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JOHN RANDOLPH TUCKER: THE MAN AND HIS WORK†

JOHN W. DAVIS*

I

Just one hundred years ago Judge John W. Brockenbrough opened his Lexington Law School. He was then the competent and respected Judge of the District Court of the United States for the Western District of Virginia. The difference in size between his docket and that of a Federal Court today is eloquent of the changes that time has brought. He ran his court and still found time for teaching. Filial piety compels me to pause and pay tribute to his educational efforts since in the early 1850's my first law preceptor, who was also my father, was enrolled among his pupils. I am thus of the Lexington Law School in the second generation. My father often spoke of Judge Brockenbrough in terms of respect and affection and during a long life at the bar a likeness of the Judge adorned his office wall. I regret that most of his reminiscences of Lexington and the Lexington Law School have passed beyond my recall. Two, however, stand out in my memory. The first was of a custom that when the Judge went out on his judicial travels his law students would follow in his train, thus giving them a chance to see the law in action. May I suggest that this primitive but highly practical use of the case system is not unworthy of present day imitation. I have no doubt that a smell of the courtroom would be good for law students, all and sundry. The second set of recollections dealt with a raw-boned and somewhat eccentric teacher of mathematics at the V. M. I. who from time to time came over for fencing bouts with the more athletic of Judge Brockenbrough's students. This man came later to be known to history as Stonewall Jackson.

In the year 1870 Judge Brockenbrough's one-man law school was

†This article includes two addresses delivered by Mr. Davis at Washington and Lee University on May 10 and 11, 1949, inaugurating the John Randolph Tucker Memorial Lecture Series.

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integrated with the then Washington College and there was added to its faculty as Professor of Equity and Public Law John Randolph Tucker. As we celebrate this year the centennial of the Law School we meet to inaugurate what is planned to be a series of annual lectures to be given in honor of John Randolph Tucker, scholar, lawyer, statesman, orator and teacher. We do this in the confident hope that from year to year these lectures may furnish opportunity for the discussion of these vital topics of law and government upon which he so delighted to dwell.

It has seemed to me that an undertaking thus associated with his name might properly be prefaced by some discussion of the man himself. What manner of man was he? What did he do? What did he believe? What did he teach? "Show me the man you honor" runs the saying, "and I will show you the man you are." Nearly all of his contemporaries no doubt have already joined him in the Great Beyond, but there still remains some of those who sat under his teaching and to whom his life and words are yet a present source of inspiration. May I try in their behalf to bring before you the man they honor.

John Randolph Tucker was born at Winchester, Virginia, on the 24th day of December, 1823. He died in Lexington on the 13th of February, 1897. The influence of ancestry was strong upon him for he came of a line of lawyers and teachers of the law. His grandfather, St. George Tucker, held a chair as Professor of Law at William & Mary College. After service in the Army of the Revolution he became a member of the Court of Appeals of Virginia and, by appointment of President Madison, United States District Judge for the District of Virginia. He was the author of Tucker's "Blackstone," one of the earliest, if not the earliest, of American commentaries. His son, Henry St. George Tucker, was a member of Congress, a Judge of the Court of Appeals of Virginia, later Professor of Law at the University of Virginia and author of Tucker's Commentaries on the Laws of Virginia and other works. He was a half-brother of the famous John Randolph of Roanoke for whom his son John Randolph Tucker was named.

When Henry St. George Tucker was elected to the Court of Appeals in 1831 he moved to Richmond with his family. It was after attending school at a then new academy in that city that John Randolph Tucker entered the University of Virginia in 1839 when he was but fifteen years of age. A year later he graduated in mathematics. In 1844 he graduated in law and though not yet twenty-one he began his law practice in Richmond where he made his first appearance at the bar

of the Court of Appeals in 1846 in the leading case of *Hunters v. Waite*,¹ on the validity of voluntary settlements. His father, however, was compelled by failing health to give up his law professorship and return to Winchester. John Randolph, always the most devoted of sons, followed him and formed a partnership with Mr. Robert Y. Conrad of that place. His success at the bar and his forensic power drew him before long into political notice. He became a candidate for the Electoral College on the Democratic ticket in 1852 and again in 1856. Under the leadership of Henry A. Wise he campaigned actively against the "Know Nothing" ticket in 1855. Mr. Tucker held Wise in enduring regard and later spoke of him as that "orator, lawyer, statesman and soldier."² In 1857 he was appointed to an unexpired term as Attorney General of Virginia and was elected to that office in 1857 and re-elected in 1863. This, of course, took him back to Richmond where he saw the coming of secession and heard the guns of the Civil War. Of his life during that troubled period he left no written memorial nor did he often rouse its painful memories in conversation.

Appomattox, however, came and went, and like other followers of the lost cause he had to pick up the threads of life anew. As one ex-Confederate put it in some family memoirs I have seen: "We had to begin again at the bottom—and it was out." There could be no better or more complete description of life in the vanquished South. So Mr. Tucker moved to Middleburg in Loudoun County, the home of the lady (Laura Holmes Powell) he had married in 1848, and there took up his profession once again. In 1869 he was made one of counsel for the B & O Railroad Company and moved to Baltimore. Elected in 1870 to the professorship of Equity and Public Law at Washington College, he made his last change of residence to Lexington and here he lived until his death.

Teaching was congenial to him and no doubt he expected to follow that occupation to the end of his life. Judge Brockenbrough continued to teach Common and Statute Law, but the field of Equity and Public Law assigned to Mr. Tucker gave him ample scope and he went at it with a will. The system of teaching employed, as the college leaflet of the day states, was that by lecture and examination. The case system had not yet made its way.³ When Judge Brockenbrough retired

¹3 Gratt. 26 (1846).

²Reminiscences of Virginia's Judges and Jurists, Richmond, February 7, 1895.

³Mr. Tucker later expressed his estimate of the case system in these words (Reminiscences of Virginia's Judges and Jurists, Richmond, February 7, 1895):

"It is certainly true, that the ready access to cases by means of digests and in-

in 1873 there came to fill his place Charles A. Graves, concerning whom I pause to say that no more consummate master in the art of instruction ever lived.

But Mr. Tucker's plans for a purely scholastic life were soon to be interrupted. Without any activity on his part and apparently to his entire surprise he was nominated for Congress from the Lynchburg District and was easily elected. He was re-elected for each of five succeeding terms, but after twelve years of continuous service he wearied of the post and by a public letter to his constituents announced in 1886 his determination to retire.

With his Congressional life thus voluntarily ended Mr. Tucker made his final and lasting return to Washington and Lee. He did not wholly divorce himself from active practice but a review of the cases in which he was engaged would overstep our present bounds. Among these cases, however, I note his appearance for the Chicago Anarchists who sought from the Supreme Court a writ of error against their conviction in the Supreme Court of Illinois.⁴ I like his sturdy and lawyer-like reply when friends questioned his acceptance of the case: "I do not defend anarchy, I defend the Constitution." That he never ceased to do, whether in the political forum, the courthouse, or the classroom.

This bare chronology of Mr. Tucker's life would be lacking in interest if it were not possible to fill in some of the details. These are not lacking. The only problem is one of selection. His congressional career alone could well be made the subject of lengthy consideration for it was one of the highest distinction and usefulness. Immediately

dexes, is a labor saving device which makes legal research more mechanical than mental. It dispenses with a reliance on one's own personal resources, by furnishing the thoughts and conclusions of others, made to his hand. Digests are thought-dispensing machines. It is the man without books, or with but one book, who is to be feared as the creator of new thoughts, which so often sweep the deck, covered with musty tomes of obsolete lore, or with crude and ill-fitting decisions from the many factories of ready-made law at home and abroad, which load the shelves of our modern libraries.

I will not be understood to decry case-learning; but it should aid, not supplant; stimulate, not suppress, the intense work of the native intellect. A broader view of fundamental principles is unquestionably gained by observing the many cases in which their application is needed, and by this widening the general truth through an analytical dissection of as many particular cases as possible. But while thus giving my judgment for an intelligent combination of both systems, I am free to say, if either alone is to be preferred, it is that which strains mental effort to its highest excellence, where libraries are not to be reached, rather than that under which the sluggish and unthoughtful explorer of digests for what other men have thought, induces self-exemption from any thought of his own."

⁴Exparte Spies, 123 U. S. 131, 8 S. Ct. 22, 31 L. ed. 80 (1887).

upon his entrance into Congress he was made a member of the Ways and Means Committee, then and still the senior committee of the House, and in the 48th and 49th Congresses he was Chairman of the hardly less important Committee on the Judiciary. He was in contact with such well-known figures as James G. Blaine, James A. Garfield, William McKinley, Thomas B. Reed, Samuel J. Randall, John G. Carlisle, Roger Q. Mills and others of like stature. He did not suffer by comparison with any of them, nor did he hesitate to cross swords with any opponent no matter how formidable.

He had occasion from time to time to outline his whole philosophy of government. Perhaps as we go along you will permit a few pertinent quotations. They present some occasion to contrast the past with the present.

He took his seat on December 6, 1875 and his first reported speech was that made in the following January in opposition to a proposed appropriation of \$1,500,000 for the Centennial Exposition at Philadelphia. That seems a paltry sum measured by modern standards and not one to be too anxiously considered, but it touched off a whole field day of oratory. Supporters of the grant made burning pleas to patriotism in which Valley Forge, Thermopylae and similar inspiring events were dwelt upon. Of these orations perhaps the most fervent was that by Carter Harrison of Illinois. He pictured the American eagle rising from the Atlantic and never ceasing his flight until he dipped his pinions in the blue waters of the Pacific—which was quite a flight even for an amphibious American eagle. He promised that the emotions stirred by the Exposition would hatch a new brood of American eagles under “yonder magnificent dome cutting the blue field of Heaven with its rounded brow.” He rose to his climax in declaring: “Emotional patriotism is as instinctive as is the love of woman to the boy when the dawn of manhood first darkens his lip.” Mr. Tucker, as one might expect, did not fly so high. He began as he did in most of his speeches and lectures with a summary of underlying principles. He asserted, as he did many times thereafter, that ours is a government of granted and enumerated powers, not of original and unlimited powers. He followed Madison in declaring that the power to lay and collect taxes “to provide for the common defense and general welfare” was in no sense an independent grant of power but a mere definition of the objective of the taxing power itself. “For,” said he, “whenever you claim power to do anything you may judge to be for the general welfare, you proclaim to the country and to all its schemers and jobbers

this invitation: 'Have any of you any scheme you think for the general welfare, if so bring it forward.' There will be no lack of them, Sir." True, Mr. Tucker did not have the advantage of the later lucubrations of the Supreme Court in *United States v. Butler*,⁵ as to which more may be said. But is his prophecy being daily fulfilled or is it not? For himself he proposed this canon of conduct; "Show me the granted power or how this bill is necessary and proper to carry into effect an expressly granted power, or before God and under my oath I cannot vote for it." How rarely does one hear that note sounded in these latter days. He closed with a ringing peroration devoted to the restored Union and a pledge of its lasting support by the State of Virginia.

This speech placed him at once in the front rank of Congressional debaters. So much so that a newspaper of Baltimore declared: "Were he never to utter another syllable his fame would be secure and his memory forever honored."

In the Hayes-Tilden contest he played a prominent part. He supported the creation of the Electoral Commission to decide the contests in Louisiana and Florida; and when it had been set up he argued before it the case for the Tilden electors in Florida, urging that their rights had been set at rest by the binding decisions of the courts of that State. When the Commission, by a vote of 8 to 7, refused to go behind the Governor's certificate, great was his disappointment and he united with other members of the House in a written remonstrance declaring that the decision "puts fraud at a premium, fair dealing at a discount." Nor did he ever come to a change of views on that subject.

The echoes of the War Between the States were still ringing and more than once the bloody shirt made its appearance on the floor. When it was appropriate, either in the Congress or without, Mr. Tucker lost no opportunity to preach in the most eloquent terms conciliation, unity and devotion to the Union. He and Garfield, while personal friends, were favorite antagonists in debate and when Garfield made some criticism, which he later modified, of those who having taken an oath to the United States had joined the Confederacy, Mr. Tucker was quick to challenge. Said he:

"My reason for referring to what he said was that I represent on this floor a little town where sleep the remains of one of the noblest Americans that ever trod its soil. He sleeps in death and no dishonor can ever, expressly or by implication, be cast

⁵297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477 (1936).

upon that honored grave that the representative of that district will not rise here and repel it."

As a member of the Ways and Means Committee he became keenly interested in the subject of the tariff. In his great speech concerning it delivered in 1878 he discussed the topic from its constitutional, historic and economic angles and I do not think that in all the flood of debate the tariff has provoked you will find any more cogent or more closely reasoned exposition of the anti-protectionist point of view. He declared himself a free trader in principle or at most for a tariff for revenue only. "Protection," said he, "is privilege" and he criticised the perversion of the taxing power "from the purpose of revenue to the grant of a bounty or special privilege . . . if directly a robbery, if indirectly a fraud."

"My notion of equality," he said, "is this. It is equality before the law when every man, using the gifts which Providence has bestowed upon him—brain, energy, muscle, nerve power—shall work out his destiny by his own unaided efforts, and unobstructed by any operations of government . . . I ask no fostering care . . . no help from government, no obstruction by government."

He went on:

"It is further important to observe that each man with his self-interest, concentrating his intelligence on the question of its promotion is wiser to devise the methods of success than any government can be for him. Let him alone and the average man will better decide on the best and most profitable employment than could the wisdom of the Congress or parliament of any nation."

In a still later speech he summed up his political creed:

"If, Mr. Chairman, I should venture to predict the policy of a triumphant future I would fix its landmarks thus: Let us cling to the Constitution as the *tabula in naufragio*, as our only hope under God in the breakers and amid the storms which beset us; that Constitution which is a bundle of the institutional liberties of the Anglo-Saxon race secured by new and Republican forms of government.

Let us uphold the Federal authority in all its integrity . . . and preserve to the governments and the people of the several states all their rights and powers.

Let us strictly and zealously secure to every citizen his individual and personal rights to life, liberty and self-development

Let us grant to government the minimum of power, to the

citizen the maximum of liberty, consistently with the order and safety of society."⁶

I know no finer expression of basic Americanism than this.

Mr. Tucker's last battle in Congress on the eve of his retirement was in support of the bill to abolish polygamy in the Territory of Utah. On this subject he was more than ordinarily fervent, for the practice of polygamy outraged his deepest sentiments.

"What," said he, "is the home of the people? The one man and the one woman; the one man loving supremely none but her and the woman loving none supremely but her husband. Thank God there are such homes yet in this great land which He has given to us and our posterity. That is the foundation of your policy."

The same idea was repeated in the definition of marriage which he framed for his class on Domestic Relations:

"Marriage," said he "is a civil status, the jural result of a contract between one man and one woman for perpetual cohabitation and mutual support, looking to the procreation and nurture of children under the security of certain parentage."

It is hard to see what can be added to or taken from that definition. I remember it as if I heard it but yesterday.

When I come to speak of Mr. Tucker as a teacher I enter at last the field of personal experience. I can not pretend to be an unbiased witness. But I do not hesitate to declare that no more inspiring teacher ever appeared in any classroom. He was never obscure, never tedious, never censorious or caustic. All that he had of learning, experience, humor and oratory (where oratory was appropriate) he poured out without stint. He filled the dullest student with a perception of the majesty of the law, the dignity of the profession he was seeking to enter and a sense of the eternal verities by which all law is underlaid. He moulded not only the minds but the characters of his listeners. As one of them writes me—"another might be a fine teacher of legal anatomy, while Old Ran breathed into the body the breath of life." Or as another says: "In my two years under his teaching I absorbed not only the philosophy of the law but also a philosophy of living." Perhaps this, rather than purely didactic instruction is the cardinal test of greatness in a teacher.

Perhaps, also, his methods would not meet the modern standards of scientific pedagogy. He taught almost entirely by lectures, supple-

⁶46th Cong., 1st Sess. p. 243.

mented by notes printed for the use of his classes in pamphlet form. These were not text books nor intended so to be. They were rather guide posts, first to the lecturer himself and then to his hearers. There were copious references in them to text-writers and decided cases and these the student was confidently expected to consult and study for himself. It seems in retrospect that this confidence was frequently misplaced; but those who failed to justify it could be sure that, to use an insurance term, they had thereby largely increased their "area of exposure" when examinations rolled around.

The sentences in these notes were terse, sometimes almost cryptic, filled with abbreviations and the Latin phrases of which he was so fond—*tabula in naufragio*, his favorite description of the Constitution; *sic utere tuo ut alienum non laedas*, the periphery of private rights; *juris praecepta sunt haec, honeste vivere, alterum non laedere, suum cuique tribuere*—these and others like them were constantly on his lips. Indeed, I think he was just a little proud of his knowledge of the classics. When a Congressional colleague teased him one day with the remark, "*Nulla vestigia retrorsa*, exclaimed the gentleman in the unknown language of Pocahontas, his ancestress," Mr. Tucker, without pausing to deny as he might have done his descent from Pocahontas, drily replied: "The descendant of Pocahontas never said *retrorsa* instead of *retrorsum*."

None of the subjects upon which he lectured was intentionally slighted—equity, international law, corporations, partnerships, domestic relations, negotiable paper, insurance; but it was when he reached those nearest to his heart—natural law, which he held to be divinely implanted in the human breast; political science, where he delved deep into English history as the fountain of our liberties; the Constitution and the Bill of Rights—here he took fire and carried his hearers on from day to day in a flow of masterly and exalted reasoning. And like the Greatest of all Teachers he knew the value of story and parable to drive his points home.

From the well of a deep religious conviction he drew the belief that man was created by God and being so created he was a trustee under God of all his given powers, including the liberty of self-use; that self-defense was thus a religious duty as well as a personal right. On the same firm ground he placed the right of private ownership of property as but the outcome and symbol of this God-given right of self-use, so that this property when lawfully acquired by mental or physical effort became but an extension of the man himself and likewise sacred.

When it came to the origins of government, he rejected as wholly fanciful the theory of a social contract put forward by Locke and Rousseau as well as the divine right propounded by Hobbes in the *Leviathan*. He found the roots of government in the family with its patriarchy, broadening out into the tribe and ultimately the state. He accepted of course the dogma announced by the Constitutional Convention over the signature of Washington, that "Individuals entering into society must give up a share of liberty to preserve the rest," but he propounded this cardinal canon of political science: "Limit law-making to the defense of man-right and of his self-use for self-development, without aid or hindrance from government. When it passes this limit and becomes paternal, the *patriarcha* [another of his Latin terms] will burden all for the privilege of the law and give monopoly to the few to the exclusion of the mass."⁷ The greatest good to the greatest number he held was a fallacious statement, for the true end to be sought was not advantage measured by preferential numbers but the maximum of good to each and all. The idea of the state as a master rather than a mere instrument, a creator and not a mere guardian of rights was wholly foreign to his thought.

Holding these views, it is not surprising that he was rated a strict constructionist of the Constitution; a defender of its distribution of powers, those it conferred upon the Federal Government and equally those it reserved to the states. He gloried in the name.

Said he on one occasion:

"Sir, despite the derision of gentlemen who say that constitutional questions have practically passed away and are a part of those Bourbon ideas, as they are called, in the cant of the day, which are no longer to be respected, yet while I occupy a seat on this floor I shall never permit to pass without challenge any action of this house which I believe will tend to disturb that splendid equilibrium of power which was established by the Constitution of our fathers. The equilibrium between the Federal Government and the State Governments; between the different departments, executive judicial and legislative of this Government; and between the two houses of Congress are all important to be sedulously conserved, lest the disturbance of the equilibrium may result in the overthrow and *ungearing* of the whole system of political machinery, so wisely and well adjusted."

So he believed, so he taught, so he lived.⁸

⁷1 Tucker on Constitution 81-82.

⁸At his death, Mr. Tucker left an unrevised manuscript of a work on the Con-

What shall I say of Tucker, the man? A grandson who grew to manhood under his roof, says speaking for all his grandchildren, "I had admiration, respect and love for him without any fear." So much could be said also by all his students, his townsmen, his constituents, his Congressional colleagues, indeed by all who knew him. He was distinctly a joyous, at times a playful man and as such he could do without loss of dignity things he would not be expected to do—a student writes me, "To this day I have in my mind a clear picture of him on the campus, in a frock coat, playing something akin to leap-frog with a small grandson. Somehow I was not shocked."

Not all the heaviest of the responsibilities that came to him could quench his humor or check his proclivities as a raconteur. When he was leaving to enter Congress a sober-minded friend warned him against this trait, as if it were a dangerous fault. "Ran," said he, "you are a good man and a sensible man; you have talents, Sir, that may be useful to your country. But if you expect to do anything for your own reputation, or for this grand old Commonwealth, Sir, I hope when you get to Washington you will never tell an anecdote."⁹ Needless to say this advice went unheeded. There is a story, generally accepted, that when President Cleveland contemplated appointing him to the Supreme Court—a station that he would have adorned—Mr. Cleveland, having listened to an evening of his stories, conceived the idea that Mr. Tucker was a man of too much levity for the post. That great President never made a greater mistake.

Much of his humor had a teasing even though kindly turn. A student, after the last examination that stood between him and his degree, climbed the hill to Mr. Tucker's home by invitation to learn his fate. Looking up from the papers around him, Mr. Tucker said in sorrowful accents, "Turpin, what happened to you?" With a sinking voice the luckless student replied, "I don't know, Mr. Tucker." The inquisition continued, "Usually you have done pretty well in my

stitution. This was published without editing in two volumes by his son Henry St. George Tucker, with this prefatory note: "The book is an expression of the views of the author, not merely his intellectual opinions, but his deep convictions, in the consistent exercise of which he lived and in the faith of which he died; and neither the dissent of friendship, nor the storm of popular indignation, nor yet the hope of political preferment, ever shook this unswerving devotion to them. He religiously believed that the maintenance of these principles was necessary to the stability and preservation of the Union and the happiness and prosperity of the people, and that their rejection would as certainly result in tyranny, despotism and ultimate dissolution."

⁹Related by Col. Wm. Preston Johnston in his sketch of Mr. Tucker.

classes. What happened this time?" Sensing the agony of the unhappy student, a daughter, Mrs. Pendleton, sitting near broke in with "Father, this has gone far enough." Then and only then did the student learn that he had made the best grade he had ever reached in any of Mr. Tucker's classes. It was with heightened affection no doubt that the belabored student joined in the ensuing laugh.

But all his rollicking pleasantry had in it nothing inconsistent with his intense gravity on serious themes or with the high and lofty purpose of his life. The same student who was bantered about his grades, writes me—"Distance dims the view, but I have carried with me from then until now the feeling that I had sat at the feet of Gamaliel and had been taught according to the perfect manner of the law of the fathers If I could feel when I am gone there would be even one who felt I had done for him what Mr. Tucker did for me I would be content." This many both of the living and the dead could confirm.

May I close on a note of personal reminiscence. I am perhaps the last person to whom Mr. Tucker uttered connected speech. I was called to his bedside on the day he died, and entered as some stimulant was being administered to him. One of his favorite jests throughout his illness had been that his doctors, nurses and even his family were in a conspiracy to give him poison in the guise of medicine. As the cup left his lips, I said, "I see they are still trying to poison you, Mr. Tucker." "Oh, no, John," said he, "You wouldn't call good whiskey a poison, would you?" It was a last flash of his old gaiety. He was fully aware, however, that his end was near, and as I rose after a few minutes to take my leave, we both knew that it was the moment of farewell. He thanked me as I expressed my gratitude for all that he had meant to me and to others, and then in words of majestic and thrilling eloquence he professed his entire devotion to the Christian faith in which he had lived and his confident reliance upon its promises. He faced his end without shrinking and without fear for he knew in Whom he had believed. This was his dying message to his students and when after greater length than I have given, it was ended, he lapsed into a slumber from which I believe he did not again emerge.

So died one worthy to be named among the noblest of Virginians.

II

It is a favorite tool of controversy, to summon the spirits of the mighty dead to confirm a speaker's views of the present; "If Napoleon were here he would do 'so-and-so'; if Jefferson or Hamilton or Franklin were here, he would say '-and so-on and so-on'." This is frequently an ingenious but rarely a convincing argument. One can perhaps assert as to certain things that the dead exemplar would probably not do or say them because obviously foreign to his character. But to predict that after the flux of events, the change of scene, the passage of years, he would say or do what under different circumstances he had theretofore said or done, is to press conjecture beyond all proper limits. It can be only rank speculation. I attempt nothing of the sort if I endeavor to apply to present day problems some of the lessons of Mr. Tucker's teaching.

Certainly the 52 years that have passed since he died have brought changes past all of his imagining. Technology alone has wrought a hundred miracles. In 1886, I believe, Gottlieb Daimler invented the internal combustion engine, the source of so many of our woes as well as our comforts, but it reached its ultimate use much later in the automobile, the submarine and the aeroplane. Without this invention there could have been no transport of millions of armed men with their weapons and supplies to world-war battlefields; no death lurking beneath the waters to sink peaceful ships without warning or trace; and no aerial bombing of undefended towns and cities.

In Mr. Tucker's days as a public orator no loud speakers were in existence to level out the gifts of nature and give the piping voice a chance against its stronger rival. There was no radio to spread a speaker's message over the continents, no television to make the sense of sight as far-reaching as that of hearing, and no similar means to make the communication of ideas instantaneous and universal.

He had lived through four years of devastating civil strife, that called to the field the largest armies of which to that time there had been authentic record. No doubt that experience colored much of his later thought. When men of that day spoke of "The War" they meant the War Between the States and no other. But how could he or anyone have dreamed that in the half-century that followed his death, this country would successfully emerge from three foreign wars: the first with Spain, of limited scope, it is true, but far-reaching in its consequences; the other two world wars in very truth, tearing down thrones and empires, destroying the achievements of centuries, over-

turning beliefs and customs long established—shaking the very globe itself.

From such cataclysms no participating nation, victor or vanquished, ever emerges the same as when it entered it. There is no reason to think that America can or could escape this result. The worst evils of war lie in its aftermath. The deepest scars are more on the minds of men than on their bodies. Yet, had they been forewarned of these great events, I think neither Mr. Tucker nor the men of his day could have foreseen the fateful and menacing shapes that move to and fro in the noise and dust of the whirlwind still unlaid. Mere dissent or opposition was no discouragement or novelty to those men of the post civil war era. That conflicting philosophies of human rights and governmental duties were abroad, indeed had always been abroad in the world, was a patent fact of history. But what differentiates this age from all that have gone before is the spectacle of a world openly divided into two opposing camps—one professing a belief in the liberty of the individual man and in his right to choose his rulers, the other striving for universal rule by a self-chosen and self-perpetuating group having both desire and power to stamp out all dissenters.

What does all this add up to? Are we in a wholly new world? Has the time come to abandon our old ideas and principles and seek for a new supply? One might think so if it were not for the apparently changeless character of Man himself, of Man who in the five or six thousand years in which he has left a written record of himself has undergone little if any change in his appetites, hopes, ambitions, passions, loves or hates or even in the scope of his mental powers. True, science standing on the shoulders of earlier discovery, has pushed back the boundaries of man's ignorance and rid him of some of his superstitious fears; he no longer hears Jove in the thunder or dreads the wrath of Neptune on the sea. Yet to the same outward stimuli to thought or action the most modern man can be expected to react much as did his historic ancestor. In this sense our world has not changed. Truly "we are the ancients of the earth."

To complete that quotation, I am not quite sure what Tennyson meant when he added "and in the morning of the times." Yet taking the figure as it stands, quite obviously the morning of our times is sadly overcast. Not only is the sky beclouded but the winds whirl us to unknown destinies. There are even some gloomy souls, whose views I do not share, who think we are being jet-propelled along the atomic road to the plains of Armageddon.

In such circumstances there is little wonder that men cry out for guidance, for some fixed monuments by which to steer. It will not find them, as I think, merely by following the flood of words that is daily being poured out on topics great and small in books, in the press, over the radio and in our public forums. Words, God wot, we do not lack them.

"For what," says Cicero, "is so insane as the empty sound of words, however well chosen and elegant, if there is no foundation of sense or sagacity?"

No doubt Mr. Tucker would have given you the Latin for that.

What the world is seeking as it seems to me is something far more definite and elemental. It needs some compass points, some guide-posts, some re-announcements of eternal verities by which men may live, some fixed principles to which the mind and heart may cling. "Follow principles," said Jefferson, "and the knot unties itself." Let me suggest some of these monumental ideas.

To an American the first fixed point should ever be the Constitution and its Bill of Rights. This, as Mr. Tucker so often said, is our plank in the shipwreck, our reliance in sunshine and storm alike. It has never failed us in the past; there is no reason to believe it will fail us in the future. Each graduate of this law school will be required when he comes to the bar to make solemn oath that he will support the Constitution of the United States and the Constitution of the state to whose courts he may apply. What does this mean? What can it mean other than that he will, whether in private life or public station, take no action which the Constitution, from its preamble to its latest amendment, does not countenance, nor will he suffer the same to be done by another if in his power to prevent. By this oath he must live and by it he must be judged. To perform it he must of course be a constant student of that which he has sworn to support.

It may be true as Chief Justice Hughes once remarked, that the Constitution is what the judges of the Supreme Court say it is. We have also been admonished that there has been of late a "shift" in constitutional doctrine, after a "reconstruction of the membership of the Court," a fact sufficiently apparent to need no proof. But the Constitution is not a compound of metaphysical subtleties. Its language is as plain and direct as its great architects could frame and its meaning is not to be whittled away by substituting "interpretation" for the orderly processes of direct amendment.

It is quite obvious that the Federal Government has taken to it-

self in these latter days great and hitherto unsuspected powers and that its earlier glacial though constant advance in function has become in modern progress a rushing flood. It is worth while to consider what the breaches are in the wall that have let this torrent through. How is it that the "splendid equilibrium of power" of which Mr. Tucker spoke, has been so upset?

The exigencies of war, of course, have played their part. The scope of the war power has never been measured and probably never can be. Self-preservation is the first law of nature, both for men and governments. And policies resorted to under stress of war have a marked tendency to persist when war is past. But I mention two other breaches made in time of peace that are readily discernible. The first of these is the broadened definition of the power given Congress to regulate interstate and foreign commerce. This is too large a subject for discussion in detail. I can but sketch the outlines. "Commerce," it was said by the Chief Justice, in *Gibbons v. Ogden*,¹⁰ "undoubtedly is traffic, but it is something more—it is intercourse." Starting with this premise, Congressional regulation has advanced from the enactment of measures addressed to the freedom of interstate transfer of persons, goods and information to the absolute prohibition of any transport of designated articles; from prohibition of certain forms of commerce to the removal of alleged obstructions to the current and its flow; from the removal of obstructions real or fancied, to a supervising of the personal activities of those by whom actual or prospective commerce might be carried on; and lastly, to the control of any or all of those acts or things by which commerce may ultimately be "affected." All this depends upon a chain of reasoning based upon tracing a connection between a cause, however remote, and an effect, however distant. Such a chain is not easily broken. For, as has been well said, the train of cause and effect in human affairs has not been logically interrupted since the earth tore loose from the sun.

I submit that this deductive method reached its apogee in the decision of *Wickard v. Filburn*.¹¹ Here we have a small farmer who had planted for his own use 23 acres of wheat to be fed to his own livestock on his own farm. Under the administration of the Agricultural Adjustment Act, however, there had been allotted to him for wheat raising but 11.1 acres of his holdings and he therefore reaped from his efforts an excess yield of 239 bushels. This excess of self-induced

¹⁰9 Wheat. 1, 6 L. ed. 23 (1824).

¹¹317 U. S. 111, 63 S. Ct. 82, 87 L. ed. 122 (1942).

wealth fell under the all-seeing eye of the Federal Government and its mighty arm reached out to punish so wilful a disturbance of market conditions. A penalty of \$117.11 was duly assessed against the offender and this the Courts sustained.

For, said the highest of all courts:

“Even if appellee’s activity be local and though it may not be regarded as commerce, it may still whatever its nature be reached by Congress if it exerts a substantial economic effect on Interstate Commerce and this irrespective or whether such effect is what might at some earlier time have been defined as ‘direct or indirect’.”

And how did the self-supporting efforts of the unfortunate Filburn meet this description? The Court goes on to tell us:

“If we assume that it is never marketed, it supplies a need of the man who grew it, which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.”

In tender consideration, however, of a farmer’s needs, the Court goes on to point out an avenue of escape, saying:

“Had he chosen to cut his excess and use it or feed it as hay or to reap and feed it with the head and straw together no penalty would have been demanded”;

this apparently, however, for no lack of power on the part of Congress but because of its forbearance.

I have chosen to quote from this opinion rather than to paraphrase it for paraphrase could only mar its clarity. It seems to hold that one way to affect interstate commerce is to refuse to engage in it. If this reasoning is to prevail what possible activity or inactivity of man is beyond the reach of the Federal commerce power? Small wonder that it has been held to extend to the regulation of the wages of a janitor or window-washer serving an office building, part of which is rented to tenants themselves engaged in some form of interstate commerce; or that in the days of the late and unlamented NRA an humble presser of other men’s pants should have felt the weight of the Federal power because of his failure to make the standard charges for his services. How much of recent legislation rests on this interpretation of the commerce power—the Federal Wage and Hour laws and much beside. Engaged in commerce between the states, obstructing commerce between the states, and now “affecting” commerce between the states—these are the grand omnific words, the *open sesames*, to unlock for Congress a whole vast storehouse of governmental power.

But the widest of all breaches in the constitutional wall, which was supposed to render impossible a centralized government, is by way of the power of Congress, uncontrolled and uncontrollable, to collect funds from the citizen and spend them as it will. It now may tax and tax and spend and spend with none to say it nay.

This power is certainly uncontrollable by any judicial process for you will recall that when Federal grants in aid for maternity care were challenged in the case of *Massachusetts v. Mellon*¹² it was held that not even a state, much less a private citizen, had standing in court to complain of Federal appropriations. *Sic volo, sic jubeo* is the all-sufficient answer of Congress to any such attack.

There was long supposed to be some limitation on Federal spending arising from the specific grants of authority named in the Constitution to which all spending must be addressed. This was the so-called Madisonian Doctrine which held its ground for a century. It held that the language of Article 1 Sec. 8 of the Constitution giving to Congress power to lay and collect taxes, duties, imposts and excises "to pay the debts and provide for the common defense and general welfare of the United States" was but a limitation on the taxing power itself and not an undefined and indefinable addition to the powers expressly granted. It was this view which Mr. Tucker so ably defended in his first great speech in Congress.

But the "general welfare clause" caught the attention of the Supreme Court at last and the opinion in *United States v. Butler*¹³ proclaims that "the power of Congress to authorize expenditure of public moneys for public purpose is not limited by the grants of legislative power found in the Constitution"; or as Justice Stone put it in the same case, "The spending power of Congress is in addition to the legislative power and not subordinate to it." True, he went on to say that the purpose as thus declared must be truly national rather than local, but how much difficulty do you think a Congressman would have in detecting a general purpose to be served by expenditures to be made in his own district?

It is under this guise of the "general welfare" that many current Federal expenditures now being made and others clearly in prospect depend: social security, guaranteed prices, low-cost housing, free medical care, public education and many more. It is clear, is it not, that if the benevolence of the Congressional intent is the only criterion for

¹²262 U. S. 447, 43 S. Ct. 597, 67 L. ed. 1078 (1923).

¹³297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477 (1936).

the spending power, it has no perceptible boundaries whatever. It adds nothing in the way of restriction to say, as does the opinion of Justice Stone from which I have quoted, that it must not "coerce action left to state control." This is quite unrealistic, for he who pays the piper can call the tune. He always has and no doubt he always will.

We have it but recently on high authority that "The human welfare state is the great political invention of the Twentieth Century." If I understand what is meant by the "human welfare state" I must be permitted to question whether it can be called an invention, or if so whether it bears so recent a date. There seem to be traces of it as least as far back as the Greeks and Romans; Diocletian's edict of 301 A.D., for instance. Perhaps Joseph may have grasped the idea when he conserved the corn of Egypt and redistributed it in the evil day. True, unlike some of his modern imitators, his transactions, if my memory serves me, did contemplate a *quid pro quo*, but also, drawing on my memory, when he was through all the land of Egypt belonged to Pharaoh.

But in the phrase "a welfare state" there lurks a deeper fallacy which only too easily seizes upon the minds of men. Too readily can they be brought to think of the State as an all-wise and benevolent being, brooding in more than mortal omnipotence and solicitude over the lives of its subjects or citizens. To these it distributes its largess from its boundless stores. In the last analysis, what in an active and practical sense is a state, any state? What, in an operative rather than in a political or geographic sense is a state, any state, but a group of men, some of whom are elected, more of whom are appointed, who have power for the time being to take from their fellows what these have earned and spend it for purposes such as the spenders approve.

Except for an oddment of property here and there the state produces no part of the moneys disbursed in its name. If pensions are to be granted to the aged, it is those still young enough to work who must provide the funds. If prices of farm products are to be guaranteed from the public treasury the guarantee must be met from the taxes levied on prospective consumers to fulfill it. If grants are to be made for education or for medical care, the reservoir from which they are to come must be filled by those with or without children, by the healthy and the sick alike. It is idle to argue that sufficient means can easily be drawn from accumulated wealth for of this there is no store adequate for a tithe of the task.

"Taxes are paid in the sweat of every man who labors." Nothing

truer was ever said and the question which every so-called welfare program must confront is how much may fairly and justly and wisely be taken from what A has earned in order to give it to B.

I am not arguing now that such expenditures as I have alluded to are good or bad, harmful or helpful. There are well-meaning people in this country who think in face of all dissent, that we should have more, not less, of taxing and of spending, more, not less, of conscious effort by government to see that no man retains too large a part of what he may have earned and no man receives less than enough to satisfy all his needs.

It is easy to combat such doctrines for was it not Thucydides who wrote long ago:

“For such is the manner of men; what they like is always seen by them in the light of unreflecting hope; what they dislike they peremptorily set aside by an arbitrary conclusion.”

a saying which somewhat justifies by its antiquity my earlier statement that human nature does not change.

This, however, is by the way. The point I am seeking to make is that we should not be misled ourselves or countenance the misleading of others by the use of such abstract terms as the nation, the state, or the government. Public policies must be considered always in terms of the human beings concerned, those who hold the power and those on whom it bears, those who are the grateful recipients of governmental bounty and no less those who are the involuntary donors.

Some in pursuit of a promised security would throw away, I fear, the system that has made us great. All men are created equal, says the Declaration; but some there will always be who for want of natural gifts or failure to use the gifts they have will never reach success under any system. Of these one can say, “The fault, dear Brutus, is not in our stars but in ourselves that we are underlings.”

Moreover, the greater the power and the wider its field of exercise, the more necessary seems the rule formulated by Mr. Jefferson in the Kentucky Resolutions:

“In questions of power let no more be said of confidence in man but bind him down from mischief by the chains of the Constitution.”

Hear Mr. Tucker again speaking from the floor of Congress in 1886:

“It is unfashionable I know to stickle for the Constitution. It is an idea too prevalent that we have outgrown the written Constitution of our fathers and the will of the people expressed

through the Government is the Constitution of the future To violate the Constitution by usurping power is more disastrous to the public good than all the possible good the usurpation can promise to the people."

The next great monument to which I call your attention is the shining peak of human liberty. If America as a nation and a people has any sufficient excuse for its existence it must be found in a belief unshaken and unshakable, in the freedom of man as the true end and aim of all government, the well-spring of all progress. If you have never read it, or even if you have, I commend to you as one of the noblest passages of English prose the splendid apotheosis of liberty in Chapter V Book X of Henry George's "Progress and Poverty." "Only in broken gleams and partial light," he writes, "has the sum of liberty yet beamed among men, but all progress hath she called forth."

Many have been the attempted definitions of liberty and many the altars erected in her name. In the Bill of Rights we find a catalogue of some of the incidents of freedom—freedom of speech, of the press, of worship, of assembly, of trial by jury, immunity from unlawful search or seizure and from the confiscation of property. Latterly there has been an effort to condense this list into the "Four Freedoms" so widely publicized—"Freedom of Worship, Freedom of Speech, Freedom from Want and Freedom from Fear." But no such catalogue can border on completion if it does not include the right of "self-use" as Mr. Tucker called it, the inherent right of every individual to use at his own will and for his own advantage those powers and facilities given him by nature or by nature's God. Of this self-use the antithesis is but slavery.

It is in this concept of human liberty that the American ideal is in bitter and irreconcilable conflict with all forms of the totalitarian state, Communism, Nazism, Fascism, or what you will. All those forms of statism which exalt the state above the citizen are repugnant to it. The multiple varieties of socialism, including that milder form which masquerades under the seductive name of a "planned economy" are equally repugnant. For though no one can deny that it should be the proper care of government to hold open for its citizens the door of opportunity, it is a wholly different, indeed a wholly antagonistic thing for government to seize those opportunities for itself. Governmental and individual rights do not occupy the same area; where one advances the other must recede. It is not in the nature of governments to persuade; they can only compel, and between freedom and compulsion there is an unending conflict.

It will be a sad day, believe me, for America if the wave of collectivism sweeping across the world does not break in vain upon her shores. If the day should ever come, which in the language of the old treaties relating to war "is not to be expected and may God forbid"—if the day should ever come when Americans or any major part of them will be content to take their food from the governmental bread-fruit tree with an occasional banana for dessert, then indeed will the night have settled down.

I say this is not to be expected. I go further and say that it is inconceivable. Collectivism is no new thing. It did not begin with Karl Marx or find its most successful advocate in Lenin. The idea of the supremacy of the state and the unimportance of the individual is as old, perhaps older, than the pyramids of Egypt and the Pharaohs who built them. It was the harsh, rocky basis on which was constructed most of the ancient empires and it underlies their modern prototypes. But if there is one thing that history and human nature have taught it is that man's desire to control his own destiny is ineradicable. Man, "too feeble to wield unlimited power and too noble to submit to it," will not for indefinite periods permit himself to be deprived of his liberties and rights. Collectivist states will rise out of calamity and despair and once established in authority will flourish for the time, for power feeds on power. But they are doomed because they carry within themselves the seeds of their own destruction. That which to survive must destroy the rights of man must of necessity eventually destroy itself.

And that brings me to the last point of the compass to which I wish to call your attention. It is marked "religion." I do not use the term in any narrow or creedal sense. I take it to signify a man's conception of his relation to the Infinite and the bearing of that relationship on his duty to his neighbor and himself. When Lenin declared that "Religion is the opiate of the People" he told a half-truth. It may be that only in religion is an anodyne to be found sufficient to enable men to bear the multiform pains and suffering of this mortal life; but he reads history as well as biography in vain who does not see in religion the most powerful of impulses to human effort and a prime cause of all human advancement. Albert Einstein, who has carried man's thought further into the surrounding universe than any man since Newton, is authority for the statement that "the cosmic religious experience is the strongest and noblest mainspring of scientific research." In one of his most pregnant sentences Dr. Harry Emerson Fosdick has said that "faith is a determination to live as if certain things were true" and

until a man has hammered out for himself a faith in those certain things by which he is determined to live and die, he will wander long in the darkling wilderness. What is true of the individual is true in a sense of nations for until they attain to some form of faith, some pervading conception of truth and duty, of right and wrong if you choose, the prospect of a perpetual peace will remain an iridescent dream.

It must seem to you that in these lectures I have leaned heavily on quotations from Mr. Tucker. That is not by accident but by deliberate intent, for my effort has been to picture him as he was and as I would have him remembered. How poorly I have succeeded I too well know; but for my concluding words I turn to him again and quote from an address delivered by him in 1877 to the graduating law class of the University of Maryland:

“Young gentlemen, let me beg you to take no low or unworthy views of your calling. I do not disparage the glorious privilege of making a competent independence by your honest industry. But let not this lead you to a love of Mammon as one of the objects of your great mission in life. Do not degrade the noble aspirations for moral achievements to a sordid and groveling devotion to the accumulation of wealth. Seek *first* the moral rewards of professional labour and genius, and be sure its material recompense will be added unto you.

In the needed reforms of the law, it will be yours to take part. This should be done by avoiding as well a blind adherence to ancient systems, as a too ready adoption of every new device which promises amendment. Many think everything good because old, and everything evil because new; others directly reverse these propositions. Neither is right; both are in error. Change is not reform; nor is a blind conservation of the established order of things, wisdom. You may derive a profound canon for conservative progress from Lord Bacon. He says: I dare not advise to cast the law into a new mould. The work which I propound tendeth to pruning and grafting the law, and not to ploughing up and planting it again; for such a remove I should hold, indeed, for a perilous innovation.

But above all, because inclusive of all, let me beseech you here, at the altar of your Alma Mater, and in the presence of God and of this noble audience, to prepare, by solemn consecration, to advance the right and destroy the wrong; to promote justice and defeat iniquity; to defend the oppressed and assail the oppressor; to protect freedom and oppose tyranny; to uphold the institutional liberties of your people and to guard them against all usurpation; and so, keeping your hands clean, your heart pure, and your mind nobly aspirant to achieve these high purposes, may you serve God, honour your country, do good to

your fellowmen, and thus merit the honourable epitome of a well spent life.”

I leave these words as Mr. Tucker’s testament to the Law School of Washington and Lee.