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Charles T. Cullen

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St. George Tucker, John Marshall, and Constitutionalism in the Post- Revolutionary South

*Charles T. Cullen**

Most observers accept that between 1787 and 1860 the conception of the purpose and meaning of the United States Constitution was different in the North and South. A few historians have attempted to pinpoint the time when fundamental divergence began, arguing that possibly by 1820 and certainly by 1830 the differences were so basic that conflict was inevitable.¹ No one, however, has concentrated on the origins of this difference, although Richard E. Ellis has launched a study into the development of states' rights that obviously will have to consider the problem. In my own experience of studying the careers of two Virginians, several factors seem significant when one reflects on the development of constitutional thought and interpretation during the first decades after the Constitutional Convention. This study reveals that John Marshall's general interpretation of the Constitution, which is well known, differs fundamentally from that of a fellow Virginian, St. George Tucker, whose views are becoming better known.

Most comparisons of American constitutional thought during the early Republic have evolved from the classic textbook expositions of Jefferson-Hamilton and Calhoun-Webster. Failure to expand analysis of American constitutional thought beyond the pat comparison of Marshall-Jefferson or Marshall-Jackson rivalries leaves us with a simplistic interpretation of constitutionalism. I suggest that a study of the attitudes of John Marshall and St. George Tucker, two southerners from the same state, permits a much broader and arguably more accurate interpretation of constitutionalism between 1790 and 1860.

St. George Tucker sat as a General Court judge and at the same time taught law and police at the College of William and Mary from 1790 to 1804, succeeding George Wythe, the first to hold the chair. The first William and Mary professor to offer extended lectures on the United States Constitution, Tucker's constitutionalism is best

* Editor, *The Papers of John Marshall*. B.A., University of the South, 1962; M.A., Florida State University, 1963; Ph. D., University of Virginia, 1971.

1. See J. CARPENTER, *THE SOUTH AS A CONSCIOUS MINORITY 1789-1861* (1930); A. CRAVEN, *THE GROWTH OF SOUTHERN NATIONALISM 1848-1861* (1953). For a new approach to the study of constitutional thought in the South, see R. BRUGGER, *BEVERLEY TUCKER* (1978).

explained by focusing on his conception of sovereignty and the American Revolution. Tucker instructed his students that although governments might have evolved gradually from existing political structures, as in England, the American Revolution had demonstrated the practicability of the people organizing themselves into a government of their own creation, whereby the people are made forever sovereign and the limits of government are defined in order to preserve that sovereignty. Moreover, Tucker pointed out that the powers of government are divided and distributed in order to prevent any part from "crashing down on the whole." Thus, states that had seceded from the confederation would have owed nonseceding states their rights under the Articles had secession not been unanimous. In other words, Tucker viewed the written constitution primarily as a protection of sovereignty, designed to preserve rights won by the people in the Revolution. The best expression of the will of the people, therefore, was the Constitution, and that document revealed how much sovereignty the people had been willing to entrust to the government.²

Tucker believed strongly that the federal government was founded in "an original, written, federal, and social compact, freely . . . entered into by the several states . . . ; whereby the several states . . . have bound themselves to each other, and to the federal government . . . ; and by which the federal government is bound to the several states," and to its citizens individually.³ Most of his attitudes toward political events of the 1790's, which would have to be labeled Republican, were founded in his conviction that the United States Constitution was designed primarily to protect the citizens of the several states, and that it must be construed strictly as adopted by them. The people had limited the powers of the federal government by definition in the Constitution itself. The United States was a federal rather than a unitary government. The role of all government was concerned primarily with two areas: international relations, and, in Tucker's words, "the administration of justice between individuals, the preservation of their own domestic peace, and that of their citizens, and the advancement and promotion of the general happiness and prosperity of all who put themselves under their protection."⁴ He said that in a unitary govern-

2. 1 W. BLACKSTONE, COMMENTARIES, pt. 1, app. at 3-6, 140-377 (S. Tucker ed. Philadelphia 1803) (1st ed. London 1765). For a discussion of Tucker's views on the United States Constitution, see C. Cullen, *St. George Tucker and Law in Virginia, 1772-1804* (1971) (unpublished Ph.D. dissertation, University of Virginia).

3. 1 W. BLACKSTONE, *supra* note 2, pt. 1, app. at 140.

4. *Id.* at 177.

ment, such as England's, the state was responsible for both things, but in a federal government there was by definition a division of power and responsibility. Generally, the central government should manage international relations and the states should handle *all other* functions of government.

Tucker agreed that this division had not been adhered to strictly in the United States, because "a more intimate union between the states, in certain respects,"⁵ was thought desirable. Some functions that would normally fall to the states, such as the power to make uniform bankruptcy laws, had been given to Congress. But these powers "unnaturally" given to the central government were few, and because they were not the powers naturally exercised by a federal government, they were to be strictly construed.⁶ State constitutions provided for more latitude inasmuch as they empowered the branches of state government to administer the internal affairs of the people—that is, their law and police. Tucker's concerns remained regional, even local, in character for the rest of his career. He did not attempt to produce an American law treatise in 1803 when he published his edition of Blackstone's *Commentaries*; a Virginia survey sufficed. Tucker was looking backward to the Revolution, trying to preserve what had become Virginian (or American as he saw it) in the face of an increasing threat of change represented by the federal constitution.⁷ The question of uniformity had not been answered in the Constitution, and Tucker obviously favored localism—Virginia sovereignty and local control of Virginia law and police. In its early stages of development, therefore, states' rights stemmed from a very conservative posture of those whose view of the political system was local rather than national.

John Marshall represents the other side of the coin. Considering that his views of the United States Constitution are widely known, it seems that much could be learned from a study of the origin of Marshall's constitutional attitudes. Unfortunately the evidence is sparse, and we can only examine more closely the factors that might have influenced him. In doing so, I believe we can also come closer to understanding the origin of states' rights and the fundamental differences between antebellum constitutionalism in the North and South.

5. *Id.*

6. *See id.*

7. *See generally* 1 W. BLACKSTONE, *supra* note 2, pt. 1, app. This attitude perhaps explains why Jefferson recommended Tucker's edition of Blackstone's *Commentaries* in spite of a profound dislike of the original work. *See Waterman, Thomas Jefferson and Blackstone's Commentaries*, 27 *ILL. L. REV.* 629, 636, 652-53 (1933).

Marshall lived the first twenty years of his life in Fauquier County, part of the western section of Virginia's Northern Neck. Apparently he never traveled out of that region until he joined Washington's army and marched north during the Revolution.⁸ He spent the winter with the troops at Valley Forge, and it is safe to say that between 1776 and 1800 his idol was George Washington (we must observe also that America's first real biography was John Marshall's multi-volume study of George Washington⁹). Marshall developed a strong appreciation for the idea of national unity—the common cause—that was undoubtedly born in his “frontier experience” as a young man and reinforced during the war. When he was just beginning his legal career, his parents and siblings left Virginia for Kentucky, and while he intended to follow, his success in Richmond stopped him from moving.¹⁰

Marshall's experience during the formative years of Virginia's government was outside the establishment. Unlike Tucker, Jefferson, or Madison, his natural allegiance during the Revolution was to the emerging nation rather than to the state. He favored increased representation from the western sections of Virginia, in opposition to the eastern bias of the establishment.¹¹ Later, when deciding cases in the Supreme Court on commerce or the development of business in the United States, he was perhaps preconditioned to consider the Court as a governmental instrument for national prosperity rather than as an adjustable vice built primarily to protect the people from the tyranny of their elected representatives. In the area of constitutionalism, Marshall was as much a nation builder as Washington had been in the political and military arena.

A study of Marshall's early career suggests several reasons for constitutionalism fundamentally different from that of Tucker, a constitutionalism that became law in the early Republic because of Marshall's position on the Supreme Court. The writings and careers of southern constitutionalists like Tucker also merit further study in order to fully appreciate the growing divergence between the views originally expressed by him and those embraced by the nationalists, who decreased in number in the South after Marshall's time. Finally, we should develop a better understanding of the influence of southerners on the formation of legal and constitutional systems in other states. Virginia's influence upon other states is

8. See 1 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 33-57 (1916).

9. J. MARSHALL, *THE LIFE OF GEORGE WASHINGTON* (5 vols.) (1804-1807).

10. See 1 *THE PAPERS OF JOHN MARSHALL* 119-20 (H. Johnson, C. Cullen, & N. Harris eds. 1974).

11. *Id.* at 133-34.

obvious. Illinois, Missouri, Oregon, Texas, and Florida had territorial governors from Virginia. Even Montana's constitution was a compromise between the Missouri (southern) approach and the Massachusetts approach. Lawyers, trained in Virginia by St. George Tucker and others, fanned out in a similar pattern. Some of the results of this migration are now being studied by legal historians. For example, Maxwell Bloomfield has recognized that several aspiring young attorneys moved from Virginia to Texas after studying law in their native state.¹²

Such developments could have important implications for the history of American law in the nineteenth century. It might be noted that early in that century Virginia lawyers took with them St. George Tucker's edition of Blackstone's *Commentaries*, which contained extensive notes he had written indicating at which points American (Virginian) law differed from the English, as well as essays on such topics as the United States Constitution, the Virginia constitution, slavery, treason, and the jurisdiction of criminal courts in Virginia. This publication had at least a partial effect on federal law as well. After Aaron Burr was indicted by a grand jury, Marshall turned to Tucker's essay on treason and recommended it to his Associate Justices as he pondered the legal questions raised by the case.¹³ The sources exist for a study of southern legal history, and it is time we recognize the necessity of turning our attention somewhere other than on New England. The large, relatively unused cache of papers in the Tucker-Coleman collection at the College of William and Mary, as well as the papers of John Marshall, now being published for the first time, offer a rich lode in what has too long been considered an empty mine.

12. M. Bloomfield, *The Texas Bar in the Nineteenth Century*, 32 VAND. L. REV. 261 (1979).

13. Letter from John Marshall to William Cushing (June 29, 1807) (R. T. Paine Papers, Massachusetts Historical Society, Boston, Massachusetts).

