.”<sup>71</sup>

Henry argued that “there is nothing in nature which has not its laws.” According to this interpretation, everything in nature follows laws, including man, and Henry believed that the human conscience could lead men to the knowledge of these laws. He argued that the “innate sense of right and wrong” could be improved if one gave the matter “judicious attention and cultivation.” Moving on to the methods by which one could determine which laws were natural, Henry proposed his first test of universality: “Where throughout the world, both savage and civilized, a principle has been adopted as a law of our nature; where the municipal institutions of every people both ancient and modern have recognized its authority, we may safely take it as one of the great principles founded in the nature of man.” The first law he could find of this type was “the law of self-preservation.” To demonstrate the working of this law, Henry proposed that one imagine a group of men with no common tie thrown upon an island by shipwreck; “the law of self-preservation must be the prevailing law among them.” Taking the matter one step further, Henry placed the “right of self-defense” as the proper inference from the law of self-preservation. Following this same method, Henry proposed other principles of natural law: first, “the natural inclination between the sexes” from which he inferred the “social principle” of

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<sup>71</sup> HSGT, *A Few Lectures on Natural Law* (Charlottesville: James Alexander, 1844), 2-3.

family construction and the duties of parents to children; second, “the existence of a right of property.” Anticipating an objection on this score, Henry considered those societies that held property communally and found that even those societies respected the right of property: “[f]or though it is held in common among themselves, the society holds it in exclusion of all others; thus affirming ... the principle for which we are contending.”<sup>72</sup>

Henry thought that natural law should be knowable apart from the Bible. He believed that natural law applied to all humans, not just Christians; indeed, he stated that natural law applied even before Christian revelation occurred. Furthermore, without a “foundation for morality antecedent to revealed religion” there could be no way to test religion’s conformity “to a pure morality by which its claims to a divine origin is to be tried.” Yet in wishing to know natural law through reason alone, Henry did not hesitate to call on the Bible to refute the modern notion of the state of nature. The state “never could have had existence,” for man’s “helplessness in infancy and all his propensities contradict it.” The Bible stated that “men and women both sprung full formed into life and constituted the first society in the connubial state.” Soon thereafter Adam and Eve had children “and thus from the beginning society had existence.” Even if one were to set aside the Biblical account of creation, it would still be the case that “the natural wants of man” make society “essential” to man.<sup>73</sup> Although Henry had a rather ambivalent attitude concerning slavery, his understanding of a natural law, knowable by reason, and existing independently of any sort of social contract or state of nature would latter prove useful to a professoriate increasingly enamored with slavery.

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<sup>72</sup> Ibid., 3, 9-12.

<sup>73</sup> Ibid., 22, 31.

As in most matters, Henry's younger brother Beverley took the arguments one step further, going farther than anyone else in this chapter towards the classic understanding of natural right. Only the revival of classic natural right could make possible what historians have traditionally called the "positive good" argument in favor of slavery. Beverley saw slavery as a way of civilizing the barbarous, singling out the aboriginal African's predisposition to nakedness and the master's necessity of teaching him to wear clothes. By doing so a "feeling of self-respect has been inspired, and this has brought with it pride of character, modesty, chastity, and, not infrequently, refined delicacy of sentiment." He noted that these sartorial changes led to a new respect for marriage among the slaves, and he used anecdotal evidence to make his point: the "Episcopal minister of the village in which I live, celebrates the rites of matrimony between as many blacks as whites...." Beverley was certain that continuing progress in this direction would continue to be made, and that before long "this once degraded and brutish race" would be on the same level "with the lower classes of society in the most moral countries under the sun."<sup>74</sup>

For Beverley, law existed to subjugate the unwise to the wise. Believing that only an original severity of law could drive the unwise to acquire wisdom, he stated that "the heart may shudder" if one examined too closely the means necessary to subjugate inferior people. The results of subjugation, however, were worth it, for they allowed men to live "in relations best for the happiness of all," namely, in an environment "where the wisdom of the enlightened, and the virtue of the good, and the prudence of the sagacious are wisdom, and virtue, and prudence for those who, in themselves, possess none of these qualities...." Finding the arguments concerning the profitability of slavery to be of little interest, Beverley asserted that happiness is more important than wealth, for in the pursuit of happiness "wealth is but an instrument." He did not

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<sup>74</sup> Beverley Tucker, *A Series of Lectures on the Science of Government, Intended to Prepare the Student for the Study of the Constitution of the United States* (Philadelphia: Carey and Hart, 1845), 308.

believe wealth to be the most important instrument in the quest, however, for he found “order, harmony, tranquillity, and security” to be more important. Believing wisdom to be impossible without leisure, Beverley attempted to square this maxim with God’s curse on Adam that man could not eat but from the sweat of his own brow. He reached the conclusion that “the curse that dooms that mass of mankind to toil, dooms them also to ignorance. When the former penalty is recalled, the latter may be remitted. Not till then.”<sup>75</sup>

Beverley stated that he, and most of the fellow masters he knew, would not give up their slaves “on any terms whatever.” For them, the relation between the master and his slaves had become “an affair of the heart.” Yet if the affection was there, why not then let the slave be free, for would he not go on working for his master as before? Beverley’s answer to this question involved a considerable digression. He asked the reader to consider “that dark time” when the medieval monasteries represented the sole place of learning in society, and Church laws forced monks to remain single. He believed that “the indissoluble nature of the connubial tie teaches the parties to put a curb on the heart and imagination which restrains their wanderings...” He noted that many astute non-Southerners could grasp this truth while nevertheless remaining perfectly incapable of understanding slavery. Beverley made a contorted argument, seeming to favor an approach that political thinkers would today label “communitarian.” If monks could marry and have families, then their communal form of organization could no longer survive. Similarly, if masters no longer owned their workers “a conflict of interests would have taken the place of a community of interests; and friendship ...would no longer result naturally from the relation

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<sup>75</sup> Ibid., 309-310, 318-319, 323.

between the parties.” Beverley admitted that his thesis had the aroma of “paradox and extravagance” as indeed it did.<sup>76</sup>

Beverley Tucker wrote the way he did, in part, because circumstances had forced him to adopt extravagant and paradoxical forms of reasoning. His colleagues at other colleges and universities in Virginia saw and felt the lawlessness present on their campuses. They noticed the burgeoning sectionalism both within and without their state. These events forced these professors to question the political thought of their forefathers, but they had a great distance to go before reaching the new science of politics that would enable them to make sense of the sort of society that they had created. The next generation of professors would create this new science of politics for the slave South, and they would do so by restoring the ancient premises of political philosophy. But before this new way of thinking could emerge, the proslavery professors of the middle generation had to confront rising challenges to what they conceived of as the orthodox reading of the United States Constitution.

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<sup>76</sup> Ibid., 312-313, 317.

## Chapter Four: Constitutional Orthodoxy under Siege

### I.

St. George Tucker's children, Henry and Beverley, inherited an orthodox understanding of the Constitution of the United States from their father. Basing their interpretation upon a Whig theory of politics that they had also inherited, Henry and Beverley confronted the challenges that faced constitutional orthodoxy during the first fifty years of the nineteenth century. Soon after St. George Tucker's death in 1826, political and legal thinkers in the North began a campaign to transform a voluntary union of free and independent states into a single nation. Spurred on by sectional disputes, and led astray by a changing conception of natural rights, the Tucker brothers attempted to defend their father's interpretation of the Constitution and to pass this interpretation on to a new generation of college students. Although the brothers agreed in their premises, they often disagreed on the proper course of action to take. Both conceded the legitimacy of secession, but Henry thought such a course of action would be disastrous, while Beverley consistently lobbied for secession from the 1830s onward.

Constitutional orthodoxy built upon a larger political philosophy, one which, as described in chapter two, could properly be described as a Whig political philosophy. As a law professor at the University of Virginia, Henry had the responsibility of teaching political philosophy to his students. He took this part of his job very seriously. He argued that the "flag of freedom" had been driven from the old world to the new. In order for this freedom to continue to thrive in Virginia and the United States, it would be necessary for college students to "to search out and to cultivate with care the genuine principles of well-regulated liberty, that we may steer the vessel of state safe from the destructive breakers of monarchy on the one hand, and the no less fearful whirlpool of licentious and unbridled democracy on the other." Henry told his students that the

study of political philosophy was the only way to protect this type of liberty, and that an understanding of the general principles of political philosophy had to be commenced before a student could begin to study “the organization and structure of our own forms of government.” Beverley presented broadly similar arguments to his students at the College of William and Mary.<sup>1</sup>

Both brothers had learned the fundamentals of this political philosophy from their father. St. George Tucker had guided them to the writings of Sir Edward Coke because he believed Coke’s writings an indispensable prerequisite for a proper understanding of the Whig theory of liberty that made constitutional orthodoxy possible. Henry proved to be a diligent, if not a happy student of Coke. In 1799, St. George began to pressure his son to work through the writings of the English legal theorist. Henry promised to do his best, and stated that “I shall not, if possible, mispend anytime whatever.” But he did not attempt to mask the difficulties from his father: “After reading Coke all day, you may easily suppose anything in the evening will be amusing.” At this time, Henry also directed his brothers in their studies, and had them read, at the behest of St. George, the writings of the philosopher David Hume. Henry sometimes wished that he could read these books rather than Coke. “Indeed when I look at a law book, I am delighted with the thought of reading it, unless it be old Coke; to him I declare, I have paid the utmost attention, and I do not perceive but a very trifling difference between my knowledge now, and when I began.” Henry hoped that after reading the more modern commentators, he would be able to return to Coke and mine the old text for information.<sup>2</sup>

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<sup>1</sup> HSGT, *Introductory Lecture: Delivered by the Professor of Law, in the University of Virginia, At the Opening of the Law School, In September 1841* (Charlottesville: Magruder and Noel, 1841), 22; Beverley Tucker, *A Series of Lectures on the Science of Government: Intended to Prepare the Student for the Study of the Constitution of the United States* (Philadelphia: Carey and Hart, 1845).

<sup>2</sup> HSGT to SGT, 21 July 1799, 4 Aug. 1799, 1 Sept 1799, Tucker-Coleman Collection, W&M.



It is worthwhile to consider why St. George Tucker would bother with making his son read Coke. As one scholar has pointed out, American constitutionalism draws from two traditions: the “rule-of-law” tradition and the “structure and balance” tradition. The former tradition attempted to square human law with a higher law. This conception had its roots in ancient Rome and medieval England. Although the Romans could conceive of the notion of a law higher than the laws made by man, they were incapable of using this notion to rein in their leaders. In medieval England, on the other hand, the rule of law was able to restrain even the power of a monarch: “Like other feudal lords, the king was bound by a web of contractual rights and obligations under the common law deriving from ownership of the land. These mutual obligations created a sphere of personal liberty and individual rights protected by the courts, which placed the king under the law.” With the addition of the English Civil War and the Glorious Revolution, Englishmen came to see government as being accountable to the people. This combination of fundamental law and accountability to the people represented the “first essential of constitutional government.”<sup>3</sup>

In the English tradition “certain historic documents such as Magna Charta possessed special significance,” but generally speaking their constitution “was not a written instrument but an organically evolving assemblage of statute, belief, and institutional practice.” The English constitution limited government power by providing citizens with common law rights that were upheld by the courts and by contributing to a structure of government that had some institutional checks and balances. Coke’s famous decision in the 1610 suit that has come to be known as “Dr. Bonham’s Case” illustrates these safeguards. Parliament had given the London College of

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<sup>3</sup> Herman Belz, et. al., *The American Constitution: Its Origins and Development*, 7<sup>th</sup> ed., (2 vols., New York: W. W. Norton & Company, 1991), I: xx-xxi.

Physicians an exclusive grant to license the practice of medicine in London. It also gave them the power to punish those who refused to honor this monopoly. Coke argued in the case of Dr. Bonham that the London College of Physicians had acted as a judge in its own case, and that it had thereby violated one of the fundamental principles of the common law. “Coke’s opinion nevertheless contained the idea of a fundamental or higher law restraining governmental acts.” During the seventeenth century as the doctrine of Parliamentary supremacy took root, it became unclear exactly what the doctrine of fundamental law meant in this British setting.<sup>4</sup>

Beginning with the Declaration of Independence, Americans made important modifications to the English higher law tradition. These modifications worked to resolve certain trouble spots in English law. Americans believed that in order to keep the government in check the “principles and rules” of the fundamental law had to “be given positive, written, documentary expression as a fixed standard—a higher law— against which to hold the government accountable.” During the years leading up to the American Revolution, the colonists used some of Coke’s seventeenth-century precedents to attack some of the navigation laws set forth by Parliament. The writings of the English jurist had planted one of the seeds that led to the America colonies declaring their independence. Not surprisingly then, Thomas Jefferson and St. George Tucker had looked to Coke as a means by which to convey the proper understanding of rights to young students of the law.<sup>5</sup>

As a mature scholar, Henry returned to Coke’s writings whenever he discussed the origins of American law and society. Henry compared the challenge of practicing law to a great armored battle, and he named Lord Coke as the great provider of weapons. Coke’s “armory”

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<sup>4</sup> Ibid., 61. Cf. James R. Stoner, Jr., *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence: University Press of Kansas, 1992), 48-68.

<sup>5</sup> Belz, *The American Constitution*, 62.

would provide students with “mail for your defense, and the battle-ax for assault....” After reading the master, students could turn to Coke’s “less distinguished successors,” who “unable to cope with him in massive weapons, boast at least their superior symmetry of array, and will teach the way to victory by the skill of these approaches.” Henry espoused a version of Coke’s higher-law teaching. He believed that good laws do not change; they are “permanent, uniform, and universal.” Thus Henry approved of the power of precedent: “In it we perceive that veneration for antiquity, which leads the modern civilian to trace up his principles to the original fountains of the law.” The professor did not find it at all strange that one would need to “grope among the rubbish of the year books of four centuries ago, for the precious treasures of the law.” According to Henry, properly trained lawyers abhorred the idea of pushing for change merely for the sake of change. Because they opposed unnecessary change, lawyers provided a useful counterweight to “the disorganizing tendency which sometimes prevails in democratic institutions.”<sup>6</sup>

In teaching constitutional orthodoxy, Henry Tucker built upon a tradition established by Coke. The Virginian defined a constitution as “a law to the lawgiver, a binding and obligatory rule for the government itself.” He described law as “a rule of action prescribed by a competent power commanding what is right and prohibiting what is wrong.” According to this interpretation, only the sovereign power could make law, for “if there be a power actually superior to that which declares the law, it is no law to that superior.” Admitting that men in the early stages of society shared sovereignty equally, Henry nevertheless argued that it would be impossible for modern societies to share legislative power equally among all the citizens. Societies therefore found it necessary to produce constitutions that delineated the design of their legislatures. In these terms, the people held sovereignty and they used this sovereignty in order to

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<sup>6</sup> HSGT, *Introductory Lecture*, 4, 7-8.

produce a constitution that could bind those who governed them. The power of the government was not absolute, for the constitutions were higher than the government they created.<sup>7</sup>

Luckily for Henry, not all of the sources of constitutional orthodoxy were as difficult as Sir Edward Coke. As a young man, Henry had enjoyed James Madison's *Report on the Virginia and Kentucky Resolutions*, describing it as "most excellent," and stating: "I would have rather been the author of them than of any piece I ever read of the same length." Henry especially admired Madison's "closeness of reasoning," noting that such skill "must produce conviction on every mind, and ... does the author immortal credit." Throughout his life, Henry would continue to adhere to the interpretation of the Constitution manifested in the Virginia and Kentucky Resolutions and in Madison's famous defense of them. He insisted that these documents "promulgate nothing which is not truly orthodox." This constitutional orthodoxy came under increasing pressure, however, as the Union suffered from a burgeoning sectional divide. This divide became especially conspicuous during the crisis surrounding the admission of Missouri as a state.<sup>8</sup>

## II.

Beverley had paid very close attention to the conflicts that marked Missouri's admission to the Union. He had resided in Missouri at that time, and he had exercised a fair degree of political influence there. He took it upon himself "to study the subject, to endeavor to acquaint the people with their rights, to rouse them to resist the proposed wrong, and to bear an active part in the controversy." Believing that he "fully understood the reasonings which prevailed with the people to assert and maintain their rights," Beverley enumerated those rights on the following basis: In

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<sup>7</sup> HSGT, *Lectures on Government* (Charlottesville: James Alexander, 1844), 35-36.

<sup>8</sup> *Ibid.*, 194; HSGT to Joseph C. Cabell, 1 Feb. 1800, Cabell Papers, box 5, UVA.

1803, France ceded the territory of Missouri to the United States. This treaty stipulated that the individuals residing therein must be admitted to the Union on “the same footing” as all other states that had been admitted. “Hence it was denied that Congress had the right to refuse admission to Missouri, because of a feature in her Constitution which was found in the Constitutions of nearly half the existing states.” In other words, since half of the existing states had slavery in 1803, Missouri should be allowed to enter the Union with slaves in 1820. Furthermore, all the other states had entered the Union as free and independent states, and Missouri therefore had that same right as well. Beverley defined the creation of a constitution as “the highest act of sovereignty,” and he did not think it proper for an outside power to dictate to the sovereign people of Missouri a method of constitutional construction.<sup>9</sup>

After the dispute over Missouri, the next great challenge to constitutional orthodoxy emerged as a result of South Carolina’s 1832 attempt to “nullify” a federal tariff on imported goods. Beginning in 1830, the legislature of that state had issued a document that came to be known as the *South Carolina Exposition*. John C. Calhoun, a South Carolinian and the vice president of the United States at that time, had secretly written the document. In it he argued that the tariff was unconstitutional and that state governments had the right to “nullify” such laws. Unlike St. George Tucker and other men of the founding generation, Calhoun did not believe that sovereignty could be divided: either the states were sovereign, or they were not. In retrospect, nullification seems to be a predecessor of secession, but as historians have gradually come to realize, Calhoun was primarily interested in finding a way to secure minority rights within the American constitutional order. He did not want South Carolina to secede from the Union, and he devised nullification as a means to forestall that course of action. Whatever its

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<sup>9</sup> NBT to John C. Calhoun, 13 Nov. 1844, *The Papers of John C. Calhoun*, ed. Clyde Wilson, et al., (28 vols., Columbia: University of South Carolina Press, 1959-2003), XX: 282-287.

merits as a mode of constitutional interpretation, the nullification movement did succeed in securing a lower tariff rate.<sup>10</sup>

Beverley did not think very highly of what he called “the mysteries of nullification.” He agreed with those South Carolinians who believed the tariff to be detrimental to the interests of their state. He did not think, however, that a state could in any way nullify a federal law. At the time of the Nullification Crisis, indeed for the rest of his life, Beverley argued that the best course of action for South Carolina would be to leave the Union. He believed that South Carolina could establish a virtually tariff-free commercial treaty with England. Even if only two states formed a “Southern Confederacy,” the other states of the South would find it in their interest to follow. Beverley advanced this thesis with a rhetorical question: “Could Virginia raise a pound of tobacco if tobacco from North Carolina were admitted into England on such terms?” Beverley railed against Virginia’s politicians for their cowardice in refusing to take decisive action during the Nullification Crisis. Beverley wanted secession, and he believed that the crisis over nullification had presented the perfect opportunity. He would later note that he had been preaching this same gospel since the early 1830s, and that he had grown tired of hearing politicians say “now is not the time” to be quickly followed with “the time has now passed.”<sup>11</sup>

Henry also opposed the doctrine of nullification, but he did not think secession would be a good idea. He believed that the states had the right to object to the constitutionality of an action of the federal government, and he used the Virginia and Kentucky Resolutions and Madison’s

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<sup>10</sup> Belz, *The American Constitution*, 207-209; John Niven, *John C. Calhoun and the Price of Union* (Baton Rouge: Louisiana State University Press, 1988), 188; William W. Freehling *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York: Oxford 1965).

<sup>11</sup> NBT to JHH, 17 Feb. 1836, 27 Dec. 1849, NBT Correspondence typescript, DU; For a summary of Beverley’s career as a secessionist see Eric H. Walther, *The Fire-Eaters* (Baton Rouge: Louisiana State University Press, 1992), 8-47.

defense of them as his precedent. Henry did not, however, think that these writings upheld a right of nullification. John Taylor of Caroline, in introducing the resolutions, had argued otherwise but his fellow legislators disagreed and altered his wording. Henry asserted that the state of Virginia had never supported the doctrine of nullification in any of her public acts. He believed the doctrine to be “inconsistent” in that “the opposing state may stand alone in its opinion, and while it resists the unanimous sentiment of all the rest, claim and receive the benefits of the Union.” Henry did, however, adhere to the tenth amendment’s guarantee that the rights not delegated to the federal government remained as the proper jurisdiction for the state governments, and that, therefore, the state legislatures could state their concern that a action of the federal government violated the Constitution. He wondered whether the state legislature, or a state convention perhaps appointed by the state legislature, should undertake this duty. He noted that South Carolina had established a convention for her nullification proceedings.<sup>12</sup>

Because he adhered to the principles of the Virginia and Kentucky Resolutions, Henry believed that the states had a right to protest, but he also believed that article three, section one of the Constitution gave the Supreme Court the final say in all cases arising under the Constitution. According to this interpretation, all cases involving questions of constitutional law, including those cases relating to the jurisdiction of powers, devolved upon the Supreme Court. In these cases, despite objections from the various states, the Supreme Court would have the final say. The verdict of the Supreme Court in such cases could be overturned only by the Supreme Court itself, in a later decision, or by amending the Constitution. In controversies between a state and the United States regarding “the extent of powers of the latter,” an individual state could voice objections through its legislature. If these measures did not bring about a change in the actions of

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<sup>12</sup> HSGT, *Lectures on Constitutional Law, For the Use of the Law Class At the University of Virginia* (Richmond: Sheperd and Colin, 1843), 192, 198.

the federal government, then the state could resist these actions. In this case, “the obnoxious measure will be carried out, not, indeed, by action upon the state itself, through its several organs, but upon the individuals composing the state, according to the true theory and principles of the constitution.” If the individuals comprising the state still refused to comply, they had the option of secession, a remedy that exists “above” the Constitution. Only by “revolution, or secession, which is revolution” could the individuals comprising a state resist a law passed by congress and upheld by the Supreme Court.<sup>13</sup>

Henry stated that he and his brother had “different views of the causes of the present dangerous crisis, and of the course it has rendered inevitable.” They agreed on the tariff, but disagreed about the issue of South Carolina. “Her course has been, I conceive, ill-advised, rash and unjustifiable; and if ‘we dream on till we wake in blood,’ hers will be the blame.” Yet Henry did not wholly approve of the President Jackson’s course of action either. Henry believed that Jackson’s threat to send in troops to enforce the tariff only aggravated the crisis. South Carolina should “have been warned, but she ought also to have been left to the operation of the law until her outbreakings had rendered submission to her dictates or enforcement of the law inevitable.” According to this interpretation, the president could not have altered the tariff, even if he had wished to do so. The Constitution, according to Henry, enabled the president to carry into execution the laws. The Constitution did not, however, give the president any right to declare the tariff unconstitutional. “Every state, indeed, as party to the compact, has a right to impugn the motion which led to it. But the judiciary cannot, nor can the executive officer who is called to

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<sup>13</sup> Ibid., 209.



execute its judgment; for if he could, he would in effect exercise a veto which could not be controlled by any constitutional vote of two-thirds.”<sup>14</sup>

Believing that the real problem resided not in the activity or lack of activity by the president, but in a design failure in the Constitution, Henry argued that the “constitution has made no provision for the case of a state who opposes the law, different from those which apply to the opposition of a rabble or the insurrection of a mob.” He found it unfortunate that the Constitution gave the president the power to abuse a state that was only exercising a legitimate prerogative. Henry knew that direct attempts to countermand federal authority could result in the federal government prosecuting individuals. For instance, “if the governor of a state were to issue an order to the militia while in the actual service of the United States during war, the executive of the Union could not act, indeed, upon the *governor*, but a court martial would act upon the individual *who should foolishly obey his orders*.” The Constitution denied the president the power to declare a foreign war, yet by giving him “the duty of enforcing a law resisted by a state ... it lights the torch of discord and spreads the flames of civil war throughout the land.”<sup>15</sup>

Henry knew that it would take an amendment to correct such an oversight in the Constitution. He thought that South Carolina should have called for such an amendment, and that it would have been wise for that state to “withdraw her ordinances and propose it.” Perhaps even the Virginia legislature could propose such a measure. If the North refused to recognize this legitimate grievance, “it may then indeed become a question of the greatest importance whether the grievances complained of will justify and require a Southern convention.” If South Carolina thought her fellow Southern states were moving too slowly on this issue, her people could vote

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<sup>14</sup> HSGT to NBT, 20 Jan. 1833, “Correspondence of Judge Tucker,” *William and Mary College Quarterly Magazine* XII (1903): 89-91.

<sup>15</sup> *Ibid.*, 89-90; HSGT, *Lectures on Constitutional Law*, 210.

to secede from the United States. “I for one would not object to her secession; though as to ourselves, I do not see clearly enough what is in the womb of time to induce me to say that we ought to follow her example.” Henry did not believe that the federal government had the power to act upon the state legislatures in any manner whatsoever. He knew that his approach to these questions was not typical. He prided himself on his ability to take the middle ground, to “occupy an isthmus that divides two great contending parties in the nation.” On the one side “is nullification, and upon the other centralization; the rocks of Scylla and the engulfing whirlpool of Charybdis.”<sup>16</sup>

### III.

The greatest advocate of centralization was the law professor and Supreme Court Justice Joseph Story. Henry feared secession, but Story feared it even more. Story argued that secession was an illegitimate concept, and in searching for the source of this mistake, he fastened upon the writings of St. George Tucker. Writing from within the confines of the new law school at Harvard University, Story took a view of the crisis arising out of the nullification movement that differed from those espoused by the Tucker brothers. In doing so, Story articulated the definitive statement of the nationalist position. He also worked behind the scenes to aid some of the popularizers of this new view, such as Senator Daniel Webster.

Story was born in 1779, just a year before Henry Tucker. The careers of both men followed similar trajectories. Story entered politics in 1805, when he won a seat in the Massachusetts legislature and began a fight for an independent judiciary in that state. In 1808, Story won a seat in the United States House of Representatives, but he had a difficult time taking politics seriously, and he quickly resigned. Before long, he found other work arguing cases

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<sup>16</sup> *Ibid.*, 210, “Correspondence of Judge Tucker,” 91.

before the Supreme Court. In 1810, James Madison appointed the thirty-two year old Story to serve as a justice on the Supreme Court, making him the youngest man to ever win such an appointment. Nineteen years later, despite taking a very active role as a Supreme Court Justice, Story accepted a professorship at Harvard Law School. He held this chair in addition to his duties as a judge on the Supreme Court. Immediately after assuming his chair at Harvard, Story began work on his magnum opus, *Commentaries on the Constitution of the United States*.<sup>17</sup>

The same events that troubled Henry and Beverley pushed Story to write with a vengeance, for he wished to destroy the foundation of his enemies' argument. He found this foundation in the constitutional writing of St. George Tucker. Story began his attack on Tucker with a series of rhetorical questions regarding the Constitution: "Is it a treaty, a convention, a league, a contract, or a compact? Who are the parties to it? By whom was it made? By whom ratified? What are its obligations? By whom, and in what manner may it be dissolved?" Story believed that these were important practical questions, not matters of metaphysics, noting that statesmen often gave contradictory answers to them. He then introduced Tucker, as "a learned commentator," who had defined the United States Constitution as "an original, written, federal, and social compact, freely, voluntarily, and solemnly entered into by the several states, 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

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<sup>17</sup> James McClellan. *Joseph Story and the American Constitution: a Study in Political and Legal Thought*. (Norman: University of Oklahoma Press, 1971), 20-44; R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), 240-242; Joseph Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution* (2 vols., Boston: Little, Brown and Company, 1833).

States, and by which the federal government is bound to the several states and to every citizen of the United States.” Story correctly noted that Jefferson agreed with this interpretation.<sup>18</sup>

Story then immediately proposed his counter-argument. He stated that: “The constitution was neither made, nor ratified by the states, as sovereignties, or political communities. It was framed by a convention, proposed to the people of the states for their adoption by congress; and was adopted by state conventions, —the immediate representatives of the people.” The Bostonian feared that under the Tucker model the Constitution acted as a “mere treaty” between the states, thereby giving each state the “right to judge for itself in relation to the nature, extent, and obligations of the instrument, without being at all bound by the interpretation of the federal government, or by that of any other state....” As a learned lawyer, Story knew that the term “compact” carried with it a clearly defined set of rights. In popular parlance, the word simply means an agreement between people or between nations, but in a legal sense the term implies “the notion of distinct contracting parties, having mutual rights, and remedies to enforce the obligations arising therefrom.” As a student of the law, Story knew that a compact gives each party to it “an equal right to judge of its terms, to enforce its obligations, and to insist upon redress for any violation of them.”<sup>19</sup>

Story feared that the old constitutional orthodoxy allowed for individual states to nullify any federal laws not to their liking, or even to leave the Union, should they so desire. “These conclusions may not always be avowed; but they flow naturally from the doctrines, which we have under consideration.” Feigning generosity toward his opponent, Story stated that Tucker failed to take his arguments through to their proper conclusions. As shown in chapter two,

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<sup>18</sup> Ibid., I: 206.

<sup>19</sup> Ibid., I: 207-208.

however, this charge was false. St. George Tucker openly avowed the legitimacy of secession and had described numerous situations in which such a course of action would be necessary. Covering over Tucker's conclusions, Story focused instead on the Virginian's premises. The Harvard professor thought Tucker's arguments to be absurd on their very face because they presented "the extraordinary spectacle of a nation existing only at the will of each of its constituent parts." According to Story, Tucker's theory "wholly failed to express the intentions of its framers, and brings back ... all the evils of the old confederation, from which we were supposed to have had a safe distance." Story did not think the power of the federal government to act upon individuals could be worth much, if the state governments could shield individuals from the federal leviathan.<sup>20</sup>

Discounting the role played by the states, Story viewed all political disputes in the Union as disputes between majorities and minorities. He thought that minorities should have no option save submission. For example, he noted that in the case of the American Revolution, a powerful minority of Americans had opposed the efforts of the majority who supported the Declaration of Independence. According to Story, the majority made the active support of the minority position into a crime. Thus, he drew the moral: "The truth is, that the majority of every organized society have always claimed, and exercised the right to govern the whole of that society, in the manner pointed out by the fundamental laws, which from time to time have existed in such society." Story believed that the majority had the right to decide to what extent it would "respect the rights or claims of the minority; and how far they will, from policy or principle, insist upon or absolve

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<sup>20</sup> Ibid., I: 213- 215. Ironically, Story's appeal to the intentions of the Framers came at a time when few knew what exactly had transpired on Philadelphia in the summer of 1787. That ignorance would soon be lifted, thanks in part to the efforts of George Tucker, who helped to convince Dolly Madison to publish her late husband's notes of the Constitutional Convention. See: GT to Dolly Madison, 25 July 1836, miscellaneous correspondence file, UVA.

them from obedience.” In practice, Story argued that the majority will “is absolute and sovereign, limited only by their means and power to make their will effectual.”<sup>21</sup>

Story disliked the theory of the social contract. He found an uncomfortable similarity between Tucker’s compact theory of the Union and the philosophical theory of the social contract. Story knew that Tucker saw the Constitution, in part, as “a social compact.” According to the parlance of the day, a social compact acted upon people while a federal compact acted upon states. Story disagreed with Tucker. He feared that many other “statesmen and jurists” agreed with Tucker’s positions, and that these positions had been “recently revived under circumstances, which have given them increased importance, if not a perilous influence.” Story believed that social contracts are not real contracts, and that that they should not be treated with “the same constructions and conditions, as belong to positive obligations, created between independent parties, contemplating a distinct and personal responsibility.” Even if one wished to consider the Constitution as a bona fide compact at its time of adoption, Story doubted that it would be prudent to continue to see the document in those terms.<sup>22</sup>

In order to bring his readers over to the nationalist interpretation of the Constitution, Story had to disguise the fundamental principles that had guided the framers and the ratifiers of the Constitution. He believed that by demolishing the compact theory of the Union that he could also defeat nullification and secession. In his narrow view, the fact that the states sent delegates to draft the Constitution, that the Constitution was ratified by the states, and that the states played essential roles in the working of the Constitution’s design were all of minimal importance. Story believed that these facts could be re-interpreted if he could convince his readers to abandon St.

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<sup>21</sup> Story, *Commentaries on the Constitution of the United States*, 220-221.

<sup>22</sup> *Ibid.*, 212, 222.

George Tucker's interpretation of the Constitution and cease to see that document as a social compact.

Fundamentally, the debate over the nature of the Constitution had become a debate about the origins of natural rights. The constitutional orthodoxy of the Tuckers built upon the modern theory of natural rights. Proponents of this theory argued that humans originally existed in a state of nature, and that they came together in order to form a government that could meet their needs. By doing so these humans exchanged natural rights for civil rights. The contracts that enabled such an exchange relied upon the consent of those who agreed to live under them; without such consent, the people could overthrow their government, thereby converting society back into a state of nature. In the state of nature, humans could recommence the effort, make a new contract and thereby form a new government. Thinkers who viewed the Constitution in such terms, such as the Tuckers, had to disagree radically with those who, like Story, saw the Constitution as a permanent and irrevocable supreme law of the land. As the last chapter indicated, however, the very basis of the modern natural rights theory was coming under increasing attack. Both northern and southern thinkers were moving against the old way of understanding natural rights, yet the old idea retained a considerable influence. This state of affairs produced confusion, among both the defenders and the besiegers of constitutional orthodoxy.<sup>23</sup>

Henry Tucker had problems with the idea of modern natural rights. In his *Lectures on Government* he attacked the idea of the state of nature construct and replaced it with an expression of patriarchy that owed much to the arguments made by the seventeenth-century

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<sup>23</sup> Andrew C McLaughlin, "Social Compact and Constitutional Construction." *American Historical Review* V (1900): 467-490; Elizabeth Kelly Bauer, *Commentaries on the Constitution: 1790-1860* (New York: Columbia University Press, 1952), 285-286, 308; McClellan, *Joseph Story and the American Constitution*, 81-82, 99-104, 248-251.

English philosopher Sir Robert Filmer.<sup>24</sup> Henry believed that “the natural state of man has ever been and ever must be a state of society.” He based this conclusion upon his reading the Bible. In the holy book, Henry found the “first germ of the exercise of power on the one hand, and of the duty of obedience on the other” arising in the “connubial state” that came into existence between Adam and Eve. Henry believed that the dominion of man over woman continued in his time, and that “no serious or successful effort has even been made to throw off this subjection,” or “to give to the gentler sex an equal influence with man in the conduct of public affairs.” He regarded exceptions to this patriarchy as mere fables. According to Henry, the “very natures” of men and women inclined them to their respective roles.<sup>25</sup>

Despite the precedence Henry gave traditional gender roles, he thought that “parental authority” provided an even better example of the early action of the “principle of government.” Nature, according to Henry, made it so. The character of a human infant “renders the authority of the parent indispensable on the one hand and the obedience of the child unhesitating on the other.” The ability of a parent to govern over many children indicated, in Henry’s mind, that “the disposition to govern, together with the habit of being governed,” exists in human beings by nature. From this premise, Henry concluded that patriarchal governments are in accordance with human nature. He believed that the Bible justified this form of government, and he provided an example: Noah lived for 350 years, and in that time his children and his childrens’ children must

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<sup>24</sup> Filmer has been largely neglected by historians and students of political thought. Too many scholars have gotten their only idea of Filmer from reading the first of John Locke’s *Two Treatises of Government*, which offers a relentless critique of Filmer’s *Patriarcha*. There are, however, a few exceptions: Peter Laslett, “Sir Robert Filmer: the Man versus the Whig Myth,” *William and Mary Quarterly* V (1948): 523-546; M. E. Bradford, “A Neglected Classic: Filmer’s *Patriarcha*,” in R. A. Herrera et. al. eds., *Saints, Sovereign, and Scholars: Studies in Honor of Frederick D. Wilhelmsen* (New York: Peter Lang, 1993), 273-279.

<sup>25</sup> HSGT, *Lectures on Government*, 2, 15-16.



have reached a very high number. Yet “his patriarchal government over the whole is not intimated to have been impaired, at least as far as it could extend itself.”<sup>26</sup>

Henry noted that the ancient Jews followed the authority of priests as well as the authority of their patriarch. The other ancient races of their day often followed kings. The Assyrians, the Egyptians and the Chinese all followed monarchs, even before God revealed himself to the Jews. “The earth then has been for ages subjected to the dominion of a monarch, and it is only here and there, that we see man asserting the prerogative of self-government in comparatively small and insignificant societies.” Ancient Greek history provided Henry with some examples, but he also singled out Carthage before her defeat by Rome. In the middle ages Florence, Genoa and Venice all tried to function as republics but soon reverted to aristocracy. Of course, Henry did not wish his students to think that monarchy was so natural that Virginia should abandon her republican form of government.<sup>27</sup>

Attempting to qualify his Filmerian philosophy with a Lockean dose of modern natural rights, Henry acted as if the idea of natural equality could be divorced from its origins in a presumed state of nature. He moved to “consider the effect of the structure of society upon the rights of those who constitute it, whether it be regarded as arising out of actual compact, or consider it as only kept together from a sense of its necessity, upon those principles on which alone its original organization could have been justly bestowed.” Unlike a typical Filmerian, Henry asserted that all inequalities “spring from the institutions of society.” Proposing the example of two children born at the same time, Henry argued that they were in all ways equal. Even if one child was stronger or smarter or more attractive than the other, that would not give

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<sup>26</sup> Ibid., 16-18.

<sup>27</sup> Ibid., 21.

him a “superior right,” for if it did then the laborer could be superior to the lord, the clown to the nobleman or the maid to the mistress. Despite his modified Filmerian philosophy, Henry proved completely unwilling to consider the possibility that all men were not, in fact, born equal. Henry regarded the statement that “all men are created equal” as “a truth which with us is no longer held to be debatable, but is placed among the aphorisms of politics, upon the footing of those axioms, which serve as the firm foundations of mathematical science.”<sup>28</sup>

If, as Henry supposed, men were equal by nature, then society could not “consistently with the principles upon which it was founded, create an inequality in respect of natural rights among those who compose it.” Henry believed that society was “bound,” as if by contract, to protect the rights of its citizens, and “if bound to protect my rights, it is bound to protect my equality which is one of my rights.” The problem was, that by positing a Filmerian construction of the basis of society and government, Henry had abandoned the old contractual way of understanding these matters. Under the terms he had set forth, government was not “bound” to do anything. Faced with the intractability of this dilemma, Henry posed a construct that was, by his own terms, fictive: “our business being to enquire into the legitimate principles upon which society may organize government, we must treat the matter as though there was a voluntary association of individuals in the act of forming a regular government.” All of a sudden, with the aid of one fictive construct, Henry the Filmerian became Henry the Lockean, arguing that “the very act of entering into society supposes the right in man to surrender some portion of his natural rights in return for benefits received.”<sup>29</sup>

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<sup>28</sup> Ibid., 23-24.

<sup>29</sup> Ibid., 26-30.

Henry argued that of all the governments in the world at the time, only the United States possessed a written constitution, and only the American experience had approached the ideal of a regime established in terms of a social compact. The other governments of the world, including the government of England, existed as governments of force and were therefore illegitimate. Henry argued that in Virginia, the people themselves, in their capacity as a “society,” possessed sovereignty over the “government” which existed only as their creation. According to this interpretation, if ever the government should cease to serve their interests, the people had the right to change it or abolish it. The Virginia Constitution created the government of the state, and that government existed as the agent of the people. The government of Virginia had no power to alter the Virginia Constitution, and if they tried “they would with their own hands have destroyed the vital principle of their own existence.”<sup>30</sup>

Henry spent so much time demonstrating this truth because he had too often heard the sovereignty of the people “sneered at, if not openly denied....” He wished to emphasize, however, that this “sanitary power” should only be applied when absolutely necessary. Some would argue that Henry hereby made the case that the laws of the state could not bind the individual. But he protested this assertion. He argued for the supremacy of the American Constitution to its English rival on the ground that “with us the alteration, amendment and change of our constitution and forms of government is mainly provided for by the fundamental law itself; whereas in Great Britain those grievances for which there is no stated remedy or express legal provision, are only to be redressed by revolution....” The Virginian found it fortunate that thus far in American history, disagreements had followed party lines rather than sectional lines. Should the rights of a sectional minority be disregarded, Henry feared that

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<sup>30</sup> Ibid., 37.

secession would result. Henry had good reason to fear that forces were tending in that direction. At this very time, Story provided intellectual guidance to those nationalists who were searching for ways to override the rights of the southern states.<sup>31</sup>

#### IV.

Story feared the consequences of giving minorities constitutional protections. On this subject, Henry disagreed radically with his northern colleague. In fact, Henry believed that constitutions exist, by their nature, to protect the rights of minorities. Specifically mentioning the French political writer Alexis de Tocqueville, Henry stated that the question of “how to restrain that majority, whilst in the exercise of its powers, from excesses destructive of the rights of the majority, is the great problem which, it would seem, is yet to be reached.” Some people believed that representative democracy worked to mitigate this danger. Unfortunately, Henry believed that party politics had lessened the safeguard supplied by representative democracy: “The successful party has swept from office, as with a besom, the adherents of its adversaries and even on the floor of the legislative assembly, the freedom of debate has been stifled ... by the adoption of that unprecedented novelty in parliamentary proceedings, familiarly called the one hour rule.”<sup>32</sup>

Henry noted that immediately after the Constitution had been adopted, two great political parties emerged: “The federal party (so called by a strange perversion of the use of terms) have always been inclined to represent the United States as constituting *one people*, instead of a confederacy of states; while their opponents (formerly called anti-federalists, but more recently known as the democratic or republican party) have ever strenuously contended that the constitution was a compact, or the result of a compact between the *states*; who retain their

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<sup>31</sup> Ibid., 49.

<sup>32</sup> Ibid., 58-59.

sovereignty, and all the rights of sovereignty, which they have not expressly transferred to the federal government.” Story argued that the Constitution, in its opening sentence, declared that it was the creation of the people of the United States. Daniel Webster followed this interpretation in a number of his speeches. Henry believed that the Federalists had fallen from power “in no small degree” because of their “strenuous maintenance of this political heresy....” Story had offered the most advanced defense of this theory, and Henry proceeded to take this argument apart.<sup>33</sup>

Story was more radical than many Federalists, for he argued that the people of the United States were one people not only at the time of ratification, but in 1776 when they issued the Declaration, and indeed even when they had been contented colonials. To refute Story, Henry turned to William Blackstone. This English commentator had noted that Scotland, Ireland, and Hanover, though nominally under British control, were distinct and separate dominions. They were distinct not only from Britain, but from each other as well. Henry applied this same reasoning to the New World colonies. “If they were not one with the realm, it is difficult indeed to imagine how they could as distinct dependencies be one with each other.” Henry demonstrated Story’s subtle admission to these truths, for even Story admitted that the individual colonies had no right to make laws for each other.<sup>34</sup>

The colonies were different “peoples,” said Henry. He here demonstrated the power of new words to convey new ideas. The plural form of people did not exist in the English language at the time, but Henry justified its use by appealing to a precedent set by de Tocqueville. Henry noted that the colonies had different origins, produced types of settlements, and followed

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<sup>33</sup> HSGT, *Lectures on Constitutional Law*, 8-9, 10.

<sup>34</sup> *Ibid.*, 12.

different “forms of civil polity.” He believed that each colonial government had possessed a distinct character. Some “were provincial, some proprietary, and some were chartered.” Indeed, some of the colonies, such as New York and New Jersey, had been conquered by the British and in accordance with “the principles of the common law,” these colonies continued to possess their original legal systems until they were “changed by the stern *fiat* of the conquerors.” Thus, in explaining the diversity of the various new world sovereignties, Henry employed the plural form of the word “people”: “These various peoples were, therefore, essentially distinct and separate, and utterly incapable of amalgamation or oneness: and we must remember that the question is not whether they were sovereign in respect of foreign nations, but whether they were one in regard to each other.” With a flurry of rhetorical questions, Henry indicated that they were not. They did not even have the power to call upon the militias of their fellow states when in danger.<sup>35</sup>

According to Henry, the colonies were not only separate from each other, but largely separate from the King as well. For instance, the colonies often made independent treaties with neighboring Indian tribes. Henry classed this ability for independent action as an indispensable attribute of a people. “To constitute one people, those who compose it must *act* as one people. It is the unity of action which alone makes those one, who, without it, would be several.” He further noted that a society, which has the power to make law for itself, possessed, by definition, sovereignty. “Thus, it is that two peoples may have the same king, and yet be a separate people: as in the case of Great Britain and Hanover now, and of England and Scotland before the union.” Henry cited Jamaica, Canada, and England as further examples, noting that “if these portions of

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<sup>35</sup> Ibid., 13-14; In his study of political thought in the antebellum South, Michael O’Brien emphasizes that the lack of a plural form of the word “people” had a great influence on “how it was possible then to think.” Michael O’Brien, *Conjectures of Order: Intellectual Life and the American South, 1810-1860* (2 vols., Chapel Hill: University of North Carolina Press, 2004), II: 835.

the empire are foreign to England, the thirteen colonies must have been foreign to her, and if foreign to her, how much more foreign to Hindostan, or Antigua, or to one another?" After reviewing the different origins, the separate institutions, and the ability for separate action, Henry concluded that the thirteen colonies "did not in any sense whatever constitute one people."<sup>36</sup>

Henry believed that the various colonies had been related to each other only to the extent that they all owed allegiance to the King. When they broke this allegiance, they became free and independent states. By cutting off the head the colonies did not, by that act, become one body. Furthermore, the Congress assembled by the representatives of the various states "represented states alone, and acted only upon states." Henry also noted that Virginia declared her own independence on 15 May 1776. According to Story, the united colonies were, "a nation de facto, having a general government over it created, and acting by the general consent of the people of all the colonies...." Henry would have none of this argument: "These opinions are utterly at war with the first principles of our federal government, as they have been received and handed down to us by the wisest and purest statesmen of both parties." Henry and Story agreed that sovereignty passed from the crown to the people; they differed in that Story thought that this sovereignty went to the people as whole, while Henry believed that the sovereignty went to the people of each individual state.<sup>37</sup>

To make his case, Henry noted that each state had one vote in the Continental Congress: "a test of confederate character which has been universally admitted." The individual states had the power to remove their representatives at will, and Henry thus compared these early representatives to ambassadors. Perhaps most importantly, this Congress "acted by

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<sup>36</sup> HSGT, *Lectures on Constitutional Law*, 15-17.

<sup>37</sup> *Ibid.*, 45, 49.

recommendation mainly.” During this period the Congress “exercised its powers by a sufferance growing out of the situation of the country, which had not yet been able to form any regular government; and the acquiescence of the states constituted its justification for the broad powers it often felt itself compelled to exercise.” Any state that had rejected the authority of this government could have simply withdrawn its representatives. According to Henry, Story seriously misrepresented the reality of this situation by arguing that the states had been under the control of this government. Henry seemed nonplused that anyone could regard the delegates of the states, who existed to serve the interests of the states, as under the control of a national government. Henry also had problems with Story’s use of the word “union.” “We speak of forming or dissolving a union in reference to states, but no one ever dreamed of calling a national government a union, or of breaking up the very foundations of society itself, when he speaks of the dissolution of a union.”<sup>38</sup>

Story argued that the Declaration of Independence did not create thirteen free and independent states, but rather created a free American people. He believed that the moment the Declaration was issued, the United States became “a nation de facto, having a general government over it created, and acting by the general consent of the people of all the colonies.” Henry disagreed. He noted that although the states acted together in issuing the Declaration of Independence, the document illustrated in its wording, over and over again, the plurality of states it created. Furthermore, “when the treaty of peace was made, each state is distinctly named in the treaty, and the independence of all is distinctly acknowledged.”<sup>39</sup> Henry then turned his attention to the specific role played by Virginia.

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<sup>38</sup> Ibid., 51-55.

<sup>39</sup> Ibid., 77, 82, 88.



Henry's home state had seceded from the Empire in May of 1776 and had created its own constitution by June of that year. Virginians did not replace that constitution until 1832. Thus, Virginia had already taken the necessary steps to become a free and independent state before the Declaration of Independence had even been written. Henry thought that Vermont offered a peculiar instance of these same forces. She did not participate in the original Declaration of Independence. Instead, she issued her own one year later. The states that did issue the Declaration did so "in their character of separate communities, dependent on each other only so far as common danger and their own consent had made them so." Turning to the Articles of Confederation, Henry used this document to enforce his reading of the Declaration. It specifically listed the various states. "The style of the confederacy was the *United States of America*, a name which very plainly indicates the union of political bodies, and not the *oneness* of a single republic." The Articles of Confederation not only declared the freedom and independence of each individual state, it went further by avowing "their anterior independence and sovereignty, by the declaration that they *retained* them." Story had made much of the fact that the Articles called for "perpetual union." Henry replied that this expression negated Story's "favorite notion of oneness, since union implies the connection of those who before were separate."<sup>40</sup>

Apologizing to his readers for spending so much time demonstrating the sovereignty of the states, Henry justified himself: "I have devoted more time to these investigations, because the opposite opinion has been so industriously maintained by an able writer, obviously with the view of influencing certain great political questions which have arisen under our constitution." If Story's theory were correct, Henry believed that the Continental Congress could well have

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<sup>40</sup> Ibid., 89-91, 96.

proposed getting rid of the states altogether. Henry admitted that “according to the theory of our government, the *people* are the sovereign.” This statement, however, led him to inquire who, exactly, these people were. Henry gave his answer: “The people of each state, distinct from the other states,” are the people. When the time came to delegate power “the people of *each* state” did so, not the people considered as a whole.<sup>41</sup>

Henry wished to prove that he was “neither a nullifier nor [an] anarchist....” He conceded that Story sometimes merely drew incorrect conclusions from correct premises. For instance, Story had stated that St. George Tucker’s doctrines made it possible for any individual state to destroy the Union. Henry protested this interpretation: “Such a heresy will not be found in these pages.” Instead, Henry argued “that every party to a compact has a right to judge of its infraction, and to refuse longer to be bound by it when broken,” but that “every other party has an equal right to judge, and that the recusant acts upon his own responsibility, in undertaking to decide and to act contrary to the prevailing opinion of the other parties to the contract.” He argued that the Constitution was not an agreement between the states, but the result of an agreement. The actual agreement is the “We, the people” clause in the preamble. Henry agreed with Story’s assertion that the Constitution of the United States must be as permanent as any state constitution, but “with this modification,” namely “that though irrevocable by the ordinary forms of government, it may be revocable by the exercise of rights paramount to all constitutions....” Henry believed, however, that “the state which asserts these rights, does so on its own responsibility, since in matters between states, if one has a right to judge, others have also.” When Story asserted that the people of the United States possessed the right to alter or abolish the Constitution, Henry entered a disclaimer: “If all the people in six of the largest states were to

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<sup>41</sup> Ibid., 93-95.

concur, they would have no right to alter or abolish the constitution, though they would constitute a majority of the Union.” Similarly, Henry did not think that only one or two states could abolish the Constitution “except upon the principles of revolution, which are above the law.”<sup>42</sup>

After considering the meaning of the name the “United States,” Henry argued that the name implied that several political bodies had come together for their common defense. “Such is its true meaning philologically, for when we speak of things united, we imply a previous separation of the parts.” The name therefore “does not mean one people, but *several peoples united*, and in this sense must the delegates appointed under that confederation have used the language.” Even more telling is the language used by the state ratification conventions, and Henry provided examples from each of these assemblages. In sum, “with all deference to the learned commentator, it appears to me that in the origin, progress and adoption of the constitution of the United States, the states, free, sovereign and independent, were the actors, and emphatically the parties.” Henry regretted that Story had not paid more attention to the state ratification conventions. Yet even without giving proper attention to the means by which the states ratified the Constitution, Henry believed that the true nature of the Constitution showed through. For instance, three-quarters of the state legislatures could ratify an amendment to the Constitution. Henry pointed out that three-quarters of the people of the United States did not have such a power. Henry also quoted from the very explicit language in the Tenth Amendment.<sup>43</sup>

## V.

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<sup>42</sup> Ibid., 122-124, 126-132.

<sup>43</sup> Ibid., 152-155.

Henry and Story did, however, have one thing in common: they both feared the breakup of the Union. Story thought that minorities, sectional or otherwise, had no alternative save complying with the will of the majority. Henry knew that such a formula would not work. He offered up a general principle: “Where the interests, the feelings or even the prejudices of two different sections of a confederation are distinct and conflicting, where one regards as essential, what the other looks upon as ruinous, and where the line of demarcation is as plain territorially as it unfortunately is in point of interest or opinion, it may be confidently pronounced that the union of the respective portions must speedily be dissolved, unless there be co-existing causes of an opposite tendency more than adequate to control the repellent principles.”<sup>44</sup>

Henry knew that if the South were to face the “intolerable evil” of majority tyranny, it would inevitably “drive the injured states to the sad alternative of dissolution.” He quoted de Tocqueville’s view that the American states stuck together out of a certain kind of like-mindedness. Henry hated the idea of secession, and he attempted to convince himself that the national consolidation so feared by his fellow southerners would never come to pass:

“Consolidation can only be effected, first, by usurpation; second, by changes of the constitution, to which the state shall assent for their annihilation; third, by subjugation by overgrown members of the union; fourth, by combination of sectional divisions of the residue of the states.” Henry confidently expressed his prediction that such occurrences would never come to pass. “The danger of the usurpation of the government by an ambitious individual appears to me to be an idle dream, unless we should be involved in desolating wars, which to often result in investing dictatorial powers on the hands of one man.” Henry believed that American leaders lacked the

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<sup>44</sup> HSGT, *Lectures on Government*, 179.

“pretext for raising standing armies,” and he believed that the navy could do the primary work of defending the country.<sup>45</sup>

Henry thought “tyranny and absolutism” would be more likely if the Union were broken up, than if the confederacy of states remained together. Secession, according to Henry, would surely lead to the creation of “standing armies, to which neighboring nations not united in confederacy, must sooner or later resort....” Such armies would indeed be necessary, for disunion would provoke “the great northern hive” with its “vastly superior power” to attempt to subdue the South. Henry feared “absolutism” would be the consequence of having two nations in a position of “perpetual collision and strife,” and he thought it would be especially sad if the North and South were to become enemies of that nature. Henry feared the day when southerners would have to beat their ploughshares back into swords and face off against “our pristine brothers, with whom in two heroic and glorious wars we successfully fought, shoulder to shoulder, against the enemies of our common liberties.” He echoed the language of the Declaration, that men should suffer injustices, so long as those injustices could be endured, rather than facing the challenge of unknown crises. “Try it when we may, we shall find the remedy worse than the disease, unless some important part of the constitution has been attacked in its recesses, or its vitals been impaired by systematic violation.”<sup>46</sup>

Believing that a proper understanding of the American constitutional order would make Southerners less fearful of sectional tyranny, Henry emphasized that the president’s veto power could help keep northern interests in check. “There has probably never been a president since the foundation of the government, not even the Adams’s, who could have been persuaded to sanction

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<sup>45</sup> HSGT, *Lectures on Government*, 171.

<sup>46</sup> *Ibid.*, 187-188.

a bill for the promotion of the schemes of the fanatical friends of abolition.” Henry expressed confidence that the South would continue to have a friend in the oval office based upon the “simple fact that a president never has, and perhaps never will be elected by a party purely sectional.” The nature of the American electoral system compelled the president to seek votes from all quarters of the Union, and indeed, tends to draw its candidates from a middle point between North and South: “to this cause, perhaps, may in part, be attributed the fact that in fifty-eight years, the presidential chair will have been filled forty-six years by five Virginians and one Tennessean.” Henry therefore believed that the veto would always aid the South, for he did not think the North would ever muster a two-thirds vote in either house of Congress. He also thought that even with a significant northern majority in the Senate, there would always be “high-minded” Northerners willing to side with the South.<sup>47</sup>

Despite his dislike of the idea of secession, Henry knew that such a course of action existed as the inevitable concomitant “of the government being composed in effect of independent states.” Henry examined those parts of the Constitution that kept the United States from breaking into a number of confederacies. First, he noted that the members of the various state legislatures had to swear to an oath to protect the Constitution. Unfortunately, he feared that these oaths would have little force once politicians convinced themselves that violations of the Constitution by another party had justified secession. Contrary to the general perception, Henry argued that dissolving the Constitution, even if someone else had violated it, would still be a breach of the oath. Instead of dissolving the Constitution, Henry thought it better “to repair the breach,” and to attempt to do so through constitutional means: elections could remove inadequate leaders, and state legislatures could issue “remonstrances and appeals to our sister states....”

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<sup>47</sup> Ibid., 189-190.

Henry hoped that “the moral influence of truth and the sanative operation of *time* itself” would work to keep the Union whole. He again appealed to the Virginia and Kentucky Resolutions as the proper model. Henry believed that affairs would have been much worse if Virginia had seceded instead of offering up her resolutions, for Virginia’s leaders would have thereby violated their oath. “I hold, therefore, that it is a sacred duty on the part of every man who has taken this solemn oath, if the constitution be violated in part, to hold on strenuously and faithfully to the rest, and to strain every nerve to restore it to its integrity and purity.”<sup>48</sup>

Henry wanted to have it both ways: “Let it not be supposed, however, from what is here said, that I am an advocate for passive obedience and non-resistance to all unconstitutional legislation.” If affairs were worse within the Union than they would be outside of it Henry would advocate “resistance and revolution,” in other words, in that circumstance he would support secession. Henry defined secession as “an appeal from the canceled obligations of the constitutional compact to original rights and the law of self-preservation....” He believed that even English conservative writers such as William Paley and William Blackstone supported such a right. Henry did not, however, think that any actions which a “succeeding administration would remove” could be grievous enough to support secession. He referred his students to Washington’s farewell address, noting that “[a]ny disputation on the nature and character of our government must indeed be imperfect, which does not avail itself of the parting advice of the father of his country on this important subject.”<sup>49</sup>

The people of the United States had come to love the Union, and Washington’s words spoke to that love. Henry was convinced “that however a doubt of the value of the union may

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<sup>48</sup> Ibid., 198-200.

<sup>49</sup> Ibid., 200-201.

exist in the bosom of the ambitious or disappointed, it has never yet found its way to the great body of the people.” Henry noted that all prominent politicians spoke publicly in favor of the preservation of the union. He believed that if any politician were to think otherwise “he would soon find the policy of locking up his opinions within the recesses of his own heart,” or else face defeat come reelection time. Even if a state could reach a majority vote in favor of secession, Henry believed that the minority opposing it would “manfully” resist what he called “treason to the constitution.” If secession were ever to arise in an individual state, Henry predicted that that state “will most probably find her own bowels torn by civil dissensions within, while pressed by enemies from without.”<sup>50</sup>

Henry did not believe that “peaceable secession” existed “within the ordinary laws of human action.” He did not think it possible that the “five and twenty members of this great confederacy would tamely submit to the destruction of the great and magic arch by striking out its keystone, or even pulling away its least important fragment.” He never thought more than one state would secede at a time, but he did prove correct on one point: “come when they will, disunion and secession must result in civil wars, and end at last, perhaps, in ruthless despotism....” He concluded by praising *The Federalist*, which he noted that his students had recently read. “Those papers have been, with great propriety, made a manual for our youth, and I have only to express a hope that their wise and wholesome councils have made a due impression upon your hearts, and that that impression may be as indelible as it is salutary.” Henry thought that the best way to preserve the union would be “to imbue the minds of those who are at some future day to be the legislators of the land, and the leaders of the democracy, with a just sense of

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<sup>50</sup> Ibid., 201-203.



the dangers to which our institutions are exposed, and the weighty duties which will devolve upon them for their prevention.”<sup>51</sup>

## VI.

Beverley’s position on the issue of sectionalism caused him to disagree with Henry. Both brothers imbibed the principles of constitutional orthodoxy from their father, and they largely agreed on fundamental principles. For instance, Beverley believed that his brother had done of good job of presenting the federal character of the United States government. “If I were now to resume the pen I should begin where he left off.” They disagreed, however, on the merits of secession. Beverley complained that his brother’s “passion for the Union was almost monomaniacal.”<sup>52</sup>

Henry argued that only the overly ambitious wanted secession, but Beverley insisted on exactly the opposite. By the early 1850s, Beverley had grown convinced that most southern politicians thought their continued importance depended upon the South staying in the Union. The very ambition of these politicians kept them from doing the right thing for their home states. He thought that the Unionist sentiment so revered by his brother had degenerated into so much buncombe; it had become a mere applause line that no one really believed in anymore. Southern politicians were “much in earnest in their stereotyped declamation about this great glorious and happy union, and because there is a certain amount of stereotyped applause always ready to greet such displays of hackneyed eloquence, they persuade themselves that the people are as much in earnest as they are.”<sup>53</sup>

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<sup>51</sup> Ibid., 203, 205-206, 224.

<sup>52</sup> NBT to JHH, 29 May. 1849, NBT Correspondence typescript, DU.

<sup>53</sup> NBT to JHH, 18 Apr. 1851, NBT Correspondence typescript, DU.

Much of Beverley's drive for secession came from his powerful instinctive grasp of what Carl Schmitt, a twentieth-century philosopher, called the friend/enemy distinction in politics. Schmitt stated that an enemy only exists "when, at least potentially, one fighting collectivity of people confronts a similar collectivity." In such a conflict the enemy "intends to negate his opponent's way of life and therefore must be repulsed or fought in order to preserve one's own form of existence." Schmitt believed that a just war could only be fought when a people face an "existential threat" from a "real enemy." Beverley wished the South to break free from the Union. He did not see the United States as a real country, but as "a mere creature of convention...." Only outside of the Union would the southern states be free to "regard as enemies those who hate us and whom we hate." Beverley had reached what Schmitt would call one of the "high points of politics," that moment "in which the enemy is, in concrete clarity, recognized as the enemy."<sup>54</sup>

Beverley believed the people of the North to be the sworn enemies of the people of the South. He therefore espoused a hatred of Yankees that his biographer aptly described as "antisemitism without Jewry." Beverley argued that northerners combined specious piety with materialism. He stated that he could have "no fellowship with him who worships mammon, and least of all, when he pretends to combine that worship with the worship of God. Spiritual pride and purse pride both disgust me: the combination of the two is intolerable." The Virginian referred to the people living between the Ohio and Mississippi rivers as "vile mercenary rabble." He compared the manners of northerners to those of a "badly-trained dog, who comes to you with his tail tucked, and his ears back to neck, and is no sooner relieved of his fear of being kicked, then he paws you with his dirty foot." Beverley thought that Southerners had a better

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<sup>54</sup> Carl Schmitt, *The Concept of the Political* (1932; Chicago: University of Chicago Press, 1996), 27-28, 51, 67; NBT to JHH, 17 Feb. 1836, NBT Correspondence typescript, DU.

understanding of what it meant to be a gentleman. According to his definition, a gentleman “bears himself equally toward equals, deferentially toward superiors, and mildly toward inferiors....”<sup>55</sup>

Beverley sensed that a new form of what we today call multiculturalism was on the rise in the North, and he did not approve of this development. Yet Beverley noted that he did not wish to introduce slavery to Ohio either. “No, sir. I would not so wrong the Negro.” Beverley saw Ohio as a bastion of multiculturalism, and therefore incapable of producing a gentleman. Black people were, according to Beverley, superior to Ohio’s agglomeration of immigrants. He believed that northerners were “sensible of the negro’s superiority, and they are jealous of it.” He stated that northerners “steal our slaves from us, and when they have made them what they call free, they harass them, they persecute them, they combine to shut them out from all credible or profitable employment....” Ohio, with her factories, had the elements of civilization, but she lacked “the refinements and courtesies of life” that made civilization worthy of the name. The Southerner, according to Beverley, made his slaves into gentlemen. “The man of Ohio has nobody below him but his *hog*.” And Beverley did not believe that a hog could ever be made into a gentleman. After traveling to Ohio, Beverley was shocked to hear more German spoken than English. Ohio was, said Beverley, a “cesspool.”<sup>56</sup>

In the years after the death of his father in 1826, and then his brother in 1848, Beverley Tucker saw it as his duty to carry forth teaching the proper understanding of the Constitution. Unfortunately, he became so preoccupied with secession, that he spent more time preaching that

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<sup>55</sup> Robert Brugger, *Beverley Tucker: Heart Over Head in the Old South* (Baltimore: John Hopkins University Press, 1978), 78; NBT to JHH, 12 June 1848, 12 July 1849, 2 Feb. 1850, NBT Correspondence typescript, DU.

<sup>56</sup> NBT, *Prescience: Speech Delivered by Hon. Beverley Tucker of Virginia, In the Southern Convention, Held At Nashville, Tenn., April 19<sup>th</sup> 1850* (Richmond: West & Johnston, 1862), 26-28.

doctrine than he did interpreting the Constitution. Indeed, he even came to believe that disingenuous representatives at the Philadelphia Convention had corrupted the document. The consolidationists wanted to declare the United States a nation but they were voted down “and the words nation and national [were] everywhere stricken out of the draught of the Constitution.” The consolidationists did not, however, allow this defeat to destroy their dream. They acquired a majority in the first Congress and “made a mystery of the journal of the convention,” and thereby managed to hide their defeat “until they had given all the authority of contemporaneous exposition to their centralizing constructions.” Beverley believed that “[w]ords are things; and had the testimony of the journal of the convention been the other way, it would have been published.”<sup>57</sup>

Beverley wanted a public venue from which he could spread his message of secession. He believed that he needed an audience equivalent to that available to a senator of the United States. In 1850, he finally won such an opportunity, when the General Assembly of Virginia choose to him attend a convention of the Southern states in Nashville, Tennessee. Beverley knew that the great mass of the people were not yet ready for secession. He therefore argued that the convention should merely propose amendments that they knew the North would never adopt as a means of stalling and covering over their true intentions. He proposed two such amendments: one requiring a two-thirds majority in both houses of Congress in order to change trade laws, and another explicitly stating the right of a state to secede. He hoped that the South could thereby keep the issues alive until the next presidential election, at which time the South could sabotage the election in such a manner as to leave the Union without a chief executive.

In private letters to friends, Beverley had long advocated this passive-aggressive

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<sup>57</sup> NBT to JHH, 13 Mar. 1850, NBT Correspondence typescript, DU.

approach to disunion. “Look at the Constitution and you will see what no one has ever remarked upon, that the absence of all the Representatives and Senators from ten states will make an election impossible.” If the date for the inauguration of a president passed without a president actually being inaugurated, the government would, according to Beverley, cease to exist. He noted that this part of the Constitution demonstrated the supremacy of the state governments over the federal government. This confirmation of theory with practice would mark an auspicious beginning for a new southern union: “There will be no commander-in-chief to send his navy to blockade the port of Charleston, and no means by which the power of the Union can be brought to bear on the dissenting States. In any controversy that can arise it will be state against state, not a state against the federal government.” Beverley thought that southerners would do well to keep this plan to themselves until the time came to move for independence.<sup>58</sup>

In his speech before the Nashville Convention, Beverley stated that no one should fear secession and that separation could be brought about without a fight. He did not think well of those men “who would rather not know their rights,” for fear that they would “be obliged to defend them at all hazards and to the last extremity.” Using a metaphor, Beverley compared the Union to a patient with a gangrened limb. The patient was not yet willing to amputate, but he was not in any mood to die either. Beverley knew that “when put to choose between the loss of a limb and the loss of life,” the patient would choose to lose the limb. The Virginian then drew the moral: “So let the people of the South once see distinctly they must choose between the Union, and all the rights and interests that the Union was intended to protect, and they will not hesitate

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<sup>58</sup> NBT to JHH, 13 Oct. 1847, NBT Correspondence typescript, DU. Beverley’s claim that no one else had noticed this loophole was not true. As demonstrated in Chapter 2, St. George Tucker had emphasized this fact in one of his lectures. SGT, “View of the Constitution of the United States,” in Clyde N. Wilson, ed., *View of The Constitution of the United States: With Selected Writings* (Indianapolis: Liberty Fund, 1999), 257.

to renounce it, even though a bloody war should be the consequence.” With that said, however, in the next breath Beverley argued that secession could be brought about in a peaceful manner. Daniel Webster, a senator from Massachusetts, had asserted that a peaceful separation would be impossible. According to Beverley, Webster “has no right to speak for the South. We are not his clients.” Webster had only a right to speak for Massachusetts. Beverley countered that a Southern Confederacy would have no good reason to make war upon the North. “Sir, no man among us dream of such a thing —no northern man apprehends it.” Therefore, he interpreted Webster’s words as “words of menace.”<sup>59</sup>

Like his brother, Beverley posited George Washington as the model southern politician. Beverley called upon his listeners to bring forth again statesmanship on such a model. He believed that secession could best effect such a goal. The last time the South made a bid for independence, her great leaders were still obscure men: “Washington was a surveyor, Patrick Henry an obscure county court lawyer, Green was at his forge....” Beverley hoped that “even now, in the depths of your forests, are other such men, wanting nothing but a righteous cause, and brave men resolute to support it, to secure independence and freedom to you, and immediate honor to themselves.” In a rare use of understatement, he noted that the “genius of Jefferson, the virtue of Madison, the strong will of Jackson, served the times pretty well.” Unfortunately, many other Virginia politicians had been false idols. Beverley wanted his fellow southerners to turn towards the true God: “seek for men distinguished by private virtue as well as talent—men worthy to minister between God and you, in the great concerns of duty as well as right.”<sup>60</sup>

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<sup>59</sup> NBT, *Prescience*, 7-8, 10-11.

<sup>60</sup> *Ibid.*, 15-17.

Beverley asked his listeners to imagine a situation in which only five states —namely Florida, Georgia, South Carolina, Alabama and Mississippi— had left the Union. He believed that these states would have peaceful intentions in doing so, and that it would be foolish for the North to stand in their way, for if they did, the job of carrying their cotton to Europe would fall to some European power. Furthermore, were the North to intercede against the South, she would lose the flow of cotton into her own mills. Like his friend senator James Henry Hammond of South Carolina, Beverley seemed quite certain that the North would never dare to act against King Cotton. If the North tried to subjugate the South with a war of desolation, “such a war would re-act upon the North like the bursting of a cannon in a crowded ship, working ten times more mischief there than on the enemy.” Beverley did not think that Northern plutocrats could trust that the laboring classes would remain loyal to a system that exploited them. He compared the voluntary southern restriction of her cotton crop to the Dutch trick of flooding the country to keep it from falling to invaders. Beverley thought that the South could give up growing cotton and plant only wheat without too much domestic suffering, but that the industrial nations of the world would never be able to accommodate the change. “Sir, the pillars of the earth would be shaken; and here stands the South grasping them in her strong arms.”<sup>61</sup>

Beverley did not believe that the upper South would ever participate in a military attack on the lower South. If a military conflict did erupt, and the struggle took an extended amount of time to finish, Virginia would, he believed, be willing to leave the Union that she had done so much to help create. Virginia had not sided with South Carolina in 1832 and 1833, but she never would have let northern forces move across her soil to put down nullification. Even if the matter never came to war, “how long would those states be content to remain under the grinding

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<sup>61</sup> Ibid., 19-20.

misgovernment which taxes them for the benefit of their masters in the North, while witnessing the prosperity of their Southern brethren living under a revenue tariff and enjoying the blessings of free trade.” According to Beverley, the South, left to its own devices, would adhere to a policy of “free trade.” He believed that such a policy would hold out a great incentive to the border states. He even went so far as to claim that Pennsylvania might join the southern confederacy. After all, the tariffs did more to help New England than they did to help her. In addition, he hoped that the Mississippi might tie Illinois to the future of the Confederacy.<sup>62</sup>

According to Beverley, the North had stolen “seven hundred millions” from the South with the operations of the national tariff system. This wealth had been invested in shipping and factories, and in speculation on “barren lands at high prices....” Without cotton to drive the factories, the ships would have nothing to deliver. Beverley painted a gloomy scene: “The ships lie rotting at the wharves; the factories tumbled into ruins; and skulking in corners of their marble palaces, the merchant princes, like those of Venice, live meagerly on contributions levied on the curiosity of travelers.” He predicted that these regions would succumb to the doctrines of “communism,” but that the change would be ineffectual for “communism is of little worth where there is nothing to divide, and that what they call the rights of labor cannot be enforced against those who have nothing to pay.” He reiterated that Bostonians should look to the history of Venice — “a wilderness of marble in a waste of waters”— before being so bold as to attack the South. Beverley believed that England could, in theory, be self-sufficient, but that without cotton her entire social structure would fall apart. “The play of the shuttle is the pulse of life to her.” The rest of Europe faced a similar situation. Material forces demanded that no one make war upon the South: “the immense fixed capital invested in manufacturing establishments, and the

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<sup>62</sup> Ibid., 24.



multitudinous population whose bread depends on them, compel the world to peace.” Europe, according to Beverley’s prediction, would force the North to make peace with the South.<sup>63</sup>

The very word “Union,” according to Beverley, could cast a magic spell on most southerners. “In the South, attachment to the Union is a matter of sentiment. In the North it is an affair of calculation.” Beverley argued that if the Union had asked as much of the North as it did of the South, the North would have backed out the agreement by 1800. He described the Union as a friendship between a southern giant and a northern dwarf, in which the former did all the work and the latter accrued all the benefit. “In our case it is the Giant that has been maimed and crippled, and the dwarf, taking advantage of his helpless condition, has cheated him of the purchase of his prowess and his blood.” To help make this case, Beverley described the battles with Mexico that the United States had won with Southern blood. The northern dwarf told the Southern giant that he could have the scraps, if he stayed, but that if he left he would be thrown into the fire.<sup>64</sup>

Beverley believed that Virginia would sacrifice much to a just cause, but that she had grown impatient with Yankee demands. He clarified this warning by stating that he and the fellow members of the delegation did not speak for Virginia, but only of her. Indeed, Beverley believed that in his own case, he spoke only for himself. But “Virginia will never disavow those who pledge her honor in defense of honor.” Beverley believed it to be his mission to assure that Virginia acquired either “[e]quality or independence.” He insisted that Virginia would have either one or the other of these features. He asserted: “if I can be at all instrumental to such an achievement, I shall not have lived in vain.” And even if Virginia had lost the “just principles

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<sup>63</sup> Ibid., 20-22.

<sup>64</sup> Ibid., 36-37.

and elevated sentiments” that made her great, Beverley was still prepared to go home to her bosom to die.<sup>65</sup>

In the end, both Henry and Beverley would prove themselves to be poor prophets. Henry’s hope that the United States Constitution would prevent a purely sectional party from putting a man in the White House proved entirely too optimistic. Beverley’s hope that Britain would recognize the Confederacy proved similarly illusory. But no one ever claimed that constitutional orthodoxy could predict the future. Both Henry and Beverley did an excellent job of teaching constitutional orthodoxy to a new generation of college students, and by so doing they carried on the legacy of their father. Had they lived to see it, one can be sure that the Tucker brothers would have been extremely disappointed at the bloody and destructive way in which the conflict between North and South eventually resolved itself. Neither of them, however, would even live to see secession: Henry died in 1848 and Beverley in 1851. The task of seeing Virginia through those terrible years would fall to the next generation, and that generation would contain other prominent members of the Tucker family.

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<sup>65</sup> Ibid., 38.

## Chapter Five: Slavery and A “New System of Political Science”

### I.

Many historians have noticed the reverence with which southerners held the culture of the ancient world. Fewer historians, however, have noted the ways in which this reverence changed over time.<sup>1</sup> The preceding chapters have demonstrated the changes in political thought between the generation of St. George Tucker and the generation of his children. But the sharpness of this change is even more evident in the contrast between the two leading political figures of these respective generations: Thomas Jefferson and John C. Calhoun. Jefferson, a member of St. George Tucker’s generation, argued, in the words of the Declaration of Independence, that “all men are created equal,” and that people thereby possess rights that cannot be taken away from them. Jefferson counted life, liberty, and the pursuit of happiness among these rights. Calhoun, a member of Henry and Beverley Tucker’s generation, disagreed with this theory. He expressed his rebuttal succinctly: “All men are not created. According to the Bible, only two, a man and a woman, ever were, and of these one was pronounced subordinate to the other. All others have come into the world by being born, and in no sense...either free or equal.”<sup>2</sup>

Finding the first premise of natural rights absurd, Calhoun moved to establish humankind’s real state of nature. Distinguishing among three states—a state of individuality, a state of society, and a state “under government”—the South Carolinian argued that the first of these cannot be the state of nature since it is “so opposed to the constitution of man as to be inconsistent with the existence of his race and the development of the high faculties, mental and

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<sup>1</sup> Some exceptions include: Harvey Wish, “Aristotle, Plato, and the Mason Dixon Line,” *Journal of the History of Ideas* X (1949): 254-266; and Susan Ford Wiltshire, “Jefferson, Calhoun and the Slavery Debate: The Classics and the Two Minds of the South,” *Southern Humanities Review* XI (1977): 33-40.

<sup>2</sup> John C. Calhoun, “Speech on the Oregon Bill,” 27 June 1848, in Ross M. Lence, ed., *Union and Liberty: The Political Philosophy of John C. Calhoun* (Indianapolis: Liberty Fund, 1992), 541-572.

moral, with which he is endowed by his creator.” He found the second of these states incapable of being a state of nature, since “society can no more exist without government, in one form or another, than man without society.” Calhoun concluded that the political state alone is attuned to man’s nature. “It is the one [state] for which his creator formed him, into which he is impelled irresistibly, and in which only his race can exist and all its faculties be fully developed.”<sup>3</sup>

According to this interpretation, God made humans such that they required government, and therefore any form of government would be better than anarchy. Calhoun might have well have said, quoting Aristotle, that man must be either a beast or a God if he wishes to live outside the city.<sup>4</sup>

Thomas Jefferson, like many highly educated men of his day, possessed a fair degree of familiarity with the ancient writers, but he did not take these writers seriously. For instance, in 1814, Jefferson decided to read Plato’s *Republic*. He described the endeavor as “the heaviest task-work I ever went through.” He did not think the end had been worth the effort. “While wading thro’ the whimsies, the puerilities, and unintelligible jargon of this work, I laid it down often to ask myself how it could have been that the world should have so long consented to give reputation to such nonsense as this?” Jefferson hoped that colleges and universities would abandon the study of Plato in favor of schools where “every branch of science, useful at this day, may be taught in its highest degrees.”<sup>5</sup> Jefferson did not think much of Aristotle either. When

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<sup>3</sup> Ibid., 567-568.

<sup>4</sup> “One who is incapable of participating or who is in need of nothing through being self-sufficient is not part of a city, and so is either a beast or a god.” Aristotle, *The Politics*, translated with an introduction, notes and glossary by Carnes Lord (Chicago: University of Chicago Press, 1984), I.2.1253a25-30.

<sup>5</sup> TJ to John Adams, 5 July 14, *The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams*, ed. Lester J. Cappon (Chapel Hill: University of North Carolina Press, 1987), 432.

asked what translation of Aristotle's *Politics* he thought the best, Jefferson responded that the matter was of no great importance, because "the style of society" differed so greatly between the ancients and the moderns that "little edification can be obtained from their writings on the subject of government." Jefferson argued that the "new principle of representative democracy" had "rendered useless almost everything written before on the structure of government...." He therefore thought it a matter of little importance "if the political writings of Aristotle, or of any other ancient, have been lost or are unfaithfully rendered or explained to us."<sup>6</sup>

In the years after Jefferson's death, the South underwent a transformation in political thought, characterized by a critique of the idea of modern natural rights, and a restoration of either the biblical theory of moral right or of classic natural right. Calhoun's remarks on Aristotle demonstrate this change. Responding to an inquiry made by a young man seeking the proper reading material for a better understanding of politics, Calhoun replied: "I would advise a young man with your views to make himself thoroughly acquainted with the history of the five states of antiquity and the history of England and our country, and to read the best elementary treatises on Government, including Aristotle's, which I regard, as among the best."<sup>7</sup>

Clearly, between the generation of St. George Tucker and his children some changes in favor of an older understanding of natural right had occurred. But most thinkers of this second generation did not understand as clearly as Calhoun the meaning and significance of these changes. Not until the third generation reached maturity, did the conventional wisdom on political questions become more Calhounian than Jeffersonian. Circumstances moved the young

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<sup>6</sup> TJ to Isaac H. Tiffany, 26 August 1816, in Andrew A. Lipscomb and Albert Ellery Bergh eds., *The Writings of Thomas Jefferson* (20 vols., Washington, D.C.: Thomas Jefferson Memorial Association, 1904), VII: 65-66.

<sup>7</sup> John C. Calhoun to A. D. Wallace, 17 December 1840, in Clyde N. Wilson ed., *The Essential Calhoun: Selections from Writings, Speeches, and Letters* (New Brunswick: Transaction Publishers, 1992), 423.

men of this generation, even those who began as Jeffersonians, toward a critique of the modern idea of rights, and in the direction of a self-consciously conservative appropriation of older ideas on this subject.

## II.

One of these men would be Albert Taylor Bledsoe. Descended from Virginia Baptists who had moved to Kentucky at the beginning of the nineteenth century, Bledsoe was born in Frankfort, the new state capital, in 1809. Bledsoe's parents owned a handful of slaves whom they referred to as "servants." When Bledsoe entered West Point in 1825, his parents moved to Illinois. In 1827, a wave of religious sentiment swept through the cadets at West Point, and Bledsoe, responding to the trend, made a public confession of faith. The young Kentuckian had taken the opportunity to study at West Point without really considering if he wanted to be a career officer. He discovered soon after graduation that life in the peacetime army did not suit him. After several years of service in Indian Territory, Bledsoe resigned from the army and moved to Kenyon College in Ohio where he taught mathematics and studied theology. Graduating in 1835, he married and soon thereafter received the Deacon's Order in the Episcopal Church. Deciding not to take on the life of a minister, Bledsoe instead accepted a job at Miami University in Ohio. Before long he had a professorship in mathematics, and became close friends with William Holmes McGuffey of "McGuffey's Reader" fame. The two would also work together later at the University of Virginia.<sup>8</sup>

Bledsoe's conservative beliefs on the question of student discipline caused him problems at Miami University, where he became involved in a controversy with the president of the University over this issue. Bledsoe favored strict and traditional discipline, while the president

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<sup>8</sup> Willard Murrell Hays, "Polemics and Philosophy: A Biography of Albert Taylor Bledsoe," (Ph. D. diss., University of Tennessee), 17-22.

adhered to more liberal ideas. The president's views held sway and as a result, students often got into fights, sometimes even fights involving whips or firearms. Bledsoe found this situation intolerable and called for the removal of the president. When his effort failed, Bledsoe resigned and moved to Springfield, Illinois, to practice law.<sup>9</sup>

Springfield had recently become the capital of Illinois, and this change in status attracted many young lawyers to the town; the most notable, of course, being Abraham Lincoln. Bledsoe and his family lived at the Globe Tavern in Springfield, the same establishment where Lincoln and his family lived. In 1840, Bledsoe watched as Lincoln destroyed Bledsoe's law partner in a political speech. The attack reduced the man to tears. Soon thereafter, Bledsoe ditched this partner in favor of Edward Dickinson Baker, who would eventually become a senator from the State of Oregon and then die fighting for the Union during the Civil War. Bledsoe had little regard for William H. Herndon, Lincoln's longtime partner, whom he regarded as a "little man" incapable of understanding Abraham Lincoln's greatness.<sup>10</sup>

Lincoln and Bledsoe were both members of the Illinois Whig party. In 1843 they combined with another local Whig, Stephen Logan, and drafted a statement of Whig principles that called for the adoption of a convention system. Bledsoe also became involved with a pro-Whig newspaper, the *Sangamo Journal*, for which he wrote editorials and did some editing. He remained critical of slavery and state sovereignty during his Illinois years, but in his editorial columns he developed an analysis of the history of political thought that he would later turn to use in his proslavery writings and his post-war defenses of secession. Bledsoe would look back at his years in Illinois with nostalgia, but in 1848 he proved himself willing to leave the North.

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<sup>9</sup> Ibid., 109-130.

<sup>10</sup> Ibid., 130-137; Much of what we know about Bledsoe's relationship with Lincoln comes from Bledsoe's post-war review essay "Lamon's Life of Lincoln," *Southern Review* XII (1873): 328-368.

He accepted a job as professor of mathematics at the newly-formed University of Mississippi and began to rediscover his southern roots.

By 1856, Bledsoe had completed the process, for in that year that he published *An Essay on Liberty and Slavery*. In 1860, this book would earn a place in a classic collection of proslavery works entitled *Cotton is King and Pro-Slavery Arguments*.<sup>11</sup> Ironically, the work says little about the actual institution of slavery. Instead, it offers a critique of the anti-slavery arguments made by abolitionists. Bledsoe focused on a variety of fallacies in abolitionist reasoning, but he commenced the book with an assault on the idea of modern natural rights. Regretting that liberty generally served as “a theme for passionate declamation, rather than of severe analysis or of protracted and patient investigation,” Bledsoe feared that the word had come to serve merely as a “a vague and ill-defined something which all men are required to worship, but which no man is bound to understand.” He thought that the world would be better off if only those people “who had taken the pains to understand it” would speak about it, but he knew that too many men “believed that they could understand liberty merely by instinct.” Bledsoe had little regard for instinct, finding it “a blind guide” and a false oracle.<sup>12</sup>

In his book Bledsoe undertook a search for the origins of the conventional wisdom regarding civil liberty, and he found it in the political thought of William Blackstone and John Locke. These Englishmen established the idea that “civil liberty” consists in “a certain portion of our natural liberty, which has been carved therefrom, and secured to us by the protection of the laws.” Quoting from their writings, Bledsoe demonstrated that these philosophers regarded

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<sup>11</sup> ATB, *An Essay on Liberty and Slavery* (1856; repr., New York: Books for Libraries Press, 1971), 10-11; Elliott, E. N. Elliott, ed., *Cotton is King and Pro-Slavery Arguments: Comprising the Writings of Hammond, Harper, Christy, Stringfellow, Hodge, Bledsoe and Cartwright, on this Important Subject*. Augusta: Pritchard, Abbott and Loomis, 1860.

<sup>12</sup> ATB, *An Essay on Liberty and Slavery*, 10-11.



natural liberty as a state of perfect freedom for man, albeit one hedged in by the “laws of nature.” Detecting an inconsistency, Bledsoe noted that Blackstone and Locke referred to natural liberty as both as something highly exalted, a “gift of God to man,” as well as something “wild and savage” that men should give up in favor of civil liberty.<sup>13</sup>

Tracing this error to its source, Bledsoe found it in the philosophy of Thomas Hobbes. According to Hobbes, an individual in the state of nature “may set up a right to all things, and consequently to the same things.” In Hobbesian terms, “there is no law” in the state of nature “except that of force.” Wanting to foist “despotic power” upon man, Hobbes delighted in scaring his readers with the “wild and ferocious liberty” of the state of nature. According to Bledsoe, the “atheistical philosophy of Hobbes” had no place for a divinely given law of nature. The professor found it deplorable that Blackstone, as a “Christian jurist,” should forget “the great central light of his own system” and make an appeal to the Hobbesian “abyss of darkness.” Hoping to restore a correct understanding of the law of nature, Bledsoe argued that no man can possess a natural right to do wrong, and that, therefore, the law that forbids man from doing wrong does not thereby “diminish the natural liberty of mankind.” Bledsoe did not think that one should place “the evil passions of men” among their rights and liberties. According to him, government implied restriction not of man’s natural liberty, but of his natural tyranny: good government recognizes man’s “natural rights, and secures his freedom, by protecting the weak against the injustice and oppression of the strong.”<sup>14</sup>

Bledsoe believed that Hobbes had caused generations of Englishmen to identify their will with the will of God. “If there be no God, if there be no difference between right and wrong,

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<sup>13</sup> Ibid., 13-15.

<sup>14</sup> Ibid., 15-17.

if there be no moral law in the universe, then indeed would men possess a natural right to do mischief or to act as they please.” If the divine law did not exist, then there would be no law in the state of nature, and individual liberty would enable one to do whatever one had the power to do. “Right would give place to might, and the least restraint, even from the best laws, would impair our natural freedom.” Bledsoe posited instead the following maxim: “No good law ever limits or abridges the natural liberty of mankind.” To develop this thesis, Bledsoe began with the right to defend oneself. This right existed both in the so-called state of nature and in civil society. But what of the right to punish a transgressor? According to the divine law, that right belonged not to the individual, nor to society, but to God alone. Thus it could not be said that the right to punish was transferred from the individual to society, since the individual never had that right in the first place. Society received the right to punish a transgressor from its natural duty to prevent the strong from oppressing the weak. The individual should never punish the person who transgressed against him, for that would be to serve as a judge in one’s own case. Building from an erroneous state of nature, wherein man is said to have the right to punish transgressors, the “imagination of theorists” had produced a false God; a deity called upon by those who wished to subvert “institutions and laws which have received the sanction of both God and man.”<sup>15</sup>

Rights, argued Bledsoe, came from God, and the state protected human liberty. “Civil society does not abridge our natural rights, but secures and protects them.” If the state of nature of the political philosophers could be found to exist, it would be one in which men had rights but possessed no liberty. It would be a “reign of terror” not a “reign of liberty.” Thus “the state of nature, as it is called, would be one of the most unnatural states in the world.” Human reason can conceive of the state of nature, “but if it should actually exist, it would be a war with the law of

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<sup>15</sup> Ibid., 17-19, 20-22, 27.

nature itself.” According to Bledsoe, man, by nature, is social, for “God himself has ...laid the foundation of civil society deep in the nature of man.” Thus societies are not “accidental or artificial”; they are the outgrowth of a “decree of God; the spontaneous and irresistible working of that nature, which, in all climates, through all ages, and under all circumstances, manifests itself in social organizations.”<sup>16</sup>

Bledsoe understood that the rejection of the so-called state of nature would entail a reconsideration of the idea of inalienable rights. Such rights could be either rights which “the possessor...cannot alienate or transfer” or rights which “society has not the power to take from him.” Bledsoe argued that the power and authority of society do not derive from the individual’s transfer of his rights, instead society fulfills and protects those rights. Thus, an inalienable right must be “one of which society itself cannot, without doing wrong, deprive the individual...” Bledsoe stated that society did not have the right to deprive a person of life or liberty without “*good and sufficient cause or reason.*” For instance, if the state were to imprison or execute a murderer, it would do so not because it wanted to cause the criminal pain “but simply to protect the members of society, and *secure the general good.*” A society can, with justice, take away both an individual’s liberty and his right to liberty, if doing so served the general good. Bledsoe’s axiom “that no unjust law can ever promote the public good” seems overly optimistic, but he based it upon the notion that an inalienable right to life and liberty implies an inalienable duty to protect the life and liberty of others, by fostering a society that protects the general good. In summary, “public order and private liberty .... are not antagonistic, but co-ordinate principles.”

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<sup>16</sup> Ibid. 29-34.

Private liberty cannot exist without public order, and since liberty is not license, order cannot be despotism.<sup>17</sup>

### III.

The publication of Bledsoe's work coincided with, and may well have contributed to, his getting the job as professor of mathematics at the University of Virginia. There he was able to work again with a former colleague from the University of Mississippi, George Frederick Holmes. Born in British Guiana in 1820, Holmes had grown up in England before moving to the South as a young man. In the early 1840s he settled in Orangeburg, South Carolina, where he attempted to make a living as a lawyer. His law practice never flourished, but he embraced southern attitudes about slavery and became increasingly interested in philosophical issues. In 1845, he married Eliza Lavalette Floyd, the daughter of a former governor of Virginia. To support his new wife, Holmes lobbied for the job of professor of Greek at South Carolina College, but ended up teaching the ancient languages at Richmond College in Virginia. Unimpressed with the facilities available at this small Baptist institution, Holmes eagerly accepted an academic chair at the College of William and Mary in 1848.<sup>18</sup>

Holmes's excitement did not last long. The college had been struggling for some time. It had begun to seek public funding in 1836, but despite connections with numerous public men in high offices, the college did not succeed. Thomas Dew had managed to keep the school operating despite inadequate funding, but with his untimely death in 1846, tensions broke out among the remaining faculty. The public of Williamsburg also voiced complaints about the number of foreign-born professors at the college. After less than a year at William and Mary,

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<sup>17</sup> Ibid., 35-41.

<sup>18</sup> Neal C. Gillespie, *The Collapse of Orthodoxy: The Intellectual Ordeal of George Frederick Holmes* (Charlottesville: University Press of Virginia, 1972), 4-23.

Holmes realized that he had stepped into an unworkable situation. In 1849, he resigned and assumed the presidency of the newly-founded University of Mississippi. He had an equally difficult time there. The campus had few resources at that time, and Holmes faced the usual difficulties with student discipline. When he took a leave of absence to return to Virginia in order to recover from health problems, the trustees of the university took the opportunity to depose of him as president. Holmes fought, unsuccessfully, to be re-instated. During the first three years of his academic career, Holmes, in the word of his biographer, “crowded more frustration and disappointment than many experience in a lifetime.” He moved into his wife’s family home in Virginia where he spent the next nine years doing little but studying philosophy and writing articles, before finally winning a professorship in History and General Literature at the University of Virginia in 1857.<sup>19</sup>

By the time of his appointment, Holmes had transformed himself into one of the leading Aristotelians in the South. “The more I study Aristotle,” he wrote, “the less necessity do I discover for any other philosophy than modernized and Christianized Peripateticism. Aristotle is still, as in the thirteenth century, *‘il maestro di che chi sanno.’*”<sup>20</sup> Holmes’s reading of Aristotle profoundly shaped his view of the slavery question. Like the ancient philosopher, Holmes believed slavery a fundamental problem of political thought. He placed the question of slavery at the center of political philosophy, for “[t]he question of labor... lies at the basis of all political

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<sup>19</sup> Ibid., 34-39; Ludwell H. Johnston, et. al., *The College of William and Mary: A History* (2 vols., Williamsburg: King and Queen Press, 1993), I: 263-273.

<sup>20</sup> GFH to J. H. Thornwell, 16 Sept 1856, in B. M. Palmer, ed., *The Life and Letters of James Henley Thornwell, D. D., LL. D.* (Richmond: Whittet and Shepperson, 1875), 399-400. The Italian phrase is slight misquotation from Canto IV of Dante’s *Inferno*. The full sentence reads “*Poi ch’innalzai un poco più le cigalia, vidi ‘l maestro di color che sanno seder tra filosofica famiglia.*” A recent translator has rendered this passage as: “I raised my eyes a little, and there was he who is acknowledged master of those who know, sitting in a philosophic family.” Dante Alighieri, *The Inferno*, trans. Robert Pinsky, (New York: Farrar, Straus, Giroux, 1994), 33.

and social speculation.” The professor had long doubted “whether the time had yet arrived when a fair and candid hearing could be expected for the sedate and cool language of philosophy,” but he predicted that such a time might finally occur as a reaction to “the mania against slavery produced by Uncle Tom’s Cabin.”<sup>21</sup>

Holmes mourned the divisiveness of the sectional debate on slavery, but he praised the philosophically rich results of the debate. The controversy made possible “the creation of a genuine southern literature—in itself, an inestimable gain to our people.” In Holmes’s mind, the jewel in the crown of this southern literature would be what he called “a new system of political science.” He thought that the old system had too many fallacies that served the abolitionists. Placing the distinction between natural liberty and civil liberty chief among these fallacies, Holmes attacked the idea of natural liberty, arguing that it led “by a necessary deduction to the state of nature advocated by Rousseau and to all the orgies, the frenzy and the tyranny which sprung from the principles of the Genevan sophist.” Holmes believed that morals exist in all times and places, and that civil society did not take away natural rights. Instead, he argued, society secured and protected morals and freedom. Holmes’s “new system of political science” owed a great deal to the political teachings of Aristotle.<sup>22</sup>

Some might argue that Holmes and others who thought like him were not rediscovering the ancients so much as recreating them. At the center of this dispute rests the question of slavery. Although the subject remains controversial, the existence of slavery did not seem to present too great of a challenge to the ancient conception of human nature. The ancients always

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<sup>21</sup> GFH, “Fitzhugh’s *Sociology for the South*,” *Quarterly Review of the Methodist Episcopal Church South* IX (1855): 180-201, (quotations p. 180-181); “Bledsoe on Liberty and Slavery,” *De Bow’s Review* XXI (1856): 132-147; Gillespie, *The Collapse of Orthodoxy*, 89-90, 102.

<sup>22</sup> GFH, “Bledsoe on Liberty and Slavery,” 138-140.

remained reasonably hospitable to slavery. To understand their attitude on this question it is necessary to step back from the idea of individual rights and liberties that are a defining mark of life in the modern western nations. In most civilizations in world history, slavery represented not the antithesis of individual liberty, but its close cousin. As sociologist Orlando Patterson explains, “there was no word for freedom in most non-Western languages before contact with Western peoples.” Most traditional societies demonstrate a fear of life outside of the community bond, a fear of life without a master. In the West African societies that Patterson discusses, to be masterless was to be confronted with a death sentence. For in traditional societies, the opposite of slavery is not freedom, but “countervailing power”; therefore, people are more likely to seek to “become embedded in a network of protective power,” than they are to seek individualistic freedom. Ironically, in most civilizations in history individualistic freedom is “the surest path to slavery.”<sup>23</sup>

Although modern scholars frequently think of the ancient Greeks as the inventors of democracy and as being, at their best, very similar to modern democrats, the ancients generally conceived the idea of freedom the same way people in traditional societies have always conceived it. For instance, the Greek writer Xenophon wrote a dialogue describing a debate between Socrates and Aristippus on this question. Aristippus argued that just as he would not wish to be a slave, so would he not want to be a master. Socrates replied that no middle ground can exist between these two states. Unconvinced, Aristippus reiterated that he did not want to be a master or a slave, asserting that he would go about the world as a stranger to other men. Unsatisfied with this argument, Socrates pointed out that a stranger is always an easy target, and

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<sup>23</sup> Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge: Harvard University Press, 1982), 27-28.

that those who strive to escape from social bonds in a quest for personal freedom are likely to end up as slaves.<sup>24</sup> Socrates's students would carry forth similar views in their latter teachings.

Plato became the most famous of Socrates's disciples. In his greatest dialogue, entitled *The Republic*, Plato had Socrates posit a cyclical pattern of decline for all regimes. Socrates persuaded his interlocutors that aristocratic regimes become timocracies, timocracies become oligarchies, oligarchies become democracies, and democracies become tyrannies. He described these regimes in terms of an anthropological principle, in which the characteristics of the regime are the characteristics of the type of person that predominates in that regime: the polis is the man writ large. Considered in terms of Socrates's declension model, a certain type of man would be dominant in each regime respectively. One way to gauge the character of these men would be to consider how they treated their slaves. Passing over the character of the aristocrat's relation to his slaves, Socrates noted that the timocratic man treated his slaves brutally, "not merely despising slaves as the adequately educated man does." Yet when confronted with freemen, the timocratic man is "tame," and in relations with rulers he is "most obedient."<sup>25</sup>

As regards the rule of the oligarch as a slave master, Socrates again fell silent. Only with his consideration of last days of democracy as that regime slid into tyranny did Socrates return to the subject of slavery. He did so in order to criticize the idea of a society without slaves. Appearing to have little regard for a masterless society, Socrates described the myriad freedoms prevalent in a democracy. He noted that these freedoms made the rise of tyranny necessary, asking: "do you notice how tender they [the myriad freedoms] make the citizens' soul, so that if

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<sup>24</sup> Xenophon, *Memorabilia*, trans. Amy L. Bonnette, (Ithaca: Cornell University Press, 1994), II.1.1-34. My interpretation follows that of Paul Rahe in *Republics Ancient and Modern: Classical Republicanism and the American Revolution* (Chapel Hill: University of North Carolina Press, 1992), 49-52.

<sup>25</sup> Plato, *The Republic*, trans. Allan Bloom (New York: Basic Books, 1991), VII: 549a.



someone proposes anything that smacks in any way of slavery, they are irritated and can't stand it?" As a result, the citizens of a democracy end up "paying no attention to the laws, written or unwritten, in order that they may avoid having any master at all." This sentiment, according to Socrates, prepared the ground from which the tyrant would arise. The tyrant would find it necessary to keep his city constantly at war. He would get rid of all the men in the city who were of any worth, and then he would proceed to free the slaves held by the citizens. These freed slaves would become the tyrant's bodyguard, and the citizens of the state would find themselves in the unwonted position "of the harshest and bitterest enslavement to slaves."<sup>26</sup>

Aristotle carried the Socratic legacy forward to the next generation. The ancients placed a high premium on wisdom because their view of the nature of man required them to do so. Aristotle, the most systematic and comprehensive of the ancient philosophers, believed that all things have an inherent and unchanging nature which dictated a specific end, or to use his term, a telos. According to this account, virtue consisted in doing the right thing in accordance with nature. To be virtuous would be to enjoy good things and hate bad things. In these terms, each animal had its own proper activity, and thus its own proper pleasure. Aristotle recognized that what people considered pleasurable varied a great deal, yet he argued that just as one should not call something sweet because a sick person thought it tasted sweet, so one should not call a bad action pleasurable just because a bad person enjoyed doing it. The proper activity for man would be something pursued for its own sake, not something pursued for some other good. It would make man happy. Aristotle found something divine in human intellect, and he believed that in pursuing the intellect man moved after the immortal, or indeed strove to become immortal. Thus he believed that the proper activity for man must involve rationality and contemplation. He

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<sup>26</sup> Ibid., VII: 563d-569c.

believed that to live the life of contemplation would be to live in accordance with what is highest in man, and thereby to live in accordance with what is best and most pleasant for man. He believed that such pursuits were not possible outside of society. Therefore man could not exist in accordance with nature outside of society.<sup>27</sup>

Aristotle thought that the despotic rule of the wise over the unwise, or of the virtuous over the unvirtuous, existed in accordance with nature. Aristotle's modern critics, by contrast, hold that all forms of despotic rule are unjust, for they believe despotic rule to be based upon arbitrary conventions. When Aristotle said "by nature" he did not mean something existing in a primitive or undeveloped state; he instead meant something conforming to, or moving toward the ideal implied in man's telos. Aristotle believed that masters ruled their slaves in a sort of "despotic partnership," whereby the slave helped to provide the master with leisure to pursue those things that conform to the highest nature of man. The master, in turn, should work to convert the slave to a proper understanding of the ends of human existence. According to Aristotle, the master and the slave are a team: "that which can foresee with the mind is the naturally ruling and naturally mastering element, while that which can do these things with the body is the naturally ruled and slave; hence the same thing is advantageous for the master and slave." For Aristotle, slavery existed in accordance with nature because the slavish qualities that necessitate slavery went against nature and needed to be corrected through slavery. Aristotle argued that a master who owned a slave by nature would be doing both himself and his slave a

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<sup>27</sup> Aristotle *Nicomachean Ethics*, X.1-9.1172b-1181b.

service. He asserted that the slave by nature would therefore feel affection for his master, while the slave by law would not.<sup>28</sup>

Holmes based much of his interpretation of slavery on the following quotation from Aristotle: “Nature has clearly designed some men for freedom and others for slavery: —and with respect to the latter, slavery is both just and beneficial.” In explaining this statement, Holmes argued that Aristotle found “a natural inherent difference between the master and the servant....” Holmes rejected the sentiment that condemned Aristotle for justifying the practice of making men slaves, and thereby reducing them to the status of mere things, but he admitted that “the natural relation between master and slave, in the tenor of Aristotle’s remarks, is exhibited by him in a form abhorrent from the general feelings and opinions of modern times, but this may be traced, in a great measure to the peculiar prejudices of the Greeks.”<sup>29</sup> Holmes noted the many vices of the Athenians: the poor status of women, the practice of pederasty, faithlessness coupled with an imitation of the dissolute character of the Greek gods. Perhaps worst of all was the Greek vanity that “led them to claim honors for those merits which they were furthest from possessing,” namely the virtues of compassion and pity. Despite all these failings, however, Holmes found the Athenians free from a “settled malignity of a corrupt design,” suffering instead from “their recklessness, their volatile disposition, their love of change and their systematic rejection of all restraint.”<sup>30</sup>

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<sup>28</sup> Aristotle, *The Politics*, I.2.1252a30, I.6.1255b10; I have drawn in part on the argument put forth by Darrell Dobbs in his “Natural Right and the Problem of Aristotle’s Defense of Slavery,” *Journal of Politics* LVI (1994): 69-94.

<sup>29</sup> GFH, “Observations on a Passage in the Politics of Aristotle Relative to Slavery,” *Southern Literary Messenger* XVI (1850): 193-205.

<sup>30</sup> GFH, “Athens and the Athenians,” *Southern Quarterly Review* XXII (1847): 273-321; (quotations pp. 305-312).

According to Holmes's interpretation of Aristotle, "there are certain races designed by nature for servitude, as there are others as manifestly designed for freedom and command." Holmes claimed that the philosopher placed "the Asiatics" and "the Barbarians" in the former class and "Europeans" in the latter. According to Holmes, Aristotle favored with "a marked pre-eminence" the Greeks, but not without distinctly asserting "the similar claims of the uncivilized races of the North of Europe." Holmes tried to place Aristotle's contempt for Asiatics in context, noting that the wars between the Athenians and the Persians left the philosopher prejudiced against the populations to the East: "Yet we may remark, that the experience of forty centuries, and the permanence during the whole of that time of despotic governments and servile institutions throughout Asia, indicates sufficiently the existence of a servile character in the Asiatics, to redeem the language of Aristotle from the appearance of sciolous or malignant generalization."<sup>31</sup> On these racial issues Holmes moved beyond a strict interpretation of Aristotle's words. Aristotle always sought to praise the middle way, the path of moderation. He noted that the Greeks occupied the middle position between Europe and Asia. The philosopher stated that Europeans possessed "spiritedness," but that they remained "relatively lacking in thought and art." Therefore he believed Europeans to be free, but "incapable of ruling their neighbors." He argued that Asians, possessed both thought and art, but lacked spiritedness, "hence they remain ruled and enslaved."<sup>32</sup>

Aristotle would probably have objected that new world slave populations in the nineteenth century were almost solely of sub-Saharan African descent. Holmes, by contrast, thought that the moderns had outdone the ancients on this score. A chief difference between

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<sup>31</sup> Holmes, "Observation on a Passage in the Politics," 194.

<sup>32</sup> Aristotle, *The Politics*, VII.7.1327b20-30.

ancient slavery and modern slavery, according to Holmes, was that in ancient times “the enslaved people were, for the most part, of the same grade of intellectual and moral capacity with their enslavers.” Holmes mentioned instances in which certain slaves were clearly superior to their masters, Plato’s enslavement being the most famous example. Despite this example, Holmes’s definition of intelligence seems almost entirely culture-bound. Noting that the ancients often found their slaves among the barbarian tribes, he argued that “Thracians, Syrians and Goths approximated much more closely to the capabilities of the Greeks and Romans than the Ashantees and Mandigoes do to the culture and intelligence of the Anglo-Saxon and Spanish families.”<sup>33</sup>

The extent to which Aristotle’s conception of the slave by nature should be understood in racial terms has long puzzled his commentators. Aristotle believed that “barbarians” needed to be ruled, but the question of who or what qualifies as a barbarian has long troubled scholars. St. Thomas Aquinas, the best-known of Aristotle’s western commentators, considered three possibilities. The barbarian could be anyone who speaks a different language, or anyone who speaks a language that has no written counterpart, or anyone who is “not ruled by any civil laws.” Aquinas noted that a barbarian must in some sense be considered foreign, either in absolute terms, or in relative terms. A foreigner in relative terms would be someone who merely spoke a different language, a foreigner in absolute terms would be illiterate and from a civilization without laws. In speaking of the slave by nature Aristotle referred, according to Aquinas, to “those who are barbarians absolutely.” Among those who are barbarians absolutely there is “no rule according to nature.” These barbarians have the physical power of the slave, but not the reason of the master. It would therefore be natural for the Greeks “who were endowed

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<sup>33</sup> GFH, “Ancient Slavery,” *De Bow’s Review* XIX (1855): 559-578, 617-637, (quotation p. 570).

with reason,” to rule over the barbarians. The converse situation would be against nature, and Aquinas turned to scripture to describe why: “But when the converse takes place, there ensues a perversion and a lack of order in the world, according to the words of Solomon, ‘I have seen servants upon horses and princes walking on the ground as servants.’”<sup>34</sup>

Aristotle, Aquinas, and Holmes all sought to explain a situation in which enslavement could be considered just. Acknowledging that not all slaves were slaves by nature, Aristotle admitted that slavery was not always just, since “no one would assert that someone not meriting enslavement ought ever to be a slave.” Believing that Aristotle clearly distinguished between “that servitude which is according to law and that which is according to nature,” Holmes praised the philosopher for recognizing slavery as “an established fact,” and inquiring into its naturalness. According to Holmes, the “injustice of the origin in particular cases has nothing to do with the general justice and natural character of the relation” in general, and he believed that Aristotle clearly perceived this fact. Even Plato, who had suffered from unjust enslavement, “is as sedulous as Aristotle in encouraging and extending it in his model republic.”<sup>35</sup>

Holmes correctly understood the ancient’s position on this question. Aristotle had conceded that the opponents of slavery had a case. He held that the slave by nature did exist, but he also admitted that some slaves were slaves only by law. These unfortunate people usually became slaves only when captured in war. Some would argue that such a process should be illegal “on the ground that it is a terrible thing if what yields to force is to be enslaved and ruled by what is able to apply force and is superior in power.” Aristotle did not wish to make a brief

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<sup>34</sup> Thomas Aquinas, *Commentary on the Politics*, trans., Ernest L. Fortin and Peter D. O’Neill, in Ralph Lerner and Muhsin Mahdi, eds., *Medieval Political Philosophy: A Sourcebook* (New York: Macmillan, 1963), 305-306. The Biblical passage comes from Ecclesiastes 10:7.

<sup>35</sup> Aristotle, *The Politics*, I.6.1255a25; GFH, “Observations on a Passage in the Politics,” 201.

for the case that might makes right, but he did consider the possibility that a person possessing virtue should rule against the will of a person lacking in virtue, so long as the virtuous person ruled benevolently. Aristotle saw the military arts as inextricably bound up with the practice of slavery. For instance, he listed three reasons why the citizen should undergo military training: to keep from being enslaved, to learn the art of leadership, and “to be master over those who merit being slaves.” Aristotle stated that war should be used to capture “those human beings who are naturally suited to be ruled but unwilling —this sort of war being by nature just.”<sup>36</sup>

Holmes thought that civilization defended the mutual interests of the master and the slave, even if that required servile relations between an intellectually inferior master and an intellectually superior slave. “Servitude may represent the only organization which will discipline, educate, and profitably employ the masses whose development has been retarded by the conditions of their previous life and origin; and it may also be the sole method of restraining and regulating those who have run through the course of their civilization, and become effete.”<sup>37</sup> In coming to terms with Aristotle’s position on slavery, the professor thought it necessary to consider slavery not “as it existed at one particular time, or in one particular community, but in its essential and universal characteristics.” Holmes defined slavery in the abstract as “continuous and involuntary dependence and service,” but he left “the degree of dependence and its form, and the character and extent of the service undefined, as these vary with the varying moods of masters, and the fluctuating conditions of society.” Holmes believed that slavery, under this broad definition, existed in nearly all “civilized or semi-civilized” societies; indeed, he regarded this species of slavery as “a necessary consequence of social organization....” In these terms

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<sup>36</sup> Aristotle, *The Politics*, I.6.1255a10, VII.14.1334a1, I.8.1256b25.

<sup>37</sup> GFH, “Ancient Slavery,” 570-571.

then, Holmes argued that slavery existed in accordance with nature. The mode of determining what exists by nature, and what by convention “is to discover what things are habitually attached to political or social organization, in the various stages of its development, but most especially in its highest forms.” Holmes believed that the study of the highest forms of society could forestall an overemphasis on those transitory institutions necessary for the development of such a society.<sup>38</sup>

After establishing the extent to which one could regard slavery as in accordance with nature, Holmes moved to attack the abolitionists. Assaulting those “free-labor doctors and quacks” who rejected slavery because it kept the slave in a debased state, Holmes asserted that the free-labor system had the same tendency. In fact, Holmes believed that the free labor system destroyed the working classes. Taking the arguments of the abolitionists to their logical conclusion, Holmes found a dystopian vision in which the laborers of the world were “quietly buried out of sight forever” and the rest of the world was “divided between rich consumers, rich manufacturers, rich traders, and the machines which supply the first, employ the last, and enrich their owners.”<sup>39</sup> He detected a smug note of hypocrisy among those who criticized the ancients for their supposed contempt for labor. Admitting that “ancient philosophy and patrician literature” had little positive to say about manual labor, he noted that modern “fashionable novels” did not celebrate the laborer either. “The ancients openly avowed their disparaging opinions; the moderns say one thing and think another.” Turning to Xenophon’s *Memorabilia*, Holmes found Socrates praising manual labor. Holmes counseled the reader to reconsider the abolitionist’s utopia: the “recent asservation of the dignity of labor by communists, socialists,

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<sup>38</sup> GFH, “Observations on a Passage in the Politics,” 194-196.

<sup>39</sup> *Ibid.*, 572-573.



and demagogues of every hue” hid their true goal of emancipating “the laborer from the necessity of working.” The abolitionist ultimately hoped to eliminate human labor altogether and thereby to “destroy the laboring class.”<sup>40</sup>

Holmes found a parallel between ancient and modern abolitionism. In both eras, free labor drove out slave labor, not vice versa. Free labor is “less costly, more intelligent, and therefore more efficient in occasioning the multiplication of products.” Slavery only encroached upon free labor in those instances in which there were not enough free laborers to accomplish the tasks required by society. Examining the ancient Roman attempt to introduce a free labor yeomanry to balance the influence of the aristocracy, Holmes argued that abolitionist historians were mistaken in seeing an alliance between the enslaved and the wealthy. Instead, he saw a relationship at work between the very wealthy citizens and the poorer laboring masses of ancient Rome. In the days of the Gracchi all the social classes of Rome were possessed with “covetous idleness.” A combination of luxury and laziness “impoverished the world, and substituted slavery ... for the free labor which had already renounced work.” The money for these welfare programs came from foreign conquests, giving rise to an ancient warfare/welfare state, with a precedent in earlier Athenian models.<sup>41</sup>

According to Holmes, these forces destroyed the ancient civilizations, and he believed that they would also destroy England, France, and the northern United States. He singled out the excesses of popular rule and rapacity as well as the greed and wealth of the upper classes as the true causes of social decline. Resisting the argument that slavery had been responsible for the decline of ancient societies such as Greece and Rome, Holmes argued that despite the

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<sup>40</sup> *Ibid.*, 575-577.

<sup>41</sup> *Ibid.*, 620-622.

dissimilarities between the various ancient societies, all of the great ones featured slavery, and he found it difficult to see how slavery had degraded them. The rise of “pauperism” and “mendicancy,” on the other hand, coupled with a “fever of trade and competition,” and the “consequent taxation, direct, indirect, and industrial,” had worked to consume the nations of Europe “sensualizing one part of the population while it brutalizes the mass.” Modern thinkers, such as Malthus, found the problem in overpopulation, but the ancients were concerned that the population did not grow fast enough. Among the moderns “[t]he wealthy classes alone listen to the prescription, and accept celibacy as the condition and price of luxury and licentiousness.” The privileged of the ancient world suffered a similar problem, so much so that some Roman Emperors introduced incentives to encourage marriage and the growth of the family. In all sensuous societies, the privileged avoid “the expenses and embarrassments of married life, that they might indulge themselves in selfishness and sensualism.” Holmes saw slavery as a profoundly conservative remedy for such a society in crisis.<sup>42</sup>

Most academic thinkers in antebellum Virginia fell somewhere between Bledsoe’s critique of modern natural rights and Holmes’s more comprehensive effort to retrieve the ancient conception of the master’s right to rule. Holmes’s contingent included a number of prominent members. For instance, James P. Holcombe—a law professor and a colleague of Holmes at the University of Virginia—made a defense of slavery that demonstrated an appreciation for ancient political thought. William Andrew Smith, a professor of philosophy and later president of Randolph Macon College also came to espouse Aristotle over Locke. But Holmes found his best-known convert in the Virginia polemicist George Fitzhugh. In his 1857 book entitled *Cannibals All! Or, Slaves Without Masters*, Fitzhugh recalled his delight in discovering that he had found

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<sup>42</sup> Ibid., 617-620.

his way back to Aristotle without even realizing he had done so. Speaking of himself in the plural, Fitzhugh noted his surprise at discovering “that our theory of the origin of society was identical with his, and that we had employed not only the same illustrations but the very same words.” A correct understanding of the origin of society enabled a “true vindication of slavery” resting upon Aristotle’s “theory of man’s social nature, as opposed to Locke’s theory of the Social Contract, on which ... Free Society rests for support.” Thanking Holmes for directing him to the writings of Aristotle, Fitzhugh noted how the experience changed his life. “I used to think I was a little paradoxical. I now fear I am a mere retailer of truisms and common places.”<sup>43</sup>

#### IV.

Perhaps more so than any thinker considered thus far, Robert Lewis Dabney’s career demonstrates the trajectory of Jeffersonian ideas during this period. As a profoundly evangelical and anti-classical thinker, Dabney would not seem a likely candidate for the new system of political science. The “new” ideas, however, worked on him slowly, over time. As a graduate student at the University of Virginia in the early 1840s, Dabney had approached ancient philosophy with the same prejudices manifested by the mature Jefferson. The young Virginian found modern literature superior in nearly every way to ancient literature. While admitting the usefulness of studying the ancient languages as a means to understand and preserve contemporary English, Dabney doubted that the massive effort required to learn the ancient

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<sup>43</sup> James P. Holcombe, “Is Slavery Consistent with Natural Law?” *Southern Literary Messenger* XXVII (1858): 401-421; William Andrew Smith, *Lectures on the Philosophy and Practice of Slavery, as Exhibited in the Institution of Domestic Slavery in the United States; With the Duties of Masters to Slaves* (Nashville: Stevenson and Evans, 1856); Michael O’Brien, *Conjectures of Order: Intellectual Life and the American South, 1810-1860* (2 vols., Chapel Hill: University of North Carolina Press, 2004), II: 960-965; George Fitzhugh, *Cannibals All! Or Slaves Without Masters*. ed. C. Vann Woodward, (1857; repr., Cambridge: Harvard University Press, 1960), 13; George Fitzhugh to GFH, 11 April 1865, quoted in Harvey Wish, *George Fitzhugh: Propagandist of the Old South* (Baton Rouge: Louisiana State University Press, 1943), 118-119.

languages well enough to read the masterworks would be worthwhile. He admitted that a knowledge of Greek could help the student to grasp the New Testament, but he thought the New Testament the only book written in Greek worth reading. The Greek poets, even Homer, he found inferior to Milton. He especially despised the claim that one should study the ancient languages in order to understand ancient philosophy. The only ancient philosopher Dabney had any respect for was Plato, because the Greek received his teachings on morality “in Egypt from the reports of the laws of Moses, which lingered in that country.”<sup>44</sup>

Part of Dabney’s animosity towards the ancients seems to have arisen as a result of his difficulty learning the ancient languages. He expressed his difficulty regarding Latin and Greek. The former, “which I have been so long pretending to learn, I do not even now read with sufficient ease to make it agreeable to read Latin works, and as for the Greek, I utterly abhor it, and do not suppose that I could, in ten years become master of it.” Dabney claimed that he had never met anyone who enjoyed voluntarily reading the ancients, and he therefore concluded that entirely too much time had been devoted to their study. “If all the time that I have studied the dead languages had been judiciously devoted to other things, I might have been now, a well-educated man.”<sup>45</sup>

Dabney especially despised the religions of the ancient Greeks and Romans. Describing them as “puerile and ridiculous” he contrasted the “imposing and sublime” message of Christianity. The Greek deities with their petty adulteries and feuds, could not compare to Christianity, which offered “a deity, invisible, omnipresent, ruling over a universe of infinite

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<sup>44</sup> RLD to Mrs. Ann E. Payne, 2 March 1840, RLD Papers, UVA, Box 1; Francis Butler Simkins, “Robert Lewis Dabney, Southern Conservative.” *Georgia Review* XVIII (1964): 393- 402; Fred Hobson, *Tell About the South: The Southern Rage to Explain* (Baton Rouge: Louisiana State University Press, 1983), 94.

<sup>45</sup> RLD to Mrs. Elizabeth Dabney, 27 May 1841, RLD Papers, UVA, Box 1.

extent, and embracing infinite numbers of individuals, and an eternity of endless progression in wisdom and happiness for the just ... and an eternity of unhappiness for the wicked.” In Dabney’s eyes, the ancient world offered a constricted view of man’s potential: even the landscapes and seascapes known to the moderns were more impressive and inspiring than those known to the ancients. He thought the Mediterranean “but a pool compared” to the Atlantic and Pacific oceans which “we now ride in security....” Even science remained something to produce awe, for “modern astronomy” was better able to inspire profound feelings in the poet than were the superstitions of the ancients. Dabney believed that a culture with an inferior religion would produce inferior morals, and he professed to find such inferior morals among the ancients. “We are told that Demosthenes, the patriot orator visited a prostitute at Corinth; that the virtuous Cato exchanged wives with one of his friends, and that this practice was common.” He believed that these inferior morals resulted in the mistreatment of women and deprived ancient literature “of that exquisite sentiment” that refines and strengthens the passions.<sup>46</sup>

Dabney’s Jeffersonianism resuscitated aspects of Jefferson’s political thought that early generations had failed to notice and that present generations have all but forgotten. For instance, while he was still a seventeen-year-old undergraduate, Dabney wrote a passionate essay against immigration. He argued that European nations sent only paupers to the United States. Their object “must be either to injure our government, or to free itself from inconvenience at our expense, and in either case the danger is great.” Dabney thought that the governments of the old country were trying to get rid of a domestic problem, by sending away “the dregs of the European populace.” They did so in order to forestall the social reforms that could put their countries into a proper working order, and by so doing they made use of the innate selfishness of

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<sup>46</sup> RLD, “Essay: Claims of Ancient Literature,” (?) March 1840, RLD Papers, UVA, Box 1.

the immigrant. If the situation in their home country was so poor, they should stay home and try to fix it, instead of making sure to “save their own bacon” and thereby leaving “their poor oppressed country to struggle for itself.” Dabney asked a rhetorical question: “In what situation should we be, if the heroes of the Revolution had sought refuge in foreign lands, instead of resolving to defend their native soil to the last gasp?”<sup>47</sup>

Dabney felt assured that these pauper immigrants would become criminals. Noting that they barely possessed enough money to pay for their voyage to America, he stated that upon arrival they would be chagrined to discover “that they have gained nothing by the voyage.” Lacking the “means of support, they wander about the country, and are soon hung or imprisoned for a breach of those laws of which they are ignorant.” Dabney feared that immigrants “however contemptible they may be in themselves, are liable at every moment to become powerful instruments in the hands of any desperado, who has the skill to direct them against the government.” He stated that if the Union were to collapse, it would most likely happen in that manner. “Indeed, when we glance at the corruption and disorder in New York, chiefly caused and supported by this class, we may justly fear that the fatal blow has been struck already.”<sup>48</sup>

Dabney’s anti-immigrant position seems, on the face of it, very different from the argument one would expect from an egalitarian such as Thomas Jefferson. Surprisingly, however, Dabney had merely radicalized a nativist streak that existed comfortably within the modern natural rights tradition favored by the third president. Using modern natural rights as his starting point, Jefferson made some surprisingly nativist arguments. He thought a happy society must “harmonize as much as possible in matters which they must of necessity transact together.”

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<sup>47</sup> Ibid.

<sup>48</sup> RLD, “Oration: On the Immigration of Foreigners to Our Country,” 1837, RLD Papers, UVA, Box 1.

Arguing that civil government exists for “the sole object of forming societies,” Jefferson believed that citizens must conduct their governments upon “common consent.” He found the governments in North America to be a unique mixture “of the freest principles of the English constitution, with others derived from natural right and natural reason.” Knowing that immigrants would come from countries with different political systems, Jefferson feared they would either bring their foreign principles to the United States, or, still worse, “exchange them for an unbounded licentiousness, passing, as is usual, from one extreme to another.” Jefferson did not see the problem ending with the first generation of immigrants: “These principles, with their language, they will transmit to their children. In proportion to their numbers, they will share with us the legislation. They will infuse to it their spirit, warp and bias its direction, and render it a heterogeneous, incoherent distracted mass.” Restricting immigration, according to Jefferson, would make America “more homogeneous, more peaceable, [and] more durable...”<sup>49</sup>

As a University of Virginia graduate student Dabney did not approve his University’s practice of hiring foreigners: “I do not like much to see the high stations conferred on foreigners, who have no sympathy with our ways of feeling, and our manner, and no love for our institutions.”<sup>50</sup> In the case of the Barbados-born George Tucker, however, his foreign birth seemed to be only one of many problems. The University had “in some odd corner of its laws,” a requirement that students must pass a general exam to prove that they could write English correctly. George Tucker ran the exam, and Dabney hated him. Writing to his brother, Dabney stated that “if he believed in the transmigration of souls,” he would be certain that Tucker

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<sup>49</sup> TJ, *Notes on the State of Virginia*, in Merrill D. Peterson, ed., *Jefferson: Writings* (New York: Library of America, 1984), 211-212; for a consideration of Jefferson’s xenophobia in relation to his views on slavery see Lewis P. Simpson’s *Mind and the Civil War: A Meditation on Lost Causes* (Baton Rouge: Louisiana State University Press, 1989), 23-24.

<sup>50</sup> RLD to Mrs. Elizabeth Dabney, 25 October 1840, RLD Papers, UVA, Box 1.

“contains the spirits of all the pettifoggers that ever were born.” According to Dabney, the old professor failed about two-thirds of his students. “The granny has a whole raft of whimsical notions about the terms in common use,” thus if one had not had occasion to hear his lectures on rhetoric, “or found out his hobbies some how or other,” one would stand little chance of passing.<sup>51</sup>

George Tucker also taught Dabney in an ethics class and in a class in political economy. Dabney was not impressed. Regarding the class in ethics, the young Virginian stated that “our old professor, Mr. Tucker, does not pursue very extensively, for he is not so good himself, as to be wanting to talk a great deal about our duties.” Regarding political economy, Dabney and one of his fellow students from South Carolina hoped to get George Tucker involved in a dispute with John C. Calhoun on the theory of tariffs. They believed that, given the occasion, Tucker’s “vanity will lead him to attack Mr. Calhoun, for whom he seems to think himself a full match.” Dabney had a hard time understanding how Tucker ever got the job at the University of Virginia, and he seemed especially shocked that Jefferson himself had worked to get Tucker hired. “The only way to account for it is to suppose that he was a man once, and that he is now weakened by age, for he is not less than 70 years old.” Dabney feared that “the institution will suffer by his imbecility before it gets rid of him, for he seems to be not at all aware of his weakness, and to think himself as good a man as ever.”<sup>52</sup>

Dabney found the new law professor, Henry St. George Tucker, more to his liking. He had feared that the Board of Visitors would hire one of Judge Story’s students from Harvard, for it would be wrong to have a student of Story teaching “federal doctrines under the sanction of an

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<sup>51</sup> RLD to Charles W. Dabney, 12 March 1840, RLD Papers, UVA, Box 1.

<sup>52</sup> RLD to Charles W. Dabney, 13 June 1841, RLD Papers, UVA, Box 1



institution founded by the father of State's Rights." Dabney thought that the University had expanded enough that it could attract first-rate talent. When Henry Tucker got the job, Dabney editorialized that "Judge Tucker is going on swimmingly and has a fair proportion of the students in his class." Dabney had heard that Henry delivered "very fine lectures, but does not work the students much more than half as hard" as his predecessor did. Henry also published a textbook, "which I think looks rather ugly." Dabney attended Henry Tucker's inaugural lecture "which was very handsome," but perhaps not good enough to merit publication. "They were firmly resolved to lionize him, before he came, and they are only carrying out the notion, by printing his address."<sup>53</sup>

Dabney thought that Henry Tucker did a good job with his own students, but not enough to keep the entire campus under control. A masked student during a campus demonstration had murdered Henry Tucker's predecessor in the chair of law, and Dabney thought that the campus still needed to be properly set in order.<sup>54</sup> He found Judge Tucker too forgiving of student lawlessness: "He thinks that he is dealing with men who have gentlemanly feelings that may be wakened up, and who are only momentarily overcome by temptation; instead of a parcel of absurd, wrongheaded, and selfish rascals, who are willing to sacrifice every motive of affection for their parents, of patriotism, and respect for public opinion to their appetites, or to what they madly conceive is their honor and independence." According to Dabney, students at the University of Virginia held the professors to be their enemies; therefore, these students aimed to

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<sup>53</sup> RLD to Charles W. Dabney, 8 May 1841, 22 Sept. 1841, RLD Papers, UVA, Box 1.

<sup>54</sup> The circumstances surrounding the murder of John Davis can be found in: E. Lee Shepard, "John Anthony Gardner Davis," in Hamilton Bryson, ed., *Legal Education in Virginia, 1779-1979: A Biographical Approach* (Charlottesville: University Press of Virginia, 1982), 181-185; Robert F. Pace, *Halls of Honor: College Men in the Old South* (Baton Rouge: Louisiana State University Press, 2004), 91-92.

hurt their professors by breaking the laws. “The fools actually think when they get mad with a professor that they are revenging themselves by getting drunk and behaving disorderly.” After receiving his M.A. degree in 1842, Dabney went on to pursue a doctorate in theology at Union Theological Seminary in Virginia. In the years after Dabney’s graduation, the University of Virginia became increasingly southern in sentiment. By the early 1850s, the Board of Visitors had abandoned the practice of hiring unacculturated foreigners. Instead they offered employment to men who knew how to deal with southern undergraduates.<sup>55</sup>

At that time, Dabney became a professor at the Union School of Theology, where he retained the vocal prejudice against the ancients that he had expressed as an undergraduate. There was one ancient book, however, that Dabney espoused unequivocally: the Bible. He argued that southerners needed to take a stand “on the fundamental ethical question of the justifiability of slavery,” and he believed that the “proper way to argue this ethical question is, to push the Bible arguments.” Dabney claimed that philosophical defenses of slavery had little effect on the great masses of mankind. “If we want to affect the general current of national opinion on this subject ... we must go before the nation with the Bible as the test, and the ‘Thus saith the Lord,’ as the answer.” He did not think that the biblical argument for slavery could be refuted, and, more importantly, he thought it would force the abolitionists “to unveil their true infidel tendencies.” Presented with the choice, Dabney believed that the mass of northern Christians would chose the Bible over and against the abolitionists. Therefore, southerners could

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<sup>55</sup> RLD to Mrs. Elizabeth Dabney, 23 Dec. 1841, RLD Papers, UVA, Box 1; David Henry Overy, “Robert Lewis Dabney: Apostle of the Old South,” (Ph.D. diss., University of Wisconsin, 1967), 28-38; I have profited from Lewis S. Feuer’s description of the violence-prone atmosphere of the University of Virginia and the failure of European professors to understand their southern charges in “America’s First Jewish Professor: James Joseph Sylvester at the University of Virginia.” *American Jewish Archives* XXXVI (1984): 152-201.

use the Bible to “drive abolitionism to the wall,” thereby accruing “immense political advantage.”<sup>56</sup>

Dabney thought that he or any other qualified person could make the argument; the challenge, on the other hand, would arise from trying to live up to it. Slaveholders needed “to recognize and to grant in slaves, those rights which are a part of our essential humanity....” Slaveholders had to realize that the “right to hold slaves to labor, does not include a right to make them break the Sabbath, or to keep them ignorant of moral and religious duty, or to make a husband guilty of the sin of separation from his wife....” To the extent that the laws of Virginia or the practices of her slaveholders allowed such abuses, they “are not a part of the scriptural and lawful institution, but abuses.” For Dabney, the revealed word of God triumphed over all other considerations. And the revealed word of God granted southerners the “moral right” to own slaves.<sup>57</sup>

Although he did not formally adopt the principles of ancient philosophy, Dabney’s stringent conservatism turned him against northern society and resurrected another of his youthful concerns. At thirty-one years old, Dabney continued to fear the consequences of excessive immigration. He hoped that “a just providence may design to chastise the North by means of this foreign emigration, in the monopoly of which she is now glorying.” Looking to the future, Dabney speculated that Oregon and California “will be essentially an oriental empire.” He thought that these states would turn towards Asia and either break off from the Union, or perhaps take everyone’s attention away from slavery and make the South into a “powerful minority” that could broker power between the eastern and western states. With the addition of

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<sup>56</sup> RLD to Charles W. Dabney, 15 Jan. 1851, RLD Papers, UVA, Box 2.

<sup>57</sup> Ibid.

the West, a new sort of sectional equilibrium might emerge. In any case, Dabney thought that the North would lose her dominance.<sup>58</sup>

He predicted that the newly arriving immigrants would turn the North towards socialism, a direction in which the Yankees were already moving with “their government education plans and state improvements.” He held out the distant hope that northern society, paralyzed by the “infusion of so much vice” might lose focus and call off their attack on “southern institutions....” He believed that immigrants were aggravating a northern disposition to “religious heresy.” He listed some of these heresies: “Unitarianism, Universalism, Pelagianism,” and, of course, “Catholicism.” Dabney believed that without “theological verity” both “public virtue” and “private morality” would suffer. According to this vision, the “seed” of corruption had been “sown under the surface” of northern society “in false theories of religion and morals.” He believed that the moral failures of the North would kill that region’s prosperity, and that the advantage would fall to a pristine South. “We may see it made manifest in a few years, that the North had, even now, passed the flood tide of public prosperity, and the wave of progress may flow southward, giving us the preeminence.” He thought that “moral causes” of the South could easily trump Northern “superiority of territory and material resources,” after the space of “a generation or two.”<sup>59</sup>

Dabney made the southern cause his cause, and he rejected opportunities to move north. For instance, in 1859 the faculty of Princeton Seminary in New Jersey offered him a chair in Ecclesiastical and Biblical history. They did so because they admired his polemical talents. His vocal pro-southern sentiments did not seem to be a problem, perhaps because he publicly stated

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<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

his dislike of secession, fearing that Virginia would suffer as a result of the rash actions of states further to the south. Dabney rejected the chair at Princeton for a number of reasons, including an unwillingness to sell his slaves, and a fear that Union Theological Seminary would collapse in his absence. Before long the sectional divide would catch up with him, splitting his church, his country, and even his state. Not long after the war began, the Assembly of the Old School Presbyterian church expelled the southern branch of its membership. Dabney had not attended the convention where this occurred, for he knew it would deviate from the traditional meetings that had eschewed political issues. With the seminary closed for the summer, Dabney secured a four-month chaplain's commission with the 18<sup>th</sup> Virginia volunteers. He likened the "bronzed and bearded faces" of the yeomen farmers in his regiment to the Roundheads fighting under Oliver Cromwell in the English Civil War. Although Dabney served as a messenger in the battle of Bull Run, he soon grew tired of the low salary and unsanitary conditions of camp life. Planning to return to the seminary at the end of his four month term, Dabney argued that southern college students should stay in school. The new nation would need an intellectual class capable of defending her interests, and this class would come from the colleges.<sup>60</sup>

But it soon became apparent to Dabney that all the students were off fighting with the army, and he decided to join them, accepting a position as chief of staff for General T. J. "Stonewall" Jackson. The general warned the professor that he would have to get up early and forsake preaching on all days except Sundays, and Dabney conceded. Having almost no previous military experience, his appointment as chief of staff proved controversial. Most of the other staff officers were considerably younger and thought him to be a rather old and strange individual. Dabney did see some military action in his new capacity, but during his brief term as

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<sup>60</sup> Overy, "Robert Lewis Dabney," 91-92, 102-105.

chief of staff, he basically served as Jackson's secretary. Dabney's military career ended with the close of the Seven Day's Battles of June and July 1862. Confined to bed with typhoid fever, Dabney began the job of writing an apologia for the South.<sup>61</sup>

Unfortunately for his cause, these works would not appear until after the end of the war. Dabney's biography of Stonewall Jackson appeared first in 1866, but his definitive statement on slavery did not see publication until another year after that.<sup>62</sup> In these writings Dabney continued to argue that slavery did not violate the natural liberty and equality of man. He stated that the abolitionists had appealed to a "radical and disorganizing scheme of human rights...." Noting that the enemies of slavery had based their rights theory upon the idea of a social contract, Dabney demonstrated an astute eye for the history of political philosophy. He traced the "true origin of this theory" to "Hobbes of Malmesbury." The Virginian also noted, correctly, that this theory did not become respectable until John Locke vouched for it. Locke possessed an "amiable and pious spirit," but he was, in reality, "a disguised follower of the philosopher of Malmesbury." Dabney found Locke's psychology to be "but a system of sensationalism," and he argued that Locke's theory of ethics "led to the denial of original moral distinctions." The consequences of Locke's deception, according to Dabney, were costly. He charged the Englishman with "all the mischievous and atheistical doctrines developed by Hume in Great Britain, and Cordillac in France."<sup>63</sup>

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<sup>61</sup> Ibid., 111-131.

<sup>62</sup> RLD, *Life and Campaigns of Lieut.-Gen. Thomas J. Jackson* (Richmond, Va. National Publishing Co., 1866); for a recent analysis of this work see: Wallace Hettle, "The Minister, the Martyr, and the Maxim: Robert Lewis Dabney and Stonewall Jackson Biography," *Civil War History* XLIX (2003): 353-369; RLD, *A Defence of Virginia, [and through her, of the South] in Recent And Pending Contests Against the Sectional Party* (New York: E. J. Hale & Son, 1867).

<sup>63</sup> Ibid., 242.

Perhaps with Henry Tucker in mind, Dabney noted that numerous writers had acknowledged the nonexistence of the state of nature and the social compact but nevertheless persisted in using the construct “as the implied and virtual source of political power and civic obligation.” Unsatisfied with this state of affairs, Dabney argued that the state of nature, as a merely theoretical construct, could not serve as the “basis for anything,” and certainly not as the “source of practical rights and duties.” The theology professor refused to believe that God ever granted humans “such independency.” And even if God had granted it, “there is not a government on earth, not the most liberal,” that could allow a subject to claim that he had renounced the social contract and therefore no longer lived within the realm of civic obligation. Indeed, Dabney went one step further, noting that any society that faced a citizen making this claim, would have a “natural right” to destroy him.<sup>64</sup>

Dabney found the social contract philosophy atheistical, because it “affects to treat men as though their existence were underived, and independent of any supreme being.” This philosophy ignored “the great scriptural fact,” that God “has determined that man shall live under social law.” Worse yet, unless the people who determined the original contract wrote their contract down, no one would be able to figure out what it said. Under such a contract, one unconstitutional act by the rulers would dissolve the entire government. Dabney did not believe the right of life and death over the subjects of the government could be properly derived from a naturally existing right of an individual. “No man’s life is his own: it belongs to God alone.” Following the terms of the social contract philosophy, political philosophers could, according to Dabney, reach only one of two conclusions: either they would agree with Hobbes, that outside of

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<sup>64</sup> Ibid., 244-245. Here Dabney neglects to mention the right of expatriation, a right made much of by Jefferson. Cf., TJ, *A Summary View of the Rights of British America* in Merrill D. Peterson, ed., *Thomas Jefferson: Writings* (New York: Library of America, 1984), 105-122.

society right and wrong do not exist, or they would agree with those abolitionists who argue “that all government is immoral.”<sup>65</sup>

In making the case for the social contract, philosophers expected one natural right in particular to carry a great deal of weight. They argued that the right of self-preservation existed in the state of nature and in society as well. Dabney agreed that a right to self-preservation should exist under any conditions whatsoever. The abolitionists argued that “no restraint of government on man’s will can be righteous, which is forcible and involuntary, because the obligation of all just government originates in the option of the individuals governed, who are by nature sovereign.” Dabney believed that he could forward a better basis for the construction of free governments.<sup>66</sup>

He began with a number of what he called “natural facts”: that God exists, that human existence “proceeds from his act,” and that all people “are his property....” In addition, the Virginian believed that any inductive theory needed to begin with the acceptance of man’s fallen nature. According to Dabney’s theory, human will meant little. Humans are “the creature of an intelligent and moral personal Creator,” and they are therefore incapable of creating a proper rule of behavior without divine assistance. Man cannot make himself, he exists by God’s will, and thus man is subjected to God. “This subjection is not only of force, but also of moral right.” Dabney defined the rights of man as “those things which other creatures are morally obliged to allow him to have and to do.” According to Dabney, God’s will enjoins man to exist “under civil

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<sup>65</sup> RLD, *A Defence of Virginia*, 246.

<sup>66</sup> *Ibid.*, 248-249.



government.” The professor believed that man’s “social nature” gave evidence of this dispensation.<sup>67</sup>

Under these terms, a proper government would be one that “enjoins on its members or subjects the doing of those things which are morally right, and the refraining from those things which are morally wrong.” Under this political model, the right of leaders comes from God. Natural liberty consists in a human’s “privilege to do whatever he has a moral right to do.” Freedom to do whatever one wants to do is not liberty, but rather license. Civil liberty, “under an equitable government,” is the same as natural liberty, rightly construed. All governments allow for some of the privileges of natural liberty. “A perfectly just government would be one which would allot to each citizen freedom to do all the things which he had a moral right to do, and nothing else.” According to this model, true rights come from God, not from the government. As a result, the government cannot take away these rights. He noted that only a correct understanding of God could assure liberty. Advocates of the social contract philosophy, according to Dabney, would be wise to look to the history of their method of thought: “when we turn to the history of opinion, we see that while Locke illogically deduced from this theory of the social contract a scheme of liberal government, his greater master, Hobbes, inferred that the most complete despotism was the most consistent.” Social contract philosophy, according to Dabney, carried within it the seeds of despotism. He believed that “the French and Yankee Jacobins,” had sown these seeds. He tersely asserted that their “tree” should be “judged by its fruits.” He believed that these “Jacobins” had betrayed the teachings of Christ.<sup>68</sup>

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<sup>67</sup> Ibid., 249-253.

<sup>68</sup> Ibid., 253-254.

According to the professor, the meaning of the golden rule “is, not that we must do to our fellow all that our caprice might desire, if our positions were inverted; but what we should believe ourselves morally entitled to require of him, in that case.” He conceded that “one man is not morally entitled to pursue his natural well-being at the expense of that of other men, or of the society.” Yet from this premise, Dabney deduced that societies must effect “a varied distribution of social privilege among the members, according to their different characters and relations.” Only those with the power to distinguish between right and wrong action should be given the power to act independently. To give everyone the same rights and privileges “would be essential inequality; for it would clothe the incompetent and undeserving with power to injure the deserving and capable, without real benefit to themselves.” In making the case for the naturalness of these restrictions, Dabney began by noting the naturalness of depriving women and children of certain rights. He also believed that restrictions should differ from culture to culture. “If intelligence and virtue are, on the average, more developed, the restraints of government should be fewer; if less cultivated, more numerous.”<sup>69</sup>

Dabney argued that even the slave for life possessed a certain amount of liberty: the slave had the right to do those things that he was supposed to do. If the slave lacked rights that other people possessed, it was because his “inferior character, ignorance, and moral irresponsibility, have extinguished his right to do them.” The laws that enforce slavery, should be designed so as to “to secure, on the whole, the best well-being of both parties to the relation, servant as well as master.” Dabney admitted that some masters abused their slaves, but he refused to concede that that fact meant slavery was, of itself, a wrong; after all, many parents abused their children, and these abuses did not prove that the authority of the parent over a child was unjust. The proslavery

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<sup>69</sup> Ibid., 255-257.

philosophy Dabney constructed, although it made no open nods to ancient philosophy, still bore a remarkable resemblance to George Frederick Holmes's new system of political science.

Dabney's proslavery political philosophy survived the defeat of the southern cause on the battlefield. Indeed, Dabney would continue to make similar arguments well into the 1880s.<sup>70</sup>

## V.

George Frederick Holmes continued his Aristotelian discussions of politics into the latter years of the nineteenth century as well. He spent the duration of the war at the University of Virginia, largely looking for a productive way to spend his time. Just before the outbreak of the war, he convinced the university to grant him money for the formation of an archive containing public documents pertaining to secession. Although he received some financial support, no government agencies sent any documents, and the project quickly fell apart. In the closing months of 1862, Holmes spent much of his time with Bledsoe and the two discussed Lincoln's Emancipation Proclamation. Holmes confided to his diary that it was "very badly written, with many Lincolnisms in it." Already by that year Holmes had given up hope that the Confederacy would be able to secure a lasting independence, although he may just have been upset that his attempt to give the administration an historian's advice on the nature of such conflicts had been rebuffed by the secretary of the treasury, who argued that nations could learn little from the past.<sup>71</sup>

As late as 1884, Holmes continued his assault on the Hobbesian conception of political science, and his partisanship on behalf of the Aristotelian version. Holmes referred to the state of nature and the social contract as "unsubstantial dreams...disproved by physiology, by philosophy, and by history." He found the isolation dictated by the state of nature to be

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<sup>70</sup> Ibid., 260; RLD, "Anti-Biblical Theories of Rights," in C.R. Vaughn, ed., *Discussions of Robert Lewis Dabney* (1888; 3 vols., Carlisle, PA: Banner of Truth Press, 1982), III: 21-46.

<sup>71</sup> Neal Gillespie, *The Collapse of Orthodoxy*, 203-206.

“physiologically impossible.” Because children remain virtually helpless for many years they need the care of at least one parent; therefore, the “family, not the individual, constitutes the unit of humanity.” Holmes believed that an inductive search through the history of the world disproved “the fantasy of isolated existence.” Never in any time or place “has any population been found consisting of segregated individuals.” According to Holmes, the “essence” of society is the “common life” produced for all. “Man is by nature, by constitution, social.” Holmes believed that any society based upon a denial of these basic truths would suffer a calamitous decline: “Disastrous revolutions, mischievous laws, insane innovations and inoperative constitutions have sprung from failure to recognize the natural origins and the natural development of societies.”<sup>72</sup>

Twenty years after the end of the Civil War, Holmes continued to find it necessary to discuss slavery. He compared slavery to machinery, noting that social progress required the development of one or the other or both. He defined slavery and machinery as the “chief agents in creating and sustaining wealth and population.” And even when discussing something so modern, Holmes continued to call upon the political thought of Aristotle. The professor noted that both slaves and machines are “‘labor saving’ and profit-making, or surplus-making contrivances.” Citing the ancient philosopher, Holmes noted that Aristotle referred to slaves as “‘animated machines,’ (*organs*) and includes them in the same category with tame animals.” Holmes believed that by so doing, the philosopher anticipated “in some measure, the steam machinery and the automatic engines of the nineteenth century.”<sup>73</sup> Holmes’s interpretation of Aristotle on this issue is, once again, plausible. The philosopher argued that a household could

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<sup>72</sup> GFH, *A Science of Society* (Charlottesville: Anderson Brothers, 1884), 25.

<sup>73</sup> *Ibid.*, 158-159.

not work without possessions. A person skilled at household management must therefore know how to acquire and defend possessions. Aristotle described some possessions as animate, and others as inanimate, noting that a slave “is a possession of the animate sort.” Aristotle also classified the slave as an instrument, like a weaver’s shuttle. Instruments need direction. If an instrument could “perform its work on command or by anticipation ... so that shuttles would weave themselves and picks play the lyre,” then “master craftsmen would no longer have need for subordinates or masters for slaves.”<sup>74</sup>

Holmes warned, however, against an anachronistic understanding of slavery. He believed that slavery needed to be understood in terms of the time in which it existed. The institution may have been beneficial and progressive in its inception, and only damaging and retrogressive in its dotage. “The abuses of an institution are no disproof of its aptitude and use. They show the need of regulation; they do not authorize uninquiring condemnation.” Holmes believed that slavery contributed to differentiation and the establishment of social order in most societies. He saw slavery as a means of teaching the uncivilized the necessity of labor in order to save them from starvation.

The professor still refused to idealize the practice of paid labor, noting that the “transformation of slavery into what has been humorously designated free labor has been a gradual and agitated procedure.” He believed that Stoicism and then Christianity had already done a great deal to mitigate the condition of people held in bondage before any sort of abolition movement had come along. “These influences and the distresses of an expiring civilization did not suppress slavery altogether, but altered it profoundly, and prepared the way for the modern system of free labor.” He noted the presence of serfs in England until the eighteenth century and

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<sup>74</sup> Aristotle, *The Politics*, I.4.1253b35.

the 1861 freeing of the serfs in Russia. He refused to glorify the latter, arguing that serfdom had gradually transformed itself into free labor: “Serfdom became service; serfs became servants.” Holmes cautioned that the “terms differed but slightly; the relations differed less than is ordinarily supposed.” He refused to overlook the unfortunate side effects of free labor. Free labor societies offered “no care of the sick, the children, the aged, and the decrepit.” They had their own means of compulsion as well, only in a free labor society, “the merciless coercion of physical necessities supplants the arbitrary authority of a human owner.”<sup>75</sup>

Holmes refused to classify the abolition of slavery as a symbol of moral progress. “Slavery has been abandoned, because free labor is less onerous, less costly, and more efficient than slave labor.” Religious factors may have played a role, but “the thoughts, feelings, and practical creeds of societies run along the line of their supposed interests.” Free labor, according to Holmes, provided no panacea. It “has not ensured satisfactory provision for the laboring class, and it has thrown modern societies into violent agitation and perilous alarms.” Slave revolts were replaced with “dynamite revolt.” Holmes argued that just as slavery gave way to free labor, so free labor would give way to machinery. As before, however, he feared the abolition of labor, arguing that “the machine enslaves the workman.” Machinery made possible great material progress, but not without significant cost: “Great economies, great reduction of cost are secured; but they are gained at the expense of the laboring class, and are followed by a swelling train of miseries and dangers.” Among these dangers Holmes placed the premature consumption of natural resources; resources that “ought to have been reserved for future generations.”<sup>76</sup>

While continually keeping one eye on ancient philosophy, Holmes managed to anticipate a number of modern concerns. His new system of political science proved durable enough to

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<sup>75</sup> GFH, *A Science of Society*, 162-165.

survive the abolition of the institution that it had been built to defend, the war that had made that abolition possible, and the passage of decades of time.

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<sup>76</sup> Ibid., 165-167.

## Chapter Six: Secession and the Fate of Constitutional Orthodoxy

### I.

Despite the renaissance of classic natural right, the constitutionalists of Virginia academe continued to adhere to a modern natural rights philosophy, but they did so in ways that expanded the range of constitutional orthodoxy. This tradition continued to find proponents in the Tucker family, the most prominent among them being John Randolph Tucker. Born in 1823, the son of Henry, John grew up in Winchester, Virginia. In 1831, when Henry joined the Virginia Court of Appeals, young John came along with the rest of the immediate family to Richmond. He attended a private academy in that town before matriculating at the University of Virginia in 1839. Graduating in 1844, John began the practice of law in Winchester one year later, and soon became active in politics as a Democratic elector and campaigner against the Know-Nothing party.<sup>1</sup>

John Tucker's constitutional theories were closer to those of his Uncle Beverley than they were to those espoused by his father. Beverley had been an enthusiastic proponent of secession from the early 1830s onward, and although John did not push quite so hard for secession, he defended the right with more gusto than his father had ever mustered. John built his theory of secession upon the philosophy of modern natural rights, calling himself "an earnest and jealous advocate of the power of the States, because I am a zealous friend to the sovereignty of man." According to John, the people formed the various states, and the various states composed the federal government. He compared the secession of a state to the expatriation of a citizen. He did not, however, describe his political philosophy as a philosophy of modern natural rights. Instead

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<sup>1</sup> John W. Davis, "John Randolph Tucker: The Man and His Work," *Washington and Lee Law Review* VI (1949): 139-162; Jerry Bruce Thomas, "John Randolph Tucker," in *American National Biography*, eds., John A. Garraty and Mark C. Carnes (24 vols., New York: Oxford University Press, 1999), XXI: 898.



he defined it as the “Virginian idea.” He regretted that the “the American Idea” had moved so far away from the “Virginian idea.”<sup>2</sup>

According to the Virginia idea, the word “people” should mean a group of individuals, not a mass. Each person would possess sovereignty, and society would be “a league, based upon compact, actual or supposed, between individuals.” Government would serve as the “joint agent” of these people. Tucker maintained the modern natural rights tradition, but he attempted to put it into an explicitly Christian framework. He believed that such an understanding could best support human dignity, for it would put individual humans into the proper relation with their creator. Under this dispensation, after the creation of Adam “government was ... divinely instituted.” The sovereignty of man thus preceded the existence of government. Early governments may have been primitive, but they “must have sprung from an original or tacit assent”; thus “political science” dictates that all governments derive their validity “from the terms of a supposed compact between men.” All of John Tucker’s political thought, throughout his life, began with this premise.<sup>3</sup>

Referring to the natural rights of men outside of society as the “liberty of isolation,” Tucker asked why people ever bothered to enter society at all. He answered that only “the fear of the loss of his rights,” had “driven man from primeval isolation into society.” Mankind’s natural love of liberty, bequeathed by God, “impels him to seek its security, its protection, in the shield of the government, which the social compact creates.” Tucker did not believe that a person surrendered any rights by entering into society. He attributed this misconception to the

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<sup>2</sup> JRT, *Address of John Randolph Tucker, Esq. Delivered Before the Phoenix and Philomathean Societies, William and Mary College, of the 3<sup>rd</sup> of July, 1854* (Richmond: Chas. H. Wynne, 1854), 24.

<sup>3</sup> *Ibid.*, 5-6.

failure to make a “distinction between the *exclusive rights* of a *perfectly isolated being*, and the *modified rights* of a *social being*.” According to Tucker, Robinson Crusoe could claim to be lord of his domain, but had anyone else been there on the island besides him, his claim would have acquired their consent. “Thus his exclusive rights, the result of isolation, would be modified and abridged by the presence of those, whose rights would be as unlimited as his own.”<sup>4</sup>

A certain duality pervades Tucker’s political thought. On the one hand, he stressed that people possess a naturally gregarious attitude, but on the other hand he noted that each person possesses “a will which opposes restraint, and restively shrinks from control external to itself.” Humans, therefore, are both social and anti-social. The social tendency “finds its best development in *power*,” while the anti-social tendency finds its best development in “*liberty*.” Left without check the social tendency would lead to “*despotism*,” while the anti-social tendency would lead to “*anarchy*.” According to Tucker, only an equal match between the two could produce progress in political affairs. “The most difficult problem in the science of government, is the proper arrangement of these two forces.” He believed that each of the two forces needed to have its own “distinct and palatable manifestation in the social organism.” History demonstrated that “centralism and individualism are the respective modes in which despotism and liberty manifest themselves; and that in the struggle between these, is to be traced the history of the progress of free institutions.”<sup>5</sup>

Tucker described Virginia as “the cradle of American liberty,” and Virginians as the first Americans to leave the British Empire and become a separate and sovereign state. He cited Edmund Burke’s observation that each colony existed “as a distinct political society.” Even at

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<sup>4</sup> Ibid., 7.

<sup>5</sup> JRT, *An Address Delivered Before the Society of Alumni of the University of Virginia, At Its Annual Meeting, Held in the Rotunda, on the 28<sup>th</sup> June, 1851* (Richmond: H. K. Ellyson, 1851), 6-10.

the time when the states faced an outside danger and needed to act as one, “their jealousy of central power and for their exclusive rights, developed itself in every prominent fact which the history of the times has left upon record....” Tucker stressed this point in order to counter “the bold and unfounded assertion of a certain political school, that prior to the declaration of independence, the several colonies were one, and that that declaration was the act of a *nation*, with supreme controlling powers—in contradistinction to its being merely the united act of the *several colonies*, only bound by their separate consent.” Reviewing the facts, Tucker noted that the colonies had been established at different times, and often by different countries. They had considered and rejected multiple schemes for defensive alliances, maintaining that they made their policy independent not only of the other colonies, but of Great Britain itself. “[I]f these and other known facts in history do not disprove the assertion of the oneness of the colonies, and do not establish their essential separateness as political communities, I confess I am at a loss to know what certain conclusions can be drawn from historical facts.” He warned that the triumph of the theories of the “Harvard School” over the “Jefferson creed,” would be “the fatal triumph of the principles of centralism over those of individualism.”<sup>6</sup>

According to John Tucker, Virginia representatives convinced other members of the colonies to pass the more comprehensive Declaration of Independence. “From this period the tendency became stronger every day for a more centralized federative government.” But the Articles of Confederation “distinctly shewed the original character and previous relations of the parties to it.” Before the Articles, representatives at Congress acted solely on the basis of the orders given them by their home states. The Articles established a league between the states. Nevertheless, these Articles explicitly stated that all the new powers arising from this league

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<sup>6</sup> Ibid., 18-20.

came as a grant from the individual states. In discussing these powers, Tucker invoked the Whig language of speaking out against power: “Power oft invades the paradise of peace, the sanctuary of liberty, clothed as an angel of light, and whispers its bright temptation into the ear of its innocent and unsuspecting victim.” Admitting the virtues of the Constitution that replaced the Articles, Tucker qualified his praise by noting that it “gave increased efficiency and influence to the already strongly centralizing tendencies of the Union.” The amendments saved the Constitution from being a total loss for individualism, and Tucker argued that Virginians had done much to assure their adoption. But the amendments could only do so much. “The history of the struggle between central and State power, under the present constitution, is a mournful, but soon told story.”<sup>7</sup>

He began the story with Alexander Hamilton’s speech at the Philadelphia convention, where the New Yorker had argued that corruption, i.e. the power of patronage, held the English Constitution together. Hamilton admired the English Constitution, and he did not mean these remarks as a criticism. Tucker argued that the peoples’ opposition to Hamiltonian principles eventually lead to “the expulsion of the Massachusetts school from power....” According to Tucker, the rise of the Jeffersonians allowed the United States to function much more effectively; indeed, “it was not until the hereditary enemy of our rights brought war upon our border, that the necessity of external security gave colorable justification to the extension of its [the federal government’s] powers by construction.” Yet even after the war, and through the Era of Good Feelings, the power of the federal government continued to grow and grow. Searching for the reason, Tucker noted that the executive branch had a near monopoly on the power of patronage. He argued that the president could use this power to literally change the views of the

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<sup>7</sup> Ibid., 21-22, 26.

most important citizens of a state. Allied with power of taxation, the patronage power became still more ominous. The federal government took much of its money through indirect taxation; the people lost their money, but they did not sense its loss. This money could then be sent back to them in the form of patronage. The states could try to keep up, but they could only draw their money from direct taxation, and the people quickly recognized and protested this form of taxation.<sup>8</sup>

Centralism clearly possessed great advantages in the fight between power and liberty. Tucker searched for potential remedies to be deployed in this unequal contest. He quickly arrived at the right of secession. He believed that the Declaration of Independence had made this right known to the world. Even if centralism were to triumph, Virginia could still secede and win back her old freedoms. Virginia could always “*RESUME the powers she has granted, annul the compact violated by others, and withdraw from a Union inconsistent with the rights of her people and destructive of her honor and her sovereignty.*” According to this interpretation, a state maintains its right to secede, unless it specifically gives up that right. Believing that the states were sovereign before the Constitution came into existence, Tucker defined this sovereignty as “that supreme social power which springs from the individuals composing it, and dwells in it, as one political society.” Tucker believed that the people possessed sovereignty and were incapable of permanently divesting themselves of it. No one could permanently divide the sovereignty of the people of Virginia: if that state removed its allegiance from the Federal Union, argued Tucker, the laws of that Union would no longer be binding on the people of Virginia.<sup>9</sup>

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<sup>8</sup> Ibid., 26-27; Cf. James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W. W. Norton & Company, 1987), 129-139.

<sup>9</sup> JRT, *An Address*, 35.

The “Massachusetts school” claimed that “the people of the United States” had adopted the Constitution and that the states were “merely convenient territorial divisions of this one great nation.” Tucker proposed a counter-thesis: “the constitution was adopted by, and was and is now, binding as a compact, between the States as sovereign contracting parties.” Admitting that during the first phase of the Philadelphia convention, “the tendency to a powerful centralism was very strong,” Tucker described how, during this first phase, the delegates considered ways of putting the states firmly under the control of the federal government. They considered a federal veto on state laws, a scheme by which state governors would be appointed by the federal government, and a means of stripping the states of all of their military power. The delegates, however, quickly voted down each of these proposals. “The jealousy evinced by the small States in struggling for their equal voice in the government, and by the Southern States in opposing the power of regulating commerce, demanded so eagerly by New England, and of the imposition of restraint upon their slave trade, engendered in the Convention a spirit of patriotic opposition to central power, and of determined maintenance of the rights of the States.” Tucker noted Gouverneur Morris’s sad lament that the states had many representatives at the convention, but America only a few. Morris wanted another convention, one that would push through his nationalizing program.<sup>10</sup>

Morris’s discontent marked, in Tucker’s estimation, the second phase of the convention. The forces that so irked the Pennsylvanian assured that “in the administration of its highest and most important trusts, the government of this Union is federative, not national.” In other words: “States, not men, are units in our federal system.” He described the procedure for amending the constitution as “eminently federative.” At the convention “a quorum was constituted, and all

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<sup>10</sup> Ibid., 36-38.

votes were taken, not by *members*, but by *States*.” Hamilton proposed that the new Constitution should first be ratified by Congress, before heading to the state ratification conventions. This proposal failed to win the requisite number of votes. In Tucker’s mind this failure marked a “decisive action” against recognizing Congress as “a party to the constitution”; it thereby based the establishment of Congress “upon that foundation, upon which alone it can rest, the sovereign will and pleasure of each state.”<sup>11</sup>

Continuing the argument, Tucker turned his attention to the various ways in which the states ratified the Constitution. Massachusetts and New Hampshire had referred to it as a “compact” in their ratification documents. Most of the other states “expressly affirmed the reservation of all powers not delegated to the government;” indeed, “three of them directly retained the right to *resume* the powers delegated in certain specified cases.” Of course, the proponents of the centralist thesis found the preamble more important than this assemblage of historical facts. “The famous words, ‘We the people of the United States’ in the preamble, have been construed to prove one or the other of two conclusions: either that the constitution was adopted by ‘the people of the United States’ as a political unit, or that, however originally adopted, it constitutes the States, formerly distinct, now and forever one people.” Tucker believed that the history of the Constitution’s development and ratification disproved both theses. The Constitution made the federal government into “the common agent of all the states.” It related the states to each other as “co-contractors upon the terms of the constitutional compact.”<sup>12</sup>

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<sup>11</sup> Ibid., 38-40.

<sup>12</sup> Ibid., 40-41.

Tucker held the Constitution to be “revocable at the will of the principal or contracting parties.” Because the Constitution did not grant any federal body the power to decide whether the provisions of the compact had been broken, under the provisions of the tenth amendment, this power devolved to the states respectively, or to the people. To those who argued that only the Supreme Court could decide the constitutionality of a given action, Tucker responded that the judiciary only possessed juridical power; thus, the court could only intervene if a specific law had been broken. He did not believe that the federal judiciary had the power to decide cases between the states and the federal government. Under the Constitution, “persons, not States, are regarded as the *subjects* of its [the federal government’s] action; while States, not persons, are *the sources* of its power.” He found it “contrary to the very nature of sovereignty” that a state could be sued. The eleventh amendment only mentioned cases in which the state may be a plaintiff, not those cases in which it could be a defendant. “How, then, can that tribunal be an arbiter, much less a final arbiter, when it can never decide between the contestants, the United States and a State?” The Supreme Court held powers over the states, but it did so only by the consent of those states. The Supreme Court “is a judicial power *within* the Union, but not *beyond* it, or *distinct* from it.”<sup>13</sup>

Tucker did not believe that secession would inevitably lead to war. Even if war did ensue, that did not mean that secession was wrong. “*Right* may often be, and often has been resisted by *wrong*.” Prophetically, Tucker guessed that the government of the United States would have a difficult time resisting the secession of a state without recognizing that that state had itself seceded. If the federal government were to close the ports of a seceded state or attempt to cut off her commerce, it would have a difficult time claiming that that state remained in the Union, for

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<sup>13</sup> Ibid., 43, 49-52.



the Constitution forbids the federal government from engaging in such acts. “*By their own act, the United States would declare her out of the Union!*” He knew that in the event that the other states failed to accept the secession of a state, that the states would be driven to violence, but he did not think that such a strategy could work: “Would you dye the wedding garment with the blood of your bride, and lead her to the sacrificial altar of your glorious re-union, the bleeding, trembling victim of your brutal violation?” Turning to Madison’s notes of the constitutional convention, Tucker demonstrated that the men at that convention had considered whether to give the federal government the power to use military force against a state that did not live up to its obligations. Madison argued that this proposal should not be considered, on the grounds that the use of force against a member of the Union would, by that very action, dissolve the Union. The proposal never came up again at the convention. “A system was established in which it was not deemed necessary to incorporate this revolting principle; and thus by its rejection is the inference made inevitable, that as this Union can only be formed by the free consent of the parties to the compact, it can never be held together against that consent by force of arms.”<sup>14</sup>

Distinguishing between secession and revolution, Tucker argued that revolutions depended upon the actions of individuals, while secession depended upon the action of a state. After a revolution the parties in conflict united to become one; after secession the parties in conflict became separate forever. “In a revolution the citizen bears his unprotected bosom to the storm that rages around him; in secession it is shielded by the aegis of his State, impenetrable to the assaults of power upon his life, his liberty or his property.” Some would argue, however, that secession could only be a right if it did not bring on violence. Tucker disagreed. He believed that those who opposed secession with violence were the real aggressors, and that they had no

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<sup>14</sup> *Ibid.*, 56-57; Cf. Madison, *Notes of Debates*, 45.

principle to appeal to other than “the long buried dogma that might makes right....” According to Tucker’s reasoning, any individual state could decide that it would like to leave the Union. Even if all the other states said that that individual state had no right to leave, an individual state could still leave if it wanted to do so. The Constitution did not give the other states any right to keep any individual state in the Union. To clarify his point, Tucker employed a *reductio* argument: “the proposition, which would make the right of one to secede depend upon the assent of the others, would make the compact dissoluble only by mutual and unanimous consent. Thus the dissent of Delaware would make the constitution irrevocably binding upon all the other states.”<sup>15</sup>

In the end, however, Tucker became more conciliatory, stating that he would be reluctant to assert the right of secession were it not for the fact that he believed this right, paradoxically, gave the greatest hope that the Union would continue. He hoped that the right of secession would restrain the forces of centralism. He believed that the centralists wanted “absolute and despotic power” and that they strove to acquire it “by the assertion and maintenance of the doctrine, that the government may construe its own limitation and enforce its construction against the delegating authority at the point of the bayonet....” Perhaps the fear of disunion would scare the centralizers away from the unchecked application of their power. Some would say that standing athwart the juggernaut of centralization was treason, but Tucker echoed Patrick Henry: “‘If this be treason, make the most of it!’” The true friend of the Union, according to Tucker, would always maintain the sovereignty of the states. He called for the “young men of the South” to undertake the “bold and manly defiance of error.” He believed that Virginia made the Union, and

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<sup>15</sup> JRT, *An Address*, 55, 61.

that she could save it only by appealing to the premises upon which it had been formed. Constitutional orthodoxy would save the union, not destroy it.<sup>16</sup>

## II.

John Randolph Tucker emphasized those aspects of constitutional orthodoxy that could be used to justify secession. His Uncle Beverley had been one of the first to call upon this aspect of St. George Tucker's teaching. The liberal version of constitutional orthodoxy that Henry Tucker had propagated found a new voice not in the writings of John Randolph Tucker, but in another member of the Tucker family: Henry Augustine Washington. Born in Virginia in 1820, Washington married into the Tucker family in 1852. He had received his bachelor's degree from Princeton University in 1839. Soon thereafter he returned to Virginia and trained for the law at a private law academy. After receiving his license in 1841, Washington moved to Richmond to practice law. He did not enjoy the experience, for he wished to live in the countryside. Looking around at himself and his peers, Washington felt that he seemed to be doing as well as anyone else, yet "my receipts do not match my expenditures." The problem with being a lawyer in town was that "partial success entails only poverty."<sup>17</sup>

Washington hoped that by moving back to the country and by mixing agricultural pursuits with the practice of the law that he could make enough money to survive without going into debt. Perhaps he would even run for political office. Washington believed that in the country one could be successful politically, but that it would be very difficult to be a success professionally. "Nearly all the great statesmen in Virginia have come from the country, but all the great lawyers have resided in Richmond." Hoping to get money from his father to purchase

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<sup>16</sup> Ibid., 62-63.

<sup>17</sup> HW to Lawrence Washington, Washington Papers, W&M, Box 1, Folder 2.

land in King George County, the young man described his plan to abandon city life.

Washington's father did not approve. He called upon his son to try practicing law in Alexandria instead of Richmond. He advised against purchasing any land at present, as he foresaw a "a crisis near at hand in the money matters of this country" that would drive down all prices and make it possible to acquire large plots of land in the near future.<sup>18</sup>

By 1848, Washington would have other options before him than rural lawyer and politician. He had an offer to become professor of history and political economy at the College of William and Mary. Some of his friends advised him against the move on the ground that such a position would make it difficult to pursue a career in politics. A political career, they argued, would be the best way to become financially secure. As a professor Washington would make \$1000 a year plus \$20 per student, but one friend argued that the "prospects of the college...are not good" even though "some revival from its ...extremely disrupted state may be expected." Another friend doubted that Washington had the temperament to be a professor: "Unless your tastes very decidedly incline you to the duties of a Professor's chair, to a library life and the labors of authorship, I should by no means consider your acceptance as politic or prudent." Washington received opposite counsel from one of the members of the Board of Visitors who told him that he had a good chance to get the job and reminded him that Thomas Dew considered the chair in History and Political economy "preferable to a place in the Cabinet at Washington." On receiving the unanimous nomination from the Board of Visitors on 30 December 1848, Washington gladly accepted the job.<sup>19</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> James A. Seddon to HW, 1 Dec. 1847; William Boulware to HW, 7 Dec. 1848, Washington Papers, W&M, Box 1, Folder 2; Carol Sturzenberger, "Biography," in "The Diaries of Henry A. Washington, 1842-1845," (M.A. Thesis, The College of William and Mary, 1979), 18.

During the seven remaining years of his life, Washington made a number of important scholarly contributions. He edited the first complete edition of the papers of Thomas Jefferson, and he edited and published Thomas Dew's *Western Civilization* textbook, which would continue to be published and republished for the next forty years.<sup>20</sup> George Frederick Holmes had briefly filled Dew's chair before departing for the University of Mississippi, and Washington came in to replace Holmes. Washington's conception of natural rights was closer to Dew's than to that of his immediate predecessor. Holmes had asserted that the very idea of natural rights led "by a necessary deduction to the state of nature advocated by Rousseau and to all the orgies, the frenzy and the tyranny which sprung from the principles of the Genevan sophist."<sup>21</sup> Washington, by contrast, became the first Virginia professor to distinguish adequately between the three major proponents of the state of nature philosophy. Washington began with Thomas Hobbes, praising him as "a great bold, original thinker," and argued that Hobbes's greatness revealed itself in his creation of the "state of nature" idea. The young professor also agreed with Hobbes's contention that humans abandoned the state of nature by forming a "compact."<sup>22</sup>

Washington then noted that John Locke had modified Hobbes's theory by arguing that humans held certain inalienable rights in the state of nature. According to the professor, Locke thereby made "for the first time in human history, the suggestion of the idea of *natural rights*, and the *universal freedom and equality of mankind* in connection with government." According to this theory, humans, by entering society, surrender not their rights, but their "personal

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<sup>20</sup> HW, ed., *The Writings of Thomas Jefferson: Being His Autobiography, Correspondence, Reports, Messages, Addresses, and other Writings, Official and Private* (9 vols., Washington, D.C., 1853); TRD, *A Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations* (New York: D. Appleton and Company, 1853).

<sup>21</sup> GFH, "Bledsoe on Liberty and Slavery," *De Bow's Review* XXI (1856): 132-147, quotations, 138-140.

<sup>22</sup> HW, "The Virginia Constitution of 1776." *Southern Literary Messenger* XVII (1852): 671.

privilege of punishing and redressing all violation of those natural rights.” Locke held that this power could be transferred or divided, “and that, in England, it had actually been transferred and distributed among the different departments of the Government and the different orders of the State, in various proportions.” According to Washington, Locke demonstrated that “that the ancient constitution of the realm was in strict conformity with the abstract principles of government,” and thereby refuted the monarchical ideas of Hobbes. Washington revered Locke, asserting “that politics, as a science, has made no progress in that country from that day to this.”<sup>23</sup>

On the continent, however, Jean-Jacques Rousseau transformed Locke’s political philosophy. According to Washington, Rousseau’s version of the social contract came about as “the result of unanimous agreement” in a society. Under this conceptualization, every member of society served as a party to the contract; the contract arose “not between the people and their rulers, but between the people themselves.” According to Rousseau, the power of the entire community worked to preserve what was best for each member. Unlike Locke, however, the Genevan did not believe that this power could be divided or transferred. The leaders of a society existed only as the representatives of the people. According to Washington, Rousseau’s philosophy decisively influenced the French Revolution, giving it “its distinctive character” and setting it off in the wrong direction. Washington depicted Locke as the healthy mean between Hobbes and Rousseau; indeed, he saw the philosophy of Locke as the proper antidote for Hobbesian and Rousseauian thought. The philosopher of Malmesbury believed power to be transferable but indivisible, thereby making him the philosopher of “*absolute monarchy*.” The Genevan, by contrast, thought the supreme power to be indivisible and non-transferable, thereby

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<sup>23</sup> Ibid., 672.

making him the philosopher of “*pure democracy*.” Locke, however, “by maintaining that the supreme power was both transferable and divisible, was led to *mixed government*.”<sup>24</sup>

The idea that an individual could have rights that arise independent of the state, rights that, indeed, could be held against the state, was, according to Washington, a view “peculiar to modern civilization, and the distinguishing glory of modern liberty.” Such a view had “no place in the ancient world.” The ancient civilizations had the idea thrust upon them by “northern barbarians” who invaded their world and brought the idea with them “from the woods of Germany....” Ancient liberty, according to Washington, “was civil, and not personal liberty, man’s liberty as a citizen and not as an individual; his franchises and privileges as a member of society, and not his rights against society.” The professor described the ancient state as something totalitarian. Its powers were not only “civil and political” but “censorial, inquisitorial, paternal.” The ancient state saw itself as the parent of the citizen, “directing his whole education for him, prescribing what he should eat and what he should drink, when he should marry and whom he should marry, which children he should rear and which he should sacrifice....” The ancient state “took charge” of the citizen’s “entire existence, public and private, from the cradle to the grave; thinking for him, acting for him, doing everything for him, leaving him nothing for himself, and calling upon him at every turn, to lay down the deepest instincts of human nature, and the dearest affections of the human heart as sacrifice on the altar of an inexorable State policy.”<sup>25</sup>

Washington fit the societies of the North and South into this structure, arguing that the North favored society over the individual while the South favored the individual over society.

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<sup>24</sup> Ibid., 672.

<sup>25</sup> Ibid., 659.

Washington saw the social system of Virginia as a “sort of anomaly in our times.” The only other societies existing at the time to which Washington believed it could be compared were the other slaveholding states, and under close inspection all these societies appeared to him as “very much like the remnant of an older civilization —a fragment of the feudal system floating about here on the bosom of the nineteenth century.” Favoring man at the expense of society, Virginians took a distinct view of human liberty as something belonging to the individual, whereas Yankees would stress the importance of “civil, political, or religious liberty —the liberty of the citizen.” Virginians, because they held to an individualistic view of liberty, “could not understand why they should abridge their natural rights for the improvement of their social relation, when they felt society to be a burden, and only desired to be relieved of its trammels.”<sup>26</sup>

Yet if a society must lead to one of the two poles, Washington thought that of individualism would be best, for he saw northern materialism moving in a direction stultifying to the individual. He thought that northern materialism distorted the individual’s ability to move towards his telos: “the tendency of the present order of things is to engross men exclusively in the miserable work of accumulation, and to chain down their minds to low and perishable interests, to the neglect of higher and more enduring interests and the cultivation of those spiritual and intellectual faculties which distinguish man from the brute, and connect him, in the gradation of being, with the higher intelligences.” He held that a certain amount of individualism, particularly an individualism removed from the influences of the city, could be beneficial. Who knows, asked the professor, what Jeffersons, Henrys or Washingtons were growing up anew “in the bosom of that isolated country life, which still constitutes a

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<sup>26</sup> HW, “The Social System of Virginia,” *Southern Literary Messenger* XVIII (1848): 65-81; repr., in Michael O’Brien, ed., *All Clever Men Who Make Their Way: Critical Discourse in the Old South* (Athens: University of Georgia Press, 1982), 231-262; quotations, 238, 251.



distinguishing feature of Virginia society?” According to the professor, individualism best-suited Virginia, “for, after all, it is the noble people that make the noble government,” and not vice versa.<sup>27</sup>

Despite his praise for the philosophy of Locke and the individualistic philosophy of liberty, Washington nevertheless argued that the rights of Virginians arose out of a lived reality, and not from philosophical speculation. Washington thought that the Virginia Constitution of 1776 had done an excellent job of accounting for the traditions and ways of life in Virginia. He described this constitution as a collection of “the ancient and immemorial rights, franchises and privileges of the colonists of Virginia, gathered together and bound up in one great system of law, order, liberty and justice.” He believed that that constitution guarded the “rights, franchises and liberties” that English settlers had brought with them to the New World. In asserting these rights as an inheritance, and not as the products of “modern speculation” originating in “any abstract theory of human rights and human equality,” Washington stated that the individual liberty protected by the Virginia Constitution had a “*feudal and aristocratic origin.*” He described the Magna Charta as the first great enumeration of the rights protected by the Virginia Constitution. Inquiring after the source of these rights and liberties, Washington accepted Lord Coke’s argument that that charter declared rights that already existed. It merely reaffirmed “those ancient rights and franchises, which were the birthright and inheritance of the feudal peerage everywhere, but which the English barons had lost by the usurpations of the crown during the first century after the conquest.”<sup>28</sup>

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<sup>27</sup> Ibid., 261.

<sup>28</sup> HW, “The Virginia Constitution,” 658.

Washington noted that the English aristocracy, although militant and imperious to those outside their order, were a “turbulent democracy” within their own circle. The aristocrats did not think the King to be better than any of them individually, and they only adhered to his leadership so long as he maintained their rights and liberties. Washington disputed the popular notion that the people of England were a party to the Magna Charta. He believed that only the King and his Barons were represented in it. The free humans referred to in the Charter “were, beyond all doubt, the feudal barons.” Washington painted a picture of England at this time in racial terms, in which the French-speaking Normans lorded it over the Saxons. Over time, he argued, the two races merged to form the “Commons.” According to this interpretation, the English Constitution became more open over time, by receiving “different portions of the subjugated races within its exclusive and aristocratic pale.” In these terms, historical progress had made it possible to give the rights of noblemen to normal people. Washington defined the English Constitution as an “enlarged, liberalized, and generalized” form of the Magna Charta. The English Constitution transformed itself in this direction in order “to meet the progress of society, and the development of the different classes.” Washington took this thesis one step further, arguing that all American Constitutions are also “*that same great Charta, still more enlarged, still more liberalized to meet the yet greater progress of American society, and the more rapid growth among us of the principles of equality.*”<sup>29</sup>

Washington then reiterated his theory that American constitutional liberties came not from an “abstract theory of human rights and equality,” but were rather an inheritance of a “haughty and exclusive aristocracy....” The task for Virginians of his day, claimed Washington, would be “to reconcile ancient liberty with modern equality.” He then advanced his thesis yet

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<sup>29</sup> Ibid., 662.

another step. He argued that liberty, wherever and whenever it had existence, always grew from an aristocratic privilege to something held by the general run of men: “*society always begins in inequality and tends toward equality....*” To prove his point, Washington considered the ancient Greeks, arguing that, like the English, their civilization had been based upon conquest. The ruling classes of Greece had ruled by the sword, and treated their subjects imperiously, but among themselves, they were a democracy. Indeed, they were more democratic than the English in that they did not yet have a King. When the time came to go to war they had to elect one. “Starting from this point, the student of Grecian history may trace her institutions through all the stages of their subsequent development; he may see the bigotry of race gradually yielding before the pride of wealth; the pride of wealth before the spirit of equality.” Washington described these changes as part of an inexorable historical force, holding that the history of liberty in ancient Greece was not “*the offspring of theory or speculation.*” According to this interpretation, the ancient aristocracies passed liberty down as an inheritance to the common people. “The idea that it was founded in nature —that it was an inalienable right due in common justice to all mankind, has no place in the ancient world.”<sup>30</sup>

True liberty, according to Washington, has its roots in the privileges of aristocratic conquerors. Over time, the conquered come to share the privileges of their rulers. “Society, as I have said, always begins in inequality and tends towards equality, and he only deserves the name of a statesman who sees that its institutions keep pace with its progress, and that the Constitution opens, from time to time, to admit class after class, successively, as they are prepared to enter it.” Washington believed that nations grow the same way that children grow, “and to suppose that the early institutions of a nation are adapted to it throughout all the stages of its progress, is as

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<sup>30</sup> Ibid., 663.

absurd as to suppose that the swaddling clothes of the infant are adapted to the proportions of the full-grown man.” Only a fanatic would overthrow society in favor of a theoretically perfect order, but only a bigot would oppose all reform, thereby preparing “the way to inevitable revolution.”<sup>31</sup>

Despite this profession of constitutional liberalism, Washington argued against the universal right of self-government. He believed there to be “but one *universal* principle of government, which is, that every people are entitled to those institutions which will make them most happy, most prosperous, and most contented.” The professor described government as a practical affair, and one that differed from place to place, and from time to time. What worked best to secure contentment and prosperity in one part of the world might be a complete failure in another part of the world. But Washington argued that in all times and places, the “prosperity of the governed” should be the goal, “and that every people have a right, (a natural right if you please), to that form of government which will secure that end.” Some peoples have a “natural right” to democracy, while others have a “natural right” to despotism. Washington would not have supported the exportation of democracy at the point of a gun: “I am not bigot enough to suppose that our institutions are adapted to all times and nations, and that all governments proceeding upon other principles, must necessarily be illegitimate and in derogation of natural rights.” Washington quoted the English historian Thomas Babington Macaulay to the effect that a good government is like a good coat, it should fit the person who wears it.<sup>32</sup>

Although Washington believed that English liberties had evolved without the aid of theoretical speculation, he disagreed with those thinkers who argued that “speculative politics”

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<sup>31</sup> Ibid., 668.

<sup>32</sup> Ibid., 669.

would inevitably lead to disaster. Admitting that the idea of speculative equality had, in the past, been pushed to extremes, Washington nevertheless argued that “the evil is one which, in the nature of things, must soon correct itself, and it is manifest that the reaction has already commenced.” The professor maintained his confidence “that modern civilization will not fail in the accomplishment of its great work of reconciling the *principles of equality* with the *principles of liberty*.” Noting that “scientific, moral and religious” doctrines allowed for both theory and fact, Washington asked rhetorically why the realm of politics should be any different. Fearing that “the despotism of prescription” could be every bit as dangerous as “the despotism of theory,” Washington asserted that the doctrine of equality could be safely expanded. Over time he hoped that “those ancient and high-born rights, privileges and franchises, of which I have so often spoken, may be extended with safety and infinite benefit to the humblest citizen who toils and sweats in the field, the work-shop, the factory, or on the highway.”<sup>33</sup>

Had he survived to experience the Civil War, Washington might very well have sided with the Union cause. His thesis concerning the gradual extension of equality and his argument that the true statesman aids society in this transformation sounds much like the postwar justifications used by Lincoln partisans. But the professor did not survive to see the war. He had long been a sick man. His biographer believes that Washington contracted “chronic dysentery” while still a law student. The illness compelled him to resign his professorship in 1857. That summer Washington moved to Baltimore hoping to find better medical care than that available in Williamsburg. By December his health had improved somewhat, and he relocated to Washington D.C. where he lived with his parents and occasionally observed congressional sessions. His brother gave him an “airgun” as a present, and Washington used it in an attempt to eliminate the

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<sup>33</sup> Ibid., 673-674.

pigeons that would fly up and land on the roof of a shed near his room. In 1858, Washington's servant found him sprawled upon the floor with blood streaming from his eye. "It was evident at a glance that in bending over to see into the yard, without exposing himself more than necessary to the current of air, the fringe of his shawl had caught the trigger of the gun, and the contents were discharged into the brain through the eye." Thus ended the career of liberal constitutional orthodoxy in Virginia academe.<sup>34</sup>

### III.

The untimely death of Henry Washington left John Randolph Tucker as the most prominent expositor of constitutional orthodoxy in the Tucker family. John became attorney general for the state of Virginia in 1857. He continued to serve in this capacity throughout the Civil War. He had hoped that God would look favorably upon the Union, and assure that that body remained loyal to its first principle: the sovereignty of the states. But when the war came, Tucker defined it as a war of "national independence." Believing this objective to be "right in the sight of a just God," Tucker noted that the states had always reserved the right to leave the Union. Even from within the Union, "all powers not delegated, were reserved to the States respectively, or to the people." Tucker argued that these abstract questions had important practical consequences: "The preservation in proper equilibrium of the granted powers and the reserved rights, was the law of life to the union." Tucker believed that the states themselves had the right to determine if their reserved rights had been violated, "for it is obvious, that if the right, finally to decide such an issue, resided in the Government exercising the disputed power, its delegated authority would

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<sup>34</sup> Carol Sturzenberger, "The Diaries of Henry A. Washington," 3; Right Reverend J. Johns, D. D., *Memoir of Henry Augustine Washington* (Baltimore: James Young, 1859), 28.

become unlimited, and despotic, which was never intended; and would have made the reservation of all ungranted power, an empty form, and of no effect.”<sup>35</sup>

Tucker provided his own narrative of the events that led to the South leaving the Union. “Forty years ago, the North violated the Constitution, as the Supreme Court of the United States has recently decided, by excluding the South, with its social institutions, from lands purchased with the common treasure of the country.” Tucker believed that Northerners promoted this step in an effort to increase their political power. In the 1830s, the North “flooded Congress with petitions for interference with slavery in the South.” Southerners denounced this action; they believed that Northerners were trying to exercise an unconstitutional power. When the Union acquired a great amount of land from Mexico, the North attempted to shut the South out of this area as well. “This was a deep wrong! It was a gross insult!” Tucker believed that southerners had been used to acquire land that the North then deemed them “unworthy to enjoy.” With the accomplishment of this act, the South fell to the mercy of the northern majority. The South held on, hoping to use political parties in such a way as to secure justice from their new masters. “But the North, from the moment the balance of power was disturbed, began to consolidate parties in that section, and abolitionize the whole.” The “Abolition party” nearly won in 1856. Then, in 1859, Virginia, the oldest state in the Union and one which had done so much for the cause of that Union, “was the scene and the victim of an Abolition raid, designed to raise her slaves to insurrection, and to devote her homes to flame and desolation and outrage!” Some northerners could still be brought to denounce John Brown in those days before the war, but Tucker argued that those northerners were hypocrites, for they now “equal him in brutality of purpose and

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<sup>35</sup> JRT, *The Southern Church Justified in its Support of the South in the Present War: a Lecture, Delivered Before the Young Men’s Christian Association, of Richmond, on the 21<sup>st</sup> May, 1863* (Richmond: WM. H. Clemmitt, 1863), 8-10.

surpass him in its successful execution.” Tucker believed that the Northern response to the Brown raid had helped to put Lincoln in office.<sup>36</sup>

In Tucker’s mind the Brown raid indicated that the United States had already split in half: “They became in fact, two nations in sentiment, linked together by a feeble political bond.” He thought it would be easier to keep France and England under the same government. Lincoln had asserted that those who deny freedom to others do not deserve to have it for themselves, but Tucker turned that theory back upon the president. The North “has denied freedom to the South, and has lost it; it has struck a blow at the liberty of the South, and has fatally pierced its own.” Tucker offered an extended block quote from a speech made by William H. Seward, Lincoln’s secretary of state. In this speech, Seward stated that he would not rest until slavery was on the way to extinction. Tucker noted that Lincoln had made similar comments as well. “All this was proposed to be done under a Constitution which recognized and protected slavery —and treated, as equals, free and slave states— and by a Government formed and bound to protect, defend and advance each and all the States, in their interests and institutions.” According to Tucker, a government that existed to protect the entire country had declared war on half of it; thus the South had no choice but to secede, if they wished to protect themselves from revolution.<sup>37</sup>

According to Tucker’s interpretation of the United States Constitution, the southern states had “acceded” to the Union in peace, and they had similarly “seceded” from it in peace. “In February, 1861, these States adopted a new constitution differing but little from the old, and formed a new Confederation.” The states did so because they “sought only to be independent.” Even after the adoption of a new constitution, the Confederate States did not declare war. This

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<sup>36</sup> Ibid., 17-19.

<sup>37</sup> Ibid., 20-22.



Constitution kept the Mississippi free to northern navigation. Furthermore, it asserted that immediate steps would be taken to resolve disputes over public property and public debt. Making real this proclamation, the Confederacy sent delegates to Washington D.C., but the Lincoln government refused to meet with them. Tucker supplied a verse from scripture: “‘if thou wilt take the left hand, then I will go to the right...’” He believed the South had been reasonable. “But Pharaoh was resolved not to let the people go!” He described the Federal Government’s attempt to indict twelve million people, arguing that in such a situation, the people of Virginia had no choice. Either Lincoln would force them to fight against the South, or they could choose to side with their southern brothers in a fight for self-determination.<sup>38</sup>

Tucker believed that Northerners had violated “international law” in their destructive war against the South. The worst crime committed by the northern states, in Tucker’s view, involved the federal government’s war upon the very Constitution that she claimed to be upholding. “The Federal Government refuses to recognize our independence, and still claims these states as members of the Federal Union.” That would be fine, argued Tucker, but for the fact that “at every step of this contest, that Government ... tramples under foot the Constitution its officers are sworn to support, and which it falsely professes a purpose to restore.” Without the authority of the South the Union would never have existed in the first place, and yet the Union blockaded her ports, “which the Constitution guaranteed should be open and free.” Tucker enumerated a further series of these violations: The federal government took away southern property without due process of law, and the president unconstitutionally suspended habeas corpus. Military courts tried citizens even in areas where the civilian courts remained in operation. The federal government “muzzled the press, abridged the freedom of speech, and... prohibited the free

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<sup>38</sup> Ibid., 23-25.

exercise of religion, even in the Northern States.” The president emancipated the slaves with an “imperial edict” thereby destroying three billion dollars worth of property “without compensation and for no public use!” The federal government gave “freedom to the slave, and put chains upon his master, without warrant of law, and beyond the hope of relief.” Furthermore, this same government made war upon women and children and destroyed southern food supplies. It then required southern men “to take its oath of allegiance, as a condition for the privilege of purchasing needful supplies for their families, thus compelling to perjury, or condemning to starvation.”<sup>39</sup>

The federal government therefore, according to Tucker, “defeated every object for which it was formed.”

It has done gross injustice, though formed ‘to establish justice.’ It has stirred up servile insurrection, though formed to ‘to ensure domestic tranquillity.’ It has made fierce war upon us, though formed ‘to provide for our defense.’ It has spread ruin and desolation in its march, though formed ‘to promote our welfare.’ It has destroyed liberty of thought, of speech, of action; liberty of the press —liberty of religion— though formed ‘to secure the blessings of liberty to us and our posterity.’ It has destroyed our lives, confiscated our property, invaded our homes, [and] engendered a war of races in our midst.

Anticipating the charge that the South had brought these misfortunes upon herself by seceding, Tucker argued that the war had only sped up the Republican project to destroy the South. He asserted that even without the secession of the southern states, the Republicans would have worked to carry out this same project: “Hatred of the South has been felt for years —and only waited a fit occasion, to ripen into the deadly fruits of a war of desolation, plunder and ruin.” In the Union or without, the “civil liberty” and “constitutional freedom” of the South would have been attacked.<sup>40</sup>

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<sup>39</sup> Ibid., 26-28.

<sup>40</sup> Ibid., 28-29.

#### IV.

Tucker made a powerful case for secession. But the southern armies failed to win a lasting independence for their people, and with their defeat the Confederates had to leave all hope of independence on the battlefield. Because of this changed situation, constitutional arguments had to change shape as well. An indictment of the federal government must needs be very different from a defense of the constitutionality of a failed war for independence. Albert Taylor Bledsoe would be one of the first in the South to take on the new task.

Before the war had begun, Bledsoe had grown impatient with Virginia's slowness in moving to declare her independence: "Virginia was slow, exceedingly slow, and tried almost beyond endurance, the patience of many of her noblest sons." Virginians failed to act because they failed to understand "the Yankee character." They did not "comprehend the perfidy of its designs, nor the malignity of its purposes." Bledsoe classed General Robert E. Lee, at the time serving as the commander in charge of all the soldiers in Virginia, as one of this class of southerners. Bledsoe wrote to Jefferson Davis that Lee's public comments "are calculated to dispirit our people." According to this interpretation, Lee did not know "how good and how righteous our cause is, and consequently lacks the one quality which the times demand."<sup>41</sup>

When the war finally began, Bledsoe left his post as professor of mathematics at the University of Virginia and accepted a commission as a colonel in the Confederate States Army. In that capacity he served as the Chief of the War Bureau in Richmond. In the words of Bledsoe's biographer, this agency "functioned largely as a coordinating and clerical agency for the Secretary of War." Unfortunately, Bledsoe had poor relations with the secretary. The

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<sup>41</sup> ATB to Jefferson Davis, 10 May 1861, in Lynda Lasswell Crist, et. al. ed., *The Papers of Jefferson Davis* (11 vols., Baton Rouge: Louisiana State University Press, 1971-2004), VII:159-161.

professor would later describe the War Bureau as a “purgatory” —a place where he single-handedly had to face off against “swarms of politicians and office seekers, all bent on their own private little ends,” grasping at his “elbows, sides, brain, and nerves, and never permitting him to devote the little sense he had to the most glorious cause the world has ever seen....” After just over a year at the Bureau, Bledsoe returned to the University of Virginia.<sup>42</sup>

There he spent a year teaching before traveling to England in the hope of writing a defense of the Confederate cause. Bledsoe should have made a point of securing university leave, but because he did not, this trip ended his career as a university professor. He did, however, set off with letters of introduction from a variety of notable southerners. Bledsoe would later insist that he had not actually asked for the letters, and that he did not present them to anyone “because I went to England to work, and not to see Lords.” He claimed to have received numerous invitations from English aristocrats desiring a visit, but he “declined them all on the ground of duty to the South as a writer, till they ceased to be given.” For a person hoping to contribute to the Confederate cause, Bledsoe certainly could have done a better job as a cultural ambassador. Although he occasionally splurged and enjoyed a whist party or some other type of social function, he nevertheless insisted that he “could not keep up with these parties and write.”<sup>43</sup>

Bledsoe’s defense of the Confederate cause did not appear in time to help the war effort. During the war, a British publication had offered to serialize the book, but the former professor declined the offer because it would have taken more than two years to publish the entire work in that manner. When the war eventually ended, Bledsoe changed the stated goal of the book,

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<sup>42</sup> Willard Murrell Hays, “Polemics and Philosophy: A Biography of Albert Taylor Bledsoe,” (Ph.D. diss., University of Tennessee, 1971), 428; ATB, “Hon. A. H. Stephens on the Late War,” *Southern Review* IX (1872): 120-156, quotation p. 148.

<sup>43</sup> ATB, Memorandum Book, undated, in Dinwiddie family papers, UVA.

publishing it in an effort to win clemency for an old friend: Jefferson Davis. The former professor entitled the work, *Is Davis a Traitor; or, was Secession a Constitutional Right Previous to the War of 1861?*<sup>44</sup> Bledsoe would later regret that he had lost most of the letters from Jefferson Davis's lawyers respecting the treason trial. "When Davis begged me to publish the book, just before the time set for his trial, he said he knew that no one would analyze and discuss the subject as I had done; and both Reed and O'Connor, the two most eminent of his counsel, admitted that I opened and cleaned up the great theme to their mind." Posterity has to some extent shared the supposed verdict of these lawyers. Richard Weaver, one of the early scholars of the so-called "Lost Cause" theory, called Bledsoe's book "the masterpiece of Southern apologias."<sup>45</sup>

As demonstrated in the previous chapter, Bledsoe had little patience with the first premise of modern natural rights theory. In his defense of Davis, he continued his attack on the state of nature idea, describing it as "one of the darkest metaphysical theories of Europe...." Bledsoe chastised those who conflated the "vague and visionary" social compacts of the Old World with the historically real compacts of the New. Unlike other foundings in history, the American founding was not mythical, but "historical and real." The social contract philosophy, in other words, held no validity to Bledsoe except to the extent that it could be used to explain American constitutionalism. Defining the prewar Constitution as a compact between free and independent

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<sup>44</sup> ATB, *Is Davis a Traitor; Or Was Secession A Constitutional Right Previous to the War of 1861?* (Baltimore: Innes and Company, 1866).

<sup>45</sup> ATB, Memorandum book; Richard Weaver, "Albert Taylor Bledsoe," *The Southern Essays of Richard M. Weaver* (1944; Indianapolis: Liberty Fund, 1987), 147-158. Bledsoe was certainly correct in noting that Charles O'Connor and William Reed served as members of Davis's council in this great trial that never made it to court. William J. Cooper Jr., *Jefferson Davis, American* (New York: Knopf, 2000), 561-565; Bledsoe does not note, however, that John Randolph Tucker also served as one of Davis's lawyers. Thomas, "John Randolph Tucker," 898.

states, Bledsoe argued that the old Union had been based on consent and not conquest. He thought that the war, though it saved the United States as a geographical entity, had destroyed the very nature of the old Union. Bledsoe argued that the new Union was “no longer a government by consent, but a government of force. Conquest is substituted for compact, and the dream of liberty is over.”<sup>46</sup>

Bledsoe believed that a conspiracy existed to keep the right of secession hidden from public view. The greatest obfuscations, according to this account, came from Daniel Webster and Joseph Story. In 1833, Webster delivered his famous speech “The Constitution is not a Compact” and Story published a similar argument in his *Commentaries on the Constitution*. Both men admitted that if the Constitution were, in fact, a compact, then secession would be permissible. Bledsoe demonstrated that even an adamant nationalist like Gouverneur Morris did not hesitate to call the Constitution a compact before, during and after the convention. Both Hamilton and Madison referred to the Constitution as a compact in the *Federalist Papers*. And even Webster himself, only three years before his speech inveighing against the term, referred to the document of union as a “Constitutional compact.” Bledsoe believed that Webster and Story had been deliberately duplicitous. The North wished to control the Union, and “like every other despotic power, it must, of course, have its sophists, its sycophants, and flatterers, to persuade it that it can never violate its compacts, because it has never made any compacts to have violated.”<sup>47</sup>

Bledsoe assembled a virtual clearinghouse of arguments in defense of secession, but he put one at the center. He asked a rhetorical question: where in the Constitution did the “free sovereign and independent states ... delegate, surrender, or give away... the right to secede from

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<sup>46</sup> ATB, *Is Davis a Traitor?*, 31-32, 185.

<sup>47</sup> *Ibid.*, 6, 25, 45.

the Union?” Bledsoe believed that the South had had the great body of precedent on its side: “The creed of the fathers, the creed of all sections in 1787, the creed of all the States for more than thirty years after the formation of the ‘more perfect Union;’ was substantially the creed of the South in 1861.” In being the last to follow the creed of the fathers, the South “did dislocate the Union, and breed fiery discord; but then, this was simply standing still, and refusing to follow the rapid revolution of New England.” Bledsoe alluded to a speech made by Abraham Lincoln in 1848, in which the future president articulated the right of “any people whatever to abolish the existing government, and form a new one that suits them better.” Bledsoe claimed that when Lincoln had been asked why the North did not just let the South leave the Union, the president had replied: “Let the South go? Where, then, shall we get our revenue?” According to Bledsoe, the North had coerced the South back into the Union, and then taxed her without allowing her any representation in Congress. Alluding to the cry of “no taxation without representation,” Bledsoe dryly remarked that the “Union waged a seven years war to establish that right, and a four years war to demolish it.”<sup>48</sup>

As a master polemicist, Bledsoe did not restrict himself to northern opponents. He attacked the former vice president of the Confederacy as well. In his debate with Alexander Stephens, Bledsoe manifested considerable resignation. He believed that the great masses of the people, even the southern people, had failed to understand the meaning of the southern cause. Consequently, politicians of both the North and South had been forced to resort to demagoguery in order to manipulate the people in the direction they needed them to go. According to the former professor, much of this demagoguery had been expressed regarding the issue of slavery. Before the war, Stephens had been one of the many political men to agitate on this issue.

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<sup>48</sup> Ibid., 129, 136-137, 143-144.

According to Bledsoe, Stephens had little choice, for the great masses of people would never have been willing to fight were it not for slavery: “A fight between two game-cocks would have done more to arouse their warlike passions, than a conflict between two political theories about which they knew little and cared less.” As a savvy politician, Stephens realized that only slavery could mobilize the great masses for war. Thus at the beginning of the war, the Georgian had made slavery out to be the sole cause of the fight. In his famous “Cornerstone Address” of 1861, Stephens argued that the Union had been built on a “sandy foundation” of racial equality, and that this fact had proven its downfall.<sup>49</sup>

According to Bledsoe, Stephens had been a mono-causalist before the war when he regarded slavery as the only topic of contention, and a mono-causalist after the war as well, when he neglected to discuss slavery as one of the issues leading up to the conflict. Accusing the former vice president of neglecting to mention slavery in his post war volumes, Bledsoe argued that Stephens had staked his entire interpretation of the war on a single political theory. By focusing on just one cause, Stephens produced “a big book for the times” instead of “a great book for eternity.”<sup>50</sup> Worse yet, Bledsoe found Stephens unreliable on the one issue that mattered most: secession. In his post-war work, the former vice president portrayed himself as having opposed the policy of secession but not the right of secession. Bledsoe, however, returned to Stephens’s prewar speeches and demonstrated that the Georgian had misrepresented his antebellum position. Bledsoe believed that Stephens failed to understand secession properly, even in his postwar volumes. According to the former professor, Stephens conflated the right of secession with the right of revolution. Bledsoe distinguished between the two: the right exercised

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<sup>49</sup> ATB, “Alexander H. Stephens on the War,” *The Southern Review* VIII (1868): 260.

<sup>50</sup> The book in question was AHS, *A Constitutional View of the Late War Between the States: Its Causes, Character, Conduct and Results*. (2 vols., Philadelphia: National Publishing Company, 1868-1870).



in 1776 was the right of revolution, but the right exercised in 1861 was that of a sovereign state seceding rightfully from a federal compact.<sup>51</sup>

In the contest with Stephens, Bledsoe, perhaps growing cynical, had backed down from his old claim that the creed of the South had been the same as the creed held by the framers of the Constitution. The Georgian had argued that the framers all upheld the right of secession and that most scholars and public men held the same view up until the 1830s. Bledsoe disagreed this time, stating that no one discussed the right of secession between 1789 and 1826. The subject, according to Bledsoe, did not seem to have been on anyone's mind at the time. Stephens mocked this statement, asking: "Did not Judge Tucker's Commentaries appear during this period? Did not he clearly maintain the right?" Indeed, Alexander Stephens did not allow any of Bledsoe's charges to go unanswered. He vociferously disagreed with the former professor's contentions that he failed to distinguish between the right of revolution and the right of secession and that he had somehow wavered on the secession issue. Stephens defined secession as the right of a sovereign state, not a constitutional right. Stating that he did not always approve of secession as a remedy for a wronged state, the Georgian nevertheless maintained that he had always defended the right of a state to secede.<sup>52</sup>

In response, Bledsoe continued to maintain that secession existed as a constitutional right, and he continued to assert that Stephens believed secession to be a constitutional wrong. "Many things are called legal rights, not because they are expressly given or conferred by, but because they are consistent with the law." Bledsoe described secession as a right of this type. In an abrupt

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<sup>51</sup> ATB, "Alexander H. Stephens on the War," 263-264.

<sup>52</sup> AHS, "Mr. Stephens' Review of Dr. A. T. Bledsoe's Review of 'The War Between the States,'" in *The Reviewers Reviewed: A Supplement to The "War Between the States,"* (New York: D. Appleton and Company, 1872), 11, 33.

volte-face from the position that he had upheld in his defense of Jefferson Davis, Bledsoe reiterated his claim that the framers of the Constitution had opposed the idea of secession. He cited Hamilton's statement in the twenty-second *Federalist* as well as a letter that James Madison wrote to Daniel Webster. Bledsoe conceded Stephen's point that scholars had long upheld the right of secession. He specifically mentioned, in this regard, the writings of St. George Tucker. But he discounted the fact on the grounds that "[n]ot one in a hundred thousand of the people had ever heard of the work of ... Tucker, until it was noticed in the Commentaries of Kent or Story, even if they have ever heard of it to this day." Bledsoe attempted to downplay the importance of the Hartford Convention as well: "what has that secret Convention, and its unpublished resolutions, to do with the discussion of anything 'by the public men of the country?'" Believing that the war had forever defeated the cause of constitutional orthodoxy, Bledsoe had nevertheless continued, for a time, to defend the old principles. By the time of his debate with Stephens, however, the former professor had succumbed to an ever more querulous cynicism. Bledsoe died in 1877, just as the Reconstruction he so hated came to an end.<sup>53</sup>

## V.

John Randolph Tucker, unlike Bledsoe, never abandoned the cause of constitutional orthodoxy. Indeed he labored valiantly to fit the faith of his grandfather into the changed political situation brought about by the end of the war. Soon after defeat, Tucker moved to Middleburg, Virginia, his wife's hometown. He practiced law there until 1869, when he moved to Baltimore to serve as counsel for the Baltimore and Ohio Railroad Company. One year later he won a professorship at Washington College in Virginia. From that point on, Lexington would be his hometown. He taught law through lectures and examinations, the newer case law method having not yet been

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<sup>53</sup> ATB, "Hon. A. H. Stephens on the Late War," 133-134, 155-156.

introduced to the South. In 1872, the residents of the Lynchburg district elected him as their representative to Congress. Tucker would serve twelve terms in that capacity. During this time he served on the Ways and Means Committee as well as the Judiciary Committee.<sup>54</sup>

Tucker took up a variety of causes during his tenure in the House of Representatives. On one occasion, he refused to vote for a grant of money to finance an exhibition in Philadelphia. He feared that the “general welfare” clause could easily be misconstrued in such a manner that every costly pork barrel scheme would seem constitutionally reasonable. In the contest between Rutherford B. Hayes and Samuel Tilden, Tucker supported the creation of an Electoral Commission to decide the contests in Louisiana and Florida. Once this commission had been established, Tucker argued before it on behalf of the Tilden electors from Florida. Throughout his congressional career, the professor consistently fought against protective tariffs. Believing that people do best when they can decide things for themselves without the aid of government, Tucker articulated a general principle: governments should have “the minimum of power,” and citizens “the maximum of liberty,” that could consistently be held while maintaining “the order and safety of society.” On certain issues he believed the government should intervene to restrict natural liberty. For instance, in his last congressional battle Tucker argued on behalf of a bill for the abolition of polygamy in Utah. In this debate he defined marriage as “a civil status, the jural result of a contract between one man and one woman for perpetual cohabitation and mutual support, looking to the procreation and nurture of children under the security of certain parentage.”<sup>55</sup>

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<sup>54</sup> Davis, “John Randolph Tucker,” 141.

<sup>55</sup> Ibid., 144-146; JRT, “Elections by the People Must be Free from the Power and Presence of the Standing Army,” 46<sup>th</sup> Cong., 1<sup>st</sup> sess., *Congressional Record*, (4 April 1879): 245-246. On Tucker’s opposition to polygamy, cf. Gaines Foster, *Moral Reconstruction: Christian Lobbyists and the Federal Legislation of Morality, 1865-1920* (Chapel Hill: University of North Carolina Press, 2003), 63-64.

In Congress, Tucker generally refused to retaliate in kind against his Republican colleagues who enthusiastically waved the bloody shirt in remembrance of the late war. Noting that he looked back at the war with sorrow, the Virginian stated that he had “no palinode to sing.” When the war began, Tucker noted, southerners believed their cause to have been the right one. “Claiming nothing which I do not accord to our then opponents, I think we may each respect the conscientious beliefs that impelled us into that unhappy conflict.” Admitting that the question of slavery had been a driving influence behind the war, Tucker noted that the Reconstruction amendments, and indeed the war itself, had permanently settled that question. He therefore declared it his purpose as a representative from the state of Virginia “to make this a glorious Union among the nations of the earth and this Government a great and noble one for the security of the liberties, the independence, and prosperity of all these united Commonwealths.” He referred to the late war “as nothing but the convulsive throes of the infant Hercules in his cradle —marking growth, development and progress.” Believing that Americans were responsible for the progress of humankind, Tucker worked to make sure that the American “experiment” continued to operate.<sup>56</sup>

Tucker believed that constitutional orthodoxy had survived the adoption of the Reconstruction amendments. He noted that at the time of the framing of the Constitution, the representatives of the various states had agreed that Congress could eliminate the international slave trade after 1808. According to this interpretation, the states had imposed this restriction upon themselves, in the interests of preserving the Union. Tucker placed the thirteenth amendment in this same tradition. Eight southern states had ratified it. Even the states that did not ratify it, “had bound themselves to agree to amendments of the Federal Constitution,” once

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<sup>56</sup> JRT, “Election by the People,” 242.

three-quarters of the states had ratified. Slavery had been the “apple of discord” between the northern and southern states, but the thirteenth amendment made abolition “a matter for reasonable agreement and compact between the States....” Therefore, the thirteenth amendment “sustains and supports” constitutional orthodoxy to the extent that it upheld the traditional interpretation “of the relations of the Union to the States pre-existent to the war and this amendment.”<sup>57</sup>

The fourteenth amendment, according to Tucker, played a similar role. It granted citizenship to anyone born in the United States. This amendment overturned the decision of *Dred Scott v. Sandford*, which had held, according to Tucker’s interpretation, “that no negro was a citizen within the meaning of the judicial clause of the Constitution which gave jurisdiction to the Federal courts in suits between citizens of different States.” The professor believed that the elimination of slavery with the thirteenth amendment necessitated the addition of the fourteenth amendment. “It is obvious that the above-cited provision of the fourteenth amendment, as to who should be citizens of the United States and of the State wherein they reside, was proper to be adopted, in order to settle the questions which had arisen prior to the war and prior to the abolition of slavery.” But the fourteenth amendment had other provisions as well. It declared that no state could pass a law that would “abridge the privileges or immunities of citizens of the United States.” This provision implied, according to Tucker, that without it “a State might abridge the privileges of a citizen of the United States, and that it was necessary to prohibit this abridgment by an amendment ratified by the States themselves.”<sup>58</sup>

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<sup>57</sup> JRT, *The Constitution of the United States: A Critical Discussion of its Genesis, Development, and Interpretation* (2 vols., Chicago: Callaghan & Co., 1899), I: 342-343.

<sup>58</sup> *Ibid.*, 344.

Tucker inquired into the nature of these privileges and immunities. He noted that the rights of a citizen of the United States were not the same thing as the rights of a citizen of an individual state. For instance, one may be a citizen of the United States, but not have the right to run for election in an individual state, on the grounds that one has not established residency there. According to his estimation, the *Slaughter-House Cases* provided “a very full consideration of the character of the fourteenth amendment.” Based upon this decision, the professor argued that each American holds citizenship under two governments: that of the Union, and that of his state. According to Tucker, the *Slaughter-House Cases* validated this reading of the Reconstruction amendments, namely, that these amendments in no way altered the main features of the Constitution. The Virginian believed the fourteenth amendment to be little more than a clarification of the privileges and immunities clause in the original Constitution.<sup>59</sup>

Tucker had been an early advocate of the theory that the fourteenth amendment incorporated the privileges and immunities clause of the Constitution and the first ten amendments, making this argument before the Supreme Court in 1887. One year after ending his congressional career, Tucker returned full-time to his professorship at Washington and Lee College. From that base he accepted the occasional high-profile legal case. His best-known case from this period involved the defense of August Spies, a member of a group of Chicago anarchists charged with the murder of several policemen during the famed Haymarket riots. The professor had been one of three members of an improbable legal “dream team” that included the infamous former military governor of New Orleans, Benjamin F. Butler. Together they spent two

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<sup>59</sup> *Ibid.*, 347. In the *Slaughter House Cases* of 1873, the Supreme Court held that the fourteenth amendment did not protect a group of white butchers from New Orleans who believed that a Louisiana law creating a monopoly in the operation of slaughterhouses impaired their rights as citizens of the United States. Instead, the Court held, as Tucker described, the idea that state citizenship and federal citizenship were separate but overlapping issues. Herman Belz, et. al., *The American Constitution: Its Origins and Development*, 7<sup>th</sup> ed., (2 vols., New York: W. W. Norton & Company, 1991), I: 355-356.

days before the Supreme Court petitioning for a writ of error so that Court would review the verdict handed down by the Supreme Court of Illinois. Their effort failed, but during the course of their appeal, Tucker made the argument that the fourteenth amendment gave the Supreme Court the jurisdiction for such a writ. When questioned about the case in later years, Tucker would always reply the same way: “I do not defend anarchy, I defend the Constitution.”<sup>60</sup>

The third and fourth clauses of the fourteenth amendment presented Tucker with more of a challenge. He recognized that they condemned the secession of the southern states. These clauses described secession as “insurrection and rebellion” and “created a disability in the part of those who participated in the same....” According to Tucker, this part of the fourteenth amendment sanctioned the “theory that the compact between the States is permanent, and that no State can be absolved from it but by the consent of the States or through rebellion.” He therefore accepted that the fourteenth amendment had settled “the conflict of opinion which honestly existed among men prior to 1861....” Admitting that the Reconstruction amendments had “increased the powers of the general government to some extent,” and that they had “abridged the powers of the States,” the professor nevertheless held “that in all essentials, the system of our Constitutional Union, its structure and its fundamental principles have not been changed.” States, according to Tucker, still composed the Union. The Constitution still existed as the only bond between these states, and the federal government still exercised only those powers delegated by

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<sup>60</sup> Charles V. Laughlin, “John Randolph Tucker,” in W. Hamilton Bryson, ed., *Legal Education in Virginia: 1779-1979: A Biographical Approach* (Charlottesville: University Press of Virginia, 1982), 631; *Ex parte Spies* 123 U.S. 131 (1887); Paul Avrich, *The Haymarket Tragedy* (Princeton: Princeton University Press, 1994), 334.

the states. The powers “not so delegated nor forbidden to them” still belonged to the state governments and to the people of the states.<sup>61</sup>

Tucker had less to say about the fifteenth amendment, although he noted that it gave black men the power to defend their right of personal freedom through suffrage. He found this right unproblematic. Indeed, he completely accepted the Reconstruction amendments and the implications commonly drawn from them at the time: “To these results, as parts of our constitutional system, I bow without reservation, and yield to them the obedience due by a citizen of Virginia to the supreme law of the land.”<sup>62</sup> With these amendments in place, Tucker believed that young Southerners could continue their adherence to “the profound political philosophy” of the South. He described this political philosophy as “the Inductive Philosophy” of “political science” and labeled it “the peculiar product of Southern thought....” The professor asserted that this political philosophy had made possible the United States Constitution. Contesting the thesis that the war had overthrown constitutional orthodoxy, Tucker referred to this thesis as a “political heresy” and noted that if it were true “then liberty is dead, and despotism is supreme.” The thirteenth amendment ended slavery, and the fourteenth amendment ended the right of secession. “But it is false to assert that the reserved powers of the States have

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<sup>61</sup> JRT, *The Constitution of the United States*, 347-348. It worthwhile to note that in contrast to his discussion of the thirteenth amendment, Tucker did not note the circumstances surrounding the adoption of the fourteenth amendment. These circumstances were far more controversial: Forrest McDonald, “Was the Fourteenth Amendment Constitutionally Adopted?” in *Georgia Journal of Southern Legal History* I (1991): 1-20.

<sup>62</sup> JRT, *The History of the Federal Convention of 1787 and of its Work: An Address Delivered Before The Graduating Classes At The Sixty-Third Anniversary of the Yale Law School, on June 28<sup>th</sup> 1887* (New Haven: Law Department of Yale College, 1887), 48.



otherwise been impaired, or the delegated authority of the federal government been increased so as to bring within its reach the essential rights of the several states.”<sup>63</sup>

Asking what the Old South could teach the New South, Tucker sought after a nexus to unite the two. He did not think that everything the Old South “ever believed and wrought out by its great intellects and its social and political virtue” should be simply thrown away. For “in all the history of civilized man, every seemingly extinct order has contained the seeds of that which succeeds it, and the rubbish of the past is but its circumstances, its incidents.” Tucker believed in progress, and he therefore stated that the New South would carry on the best things about the Old South. “When Rome crushed political Greece beneath its iron heel, the seed of Greek art, philosophy, and polity sprang from underneath it to teach the victor the ideas of a civilization which had filled the modern world with its immortal glory.” In turn, the Romans spread this Greek legacy to Europe where it served “as at once the creator and protector of all that the modern world values as civil and political liberty.” The real battles, according to Tucker, would be fought not on the battlefield but “within the human soul,” and the individual soul could hold out indefinitely. The only conqueror in affairs of the soul, according to Tucker, is “Truth!” He did not think that the New South could be great, or even prosperous, if she were to repudiate “the political philosophy of her ancestry,” or abandon herself “to the greed of gain,” by adopting “political principles which will prostitute federal power to the promotion of schemes of general plunder, in which she is to win her reward by taking her share of the dishonorable spoils.”<sup>64</sup>

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<sup>63</sup> JRT, *The Old South and the New South: Baccalaureate Address Before the South Carolina College, Commencement, 1887* (Columbia: Presbyterian Publishing House, 1887), 8, 22; For a modern scholarly reading of the Reconstruction Amendments that offers a theoretical grounding for the Tucker interpretation see: M. E. Bradford “Changed Only a Little: The Reconstruction Amendments and the Nomocratic Constitution of 1787,” in *Original Intentions: On the Making and Ratification of the United States Constitution* (Athens: University of Georgia Press, 1993), 103-131.

<sup>64</sup> JRT, *The Old South and the New South*, 3-4, 24.

According to Tucker, the Union as a whole faced a new set of challenges. He feared that the rights of individuals had come to be threatened by centralized power, both public and private. He feared that corporations, although “valuable in themselves and important and in some respects essential,” to the economy, might someday occupy “all the avenues of social industry in exclusive or injurious competition with individual energy and personal right.” Defining the corporation as a creature of the law, the professor argued that the law must make sure that corporations “shall not invade the sanctity of the rights of the free man.” He believed as well, that the obverse of this danger existed in the form of political centralization. Both the state governments and the federal government demonstrated a “tendency to control, regulate, and direct the industry and enterprises of individual men.” Tucker feared this regulation because he did not think that it worked as intended. The government claimed to exercise a paternal regard for the individual, but it quickly lost sight of the needs of the people in favor of “the few fawning parasites, who crowd the lobby and swarm the corridors of legislative bodies.” He feared that “class legislation” would make a minority rich at the expense of the many. In general terms, Tucker continued to believe that the world would do better with less government rather than with more.<sup>65</sup>

Tucker held that the governmental powers that had to exist needed to be kept responsive to the people. He continued to fear that the patronage powers of the presidency had perverted the constitutional order and made the government less responsive to the people. The framers had designed the electoral college so that the states could use their electors to choose the president. In the event that these electors could not decide on a single candidate, the House of Representatives would do so, with each state given one vote. “National conventions of partisans, however, now

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<sup>65</sup> JRT, *The History of the Federal Convention of 1787*, 49.

dictate the person to obedient electors, and the eventual power of election by states is thus defeated.” In practice, believed Tucker, the old system had been abandoned. The men who composed these conventions were usually office seekers, “whose greed for the spoils too often is the sum of their zealous patriotism.” Under such a system the powers of the president increased to the extent that he “centralizes public sentiment as to public measures, and practically controls all action in both houses of congress, and the President thus becomes the representative center of all opinion and the index of all political action.” Pitching his case to a northern audience, the professor argued that the “rottenness of corruption” produced under such a system of patronage was “more dangerous to liberty than the anarchy of disunion!”<sup>66</sup>

The framers of the Constitution had created, and the men that fought for southern independence had kept alive, “the equilibrium between the delegated and reserved authority — between the powers of centralization and the powers of the states.” Tucker wanted the younger generation to continue to keep these values alive, but he feared that technological innovations and the greater unity produced by these innovations would turn the young away from the legacy of their fathers and produce in their place “a feeling of paternity for the federal government....” If the young began to view the federal government as a paternal symbol, politicians would concoct schemes that might seem to be for the benefit of all, but that would actually favor only a selected few. Similarly, technology produced luxury and a “miraculous increase of wealth,” thereby leading many young people to abandon the “primitive and republican simplicity” of their forefathers. To set the right example, John turned to the writings of his own father, Henry Tucker. Praising the “conscientiousness” with which his father approached constitutional questions, John nevertheless noted that Henry had backed down from constitutional orthodoxy in

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<sup>66</sup> Ibid., 51-52.

the years after the War of 1812. That war had caused many men of the “Jeffersonian school” to neglect “the strict canons of construction,” and Henry had been “affected in the views which he then took by the general departure of the mass of his party from the ancient doctrines.” Looking for the true faith, John instead turned to the writings of his grandfather, St. George Tucker.<sup>67</sup>

Noting that St. George had written the first major post-ratification commentary on the United States Constitution, John returned to this work to find the proper lessons for the new generation. A tribute to “the originality as well as to the ability of the work,” could be found in the fact “that all subsequent controversial disquisitions have appealed to him as authority, or have attempted to overthrow his doctrines.” John conceded that his grandfather had been proven wrong on a number of matters, but he attributed this defeat to the fact that St. George wrote his commentary in the years “before the decisions of the great Chief Justice” John Marshall had been written. Nevertheless, the constitutional orthodoxy espoused by St. George had managed to survive. Summarizing the tenets of this orthodoxy, John noted that St. George “was jealous of centralism, and a firm believer in the reserved powers of the States as essential to the liberty of the citizen.” Much like his grandfather before him, John Tucker saw the rights of states “as the guardians appointed by heaven’s wisdom to save liberty from centralism.” Because the governance of a state by an outside power “divorces power from right, instead of wedding power to right,” the statesman should attempt to steer between “the Scylla of anarchy and the Charybdis of centralism —dissolution and despotism.” With the former danger no longer a threat, John carried forth constitutional orthodoxy by focusing on the latter.<sup>68</sup>

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<sup>67</sup> Ibid., 49-51; JRT, “The Judges Tucker of the Court of Appeals of Virginia,” *Virginia Law Register* I (1896): 794

<sup>68</sup> Ibid., 800; JRT, *The History of the Federal Convention of 1787*, 52-53.

## Conclusion

St. George Tucker left behind a variety of legacies. He inaugurated an academic debate about slavery, a debate that continues to this day. He offered an interpretation of the United States Constitution in which he delineated in greater detail than anyone before him the way in which the founding generation understood that document. He raised and trained two sons who demonstrated the diversity of approaches one could take on constitutional issues while remaining faithful to the letter and spirit of the Constitution. But perhaps St. George Tucker's most important contribution involved his perpetuation of the Whig theory of liberty. His offspring carried these views forward, taught them to their children and they, in turn, passed them on to the next generation.

For instance, as late as 1949, one of John Randolph Tucker's students, a man named John Davis, moved "to apply to present day problems some of the lessons of Mr. Tucker's teaching." Briefly noting the many changes that had taken place in the more than fifty years since his teacher's death, Davis admitted that Tucker could not have predicted the world wars that the United States had fought. Yet Davis did not believe that human nature had changed in the meantime. Tucker had turned his students towards the "monumental ideas" of the past, and in America, that meant a return to the Constitution and the Bill of Rights. In Davis's day every lawyer had to take an oath to protect the Constitution, and he would perhaps have been amused that even graduate assistants at public universities take such an oath today. Davis argued that upholding the oath meant opposing the exercise of any governmental power that went against the Constitution. Some argued that the Supreme Court possessed the sole right to interpret the Constitution, but Davis did not agree. According to his understanding, everyone who takes an oath to defend the Constitution thereby has to interpret the Constitution. Therefore he believed

that everyone who takes the oath should follow the precedent set forth by the Tucker family: everyone should become “a constant student of that which he has sworn to support.”<sup>1</sup>

Chagrined by the rise of collectivist social movements and the threat they represented to the Constitution’s theory of limited government, Davis returned to the lessons he had learned from John Randolph Tucker. Dismissing the idea that collectivism began with the moderns, Davis noted that the “idea of the supremacy of the state and the unimportance of the individual is as old, perhaps older, than the pyramids of Egypt and the Pharaohs who built them.” To combat the danger arising from this mentality, Davis offered up the Whig theory of liberty he had learned from Tucker: “If America as a nation and a people has any sufficient excuse for its existence it must be found in a belief unshaken and unshakable, in the freedom of man as the true end and aim of all government, the well-spring of all progress.” Davis thought Franklin Roosevelt’s four freedoms an inadequate summary of the Bill of Rights. These four freedoms did not include “the right of ‘self-use’ as Mr. Tucker called it, the inherent right of every individual to use at his own will and for his own advantage those powers and facilities given him by nature or by nature’s God.” Believing that without the right of self-use men become slaves, Davis argued that government could only operate on a military model: “It is not in the nature of governments to persuade; they can only compel, and between freedom and compulsion there is an unending conflict.”<sup>2</sup>

Ultimately, the Whig theory of liberty and limited government provides the best check against all theories of slavery. During the uncertain times of the early nineteenth-century, the modern natural rights philosophy presented few challenges to the continuance of slavery, but at

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<sup>1</sup> John W. Davis, “John Randolph Tucker: The Man and His Work,” *Washington and Lee Law Review* VI (1949): 139-162; quotations, 151, 153.

<sup>2</sup> *Ibid.*, 159-160.

least this philosophy provides little support for the reintroduction of any form of servitude. More importantly, the modern theory of natural rights makes possible the Whig theory of liberty. The Whig distrust of power makes it possible for the scholar to take ancient philosophy seriously without having to worry about losing modern liberty. The Whig theory of politics supplies the antidote to the dangers of classic natural right. As C. S. Lewis phrased the matter: “Aristotle said that some people were only fit to be slaves. I do not contradict him. But I reject slavery because I see no men fit to be masters.”<sup>3</sup>

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<sup>3</sup> C. S. Lewis, “Equality,” in Walter Hooper, ed., *Present Concerns* (New York: Harcourt, 1986), 17.

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