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THE JURISPRUDENCE OF CHRISTOPHER G. TIEDEMAN: A STUDY IN THE FAILURE OF LAISSEZ-FAIRE CONSTITUTIONALISM

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INTRODUCTION

One of the most misunderstood periods in American legal and constitutional history is the so-called "era of laissez-faire constitutionalism" in the late nineteenth century when courts, both state and federal, struck down a score of legislative acts perceived as intrusive upon "substantive" due process rights and, in so doing, incorporated laissez-faire principles into constitutional law.[1] Until recently, scholars have accepted almost as articles of faith the following two assumptions: first, that American judges during this era were motivated by the desire to protect the privileges of the wealthy and of corporations; and second, that the means by which they furthered these interests—for example, engrafting upon the Constitution such laissez-faire principles as "liberty of contract" through the concept of substantive due process of law—represented a perversion of the original meaning of the due

1. By "laissez-faire," I refer generally to the notion that government intrusion into individuals' lives should be minimal at best; in other words, that individuals should be "let-alone" as far as possible. Taken to its extreme, the doctrine of laissez-faire implies either anarchism or the reduction of the function of government solely to the protection of individuals from force. Nineteenth-century proponents of this pure laissez-faire doctrine included Herbert Spencer, the English "Social Darwinist" philosopher, and William Graham Sumner, his American counterpart. *See* H. SPENCER, SOCIAL STATICS 13, 121 (1890) (formulating the "law of equal freedom," the principle that "every man has freedom to do all that he wills, provided he infringes not on the equal freedom of any other man"); W. SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER 141 (1982 reprint of 1883 ed.) ("We each owe it to the other to guarantee rights."). Most American proponents of laissez-faire did not go so far as to advocate the wholesale reduction of government to these pure principles, however. Rather, they advocated such reforms as the abolition of the protective tariff; the cessation of government subsidization of industrial and transportation development; the repeal of legal tender laws; and the cessation of the regulation of business practices, employment conditions, and labor relations. *See generally* Benedict, *Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 301-303 (1985).

process clauses.[2] Accordingly, legal scholars traditionally have cited the apogee of laissez-faire constitutionalism, *Lochner v. New York*,[3] as one of the worst examples of judicial abuse of power. As one historian recently observed, "Nothing can so damn a decision as to compare it to *Lochner* and its ilk."[4]

The recent work of several scholars, however, has questioned the assumptions underlying this traditional interpretation. In reassessing laissez-faire constitutionalism, these revisionist scholars have attempted to define more closely its ideological underpinnings, tracing connections to such potential sources as a hostility to "special" and "class" legislation deeply ingrained in Anglo-American law and political theory;[5] the dominance of classical economic theory in late nineteenth century

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2. For examples of this traditional view of laissez-faire constitutionalism, see C. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS E. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW (1954); A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960); B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942). Perhaps the earliest exposition of this view is found in Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

3. 198 U.S. 45 (1905). In *Lochner*, the Court held unconstitutional a New York statute prohibiting bakery employees from working more than ten hours a day or sixty hours a week. The majority of the Court considered the statute violative of "the right of contract" between employer and employee, which was "part of the liberty of the individual" protected by the due process clause of the fourteenth amendment. *Id.* at 53. In his famous dissenting opinion, Justice Holmes argued that the majority had decided the case "upon an economic theory which a large part of the country does not entertain" and added that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.* at 75 (Holmes, J., dissenting).

4. Benedict, *supra* note 1, at 295. Benedict surveys the relevant literature and concludes that this traditional interpretation of laissez-faire constitutionalism and of the *Lochner* case has been pervasive. *See id.* at 294-95 nn.9 & 12 (finding examples of the traditional interpretation in various types of literature, ranging from the leading constitutional history textbooks and constitutional law casebooks to books and articles dealing with the contemporary controversy over judicial activism); *see also* Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249, 250 (1987) (*Lochner* "is still shorthand in constitutional law for the worst sins of subjective judicial activism.").

5. Benedict, *supra* note 1. Benedict has concluded that the "heart" of laissez-faire constitutionalism "was opposition to class and special legislation." *Id.* at 330. He further argues that laissez-faire constitutionalism received widespread support in late nineteenth-century America "because it was congruent with [this] well-established and accepted principle of American liberty." *Id.* at 298.

America;[6] and the persistence, even after the Civil War, of early nineteenth century "free labor" ideology.[7] Emerging from this nascent revisionism is a far more complex, and less cynical, understanding of laissez-faire constitutionalism—one which attempts more fully to take into account the world view of the nineteenth century.[8]

One reason for the renewed scholarly interest in laissez-faire constitutionalism is that the current debate over judicial protection of civil liberties—and, particularly, of the "right to privacy"[9]—has

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6. Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988). Noting that Justice Holmes was "right" in his dissent in *Lochner*, *id.* at 393, Hovenkamp argues that "[s]ubstantive due process was a system of law based on an economic theory." *Id.* at 401. Moreover, he argues, judges in the era quite naturally were influenced by the classical economic theories found in the uniquely "American" school of political economy that had become prevalent at American universities by the 1870s and 1880s. *Id.* at 399-400; *see also* Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187 (1984) (associating substantive due process with classical "Liberal" economic values and assumptions).

7. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20, 26 (associating the "specialness" of the labor contract in American law with the "'free labor' ideology" that was prevalent in the Northern states prior to the Civil War).

8. For discussions of the shift in the "world view" of American intellectuals between the 1880s and 1930s, see S. FINE, LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE (1956); Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962). *See also* Benedict, *supra* note 1, at 296 (quoting Woodard, *supra*, at 288, that the shift from the laissez-faire standard to the welfare state standard was "one of the greatest intellectual and moral upheavals in western history"); Hovenkamp, *supra* note 6, at 437-39 (summarizing the "revolution" that brought about the end of the classical tradition in political economy).

9. Judicial protection of the right of privacy is relatively recent and may be traced to a line of Supreme Court decisions recognizing fundamental rights in such matters as marital and procreative decision-making. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating Oklahoma statute that authorized the sterilization of certain convicted felons); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating Connecticut statute that restricted the rights of married persons to use contraceptives); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating Virginia statute that prohibited racially mixed marriages); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right of access to contraceptives to unmarried as well as married adults by invalidating Massachusetts statute that permitted only physicians and pharmacists to dispense them); Roe v. Wade, 410 U.S. 113 (1973) (invalidating Texas law that prohibited all abortions except those performed to save the mother's life). Of these cases, *Griswold* and *Roe v. Wade* are the most important in articulating a constitutionally-protected right

refocused attention on substantive due process protection of nontextual, or unenumerated, constitutional rights.[10] Indeed, a number of scholars have called for the resurrection of substantive due process protection of economic rights as well.[11] Given the close nexus between current controversies over judicial protection of unenumerated rights and scholarly treatment of turn-of-the-century substantive due process, it is surprising that thus far revisionist scholars have neglected one pivotal figure of laissez-faire constitutionalism: Christopher Gustavus Tiedeman (1857-1903).[12] This omission is especially surprising because Tiedeman was the laissez-faire theorist who was most explicit in articulating a rationale for the constitutional protection of unenumerated constitutional rights.[13]

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to privacy founded either in "penumbras, formed by emanations" from specific guarantees in the Bill of Rights, as the Court said in *Griswold*, 381 U.S. at 484, or in the fourteenth amendment's concept of personal liberty, as the Court suggested in *Roe*, 410 U.S. at 153.

10. The right of privacy was a key concern of the Senate Judiciary Committee during its consideration of the nomination to the Supreme Court of Judge Robert H. Bork in 1987. *See* Power, *The Education of Robert Bork*, 10 U. BRIDGEPORT L. REV. 7, 19-21, 31-32 (1989). Among the questions raised during the Bork nomination hearings were questions about the ninth amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The ninth amendment and its potential use for the protection of unwritten constitutional rights have been the subjects of much recent scholarly interest. *See, e.g.*, Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988); Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983); Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987). For various views on the interpretation of the ninth amendment, see *Symposium on Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 37-268 (1988) (Barnett ed.).

11. *See, e.g.*, R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); ECONOMIC LIBERTIES AND THE JUDICIARY (J. Dorn & H. Manne eds. 1987); B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

12. For a short biographical sketch of Tiedeman, see *infra* notes 29-30 and accompanying text.

13. For a brief but insightful discussion of the significance of Tiedeman's jurisprudence, see Grey, *Introduction*, in C. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES at iii-vii (1974). Grey characterizes Tiedeman's position as one that "by no means was the standard conservative theory of [his] time" and which "bears far more resemblance to the *avant-garde* views expressed by Holmes in *The Common Law* in 1880, and later developed into 'sociological jurisprudence' by Roscoe Pound, and into 'legal realism' by Karl Llewellyn and others." *Id.* at vi.

Tiedeman played a significant role in the unfolding of "laissez-faire constitutionalism" in the late nineteenth and early twentieth centuries. Because he never held a judicial position and had only a limited experience as a practicing lawyer, Tiedeman was not a direct participant in the drama that was occurring in the courtrooms of his time. His role was more indirect and, in a sense, more basic: as a law teacher and a treatise writer, he contributed the ideas which state and federal judges shaped into the evolving doctrines of substantive due process and liberty of contract. Commentators long have regarded Tiedeman's treatise on the limitations of the police power[14] as the preeminent work of laissez-faire constitutionalism;[15] and Tiedeman himself, in the preface to the second edition of his treatise in 1900, with a little modesty noted that the first edition of the book had been quoted by courts with approval in literally "hundreds of cases."[16]

In seeking to explain Tiedeman's influence, commentators have focused invariably upon the purity of his laissez-faire principles.[17] Although Tiedeman shared with business leaders of his age a general aversion to what he called "the radical experimentation of social reformers,"[18] he surely went further than most of his contemporaries

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14. C. TIEDEMAN, TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886) [hereinafter C. TIEDEMAN, LIMITATIONS OF POLICE POWER].

15. Clyde E. Jacobs, for example, has called Tiedeman's treatise on the limitations of the police power one of the two most influential treatises of its time, the other being Thomas M. Cooley's *Constitutional Limitations*, which far less clearly sustained and developed laissez-faire constitutional principles. C. JACOBS, *supra* note 2, at 58-59. Jacobs sees the publication of Tiedeman's treatise in 1886 as the climax of a six-stage story of the legal synthesis of liberty of contract: after Tiedeman, he suggests, courts had only but to apply the doctrine which Cooley had suggested, state and federal court decisions had developed, and Tiedeman had synthesized. Benjamin Twiss has been equally generous to Tiedeman, calling the publication of his treatise one of the "outstanding contributions" during the twenty-year period leading up to the "conclusive adoption" of laissez-faire constitutionalism by the United States Supreme Court in *Lochner*. B. TWISS, *supra* note 2, at 110, 122.

16. 1 C. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES at ix (1900) [hereinafter 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL].

17. For example, Clyde Jacobs has argued that much of the force and prestige of Tiedeman's book "undoubtedly derived from its logical consistency and rigor," for while other authorities might be lacking in or hostile to a given proposition of laissez-faire, "the bench and bar might confidently refer to the works of Tiedeman for support." C. JACOBS, *supra* note 2, at 62.

18. 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, at viii (preface to first edition).

in denouncing all forms of governmental intervention in the economic sphere. In this respect, Tiedeman outshone the other leading treatise-writer of the late nineteenth century, Thomas McIntyre Cooley, who was far less consistent in his adherence to laissez-faire.[19] Tiedeman condemned as unconstitutional not only laws regulating the hours and wages of workers,[20] for example, but also usury laws,[21] laws regulating morality through the prohibition of such vices as gambling or the use of narcotic drugs,[22] anti-miscegenation laws,[23] and even the protective tariff.[24]

In his thoroughgoing adherence to free market economics and his advocacy of judicial activism in restraining legislation inconsistent with free market principles, Tiedeman justly may be regarded as the purest

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19. A former justice of the Michigan Supreme Court and, late in his career, the first chairman of the Interstate Commerce Commission, Cooley was author of the influential *Treatise on the Constitutional Limitations Which Rest upon the Legislative Powers of the States of the American Union*, first published in 1868. Comparing Cooley's treatise to Tiedeman's, one historian has noted that Tiedeman's narrow interpretation of the police power "revealed a much more extreme laissez-faire bias than Cooley's treatise." S. FINE, *supra* note 8, at 154. Alan Jones has shown that the conventional portrait of Cooley as a "laissez-faire constitutionalist" is distorted, and that Cooley is best understood as a Jacksonian Democrat opposed to privilege--hence, his concern over "class" legislation. Jones, *Thomas M. Cooley and "Laissez-Faire Consitutionalism": A Reappraisal*, 53 J. AM. HIST. 751 (1967). Similarly, other commentators have argued that Cooley at most only anticipated the rise of liberty of contract in his formulations of the doctrines of class legislation, implied limits on state legislative powers, and substantive due process. *See* C. JACOBS, *supra* note 2, at 62; Twiss, *supra* note 2, *passim*. The contrast between Tiedeman's and Cooley's positions, with respect to one category of legislation, laws prohibiting usury, is discussed *infra* notes 123-27 and accompanying text.

20. On laws regulating wages, see 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, §§ 99, 100, at 316-30. On laws regulating hours, see *id.* § 102, at 333-38; *infra* notes 152-67 and accompanying text.

21. On usury laws, see 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 106, at 351-53; *infra* notes 123-27 and accompanying text.

22. On laws prohibiting vices generally, see 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 60, at 179-87; *infra* notes 128-51 and accompanying text.

23. On anti-miscegenation laws, see 2 C. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONAL PROPERTY IN THE UNITED STATES § 188, at 894-95 (1900) [hereinafter 2 C. TIEDEMAN, STATE AND FEDERAL CONTROL]. Tiedeman also condemned as unconstitutional laws against polygamy, at least insofar as these laws violated the religious freedom of Mormons. *See id.* § 189, at 897.

24. On the protective tariff, see 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 93, at 292-94.

exponent of laissez-faire constitutionalism. But to say that Tiedeman was a laissez-faire purist does not sufficiently explain his significance. Belief in the rightness of laissez-faire formed only the backdrop of Tiedeman's constitutional thought. At its heart was his understanding of law in general and of the special role played by the judiciary in the American constitutional system.

Ironically, it was the jurisprudential framework of Tiedeman's constitutionalism, and not its laissez-faire substance, that survived him. In the first decade of the twentieth century, Tiedeman's influence eclipsed as suddenly and as profoundly as it had risen. The narrow view of the police power that had been expounded by Tiedeman, Cooley, and other laissez-faire theorists was supplanted by a broader, more elastic conceptualization of the police power.[25] Laissez-faire constitutionalism also met its demise, as judicial decisions during the so-called Progressive era steadily eroded the concept of liberty of contract, signalling the death-knell of substantive due process protection of economic rights.[26] While these developments occurred in constitutional law, an even more significant shift occurred in American jurisprudence during the early years of the twentieth century, as the legal formalism

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25. *See* E. FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1903) (discussed *infra* notes 175-87 and accompanying text).

26. Arguably, the Supreme Court's retreat from liberty of contract was first signaled only a few years after *Lochner*, in Muller v. Oregon, 208 U.S. 412 (1908), when the Court upheld another maximum hours statute applied to female workers because of what it regarded as the "special circumstances" of women. Although the Court clung to liberty of contract for two decades after *Lochner*, *see, e.g.*, Adair v. United States, 208 U.S. 161 (1908); Adkins v. Children's Hospital, 261 U.S. 525 (1923), the demise of substantive due process protection of economic rights clearly came in the 1930s. In Nebbia v. New York, 291 U.S. 502 (1934), the Court upheld, against a due process challenge, the conviction of a store owner who had sold two bottles of milk at a price below that set by a New York milk control board. The rational relationship test fully emerged in West Coast Hotel v. Parrish, 300 U.S. 379 (1937), which overruled *Adkins*. In that case, Chief Justice Hughes, for the majority, said that "[t]he Constitution does not speak of freedom of contract. . . . Liberty under the Constitution is . . . subject to the restraints of due process, and . . . regulation which is reasonable in relation to its subject . . . ." *Id.* at 391. Finally, in the famous fourth footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), the Court implicitly drew a line between economic liberties and other rights specifically guaranteed by the Constitution, holding that the presumption in favor of constitutionality was broader when legislation implicated only the former. Summarizing the history of the demise of liberty of contract, G. Edward White has observed that the doctrine, "having been 'interpreted' into being, . . . could be interpreted into obscurity." G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 40 (1978).

of the nineteenth century gave ground to legal realism and positivism.[27] Underlying twentieth-century legal realism was a new, sociological conception of the law, a conception of the law traceable back to the same late-nineteenth century German jurists who influenced Tiedeman's jurisprudence.[28]

This Article examines in depth Christopher Tiedeman's laissez-faire constitutionalism, explaining it in terms of its jurisprudential roots and suggesting reasons for its failure in the early decades of the twentieth century.

Parts One and Two of the Article explore Tiedeman's sociological conception of law, a conception influenced by the German jurisprudence of his day and made evident in his 1890 treatise, *The Unwritten Constitution of the United States.* In Part Two, Tiedeman's treatise is closely examined, showing how his understanding of constitutionalism led to his zealous advocacy of an activist judiciary defending both enumerated and unenumerated constitutional rights.

Part Three of the Article examines the practical application of Tiedeman's laissez-faire constitutionalism: his limited conception of the police power of the states (and, by analogy, of the commerce power of Congress), articulated in his *Treatise on State and Federal Control of Persons and Property in the United States,* a two-volume second edition, published in 1900, of his earlier treatise on the limitations of police power. Certain key sections of Tiedeman's treatise are closely examined as illustrative of his conceptualization of substantive due process.

Finally, Part Four of the Article concludes this study of Tiedeman's laissez-faire constitutionalism by analyzing its relation to a basic problem associated with American judicial review—the problem of reconciling majority will with the protection of minority rights. The inability of Tiedeman's jurisprudence to deal adequately with this problem—and, in particular, with the problem of judicial protection of unenumerated constitutional rights—is posited as an explanation for the demise of substantive due process protection of economic rights. In addition, some questions are raised, and tentative conclusions drawn, concerning the relationship between jurisprudence and constitutional law—a matter of vital importance in the modern debate over the

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27. *See generally* White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America,* 58 VA. L. REV. 999 (1972).

28. Thomas Grey has noted the irony in the fact that German sociological jurisprudence—the source of the "peculiarly modern view of law generally" that is found in Tiedeman's thought—in later years served to undermine the laissez-faire constitutionalism that he played so large a part in formulating. Grey, *supra* note 13, at v-vi. The character and sources of Tiedeman's sociological jurisprudence are more fully discussed *infra* notes 29-45 and accompanying text.

validity and scope of judicial protection of such unenumerated constitutional rights as the right to privacy.

I. TIEDEMAN AND NINETEENTH-CENTURY JURISPRUDENCE

Tiedeman was born in Charleston, South Carolina in 1857. He spent his childhood and youth in Charleston, where he also completed his secondary and college education, graduating from the College of Charleston with A.B. and A.M. degrees in 1876. The following spring he went to Germany, where he spent one and a half years attending courses at the Universities of Goettingen and Leipzig. Upon his return to the United States in the autumn of 1878, Tiedeman enrolled at Columbia Law School; he obtained his law degree the following spring. After a short period of practice, first in Charleston, then in St. Louis, in 1881 he accepted an assistant professorship of law at the University of Missouri. He was made a full professor in 1882 and retained that position until 1891. During his tenure at Missouri he wrote a treatise on the law of real property (1884), the treatise on the limitations of the police power (1886), a treatise on the law of commercial paper (1889), and *The Unwritten Constitution of the United States* (1890). He became professor of law at the University of the City of New York in 1891, remaining until June, 1897, when he resigned to devote time to his writing. While at New York he wrote a treatise on the law of sales of personal property (1891) and, after his resignation, a treatise on equity jurisprudence (1893), a treatise on the law of municipal corporations (1894), and by 1900 his *Treatise on State and Federal Control of Persons and Property in the United States*. Tiedeman also edited a casebook on real property (1897) and a textbook on the law of bills and notes (1898). By the time he accepted the deanship of the law school at the University of Buffalo in 1902—a position he held until his death in August, 1903—at least thirty-six law schools were using Tiedeman's texts. Personally well-liked, he was, in the words of a successor at Buffalo, "a most cultured and thorough gentleman in every sense of the word."[29]

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29. Summers, *Christopher Gustavus Tiedeman*, in 9 DICTIONARY OF AMERICAN BIOGRAPHY 531 (D. Malone ed. 1964). In addition to contributing to legal education through teaching and writing, Tiedeman also severely criticized the case method, which he regarded as far inferior to the European system of formal lectures. *See* Tiedeman, *Methods of Legal Education*, 1 YALE L.J. 150-158 (1891) [hereinafter Tiedeman, *Methods of Legal Education*] for Tiedeman's contribution to a symposium on legal education. Among other things, Tiedeman argued:

> if the duty of the teacher is to explain and discuss the principles and rules of law, he can do so more effectively and can accomplish more

While in Germany at the University of Goettingen, Tiedeman studied under Rudolf von Jhering (1818-1892).[30] Jhering was a leader in the German social-philosophical school of jurisprudence which at the end of the nineteenth century was challenging the precepts of the historical school, which had dominated earlier in the century.

The German historical school of jurisprudence was founded by Friedrich Carl von Savigny (1779-1861) as a reaction to both natural rights theory and the codification movement of the early nineteenth century. Savigny and his followers—who included Sir Henry Maine (1822-1888), founder of the English branch of the historical school—were opposed to rationalistic speculation. They believed in the slow and organic evolution of law by the energy of the "Volksgeist," or the spirit of the people. Academics rather than statesmen, they were skeptical of the notion that the mere effort of reason could devise a perfect system of law—the notion which had underlay such efforts as the Code of Frederick the Great, the Austrian code of 1811, and the Napoleonic codes. The teaching of the historical school was rooted in the romanticism and political conservativism of the early decades of the nineteenth century; distrusting legislation and adverse to action, the historical school conceived of law as something to be found, not made. Moreover, law was to be found through historical study—and, in particular, through the study of Roman law as it had been adopted and developed in the German common law.[31]

> in a given time, if he is not obliged to take up his time with catechising the students, and listening to their opinions, which even in the case of college-bred men must be the immature reflections of a tyro.

Id. at 151.

30. In his essay criticizing the case method, Tiedeman praised the system of teaching—formal lectures expounding on the lecturer's own treatise on the subject of his instruction—that he "learned to admire while sitting under the skillful instruction of the celebrated von Ihering." Tiedeman, *Methods of Legal Education, supra* note 29, at 151. He went on to recommend that American law schools follow the methods of legal instruction pursued at the German universities, to avoid "the great danger of driving out of the schools all scientific study of the fundamentals of the law in the unchecked study from the cases of isolated propositions of the law." *Id.* at 157. The pervasive influence of Jhering on Tiedeman's conception of the law generally is revealed both in this essay and in his *Unwritten Constitution of the United States*, discussed *infra* notes 45-108 and accompanying text.

31. R. POUND, INTERPRETATIONS OF LEGAL HISTORY 14-18 (1923); Schwarz, *John Austin and the German Jurisprudence of His Time*, 1934 POLITICA 178, 184-86. Pound describes the historical school's conception of law as follows:

> Law was not declaratory of morals or of the nature of man as a moral entity or reasoning creature. It was declaratory of principles of progress discovered by human experience of intercourse in civilized

Jhering and his contemporaries later in the century condemned both the nationalism and the abstract character of the historical school. Their ideas signaled a trend toward a more flexible, less conservative or static, jurisprudence. This social-philosophical school followed many paths. The approach that Jhering took was the social-utilitarian approach, so called because it insisted upon law as a means to the achievement of social ends.[32]

In his great work, *Zweck im Recht* (originally published in two volumes, respectively, in 1877 and 1883), which translated roughly as "Purpose in Law," or "Law as a Means to an End," Jhering argued that all law exists for the furtherance of social ends, and "the end [*Zweck*] is the creator of the entire law." This is true not only of law, but also of morality, of social custom or usage, of etiquette, and even of fashion. Rules intended to subserve social ends govern the whole social life; and these rules, worked out in social life and enforced by social pressure, constitute the system of social order. The nature of the sanction distinguishes rules of law from other social rules. While purely "psychological" or "internal" coercions enforce rules of morals, social usage or fashion, "external" or "mechanical" coercions enforce rules of law. Behind the law stands, in the last instance, the physical force of the community, and this force is directly exercised, where necessary, upon the person or property of the individual. In early society this physical coercion is unorganized—appearing as lynch-law, clan feud, or self-help of a wronged party. The modern state reserves the application of physical coercion to the state and its governmental organs, and thus national law becomes the command of the state.[33]

This positivist conception of law most clearly distinguished Jhering's jurisprudence from that of Savigny and the historical school. According to Jhering, the historical jurist of the early nineteenth century, like his predecessor, the natural-law jurist of the eighteenth, erring by assuming that legal rules developed from abstract principles, whether discovered in nature or through history. Jhering held that the means of serving human ends are discovered and fashioned consciously into laws. His was a "jurisprudence of realities," in which legal precepts are tested by their results and by their practical application, not solely

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> society; and those principles were not principles of natural law revealed by reason, they were realizings of an idea, unfolding in human experience and in the development of institutions—an idea to be demonstrated metaphysically and verified by history.

R. POUND, *supra*, at 9.

32. R. POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 15-16, 23 (5th ed. 1943).

33. Smith, *Four German Jurists*, 11 POL. SCI. Q. 278, 290-91 (1896) (quoting R. JHERING, ZWECK IM RECHT (2d ed.)).

by logical deduction from principles discovered through historical study of Roman and Germanic law.[34] Jhering argued, "The standard of law is not the absolute one of truth, but the relative one of purpose. Hence it follows that the content of law not only *may* but *must* be infinitely various." Law, in a way, was like medicine:

> As the physician does not prescribe the same medicine to all sick people, but fits his prescription to the condition of the patient, so the law cannot always make the same regulations[;] it must likewise adapt them to the conditions of the people, to their degree of civilization, to the needs of the time.[35]

Thus, he concluded, "A universal law for all nations and times stands on the same line with a universal remedy for all sick people. It is the long sought for philosopher's stone, for which in reality not philosophers but only the fools can afford to search."[36]

In its reaction against Savigny and the historical school, however, Jhering's jurisprudence also reacted against competing systems of jurisprudence in the latter half of the century: on the one hand, the system outlined by the English positivist school, founded by John Austin (1790-1859); and, on the other, the system outlined by German idealists, including both neo-Kantians such as Rudolf Stammler (1856-1938) and neo-Hegelians such as Josef Kohler (1849-1919).[37]

Unlike the positivists, who essentially defined law as whatever the sovereign commands, Jhering defined it as "the sum of the conditions of social life . . . as secured by the power of the State through the means of external compulsion."[38] In other words, to Jhering, it was not the enunciation of commands by state authority, but their enforcement by state power, which makes them legal rules. On the other hand, unlike the idealists, to whom law was simply the expression of will (whether of God or society or the state), Jhering insisted on going behind the will and considering the motive. This, he declared, was always something to be attained, an end (*Zweck*): law was a means to the ends of society, and rights were means to individual ends. Neither laws nor rights were

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34. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 141-42 (1910); *see also* Smith, *supra* note 33, at 682-85 (summarizing Jhering's leadership of the reaction against the excessive generalization of Savigny's historical school, towards a more practical jurisprudence; concluding that Jhering "was by instinct a realist").

35. R. JHERING, LAW AS A MEANS TO AN END 328 (I. Husik trans. 1913).

36. *Id.*

37. R. POUND, *supra* note 32, at 12, 23.

38. R. JHERING, *supra* note 35, at 380.

intelligible unless one considered the social end (in the case of a rule of law) or the personal end (in the case of a right).[39]

Jhering considered both laws and rights solely from the social point of view; hence, to him, individual ends were means to securing social ends. Private rights existed only because there was a large domain of social life in which egoism, in pursuing its own ends, realized the ends of society. And private rights were subject to limitations at the point where egoism menaced or thwarted a social interest[40]—hence, the limitations which the law imposed upon freedom of contract and upon the employment and disposition of private property.[41]

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39. Smith, *supra* note 33, at 292-93.

40. Raising the question whether there are any absolute limits of the state and the law over the sphere of individual freedom, Jhering dismissed the arguments of Wilhelm von Humboldt and John Stuart Mill (from Mill's *On Liberty*) and concluded that it was not possible to posit a formula that would define the legitimate scope of the law. "Legislation will, in the future as in the past, measure restrictions of personal liberty not according to an abstract academic formula, but according to practical need." R. JHERING, *supra* note 35, at 409.

41. Smith, *supra* note 33, at 292-93. An interesting example of Jhering's view that a social purpose underlies all law is summarized by Smith. In analyzing the principle behind the prevention of cruelty to animals, Jhering "shows that the purpose of such laws is purely social, they are made for the sake of man, and that to explain them by attributing rights to animals would logically constrain us all to become not only anti-vivisectionists, but vegetarians." *Id.* at 299.

The pervasiveness of Jhering's influence upon Tiedeman is evident in the parallel between this summary of Jhering's theory of law and the discussion of Tiedeman's theory in *The Unwritten Constitution of the United States*. *See infra* notes 46-108 and accompanying text. A more precise example of this parallel between Jhering and Tiedeman can be found in Tiedeman's critique of Henry George's *Progress and Poverty*. Tiedeman, *What is Meant by "Private Property in Land?,"* 19 AM. L. REV. 878 (1885). Associating George's proposal for a single tax on land with Herbert Spencer's proposal in *Social Statics* to replace private ownership of land with tenancy, Tiedeman argued that neither author advocated a genuine change in the law; they merely mischaracterized Anglo-American property law. "[T]here is no 'private property in land,' in the sense in which Mr. Spencer and Mr. George employ the term." *Id.* at 883. Rather, Tiedeman noted, citing his own treatise on the law of real property, an individual's property or interest in land "must always be qualified," for "the State has the right and power to stipulate the conditions and terms upon which the land may be held by individuals," including the power to tax the land or to appropriate it for a public use. *Id.* at 882-83. Similarly, in *Zweck im Recht*, after discussing a variety of limitations that the law placed on private property, Jhering concluded:

> All rights of private law, even through primarily having the individual as their purpose, are influenced and bound by regard for society. There is not a single right in which the subject can say, this I have

Jhering's philosophy of law thus rejected the notion of an objective foundation of law—based on nature or on history—while at the same time fell far short of declaring that law was merely whatever the sovereign willed the law to be. His jurisprudence, in short, was both social and teleological. It was social in that Jhering taught that law, rather than being something that the individual invoked against society, was something created by society through which the individual found the means of securing his or her interests, so far as society recognized them.[42] His philosophy of law was teleological in that it employed a teleological method, stressing the purpose of the law. It is not enough for the jurist to know that law is a development or even to understand how the law has developed; rather, as perceived by Jhering, the jurist must understand for what purpose and to what end. Legal doctrines and legal institutions have not worked themselves out; human minds fashioned them to meet human ends. "The sense of right has not produced law, but law the sense of right."[43]

As a result, the sociological jurisprudence of Jhering separated law from the will of the sovereign. Both in *Zweck im Recht* and in his earlier work, *Kampf ums Recht* ("The Struggle for Law") (1872), Jhering stressed "[t]he life of the law is a struggle." All law resulted from strife: "Every principle of law which obtains had first to be wrung by force from those who denied it; and every legal right—the legal rights of a whole nation as well as those of individuals—supposes a continual readiness to assert it and defend it."[44] Hence, Jhering emphasized not

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exclusively for myself, I am lord and master over it, the consequences of the concept of right demand that society shall not limit me.

R. JHERING, *supra* note 35, at 396.

Despite the similarity between Tiedeman's view of property rights and Jhering's overall view of the law, however, Tiedeman nevertheless did draw a line—in his treatises on the limitations on the police power, discussed *infra* notes 109-67 and accompanying text,—beyond which, he argued, the law had no legitimate purpose. As suggested in Part IV of this article, this tension between Tiedeman's sociological jurisprudence and his theory of constitutional limitations may help explain the sudden end of his influence in American constitutional law in the early twentieth century. *See infra* notes 168-225 and accompanying text.

42. Pound, *supra* note 34, at 143.

43. *Id.* at 141 (quoting R. JHERING, ZWECK IM RECHT (2d ed.)).

44. R. JHERING, THE STRUGGLE FOR LAW 1-2 (J. Lalor trans. 2d ed. 1915). Jhering cited the symbol of Justice as a metaphor for this process:

> Justice which, in one hand, holds the scales in which she weighs the right, carries in the other the sword with which she executes it. The sword without the scales is brute force, the scales without the sword is the impotence of law. The scales and the sword belong together, and the state of the law is perfect only where the power with which Justice carries the sword is equalled by the skill with which she holds

only the limitations the law placed on the individual but also the individual's obligation—a duty that was both social and personal—to assert one's rights. Law, then, was "an uninterrupted labor, and not of the state power only, but of the entire people."[45]

II. THE UNWRITTEN CONSTITUTION AND JUDICIAL REVIEW

The influence of Jhering's jurisprudence upon Tiedeman is most clearly evident in Tiedeman's 1890 treatise, *The Unwritten Constitution of the United States*. That work is, as its subtitle states, "a philosophical inquiry into the fundamentals of American constitutional law."[46] Tiedeman ultimately concluded that judicial review of acts of legislation, as against both the written and unwritten constitutions, was not only justified but also necessary to the continued existence of popular government in the United States. He reached that conclusion by applying social-utilitarian concepts of law to the peculiar characteristics of the American constitutional system.

Significantly, Tiedeman began by refuting the legal positivism of John Austin and his followers. "I cannot believe," Tiedeman wrote, "that he [Austin] was unconscious of the natural sequential development of the law, operated upon by all the social forces, out of which civilization is in general evolved."[47] Tiedeman conceded "there is no living law without a sanction or penalty," but emphasized—as did Jhering—"it does not necessarily follow that that penalty must be enforced by an organized government, or that its enforcement by such a government essentially changes the character of the rule."[48] Lynch-law in frontier America provided one example.[49] The life of a rule of law derives not

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the scales.

Id. at 2.

45. *Id.*

46. C. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES (1890) [hereinafter C. TIEDEMAN, UNWRITTEN CONSTITUTION].

47. *Id.* at 2.

48. *Id.* at 3-4.

49. *Id.* at 4-5.

> If a man is murdered or a horse stolen in such a community [on the American frontier], and the offender is captured by the vigilance committee, tried by Judge Lynch, and punished in accordance with the custom of the country, he has suffered the penalty of the law, as much as the criminal in an orderly, more civilized community, who is tried and condemned by a regularly organized court, and punished by the ordinary administrative officers of government. The only difference between the two cases is the degree of development in the administration of the law. Lynch-law, in a community not possessed of a properly organized government, is as much law as the enactment

from a government's commands, but from "its habitual and spontaneous observance by the mass of the people."[50] A legal rule, then, is the product of social forces, reflecting "the prevalent sense of right," or *Rechsgefuehl,* as it evolves in the society.[51] Legal rules change over time, as the prevalent sense of right changes, but Tiedeman carefully emphasized that this change is not the quiet, smooth, uneventful development (as in the growth of a language) claimed by "jurists of the Savigny-Puchta [that is, the German historical] school." Rather, he observed—citing Jhering—new principles of law emerged only after vigorous contests between opposing forces.[52]

As Tiedeman moved his analysis from municipal law to constitutional law, the influence of social-utilitarian jurisprudence became even more pronounced. The fundamental principles which form the constitution of a state, he argued, "cannot be created by any governmental or popular edict; they are necessarily found imbedded in the national character and are developed in accordance with the national growth."[53] Hence it followed "constitutions are effective only so far as their principles have their roots imbedded in the national character, and consequently constitute a faithful reflection in the national will."[54] (Jhering's adaptation of the concept of *Volksgeist,* from the historical school, immediately comes to mind.) John Locke's draft of a written constitution for the Carolinas and Napoleon's "paper constitutions" which he imposed upon conquered nations and "unhappy France" were two examples Tiedeman cited of "fruitless attempts to impose constitutions upon people whose principles are not in harmony with the popular political sentiment."[55] It follows that the failure or success of a form of government or constitution in the experience of one people ought not indicate any "inherent and universal demerits or excellences," or assure

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of an American legislature or the acts of Parliament.

Id.

50. *Id.* at 6.

51. *Id.* at 7.

52. *Id.* at 11-12. Tiedeman cited and quoted in German from Jhering's work, KAMPF UM RECHT ("The Struggle for Law"). *Id.* at 12 n.1. In a later chapter, on the interpretation and construction of written constitutions, Tiedeman also cited Jhering. *Id.* at 145 n.1. Throughout the book, the influence of Jhering is implicit in Tiedeman's frequent references to law as a reflection of "the prevalent sense of right" in society, or to legal change as the outcome of struggles between opposing forces in society. *See, e.g., id.* at 7, 42-43, 151.

53. *Id.* at 16.

54. *Id.* at 18.

55. *Id.* at 19.

a similar experience if adopted by others.[56] "The English and American constitutions work well, . . . not because of their inherent and abstract excellences . . . but because they are in complete correspondence with the political sentiment of the respective nations, and are themselves the natural products of Anglo-American civilization." Free government in England and the United States is assured not so much by what is found in their written constitutions but rather by "the conservative, law-abiding, and yet liberty-loving character of the Anglo-Saxon."[57]

The excellence of the American constitutions, state and federal, was to Tiedeman a result of the "complete harmony of [their] principles with the political evolution of the nation," rather than "the political acumen" of the conventions that drafted them.[58] The American constitutions "are but natural sequential developments of the British constitution, modified as to detail and as to a few fundamental principles of the new environment."[59] Tiedeman emphasized three of these new principles traceable to the American experience: federalism, popular sovereignty, and judicial review.[60] These principles in turn reflected a profound

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56. *Id.* at 20. Tiedeman thus questioned the efficacy of a written constitution, modelled after the American and other western constitutions, in Japan—"notwithstanding the wonderful adaptiveness of the Japanese character to political and economic innovations." *Id.* at 18.

57. *Id.* at 19-20.

58. *Id.* at 21.

59. *Id.* Comparing the British and American constitutions, Tiedeman identified two basic similarities: the localization of power ("an unvarying determination to confine the exercise of governmental power to the local authorities in every thing affecting only the local interests") and the separation of powers. *Id.* at 22, 24. He argued that it was not surprising that the framers of the American constitutions—particularly the Federal Constitution of 1787—imitated the British constitution, since they were "thoroughly acquainted with English constitutional law." In addition, he noted, "the universal political sentiment," influenced by Montesquieu, regarded the British constitution as the best the world had ever known. *Id.* at 25-26.

60. *Id.* at 37-40. Federalism, of course, refers to the division of powers between the federal government and the states. Popular sovereignty, in the sense used here, refers to the principle that all government agencies are the creatures of the will of the people and thus subject to limitations imposed on them by popular will—in other words, that government officials are the servants; the people are the masters. A corollary to this "fundamental doctrine of American democracy," as Tiedeman described it, is the doctrine that, inasmuch as the people alone may alter or amend their constitutions, any act of the legislatures or Congress that transcends the provisions of the constitution would be unconstitutional and void. This doctrine Tiedeman identified as "the fundamental doctrine of American constitutional law." *Id.* at 38-39. Finally, the third principle—judicial review, or the power of the courts to declare void

difference between American and English contitutionalism: the establishment of written constitutions in America, which materially altered constitutional development in the United States.[61]

Despite this emphasis on written constitutions as distinguishing features of American constitutionalism Tiedeman also stressed that the United States Constitution differed in an essential aspect from the constitutions of most of the states. State constitutions reduced many, if not most, of the details of constitutional law to writing; therefore, they required the calling of constitutional conventions "more or less frequently for the purpose of revision."[62] The federal Constitution, on the other hand, as understood by Tiedeman

> contains only a declaration of the fundamental and most general principles of constitutional law, while the real, living constitutional law, . . . the flesh and blood of the Constitution, instead of its skeleton, is here, as well as elsewhere, unwritten; not to be found in the instrument promulgated by a constitutional convention, but in the decisions of the courts and acts of the legislature, which are published and enacted in the enforcement of the written Constitution.[63]

This "unwritten constitution of the United States," argued Tiedeman, "within the broad limitations of the written constitution, is just as flexible, and yields just as readily to the mutations of public opinion as the unwritten constitution of Great Britain."[64]

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legislative acts that contravened constitutions—was a consequence of the second principle, popular sovereignty.

> The courts are obliged to construe and determine the law, whenever a question is raised before them by parties litigant, and, being the servant of the people, they must obey the Constitution rather than the act of the legislature which violates the Constitution. For such an act of the legislature is not law. It being the duty of the courts to declare what is the law, they are obliged to determine when legislative acts are constitutional or unconstitutional.

Id. at 39-40. This was essentially the same justification for judicial review enunciated by John Marshall. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

61. Popular sovereignty, "the fundamental doctrine of American constitutional law," is only feasible where there are written constitutions containing explicit grants and limitations of power, Tiedeman argued. C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra* note 46, at 38.

62. *Id.* at 42. Tiedeman noted the general rule that "the fragility and instability of a constitution are in direct proportion to the multiplicity of its written rules." *Id.* at 43.

63. *Id.*

64. *Id.* at 43.

As two examples of provisions of the "unwritten constitution," originating in practice and sustained by popular opinion or custom, Tiedeman cited the process by which a President is elected and the practice of limiting the Presidency to two terms.[65] But by far the most important provisions of the "unwritten constitution"—including many of those that protected the rights of minorities against the will of the majority—were those which originated in the courts, through their exercise of the power of judicial review.

Early in the book, when formulating his general theory about law, Tiedeman discussed *stare decisis* as a principle "absolutely binding, only [insofar] as it also reflects the prevalent sense of right."[66] Thus, although public sentiment required rigid adherence to *stare decisis*, judges have overturned previous rules, even if only under a fiction, where "the variance between the law and the prevalent sense of right was so distressing that the courts have been justified by public sentiment in abrogating an established rule."[67] The modification of the doctrine of vested rights, formulated in the Dartmouth College case and gradually eroded by the courts, furnished one example of a change in constitutional law following a change in public opinion.[68] In a similar way, judges must interpret statutes and constitutional provisions in keeping with "the prevalent sense of right." This implied to Tiedeman a power in the judiciary to limit by construction the undesirable effects of popular legislation. For example, the English Statute of Uses, although enacted to abolish uses and prevent the creation of equitable interests in lands, was given a "distorting, technical construction," which was not only consistent with the sentiment of the English middle class, but also has formed the basis for the modern law of trusts.[69]

The obligation of judges to interpret or construct according to the prevailing sense of right also implied to Tiedeman a power in the judiciary to alter, or even abolish, obsolete statutes or constitutional provisions. Responding to what he called "the fallacy of the doctrine that the government 'derives its just powers from the consent of the governed,'"[70] Tiedeman emphasized that the enactment of laws rested

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65. *Id.* at 46-53. One other example of the unwritten constitution is the President's exercise of war powers in times of great national emergencies, such as the Civil War (or, as Tiedeman identified it in a chapter heading, "The War of Secession"). *Id.* at 89-90.

66. *Id.* at 13.

67. *Id.*

68. *Id.* at 66.

69. *Id.* at 8. The example illustrates the general rule asserted by Tiedeman, that "the legislature cannot completely enslave the popular will by an enactment not endorsed by the prevalent sense of right." *Id.* at 7.

70. *Id.* at 121.

its authority, not upon the consent of the governed, but upon the ability of the law-makers to compel obedience to their edicts. The "living part of municipal law . . . consists of those rules which the great mass of people habitually and spontaneously obey, and which they compel the rebellious minority to obey, in order to prevent injury to the law-abiding individual or to the commonwealth."[71] Hence, it followed that the binding authority of law "does not rest upon any edict of the people in the past; it rests upon the present will of those who possess the political power."[72]

From this theory of law and the source of legal obligation, Tiedeman derived his basic theory of judicial interpretation—a theory which emphasized, not the intent of the original lawmakers, but rather the will of the present generation. "[A] true interpretation of the law" turns indeed on the meaning of the lawgiver, but in the United States "the real lawgiver is not the man or body of men which first enacted the law ages ago; it is the people of the present day who possess the political power, and whose commands give life to what otherwise is a dead letter."[73] The "utterances of dead men" are binding as law only when

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71. *Id.* at 122.

72. *Id.* An interesting corollary to this line of Tiedeman's thought is that "the right of secession is nothing more than the right of revolution," which is "never legal, until its successful exercise has wrought a transfer of the political power from one aggregation of individuals to another." *Id.* at 127-28. Here, two circumstances of Tiedeman's background—Tiedeman as a native son of South Carolina, and Tiedeman as a student of German sociological jurisprudence—may have had a joint influence on his interpretation of the outcome of the secession crisis of the 1830s (and, perhaps, the Civil War). Tiedeman stated:

> since all law derives its binding authority from the present commands of those who now control and mould public opinion, and not from any original compact or consent of the governed, the supreme power is that aggregation of individuals, which now has the ability to enforce obedience to its commands. The people of the United States exercised supreme power over the State of South Carolina and prohibited its secession from the Union for the same reason and on the same ground as they exercised supreme power over the Mexicans, who became American citizens, in consequence of a cession by Mexico to the United States of the territory in which they lived. It was because in both cases the United States had the ability to assert supreme power over the objecting individuals. The fact that the United States holds these peoples in subjection makes the people of the United States the depositary of sovereign power; and whenever that fact ceases to exist, and the supreme power has in fact been transferred to some other aggregation of individuals, sovereignty will no longer be in the people of the United States.

Id. at 125-26.

73. *Id.*

voiced by the living, "[f]or the present possessors of political power, and not their predecessors, are the lawgivers for the present generation."[74] In interpreting—or, more precisely, in construing—the written word of the Constitution, judges should follow that interpretation or construction which "best reflects the prevalent sense of right:"[75]

> While, therefore, as a general rule, the written word remains unchanged and confines the operations of the popular will to a choice of the shades of meaning, of which the written word is capable—until the written word has been repealed or modified by the proper authority,—the practical operation of the law will vary with each change in the prevalent sense of right; and the judge or practitioner of the law, who would interpret the law rightly, . . . need not concern himself so much with the intentions of the framers of the Constitution or statute, as with the modifications of the written word by the influence of the present will of the people.[76]

The judge "who would interpret the law rightly," therefore, must follow "what the possessors of political power now mean by the written word."[77]

Tiedeman did not stop here; judges were not to be mere rubber stamps of popular will. As a chapter in the middle of the book, *The Doctrine of Natural Rights in American Constitutional Law*, reveals, Tiedeman perceived the function of the judiciary as a check upon majority will.[78] But even here, Tiedeman did not depart from his

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74. *Id.* at 150.

75. *Id.* Although he used *interpretation* in the broad sense, encompassing what some scholars regard technically as construction rather than interpretation, Tiedeman cited the distinction made by Francis Lieber: that interpretation involved ascertaining the meaning that the framers attached to a particular constitutional provision, while construction involved applying the provision to new circumstances, not known to the framers. *Id.* at 151-52 (citing F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 168 (Boston 1839)). Drawing upon both Lieber and John Marshall, in his opinion for the Court in the Dartmouth College case, Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 644-45 (1819), Tiedeman concluded that his rule of interpretation was not merely speculative, but was "acted upon and recognized by all the leading American authorities." C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra* note 46, at 151-52.

76. *Id.* at 150.

77. C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra* note 46, at 150-51.

78. *Id.*, ch. vi, at 67-82. The text of this chapter originated in an address Tiedeman delivered to the Missouri Bar Association in 1887, *The Doctrine of Natural Rights in Its Bearing upon American Constitutional Law.* Tiedeman, *Missouri Bar Association Annual Address for 1887*, in REPORT OF THE SEVENTH ANNUAL MEETING OF THE MISSOURI BAR ASSOCIATION 97-117 (1887) (summarized and quoted in A. PAUL, *supra* note 2, at 24-27) [hereinafter *Doctrine of*

conception of law as based in the prevalent sense of right, or from the broader jurisprudential base which he shared with Jhering.

Tiedeman began this chapter by observing that legal positivists—those whom Tiedeman described as "jurists of the Bentham-Austin school"—went too far in their reaction against the doctrine of natural rights: they failed to note "popular notions of rights, however wrong they may be from a scientific standpoint, do become incorporated into, and exert an influence upon, the development of the actual law."[79] This is especially true in the United States, where the bills of rights of the state and federal constitutions have formulated and made a part of the organic law of the land "the prevalent doctrine of natural rights."[80] These rights, in their particular content, change over time; for there is "no such thing, even in ethics, as an absolute, inalienable, natural right. The so-called natural rights depend upon, and vary with, the legal and ethical conceptions of the people."[81] But, whatever those rights might

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Natural Rights].

79. C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra* note 46, at 71-72. Tiedeman attributed the origin of natural rights theory to the influence of the Roman law doctrine of *jus naturale, i.e.*, an ideal law that one might conceive to be in force in the state of nature. *Id.* at 69. This doctrine, argued Tiedeman, was developed to "the extreme limits of absurdity" by its merger with the notion of the "social contract" in post-medieval legal thought. *Id.* at 70. He further argued that the doctrine in this form—absolute natural rights grounded in a pre-social contract state of nature—had "all-powerful influence" on modern jurisprudence, until challenged by jurists of the Bentham-Austin School. In the reaction of these jurists against the doctrine, "the pendulum of modern scientific thought has swung too far in the opposite direction," Tiedeman explained. "Defining law to be the command of a sovereign to a subject, and recognizing the will of the sovereign to be the only standard of right," the positivists excluded altogether from the province of jurisprudence the consideration of "any so-called natural rights." *Id.* at 71.

80. *Id.* at 78. The subtlety of Tiedeman's argument here was missed by Arnold Paul, who contrasted Tiedeman's argument in *Doctrine of Natural Rights*, *supra* note 78, that there was "no such thing" as an absolute, inalienable natural right, with his argument in C. TIEDEMAN, LIMITATIONS OF POLICE POWER, *supra* note 14, that "[t]he private rights of the individual . . . belong to man in a state of nature." A. PAUL, *supra* note 2; at 25 & n.15. The explanation for the apparent inconsistency is not that the former argument was "delivered to a select group of professional colleagues" while the latter was a "textbook statement intended for use in law schools and courts," as Paul suggests. Rather the explanation lies in the passage from *Unwritten Constitution* previously quoted: that, however wrong Tiedeman regarded the doctrine of natural rights from the "scientific viewpoint," he recognized it as a part of the "prevalent sense of rights" in nineteenth-century America, which judges are obligated to follow. *See supra* text accompanying notes 76-77.

81. C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra* note 46, at 76.

be at any given time, the American constitutions "make it the duty of the courts to prevent any violation of these rights by the other departments of the government by refusing to enforce laws which contain such violations of constitutional rights."[82]

What doctrine of natural rights was prevalent in 1890, at the time Tiedeman wrote? The obvious answer is the doctrine of rights consistent with the philosophy of laissez-faire, a philosophy which Tiedeman noted had appeared "with the general growth and spread of popular government" and which held as its fundamental maxim "that society, collectively and individually, can attain its highest development by being left free from governmental control, as far as this is possible, provision being made by the government only for the protection of the individual and of society by the punishment of crimes and trespasses."[83] Consistent with this philosophy, the doctrine of natural rights "as presently developed" is, tersely,

> a freedom from all legal restraint that is not needed to prevent injury to others; a right to do any thing that does not involve a trespass or injury to others; or, to employ the language of Herbert Spencer, "Every man has a freedom to do aught that he wills, provided he infringes not the equal freedom of any other man." The prohibitory operation of the law must be confined to the enforcement of the legal maxim, *sic utere tuo ut alienum non laedas.* ["So use your own [property] as not to injure another's"][84]

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82. *Id.* at 78.

83. *Id.*

84. *Id.* at 76 (quoting H. SPENCER, SOCIAL STATICS 121 (1890)). Tiedeman argued that "[t]his right of freedom from needless restraint has been guaranteed to the British subject by the Magna Carta, the Petition of Right, and the Bill of Rights." *Id.* at 77. The *sic utere* formulation indeed had a long history in Anglo-American law. *See generally* Reznick, *Empiricism and the Principle of Conditions in the Evolution of the Police Power: A Model for Definitional Scrutiny,* 1978 WASH. U.L.Q. 1. State courts in the nineteenth century frequently used the *sic utere* formulation, or something very much like it, in discussing the scope of the police power. *See, e.g.*, Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-85 (1851) (observing that all property may be so regulated "that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property"); Thorpe v. Rutland & Burlington R.R., 27 Vt. 140, 153 (1854) (holding that the police power may be validly applied "in regard to those whose business is dangerous and destructive to other persons' property or business"); State v. Paul, 5 R.I. 185, 191 (1858) (observing that property rights are not absolute but are restricted "as they necessarily must be, by the greater right of the community to have them so exercised within it as to be compatible with its well-being").

This philosophy of laissez-faire, wrote Tiedeman, had "until lately, so controlled public opinion in the English-speaking world, that no disposition has been manifested by the depositories of political power to do more than control the criminal classes, provide for the care of the unfortunate poor and insane, and make public improvements."[85] But a change has come over the thought of the country, Tiedeman warned:

> Under the stress of economic relations, the clashing of private interests, the conflicts of labor and capital, the old superstition that government has the power to banish evil from the earth, if it could only be induced to declare the supposed causes illegal, has been revived; and all these so-called natural rights, which the framers of our constitutions declared to be inalienable, and the violation of which they pronounced to be a just cause for rebellion, are in imminent danger of serious infringement.[86]

Popular demands for greater government intervention in economic matters endangered individual rights:

> The State is called on to protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor, and how many hours he shall labor. Many trades and occupations are being prohibited, because some are damaged incidentally by their prosecution, and many ordinary pursuits are made government monopolies. The demands of the Socialists and Communists vary in degree and in detail, but the most extreme of them insist upon the assumption by government of the paternal character altogether,

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85. C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra* note 46, at 78-79. Tiedeman's view that the philosophy of laissez-faire "dominated" public opinion in America and England in the nineteenth century is largely a myth; various historical studies have shown that the law was used frequently to attain economic ends other than the few identified by Tiedeman here. *See generally* S. FINE, *supra* note 8, at 18-23 (summarizing the extent of federal and state government intervention in the economy of antebellum America); Woodard, *supra* note 8, at 289-90 & n.6 (identifying several studies of nineteenth century England and America which have reached this conclusion). Nevertheless, "laissez-faire" is a useful and appropriate paradigm for nineteenth-century America and England, to distinguish these societies—dominated to a great extent by classical liberal politics and economics—from the "welfare state" paradigm that took hold in England in the latter decades of the nineteenth century and in America in the early decades of the twentieth. *See* A. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 126-302 (1905) (Lectures VI-VIII, tracing the shift from the "Age of Benthamism or Individualism," in the period 1825 to 1870, to the "Age of Collectivism" that followed); Hovenkamp, *supra* note 6, at 402-39 (contrasting nineteenth century American and British political economy).

86. C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra* note 46, at 79-80.

> abolishing all private property in land, and making the State the sole possessor of the working capital of the nation.[87]

Considering "these extraordinary demands of the great army of discontents" and their apparent power, with the growth of universal suffrage, to enforce their views "upon the civilized world," Tiedeman further warned that "the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man,—the absolutism of a democratic majority."[88]

Tiedeman immediately followed these warnings with a spirited defense of judicial review—or, more precisely, of judicial protection of unenumerated "natural rights." He wrote, "in these days of great social unrest, we applaud the disposition of the courts . . . to lay their interdict upon all legislative acts which interfere with the individual's natural rights, even though these acts do not violate any specific or special provisions of the Constitution."[89]

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87. *Id.* at 79.

88. *Id.* at 79-80.

89. *Id.* at 81. Tiedeman cited Judge Cooley, stating that "the right to follow all lawful employment" is an important civil liberty and thus protected by the due process clause. He also quoted the broad definitions of the rights to life, liberty, and property suggested by the New York Court of Appeals in Berthoff v. O'Reilly, 74 N.Y. 509, 515 (1878):

> The right to life includes the right of the individual to his body in its completeness and without dismemberment; the right to liberty, the right to exercise his faculties and to follow a lawful avocation for the support of life; the right of property, the right to acquire property and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the State.

C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra* note 46, at 82. Despite this "broad and liberal interpretation" of the due process clause, the *Berthoff* court upheld the New York "civil damage" act that made owners of business premises at which intoxicating liquors were sold liable for damages caused by an intoxicated person. (In this case, the plaintiff suffered property damage indirectly caused by the intoxicating liquor sold to the plaintiff's son by the lessee of the defendant, a hotel owner. The plaintiff's horse died from overdriving by the plaintiff's son while he was intoxicated, as a consequence of "repeated potations" at the bar in the defendant's hotel.) Observing that the right of the state to regulate the traffic in intoxicating liquors was long-established and "not open to question," the New York court concluded that the statute, although it restrained the freedom of the owner in the use of his property and thus impaired its value, nevertheless did not constitute "a taking" of the property within the meaning of the Constitution. *Berthoff*, 74 N.Y. at 517, 521.

It is easy to conclude from these passages that what some historians might refer to as Tiedeman's "class bias" influenced his support of judicial review to check this perceived danger.[90] But, despite Tiedeman's personal identification with "the conservative classes" and his abhorrence of socialism, it would be wrong to conclude that Tiedeman's apparent conservativism led him to contradict his social-utilitarian jurisprudence. Two facts are important. First, Tiedeman saw the American constitutions as requiring that the courts protect the "so-called natural rights," that is, those rights which contemporary society values. Second, he regarded the political philosophy of laissez-faire not only as the "prevalent sense of right" in terms of popular opinion but also as the "end" of American (or, at the very least, nineteenth-century American) society, in Jhering's sense of the term.

Like Jhering, Tiedeman adhered to a jurisprudence which, in contrast to both the positivists and the idealists, separated law from popular will. Much of what the "great army of discontents" was calling for was legislation contrary to Tiedeman's perception of social reality. The "ills of life," which were the consequences of sin and ignorance and other "frailties of human nature," were not curable by legislation, Tiedeman was convinced, because "the stream can never rise higher than its source, nor can it be expected that legal rules, which are but a reflection of the moral habits of a people, can effect their moral elevation," least of all the moral elevation of a people living under popular government.[91]

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90. *See, e.g.*, C. JACOBS, *supra* note 2; B. TWISS, *supra* note 2. Arnold Paul also regards Tiedeman as a self-conscious "conservative;" but, in speculating about the reason for the rise of laissez-faire constitutionalism, he criticizes the "circular explanations" proposed by these and other historians, noting that by calling it "bias," they may be doing no more than to "name (and thus hide) what we do not understand." A. PAUL, *supra* note 2, at 236 n.33 (quoting Mendelson, Book Review 49 AM. POL. SCI. REV. 560 (1955) (reviewing C. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDMAN, AND JOHN F. DILLION UPON AMERICAN CONSTITUTIONAL LAW) (1954)).

91. C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra* note 46, at 6. Tiedeman's argument here nicely illustrates what Calvin Woodard has described as "the *laissez-faire* standard" regarding the problem of poverty. This standard was composed of three tenets: first, that poverty was an inevitable condition of human life; second, that a person's worldly condition, by and large, reflects that person's moral character; and third, that private voluntary charity is the proper source of relief for the legitimate needs of the poor. Woodard, *supra* note 8, at 293. Woodard contrasts this standard with what he describes as the "welfare state" standard, which rests on virtually opposite assumptions: that "poverty is an 'economic' phenomenon that can, must, and should be abolished;" that "the state is the sole social institution capable of dealing with the economic forces

One way to explain Tiedeman's laissez-faire constitutionalism, then, is that his reasoning was tautological: laissez-faire principles, according to his understanding of social reality, framed the only legitimate base for legislation; and, since law was a means to society's end, they also framed that end. Hence, it followed that the only legitimate legal rules were those consistent with laissez-faire principles.

Another way of explaining Tiedeman's constitutionalism, however, avoids such a simplistic explanation by instead focusing more closely upon Tiedeman's concept of judicial review and its applications.

Tiedeman's jurisprudence led him to the conclusion that judges must interpret the law according to the prevalent sense of right. As I have shown, this gave the courts power to modify or disregard unpopular or obsolete legislation. Tiedeman's jurisprudence also gave the courts power to modify or disregard statutes or even constitutional provisions which, however popular or current, were out of step with the will of the people, rightly understood. Here one must distinguish will from whim, or caprice.[92]

Tiedeman's discussion of the Slaughter-House Cases[93] illustrates

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which give rise to that phenomenon;" and that therefore "the chief responsibility for abolishing poverty rests on the state and the state must, in turn, exert its faculties toward that end." *Id.* at 288.

92. As discussed below, Tiedeman considered the "veto power" of the courts to be "but an obstacle 'in the way of the people's whim, not of their will.'" C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra*, note 46, at 164 (quoting J. LOWELL, DEMOCRACY, AND OTHER ADDRESSES 24 (1887)).

93. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). In these cases the Court upheld a Louisiana statute which, among other things, granted a particular company "the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business" in New Orleans. In his opinion for the majority of the Court, Justice Miller, impressed with the "one pervading purpose" of the fourteenth amendment—to guarantee to blacks the equal protection of the laws—and apparently determined to keep the amendment limited to that purpose, severely undercut the scope of the privileges and immunities clause. The fourteenth amendment prohibited the states from abridging "the privileges and immunities of citizens of *the United States*," the Court emphasized, not the privileges and immunities of citizens of the several states. *Id.* at 74 The former encompassed a relatively select group of well-defined (but hardly controversial) rights such as the right to come to the seat of national government, the right of free access to seaports, or the right to demand protection while on the high seas or in foreign jurisdictions. *Id.* at 79-80. In his opinion for the Court, Justice Miller also interpreted the equal protection clause quite narrowly, noting, "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision," which was "so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." *Id.* at 80. Finally,

the point. The fourteenth amendment if applied literally, argued Tiedeman, would have destroyed the federal system of government.[94] That dangerous result was, however, "happily averted by the bold and courageous stand" taken by the Supreme Court.

> Feeling assured that the people in their cooler moments would not have sanctioned the far-reaching effects of their action; that they lost sight of the general effect in their eager pursuit of a special end, the court dared to withstand the popular will as expressed in the letter of the amendment; and, by giving it a narrow and close construction, to cut off its injurious consequences . . . .[95]

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with respect to the due process clause, Justice Miller's opinion said very little, merely concluding that "under no construction of that provision" could the statute be deemed a deprivation of liberty. *Id.* at 81.

Justice Field in his dissent argued that if the clause were meant to cover only those privileges and immunities that Justice Miller distinguished as those pertaining to citizens "of the United States," the amendment was "a vain and idle enactment." *Id.* at 96. Field would have included among those privileges and immunities the freedom of economic pursuit, "the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons." *Id.* at 97. By granting a special and exclusive privilege to one company, the legislature infringed the rights of others to carry on the business, within the same district under similar conditions; therefore, Field concluded, the Court ought to have declared the statute unconstitutional. *Id.* at 110.

94. Presumably, Tiedeman agreed with Justice Miller's conclusion that to interpret the fourteenth amendment so as to empower the national government to guarantee the "privileges and immunities of the citizens of the States as such" would be impermissible, because it would "constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment." *Id.* at 78. Such an interpretation, Justice Miller argued, would destroy federalism.

> [W]hen, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

Id.

95. C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra* note 46, at 102-03.

Tiedeman cited the Court's majority opinion, written by Justice Miller, to support his contention that the Court saw itself as interpreting the fourteenth amendment in accord with the true will of the people:

> But however pervading this sentiment [the desire for a strong national government] and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States, with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the nation.[96]

Admitting "so-called strict constructionists" might regard the Court's rewriting of the Constitution as an unwarranted exercise of judicial power, Tiedeman nevertheless defended the majority's decision as one that kept the operation of the fourteenth amendment "within the limits which they felt assured would have been imposed by the people, if their judgment had not been blinded with passion, and which in their cooler moments they would ratify."[97] The decision of the Court in the *Slaughter-House Cases* was "a successful modification of the rule found in the fourteenth amendment," concluded Tiedeman, because "no attempt was made to overrule it by additional legislation; nor was there any outcry against it, after the people had recovered from their surprise at this bold limitation of their written commands."[98]

Tiedeman concluded his *Unwritten Constitution* by answering the question, of what value is a written constitution? To Tiedeman, having a written constitution as a safeguard to limit the powers of government was less important than the power of judges to use that written constitution to put into effect the limitations. The real value of the written constitution is "to serve as a check upon the popular will in the interest of the minority."[99] By making the federal judiciary hold office

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96. *Id.* at 106 (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 82).

97. *Id.* at 108. Tiedeman nevertheless quoted, with apparent agreement, the opinions of dissenting Justices Field, Swayne, and Bradley, to the effect that the majority's construction of the "privileges and immunities" clause made that part of the fourteenth amendment essentially useless. *Id.* at 100-01 n.2.

98. *Id.* at 108-09.

99. *Id.* at 163. Tiedeman added that a written constitution was "not needed for the protection of the people against the tyranny of the officials," *id.*, after having explained that "the danger of official tyranny has been successfully dissipated in the American constitutional system,—except so far as such tyranny

during good behavior, and by providing in the Constitution for one permanent Supreme Court, "the means have been provided, in ordinary times of peace, of protecting the minority against the absolutism of a democratic majority."[100] The institution of judicial review, as exercised by the federal judiciary, thus was essentially anti-democratic:

> It enables a small body of distinguished men, whose lifelong career is calculated to produce in them an exalted love of justice and an intelligent appreciation of the conflicting rights of individuals, and the life-tenure of whose offices serves to withdraw them from all fear of popular disapproval; it enables these independent, right-minded men, in accordance with the highest law, to plant themselves upon the provisions of the written Constitution, and deny to popular legislation the binding force of law, whenever such legislation infringes a constitutional provision.[101]

With judicial review, the real value of a written constitution, then, is that it "makes possible and successful, the opposition to the popular will."[102]

It seems difficult to reconcile this conception of judicial review—the power to veto popular legislation vested in a small group of "independent, right-minded men"—with Tiedeman's general conception of law as "the product of social forces, reflecting the prevalent sense of right," as it evolves in the society. But Tiedeman was not self-contradictory—he emphasized that judicial review, "when most successful, does not serve as a complete barrier to the popular will."[103] This was so, he argued, for two reasons. First, "the judges themselves fall under the influence of the prevalent sense of right, and ordinarily give in their decisions an

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may be demanded by a popular majority,—by the frequency of the elections and the short terms of service." All classes of government officials are "too anxious to secure popular approval;" "[t]hey have their fingers constantly upon the public pulse, and every expression of popular approval and disapproval is noted." *Id.* at 162.

100. *Id.* at 163.

101. *Id.*

102. *Id.* at 163-64. Indeed, to Tiedeman, the secure tenure of the federal judiciary was virtually the only feature of the American system of government that made the written Constitution worthwhile. Noting that "the direct and constant responsibility of almost all classes of officials to public opinions, through frequent popular elections, goes very far towards nullifying any superior merit which the written constitution possesses over an unwritten constitution," he added that if federal judges were elected for short terms of office, as are many state judges, "the written Constitution would serve very little purpose." *Id.* at 162-63.

103. *Id.* at 164.

accurate expression of it." Second, "the various checks upon this veto power of the courts also serve to make their action only a dilatory proceeding."[104] Citing James Russell Lowell in calling the power of the Supreme Court "but an obstacle in the way of the people's whim, not their will,"[105] Tiedeman concluded that this constitutional system has successfully established "what exists nowhere else, a popular government without democratic absolutism."[106]

Thus, to Tiedeman, the rules of law as expounded by the courts, even more so than legislative enactments, were the concrete results of the opposition of social forces through which the "prevalent sense of right" evolved. In his essay on legal education, published about a year after *The Unwritten Constitution*, Tiedeman stated even more explicitly the view of the judiciary that emerged from his sociological jurisprudence. "Law is not *made* by the courts, at the most promulgated by them," he emphasized, explaining that law was "not the independent creation of the judicial mind" but rather was "the resultant of the social forces reflecting the popular sense of right."[107] The judge, therefore, was "but an instrument for the promulgation of this popular sense of right in its particular application to the cause at issue." Like the legislature, the judge does not make "living law" but "only declares that to be the law, which has been forced upon them, whether consciously or unconsciously, by the pressure of the popular sense of right, that popular sense of right being itself but the resultant of the social forces which are at play in every organized society."[108] Tiedeman's view of

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104. *Id.* This "extraordinary judicial power" itself was limited by the Constitution's separation of powers and checks and balances, Tiedeman observed. For example, the President and Congress are not bound by the Court's judgment on constitutional questions and are able to alter the size of the Court and its composition. By such means "the popular will may be realized" and the Court's ability to disregard it, thwarted. *Id.* at 160-62.

105. *Id.* at 164 n.1 (quoting J. LOWELL, DEMOCRACY AND OTHER ADDRESSES 24 (1887)).

106. *Id.* at 165.

107. Tiedeman, *Methods of Legal Education*, *supra* note 29, at 154.

108. *Id.* As noted here, Tiedeman's view that law is not "made," but rather results from the popular sense of right, applied equally to courts and legislatures. Tiedeman regarded as "an unwarrantable fiction" the notion that *either* the judge or the legislator "made" law; as he envisioned it, "all law, so far as it constituted a living rule of conduct, whether it takes the form of statute or of judicial decision, is but an expression of the popular sense of right through the popular agents, the legislator or the judge as the case may be." *Id.* From this conception of the law, Tiedeman proceeded to the heart of his criticism of the case method of legal education. "[T]he whole law or any appreciable part of it, on a particular subject, cannot be learned from the study of a few leading cases, but only from a very large number of cases." In addition to the physical

the judiciary, then, was not a rigid, formalistic conception of the judge as a scientific arbitrator, but rather a conception of the judge as an impartial expounder of the consensus that emerged from conflicting social forces—in a sense, the "conscience" of the popular will. It is this conception of the judiciary that lies behind Tiedeman's analysis of the limitations upon the legislative powers of the states and the federal government.

III. CONSTITUTIONAL LIMITATIONS AND THE POLICE POWER

A. Tiedeman's Conception of the Police Power: The Definitional Limitation

In the original preface to his treatise on the limitations of the police power, Tiedeman—using the same language that he used in his *Unwritten Constitution*—warned of the danger of "the absolutism of a democratic majority." With candor he indicated his purpose was to "awaken the public mind to a full appreciation of the power of constitutional limitations to protect private rights against the radical experimentations of social reformers." The object of the treatise was "to demonstrate, by a detailed discussion of the limitations upon the police power in the United States, that under the written constitutions, Federal and State, democratic absolutism is impossible in this country." This is true, argued Tiedeman, "as long as the popular reverence for the constitutions, in their restrictions upon governmental activity, is

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impossibility of reading enough cases to learn the law—literally thousands of cases, Tiedeman argued—was the problem that the beginning law student, the "legal tyro," was not "mentally capable" of extracting the principles of the law from the adjudicated cases. *Id.* at 154. Learning the fundamental principles of the law was, he wrote, "not an elementary work which may be entrusted to beginners;" collecting together and formulating correctly the principles on which the adjudications rest was a task for "[a] few men of extraordinary mental powers"—presumably the editors of casebooks or the authors of treatises, like Tiedeman himself. *Id.* at 154-55. Under the case method, the "higher aim" of law professors—to make students "conspicuously original investigators in the law"—was "lost" on the average law student, Tiedeman argued. *Id.* at 155. He feared that the average student who studied law by the case method alone would become "what is so generally deprecated, a case-lawyer, who thinks the whole business of advocacy consists of persuading the court that the cases he cites . . . are to be followed, not because they enunciate a profound scientific truth, but merely because they have given judgment . . . on a similar set of facts." *Id.*

nourished and sustained by a prompt avoidance by the courts of any violations of their provisions, in word or in spirit."[109]

Tiedeman listed several specific constitutional provisions limiting the exercise of the police power: for example, the article I, section 10, prohibition upon bills of attainder, *ex post facto* laws, and the impairment of the obligations of contracts; and the fourteenth and fifteenth amendments.[110] Tiedeman also cited Justice Chase's opinion in *Calder v. Bull*, that "certain vital principles in our free republican governments" also limit the legislative power.[111] Although recognizing

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109. C. TIEDEMAN, LIMITATIONS OF POLICE POWER, *supra* note 14, at vii-viii; 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, at vii-viii (preface dated Nov. 1, 1886).

110. 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 4, at 18-20. Tiedeman's complete list of provisions in the United States Constitution that limited governmental power, state or federal, encompassed provisions in article I, sections 9 and 10; most of the Bill of Rights (the first, second, third, fourth, fifth, and eighth amendments); and the Civil War Amendments (the thirteenth, fourteenth, and fifteenth amendments). Recognizing that some of these limitations—as they were then interpreted—limited only the federal government, Tiedeman nevertheless argued that comparable provisions could be found in the bills of rights of most state constitutions. *Id.* at 20.

111. *Id.* at 9. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), involved a challenge to the constitutionality of a Connecticut statute that set aside a decree of a probate court and granted a new hearing. The plaintiffs in error contended that the law was void as an *ex post facto* law, prohibited by the Constitution. ("No State shall . . . pass any . . . ex post facto Law . . . ." U.S. CONST. art. I, § 10, cl. 1.) The case thus presented to the Supreme Court for the first time the question of judicial review of acts of a state legislature. The Court affirmed the decision of the Supreme Court of Connecticut, which had held that there were no errors; the prohibition of "*ex post facto*" laws was interpreted to apply to criminal laws only, not to civil cases. Following the Court's practice at the time, each justice delivered his own opinion *seriatim*. In his opinion, Justice Chase nevertheless presented a broad rationale for judicial review of legislative acts, applying not only the provisions of the written Constitution but also unwritten constitutional limitations as well. The relevant portion of Justice Chase's opinion is worth quoting in full, as Tiedeman did in both editions of his treatise. (*See* C. TIEDEMAN, LIMITATIONS OF POLICE POWER, *supra* note 14, at 5-7; 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 2, at 8-10.)

> There are acts which the *Federal*, or *State* Legislature cannot do, *without exceeding their authority*. There are certain *vital* principles in our *free republican governments*, which will determine and overrule an *apparent and flagrant* abuse of *legislative* power; as to authorize *manifest injustice by positive law*; or to take away that security for *personal liberty*, or *private property*, for the protection whereof the government was established. An act of the legislature (for I cannot call it a *law*), contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of *legislative*

"courts have no authority to override the legislative judgment on the question of expediency or abstract justice in the enactment of a law," Tiedeman nevertheless observed that "a law which does not conform to the fundamental principles of free government and natural justice and morality, will prove ineffectual and become a dead letter." The reason, as he had suggested in the *Unwritten Constitution*, is that no law can be enforced, particularly in a country governed directly by the popular will, which does not receive "the moral and active support of a large majority of people" or which "violates reason and offends against the prevalent conceptions of right and justice."[112]

By far the most important limitation which Tiedeman would place on the police power was neither tied to explicit constitutional limitations nor based exclusively upon the prevalent sense of right or justice; it was, instead, a limitation which inhered in Tiedeman's very definition of the police power. The police power of the government, "as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil law maxim, *sic utere tuo ut alienum non laedas*."[113]

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authority. The obligation of a law, in governments established on *express compact, and on republican principles*, must be determined by the *nature of the power*, on which it is founded.

A few instances will suffice to explain what I mean. A law that punished a citizen for an *innocent* action, or, in other words, for an act, which, when done, was in violation of no *existing* law; a law that destroys or impairs the *lawful private* contracts of citizens; a law that makes a man *a judge in his own cause*; or a law that takes *property* from A. and gives it to B.: it is against all reason and justice, for a people to intrust a legislature with such powers; and therefore, it cannot be presumed that they have done it. The *genius*, the *nature* and the *spirit* of our state governments, amount to a prohibition of *such acts of legislation*; and the *general principles of law and reason* forbid them. The legislature may enjoin, permit, forbid and punish; they may declare *new* crimes; and establish rules of conduct for *all* its citizens in *future* cases; they may *command* what is right, and *prohibit* what is wrong; but they cannot change *innocence* into *guilt*; or punish *innocence* as a *crime*; or violate the right of an *antecedent lawful private contract*; or the *right of private property*. To maintain that our federal, or state, legislature possesses *such powers*, if they had not been *expressly* restrained; would, in my opinion, be a *political heresy*, altogether inadmissible in our *free republican governments*.

Calder, 3 U.S. (3 Dall.) at 388 (emphasis in original).

112. 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 2, at 11.

113. *Id.* § 1, at 4-5. Defined this way, exercise of the police power necessarily involved the imposition of restrictions and burdens upon the natural and other private rights of individuals. *Id.* at 4. Accordingly, Tiedeman

> Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government.[114]

Tiedeman cited a mid-nineteenth-century state court decision stating "it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others."[115] But Tiedeman was unwilling to leave such a determination solely to the legislature. He noted there have been "so many unjustifiable limitations imposed upon private rights and personal liberty," particularly sumptuary laws and laws for the correction of personal vice, "laws which have in view the moral and religious elevation of the individual against his will, that the modern world looks with distrust upon any exercise of the police power."[116] Hence, judges are to construe police regulations strictly: "The unwritten law of this country is in the main against the exercise of the police power, and the restrictions and burdens, imposed upon persons and property by police regulations, are jealously watched and scrutinized."[117]

In the first edition of his treatise on the police power, published in 1886, Tiedeman had made an effort to comprehend all branches of the law relevant to the police power.[118] By the time of the second edition of the treatise, case law had so expanded that Tiedeman required two volumes to "corral every important adjudication, which has been made by the State and Federal courts, on the various branches of the subject."[119] The expansion of Chapter IX, *Regulation of Trades and*

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organized his treatise not in terms of types of regulations, but rather in terms of the types of rights restricted or burdened, with a threefold general classification: personal rights (including personal security, liberty, and private property), relative rights (arising between husband and wife, parent and child, guardian and ward, or master and servant), and statutory rights. *Id.* § 5, at 20-21.

114. *Id.* § 1, at 5. Tiedeman added that such a law is "a governmental usurpation," violating "the principles of abstract justice, as they have been developed under our republican institutions." *Id.*

115. *Id.* (citing the opinion of Chief Justice Redfield in the 1854 Vermont case, Thorpe v. Rutland & Burlington R.R., 27 Vt. 150 (1854), briefly discussed *supra* note 84).

116. *Id.* § 2, at 11-12.

117. *Id.* § 3, at 13. Tiedeman here also cited the holding of the New York Court of Appeals in Berthoff v. O'Reilly, 74 N.Y. 509 (1878), discussed *supra* note 89, that the due process clause is to be interpreted broadly, as the main guaranty of private rights against unjust legislation.

118. C. TIEDEMAN, LIMITATIONS OF POLICE POWER, *supra* note 14.

119. 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, at ix.

Occupations, illustrates the change that had occurred in the law during the fourteen-year interval between the publications of the two editions of the work. Tiedeman added a score of new sections: regulations to prevent fraud, the reasonableness of regulations of prices and charges, regulations of wages of workmen, regulations of hours of labor, regulations of the business of insurance, antitrust regulations, prohibition of trade in vice, monopolies and franchises, and so on.[120] Also, in recognition of the expanding jurisdiction of the national government through the interstate commerce clause, Tiedeman not only expanded the last chapter (*The Location of Police Power in the Federal System of Government*) but also changed several chapter headings from "police regulations" to merely "regulations" and the title of the treatise itself from *Limitations of Police Power* to *State and Federal Control of Persons and Property*.[121]

B. Tiedeman's Conception of the Police Power in Practice: Three Examples

Tiedeman's discussions of three particular types of regulations—laws prohibiting the charging of usurious interest, laws prohibiting trade in vice, and laws regulating the hours of labor—illustrate his conception of the police power and how that conception relates to his overall philosophy of law.

With each, Tiedeman drew a basic distinction between legitimate regulations—that is, regulations that affected only trespasses or other matters of legitimate governmental concerns under Tiedeman's formulation—and regulations that went beyond the proper scope of the police power. It is clear from Tiedeman's discussion of these particulars that he sought not merely to summarize the state of the law as it had developed by his time, but rather to show what the law should be, given his general formulation of the police power. Thus, his treatise was not

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120. *Id.* §§ 85-131, at 233-612.

121. Despite this explicit recognition of the greater role played by the federal government in the control of persons and property, Tiedeman's own constitutional theory limited the power of Congress under the commerce clause by a fairly strict adherence to federalism: because the federal government is one of enumerated powers—i.e. powers granted by the Constitution to the United States government either expressly or "by necessary implication"—the police power generally resides in the states. 2 C. TIEDMAN, STATE AND FEDERAL CONTROL, *supra* note 23, at 1018-1019; *see also* C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra* note 46, at 142 (United States government, as one of enumerated powers, cannot exercise any power unless it is expressly or impliedly delegated to the United States).

a "conservative" interpretation of the legal precedents; it was in fact a treatise that urged innovation, even radical innovation, in the law.[122]

1. Legislation Regulating Interest Rates

Tiedeman prefaced his discussion of usury laws by distinguishing two kinds of regulation of interest: the determination by the legislature of the rate of interest recoverable on contracts for the payment of money in the absence of express stipulation by the parties; and the determination by the legislature of the rate of interest the parties to a contract may agree upon. The first is a valid police regulation, the object of which is to aid the parties in effecting settlements when they have not previously agreed upon any rate of interest. If the parties disagree with the statutory rate, they can agree on any other rate. The second is not a valid regulation. "Free trade in money is as much a right as free trade in merchandise" because "[i]nterest is nothing more than the price asked for the use of money," and price is determined by the law of supply and demand.[123] Tiedeman recognized only one justification for

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122. For example, with respect to the distinction he drew between laws prohibiting trade in a vice (which he deemed legitimate exercises of the police power) and laws prohibiting indulgence in the vice itself (which he did not deem legitimate police regulations), a distinction discussed *infra* notes 128-51 and accompanying text, Tiedeman observed that this distinction "ha[d] not been endorsed by the courts." In the second edition of his treatise, nevertheless, he did not change the text "because the adverse decisions have not convinced me that the distinction is unsound." 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 121, at 510.

123. 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 106, at 351. In the section of his treatise that followed, Tiedeman maintained that free trade was "an undoubted constitutional right," and he defined free trade as essentially the right to determine whether, with whom, and on what terms one shall have business dealings. *Id.* at 353. Thus he considered the common law prohibitions against forestalling, regrating, and engrossing to be invalid exercises of the police power. *Id.* § 107, at 355-56. Similarly, speculation—even if one were to "corner the market" in a given commodity—should not be restrained, he argued:

> Because one man has the capital wherewith to buy up all the corn or wheat in our great Western markets, and to cause in consequence a rise in the value of these commodities, does not justify State interference with his liberty of action, any more than would police regulation of the whole capitalist class be permissible.

Id. at 354. Tiedeman also argued:

> It is, without doubt, an immoral act, to ask an unconscionably high price for a commodity, taking advantage of the pressing wants of the people; and it may, under a high code of morals, be held to be an extortion, for one to purchase and hold merchandise for the purpose

usury laws: the lending of money was a special privilege, conferred by Parliament, in the days when the common law condemned as usury any taking of money for the use of money. This reason furnished no justification for the present existence of such laws, since in the light of modern opinion the lending of money on interest is "in no sense a privilege."[124]

Tiedeman recognized that long acquiescence in the constitutionality of usury laws "render it very unlikely that the courts will pronounce them unconstitutional, however questionable legal writers and authorities may consider them." But Tiedeman argued that such acquiescence ought not preclude an inquiry into constitutionality.[125] Tiedeman's position on usury laws stands in contrast to that of Thomas M. Cooley, who also recognized that this form of governmental regulation of prices as "an exception difficult to defend on principle;" but Cooley maintained that the power to regulate the rate of interest "has been employed from the earliest days, and has been too long acquiesced in to be questioned now."[126] Tiedeman, consistent with his discussion of *stare decisis* in the *Unwritten Constitution*, thought that judges must invalidate rules which became "difficult to defend on principle."[127]

2. Legislation Dealing with Vices

In another section of *State and Federal Control of Persons and Property*, Tiedeman made a distinction that was not endorsed by the courts but he nevertheless believed sound. The distinction was between vice and trade in vice.

> of gaining from its sale more than a fair profit; but it cannot be claimed that there is a trespass upon the rights of others in doing so, or that the rights of others are thereby threatened with injury. One is simply exercising his ordinary rights in demanding whatever price he pleases for his property.

Id. at 357. Tiedeman distinguished certain kinds of combinations in restraint of trade—including "cornering" the market by fraud—which he generally regarded as proper objects of prohibition under the common law and modern state and federal antitrust legislation. *See generally id.* §§ 110-13, at 371-416.

124. *Id.* § 106, at 352.

125. *Id.* at 352-53.

126. T. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 246 (2d ed. 1891).

127. Citing Cooley's observation concerning usury laws, T. COOLEY, *supra* note 126, Tiedeman noted that he "differ[ed] with the learned judge in his opinion that long acquiescence in such laws preclud[ed] an inquiry into their constitutionality." 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 106, at 353.

Tiedeman defined vice as "an inordinate, and hence immoral, gratification of one's passions and desires," which primarily damages one's self. So defined, vice was not a trespass upon the rights of others, and therefore was not subject legitimately to police regulation.[128] On the other hand, no one can claim the right to make a trade in vice; "a business may always be prohibited, whose object is to furnish means for the indulgence of a vicious propensity or desire." According to Tiedeman, fornication was not a punishable offense, but prohibiting the keeping of houses of prostitution was acceptable; the state could not punish gambling, but the state could prohibit the keeping of gambling-houses or the sale of lottery tickets.[129]

Tiedeman recognized that, because of the interdependence of individuals in society ("*no man liveth unto himself*"), no one could be addicted to vices, even of the most trivial character, without doing damage to the material interests of society, and affecting each individual of the community. But these evils are "indirect and remote and do not involve trespasses upon rights," he maintained.[130] Indeed, these evils are "so remote that very many other causes co-operate to produce the result," making it "difficult, if not impossible, to ascertain what is the controlling and real cause."[131] This uncertainty, and the practical

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128. C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 60, at 180-81. Tiedeman explained:

> The object of the police power is the prevention of crime, the protection of rights against the assault of others. The police power of the government cannot be brought into operation for the purpose of exacting obedience to the rules of morality, and banishing vice and sin from the world. . . . The municipal law has only to do with trespasses. It cannot be called into play in order to save one from the evil consequences of his own vices, for the violation of a right by the action of another must exist or be threatened, in order to justify the interference of law.

Id. at 181.

129. *Id.* § 121, at 509-10. Tiedeman did not explain why trade in vice "may always be prohibited;" he simply asserted that "[a] business that panders to vice may and should be strenuously prohibited, if possible." *Id.* at 508. As discussed *infra* notes 147-51 and accompanying text, Tiedeman's distinction is untenable.

130. 1 C. Tiedeman, State and Federal Control, *supra* note 16, § 60, at 180-81. Crimes involved direct "trespasses upon rights," not the "secondary or consequential damage to others" that might result from an individual's indulgence in one's vices. *Id.*

131. *Id.* at 181. Tiedeman gave the example of an alcoholic husband whose intemperance "may result in the suffering of his wife from want, because of his consequent inability to earn the requisite means of support." *Id.* at 181 n.1. The husband's vice may be a cause of the wife's suffering,

> [b]ut she may have been equally responsible for her own suffering on account of her recklessness in marrying him, or she may be extrava-

inability to determine responsibility, has resulted in the rule of proximate causation in tort law—a rule of objective validity that Tiedeman applied in his constitutional analysis.[132] To make acts criminal that did not result in trespass upon others—acts that would not be actionable in tort because the damages they caused were too remote—would be an unconstitutional deprivation of liberty, without due process of law, he argued.[133] Thus, for example, "[i]t cannot be made a legal wrong for one to become intoxicated in the privacy of his

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> gant and wasteful; or she may by her own conduct have driven him into intemperance, and many other facts may be introduced to render it very doubtful, to which of these moral delinquencies her suffering may be traced as the real moving cause.

Id.

132. Tiedeman regarded the rule of proximate causation as one not merely of expediency but rather as one that "has its foundation in fact," a rule that was "deduced from the accumulated experience of ages, . . . a law of nature, immutable and invarying." *Id.* at 184. In extending the tort law principle to the status of a constitutional limitation upon the criminal law, Tiedeman reasoned as follows:

> If this is a necessary limitation upon the recovery of damages where a clearly established legal right is trespassed upon, there surely is greater reason for its application to a case where there is no invasion of a right, . . . When, therefore, the damage to others, imputed as the cause to an act in itself constituting no trespass, is made the foundation of a public regulation or prohibition of that act, it must be clearly shown that the act is the real and the predominant cause of the damage. The intervention of so many co-operating causes in all cases of remote damage makes this a practical impossibility.

Id. at 182. Thus, Tiedeman concluded, an act cannot be made unlawful simply because in certain cases a remote damage is suffered by others on account of it.

133. *Id.* at 184. Tiedeman even argued that to prohibit acts that were not trespasses would violate "[t]he inalienable right to 'liberty and the pursuit of happiness.'" *Id.* He left open the question whether acts that were not trespasses nevertheless could be made actionable in tort—for example, the leasing of premises where intoxicating liquors are sold, resulting in injury to third parties because of an intoxicated person's acts, as in Berthoff v. O'Reilly, 74 N.Y. 309 (1878), discussed *supra* note 89. Citing the case, Tiedeman noted that the rule of proximate cause "may be changed, and the damages imputed to the remote cause, without violating any constitutional limitation." 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, at 183 & n.1. If this is true under Tiedeman's analysis, then his distinction between vice and crime appears to have a loophole: it permits legislatures to prohibit certain acts *de facto*, not by making them criminal, but merely by making their remote consequences actionable in tort. To be consistent, Tiedeman should have argued that *Berthoff v. O'Reilly* was improperly decided—that it stretched too far the concept of proximate cause; but this apparently Tiedeman was reluctant to do.

own room," because the person who becomes drunk in private "has committed no wrong, *i.e.*, he has violated no right, and hence he cannot be punished" under Tiedeman's analysis, although he conceded that the courts had not endorsed the distinction he drew between vice and crime, which denied to government the power to punish vice as vice.[134]

One court nearly accepted Tiedeman's position. In *Ah Lim v. Territory of Washington*,[135] decided in 1890, the defendant was appealing his conviction under a statute that prohibited the smoking of opium.[136] The appellant's brief was replete with references to the first edition of Tiedeman's treatise. Citing Tiedeman, appellant's counsel put forth the following propositions:

> The inalienable right to "liberty and pursuit of happiness" is violated when a man is prohibited from doing anything which does not involve a trespass on others. That the vice of smoking opium is grossly immoral is no argument in favor of the validity of this statute. The police power of the state cannot be brought into operation for the purpose of exacting obedience to the rules of morality, and banishing vice and sin from the world. The municipal law has only to do with trespasses. It cannot be called into play in order to save one from the evil consequences of his own vices; for a violation of a right by the action of another must exist or be threatened in order to justify interference by law.[137]

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134. *Id.* at 182, 184-85. As an example of the courts' failure to observe his distinction, Tiedeman cited the Arkansas Supreme Court's decision upholding that state's statute on profanity, which did not confine the offense to swearing in public. *Id.* at 185 (citing Bodenhauer v. State, 60 Ark. 10 (1894)). He further cited several decisions upholding statutes that made it criminal to visit houses of prostitution or to engage in fornication. Tiedeman regarded these statutes as having gone too far: rather than confining their scope to "the offense of providing the means of indulgence in vice," such as the keeping of "disorderly houses"—which would have been a permissible exercise of the police power, under Tiedeman's analysis—they impermissibly prohibited the indulgence in vice itself. *Id.*

135. 1 Wash. 156 (1890).

136. The statute provided, "Any person or persons who shall smoke or inhale opium . . . shall be deemed guilty of a misdemeanor." *Id.* at 166-67. The provision was an 1883 amendment of a chapter of the 1881 territorial code that dealt with opium and which apparently sought mainly to prohibit the keeping of opium dens. *See id.* at 167 (Scott, J., dissenting).

137. *Id.* at 156-57 (citations omitted). In addition to Tiedeman, appellant's counsel also cited Cooley's *Constitutional Limitations* and Blackstone. Counsel for the Territory argued that these alleged violations of rights involved "[n]o special constitutional limitation or inhibition." *Id.* at 157. Counsel for the Territory further argued, "'The question whether a statute is a valid exercise of the legislative power is to be determined solely by reference to constitutional

These arguments did not persuade a majority of the court, however; by a split vote of 3-2, the court sustained the conviction.

Speaking for the majority, Judge Dunbar observed that "if the state concludes that a given habit it detrimental to either the moral, mental or physical well being of one of its citizens to such an extent that it is liable to become a burthen upon society, it has an undoubted right to restrain the citizen from commission of that act."[138] Such a restraint is not an encroachment upon the rights of the individual, but "simply an adjustment of the relative rights and responsibilities incident to the changing condition of society."[139]

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restraints . . . ,'" not general principles of "'natural justice and equity.'" *Id.* at 158 (quoting Bertholf v. O'Reilly, 74 N.Y. 509 (1878), discussed *supra* note 89, and citing, *inter alia*, Thorpe v. Rutland & Burlington R.R., 27 Vt. 140 (1851), discussed *supra* note 84).

138. *Ah Lim*, 1 Wash. at 164. Judge Dunbar compared the state's interest in the restraint of narcotic drug use to the state's interest in compulsory education. Education is compelled, not for the benefit of the child, but because "the state has an interest in the intellectual condition of each of its citizens . . . ." *Id.* at 163. Because state tax revenues are spent to build and maintain prisons, insane asylums, hospitals, and poor houses, "surely it ought to have no small interest in, and no small control over, the moral, mental, and physical condition of its citizens." *Id.* at 164.

> If a man willfully cuts off his hand or maims himself in such a way that he is liable to become a public charge, no one will doubt the right of the state to punish him; and if he smokes opium, thereby destroying his intellect and shattering his nerves, it is difficult to see why a limitation of power should be imposed upon the state in such a case.

Id.

139. *Id.* at 166. The court denied the existence of "an absolute or unqualified right or liberty guaranteed to any member of society;" rather, it held that scope of an individual's rights "depends largely upon the amount of protection which he receives from the government." *Id.* at 165. Hence, if government does little for individuals—for example, leaving to private charity the amelioration of poverty—one may pursue one's own happiness "without much regard to the rights of government." *Id.* at 166. With the rise of the modern welfare state, however, the situation changes:

> [N]ow all civilized governments make provisions for their unfortunates; and progress in this direction has been wonderful even since noted sages like Blackstone lectured upon the inalienable rights of man. Not only is the protection of individual property becoming more secure, but the vicious are restrained and controlled, and the indigent and unfortunate are maintained at the expense of the government, in comfort and decency, and the natural liberties and rights of the subject must yield up something to each of these burthens which advancing civilization is imposing upon the state.

Id.

Judge Scott, in his dissenting opinion, argued that the statute was void, as an impermissible exercise of the police power, in that it was "altogether too sweeping in its terms."[140] The dissenting judge did not cite Tiedeman, but did quote Cooley, "'The right of every man to do what he will with his own, not interfering with the reciprocal rights of others, is accepted among the fundamentals of our law.'"[141] More importantly, Judge Scott apparently adopted Tiedeman's distinction between trade in vice and mere indulgence in vice. To prohibit the keeping of opium dens "was a legitimate exercise of police powers;"[142] to prohibit willfully injuring oneself by smoking or inhaling opium may also be a valid exercise of the police power;[143] but to prohibit all smoking of opium—whether it results in injury to the person or otherwise affects society—was "an unwarranted infringement of individual rights, and therefore unconstitutional."[144]

Tiedeman's suggestion that the proximity or directness of the harm determines trespass might help explain the split in the Washington court: the dissenting judge saw no real or substantial relation of the statute to the public health or morals or safety, while the majority saw such a relation. The difference, in other words, was not so much in the understanding of the law—though admittedly, each side of the court applied different rules of construction reflecting contrasting views of

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140. *Id.* at 174 (Scott, J., dissenting). Judge Stiles concurred in the dissenting opinion.

141. *Id.* at 176 (quoting T. COOLEY, *supra* note 126, at 385).

142. *Id.* at 167.

143. *Id.* at 170. Judge Scott conceded that "[e]very act of the individual which has a direct tendency to render him unfit to perform the duties he owes to society, is a rightful subject of legislation" and that therefore "[s]ociety has an interest in the promotion and preservation of the bodily, mental and moral health of each individual citizen." *Id.* However, noting the obligation of the courts to exercise the power of judicial review as a check on legislative powers, discussed *infra* note 145, he argued that the police power could not legitimately extend to "every self regarding act of the person which the legislature may choose to prohibit upon the ground that it is injurious to the individual." *Ah Lim*, 1 Wash. at 171.

144. *Ah Lim*, 1 Wash. at 173. The judge added, "Individual desires are too sacred to be ruthlessly violated where only acts are involved which purely appertain to the person, and which do not clearly result in an injury to society, unless, possibly, thus rendered necessary in order to prevent others from like actions which to them are injurious." *Id.*

judicial review[145]—but rather in their understanding of what might be called the social facts of the case.[146]

The disagreement between the majority and the dissenters in *Ah Lim* suggests a basic conceptual difficulty with Tiedeman's distinction between vice and trade in vice. Tiedeman offered no explanation why, under his formulation, trade in vice comes properly within the scope of the police power, while indulgence in the vice itself does not. Setting aside the problem of first determining whether something is indeed a "vice,"[147] one confronts the following question: If personal indulgence in a vice involves (by definition) no trespass on the rights of others, why

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145. The majority stressed that courts generally should defer to legislatures the determination of acts injurious to the public. Whether the moderate use only of opium was not deleterious and consequently cannot be prohibited "is a question of fact which can only be inquired into by the legislature," Judge Dunbar wrote. *Id.* at 164. In contrast, the dissenting judge emphasized the duty of the courts to act as a check upon the legislative power. Judge Scott argued that the majority position permitted the legislature to decide that "every act of smoking or inhaling opium to be injurious to the person so doing, no matter how long or how short the duration, or how great or how small the quantity, or under what conditions or circumstances the same might have been used." *Id.* at 172. For the courts to refrain from reviewing so broad a determination would in effect make the legislature "the sole and absolute judge of the effect upon the individual, of the act forbidden" and hence "the sole judge of the constitutionality of its own acts of this character." *Id.*

146. The majority stressed that smoking opium was "a recognized evil in this country . . . an insidious and dangerous vice, a loathsome, disgusting and degrading habit that is becoming dangerously common with the youth of the country, . . ." and that it therefore had become regarded as "a proper subject of legislation in every western state." *Id.* at 164-65. The dissenting judge, in contrast, explicitly noted that however "repulsive and degrading" the habit of smoking opium had become generally, "There is a distinction to be recognized between the use and abuse of any article or substance." *Id.* at 174-75. Judge Scott stressed that the offense charged in this case "relate[d] purely to the private action or conduct of the individual" and that the statute in question made criminal "a single inhalation of opium, even by a person in the seclusion of his own house, away from the sight and without the knowledge of any other person." *Id.* at 167.

147. Tiedeman provided no definition of "vice," but perhaps there was less room for disagreement in the late nineteenth century than there is today. The differing responses of the *Ah Lim* majority and the dissenting judge to the smoking of opium—the former stressing opium abuse almost in crisis terms but the latter distinguishing use from abuse, as discussed *supra* note 146—indicate that even the smoking of opium had a somewhat uncertain status as a "vice" at the time. Indeed, state and federal legislation criminalizing the use of opiates had a rather recent origin; laws first appeared in the western states where Chinese immigrants had introduced the practice. *See* W. ELDRIDGE, NARCOTICS AND THE LAW 3-4 (1962).

should society prohibit trade in the vice—i.e., business relationships that merely facilitate acts that do not harm others? Put in more concrete terms, does it make sense to insist—as Tiedeman did—that the state may not use the police power to forbid sex between unmarried adults but may prohibit the keeping of a house of prostitution, or that the state may not forbid gambling but may close down gambling parlors?

Tiedeman's rationale for the distinction, like the rationale for the distinctions made by Judge Scott in his dissenting opinion in *Ah Lim*, rests upon the assumption that society has a legitimate interest—one that it may protect through use of the coercive power of the state—in preventing certain acts, even though they do not involve any direct trespasses on others. Apparently Tiedeman regarded the commercialization of virtually any vice as such an act: hence, trade in vice was always legitimately subject to the police power.[148] Tiedeman also distinguished from his general rule a type of vice which he called "social vice:" acts which by their nature involved injury to society, even when indulged in private. An example was the vice of fornication, which created social injury "of a strikingly strong character, in that it makes probable an increase of the public burden by the birth of illegitimate children, as well as it is the occasion of a wrong to the children so born." Tiedeman conceded that punishment of fornication therefore was "justifiable on these grounds," and that the offense was "properly distinguished from such strictly personal vices, involving no trespass upon the rights of others, such as drunkenness."[149]

This further distinction between "social" vices and "strictly personal" vices is an especially troublesome one—one which calls into question the validity of Tiedeman's overall distinction between crimes and vices. Consider, for example, Tiedeman's characterization of drunkenness as a "strictly personal" vice, in the context of his argument against the constitutionality of legislation prohibiting liquor consumption. Again, consistent with his overall rule delineating the scope of the police power, he regarded as constitutional the prohibition of the sale of liquor, but not the prohibition of consumption. Even laws prohibiting the habit of "treating"—that is, furnishing liquor to others—went too far, "inasmuch as the persons who are directly injured . . . are all willing participants, except in the very extreme cases of beastly intoxication . . . ." Such laws therefore were "open to the constitutional

148. "The keeping of disorderly houses and places of gambling is, *of course, prohibited, because it is making a business of pandering to vices*; and, for that reason, comes properly within the jurisdiction of the police power." 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 60, at 185 (emphasis added).

149. *Id.* at 185-86.

objection of a deprivation or restraint of liberty, in a case in which no right has been invaded."[150] But could one not use the same argument with respect to fornication, which Tiedeman conceded could be punished because of the social injury it created? Introduction of the concept of "social" vice, therefore, weakened Tiedeman's analysis by blurring the distinction between trespasses, which clearly were the law's business, and "vices," which were not. Although perhaps far-reaching for his time, Tiedeman's formulation fell far short of modern libertarian arguments for the decriminalization of "victimless crimes."[151]

3. Legislation Regulating the Hours of Labor

Tiedeman's discussion of limitations on the police power more closely resembles the laissez-faire constitutional position, as it has been traditionally understood, when he analyzed labor regulations.[152] Here,

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150. *Id.* § 61, at 188. This argument appeared in the section dealing with sumptuary laws, which Tiedeman treated as he did laws dealing with vices: he regarded them as "violations of the inalienable right to 'liberty and the pursuit of happiness'" in that they involved "a deprivation of liberty and property—through a limitation upon the means of enjoyment—without due process of law." *Id.* at 187. Tiedeman drew a similar distinction with respect to the "vice" of transvestism. He considered as "probably constitutional" the prohibition of the appearance in public of men in women's garb, and *vice versa*, because the practice "could serve no useful purpose, and tends to public immorality and the perpetration of frauds." *Id.* at 189. He drew the line, however, at the prohibition of cross-dressing in entirety; he argued that the state could not constitutionally prohibit the wearing of particular articles of clothing usually worn by the opposite sex. *Id.*

151. A more detailed analysis of Tiedeman's distinction between crime and vice, compared with modern libertarian formulations, is of course a topic beyond the scope of this Article. For a modern libertarian view generally, see Hospers, *Libertarianism and Legal Paternalism*, in LIBERTARIAN READER 135 (T. Machan ed. 1982) (arguing that the state has no right to prohibit actions that do not harm others, and defining "harm" narrowly, in terms of the use of physical force or fraud). For modern arguments for the decriminalization of "victimless crimes," see generally G. GEIS, NOT THE LAW'S BUSINESS: AN EXAMINATION OF HOMOSEXUALITY, ABORTION, PROSTITUTION, NARCOTICS, AND GAMBLING IN THE UNITED STATES (1979).

152. One scholar has observed that "liberty of contract," although the juristic equivalent of economic liberty generally, was associated almost exclusively with judicial decisions concerning labor laws. A. PAUL, *supra* note 2, at 67 n.15. Perhaps this was so because, in the eyes of laissez-faire constitutionalists, it was labor legislation generally that posed the most important challenge to laissez-faire principles. Tiedeman noted that "[i]n no phase of human relations is there a more widespread manifestation of legislative determination to interfere with and to restrict the constitutional liberty of

too, however, his analysis involved not merely a "conservative" interpretation of legal precedents but rather a reformulation of the law consistent with his laissez-faire principles.

Tiedeman regarded liberty of contract as a right the law should guarantee equally to the employer and the employee. Although recognizing that the legal equality between employer and employee was nothing more than "a legal fiction,"[153] he nevertheless limited the legitimate regulation of the labor contract to the preservation of the health and safety of the worker[154] or to the protection against fraud. All other regulation—including regulation of workers' wages and hours—would violate the constitutional guarantee of liberty of contract, which Tiedeman argued was "intended to operate equally and impartially upon both employer and employee."[155]

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contract, than in the contract for labor between employer and employee." 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 98, at 315.

153. "[T]here can be no substantial equality between the man, who has not wherewith to provide himself with food and shelter for the current day, and one, whether you call him capitalist or employer, who is able to put the former into a position to earn his food and shelter. The employer occupies a vantage ground which enables him, in a majority of cases, to practically dictate the terms of employment." *Id.*

154. Tiedeman regarded as legitimate, or constitutional, regulations that were "reasonable safeguards" of the health and safety of workers, provided the regulations were not in opposition to "the old common law theory of the non-liability of the employer for injuries sustained by the employee, either through accident or the carelessness or negligence of the fellow-servant." *Id.* § 103, at 339; *see also* 2 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 23, at 736-49 (discussing the constitutionality of regulations of "unwholesome and objectionable trades," and of the regulations of mines). Therefore, Tiedeman argued that the legislature could enact a law that prohibited, for example, the manufacture of cigars in tenement houses, for such activity was "considered by some to so taint the atmosphere as to endanger the health of the occupants of the house." Although he cited with approval the New York case declaring such a statute unconstitutional, *In re* Jacobs, 98 N.Y. 98 (1885), he did so on the grounds that the court correctly held that the regulation did not tend to promote the public health but, rather, was a "taking" of property without due process of law. The court "would have trespassed upon the powers of the legislature" if it had undertaken to pass on the necessity of the regulation, argued Tiedeman; "[i]t falls within the legislative discretion in every case to decide upon the necessity for the exercise of its police power." 2 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 23, at 738.

155. 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 98, at 316. Tiedeman had a generally positive attitude toward labor unions, regarding them as legitimate means of reducing the disparity in bargaining strength between employer and employee—and therefore of protecting the worker's liberty of contract. For example, he noted with approval the rejection of the

Discussing different types of laws regulating the hours of labor, Tiedeman again drew a distinction, paralleling the one he made concerning laws regulating rates of interest. Statutes which simply defined what constituted a day's work, in the absence of an agreement otherwise, did not interfere with liberty of contract any more than statutes which merely prescribed the legal rate of interest.[156] But statutes which determined the hours of labor, either directly by prohibiting labor above a proscribed maximum or indirectly by making obligatory extra compensation for overtime, violated the constitutional liberty of contract of persons who were *sui juris*, and hence were not legitimate exercises of the police power.[157]

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common law rule that regarded labor organizations as criminal conspiracies in restraint of trade; in rejecting this rule, he argued, American courts "have merely secured to the workman the same liberty of contract, which the capitalist has enjoyed at the common law, and which . . . [is] the constitutional right of every man." *Id.* § 114, at 419. Similarly, he rejected the argument that the statutory exemption of labor organizations from the restrictions of the antitrust laws was unconstitutional because it granted special protection to laborers that were denied to capitalists. Rather, he argued, such legislation was "an undoubted, and, from the practical standpoint, probably unassailable determination of the State to diminish the natural inequalities of capital and labor, by prohibiting combinations of capital and permitting combinations of labor." *Id.* at 423. Although the "thorough-going individualist" might justifiably "condemn any restrictions upon voluntary combinations of either capital or labor," Tiedeman noted, "it does not seem unreasonable" for the law to favor combinations of labor. "The individual laborer is completely at the mercy of the employer, if he cannot combine with his fellows to maintain a standard of wages and to control the terms of the labor contract in other matters." *Id.* at 424.

Tiedeman's position may be contrasted with that of his English counterpart, Albert Venn Dicey, who regarded late-nineteenth century English legislation that facilitated collective bargaining as too favorable to labor combinations. Dicey argued that in England the pendulum had swung too far in the opposite direction, in reaction against late-eighteenth century laws that had forbidden labor combinations altogether. He considered the legislation of the transitional period—the early-nineteenth century legislation that tolerated labor combinations, making them not unlawful *per se* but subjecting them to the same legal restrictions as other combinations in restraint of trade—as the best approximation to a policy of "free trade in labor," which treated the employer and employee equally. *See* A. DICEY, *supra* note 85, at 270-71. Unlike Tiedeman, then, Dicey apparently did not regard employer and employee as naturally unequal in their bargaining positions.

156. 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 102, at 333-34.

157. *Id.* An exception, of course, was legislation determining the hours of government employees, where the state itself is a party to the employment contract.

Although Tiedeman recognized the legitimacy of child-labor legislation,[158] his understanding of the class of persons who were *sui juris* was quite broad, encompassing virtually all adults. Tiedeman made no exception for women, for as he saw it "the constitutional guaranty of the liberty of contract applies to women, married or single, as well as to men."[159] Neither did he exempt "unwholesome employments" from his rule: the danger to the health of the worker was not a constitutional justification for interference with individual liberty of contract.[160] The State could legitimately regulate the hours of employment only where such regulations affected either public employees or employees of public contractors.[161]

In discussing liberty of contract, Tiedeman acknowledged that the courts did not uniformly follow his analysis, particularly in applying "the constitutional guaranty of the liberty of contract" equally to women, married or single, as well as to men.[162] One court that did accept

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158. The exception of children from the general rule regarding liberty of contract posed no conceptual difficulty for Tiedeman. "Minors are the wards of the nation, and even the control of them by parents is subject to the unlimited supervisory control of the State." *Id.* at 335. Accordingly, "there has never been, and never can be any question" as to the constitutionality of regulations controlling and limiting the powers of minors to contract for labor. *Id.*

159. *Id.* at 336.

160. Tiedeman presented an *argumentum ad absurdum*:

> But if the danger to the health of the workman is a constitutional justification for such an interference with individual liberty of contract, in the case of particularly unwholesome employments; the same reason could be appealed to, only in a less degree, to justify the regulations of the hours of labor in all employments. For there is no other cause, equally common and general, of impaired health, broken-down constitutions and shortened lives, than excessive, and hence exhausting labor; it matters not whether the occupation is wholesome or unwholesome. The same collision between fact and theory, as to the legal equality of all men, again blocks the way to a rational regulation of the unequal relations of employer and employee.

Id. at 337-38.

161. Where the regulations applied to government employees, "the constitutionality of the regulation cannot be questioned" because the government, as a party to the contract, had the right to insist on a provision regarding hours of employment. Similarly, the government, as a party to an agreement with a contractor, had the right to limit the hours worked by employees on public works projects. *Id.* at 338.

162. He noted that "[w]hile women, married and single, have always been under restrictions as to the kinds of employment in which they might engage, and are still generally denied any voice in the government of the country, single women have always had an unrestricted liberty of contract." *Id.* at 335-36. Married women, however, generally were denied this freedom "on the ground of

Tiedeman's analysis was the Illinois Supreme Court—not surprisingly, since a modern commentator has regarded that court as "the pathfinder" in making use of the doctrine of liberty of contract.[163]

In *Ritchie v. People*,[164] decided in 1895, the Illinois Supreme Court held unconstitutional a statute providing "no female shall be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week."[165] The court cited Tiedeman's *Limitations of Police Power*:

> In so far as the employment of a certain class in a particular occupation may threaten or inflict damage upon the public or third persons, there can be no doubt as to the constitutionality of any statute which prohibits their prosecution of that trade. But it is questionable, except in the case of minors, whether the prohibition can rest upon the claim that the employment will prove hurtful to them.[166]

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public policy, in order to unify the material interests as well as the personal relations of husband and wife." This discrimination against married women, however, was gradually being eliminated; given this development, Tiedeman argued, "there seems to be no escape from the conclusion" that the constitutional guarantee applied to all women, as it did to all men. *Id.* at 336. As an example of a court that did not recognize this, Tiedeman cited a decision by the Massachusetts Supreme Court, upholding a law regulating the hours of labor for women "on the ground that women are still more or less under the tutelage of the State, and need the same protection of the State against the oppression of the employer, as do minors." *Id.* (citing Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383 (1876)).

163. A. PAUL, *supra* note 2, at 51 (citing two cases decided in 1892: Frorer v. People, 141 Ill. 171, 186-87 (1892), which struck down a statute prohibiting mining or manufacturing companies from keeping "truck stores," holding that it was "class legislation" which hindered "that freedom in contracting which is allowed to all others;" and Ramsey v. People, 142 Ill. 380 (1892), which struck down Illinois' coal "screening" act on similar grounds).

164. 155 Ill. 98, 40 N.E. 454 (1895).

165. *Id.* at 102, 40 N.E. at 455.

166. *Id.* at 115, 40 N.E. at 459 (quoting C. TIEDEMAN, LIMITATIONS OF POLICE POWER, *supra* note 14, at 199). In the section quoted from the first edition of his treatise on the police power, Tiedeman went on to suggest that pregnant women might fall within the exception: "It may be, and probably is, permissible for the State to prohibit pregnant women from engaging in certain employments, which would likely to prove injurious to the unborn child." With respect to women generally, however, he had emphasized:

> there can be no more justification for the prohibition of the prosecution of certain callings by women, because the employment will prove hurtful to themselves, than it would be for the State to prohibit men from working in the manufacture of white lead, because they are apt to contract lead poisoning, or to prohibit occupation in certain parts

In the second edition of his treatise on police power, Tiedeman returned the favor, citing with approval the court's rationale for its holding that the statute violated the state constitution's due process clause, in that freedom of contract was both a liberty and a property right. "Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner," the court observed. "In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer."[167]

IV. SUBSTANTIVE DUE PROCESS, THEN AND NOW: LESSONS FROM TIEDEMAN'S JURISPRUDENCE

A. From Laissez-Faire to the Welfare State: The Police Power Revolution

Fifteen years after *Ritchie v. People*, the Illinois Supreme Court upheld, as a legitimate exercise of the police power, a statute providing for a ten-hour day for women working in factories and laundries.[168] Justice Hand, in delivering the opinion of the court in this case, *Ritchie & Co. v. Wayman*, acknowledged "[t]he right of the individual to contract with reference to labor" was an "inviolable" property right protected by the Illinois constitution; but he added "certain sovereign powers," among them the police power, inhered in the State, and "the

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of iron smelting works, because the lives of the men so engaged are materially shortened.

C. TIEDEMAN, LIMITATIONS OF POLICE POWER, *supra* note 14, at 199-200.

167. *Ritchie*, 155 Ill. at 104, 40 N.E. at 455, *quoted in* 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 16, § 102, at 336 n.2.

168. Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N.E. 695 (1910). The statute at issue was enacted in 1909 and provided, in relevant part, "That no female shall be employed in any mechanical establishment or factory or laundry in this State, more than ten hours during any one day." Violation of this provision was a misdemeanor punishable by a fine of between $25 and $100. *Id.* at 516, 91 N.E. at 696. To test the constitutionality of the statute, suit was filed by W.C. Ritchie & Company and two of its female employees against Wayman, state's attorney for Cook County, and the chief factory inspector for the State of Illinois. W.C. Ritchie & Company was engaged in the manufacture of paper boxes. The bill averred that the company employed 750 women and that during the rush season it was necessary for its female employees to work more than ten hours per day in order for the company to fill its orders. The bill also averred that the factory was situated in a well-lighted, heated and ventilated building and that the working conditions were "sanitary and healthful." *Id.* at 515-16, 91 N.E. at 695-96.

property rights of the citizen are always held and enjoyed subject to the reasonable exercise of the police power by the State." He defined the police power as "that power of the State which relates to the conservation of the health, morals and general welfare of the public."[169] So defined, the police power was "a very broad power," and "may be applied to the regulation of every property right so far as it may be reasonably necessary for the State to exercise such power to guard the health, morals and general welfare of the public."[170]

In identifying a rational basis for the 1909 ten-hour law, Justice Hand resorted to arguments that are blatantly paternalistic and sexist by today's standards. Like the United States Supreme Court in *Muller v. Oregon*[171] just two years before, the Illinois Supreme Court emphasized that the statute applied only to female employees, the protection of whose health was a legitimate state interest.[172]

Justice Hand also attempted to distinguish the 1909 ten-hour law from the 1893 eight-hour law, suggesting that the court in *Ritchie* would

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169. *Id.* at 519, 91 N.E. at 697.

170. *Id.* at 520, 91 N.E. at 697.

171. 208 U.S. 412 (1908)

172. Justice Hand's discussion of what the court regarded as the state's interest in the health of women was extraordinarily frank:

> It is known to all men . . . that woman's physical structure and the performance of maternal functions place her at a great disadvantage in the battle of life; that while a man can work for more than ten hours a day without injury to himself, a woman, especially when the burdens of motherhood are upon her, cannot; that while a man can work standing upon his feet for more than ten hours a day, day after day, without injury to himself, a woman cannot, and that to require a woman to stand upon her feet for more than ten hours in any one day and perform severe manual labor while thus standing, day after day, has the effect to impair her health, and that as weakly and sick women cannot be the mothers of vigorous children, it is of the greatest importance to the public that the State take such measures as may be necessary to protect its women from the consequences induced by long, continuous manual labor in those occupations which tend to break them down physically. It would therefore seem obvious that [the statute in question] would tend to preserve the health of women and insure the production of vigorous offspring by them and would directly conduce to the health, morals and general welfare of the public . . . .

Ritchie & Co., 244 Ill. at 520-21, 91 N.E. at 697. The similar decision of the United States Supreme Court in Muller v. Oregon, 208 U.S. 412 (1908), which Justice Hand cited, *Ritchie & Co.*, 244 Ill. at 521, 91 N.E. at 697-98, is briefly discussed *supra* note 26.

have upheld the statute had it fixed a ten-hour day.[173] That distinction makes sense only if the court applied a conception of the police power fundamentally different from that posited by Tiedeman and adopted by the court fifteen years earlier. Indeed, Justice Hand's comments about the "reasonableness" of the ten-hour statute suggest that the court had adopted the view of the police power advanced by Louis Brandeis, who was counsel for the state's attorney, Wayman. Brandeis argued that courts must uphold as legitimate the exercise of the police power where the act in question had "some reasonable relation to the subjects of such power"—i.e., "the preservation of the public health, morals, safety or welfare."[174]

The police power concept implicit in *Ritchie & Co. v. Wayman* was the concept developed by Ernst Freund in his work on the police power, published a few years after the second edition of Tiedeman's treatise

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173. *Ritchie & Co.*, 244 Ill. at 528, 91 N.E. at 700. The court discerned in *Ritchie v. People*:

> a veiled suggestion which indicates that it was the opinion of the court that the limitation of the right to work longer than eight hours was an unreasonable limitation upon the right to contract, while the right to contract for a longer day, at least under some circumstances, might be a valid limitation upon the right of contract.

Id. In so distinguishing the earlier case, Justice Hand's opinion focused inordinately upon language in *Ritchie v. People* that left room for reasonable regulations necessary for the public health, safety, or welfare, *see* Ritchie v. People, 155 Ill. 98, 114-15, 40 N.E. 454, 459 (1895), overlooking the clear language in that decision that said that the liberty of contract rights of women should be fully the equivalent of those of men. Indeed, Justice Hand even quoted out of context the passage from Tiedeman's *Limitations on Police Power*, cited in *Ritchie v. People*, that maintained it would be constitutional for the state to prohibit certain types of work "'[i]n so far as the employment of a certain class in a particular occupation may threaten or inflict damage upon the public or third persons.'" *Ritchie & Co.*, 244 Ill. at 529, 91 N.E. at 700 (quoting C. TIEDEMAN, LIMITATIONS ON POLICE POWER, *supra* note 14, at 115). As discussed *supra* note 166, Tiedeman was referring specifically to pregnant women, and he went on to affirm that to limit the freedom of contract of women generally was no more permissible than to limit that of men whose occupations might be hazardous to their health. More importantly, Justice Hand ignored altogether the arguments in the second edition of Tiedeman's treatise on the police power, discussed *supra* notes 159-66 and accompanying text, which urged courts, in their consideration of laws regulating the hours of labor, to treat women no differently than men, and which had cited *Ritchie v. People* as an example of such an even-handed judicial protection of liberty of contract.

174. *Ritchie & Co.*, 244 Ill. at 512, 91 N.E. at 700 (summarizing Brandeis' argument as counsel for appellants).

and a year after Tiedeman's death.[175] Freund's book signaled the impending death of the *sic utere tuo* conceptualization of the police power and of the doctrine of liberty of contract. Freund's book also signified the influential role played by sociological jurisprudence early in the twentieth century, as legal formalism gave way to legal realism, and as the laissez-faire standard gave way to that of the welfare state in political economy.

Freund defined the police power as "the power of promoting the public welfare by restraining and regulating the use of liberty and property."[176] Hence, unlike Tiedeman who saw the exercise of the police power as legitimate only where it enhanced or protected individual liberty, Freund saw every exercise of the police power, by definition, as an infringement of individual liberty. For Freund, the police power must be "elastic," or "capable of development"; it was not "a fixed quantity," but "the expression of social, economic and political conditions."[177] The standard of legitimacy was the nexus between a statute and the public welfare, broadly conceived as "the improvement of social and economic conditions affecting the community at large and collectively, with a view to bringing about 'the greatest good of the greatest number.'"[178] Freund viewed the *sic utere* maxim as merely one segment of the police power, those "self-evident limitations upon liberty and property in the interest of peace, safety, health, order and morals . . . punishable at common law as nuisances."[179] But, added Freund, "no community confines its care of the public welfare to the enforcement of the principles of the common law:"

> The state places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of different kinds; *and it exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these*

175. E. FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904).

176. *Id.* at iii.

177. *Id.* at 3.

178. *Id.* at 5.

179. *Id.* at 6.

rights on the part of those who are unskilful, careless, or unscrupulous.[180]

Thus, unlike Tiedeman, who confined the legitimate scope of the police power to the enforcement of the *sic utere* principle, Freund stressed "the essence of the police power" was not confined to the prohibition of wrongful acts.

One can see the difference between Freund's broad conception of the police power and Tiedeman's narrow conception by examining what Freund wrote about each of the three types of legislation discussed in Part III of this Article.

First, with respect to usury legislation, Freund too found "inadequate theoretical justification" for such laws since the loaning of money was "neither a business affected with the public interest, nor one particularly concerning safety or morals." He nevertheless viewed regulation of the rate of interest as but "a species" of the regulation of charges, which was a legitimate exercise of the police power so long as the regulation was not discriminatory. He added that "the singling out of that particular class of charges may at least be justified on the ground of historical tradition."[181]

Second, although Freund observed that "the conduct of the individual in the privacy of his home, not involving or affecting his legal relations to other persons, is generally exempt from the operation of the police power," he based his generalization wholly upon the "firmly established principle of legislative policy" that public regulations must not interfere with "purely private acts."[182] His formulation of the general rule thus differed from Tiedeman's in two important respects. First, while Tiedeman based his principle of limitation on a relatively sure definitional footing ("The municipal law has only to do with trespasses"), Freund based his generalization on the far more slippery

180. *Id.* (emphasis in original). In a footnote, Freund cited the opinion of Chief Baron Fleming in *Bate's Case* (1606), that the King had absolute power to do that which is *salus populi*, or applied to the general benefit of the people. *Id.* at 6 n.7. While Freund thus saw the police power as concerned with policy (the promotion of the public welfare) and executive in its function, Tiedeman saw it as concerned with justice (the maintenance of private rights) and thus judicial in function.

181. *Id.* at 290. Like Tiedeman, Freund felt that "antiquated and exploded theories should not be allowed to control constitutional principles;" but, like Thomas M. Cooley and unlike Tiedeman, *see supra* text accompanying note 126, he was willing to allow legislation to stand, given long-standing precedent in its favor, even though it was difficult to defend on principle.

182. C. FREUND, *supra* note 175, at 483.

ground of "legislative policy."[183] Second, and perhaps more importantly, while to Tiedeman the critical distinction concerned the direct effect of a given act (harm to others versus harm to oneself), to Freund the critical distinction concerned where the act was performed, or more precisely, whether the act had public consequences. "Purely private acts" might be beyond the reach of the police power, as Freund formulated it, but few acts fell within this category. Gambling, sexual immorality, use of intoxicants—all these private vices may become matters of public concern, and hence subject to police regulations, because they are "offensive to the public" and are "apt, in their more remote and indirect consequences, to produce physical disorder and crime, and thus to endanger the public safety."[184]

Finally, and most obviously, Freund's formulation of the police power left little room for the doctrine of liberty of contract. Freund regarded legislation for the protection of laborers—including legislation limiting the number of hours in a work day or week—as legislation "enacted in the interest of health and safety," as well as "to promote decency and comfort" ("where women and young persons are concerned"), and therefore legislation that rested upon "a clear and indisputed title of public power."[185] Not unsurprisingly, Freund had little regard for the decision of the Illinois Supreme Court in *Ritchie v. People*.[186] "It is not by the assertion of vague principles of liberty, or

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183. Indeed, given that there was "no direct judicial authority for declaring private acts exempt from the police power," Freund acknowledged that "it seems impossible to speak of a constitutional right of private consumption" of liquor or other intoxicating drugs. He ascribed legislative tolerance of purely private acts wholly to "policy." He also suggested other practical safeguards:

> Like any other exercise of the police power, control of private conduct would have to justify itself on grounds of the public welfare. Aside from this, the practical difficulties of enforcement, coupled with the constitutional prohibition of unreasonable searches, will in general be an adequate protection against an abuse of legislative power in this domain.

Id. at 486.

184. *Id.* at 172. For examples of permissible regulations of morality, see *id.* at 173-91 (gambling and speculating), 192-219 (intoxicating liquors, including the prohibition thereof), 220-23 (lewdness and obscenity), 225 (notorious cohabitation), 226-33 (prostitution), 485 (use of opium, citing, *inter alia*, Ah Lim v. Territory of Washington, 1 Wash. 156 (1890)).

185. *Id.* at 295-96.

186. *Id.* at 298. Freund wrote, "The opinion in Ritchie v. People can hardly command unqualified assent either in the light of reason or authority." *Id.* In criticizing *Ritchie*, Freund relied upon the Massachusetts Supreme Court's decision upholding a law limiting women's labor in factories to sixty hours per week, Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383 (1876), discussed

by the unqualified denunciation of class legislation that the limits of the police power can be determined," he concluded.[187]

This statement by Freund, inserted in an almost offhand fashion at the close of his criticism of the Illinois Supreme Court's decision in *Ritchie,* was a nutshell summary of the vast changes that American value systems—in law, politics, and political economy—were undergoing during the early years of the twentieth century. Laissez-faire constitutionalism, with its hostility to "class legislation" and its affirmation of "liberty of contract," began its demise. Substantive due process protection of economic liberties received criticism, at first by academics and later by the courts, until eventually the Supreme Court in the 1930s abandoned it.[188]

Roughly contemporaneous with the gradual demise of laissez-faire doctrines in constitutional law were three other major, interrelated developments that occurred during the period between the 1880s and the 1920s. One was the rise of the modern social sciences: economics, psychology and psychiatry, sociology, and political science. By the turn of the century, social scientists—self-professed experts in these new professional fields—advocated the solution of social problems through a variety of so-called "Progressive" reforms; and legislatures responded with, among other things, laws regulating wages, hours, and working conditions.[189] The adoption of Progressive legislation in turn signaled the second major development of the period, the emergence of the so-called "welfare state," or "regulatory state," standard in public policy.[190] Some argue a third major development was the inevitable response to the tension that had emerged between legislation and the common law: the shift from "formalism" to "realism" in the law.[191]

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supra note 162.

187. C. FREUND, *supra* note 175, at 298.

188. The Supreme Court's gradual, thirty-year retreat from laissez-faire constitutionalism—from Muller v. Oregon, 208 U.S. 412 (1908), to United States v. Carolene Prods. Co., 304 U.S. 144 (1938)—is summarized *supra* note 26.

189. *See generally* R. HOFSTADTER, THE AGE OF REFORM (1955); R. WIEBE, THE SEARCH FOR ORDER, 1877-1920 (1967).

190. *See generally* S. FINE, *supra* note 8; Hovenkamp, *supra* note 6; Woodard, *supra* note 8.

191. Hovenkamp, *supra* note 6, at 381-82. As summarized by Hovenkamp, the rise of legal realism first involved the formulation of the "legal formalism" hypothesis. In other words, legal scholars of the time and historians subsequently explained the dissonance between substantive due process and Progressivism by accusing the judges of the substantive due process courts of being "formalist"—that is, of using too rigidly, or too mechanically, a method of legal reasoning that deduced first principles from the existing body of rules and precedents and then applied them to the facts of the case at hand. Christopher Columbus Langdell's 1871 casebook on contracts was "undoubtedly" the

The rise of legal realism was made possible by the acceptance of sociological theories of jurisprudence by a new generation of legal scholars, including Roscoe Pound, Louis D. Brandeis, Benjamin N. Cardozo, Karl Llewellyn, and Jerome Frank.[192] These scholars received some inspiration from Oliver Wendell Holmes' famous study of the common law, which he placed in an evolutionary Darwinian framework, arguing that practical expedients were more central to the development of the law than were logical propositions.[193] Holmes' emphasis on sociological concepts—the perceived needs of human society and the prevalent notions that emerged from the resolution of human conflicts—in turn suggested the pervasive influence of German jurists such as Rudolf von Jhering upon their American contemporaries. Indeed, Roscoe Pound, one of the early leaders of the realist movement, was a student of German jurisprudence.[194] His early writings severely criticized the "mechanical" jurisprudence of the late-nineteenth century and insisted on the relevance of the ideas of the German sociological jurists. "The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law," he explained; it sought "the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles."[195] Rather than

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paradigm of legal formalism in private law, Hovenkamp argues; but he argues that it had no analogue in public law. Rather than being static and uncreative, as the "formalism" thesis suggests, the case law of substantive due process was "highly creative," he notes, suggesting that it was the prevalence of classical economic theories and not the dominance of legal formalism that best explains laissez-faire constitutionalism. *Id.* at 382-83.

For a classic criticism of legal formalism by one of the foremost early-twentieth century legal realists, see Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

192. *See generally* E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 74-94 (1973). The phrase "legal realism" probably originated with Karl Llewellyn, who in 1930 coined the similar phrase "Realistic Jurisprudence" to describe his suggested approach. *Id.* at 81. The continuing pervasiveness of legal realism is graphically illustrated by the fact that, at many law schools today, Llewellyn's book introducing the study of law, *The Bramble Bush*, remains a staple of first-year student orientation reading.

193. *Id.* at 75-76 (quoting O. HOLMES, THE COMMON LAW 1 (1881) ("The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.")).

194. *See, e.g.*, R. POUND, INTERPRETATIONS OF LEGAL HISTORY (1923); R. POUND, OUTLINES OF LECTURES ON JURISPRUDENCE (5th ed. 1943); Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140 (1910).

195. Pound, *Mechanical Jurisprudence*, *supra* note 191, at 609-10.

examine the internal logic of legal rules, he maintained, it was "much more important to study their social operation and the effects which they produce."[196]

Ernst Freund, too, was influenced by German sociological jurisprudence. Although he did not study under Jhering at Goettingen, he began his study of law in Germany, where he undoubtedly studied the sociological theories of jurisprudence posited by Jhering and his contemporaries.[197]

Given the intellectual climate of the legal community in the early twentieth century it is not surprising that Tiedeman's treatise on the police power—a treatise that stressed adherence to the *sic utere tuo* principle as the touchstone for the validity of police regulations—suddenly was no longer a useful guide for the lawyer or law student. Swayed by the "sociological method" employed by Brandeis and other "realist" lawyers in their briefs,[198] courts like the Illinois Supreme Court in *Ritchie & Co. v. Wayman* or the United States Supreme Court in *Muller v. Oregon* found easy justification for upholding labor regulations as reasonably related to the "health, morals, and general welfare of the public" and hence as legitimate exercises of the police power.

B. Judicial Protection of Unenumerated Constitutional Rights: Some Jurisprudential Concerns

It is ironic that the German sociological jurisprudence that influenced Tiedeman, and which provided the rationale for his advocacy of judicial activism in *The Unwritten Constitution*, also helped bring

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196. Pound, *The Scope and Purpose of Sociological Jurisprudence*, *supra* note 194, at 514.

197. Freund was born in New York in 1864. He was educated in Germany and in the mid-1880s studied law at the universities in Berlin and Heidelberg. He continued his legal studies at Columbia University, from which he also received a Ph.D. in political science in 1897. He taught at Columbia in 1892-93, then in 1894 moved to the University of Chicago, where he became a full professor (in jurisprudence and public law) in 1902. THE BOOK OF CHICAGOANS 247 (A. Marquis ed. 1917).

198. As noted above, Brandeis was counsel for the Illinois state's attorney in *Ritchie & Co.* Two years earlier, in Muller v. Oregon, 208 U.S. 412 (1908), his famous "Brandeis brief"—consisting of two pages of legal arguments and well over a hundred of sociological statistics and analysis—helped persuade the United States Supreme Court of the validity of the Oregon maximum hours law that applied to female workers. By the early 1920s Brandeis, then a widely respected judge on the New York bench, was himself a forceful advocate of the "sociological method" as a principal tool of judicial practice. *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51-141 (1921) (lectures II & III).

about the demise of laissez-faire constitutionalism. The fact that the same philosophy of law which directly influenced Tiedeman also, directly or indirectly, influenced Louis Brandeis or Ernst Freund or Roscoe Pound should nevertheless not be surprising. The conception of law as a means toward social ends, as Roscoe Pound noted, requires courts to keep in touch with life. This does not mean that they must follow the currents of popular opinion, or public "whim." But it does mean that courts must be sufficiently in tune with society to ascertain its "prevalent sense of right." And, as Tiedeman himself recognized and even urged, it obliges courts to "follow, and give effect to, the present intentions and meaning of the people" when construing the law.[199]

The demise of laissez-faire constitutionalism, concurrent with the rise of the welfare state and legal realism, for some time made judicial activism disreputable. Indeed, critics of judicial activism—and proponents of the opposite theory of "judicial self-restraint"—forcefully made their voices heard at the time when laissez-faire constitutionalism was at its very height,[200] although their collective voice did not definitively gain the dominant ground until the late 1930s, about the same time that the Supreme Court signaled the final demise of substantive due process protection of economic liberties.[201] Although laissez-faire constitutionalism as a movement is still dead,[202] judicial activism—given new life by the revival of substantive due process by the Warren and Burger Courts—still lives, although it is arguably more controversial today than it has been at any time since the turn of the century.

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199. C. TIEDEMAN, UNWRITTEN CONSTITUTION, *supra* note 46, at 154.

200. *See, e.g.*, Thayer, *The Origins and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (urging a highly restrictive theory of judicial review). A modern commentator has argued that Thayer's essay later became a major resource and inspiration for critics of judicial intervention: "The old judicial review had gone wrong; therefore, all judicial review was suspect." This notion, prompted by the negative traditional view of laissez-faire constitutionalism, lent support to the tradition opposed to judicial activism, the "Holmes-Hand-Frankfurter tradition of 'judicial self-restraint.'" A. PAUL, *supra* note 2, at xvi.

201. *See* United States v. Carolene Prods. Co., 304 U.S. 144 (1938), discussed briefly *supra* note 26.

202. This does not imply, however, that substantive due process protection of property and other economic rights is dead. Far from having met its demise, economic substantive due process now enjoys a renaissance of sorts, as a number of distinguished legal scholars have urged its revival. *See, e.g.*, R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980). *See generally* ECONOMIC LIBERTIES AND THE CONSTITUTION (J. Dorn & H. Manne eds. 1987).

The distinction that Tiedeman drew in his *Unwritten Constitution* between the true "will" of the people, which the courts are bound to follow, and the people's "whim," which the courts on principle are free to ignore, is a distinction of continuing relevance to the modern controversy over judicial activism. It is a distinction that goes to the heart of what is perhaps the fundamental theoretical problem in American constitutionalism: the reconciliation of judicial review with popular sovereignty. Put another way, the problem may be described as that of reconciling the will of the majority with the protection of the rights of the minority—a fundamental problem that is at least as old as the Constitution itself.[203] What follows certainly does not purport to resolve this problem, nor does it even purport to show any clear lessons, relevant to this basic problem, that can be derived from Tiedeman's jurisprudence and the demise of laissez-faire constitutionalism. I do intend, however, to raise some questions and to make some tentative conclusions that suggest the potential lessons learned from this study of Tiedeman's thought and its place in the revisionist interpretation of turn-of-the-century constitutional law.

First, it is interesting to note how similar Tiedeman's arguments on behalf of an activist judiciary protecting property and economic liberty are to arguments raised in the past thirty or so years on behalf of an activist Supreme Court protecting civil liberties. Ronald Dworkin, for example, in defending the activism of the Warren Court, has described the function of the Court in terms of the judiciary's obligation to consistently enforce the principles upon which their institutions rely. Dworkin argues that in making unpopular decisions, the judge is not enforcing his own convictions against the community's, but rather is resolving conflicts or inconsistencies in the community morality.[204]

Striking examples of this notion of the Court's obligation can be found in the writings of both the Court's most "liberal" Justices and the Court's newest "conservative" member. One memorable example is the opinion of Justice Thurgood Marshall in the 1972 death penalty cases. Notwithstanding opinion polls revealing the public about evenly divided on the question, Marshall argued that if the average citizen possessed

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203. This was the problem that was of most concern to James Madison at the time of the drafting and ratification of the Constitution, and it was the subject of his famous tenth essay in the *Federalist Papers*. *See* Ketcham, *The Dilemma of Bills of Rights in Democratic Government*, in THE LEGACY OF GEORGE MASON 38 (J. Pacheco ed. 1983); THE FEDERALIST NO. 10 (J. Madison).

204. R. DWORKIN, TAKING RIGHTS SERIOUSLY 126 (1978) ("Individuals have a right to the consistent enforcement of the principles upon which their institutions rely. It is this institutional right, as defined by the community's constitutional morality, that Hercules [Dworkin's model for the activist judge] must defend against any inconsistent opinion however popular.").

"knowledge of all the facts presently available," he would find capital punishment "shocking to his conscience and sense of justice."[205] More recently, Justice William Brennan has gone further, arguing that the death penalty is inherently inconsistent with the eighth amendment's "fundamental premise . . . that even the most base criminal remains a human being possessed of some potential, at least, for common human dignity." Noting that this is an interpretation to which neither a majority of his fellow Justices nor a majority of Americans subscribe, Justice Brennan nevertheless insisted "when a Justice perceives an interpretation of the text to have departed so far from its essential meaning, that Justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path."[206]

A very recent example of the Court's functioning of the "conscience" of the nation is its decision that the First Amendment forbids a conviction under the Texas criminal statute prohibiting desecration of the American flag.[207] In his concurring opinion, the Court's newest "conservative" member, Justice Anthony Kennedy, noted that the case illustrated "better than most that the judicial power is often difficult in its exercise." The members of the Court, he observed, must sometimes make decisions that are not only popular but also personally "painful," because "they are right, right in the sense that the law and the Constitution, as we see them, compel the result."[208]

If the notion that courts must, in upholding the true "will" of the people as embodied in the Constitution, sometimes disregard popular sentiment, however overwhelming, poses difficulties in the interpretation of specific constitutional prohibitions such as the eighth or the first amendment, surely that notion poses even greater jurisprudential difficulties with respect to the judicial protection of unenumerated constitutional rights, such as the right to privacy.[209] Thomas Grey has framed the basic question this way:

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205. Furman v. Georgia, 408 U.S. 238, 369 (1972) (Marshall, J., concurring).

206. Brennan, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 13-14 (1985). Justice Brennan added that "[b]ecause we are the last word on the meaning of the Constitution, our views must be subject to revision over time, or the Constitution falls captive . . . to the anachronistic views of long-gone generations." *Id.* at 13. Compare Brennan's argument with Tiedeman's argument in *Unwritten Constitution*, that the judge "who would interpret the law rightly" is not bound by "the utterances of dead men." *See supra* text accompanying notes 74-76.

207. Texas v. Johnson, 109 S. Ct. 2533 (1989).

208. *Id.* at 2548 (Kennedy, J., concurring).

209. The history of Supreme Court protection of the right to privacy is briefly summarized *supra* note 9.

> In reviewing laws for constitutionality, should our judges confine themselves to determining whether those laws conflict with norms derived from the written Constitution? Or may they also enforce principles of liberty and justice when the normative content of those principles is not to be found within the four corners of our founding document?[210]

That question, Professor Grey adds, is "perhaps the most fundamental question we can ask about our fundamental law," excluding the question of the legitimacy of judicial review itself.[211]

What makes the question so troublesome today is precisely the reason why it was so troublesome in Tiedeman's day: the absence of a objectively-based, or universally-recognized, body of fundamental law. Eighteenth-century jurisprudence had natural law and natural rights, but as noted in Part One, above, that body of fundamental law had been rejected by mid-nineteenth century jurists. It was in the void created by the rejection of natural rights doctrine that, successively, the historical and the sociological schools of jurisprudence arose. And, as shown in Part Two, above, it was in this philosophical milieu—a post-Enlightenment world, devoid of firm ideological footing—that Tiedeman strove in his *Unwritten Constitution* to provide a jurisprudential justification for the protection of traditional (which, Tiedeman assumed, were laissez-faire) values against the onslaught of popular demands for the "welfare state." Tiedeman's solution was to posit a doctrine of

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210. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

211. *Id.* Grey argues persuasively that the "pure interpretive model" is inconsistent with much of our substantive constitutional doctrine, pointing out that a strict adherence to the written text would jeopardize the entire body of doctrine developed under the fifth and fourteenth amendments—including application of the equal protection clause of the fourteenth amendment to the federal government under the fifth amendment due process clause, as well as application of the Bill of Rights to the states under the fourteenth amendment. *Id.* at 710-12. It would also jeopardize modern interpretations of specific provisions of the Bill of Rights, which are often far removed from the original, historically intended meaning. *Id.* at 713. Grey then distinguishes three types of noninterpretive judicial review, each progressively narrower: first, the creation (or discovery) of independent constitutional rights "with almost no textual guidance," such as the right to privacy or liberty of contract; second, the general application of norms that the written text explicitly applies in a narrower way, such as the fifth and fourteenth amendment interpretations discussed above; and third, the extension or broadening of written provisions of the Constitution beyond the framers' normative content, as in the School Segregation Cases or the extension of the fourth amendment to cover eavesdropping. *Id.* at 713 n.46. Here I am concerned primarily with the first, broadest type of noninterpretive review identified by Professor Grey.

"natural rights," based not on nature but rather on the "prevalent sense of right" of the American people.

History has proven that Tiedeman's use of sociological principles of jurisprudence was an ineffectual basis for laissez-faire constitutional doctrines such as liberty of contract. One reason, scholars have suggested, was that the laissez-faire standard no longer comported with reality.[212] Whether or not this is true, the apparently widespread and long-lived popular support for "Progressive" legislation in the twentieth century has cast serious doubt on any claim that laissez-faire principles were in accord with the "prevalent sense" of right. The "extraordinary demands of the great army of discontents" that Tiedeman in 1890 associated with popular "whim," or caprice, in the twentieth century—certainly by the time of the "New Deal" legislation of the 1930s—did not dissipate and hence seemed more like the true "will" of the people. In a twentieth-century legal culture dominated by sociological theories of jurisprudence and legal realism, judges had no intellectual armor that would enable activist courts to withstand the will of the majority; the laissez-faire constitutional principles espoused by Tiedeman simply had become irrelevant, under his own jurisprudential framework.

If such was the fate of substantive due process protection of economic rights in the twentieth century, what will be the fate of constitutional protection of other unenumerated, and equally controversial, rights in the future? In other words, is the "right to privacy" doomed to fail, as "liberty of contract" did?[213] One need not speculate

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212. *See* Woodard, *supra* note 8, at 305-11 (explaining the demise of the laissez-faire standard in terms of "a clash with reality," the reality of an industrial society).

213. Late-nineteenth century "liberty of contract" and late-twentieth century "right to privacy" have much in common. They are both nontextual, or unenumerated, constitutional rights, that are, in effect, creatures of the first type of noninterpretive judicial review distinguished by Professor Grey: i.e., independent constitutional rights "created (or found)" by the courts "with almost no textual guidance." Grey, *supra* note 210, at 713 n.46 Both, too, are ultimately based—in jurisprudential terms—on a perceived substantial support from the majority of the American people. Historically, the popular support for liberty of contract proved to be elusive; popular support for the right to privacy may be equally uncertain, outside the rather narrow sphere suggested by the Supreme Court majority in *Bowers v. Hardwick*, discussed *infra* text accompanying notes 214-19. Finally, both liberty of contract and the right to privacy seem to rest upon basic assumptions about the individual's role in society, assumptions that are likely to become less certain under the pressures of economic change. Arguably, the effect of industrialization in the late nineteenth century was to change people's attitudes about the proper role of government, from a negative model (restraining persons from causing harm to others) to a more positive model (creating and protecting opportunities for the individual and

about the future fate of the right to privacy by trying to predict the Supreme Court's treatment of *Roe v. Wade* in the upcoming term. Rather, one may look to the Court's decision in a case decided in the recent past, *Bowers v. Hardwick*,[214] in which the Court upheld the Georgia statute that made sodomy a criminal offense. In a 5-4 decision, the majority of the Court held that the right of privacy did not extend to protect homosexuals. Declaring the unwillingness of the Court to recognize "a fundamental right to engage in homosexual sodomy," Justice White, in his opinion for the majority, construed the right to privacy quite narrowly, arguing that the Court's previous decisions extended privacy protection only to decisions involving traditional family relationships, marriage, and procreation.[215] In contrast, Justice Blackmun, in his opinion for the dissenters, interpreted the right to privacy far more broadly, arguing that the case was not merely about sodomy, but rather concerned the fundamental "right to be let alone."[216] The Court's protection of certain rights associated with the family was based, not on the contribution of those rights to the general public welfare, but "because they form so central a part of an individual's life."[217] If the right to privacy means anything, Justice Blackmun argued, it must extend to an individual's freedom to choose the form and nature of his or her intimate relationships with others.[218]

The disagreement between the majority and the dissenters in *Bowers v. Hardwick*—a disagreement about the very purpose and scope of the right to privacy—illustrates the precarious jurisprudential status of unenumerated "fundamental" rights today. The disagreement in *Bowers v. Hardwick* was a disagreement not only about the law, but

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enhancing the individual's ability to "cope" with change). One may legitimately wonder whether rapid advances in computer, communications, and other technologies might also bring about changes, in the twenty-first century, in popular attitudes about privacy and the extent to which it should be valued in society.

214. 478 U.S. 186 (1986). The Georgia statute in question prohibited any oral or anal sexual act, and it applied to married as well as unmarried persons. The Court limited its consideration to the respondent's challenge to the statute as applied to consensual homosexual sodomy; it declined to consider the constitutionality of the statute as applied to other acts of sodomy. *Id.* at 188 n.2.

215. *Id.* at 190-91.

216. *Id.* at 199 (Blackmun, J., dissenting).

217. *Id.* at 204 (Blackmun, J., dissenting).

218. *Id.* at 205, 208 (Blackmun, J., dissenting).

about values—"the values most deeply rooted in our Nation's history."[219] Judicial protection of unenumerated constitutional rights—whether grounded in substantive dimensions of the due process guarantees of the fifth and fourteenth amendments, or in the nontextual, fundamental rights protected in the ninth amendment[220], or the "emanations" from specific guarantees of the Bill of Rights—inevitably involves the courts' identification and assessment of fundamental values. Even Justice Holmes, in his famous dissent in *Lochner*, did not ignore this fact. Indeed, his declaration that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics" is so often quoted out of context, that scholars frequently overlook the fact that Holmes did not condemn judicial review on substantive due process grounds *per se*; he condemned only judicial review in protection of liberty of contract because it was based "upon an economic theory which a large part of the country does not entertain."[221] With respect to judicial review generally, Holmes wrote,

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, *unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.*[222]

Thus, even a legal realist like Holmes recognized that certain "fundamental principles" might trump the will of the majority, in the courts' exercise of their power of judicial review.

The identity of those fundamental rights, and the legitimacy of judicial protection of them, remain troublesome points. Thomas Grey has suggested that the legitimacy of judicial protection of unenumerated constitutional rights is particularly troublesome in an era dominated by

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219. *Id.* at 214 (Blackmun, J., dissenting). The disagreement about morality and moral philosophy implicit in *Bowers v. Hardwick* is discussed in S. MACEDO, THE NEW RIGHT V. THE CONSTITUTION 68-79 (1987) (criticizing the "moral skepticism" of the majority).

220. On the significance of the ninth amendment for the protection of nontextual, or unenumerated rights, see the sources cited *supra* note 10.

221. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

222. *Id.* at 76 (emphasis added). Pointing to this passage, Grey argues that "[i]t is an often overlooked point that Mr. Justice Holmes in his classic *Lochner* dissent did not use the case as an occasion to reject noninterpretive adjudication generally, or even substantive due process as such; quite the contrary." Grey, *supra* note 210, at 711 n.35.

realism in jurisprudence and skepticism in ethics and epistemology.[223] Perhaps in response to such concerns, some scholars recently have urged theories of a "principled judicial activism;"[224] this development may be yet another indication of a broader movement, the decline of positivism and legal realism and the reemergence of normative legal philosophy.[225] Whether or not such a trend indeed is taking place, this study of Christopher Tiedeman's jurisprudence indicates that basic questions of constitutional law cannot be divorced from basic questions about jurisprudence. Prevailing attitudes about the origin and purpose of law generally must be taken into account by the courts in their exercise of judicial review; and indeed, these attitudes—whether explicit or implicit—do determine the contours of adjudication. This is particularly true in eras of profound social change: eras such as Christopher Tiedeman's and our own.

CONCLUSION

Recent revisionist scholarship has sought to make laissez-faire constitutionalism more understandable by explaining it on its own terms; i.e., by explaining it in terms of the "world view" of the late nineteenth century. This Article has attempted to further our understanding of laissez-faire constitutionalism by examining in some detail the writings of one of its leading exponents, Christopher G. Tiedeman.

Tiedeman is important in two respects. First, the relative purity of his laissez-faire principles distinguished him from contemporaries such as Thomas M. Cooley. Both in his treatises on the police power and in his spirited defense of judicial activism in *The Unwritten*

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223. Professor Grey concluded his article with the following troubling questions:

> Conceding the natural-rights origins of our Constitution, does not the erosion and abandonment of the 18th-century ethics and epistemology on which the natural-rights theory was founded require the abandonment of the mode of judicial review flowing from that theory? Is a 'fundamental law' judicially enforced in a climate of historical and cultural relativism the legitimate offspring of a fundamental law which its exponents felt expressed rationally demonstrable, universal, and immutable human rights?

Grey, *supra* note 210, at 718.

224. *See, e.g.*, Barnett, *Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273 (1987); S. MACEDO, *supra* note 219. *See generally* Dorn & Manne, *preface* to ECONOMIC LIBERTIES AND THE CONSTITUTION (J. Dorn & H. Manne eds. 1987), at xix-xx.

225. *See* Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy* (Book Review), 97 HARV. L. REV. 1223, 1225-36 (1984) (reviewing Farnsworth, Contracts (1982)).

Constitution, Tiedeman expounded the most comprehensive and intellectually rigorous theory of laissez-faire constitutionalism. Second, although that theory had a short-lived influence in the law—citations to Tiedeman's treatises peaked at about the turn of the century, and virtually disappeared at about the time of Tiedeman's death a few years later—the sociological theories of jurisprudence on which it was based were quite "modern" for his time; they survived and flourished in the twentieth century.

Paradoxically, Tiedeman's obscurity in the twentieth century underscores the significance of his ideas today. The demise of Tiedeman's laissez-faire constitutionalism resulted not from the failure of a moral or economic theory, but from the failure of constitutionalism itself—that is, from the failure of certain categories of rights to be given lasting constitutional protection by the courts, through judicial review, in the face of sustained majoritarian demands. To the extent that the rise of legal realism was not merely coincidentally related to the demise of substantive due process protection of economic rights, scholars who are concerned about the constitutional protection of other unenumerated rights—such as the right of privacy—should not ignore the importance of jurisprudence in matters of constitutional law.