

**LECTURES ON  
CONSTITUTIONAL LAW: FOR  
THE USE OF THE LAW CLASS AT  
THE UNIVERSITY OF VIRGINIA**

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Lectures on constitutional law: for the use of the law class at the University of Virginia by  
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**HENRY ST. GEORGE TUCKER**

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LECTURES

*Petersburg Va*  
*1826-*

ON

CONSTITUTIONAL LAW,

FOR THE USE OF THE

LAW CLASS

AT THE

UNIVERSITY OF VIRGINIA.

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BY HENRY ST. GEORGE TUCKER,  
PROFESSOR.

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# LECTURES

ON THE

## CONSTITUTION OF THE UNITED STATES.

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### LECTURE I.

Having presented to you, young gentlemen, in some former lectures, my views of the character and principles of the several forms of government, and particularly of the representative and confederate, we will now proceed to a more accurate examination of our own political system, which has been professedly constructed upon the combined principles of popular representation and an union of sovereign and independent states. I confidently believe that these enquiries will result in the conviction that whilst we have adopted a system without a prototype, we shall, nevertheless, find it eminently calculated to protect us from foreign aggression, and to secure the rights of life, liberty and property to every citizen of those free and happy republics.

Before we proceed however with our task, it may not be improper to recall to your recollections certain points of our national history with which you are doubtless familiar, but which bear too materially upon our subject to be passed at least without a reference.

The people of the United States, as you all are aware, are composed of the descendants of those subjects of the British crown, who, from various motives, left within the two last centuries their native isles and settled themselves upon this wild and desert continent. It is a principle of British law that if an uninhabited country is discovered and planted by British subjects, the English laws are immediately in force there; for the law is the birthright of

every subject: so that wherever they go they carry their laws with them, and the new found country is governed by them.(a) The proposition however must be considered as limited by their applicability and their consistency with the local and political circumstances in which the colonists are placed; and, moreover, by those changes which, in the lapse of time may be made by that power which exercises the legislative authority over them.

Such seems, indeed, to be the natural course of things, though the notion has been derided by some of our most distinguished men.(b) It could not well have been otherwise. If we imagine a body of emigrants settling in an uninhabited country, we must suppose them to be under the government of *some* laws. Bodies of men cannot subsist without them. And if they must have *some*, what so natural as their recognition, even without adoption, of that system under which they were born, and to which they have been accustomed? Under such circumstances, the laws of the fatherland, so far as they might be applicable, would be looked to as the rule of civil conduct, commanding what is right and prohibiting what is wrong. This would be the natural course of things, if the bond which united the emigrants to the land of their birth was severed forever. It would have been the case with our forefathers, if, when they left the British shores, they could have fled beyond the reach of the keen eye and powerful arm of the monarch who claimed them as his subjects. But this was not their case. They might have exclaimed in the language of the Psalmist, "If I take the wings of the morning and dwell in the uttermost parts of the sea, even there shall thy hand lead me and thy right hand shall hold me."

This indeed was eminently the case with the British subject. Leashed to the footstool of the British crown, no time nor distance could dissolve the tie. The law of allegiance bound him wherever he might go, and "he dragged at each remove a lengthening chain." It was the principle of the law of that land that neither time nor distance could impair its obligation. Allegiance was a *quality* or duty, and as is said in the quaint language of a learned ap-

(a) 1 Black. Com. 107.

(b) 4 Jeff. Corr. 178.



prentice in Plowden, it was held to be ridiculous to attempt to force the *predicament of quality* into the *predicament* of *ubi*. Wherever, therefore, the British power reached, the British emigrant would be governed by its laws; and wherever he felt its restraints, or was sensible of its trammels, he would naturally claim as a set-off to its burdens, a full title to its privileges and protection.<sup>(c)</sup> Thus it is that in the declaration of rights drawn up by the continental congress of 1774, we find it declared, "that our ancestors, who first settled these colonies, were, at the time of their emigration from the mother country, entitled to all the rights, liberties and immunities of free and natural born subjects within the realm of England."

But the common law thus brought by the colonists was, it must be observed, very different at the periods of the different settlements. The common law as existing at the settlement of Virginia was very much modified before the settlement of Georgia in the reign of George the second; so that there never has been in the various states the same system of common law in all its ramifications, though its general character throughout the whole was very much the same, except so far as it had been altered by statutes enacted by the legislatures of the respective colonies. For very early after the respective settlements, provincial assemblies were established, composed of the representatives of the freeholders and planters, with whom were associated the governor and council, the last of whom composed an upper house, while the governor was invested with the power of a negative, and of proroguing and dissolving them. Thus constituted they soon acquired a code of their own, and introduced very large and important variations from the common law in all its branches; so that at the date of the revolution, and still more at the date of the present constitution of the United States, the systems of jurisprudence of the several states were so dissimilar that it would have been *impossible*, even if had been desired, to have adopted the common law as the general law of the United States *as such*.

The power of legislation thus exercised by the colonial legislatures, with the restrictions necessarily arising from

(c) See *Cond. Rep.* 204, 211, 212; 10 *East.* 282, 288, 289.

their dependence on Great Britain was not without control: for in all the colonies, except Maryland, Connecticut and Rhode Island, the king possessed the power of abrogating the laws, and they were not final in their authority until they had passed under his review. (1 Story 158.) The colonies indeed were looked upon as dependencies of the British crown and owing allegiance thereto; the king being their supreme and sovereign lord. (1 Vez. 444; Vaugh. R. 300, 400; Shower's Parl. Ca. 30, &c.) From him the colonial assemblies were considered as deriving their energies, and it was in his power to assent or dissent to all their proceedings. In regard to the authority of parliament, the government of Great Britain maintained the right of that body to bind the colonies in all cases whatsoever; though it was admitted that they were bound by no act of parliament in which they were not expressly named. In America different opinions were entertained on the subject at different times and in different colonies. The power of taxation however was resisted from a very early period; (1 Story 172, 3, 4,) and the allegiance to the crown on the one hand, and the right of exemption from taxes unless imposed by themselves on the other, are equally asserted in a declaration of the colonies assembled at New York in October 1765. (1 Story 175.) And although in the same paper, the power of parliament to bind the colonies by legislation was admitted, yet upon the same principles on which the right of taxation was denied, the people of the colonies at length settled down upon the broad principle, that parliament had no power to bind them by its laws, except by such as might be enacted for the regulation of commerce and of the general concerns of the empire. While allegiance to the crown was thus admitted, the authority of parliament to legislate in matters of taxation and internal policy was denied: and even the declaration of independence distinctly evinces by its silence as to parliament, that the authority to which they traced their wrongs, and whose action upon them was recognized was the king alone, until the power of taxation was asserted by parliament. This assertion and the wrongs of the crown at length brought revolution, and as soon as its first steps were taken, and even before a final separation was in contemplation, a close union and co-operation of all the co-

lonies were perceived to be essential to the successful vindication of their rights and liberties as British subjects. A congress of delegates from the several colonies accordingly assembled first in 1774, and afterwards in 1775, and by them the necessary measures were adopted for the general defence. We shall hereafter have occasion to consider whether this body was to be looked upon as representing one people or thirteen distinct communities. But in this hasty sketch of the progress of the states to their present condition, it seems only necessary to say, that the congress of 1774 considered itself as invested with power to concert measures for redress of grievances, and that those of 1775 and 1776 were clothed with yet more ample powers; their commissions being sufficiently broad to embrace the right to pass measures of a national character and obligation. Anticipating the eager spirit of the people in resistance of British oppression and claims of dominion, they took measures of national defence; prohibited intercourse and trade with Great Britain, and raised an army and navy and authorized hostilities. They also raised and borrowed money; emitted bills of credit; established a post office, and authorized captures and condemnations of prizes in prize courts, with a reserve of appellate jurisdiction to themselves. At length, by the same body, the United States were declared independent in the most gloomy moments of the contest, and they continued to exercise the powers of a general government under a loose and irregular authority, until the adoption of the articles of confederation by some of the states in 1778. Those articles gave indeed a more firm and decided character to the government, and sustained by patriotism and the ardour of the conflict, bore us at length safely through our arduous struggle with one of the most powerful nations of the globe. On the termination of the war, the pressure of which, like the pressure of the superincumbent atmosphere, gave a principle of solidity to our institutions which did not properly belong to them, every thing became relaxed. The bands which united us seemed loosened, and all perceived how important it was they should be tightened. Years however passed away before the submission of the plan of a new constitution to the people, and the adoption of it by them. No sooner did it go into operation than it