

## The Lecture Notes of St. George Tucker

by

David T. Hardy

Few if any legal figures in the early Republic held the status of St. George Tucker. Educated in the law by William and Mary's George Wythe, Tucker succeeded him as the College's professor of law, a post he held from 1790 to 1804, when he was appointed to the appellate bench by James Madison.<sup>1</sup> While at William and Mary, he produced an edition of Blackstone's Commentaries,<sup>2</sup> annotated in light of American law. The text became "the standard work on American law for a generation" and remained for two decades the legal treatise most frequently cited by American courts.<sup>3</sup> Tucker had exceptional opportunity to observe the legal events at the Founding. A friend and correspondent of Jefferson and Madison, his closest friend, John Page, served in the First House, and his brother Thomas in the First Senate.<sup>4</sup>

Largely forgotten today, Tucker returned to some legal prominence last Term, when the majority in *District of Columbia v. Heller*<sup>5</sup> cited his Blackstone as proof that the Second Amendment had originally been understood as an individual right to arms,<sup>6</sup> and the dissent invoked his lecture notes to argue that during the Framing period he had seen it as a militia-related right of States.<sup>7</sup>

---

<sup>1</sup> See generally Craig Evan Klafter, *St. George Tucker: The First Modern American Law Professor*, 6 J. OF THE HISTORICAL SOC. 133 (2006).

<sup>2</sup> WILLIAM BLACKSTONE, COMMENTARIES (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803).

<sup>3</sup> David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BRIGHAM YOUNG U. L. REV. 1362, 1372.

<sup>4</sup> MARY COLEMAN, ST. GEORGE TUCKER: CITIZEN OF NO MEAN CITY 35, 61, 113-14 (1938).

<sup>5</sup> 128 S.Ct. 2783 (2007)

<sup>6</sup> *Id.* at 2805.

<sup>7</sup> *Id.* at 2839 n. 32. The majority's response, *id.* at 2805 n. 19, assumes that the passage quoted by the dissent is in fact Tucker's discussion of the Second Amendment. In this both majority and dissent were misled. See n. 15 and related text, *infra*.

Tucker's handwritten lecture notes are archived in the Tucker-Coleman Collection of the Earl Gregg Swem Library at the College of William and Mary.<sup>8</sup> The following is a transcription of the portion dealing with the Bill of Rights, which follows Tucker's discussion of the limits placed upon Congress by Article I §10. The main text appears to date from 1791-92, with some marginal notes added later.<sup>9</sup> Given his position and their dating, Tucker's notes are exceptional evidence of original public understanding.

In the following transcript, indecipherable words are denoted by blanks, and probable but uncertain ones by brackets. Tucker refers to the Amendments by their original numbering, identifying the First Amendment as the Third Article. Tucker's original "footnotes" (actually written on the blank facing pages) are so identified. His pagination is in brackets.

Tucker begins by itemizing the restrictions upon Congressional power found in Article I, 10, and then turns to those imposed by the Bill of Rights:

[Page 140]

The Third Article to the Amendments to the Constitution imposes several important restrictions on the legislative authority of the Federal government – *viz.*

8. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

Our State bill of rights, art, 16, contains the following axiom – that religion, or the duty we owe to our Creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence. In vain may the civil magistrate interpose the authority of human laws to produce that conviction

[P. 141]

---

<sup>8</sup> Tucker's legal papers are presently being edited into a two-volume edition, due for publication in 2011. <http://oieahc.wm.edu/tucker/index.html>.

<sup>9</sup> Tucker refers to the Bill of Rights as ratified, placing the notes at 1791 or later, and earlier in his notes devotes a lengthy discussion to whether the States may arm the militia if Congress failed to do so, a point mooted by enactment of the Militia Act of 1792, 1 Stat. 271. \*126-28. But the marginal note at \*145 refers to the Alien Act of 1798, 1 Stat. 570. *See* note 18, *infra*.

which human reason rejects: in vain may the secular arm be extended to realize the fortunes denounced against unbelievers by all the various sectarists of the various denominations of religion throughout the world. It is not in the power of human laws to convince though it<sup>10</sup> to torture and to punish. Hence the numberless persecutions, martyrdoms and massacres, which have stained the annals of mankind, from the first moment that civil and religious institutions were blended together – To separate them by mounds which can never be overleap'd<sup>11</sup>, is the only means by which the peace of mankind, and the genuine fruits of charity & fraternal love can be preserved. This prohibition may therefore be considered as the [cement?] of government as well as the guarantee of happiness to the individual. See Acts of 1785 c, [3?].

9. Congress shall make no law abridging the freedom of speech, or of the press.

As human laws are incapable of producing conviction on the human mind, neither can they without violating the most important of human rights control the expression of whatsoever our reason dictates. The liberty of speech is inseparable from liberty of thought. Both are the immediate gift of the Creator, and are equally entitled to exemption from coercion by any earthly power. –

[P. 142]

Restraints on the freedom of speech are the unequivocal marks of a tyrannical principle in government where they are imposed. – They have been resorted to in almost every nation, especially during the times of national struggles; but they are rather traps than fetters.<sup>12</sup>

---

<sup>10</sup> “Is” appears to be omitted here.

<sup>11</sup> A possible ancestor of Jefferson’s more elegant “wall of separation between church and state.” See *Everson v. Bd. of Education*, 330 U.S. 1, 16 (1947). A more likely source is, however, the writing of James Burgh, with which Jefferson was familiar. ISAAC KRAMNICK & G. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* 82 (1996).

<sup>12</sup> Tucker note: See the Acts of this Cwealth for punishing certain offenses Acts 1776. Ch :5. “If any person residing within this Cw shall by any word, open deed, or act, [advisedly?] & [illegally?] defend the authority, jurisdiction or power of the king or parliament as heretofore claimed and experienced within this colony, or shall attribute any such authority to the king &c., the person offending, being legally convicted, shall be punished by fine & impr. To be [assessed by?] a jury, so

The freedom of the press, says our own State bill of rights, is one of the greatest bulwarks of liberty & can never be restrained but by despotic govern'ts.

Since the introduction of art of printing the rights of mankind, & the reasonable limits of the powers of government, have been, if not better, at least more generally, understood than at any former period, since the commencement of human annals.<sup>13</sup>

– In England, where the freedom of the press flourished more than in any part of Europe, the nation has consequently enjoyed a greater portion of freedom. In America, where the freedom of the press was still less restrained, we may venture to pronounce that the people, from that source alone, have so far as related to the internal administration of the government always enjoyed a greater portion of liberty, even before the revolution, than the \_\_\_\_ State itself. Since that period, our [enemies?] have endeavored to disseminate opinions that our liberty has become licentiousness. – This is a calumny which the peaceable demeanor of the people & the regular administration of justice, daily contradict and refute. The liberty of the press, will I trust, secure to --- generations that portion of liberty which is now enjoyed among us, unsullied, undiminished, and unimpaired.

[P. 143]

10. The same article provides that Congress shall make no law abridging the right of the people peaceably to assemble, and to petition the government for the redress of grievances. The bill of rights proposed by the Convention of Virga article 15 expresses that right in terms better adapted to the nature of a representative government, administered by the servants of the people & not by rulers who are their lords, by declaring, that the people have a right peaceably to assembled together to consult for their common good, or to instruct their representatives, and that every freeman has a right to petition or, or apply to the legislature for redress of grievances. This is the language of a free people asserting

---

as the fine shall not exceed L 20,000, nor the imprisonment the term of five years. See the [Little?] Rev. Code 40.

<sup>13</sup> Tucker note: De Lolme [JEAN DE LOLME, THE RISE AND PROGRESS OF THE ENGLISH CONSTITUTION (1781)] considers the freedom of the press as a [censorial?] power actually residing in the people. [Pa?] 212. The liberty of the press consists in this, that neither the courts of justice, nor any other [judges?] whatsoever, are authorized to [take notice?] of writings intended for the press, [but] are confined to those which are [actually?] printed & must in their [case proceed?] by the trial by jury. Ibid. 215.

their rights: the other [savours?] too much of that state of condescension observable in the acts of those rulers who affect to grant, what they cannot with-hold.<sup>14</sup>

The right of the people to keep and bear arms shall not be infringed – this may be considered as the palladium of liberty. The right of self defense is the first law of nature. In most governments it has been the study of rulers to abridge this right with the narrowest limits. Where ever standing armies are kept up & the right of the people to bear arms is by any means or under any colour whatsoever prohibited, liberty, if not already annihilated is in danger of being so<sup>15</sup>. – In England the people have been disarmed under the specious

---

<sup>14</sup> Tucker note: In England it is provided by Statute 13 Car: 2 c. 5 that no petition to the king or either house of parliament, for any alterations in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury in the county – hence I presume arose the custom of grand juries presenting public grievances in this country. – The same statute declares that no petition shall be presented by more than [ten?] persons. 1 B.C. [Blackstone’s Commentaries] 143.

<sup>15</sup> One is left wondering how the dissent in *District of Columbia v. Heller* could have argued, from these lecture notes, that “St. George Tucker, on whom the Court relies heavily, did not consistently adhere to his position that the Amendment was designed to protect the ‘Blackstonian’ self defense right...” or that his lecture notes suggest the Second “Amendment should be understood in the context of the compromise over military power represented by the original Constitution and the Second and Tenth Amendment.” \_\_\_\_ at \_\_\_\_ n. 32.

The brief answer is that the dissent relied uncritically on the portions of the lecture notes quoted in Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123 (2006). Professor Cornell there asserts that the quotations given reflect Tucker’s “earliest formulation of the meaning of the Second Amendment,” and “cast[] the the right to bear arms as a right of the states.” *Id.* at 1130.

In fact, the notes quoted there come from Tucker’s discussion of the *militia clauses* of the original Constitution, which predictably deal with military power and the States. Tucker argues that the States have the power to arm their militias since such power is not forbidden to them by the Constitution, hence is protected by the Tenth Amendment, just as any arms given would be protected by the Second Amendment. Lecture notes at \*127-29. When, less than twenty pages later, Tucker does discuss the Bill of Rights, the language he uses parallels closely his 1803 Blackstone, usually down to the word.

[p. 144]

pretext of preserving the game. By the alluring idea, the landed aristocracy have been brought to side with the Court in a measure evidently calculated to check the effect of any ferment which the measures of government may produce in the minds of the people. -- The Game laws are a [consolation?] for the government, a rattle for the gentry, and a rack for the nation.<sup>16</sup>

12. 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 the manner prescribed by law.

This clause by a kind of side wind seems to countenance the keeping up a standing army in time of peace; on which subject we have already offered some remarks. It is calculated in some measure to lessen the burden of the \_\_\_ to the individual, but by no means to add to the security of the nation.

13. The right of the people to be secure in their persons, houses, papers & effects, against unreasonable searches and seizures, shall not be violated --- What shall be deemed unreasonable searches and seizures. The same article informs us, by declaring, “that no warrant shall issue, but first, upon probable cause –

[P. 145]

which cause secondly, must be supplied by oath or affirmation; thirdly the warrant must particularly described the place to be searched; and fourthly – the persons, or things to be seized. All other searches or seizures, except such as are thus

---

<sup>16</sup> Tucker note: In England the right of the people to bear arms is confined to protestants – and by the terms suitable to their condition & degree, the effect of the Declaration is entirely done away. Vi: Stat. 1 W & M 1:2 c. 2.

authorized, are therefore unreasonable and unconstitutional,<sup>17</sup> And herewith agrees our State bill of rights – Art. 10.<sup>18</sup>

The case of general warrants, under which term all warrants except such as are above described are included, was warmly agitated in England about thirty years ago – and after much altercation they were finally pronounced to be illegal by the common law – see [Release?] of Money v. Leach 3 Burrow 1743. 1 Bl. Rep: 555; vi \_\_\_ 4 B.C. 291.

But this clause does not extend to repeal, or annul the common law principle that offenders may in certain cases be arrested, even without warrant. As in the case of riots, or breaches of the peace committed within view of a Justice of the Peace, or other peace officer of a county, who may in such cases cause the offender to be apprehended, or arrest him, without warrant.

Nor can it be construed to restrain the authority, which not only peace officers, but every private person possesses, by the common law, to arrest any felon if they shall be present when the felony is committed,

14. The invaluable privilege of trial by jury is secured by the 7 & 8 articles of the Amendmts, concerning the antiquity and excellence of this mode of trial,

[P. 146]

as well in civil as in criminal cases. I shall for the present refer to 3 B.C. 349 to 3\_5 – 4 B.C. 349 to 364. –

An objection however may be made that the 8<sup>th</sup> Article provides only for a trial by a jury of the State & district wherein the crime is alleged to have been committed, instead of a jury of the vicinage, which term vicinage seems to imply in our State the county at large & not the immediate neighborhood – and I must confess that I am among the number of those who doubt the propriety of this departure from the strict common law principles.

---

<sup>17</sup> Prof. Amar has argued that the Fourth Amendment’s warrant/probable cause requirement stems from the legal immunity given the person executing the search, protecting against the original strict liability for an unreasonable search. Hence, probable cause was originally intended only to apply to warrants; warrantless searches need only be “reasonable.” AKHIL REED AMAR, THE BILL OF RIGHTS 68-71 (1998). Tucker’s discussion appears to be to the contrary, treating probable cause and warrant as components of reasonableness.

<sup>18</sup> Tucker here has a marginal note: “vi: Act concerning aliens – contra 5: Cong: c:” In his 1803 VIEW OF THE CONSTITUTION he inserts at this point an argument that the Alien Act, 1 Stat. 570, violates the Fourth Amendment.

The common law maxim, that no man is to be brought into jeopardy of his life, more than once for the same offence, is rendered a fundamental law of the gov't by the same article, as is also that other inestimable maxim of the common law, that no man should be compelled in any criminal case to give evidence against himself. That he shall moreover be informed of the nature & cause of the accusation, be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor, & have the assistance of counsel for his defence, -- And that he shall in no case be deprived of life, liberty, or property without due process of law -- & herewith again agrees our own State bill of rights.

The importance of all of these articles will more evidently appear, in the course of our examinations of the subjects to which they relate, in the fourth book of the Commentaries – I have enumerated them above only for the sake of method.

15. The right of trial by jury in civil suits at common law is also [secured?] by the 9<sup>th</sup> article of the ratified amendments in all cases where the matter in controversy should exceed the value of twenty dollars. Here again I must refer the student to 3 B.C. 349 to 385.

[P. 147]

16. Art:10 provides that excessive bail shall not be required; nor excessive fines imposed; nor cruel & unusual punishments inflicted.

These restraints against oppression are well adapted to the nature of our government, and correspond exactly with the declaration contained in our own State bill of rights. Art. 9.

17. Private property shall not be taken for public use without just compensation. Art: 7.

This article is intended to restrain the arbitrary & oppressive measure of obtaining supplies by impress't as were practiced during the last war, not infrequently without any compensation whatsoever. A law of our own State, describes in what cases impress may be made, & by whom: and authorizes the commitment of the offender, in case of illegal impresses.

18. The 11<sup>th</sup> Article declares that the enumeration in the Const. of certain rights, shall not be construed to deny or disparage other rights retained by the people.

The want of a bill of rights was strongly, & with great energy & force of [reasoning?] [insisted on?] by the [opponents?] of the C.U.S. in its original form. The author of the letters signed by Publius [roundly?] asserts that a bill of rights

was not only unnecessary but would be dangerous. His [reasoning?], as on most other points, is extremely \_\_\_ & acute, but by no means so convincing as many other parts of his letters. A bill of rights may be considered in two points of view, first as giving law to the government to be established, & secondly, as giving information to the people. The objection to a bill of rights in the former view would apply to every written constitution. As to the second point, a bill of rights reduces to obvious fundamental maxims, [perceptible?] to every man of the commonest

[P. 148]

understanding, what can only be discovered in the consequence of learned & deep research & inquiries into the principles of [the laws?], without such aid. – I cannot therefore subscribe to the doctrine, ingenious as the [argument?] in favor of it must be acknowledged to be.

The amendments proposed & ratified by the States are most of them such as would have formed the basis of a bill of rights – that they are not altogether [extensive enough?] will appear to them who will candidly examine those which were offered by this State, New York, North Carolina & Rhode Island, which I believe includes the whole that were offered by other States.

19. Lastly, it is declared that the powers not delegated to the U.S. by the C. nor prohibited to the States, are reserved to the States, respectively, or to the people. Art: 12.

This article has been thought liable to some objection from a degree of equivocation in the use of the disjunctives, nor & or. I have not [words crossed out] \_\_\_ \_\_\_ the objection. But I should conclude the sense to be, that every necessary power of government, not prohibited to the States, may be exercised by the State governments, concurrently with the United States, or independent thereof according to the subject. Now by the word prohibited in this article, I understand first, such powers as by the very terms of the Constitution are taken away from the States expressly: such for example as that of coining money, as also the other powers enumerated in Art. I S. 10 –

[P. 149]

Secondly, such as are in express terms granted to the United States, and are not in their nature susceptible of a concurrent authority in the individual States, such as the power to define or punish piracies & felonies committed on the high seas, and offenses against the law of nations. The right of creating & appointing to offices under the U.S. --- All other powers necessarily springing from the very act of

establishing a government, such as the powers of directing the course of inheritance, and of defining and punishing offenses agst. the society, other than such as are [entrusted?] to the declarations to Congress & all others of a similar description, I apprehend are [secured?] to the States – such of them as are enumerated in the Constitution and are susceptible of a concurrent authority the States may possess in that manner. Such of them as are not enumerated, they will [possess?] exclusively of the U.S – Such powers as are neither enumerated in the Constitution of the U.S. nor in the State Constitutions, nor necessarily spring from the act of establishing a government, I presume remain with the people, the original grantors of all the powers of government in those States.

## **Conclusion**

Tucker's lecture notes give remarkable insight into how an American jurist and academic understood the Bill of Rights immediately after its ratification. Tucker agrees with Jefferson that the Establishment Clause erects a strong barrier between church and state. He sees freedom of expression as broadly, indeed absolutely protected against Federal interference, and linked to freedom of thought. He viewed the Second Amendment as an individual right derived from the natural right of self defense, and Fourth Amendment reasonableness as incorporating its warrant and probable cause requirements. Tucker's lecture notes, in brief, indicate that this Framing period scholar was astonishingly modern.