

St. George Tucker's Law Reports and Selected Papers 1782–1825.
Edited by Charles F. Hobson, with Joan F. Lovelace, Managing Editor. Chapel Hill: University of North Carolina Press for the Omohundro Institute of Early American History and Culture, Williamsburg, VA, 2013. 1972 pp. in three volumes. Notes, illustrations, appendices, tables, bibliography, index. \$315. ISBN: 978-0-8078-3721-4.

The three volumes of St. George Tucker's law reports and papers constitute what their editor, Charles F. Hobson, describes as "belated recognition of the importance of this remarkable archive for historical inquiry and research." Because these volumes appeared in 2013, this review is a belated recognition of the remarkable editorial work of one of the foremost legal editors in English and American legal history, Charles F. Hobson. Editor of several volumes in the *Papers of James Madison*, Hobson also served as editor of the *Papers of John Marshall* and brought that series to completion. To that body of papers of a President and a chief justice of the Supreme Court of the United States he has added those of one of the most significant legal figures of the early republic. Tucker's legal career spanned bench and bar of Virginia's trial and appellate courts as well as judge of the federal district court. He left a massive corpus of papers: memoranda, opinions, arguments, and pleadings that track the legal history of the state and nation. The most significant of these archives, three manuscript volumes of "Notes of Certain Cases in the general Court, District Courts, and Court of Appeals in Virginia, from the year 1786 to 1811" had lain undiscovered until the 1960s, when Charles Cullen brought them to light while doing dissertation research in the special collections of Swem Library at the College of William and Mary. Tucker reported approximately six hundred cases at the state's General Court and District Court from 1786 to 1803, another five hundred cases at the Court of Appeals from 1804 to 1811, and scores of others from the United States District court, where he served as judge from 1813 until his retirement in 1825.

The present edition is more than case reports. Appendices provide biographies of lawyers, court officers, and judges mentioned in the reports, and a glossary of

legal terms. The historical and contextual sensitivity that Hobson demonstrated in his previous editorial work and in his biography of John Marshall are evident here, and provide those approaching the papers a sure guide to their fullest appreciation. An additional appendix on “The Rupture Between Tucker and Roane” documents the nasty falling out between Tucker and fellow appeals court judge Spencer Roane, with Roane’s interrogatories that Tucker answered to try to ease the rift. Even the index is worthy of note; entries under “Legal commentary by Tucker” fill almost three double-columned pages and bring coherence to the breadth of the subject’s life in the law. Hobson’s editorial choices deepen our understanding of Tucker’s jurisprudence. He has expanded and informed the corpus by including vital supporting material that enable the reader to make sense of the often arcane pleadings. Cross references to the Marshall papers provide context and enhance the value of what Tucker wrote and did as a judge. Tucker’s five-volume edition of *Blackstone’s Commentaries* (1803) has given him preeminence among the legal scholars of the early republic, and the *Papers* provide useful reference to it, too.

Of greatest significance, however, is the inclusion of unreported cases and material from his loose papers that demonstrate the development of Tucker’s thinking on the legal issues that made him such an important legal figure. As a judge, Tucker is best known for his decisions in two areas: on the judicial review of legislation, and on the law of slavery. The unreported opinions we have here on cases argued at the General Court, annotated and cross referenced to the later more famous decisions, reveal a coherence in his thinking on these subjects no less than the depth of his commitment to certain principles that we see in his more famous writing. To appreciate the value of the editorial process in the *Papers* requires that a reviewer point out how much we gain from it.

Behind the well known case of *Kemper v. Hawkins* (1793) Hobson has placed two unreported General Court cases that illustrate this process. *Kemper*, as Hobson points out, was Tucker’s “most definitive statement of the doctrine of judicial review as it came to be formulated in the early republic.” It was also a pillar of state’s rights jurisprudence throughout the early years of the republic and was cited repeatedly by those asserting the limits on federal authority. Four years before *Kemper* the General Court heard the case of *Commonwealth v. Eldridge*. Hobson exercises some historical sleuthing to show that although the case was decided in 1789, Tucker wrote his unreported opinion in 1791. By that time, the federal

government had been in operation and had begun to show signs of assuming powers that Tucker regarded as not enumerated by the Constitution. “[W]ishing to satisfy the Minds of those who doubt” his position, he seized on *Eldridge* as an opportunity to present an opinion that was nothing short of a disquisition on the federal compact and “the principles of our Constitution.” *Eldridge*, however, has been overlooked by historians because it was filed with papers of the Virginia Court of Appeals for 1807. The *Papers*, therefore, present us for the first time with what must be considered one of the most powerful arguments made against the nationalizing trends that mobilized opposition to the Federalist regime. Not only did it provide constitutional limits on the federal government, it imposed on the judiciary the obligation to erect “Barriers” against it as “the last resort.”

Six years after *Kemper*, the “fictitious case” of *Woodson v. Randolph* was brought to the General Court to test the constitutionality of a federal act. The case is noted in the published reports of Virginia decisions, but only with a terse statement rejecting a position (unattributed) to Tucker:

The question in this case was, whether the act of congress was constitutional or not. Some persons had supposed, that congress had no power to change the rules of evidence in the state courts: the general courts, however, were of opinion that, as congress had power to lay and collect taxes, duties, imposts and excises, and to make all laws necessary and proper for carrying into execution the specified powers, the aforesaid act was within the limits of their chartered authority (3 Va. 128).

Compare this to what the *Papers* edition gives us in the *Woodson* opinion:

This Question is of the utmost importance; on the one hand we are to enquire, whether there be any, & what Limits to the power of the federal Legislature; and on the other, whether there be any, & what rights, reserved to the several States, by the federal Constitution?

Tucker’s opinion runs to eight printed pages in this edition, and we can find its influence in its incorporation in his law lectures and his edition of Blackstone’s *Commentaries*. *Eldridge* offers background to these better known sources, and forces us to confront the extremity of his beliefs: in it he held that under the Articles

of Confederation every state was “equally *sovereign* and independent,” and that the Articles “have never been *rescinded* by the United States.” His repeated invocation of the term “the people themselves”—three times on a single page—added force to legitimizing the judicial role. The defendant challenging the federal act thus “refers himself to the Constitution for his defence—alludging that the Act is against the principles of the Constitution & that he is therefore not bound to pay obedience to it. And he demands of this Court to decide between *him & the Government*; or, more properly between the Act of the whole people of the Commonwealth, and the Act of the ordinary Legislature.”

Tucker’s engagement with the law of slavery offers another example of how this edition deepens our understanding of his conflicted position. His opposition to the system through his *Dissertation on Slavery: With a Proposal for the Gradual Abolition of It, In the State of Virginia* (1796) epitomizes the ambivalence of many who opposed the institution but feared the consequences of its abolition. Tucker’s program would have made the emancipated African Americans second-class citizens, denied the right to vote, serve on juries, or marry whites, and would have limited their property rights by denying them the right to make wills. The *Papers* provide insight, if not explanation, into his mentality. When George Wythe, as chancellor, invoked the Virginia Declaration of Rights in *Hudgins v. Wright* (1806) to extend equality of rights on all men, Tucker rejected the reasoning and wrote that the clause declaring that “all men are by nature equally free and independent”

was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom to those very people whom we have been compelled from imperious circumstances to retain, generally, in the same state of bondage that they were in at the revolution, in which they had no *concern, agency or interest*."

But the lesser known unreported opinions we find in the *Papers* provide additional insights into the legalistic thinking that both limited and expanded the rights of Virginians of color. *Hudgins* was a suit for freedom, a means of escaping slavery by proof of descent from a free mother or an Indian. The latter strategy was increasingly favored in Virginia, especially after *Hudgins*. Tucker, while a practicing

attorney at the General Court in 1787, had observed the case of *Hannah v. Davis* and made his own report of it, which is included in this edition. In it, we see introduced several arguments whose usefulness in establishing the freedom of petitioners found their way not only into *Hudgins* but also into Tucker's *Dissertation* and his edition of Blackstone's *Commentaries*. Though he refused to "concur with the Chancellor in his reasoning on the operation of the first clause of the Bill of Rights," Tucker agreed with him that that "whenever one person claims to hold another in slavery, the onus probandi lies on the claimant." This point had been "loudly complained of," and was, as Hobson adds in a footnote to *Hudgins*, attacked as "subversive of slavery."

In both substance and form, the *Tucker Papers* stand as an exemplary edition of the work of a figure of great historical importance whose legal career is all the better understood and appreciated by the work of its editor.

David Thomas Konig
Professor of History and Professor of Law Washington University in St. Louis