

# BOOKS

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. St. George Tucker. S. Hackensack, New Jersey: Rothman Reprint Co., 1969. \$135.00.

## INTRODUCTION

American legal commentators of the antebellum period bear a distinctly conservative stamp. At their best they were conservative in the manner of Story, imposing wise restraint on the process of change;<sup>1</sup> at their worst they could be no more than apologists for the status quo, justifying abuse and privilege in the name of order.<sup>2</sup> This pervasive conservative tone is understandable, for the task of the commentator is often synthesis and consolidation. That function was even more important in the nation's childhood. The dearth of ordered materials made practice difficult and put a premium on the elementary tasks of order. Perhaps because he was a confirmed Jeffersonian, writing at the zenith of Jeffersonianism, St. George Tucker stands out as a notable exception to the rule. His work exudes a reformist and libertarian vitality unthinkable in a Kent, a Story, or a Dane.

In 1803, Tucker, a judge on the Supreme Court of Errors of Virginia and a Professor of Law at William and Mary College, published an annotated edition of Blackstone's *Commentaries on the Laws of England*. In addition to the complete text of *Blackstone*, the five volumes contain eight hundred pages of appendices consisting of essays by Tucker on a wide variety of legal and political subjects.<sup>3</sup> Tucker also interspersed more than one thousand foot-

---

1. Z. SWIFT, A SYSTEM OF THE LAW OF THE STATE OF CONNECTICUT (1795-96). Story's tentative, equivocal attitude towards codification was a good example of this healthy conservative tendency. No one man could have done more than Story with his many treatises to bring order to American legal materials. Yet, he did not embrace codification, knowing that it would not prove a panacea and that the common law had much to offer as a method. For a short, lucid description of the codification dispute, see P. MILLER, THE LIFE OF THE MIND IN AMERICA 239-265 (1965).

2. See, e.g., James Kent's apology for slavery in his COMMENTARIES. He characterized the laws of the southern states as "extremely severe," but said of them: "They are, doubtless, as just and as mild as is deemed, by those governments, to be compatible with the public safety, or with the existence and preservation of that species of property [*i.e.*, slaves] . . ." He further absolved the contemporary generation of blame for slavery and implicitly approved the South's policies of completely insulating slaves from any potentially incendiary material. 2 J. KENT, COMMENTARIES \*252-54 (1846 ed.). See generally, J. HORTON, JAMES KENT, A STUDY IN CONSERVATISM 1763-1847 (1939).

3. Many of the essays are discussed *infra*. An enumeration of representative titles of the Appendix "Notes," as Tucker called them, follows: *Of Sovereignty and Legislature; Of the Several Forms of Government; Of the Constitution of Virginia; Of the Constitution of the United States; Of the Unwritten, or Common Law of England . . . ; Of the LEX SCRIPTA or written law of Virginia; Of the Right of Conscience and of Freedom of Speech and of the Press; Of the State of Slavery in Virginia; Abstract of Bill for the*

notes within the body of the *Blackstone* text. Most of these footnotes are short statements of the Virginia law applicable to the various subject matter areas treated by Blackstone. Some, however, are concise essays.<sup>4</sup> These original materials in the Tucker edition are noteworthy for the student of American legal history. No general commentary uniquely American existed in 1803. Only Swift's *System of the Law of the State of Connecticut*<sup>5</sup> and the literature on the Constitution that was generated by the ratification controversy<sup>6</sup> could be counted as genuinely American law books of that period. Tucker's work did not supply a general commentary, and it was not until Kent that America would have such a work. However, Tucker's *Blackstone* was an authoritative text for Virginia law. Moreover, on the matters treated at length in the appendices, Tucker would be quoted and cited as a master until after the Civil War.

These volumes stand as a singular example of an attempt to translate Jeffersonian political theory into law. No other commentator of such pure Jeffersonian pedigree and persuasion ever wrote. There is, as a result, a certain timelessness about some of the essays. Two, at least, may be considered minor classics of libertarian thought.<sup>7</sup> Despite all this, Tucker is clearly not a major figure in American legal and political thought. His influence on the profession, though measurable and significant, had none of the transforming impact of Kent or Story. His political thought, exciting at points, is largely derivative, borrowed explicitly from Locke, Paine, Jefferson, or the Federalist. Yet it is of significant minor figures that an epoch is made. They determine the quality of an age as much as does genius. From this perspective, this review will consider three distinct elements in Tucker's work. First, the work will be considered as an edition of *Blackstone*. Second, it will be treated as a Virginia

---

*more General Diffusion of Knowledge in Virginia; Of the Right of Expatriation; Of the Rights of Aliens; Summary View of the Laws relative to the Glebes, and Churches in Virginia.*

4. See, e.g., his footnote on natural, social, civil and political rights, 2 S. TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 145 n.42 (1970 ed.) [hereinafter cited as TUCKER]. (Tucker's work is in five volumes, the first two of which contain the text of Blackstone's first volume. For convenience, reference throughout this review will be to the volumes of TUCKER. Thus, "2 TUCKER" will be used rather than "Vol. I, Book II." The pagination throughout the *Blackstone* text corresponds to standard pagination of *Blackstone* editions everywhere. Thus, the page 145 referred to in this footnote runs on for eight pages because of Tucker's footnote. Appendix essays are cited to volume and appendix—page number; for example, 2 TUCKER App. 31.)

5. On the primacy of Swift, see F. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM 74 (1940). There were a few practice books at an earlier date. See, e.g., W. WYCHE, NEW YORK SUPREME COURT PRACTICE (2d ed. 1794), discussed in 1 J. GOEBEL, THE LAW PRACTICE OF ALEXANDER HAMILTON 39 (1964).

6. THE FEDERALIST PAPERS formed the core of this literature, and Tucker borrowed heavily from them. James Wilson's lectures had already been delivered but were not yet published.

7. On the *State of Slavery in Virginia*, 2 TUCKER App. 31, and *Of the Right of Conscience; and of the Freedom of Speech and of the Press*, 2 TUCKER App. 3.

law text. And finally, it will be considered as a collection of legal and political essays.

### I. AN 1803 BLACKSTONE

The most obvious, though neglected, fact about Tucker's work is that it was an edition of Blackstone's *Commentaries*. That fact is a key to understanding both the strengths and weaknesses of the work and is indispensable to an understanding of its contemporary significance. The importance of this fact lies not, however, in the mere existence of the *Blackstone* text. America had thousands of copies of *Blackstone* from the very first English editions. An American edition had come out as early as 1771, only two years after the last volume in the first English edition.<sup>8</sup> Rather, the key lies in noting that Tucker's edition was not only a publication of the *Blackstone* text but also an engagement of it in combat.

The startling impact of Blackstone upon American legal education was troubling to many, especially to those of more liberal persuasions. Jefferson marked the substance of the *Commentaries* as outright toryism. While he fully appreciated the simple elegance of the method, he considered the work all the more dangerous for that seductive quality. In all, the American master of simple elegance would have preferred Coke, with all his intricate difficulties, to the dangerous *Commentaries*.<sup>9</sup> When, in 1791, Tucker began teaching law at William and Mary, he found that Blackstone was the core of the curriculum established by his predecessor, George Wythe. Moreover, he did not feel up to the task of creating a methodological alternative to the *Commentaries*.<sup>10</sup> He could, and did, however, begin correcting the baleful influence of Blackstone with supplementary material to counter the smug Anglicism and to supplement the outdated law. By the middle of the 1790's, Tucker had published some of his lectures, the most famous of which was his essay on slavery,<sup>11</sup> later to become an appendix to the *Blackstone*.<sup>12</sup> Had Tucker's sole or primary interest remained the task of commenting upon Virginia's political and legal institutions, the vehicle of occasional essays would have sufficed. Tucker, however, remained troubled not so much by the content of the *Commentaries* as a treatise, but by its jurisprudence and political philosophy. The American Revolution had, in large measure, been ideologically justified by the repudiation of two basic British tenets: first, the rejection of British views concerning the nature and locus of sovereignty; second, the rejection of the British Constitution as a near-perfect, or even a relatively good, embodiment of political

8. P. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK* 64-65 (1939).

9. See A. HOWARD, *THE ROAD FROM RUNNYMEDE* 130 (1968).

10. 1 TUCKER at v.

11. S. TUCKER, *A DISSERTATION ON SLAVERY, WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA* (1796).

12. 2 TUCKER App. 31.

philosophy. Blackstone did not create, but he did embody, the British orthodoxy of the eighteenth century.

#### A. *The Nature and Locus of Sovereignty*

"Final, unqualified, indivisible power" located in Parliament—this, according to a leading authority, was the orthodoxy concerning sovereignty against which the colonists struggled.<sup>13</sup> It is clear, not only that Blackstone adhered to this doctrine as an accurate description of the political structure of Great Britain, but that he also accepted the doctrine as stating a general rule of political theory: that any state necessarily has a legislative authority wherein is located "final, unqualified, indivisible power."

Blackstone held the origins or nature of the state irrelevant on this issue:

However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside.<sup>14</sup>

He saw this sovereignty as marking the difference between man in nature and man in society:

Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature . . .<sup>15</sup>

Blackstone's conclusions are pure Hobbes, but they were reached despite the absence of a critical link in the reasoning of Hobbes. For Blackstone rejected the consensual basis for the origin of the state and of sovereignty. Society never had "[i]ts formal beginning from any convention of individuals," but "it is the *sense* of their weakness and imperfection that *keeps* mankind together . . ."<sup>16</sup> Thus, Blackstone followed the then current English rejection of the social contract as being nothing more than a metaphor expressing the interdependence of men. He instead saw the state as a necessary, organic reflection of the nature of man. Volition or consent was relegated to what was at most a secondary role in determining the obligations of men or citizens.

St. George Tucker rejected each of these positions as expounded by Blackstone. If any ideological issue can be specified as having been at the heart of the American Revolution it was whether sovereignty is indeed indivisible, unconditional, and legislative. The argument of the colonists had been, at its most explicit, that sovereignty was divisible—that Parliament's authority over the colonies was not of the same order as its authority within

13. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 200 (1967). Bailyn's work contains an account of the slow maturation by which colonial dissatisfaction with Parliament's performance developed into an American critique of the English theory of sovereignty.

14. 1 TUCKER 48-49.

15. *Id.* at 48.

16. *Id.* at 47.

England. Moreover, the colonists had also argued that the exercise of legislative authority was conditional upon the right of participation. With the task of nation-building came an even greater appreciation of the doctrine that sovereignty, in the sense of the exercisable power of the state, was indeed divisible. Tucker was equally enamored with the tradition of the Revolution and the tasks of the Constitution. He did not see Blackstone's errors as primarily errors in reasoning and philosophy. For, to the American, the questions of the nature and locus of sovereignty as well as the consensual basis of the state were empirical. Blackstone, like Dante's Virgil, worked under the insurmountable handicap of living before the Great Event. Thus, in refuting Blackstone on the issue of the divisibility of sovereignty, Tucker simply pointed to the structure of the Government of the United States, "by whose constitutions . . . the legislative power is restrained within certain limits."<sup>17</sup> From this constitutional fact, and from the correlative doctrine that any legislative power is created by constitutions, it followed "that supreme, irresistible, absolute, uncontrolled authority, of which the commentator makes mention . . . doth not reside in the legislature, nor in any other of the branches of the Government, nor in the whole of them united. . . ."<sup>18</sup>

Sovereignty, in the sense meant by Blackstone, properly resided for Tucker only in the "People." This tenet of the American political theory of the Revolution was more than mere rhetoric. It implied that one took very seriously the contractual theory of the origin of the state and the necessity for a consensual basis for government. For Tucker, the ultimate act of sovereignty was the alteration of government. Revolution and constitution were the twin sides of the coin of sovereignty. Anything less than the destruction or erection of government might be seen conceptually as delegated power. Consequently, an inquiry into sovereignty necessarily began with the origin of the state.<sup>19</sup> Here, Tucker, unlike Blackstone or his earlier critic Bentham, had no need for recourse to antiquity or speculation.

But the American revolution has formed 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 . . . . The world, for the first time since the annals of its inhabitants began, saw an original written compact formed by the free and deliberate voices of individuals disposed to unite in the same social bonds . . . .<sup>20</sup>

---

17. *Id.* at 49-50 n.5.

18. *Id.* at 49 n.5.

19. For, both the Federal, and State Constitutions derive their authority and existence from the immediate act, and consent of the people . . . . These acts of the people having, then, the stamp of primitive authority, must be paramount to the act of the Legislative body . . . . [T]he people, therefore, only, and not the Legislature, have it at any time in their option to alter the form and administration of Government . . . .

*Id.*

20. *Id.* at App. 4.

The American commentator was not wholly oblivious to the objections which had been raised to the "compact" theory. He was troubled by the problem of binding future generations by the "compact" of their fathers. If the future cannot be so bound, then the logic of placing critical weight upon a contractual origin leads to anarchy. Tucker looked to the great Paine for an answer to the objection: the acts of the fathers would be binding upon posterity only if—and because—posterity failed to act to change the Constitution.<sup>21</sup> For the consensual origin of the state to have moral authority, therefore, there must be avenues and opportunities for posterity to show that its acquiescence is a meaningful one. Participation is the key to a morally stable political order. While unquestionably based upon and derived from the Lockean use of tacit consent,<sup>22</sup> Tucker's argument went further. He would, after all, attribute moral significance to silence or inaction only where stringent conditions of participation are met.

The imperceptible shift from the consideration of sovereignty to the attempt to construct criteria for a morally sound sovereignty marked both Blackstone and Tucker. Parenthetically, Blackstone's earlier and more acerbic nemesis, Jeremy Bentham, recognized the shift as the product of an unhappy confusion between "fact" and value.<sup>23</sup> The differences in the positions of the two commentators with respect to the basis for a moral sovereignty led to important disagreements on points of law. Perhaps the best example of such a disagreement has to do with the issue of expatriation. Blackstone's perspective on government as organic led him to an easy acceptance of the British law that no act of volition by the subject could relieve a native-born Englishman of his duty of allegiance to the Crown.

[I]t is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands, by which he is connected to his natural prince.<sup>24</sup>

Tucker responded to Blackstone on this point in two textual footnotes and in an appendix. The issue illustrates perfectly the sense in which Tucker was an American Bentham, and more, *vis-à-vis* Blackstone. In one textual footnote Tucker simply stated that the law of Virginia differed on this point from the common law, preserving the right of expatriation and erecting procedures for its exercise.<sup>25</sup> In a second textual footnote Tucker was the inquiring law professor. He cited Locke in opposition to Blackstone and asked whether the common law was in fact as clear as Blackstone would have it on expatriation.

---

21. It is the acquiescence of posterity under the law, which continues its obligation upon them, and not any right which their ancestors had to bind them.

*Id.* at App. 173.

22. J. LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT*, §§ 119-122 (1955 ed.).

23. J. BENTHAM, *FRAGMENT ON GOVERNMENT*, ch. I, § XXX (1823 ed.).

24. 2 TUCKER 370 (This corresponds to page 370 of Vol. I of the standard BLACKSTONE edition.).

25. *Id.* at n.4.

Moreover, he also asked whether any American judge should ever apply such common law. Would it not be philosophically inconsistent with the Revolution? For the Revolution, if nothing else, established consent as critical to the nexus between sovereign and subject.<sup>26</sup> Finally, in the appendix, Tucker offered a somewhat longer essay tracing the origins of the English rule as expounded by Blackstone and attempting to refute it.<sup>27</sup> The issue of expatriation is of critical theoretical import. For only if the act of remaining a citizen is rendered voluntary by holding open the possibility of expatriation can a stable theory of society be built upon consent.

The somewhat related issue of the obligations of aliens also reflects the different starting points of Blackstone and Tucker. Blackstone seemed quite at home with the rule that an alien remained the subject of his "natural" prince even though he acquired particular obligations with respect to the law of the kingdom of his residence.<sup>28</sup> Tucker, on the other hand, viewed the entire subject of the alien's position from the perspective of potential consensual relationships. Thus, both the Constitution's grant of Congressional power to "establish an uniform Rule of Naturalization" and the exercise of that power with the first naturalization act were wholly consistent with natural right. Indeed, Tucker suggested that Congress either did not or should not have the power to deprive an alien of "an *inchoate right*, under the constitution, to become a citizen."<sup>29</sup> Once again, the voluntary element was put at a premium.

General theories of sovereignty are probably more important for their evocative power than for a comprehensive understanding of the nature of the political process. St. George Tucker's naïve reliance upon the American revolutionary experience as proof of the consensual basis of (American) government was vulnerable on many counts. Joseph Story was to utterly destroy Tucker's most elaborate formulation of this position.<sup>30</sup> Nevertheless, the vision evoked by Tucker was itself part of a dynamic maximizing of the consensual sphere between individual and state.

### B. *On the British Constitution and the Common Law*

Blackstone's hymn in praise of the English Constitution, the coda of the *Commentaries*, is the work of a lover. Neither the explicit concession that faults may be found nor the dedication to "sustain, to repair, to beautify" the "noble pile," impair that conclusion. A lover need not be blind to the faults of

26. *Id.*

27. Note K, *The Right of Expatriation Considered*, 2 TUCKER App. 90. This essay is not one of Tucker's better pieces.

28. 2 TUCKER 369. In fairness to Blackstone, it should be pointed out that he was not offended by the notion of a general naturalization bill. 2 TUCKER 374-75.

29. *Of the Rights of Aliens in the United States*, 2 TUCKER App. 98, 100.

30. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION §§ 306-72. (1858 ed.) The importance of Tucker's work may be measured by the trouble Story took to refute it. He used Tucker as the constant reference for the compact theory of the Constitution and refuted each and every paragraph of Tucker's argument.

the beloved, but he characteristically is not offended or outraged by them. Thus, Blackstone, after discussing the basis for suffrage in the election of the Commons, concluded:

This is the spirit of our constitution: not that I assert it is in fact quite so perfect as I have here endeavored to describe it; for, if any alteration might be wished or suggested in the present frame of parliaments, it should be in favour of a more complete representation of the people.<sup>31</sup>

Now Blackstone cannot be said to have been blind to the narrow and distorted bases of representation. Yet the tone of this still respectful criticism could hardly satisfy a people who had but recently fought a war in part over representation. Tucker's footnote to this passage contains a long quotation from Burgh's *Political Disquisitions*. It is worth extensive quotation for it seizes upon Blackstone's tone even here where he was a critic:

[I]n many places a handful of beggars sends in as many members as the great and rich county of York or city of Bristol. Did the learned judge consider these shocking absurdities and monstrous disproportions, or did he consider the alarming influence the court has in parliament, when he wrote what follows, viz. "If any alteration might be wished . . ."? What! are we to be put off with a cold "If," in a case where our country lies bleeding to death? . . . Had a hackneyed court hireling written in this manner, it had been no matter of wonder; but if the most intelligent men in the nation are to endeavor to persuade the people that there is hardly room for a wish; . . . [i]n what condition is this once free and enlightened people likely soon to be?<sup>32</sup>

Tucker juxtaposed the rhetorical abuse of Burgh with Blackstone in several other contexts. It seems fair to conclude that it was not the content of Blackstone's constitution alone that bothered Tucker, but the reverential attitude toward it.<sup>33</sup>

Nevertheless, Tucker's critique was primarily a matter of substance. He sang the praises of a written constitution, undoubtedly attributing too great significance to that device for obviating abuse.<sup>34</sup> More importantly, he perceived the English idea of a "mixed government" as having begun with a class model of government and society. Crown, Lords, and Commons were expected to check one another because of the supposed antithesis of interests among the classes of society they represented. Consequently, the dynamic of

31. 2 TUCKER 171-72.

32. 2 TUCKER 172 n.43.

33. Other quotations from Burgh occur at 2 TUCKER 164 n.32; 2 TUCKER 176 n.56; 2 TUCKER 335 n.53.

34. The advantages of a written constitution, considered as the original contract of society must immediately strike every reflecting mind; power, when undefined, soon becomes unlimited; and the disquisition of social rights where there is no text to resort to . . . is a task, equally above ordinary capacities . . .

1 TUCKER App. 154.

mutual check depended upon the success of the representative scheme. By sharp contrast the American model of a government with internal checks depended entirely upon functional distinctions. There was only a hint of any regard for recognition of divergent class interests which must be represented within government.<sup>35</sup> Tucker's sharpest critique of the "mixed government" praised by Blackstone was that it did not work. Court intrigue and the imperfect system of representation within the Commons conspired to place all three elements' of the mix under the thumb of the court party :

If it can be proved that the two members of the legislature who pretend to control each other are ruled by the same class of men, the control must be granted to be imaginary.<sup>36</sup>

Tucker was, of course, completely blind to the correlative defect within the Constitution of the United States: by ignoring the class interests within society, or, more accurately, by accommodating them only in the guise of divergent geographic interests, the dynamic of checks and balances between functionally divergent governmental bodies became irrelevant, or only instrumentally relevant, to the most serious clashes within society.

Blackstone's discussions of constitutional issues were marked by an almost total absence of regard for the role of the individual subject as an actor in politics. The subject, of course, was viewed as having obligations of obedience and rights to protection, but his participation seemed to be of small concern. For Tucker, by contrast, the right to participate was a critical constitutional matter. Thus, in a short essay on "rights" incorporated into a seven-page textual footnote, Tucker conceded that "social rights" (those belonging to every man in society without regard to government) might be more extensive in England where slavery was virtually unknown, but that civil rights, those rights which are a man's in his role as citizen or subject, were "far more extensive in the United States than in England. . . ."<sup>37</sup> Moreover, these rights were guaranteed by state and federal constitutions, and were thus not subject to legislative whim.

### C. *Tucker and Bentham as Critics of Blackstone*

Certainly the best known critique of the *Commentaries* is Jeremy Bentham's *Fragment on Government*.<sup>38</sup> The contrast between Bentham's concerns and those of St. George Tucker demonstrates the very limited perspective of the insular, nationalistic American critic. Bentham was concerned with destroy-

---

35. The failure of the English representative scheme is hotly argued at 1 TUCKER App. 57-59.

36. 1 TUCKER App. 57.

37. 2 TUCKER 145 n.42 (at 6th page of the footnote).

38. J. BENTHAM, FRAGMENT ON GOVERNMENT (1823 ed.) [hereinafter cited as FRAGMENT]. The first edition appeared in 1776. The more extensive work, A COMMENTARY ON THE COMMENTARIES, was pieced together only after Bentham's death and was first published in 1928.

ing the evocative power of myths like "social contract." He quite properly recognized that their function was to provide a moral basis for authority or for the rebellion against authority.<sup>39</sup> While such fictions (to use Bentham's word) might be useful in securing acquiescence, they obscured the utilitarian computation that alone permitted a reasoned choice of action. While the fictions might refer to real values such as participation and consent, they made total claims which were unsubstantiated either by the extent to which the particular value was to be distributed within society or by the all-inclusiveness of the value itself. Only a utilitarian approach could both discount the moral basis of the society by the degree to which the value of consent was in fact withheld from some persons and, most importantly, provide a just place within the computation to competing values such as order, expectations, and material good.

St. George Tucker was, if anything, more liable to the major thrust of Bentham's attack than Blackstone himself. Tucker was completely fascinated with the consensual myths. Moreover, unlike Blackstone, who only lapsed occasionally from recognition of the mythical character of his rhetoric, Tucker took with utmost seriousness the factual basis for a social and political covenant.<sup>40</sup> Insofar as the spilling of so much blood by men who were still very much involved in the political life of the new nation had been premised on precisely these myths, it is no wonder that Tucker could not view them with philosophical detachment. Still, there are distinctions in the uses to which men put their myths. Tucker's myths were not merely trotted out to justify the Jefferson of 1776. They were the basis for supporting an enlarged suffrage, the abolition of slavery, and an attitude of vigilance towards the state far less respectful than Blackstone's occasional criticisms of English defects.<sup>41</sup>

Another of Bentham's fundamental criticisms of Blackstone may be applied equally against Tucker. Bentham was outraged by what he considered to be the confusion of fact and value or of descriptive and normative statements in the *Commentaries*.<sup>42</sup> The principal culprit in this confusion was not social contract, but "natural law." Indeed, one might extend the criminal conspiracy to include all statements using the adjective "natural" in the characteristic eighteenth century manner. Thus, Bentham observed that Blackstone's criteria for distinguishing between "natural" and political society were virtually meaningless and usually inconsistent;<sup>43</sup> that authority was often considered a "natural" attribute to keep it from being questioned;<sup>44</sup> that "natural law" was

39. J. BENTHAM, FRAGMENT, ch. I, §§ xxxvi-xli; ch. IV, §§ xx-xxii.

40. See 1 TUCKER APP. 141-73, where Tucker enumerated and discussed the eight senses in which the Federal Constitution is a compact. All were refuted by Story.

41. The very elaborate and masterly discussion of the constitution, in the Federalist, . . . would probably have saved me the labour of this attempt, if the defects of the constitution had been treated with equal candour . . . .

1 TUCKER APP. 376.

42. J. BENTHAM, FRAGMENT, ch. I, § xxx; on the law of nature, see *id.* ch. IV, §§ xvi-xix.

43. *Id.*, ch. I, § xxx.

44. *Id.*, ch. IV, § xii.

a slippery concept, now brought in as a criterion for civil law, now used as a basis for political obligation.<sup>45</sup> Bentham believed that at its best natural law could only be a less clear paraphrase of the criterion of utility to measure law. However, at its worst, it could justify rebellion and disobedience without regard for consequences. Indeed, said Bentham, if natural law is not to be taken as a poor way of reformulating utility, then:

I see no remedy but that the natural tendency of such doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like.<sup>46</sup>

Tucker was even more enamored of the notion of natural rights than was Blackstone. Personal security, liberty of conscience and of opinion, and the opportunity to acquire property, were all, in modified Lockean tradition, considered natural and God-given rights.<sup>47</sup> Nevertheless, there is no general statement relieving men of the moral obligation to obey human law contrary to natural laws in *Tucker* as there is in *Blackstone*.<sup>48</sup> One suspects that there is a two-fold explanation for the absence of such a statement in *Tucker*. First, being more intimately associated with revolution, Tucker was more aware of the necessity for the prudence which, in the words of the Declaration of Independence, "dictates that Governments long established should not be changed for light and transient causes." Second, as to any disobedience less drastic than revolution, Tucker was fully immersed in the tradition that derived the extent of a citizen's obligation from his consensual relationship to the state, not from the morality of law.

Tucker's advantage over Bentham does not lie in the quality of his philosophy, but in the circumstance that he grappled with the concrete problems of nation-building. One of Bentham's principal criticisms of natural law—that it could mean whatever the speaker happened to believe strongly—may equally be leveled against utilitarianism as a guide for the settlement of concrete disputes. For, in applying the calculus to a particular set of facts, individual attitudes may well be determinative. As Austin said:

To measure and compare the evils of submission and disobedience, and to determine which of the two would give the balance of advantage, would probably be a difficult and uncertain process. . . . A Milton or a Hampden might animate their countrymen to resistance, but a Hobbes or a Falkland would counsel obedience and peace.<sup>49</sup>

---

45. *Id.*, ch. IV, ¶ xix.

46. *Id.*

47. Tucker was not consistent in his use of natural and absolute right terminology. See 2 TUCKER 145 n.42, where he intimated that the only natural right is self-preservation (a Hobbesian view). In his essay on right of conscience and free speech, however, he stated that "[t]he right of personal opinion is one of those absolute rights which man hath received from the immediate gift of his Creator . . ." 2 TUCKER App. 3. That liberty is a natural as well as a social right is intimated in the essay on slavery. 2 TUCKER App. 54.

48. 1 TUCKER 43.

49. J. AUSTIN, *PROVINCE OF JURISPRUDENCE DETERMINED* 55 (1832 ed.).

In such circumstances, a sure grip upon first principles, although they be imperfectly stated, may be more important than the most sophisticated gestures of uncertainty. Tucker knew the content of his natural law in the same hazy and imperfect way that a lawyer knows the content of the common law. Tucker could enumerate the sources to which one would look to ascertain natural law, and he could confidently assume that most of the lawyers to whom he spoke shared that knowledge. First, they would look to Locke and his American derivatives: Paine, Jefferson and Otis. Second, they referred to a body of continental and international law: the works of Grotius, Vattel, Puffendorf, Montesquieu, and Burlamaqui. These varied and often contradictory sources by no means constituted a code that could satisfy Bentham, the man who would declare war on the common law for its imprecision. However, like the common law, this tradition could provide answers and values that could enlist a substantial consensus of the initiated on certain issues.

What distinguished Tucker from Blackstone, then, was not, as in the case of Bentham, philosophy. It was, nationalism aside, his irreverent attitude. Tucker undertook to write his note on the Constitution because the *Federalist* was not free enough to point out faults.<sup>50</sup> Yet, the work is hardly anti-*Federalist*, for he quotes the *Papers* at length and with due respect. Nor may his note be explained by his alignment with Jefferson, for he attacked Jefferson boldly on the hot subject of removing the last-hour judicial appointments of President Adams by abolishing their judicial offices.<sup>51</sup> Unlike almost all of his fellow Virginians of stature, Tucker made a concerted effort, part of which is contained in the *Blackstone*,<sup>52</sup> to abolish slavery in Virginia. He did so by a stern insistence upon application of his natural law principles to the condition of the black man in America. This reformist zeal—philosophy aside—marks Tucker as more closely akin to Bentham than to Blackstone. Though Bentham would, without doubt, have cringed at his method, he might have, in his utilitarian way, found Tucker an able ally in pursuit of that which is, after all, the end of practical philosophy—the enhancement of the quality of men's lives.

## II. A VIRGINIA LAW TEXT

There was no Virginia law text before Tucker's *Blackstone*. The quarter century between the Revolution and this work had, moreover, been a period of substantial change in private as well as public law. In his preface Tucker enumerated some of these changes as among the reasons for publication of the work:

[A]mong these we may reckon the abolition of *entails*; of the right of *primogeniture*; of the preference heretofore given to the *male* line,

50. 1 TUCKER App. 376. See note 41 *supra*.

51. *Id.* at App. 360-61.

52. 2 TUCKER App. 31 *et seq.* See Section III B *infra*.

in respect to real estates of inheritance; and of the *jus accrescendi*, or right of survivorship between *joint-tenants*; the *ascending* quality communicated to real estates; the *heritability* of the *half-blood*; and of *bastards*; the *legitimation* of the latter, in certain cases . . . .<sup>53</sup>

It is with respect to private law that Tucker relied most heavily upon Blackstone's method and principles of organization. Tucker wrote essays on only a few select topics of private law. The most extended is his note on the changes Virginia had made in the law of descent of estates.<sup>54</sup> This essay is a useful one not so much because it summarized statutory law, which must have been familiar already to every Virginia lawyer, but because Tucker patiently traced the effects, under the new system, of various transactions and occurrences and contrasted them with the common law.<sup>55</sup> Seldom, with respect to private law, was Tucker the involved critic. He accepted the dogma that the abolition of the fee-tail was a good thing, furthering the democratic principles of the Revolution and removing inconvenience and insecurity of title. A lone, interesting exception to Tucker's detachment in this area does have significant public law overtones. The appendix note on land grants<sup>56</sup> was a strong warning to the gullible and a chastisement of the state for its facilitation of fraudulent practices. For the most part, however, Tucker simply used Blackstone, now noting the agreement of Virginia law with English law, now noting a divergence. Occasionally a textual footnote runs to several pages—Tucker incorporated a minor essay on Virginia's law of wills into a footnote<sup>57</sup>—but ordinarily a sentence or two and a citation suffice.

Tucker wrote before even the most elementary materials—statutes and cases—were systematically reported and collected.<sup>58</sup> One of his greater contributions, therefore, was rendering obscure material available to the public and the practitioner. The abolition of the fee-tail needed no guide, but the laws relating to matters of practice did. Tucker's recital of the various acts relating to execution upon goods must have been very helpful for practitioners, most of whom owned no complete set of statutes.<sup>59</sup> Similarly, Tucker's footnotes furnish a running commentary on chancery practice, supplementing Blackstone not only as to major issues such as the division of Virginia's chancery jurisdiction into three chancery district courts, but also as to such relatively minor topics as the point at which depositions may be opened.<sup>60</sup>

---

53. 1 TUCKER x-xi. The quotation is confusing. Virginia had indeed abolished the fee-tail, primogeniture, preference for the male line, and the right of survivorship between joint tenants. On the other hand, Virginia granted to half-bloods and bastards the right to inherit in certain circumstances, and it permitted legitimation.

54. 3 TUCKER App. 11.

55. See, e.g., *id.* at App. 20, 25.

56. 3 TUCKER App. 66.

57. 3 TUCKER 378 n.11.

58. 1 TUCKER ix.

59. 4 TUCKER 421 n.27.

60. On the organization of chancery, see 4 TUCKER 454 n.35; 4 TUCKER App. 18-21. For lesser matters of practice, see, e.g., 4 TUCKER 437 n.8, 448 n.24, 450 n.27.

As a compiler of Virginia law, no more can be claimed for Tucker than that his work was useful. He did the patient work of a collector, and it was wholly in keeping with the spirit of the man that the reformer's zeal went hand in hand with an eagerness to participate in the slow work of foundation building.

### III. THE ESSAYS

Tucker's essays have figured prominently in an impressively wide array of scholarly work. The essay on the Constitution of the United States<sup>61</sup> was considered at length by Elizabeth K. Bauer in her *Commentaries on the Constitution, 1790-1860*.<sup>62</sup> The essay on freedom of speech<sup>63</sup> received some attention in Leonard Levy's *Legacy of Suppression: Freedom of Speech and Press in Early American History*.<sup>64</sup> The essay on the common law<sup>65</sup> was bitterly attacked by William Crosskey in his *Politics and the Constitution*.<sup>66</sup> The essay on slavery<sup>67</sup> is a libertarian masterpiece discussed at length by Winthrop Jordan in his brilliant *White over Black*.<sup>68</sup> Were Tucker merely a critic of Blackstone and a Virginia text writer it is certain that this reprint edition would not have been undertaken. The appendices are so important, however, to the general history of the period that it is a wonder that they were not made more accessible before this edition.

#### A. *Commentator on the Constitution*

The one area of substantive law in which the United States already had a literature by 1803 was the Constitution. Not only the *Federalist Papers*, but also James Wilson's lectures constituted the basis for a distinguished literature. Tucker may be viewed as the first of the states' rights commentators upon the Constitution, and it is in this category that he is placed by Bauer in her work.<sup>69</sup> Tucker was an advocate of states' rights, but within a principled framework very unlike the more extreme Carolineans that were to follow him. Because he viewed the Constitution as in part a compact among the states, Tucker was firm on the point that non-specified, residual authority resided in the state governments. However, Tucker was clearly of the view that in the spheres of its delegated powers, the federal government was supreme. He stated that the powers and duties of the federal government were coextensive; that whenever the federal government "exerts a power for any other purpose,

61. 1 TUCKER App. 140.

62. E. BAUER, *COMMENTARIES ON THE CONSTITUTION, 1790-1860*, at 170-82 (1952).

63. 2 TUCKER App. 3.

64. L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 282-83 (1960).

65. 1 TUCKER App. 378.

66. 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 634-38 (1953).

67. 2 TUCKER App. 31.

68. W. JORDAN, *WHITE OVER BLACK* 555-60 (1968). See also R. MCCOLLEY, *SLAVERY AND JEFFERSONIAN VIRGINIA* (1964).

69. E. BAUER, *supra* note 62, at 170.

than the performance of a duty prescribed by the constitution, it transgresses its proper limits and violates the public trust."<sup>70</sup> Nevertheless, the Constitution is supreme and "as such binding upon the federal government; the several states; and finally upon all the citizens of the United States."<sup>71</sup>

In applying his general principles, Tucker was very much the moderate. First, he acknowledged federal supremacy in determining the limits of federal constitutional authority. Second, he strongly favored the doctrine of judicial review and recognized the right of federal tribunals to correct state courts in matters of federal law<sup>72</sup> and, possibly, in diversity cases.<sup>73</sup> It is in theory, not in substantive points, that Tucker properly belongs with the school of states' rights proponents, for he clearly conceived of the states as retaining their capacity as continually consenting members of the federal union. One ominous passage reads as follows:

Each is still a perfect state, still sovereign, still independent, and still capable, should the occasion require, to resume the exercise of its functions . . . . But until the time shall arrive when the occasion requires a resumption of the rights of sovereignty by the several states . . . the exercise of the rights of sovereignty by the states individually, is wholly suspended . . . in the cases before mentioned: nor can that suspension ever be removed, so long as the present constitution remains unchanged, but by the dissolution of the bonds of union.<sup>74</sup>

It would seem, then, that secession is the right of the states, as contracting corporate bodies within the federal union, just as revolution or expatriation is the right of the contracting citizen in appropriate circumstances.

The doctrine of judicial review was central to Tucker's dynamic of checks and balances. He saw the advantage of a written constitution as lying in its provision of specific limits to authority both with respect to other spheres of authority and with respect to the individual. However, he also saw that some organ of government must apply these limits, putting a check on the "natural" tendency of power to aggrandize itself. In his view, judicial supremacy was not itself open to the same possibility of abuse as legislative or executive

70. 1 TUCKER App. 170.

71. *Id.* at App. 171.

72. *Id.* at App. 183-84.

73. *Id.* at App. 350-51.

74. *Id.* at App. 187. There is one point of substance on which Tucker's states' rights starting point is important. Tucker was vehement in his denial to the federal judiciary of common law jurisdiction. The issue as to the place of the common law in the federal courts arose in a variety of contexts. Should the federal courts resort to the common law to give substance to terms, such as "treason," having a common law history? Do the federal courts have power to make or "apply" the common law as federal rules of decision in civil causes? Do the federal courts have power to try common law crimes? Tucker explicitly rejected the power of the federal courts to apply a federal common-law as a rule of decision. He appreciated that such a federal reception of the common law implied an enormous enlargement of federal legislative competence. Tucker's application of his constitutional principles to this problem is undertaken in his essay on the common law, *Id.* at 378.

supremacy, because a court had no means of execution within itself.<sup>75</sup> Tucker's thought is very modern in tying judicial review so closely to the preservation of the liberties of the individual:

If, for example, a law be passed by congress, prohibiting the free exercise of religion, according to the dictates, or persuasions of a man's own conscience; or abridging the freedom of speech, or of the press; or the right of the people to assemble peaceably, or to keep and bear arms; it would, in any of these cases, be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused from any penalty which might be annexed to the breach of such unconstitutional act.<sup>76</sup>

This passage is remarkable not only for its espousal of judicial review, but for its unequivocal statement that the Bill of Rights provides enforceable limits upon legislative competence. Indeed, at another point in the essay, Tucker treated the Bill of Rights together with article I, section 9, as "restraints imposed on the legislative powers of the federal government."<sup>77</sup>

If anything distinguishes Tucker from other commentators of the antebellum period, it is not his states' rights position nor his dogmatic insistence upon the contractual nature of the Constitution. Rather, it is his emphasis upon the Bill of Rights. In order that this point be fully appreciated, the appendix essay on free speech<sup>78</sup> must be considered as part of the constitutional commentary. Tucker referred to this essay to excuse his lack of treatment of the subject at even greater length within the essay on the Constitution. The essay on free speech is not primarily a theoretical piece, but an attack upon the Alien and Sedition Acts. This was an advantageous circumstance for the piece in that Tucker had a concrete factual issue to which he could apply his constitutional principles. It was disadvantageous because it raised, inevitably, the spectre of partisan interests dominating principle. Tucker assumed an absolutist position on free speech. He clearly rejected the doctrine that liberty of the press is simply the absence of prior restraints. His absolutist position, however, was not entirely the product of libertarian theory. For it was with respect to the federal government that he considered liberty of speech and press to be absolute. He properly saw the first amendment as a limitation upon congressional power, a limitation not surprising in a government of enumerated powers.<sup>79</sup> Tucker did support virtually unbridled freedom of expression as a matter of theory as well. In that discussion he borrowed heavily from Madison's *Report on the Alien and Sedition Acts to the Virginia*

---

75. If we consider the nature of the judicial authority, and the manner in which it operates, we shall discover that it cannot, of itself, oppress any individual . . . .  
*Id.* at 356.

76. *Id.* at App. 357.

77. *Id.* at App. 290-308.

78. *Id.* at App. 297.

79. 2 TUCKER App. 23-24.

*House of Delegates*.<sup>80</sup> Certainly Tucker does not stand with Milton as a libertarian theorist. As Leonard Levy has noted, however, the placement of Tucker's essay, in sharp juxtaposition to the view of Blackstone that liberty of the press meant "no prior restraint," was strategic.<sup>81</sup> Moreover, Tucker had placed the argument against the Alien and Sedition Acts in the larger context of a theory of the Constitution most jealous of individual as well as states' rights.

### B. *Tucker and Negro Slavery*

No subject occupied St. George Tucker personally as much as Negro slavery and its abolition. As early as January, 1795, Tucker set out in a quest for information to enable him to formulate an acceptable means for emancipating Virginia's slaves. He addressed inquiries to Zephania Swift of Connecticut and to Jeremy Belknap of Massachusetts, seeking their answers to a series of questions concerning the emancipation of slaves in their respective states. The Belknap-Tucker correspondence lasted more than three years and entailed not only an exchange of information about slavery, but a rich connection between the worlds of Virginia and Massachusetts.<sup>82</sup> The correspondence reveals Tucker as a man severely troubled by the institution of slavery. Unquestionably, liberty was the natural right of the black man, but the prospect of emancipation involved a great many difficulties, not the least of which was the danger of a general war. Santo Domingo was in the throes of such a turmoil as Tucker was formulating his views. Moreover, a plan, to be feasible, had to enlist substantial support from the people of Virginia, including its slaveholders. It would have to make adequate provision for the continued cultivation of land, and for compensation to former slaveholders.

Tucker wrote to Belknap that he sometimes felt like proclaiming, "Fiat justitia, ruat coelum"—Let Justice be done, though the heavens fall!<sup>83</sup> His correspondents counseled patience and an orderly scheme, and this was Tucker's preference in any event.<sup>84</sup> Tucker's deliberations culminated with the publication in 1796 of *A Dissertation on Slavery, with a Proposal for the Gradual Abolition of it, in the State of Virginia*. That pamphlet was reprinted as Note H, *On the State of Slavery in Virginia*, in the second volume of the *Blackstone*.<sup>85</sup> It is altogether a remarkable work.

Tucker began by stating unequivocally that the principles which support the Revolution of the colonists applied with far greater urgency to the state

80. *Id.* at App. 24 (footnote).

81. L. LEVY, *supra* note 64.

82. *Letters and Documents Relating to Slavery in Massachusetts*, in 3 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 375-431 (5th ser. 1877) [hereinafter cited as *Letters and Documents*]. See also 4 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 191 (1st ser. 1795).

83. Tucker to Belknap, June 29, 1795, *Letters and Documents* 409.

84. Sullivan to Belknap, July 30, 1795, *Letters and Documents* 412.

85. 2 TUCKER App. 31.

of the Negro in America. The land that fulfilled the dreams of white men was a prison for blacks.<sup>86</sup> The racist justification for Negro slavery was squarely rejected. Whatever differences there might be between the races, none could conceivably justify enslavement save the rejection of the humanity of the black:

It would be hard to reconcile reducing the negroes to a state of slavery to these principles [that all men are by nature endowed with certain rights], unless we first degrade them below the rank of human beings . . . . [B]ut surely it is time we should admit the evidence of moral truth, and learn to regard them as our fellow men, and equals . . . .<sup>87</sup>

Tucker ended his note with a plea for gradual emancipation. He considered, but rejected, the Massachusetts pattern of emancipation through a constitutional and judicial stroke, preferring instead the Pennsylvania model where "the immortal Franklin" "enlisted nature herself on the side of humanity."<sup>88</sup> The Pennsylvania Act of 1780 rendered free every person born after its effective date, though it established a period of compulsory service for the first generation of freeborn blacks. Tucker's plan called for an emancipation act that would provide that all *females* born after the effective date be born free, but that they be required to serve for twenty-eight years. Their freedom would then be transmitted to all their descendants, male and female. All children born free, but while the mother was still under an obligation of service, would also serve for twenty-eight years. Tucker's detailed calculations indicated that it would be over one hundred years before all blacks would be free; that all during that period, between two-thirds and three-fourths of the black population would be under an obligation of service, albeit, one ending at age twenty-eight.<sup>89</sup> Tucker's plan also called for payment of "freedom dues" to the emancipated by the master. Moreover, he would have disqualified free blacks both from the franchise and from office-holding:

The restriction in this plan may appear to savour strongly of prejudice: whoever proposes any plan for the abolition of slavery must either encounter, or accommodate himself, to prejudice. . . .<sup>90</sup>

Tucker sent his plan to the Virginia legislature in 1797. The reception was disastrous. Tucker's bitter disappointment that all his efforts to accommodate the objections of prejudiced men and the interests of selfish ones were of no avail showed through in his letter to Belknap on that calamity:

I proposed the most gradual plan that could possibly eventually produce the desired effect. . . . A copy of the pamphlet was sent

---

86. *Id.*

87. *Id.* at App. 54-55.

88. *Id.* at App. 72.

89. *Id.* at App. 77-84.

90. *Id.* at App. 78.

with a respectful letter addressed to the speakers of both houses of our Assembly. 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. . . .

. . . Nobody was prepared to meet the blind fury of the enemies of freedom . . . .<sup>91</sup>

Still, Tucker hoped that wider dissemination might "open the oppressors' eyes." Undoubtedly the inclusion of this essay in the *Blackstone* was an attempt to secure that wider audience. By 1803, however, Virginia had suffered its own insurrection scare, and Note H already assumed the stature of a great lost cause.

In his capacity as judge on Virginia's Supreme Court of Errors, Tucker, only three years after the *Blackstone* was published, rendered an opinion which must have symbolized for him the end of his vision. George Wythe, Virginia's chancellor and Tucker's predecessor at William and Mary, had held that as to Indians there was a presumption of freedom whenever their liberty was at issue. However, Wythe had decided the case on the startlingly broad ground that the Virginia Declaration of Rights raised a presumption of freedom as to all men regardless of color. The Supreme Court of Errors affirmed the judgment as to Indians but expressly disapproved Wythe's dictum.<sup>92</sup> Tucker's opinion nicely proves that the presumption of freedom was very reasonable as applied to Indians, because Indians could have been lawfully enslaved for a brief period only during Virginia's colonial history. Obviously, however, blacks could be lawfully enslaved throughout the history of the colony and the state.<sup>93</sup>

An institution so deeply entrenched in the economy and culture of a society as was slavery in Virginia, could not have been demolished by judicial fiat. Tucker was undoubtedly wise in reversing Wythe. Nevertheless, it must have been a bitter draught for the man who tried to secure the acquiescence and cooperation of his fellow citizens in the cause of freedom.

#### CONCLUSION

Tucker's *Blackstone* is a work more distinguished for the quality of its aspirations than for the originality or depth of its thought. It is, however, a unique and refreshing mix which sustains some of the more attractive and healthier visions of what an American republic might have become. For a century the work has been out of print. Neither the 1803 edition nor the republication of 1861 are easy to obtain. This reprint is welcome so that new libraries might add it to their collections and established libraries might

91. *Letters and Documents* at 427-28.

92. *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134 (1806).

93. *Id.* at 136.

protect their old editions. One might hope that it will also provoke some small interest in St. George Tucker himself. For if his biography is ever competently written, it will be a limited, measured contribution to the history of our law and thought.<sup>94</sup>

ROBERT M. COVER

*Assistant Professor of Law  
Columbia University*

THE SUPREME COURT AND THE IDEA OF PROGRESS. By Alexander M. Bickel.<sup>1</sup> New York: Harper & Row, 1970. Pp. xii, 210. \$6.50.

Professor Bickel's Holmes Lectures ("expanded and documented") will do nothing to depreciate their standard or his stature. Written to be read as well as (perhaps even better than) to be heard, they are, like the best of the Holmes Lectures, worthy of preserving in a book for reading, re-reading, and consulting. Like the best of Bickel, they confirm that he is one of the most perceptive, sophisticated, articulate, and sprightly of the students of the Supreme Court in our day.

Professor Bickel's pages are spangled with wit, his own as well as other men's creatively adapted, *mots justes*, learned allusions, apt metaphors, and, of course, references to Supreme Court cases, including some of which he has special knowledge (from law clerk days) or which have engaged his fancy, his intellectual interest, or his passion. (Many have forgotten the Court's part in the ill-fate of the Rosenbergs, but it appears here more than once, although its relation to the book's thesis and its time seems less than intimate.)

The subject of these essays is the "Warren Court," but the author's focus is its "dominant majority"—Chief Justice Warren and Justices Black, Douglas, Brennan, Goldberg, Fortas and Marshall.<sup>2</sup> That definition itself raises questions, for these Associate Justices constitute only a fraction of those who sat with Chief Justice Warren, and they were dominant during only the last third of the Warren years. Most of them were not on the Court at the creation of one of the book's pillars—*Brown v. Board of Education*<sup>3</sup>—and only four of them

94. There is no adequate biography of Tucker. There is a modest entry in the *DICTIONARY OF AMERICAN BIOGRAPHY*, and a book which may better be called an "appreciation" rather than a biography: M.H. COLEMAN, *ST. GEORGE TUCKER, CITIZEN OF NO MEAN CITY* (1938).

1. Chancellor Kent Professor of Law and Legal History, Yale University.

2. P. 12 note. Always present, in counterpoint if not in contrast, is Felix Frankfurter: "He is the crucial figure, his is the paradigmatic career in modern American Constitutional Law." P. 29. Some will see these lectures as an apology for Justice Frankfurter's judicial life.

3. 347 U.S. 483 (1954).