Supplementary Material

Chapter 7: The Republican Era—Individual Rights/Property

Christopher Tiedeman and Benjamin Cardozo on Property Rights and the Public Good

Christopher Tiedeman (1857–1903) was one of the most prominent and prolific legal treatise writers of the late nineteenth century. A law professor at the University of Missouri and New York University, Tiedeman's first published works helped develop the constitutional justifications for the freedom of contract and other limitations on state power to regulate economic activities. A Treatise on the Limitations of Police Power in the United States *(1886) is his most important work. That work championed libertarian constitutional understandings. In addition to advocating constitutional restrictions on state economic power, Tiedeman also favored broad free speech rights and insisted that persons had a constitutional right to marry persons of a different race.*

Benjamin N. Cardozo (1870–1938) was the most prominent state court justice of the Progressive Era and a Supreme Court justice from 1932 to 1938. Cardozo was committed to sociological jurisprudence, the belief that judges ought to play close attention to social needs and social facts when making legal decisions. Many of Cardozo's most famous legal decisions reinterpreted the common law to provide more modern understands of product liability, contracts, and torts. His most famous work, The Nature of the Judicial Process, *articulates what Cardozo believed to be the guiding pragmatic understanding of constitutional law.*

When you read these two works, consider their philosophical and pragmatic differences. Tiedeman and Cardozo clearly disputed the extent to which justices ought to decide cases on the basis of natural rights and inherited legal understandings. To what extent did these different philosophies commit them to different legal outcomes? Could proponents of property rights in the Republican Era rely on pragmatic principles when justifying their most important claims? Could opponents of the freedom of contract rely on Tiedeman? To what extent did either Tiedeman or Cardozo champion timeless principles of constitutional law? To what extent might contemporary constitutional debates be characterized as contests between the descendants of Tiedeman and Cardozo? Do the principles Cardozo thought progressive in 1921 generate politically progressive results today? Would contemporary conservatives be comfortable with Tiedeman's constitutional principles?

Christopher Gustavus Tiedeman, A Treatise on the Limitations of Police Power in the United States *(1886).*[1]

In the days when popular government was unknown, and the maxim *Quod principi placuit, legis habet vigorem,* seemed to be the fundamental theory of all law, it would have been idle to speak of limitations upon the police power of government; for there were none, except those which are imposed by the finite character of all things natural. Absolutism existed in its most repulsive form. The king ruled by divine right, and obtaining his authority from above the acknowledged no natural rights in the individual. If it was his pleasure to give to his people a wide room for individual activity, the subject had no occasion for complaint. But he could not raise any effective opposition to the pleasure of the ruler, if he should see fit to impose numerous restrictions, all tending to oppress the weaker for the benefit of the stronger.

But the divine right of kings began to be questioned, and its hold on the public mind was gradually weakened, until, finally, it was repudiated altogether, and the opposite principle substituted,

[1] Christopher Gustavus Tiedeman, *A Treatise on the Limitations of Police Power in the United States* (St. Louis, MO: The F.H. Thomas Law Book Co., 1886), v–viii.

that all governmental power is derived from the people; and instead of the king being the vicegerent of God, and the people subjects of the king, the king and other officers of the government were the servants of the people, and the people became the real sovereign through the officials. *Vox populi, vox Dei,* became the popular answer to all complaints of the individual against the encroachments of popular government upon his rights and his liberty. Since the memories of the oppressions of the privileged classes under the reign of kings and nobles were still fresh in the minds of individuals for many years after popular government was established in the English speaking world, content with the enjoyment of their own liberties, there was no marked disposition manifested by the majority to interfere with the like liberties of the minority. On the contrary the sphere of governmental activity was confined within the smallest limits by the popularization of the so-called *laissez-faire* doctrine, which denies to government the power to do more than to provide for the public order and personal security by the prevention and punishment of crimes and trespasses. Under the influence of this doctrine, the encroachments of government upon the rights and liberties of the individual have for the past century been comparatively few. But the political pendulum is again swinging in the opposite direction, and the doctrine of governmental inactivity in economical matters is attacked daily with increasing vehemence. Governmental interference is proclaimed and demanded everywhere as a sufficient panacea for every social evil which threaten the prosperity of society. Socialism, Communism, and Anarchism are rampant throughout the civilized world. 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 daily 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, and the most extreme of them insist upon the assumption by government of the paternal character altogether, abolishing all private property in land, and making the State the sole possessor of the working capital of the nation.

Contemplating these extraordinary demands of the great army of discontents, and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any I before experienced by man, the absolutism of a democratic majority.

The principal object of the present work is to demonstrate, by a detailed discussion of the constitutional limitations upon the police power in the United States, that under the written constitutions, Federal and State, democratic absolutism is impossible in this country, as long as the popular reverence for the constitutions, in their restrictions upon governmental activity, is nourished and sustained by a prompt avoidance by the courts of any violations of their provisions, in word or in spirit. The substantial rights of the minority are shown to be free from all lawful control or interference by the majority, except so far as such control or interference may be necessary to prevent injury to others in the enjoyment of their rights. The police power of the government is shown to be confined to the detailed enforcement of the legal maxim, *sic utere tuo, ut alienum non laedas.*

If the author succeeds in any measure in his attempt 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, he will feel that he has been amply requited for his labors in the cause of social order and personal liberty.

Benjamin N. Cardozo, The Nature of the Judicial Process *(1921)*[2]

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. . . [W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends.

[2] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921), 66–93.

From history and philosophy and custom, we pass, therefore, to the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its outlet and expression in the method of sociology. The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. . . . I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance. . . .

I have said that judges are not commissioned to make and unmake rules at pleasure in accordance with changing views of expediency or wisdom. . . . Mr. Justice Holmes has summed it up in one of his flashing epigrams: "I recognize without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court." . . . That is why in our own law there is often greater freedom of choice in the construction of constitutions than in that of ordinary statutes. Constitutions are more likely to enunciate general principles, which must be worked out and applied thereafter to particular conditions. What concerns us now, however, is not the size of the gaps. It is rather the principle that shall determine how they are to be filled, whether their size be great or small. The method of sociology in filling the gaps, puts its emphasis on the social welfare.

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I speak first of the constitution, and in particular of the great immunities with which it surrounds the individual. No one shall be deprived of liberty without due process of law. Here is a concept of the greatest generality. Yet it is put before the courts *en bloc*. Liberty is not defined. Its limits are not mapped and charted. How shall they be known? Does liberty mean the same thing for successive generations? May restraints that were arbitrary yesterday be useful and rational and therefore lawful today? May restraints that are arbitrary today become useful and rational and therefore lawful tomorrow? I have no doubt that the answer to these questions must be yes. There were times in our judicial history when the answer might have been no. Liberty was conceived of at first as something static and absolute. The Declaration of Independence had enshrined it. The blood of Revolution had sanctified it. The political philosophy of Rousseau and of Locke and later of Herbert Spencer and of the Manchester school of economists had dignified and rationalized it. *Laissez faire* was not only a counsel of caution which statesmen would do well to heed. It was a categorical imperative which statesmen, as well as judges, must obey. . . . The century had not closed, however, before a new political philosophy became reflected in the work of statesmen and ultimately in the decrees of courts. . . Courts know today that statutes are to be viewed, not in isolation or *in vacua*, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions, as revealed by the labors of economists and students of the social sciences in our own country and abroad. The same fluid and dynamic conception which underlies the modern notion of liberty, as secured to the individual by the constitutional immunity, must also underlie the cognate notion of equality. No state shall deny to any person within its jurisdiction "the equal protection of the laws." Restrictions, viewed narrowly, may seem to foster inequality. The same restrictions, when viewed broadly, may be seen "to be necessary in the long run in order to establish the equality of position between the parties in which liberty of contract begins." . . .

From all this, it results that the content of constitutional immunities is not constant, but varies from age to age. "The needs of successive generations may make restrictions imperative today, which were vain and capricious to the vision of times past."

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Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good. What that regulation shall be, every generation must work out for itself. . . . Men are saying today that property, like every other social institution, has a social function to fulfill. Legislation which destroys the institution is one thing. Legislation which holds it true to its function is quite another. That is the dominant theme of a new and forceful school of publicists and jurists on the continent of Europe, in England, and even here. . . .

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Some critics of our public law insist that the power of the courts to fix the limits of permissible encroachment by statute upon the liberty of the individual is one that ought to be withdrawn. . . . It means, they say, either too much or too little. If it is freely exercised, if it is made an excuse for imposing the individual beliefs and philosophies of the judges upon other branches of the government, if it stereotypes legislation within the forms and limits that were expedient in the nineteenth or perhaps the eighteenth century, it shackles progress, and breeds distrust and suspicion of the courts. If, on the other hand, it is interpreted in the broad and variable sense which I believe to be the true one, if statutes are to be sustained unless they are so plainly arbitrary and oppressive that right-minded men and women could not reasonably regard them otherwise, the right of supervision, it is said, is not worth the danger of abuse. . . . The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always to reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.

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