1990

Historism in Late Nineteenth Century Constitutional Thought

Stephen Siegel
ARTICLES

HISTORISM IN LATE NINETEENTH-CENTURY CONSTITUTIONAL THOUGHT

STEPHEN A. SIEGEL*

It were far better, as things now stand, to be charged with heresy, than to fall under the suspicion of lacking historical-mindedness, or of questioning the universal validity of the historical method.†

Table of Contents

I. INTRODUCTION ............................................................... 1433
II. HISTORISM ...................................................................... 1437
III. THE COMMENTATORS .................................................. 1452
   A. John Norton Pomeroy.................................................. 1453
      1. POMEROY’S PRIVATE LAW JURISPRUDENCE ............ 1455
         a. Pomeroy’s Municipal Law ..................................... 1455
         b. Pomeroy’s later private law writings ..................... 1464
         c. Conclusion: historism in tension with natural law .................................................. 1467
      2. POMEROY’S CONSTITUTIONAL JURISPRUDENCE ...... 1469
         a. Pomeroy’s Constitutional Law ................................. 1469
            (i) Pomeroy’s discussion of constitutional theory ................................................. 1470
            (ii) Pomeroy’s discussion of the permanence of the Union ................................. 1472
            (iii) Pomeroy’s discussion of constitutional interpretation ..................................... 1476

* Professor of Law, DePaul University. Over the years that this Article has been in progress, I acquired a large number of debts, the most prominent of which are to Susan Bandes, Robert Bone, Erwin Chemerinsky, Maria O’Brien Hylton, Sanford Levinson and Dorothy Ross. They all collegially and constructively criticized various parts of former drafts. I hope I have been a sensitive listener; they certainly are not responsible for remaining errors in this Article’s analysis or conclusions. I also thank the Faculty Research Fund of DePaul University College of Law for its support.

† A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 14 (1885)
B. Thomas McIntyre Cooley

1. Cooley's Private Law Jurisprudence
   a. Cooley's philosophy of law
   b. Cooley's common law thought
   c. Conclusion: historism ascendant

2. Cooley's Constitutional Jurisprudence
   a. Cooley's theory of constitutional law
   b. Cooley's theory of American constitutional law
   c. Cooley's theory of constitutional interpretation
   d. Cooley's practice of constitutional interpretation
      (i) Cooley's discussion of the phrase "legislative power"
      (ii) Cooley's discussion of the power of American legislatures to control the charges of private enterprise
   e. Conclusion: historism ascendant

C. Christopher Gustavus Tiedeman

1. Tiedeman's Private Law Jurisprudence
   a. Tiedeman's Unwritten Constitution
   b. Tiedeman's later private law writings
   c. Conclusion: historism in tension with legal positivism

2. Tiedeman's Constitutional Jurisprudence
   a. Tiedeman's Unwritten Constitution
      (i) Tiedeman's constitutional theory
      (ii) Tiedeman's analysis of constitutional law
         (a) Tiedeman on the contract clause
         (b) Tiedeman on the tenth amendment
         (c) Tiedeman on natural rights
      (iii) Tiedeman's normative theory
   b. Tiedeman's later constitutional law writings
   c. Conclusion: historism in tension with legal positivism

IV. Conclusion: From Natural Law to Historism to Legal Positivism
I. INTRODUCTION

Ever since Dean Pound's\(^1\) and Professor Corwin's\(^2\) seminal studies, it has been a truism of American constitutional history that the early proponents\(^3\) of laissez-faire constitutionalism\(^4\) grounded them-

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2. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 247-54 (1914); Corwin, *The 'Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 365, 382-83, 395-409 (1929). In *E. Corwin, Liberty Against Government* xi-xii (1948), Corwin says that the purpose of these articles was to account for the rise of substantive due process. Pound and Corwin did not originate this observation. See, e.g., McMurtrie, *A New Canon of Constitutional Interpretation*, 41 AM. L. REV. 1, 8-9 (1893); McMurtrie, *The Jurisdiction to Declare Void Acts of Legislation*, 41 AM. L. REV. 1093, 1095 (1893); Lewis, *The Proper Canon of Interpretation of Bills of Rights in a Written Constitution*, 41 AM. L. REG. 782, 783-84 (1893); *infra* text accompanying note 508. Still, Pound's and Corwin's work became the standard references for the notion and seem to have established its authoritative for subsequent scholars.


Thus, at present, it is a truism that throughout its career laissez-faire constitutionalism was an aspect of natural-law thinking.

This Article disputes the truism only with regard to the doctrine's early proponents because the evidence it draws from is limited to them. It speaks of the time period from roughly 1865 to 1900. It does not discuss the jurisprudence of those who carried laissez-faire jurisprudence forward from 1900 to 1937. Thus, this Article sheds no light on the validity of the truism for the conservative jurists who inherited and adhered to the already established doctrine for another two generations. But see Siegel, *Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 250-59, 262 (1984) (discussing survival of laissez-faire constitutionalism in the rate regulation context in the 1920s and 1930s) [hereinafter Siegel, *Understanding*].

Occasionally a scholar traces laissez-faire constitutionalism, in whole or in part, to a constitutionalization of the common law. See, e.g., L. TRIBE, *supra*, at 562; Balkan, *The Footnote*, 83 NW. U.L. REV. 275, 287, 295 (1989). This Article suggests that this claim is closer to the mark than the dominant truism and seeks not only to demonstrate that it is so, but also to explicate the jurisprudence that underlies it. See *infra* text accompanying notes 455-61, 691.

4. Laissez-faire constitutionalism describes the approach to constitutional law which appeared in legal commentary and judicial dissents soon after the Civil War, which began to influence the decisions of state courts in the 1880s and that dominated the Supreme Court from 1890 to 1937. Laissez-faire constitutionalism overturned many governmental regulations of private property. It struck down social welfare legislation in order to protect the free market economy from governmental control. See, e.g., L. TRIBE, *supra* note 3, at 560-68. See also *infra* note 15 (discussing the doctrine further).

Historians used to attribute laissez-faire constitutionalism to the judges' fear of the rising tide of socialism and their inbred sympathy for the interests of the wealthy elite. See, e.g., A. Paul, *Conservative Crisis and the Rule of Law: Attitudes of the Bar and Bench*, 1887-1895 (1969); B. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (1942). In the past 25 years, a revisionist historiography has appeared, which attributes the doctrine to the anachronistic application of the equal rights principles of Jacksonian democracy and the free labor ideology of Civil War abolitionism to
selves in natural-law jurisprudence.\(^5\) Unfortunately, this truism is an oversimplification that limits our understanding of *Lochner*-era jurisprudence.\(^6\)

Without doubt, many of the early proponents of laissez-faire constitutionalism\(^7\) believed in the reality of natural law.\(^8\) By and large, they believed there existed a divinely ordained, unchanging and uni-

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\(^5\) By “natural-law jurisprudence,” this Article means any jurisprudence grounded in the belief that humanity has an essential nature and that principles of social and governmental conduct may be deduced from that nature. In this Article, natural-law jurisprudence is a form of rationalist moral science that involves the claim of direct intuitive access to, or at least recognition of, the foundation principles of morality and their implications. See infra text accompanying note 52 (discussing rationalist moral science). It is also a teleological science in that it involves claims concerning the appropriate ends of humankind but leaves it to the individual's free will to pursue those ends.

Thus natural law, as used here, encompasses a great variety of more particular schools of thought. In particular, it encompasses schools that trace their roots to St. Thomas' theologically informed speculations upon humankind's God-given nature, to John Locke's secularly informed speculations upon humankind in a state of nature and to Francis Lieber's scientifically informed speculations upon humankind's biological nature. See, e.g., H. ROMMEN, THE NATURAL LAW 3-134 (T. Hanley trans. 1949) (reviewing various schools of rationalistic natural-law jurisprudence); L. STRAUSS, NATURAL RIGHT AND HISTORY (1953) (same); F. LIEBER, MANUAL OF POLITICAL ETHICS 59, 101-02 (1838) (referring to humankind's physical and mental makeup) [hereinafter F. LIEBER, MANUAL]; F. LIEBER, ESSAYS ON PROPERTY AND LABOR AS CONNECTED WITH NATURAL LAW AND THE CONSTITUTION OF SOCIETY 27-28 (1841) (same) [hereinafter F. LIEBER, ESSAYS]. In short, this Article conceives natural-law jurisprudence as a rationalist enterprise that is heavily influenced by traditional Christian views of the ends of human life. Yet this Article's definition of natural law as a Christianized, rationalistic moral science is not the only definition of natural law. See infra text accompanying notes 696-99. This Article's definition of natural law is defended, and the implications of there being other plausible definitions that encompass other particular schools of natural-law thought is discussed, at infra text accompanying notes 694-705.

\(^6\) Laissez-faire constitutionalism is also known as *Lochner*-era jurisprudence after the landmark case in which the Supreme Court voided a statute regulating maximum hours that bakers could work. See *Lochner v. New York*, 198 U.S. 45 (1905).

\(^7\) This Article shows that Christopher Tiedeman, one of the most prominent formulators of the doctrine, did not accept the reality of natural law. See infra text accompanying notes 507, 641-58. A. Lawrence Lowell, professor of government and president of Harvard University, was another pro-laissez-faire constitutionalist who entirely repudiated natural-law thinking. See A. LOWELL, THE THEORY OF THE SOCIAL COMPACT, in ESSAYS ON GOVERNMENT 1, 8-19, 136, 182-88 (1889) [hereinafter A. LOWELL, Theory].

\(^8\) The body of this Article will support this claim and the claims in the remainder of the Introduction.
versally applicable body of moral precepts. They further believed that these precepts were cognizable by human reason in broad outline, if not complete detail. Nevertheless, these same jurists also accepted the distinction between natural law and positive law. They regarded their task as the study and enunciation of the latter, not the former. The originators of laissez-faire constitutionalism adhered to the doctrine that law expressed the will of an earthly, not divine, sovereign, and they claimed to describe what American constitutional law was, not what it should be. They accepted, in short, the jurisprudence of legal positivism as well as the reality of natural law.

Most fundamentally, however, the originators of laissez-faire constitutionalism grounded themselves in a third mode of jurisprudence: a jurisprudence which this Article calls “historism.” Historism conceived law as an evolving product of the mutual interaction of race, culture, reason and events. Moreover, historism taught that objective legal principles were discernible through historical studies, not rationalistic introspection. Today, historism is a discredited and largely

9. Not all early laissez-faire constitutionalists who believed in natural law and thought it cognizable by the human intellect agreed that it was cognizable through the methodology of rationalism. See, e.g., infra text accompanying notes 192-200, 421-28.

10. Legal positivism is a jurisprudence that traces itself back to T. HOBBES, LEVIATHAN (C. MacPherson ed. 1968) (1st ed. 1642). It rose to prominence in the late eighteenth and early nineteenth century with the writings of Jeremy Bentham and John Austin. See, e.g., J. BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 83-103 (W. Harrison ed. 1948) (1st ed. 1776); 1 J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1-27 (1970) (1st ed. 1861). Legal positivism is most identified with the tenets that law and morals are wholly separate studies, and that law is wholly determined by the will of a nation's political sovereign.

11. Historism is a preexisting, but fairly obsolete, word that this Article revives and gives a subtly different meaning from that which it bore previously. In the early twentieth century, historism was used as a synonym of “historicism.” This usage of historism has generally disappeared. See Lee & Beck, The Meaning of “Historicism,” 59 AM. HIST. REV. 568, 568 n.1 (1954). Historism and its relation to historicism is discussed infra notes 12, 84 and text following note 719. I use the term “historism” to emphasize the pseudo-scientific pretensions of this philosophy.

In the 1960s, two scholars used the term “historism” to stand for the nineteenth, but not twentieth century, phase of “historicism.” See E. KAHLER, THE MEANING OF HISTORY 161-77, 186 (1964); Iggers, The Idea of Progress: A Critical Reassessment, 71 AM. HIST. REV. 1, 5-17 (1965). It was also used in the translation of Friedrich Meinecke's study of the origin of historicism. F. MEINECKE, HISTORISM: THE RISE OF A NEW OUTLOOK (J. Anderson trans. 1972). The distinction between nineteenth- and twentieth-century historicism and their relation to historism is discussed infra note 84 and text following note 719.

12. Historism is further defined and discussed infra text accompanying notes 17-84 and text following note 719. Nonetheless, it is important to emphasize at the outset that “historism” is related to, but distinct from, the mode of thought that scholars refer to under the rubric “historicism.” Unfortunately, historicism's and historicism's conceptual and terminological relationship is sufficiently close to threaten a good deal of confusion. An attempt to allay the confusion through further discussion of historicism and its relationship to historism is postponed until historism has been fully explicated. See infra note 84 and text
forgotten\textsuperscript{14} mode of thought. Yet it flourished in the nineteenth century. Laissez-faire constitutionalism was, of course, the product of many factors. But historism was its central jurisprudential determinant.

This Article explores the relation of historism and laissez-faire constitutionalism through a study of three prominent late-nineteenth-century constitutional commentators: John Norton Pomeroy, Thomas McIntyre Cooley and Christopher Gustavus Tiedeman. All three of these scholars supported laissez-faire constitutionalism.\textsuperscript{15} Two of them, Cooley and Tiedeman, are regarded as the preeminent formulators of

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15. Consider, for example, that many recent legal historians observe that late-nineteenth-century legal scholars devoted themselves largely to historical studies but do not fully explicate the normative basis for this and its connection to general social thought. See, e.g., Gordon, Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography, 10 L. & SOC. REV. 9, 15-17 (1975); Grey, Langdell's Orthodoxy, 45 U. Pitt. L. Rev. 1, 28-32 (1983). But see M. Reimann, Nineteenth Century German Legal Science (unpublished manuscript on file with the author, discussing German historical jurisprudence in terms of a broader belief system). Consider also that no less a scholar of American thought than Morton White seems to have overlooked it. See Ross, supra note 13, at 909. The importance of historism in nineteenth-century American social thought is indicated by Professor Ross' seminal article. Id. Her study has influenced Professors G. Edward White and William LaPiana. See White, Recovering Coterminous Power Theory: The Lost Dimension of Marshall Court Sovereignty Cases, 14 Nova L. Rev. 155, 161 n.29 (1989); LaPiana, Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America, 20 Suffolk U.L. Rev. 771, 788-89 (1986). I am indebted to her article. See also P. Stein, Legal Evolution (1980) and Elliott, The Evolutionary Tradition in Jurisprudence, 85 Colum. L. Rev. 38, 40-46 (1985). Both these works discuss historist legal scholarship without putting it in its full context.

16. Pomeroy's, Cooley's and Tiedeman's support for laissez-faire constitutionalism is indicated infra text accompanying notes 276-92, 469-88, 658. Support for the doctrine does not mean they advocated the "night watchman" state. Laissez-faire constitutionalism was far more supportive of the regulatory state than current libertarian doctrine. See, e.g., L. Tribe, supra note 3, at 567-68; R. Epstein, Takings: Private Property and the Power of Eminent Domain x, 131-34, 176-80, 186-88, 249-55, 269-73, 295-303 (1983) (arguing against zoning, rent control, workers' compensation laws and progressive taxation, all of which were upheld during the Lochner era). Cooley, for example, was an activist chair of the Interstate Commerce Commission. See infra sources cited in note 305. Tiedeman, however, was far closer to a libertarian position than the others. See infra note 305. Thus this Article uses the term "laissez-faire constitutionalism" simply because it is the currently popular label for a period of constitutional law. It does not imply a particular view regarding the substantive policies pursued during that period. Indeed, this Article gives some understanding of why that era was far more preregulatory than is generally realized.
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that doctrine. This Article shows that these commentators grounded their constitutionalism in legal positivism as much as in natural law. Moreover, it shows that historism mediated their conflicting jurisprudential commitments. Historism was the linchpin of their constitutional thought.

To be sure, Pomeroy's, Cooley's and Tiedeman's constitutional views differed in important respects. Pomeroy traced legal principles to God's eternal reason far more frequently than either Cooley or Tiedeman. Tiedeman understood law as the outcome of interest group conflict in a way that Pomeroy and Cooley did not. Cooley centered his analyses more exclusively on history than the others. But in the main, Pomeroy, Cooley and Tiedeman agreed, on the one hand, that a nation's positive law determined the extent to which natural law was a part of its constitutional order. On the other hand, they agreed that a nation's positive law was not an arbitrary creation. They thought that positive law was itself ultimately determined by principles of "ethnic spirit" that were revealed through the historical study of the nation and its dominant racial group.

Part II of this Article describes historism as a style of normative social theory and discusses its rationalist, positivist and teleologic branches. Part III analyzes the private and public law jurisprudence of the three named scholars, showing the varying ways they blended natural law, legal positivism and historism into a theory of constitutional law. Part IV discusses three implications of this Article for a revision of our understanding of Lochner-era jurisprudence.

II. HISTORISM

By "historism," this Article means a network of assumptions and aspirations that undergirded and significantly influenced most

16. See infra text accompanying notes 316-19, 503. They are the leading scholarly formulators. Justices Field and Bradley are the leading judicial formulators. Historism on the bench is beyond the scope of this Article. But see infra text accompanying notes 299, 472 & 479 (discussing Justice Field's opinions).

17. Many of the references in this section are to works discussing "historicism." Since, as will be discussed infra note 84, "historism" encompasses the early phase of "historicism," these references—all of which will be found to discuss historicism's early phase—are appropriate. Likewise, many references in this section are to Ross, supra note 13, who uses the term "prehistoricism." As will be discussed infra note 84, "historism" encompasses all the theorists which Ross says are "prehistorist." Consequently, the references are appropriate.

18. Another way of characterizing historism is as a historical consciousness, or as a philosophy of history, that in the nineteenth century distinctly but diffusely influenced the theory and practice of social inquiry. Given the variety of modes of social thought that this Article groups together as historist (see infra text accompanying notes 50-76) it would be an
branches of nineteenth-century social thought. Historism's central claim was that historical studies reveal objective social norms and moral values. This claim rested upon a host of tenets, the most important of which were: (1) that societies, social norms and institutions are the outgrowth of continuous change effected by secular causes; (2) that the universe has an ethical meaning that is accessible to human intelligence; and (3) that societies, social norms and institutions evolve according to moral ordering principles that are discoverable through historical studies.

These tenets are a diverse lot. The first tenet is a fundamental and distinctive assumption of modern social thought. Until rather recent times, social theorists viewed the world's disparate cultures as relatively static. They thought fundamental social change was rare and usually

overstatement to say that historism was a philosophy of history. Rather, historism embraced a variety of philosophies of history which were so related that they may be grouped together for present purposes. Historism focuses on a common thread in the work of a broad group of social theorists.

As a philosophy of history, historism was "speculative" rather than "critical." (That is, all the particular philosophies of history that historism encompassed were speculative.) Speculative philosophies of history attempt to understand the ultimate nature and meaning of historical processes and the course of human events. Critical philosophies of history study, clarify, prescribe the logical, conceptual and epistemological basis of the historian's work. For an overview of the distinction between speculative and critical philosophies of history, and the history of each type, see 6 ENCYCLOPEDIA OF PHILOSOPHY 247-54 (1968). For general histories of speculative history, see E. KAHLER, supra note 11; R. COLLINGWOOD, THE IDEA OF HISTORY (1956).

19. See, e.g., Iggers, supra note 11, at 5-9; infra text accompanying notes 51-76. From this remark, readers may anticipate that historism and natural law are not entirely distinct concepts. See infra text accompanying notes 703-05 (discussing relationship between historism and natural law).

20. See, e.g., Ross, supra note 13; Lee & Beck, supra note 11; M. MANDELBAM, supra note 13, at 41-141; Historicism, in 2 DICTIONARY HIST. OF IDEAS 456-64 (1973); Historicism, in 4 ENCYCLOPEDIA OF PHILOSOPHY 22-25 (1967). The remarks in these sources apply to early as well as to late historicism and, therefore, to historism as it is defined in this Article. See supra note 17; infra note 84.

21. See, e.g., Iggers, supra note 11, at 1-9.


23. By modern social thought, this Article means the dominant mode of social inquiry in America since the early twentieth century. The distinctive characteristic of this mode of thought is discussed infra text accompanying notes 23-26, 84 and text following note 719.

24. On the comments in this paragraph, see, e.g., Ross, supra note 13, at 910-11; J. POCOCK, THE MACHIAVELLIAN MOMENT 3-80 (1975) [hereinafter J. POCOCK, MACHIAVELLIAN]; J. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 30-69 (1967) (discussing England); E. KAHLER, supra note 11; Meyerhoff, supra note 22, at 1-25. Polybius' view of history as circular is included is as an essentially static vision. See S. GOULD, TIME'S
resulted from divine revelation or intervention. Only in the early eighteenth century did theorists begin to perceive societies and social norms as continuously experiencing qualitative change due to mundane causes. Only in the early nineteenth century did this perception become an axiom of Western social theory. The perception that social and moral phenomena are dynamic and a focus on their secular determinants is a basic facet of nineteenth- and twentieth-century social thought, distinguishing it from the previous two-and-one-half millennia of social philosophy.

In contrast, the second tenet is a fundamental and distinctive presupposition of traditional social theory. At least since Socrates, the ethical meaningfulness of the universe had been an axiom of Western social theory. Most modern social theorists assume, however, that the universe has no discernible moral order or purpose. Indeed, the hallmark distinction between traditional and modern social thought is their differing positions on the existence of moral reality. It signifies as it creates the immense gulf that separates modern from traditional social thought.

The third tenet is unique to historism. Modern social theory doubts the existence of moral reality. A fortiori, it does not hold that historical studies may discern it. Modern social theorists use historical studies to discern the “differentness” of the past and the relativity of social norms. They say historical studies may describe but never prescribe social phenomena. In contrast, traditional social theory posits the existence of moral reality. Traditional social theorists, however, sought to investigate moral reality through the exegesis of sacred texts or through introspection. That is, traditional social inquiry grounded itself...
in theology or rationalism, not history. History, most traditional theorists said, could exemplify truths taught by revelation or right reason—but historical studies were powerless to determine moral truth. In sum, both traditional and modern social thought concur in the view that historical studies are inapt to determine objective social and moral values. Historism's view that historical studies are the organon of normative inquiries is entirely unique. The most distinctive feature of historist thought is the study of history to discover the normative principles of social change and to discern objective norms amid the social flux.

As a philosophical system, historism is a unique amalgam of traditional and modern social thought. In historical context, however, it was a transitional doctrine that emerged with the collapse of traditional, and disappeared with the rise of modern, social thought. In the late eighteenth century, Western social theorists still conceived the universe as essentially static and divinely ordained. By the early twentieth century, they conceived it as dynamic and purposeless. Historism, which depicts the universe as dynamic yet providentially consecrated, mediated this fundamental transformation. Historism was a failed attempt to impose traditional norms upon a social universe that was visibly secularizing, commercializing, urbanizing and industrializing.

Of course, the social theorists who originated and elaborated historism did not think of it as a mere bridge philosophy. They saw historism as a prescient interpretation of the changes going on about them—changes too pronounced and beneficial to support visions of Western society as declining, static or dependent upon the Second Coming for any real improvement. In addition, they saw historism as a

31. Rationalism as a mode of social theory is discussed infra text accompanying notes 52-56.
32. Grotius is perhaps the most famous example of a traditional rationalistic theorist who uses history to determine truth. See infra note 56.
33. As has been pointed out many times, Darwin's theory of evolution is paradigmatic of modern thought not because it pictures species as evolving, but because it explained their evolution by natural selection from accidental variations. The variations, therefore, are random and not purposeful or meaningful. See, e.g., J. Barzun, supra note 28, at 10-11; L. Eiseley, Darwin's Century: Evolution and the Men Who Discovered It 327-34 (1961); Hovenkamp, Evolutionary Models in Jurisprudence, 64 Tex. L. Rev. 645, 648-51 (1985) (emphasizing natural selection).
34. For an analysis of the stresses in American society, see G. White, The Marshall Court and Cultural Change, 1815-1835 12-48 (1988); R. Wiebe, The Search for Order, 1877-1920 1-75 (1967); T. Haskell, The Emergence of Professional Social Science 24-47 (1977); Ross, supra note 13, at 910, 924, 926-27. This observation about historism applies to the great majority of social theorists who exemplify its tenets. A few, such as Karl Marx, used historism to suggest revolutionary norms that they considered objective moral ends for society.
35. Iggers, supra note 11, at 1-7, and Ross, supra note 13, at 911-13 relate historism to the idea of progress. G. White, supra note 34, at 5, 50, 68, 671 maintains that antebellum
laudable departure from the Enlightenment's increasingly sterile preoccupation with abstract "man," a preoccupation they held responsible for the French Revolution's radicalism, social tumult and terror. 

Most important, these social theorists saw historism as a convincing synthesis of major developments in a wide range of late eighteenth and early nineteenth-century physical and social sciences. The new sciences of uniformitarian geology, nebular astronomy and evolutionary biology taught historist theorists that physical phenomena qualitatively changed through slow accretion and the constant operation of divine law. Montesquieu's political science and the Scottish Enlightenment's social anthropology showed them that advanced societies varied with their physical environment and reached their present form by progressing through distinct stages. Sir William Jones' researches into philology revealed to them that Europe's diverse languages steadily evolved from primitive forms first spoken by prehistoric Aryans in the Indus River Valley of northwestern India. In other

American theorists were concerned with decay from the ideal social form created by the founding generation. This view is criticized in Siegel, Book Review, 67 Tex. L. Rev. 903, 928 n.155 (1989).

Western theorists tended to see their civilization as the only one progressing. See, e.g., H. Maine, Ancient Law 13-15 (Everyman's Libr. ed. 1917) (1st ed. 1861). Or they viewed it as the civilization towards which the world was progressing. See G. Bancroft, The Necessity, the Reality, and the Promise of the Progress of the Human Race, in Literary and Historical Miscellanies 481, 506-09 (1855); J.J. Burgess, Political Science and Comparative Constitutional Law 3, 37-39 (1891). For this reason, their notion of historist progress supported and expressed no small amount of Western chauvinism, superiority and domination of non-Western peoples.

36. J. Randall, Jr., The Making of the Modern Mind 421-25, 501-07 (1963); P. Stein, supra note 14, at 57; R. Collingwood, supra note 18, at 90-93; E. Cassirer, The Problem of Knowledge: Philosophy, Science, and History since Hegel 212 (W. Woglon & C. Hendel trans. 1950) (commenting on shift from considering phenomena in isolation to focusing on their interdependence). Consider also that unlike prior eras, the Enlightenment attempted to work out complete bodies of ethics and law from speculation about man's universal nature. See H. Rommen, supra note 5, at 75-76. Thus, the rise of historism represented a retreat from unusually broad claims about the power of abstract speculation.

37. H. Maine, supra note 35, at 53-54; B. Brown, American Conservatives: The Political Thought of Francis Lieber and John W. Burgess 82, 87-88, 90-91, 100 (1951) (discussing Lieber); White, Translator's Introduction: On History and Historicism, in C. Anto, From History to Sociology xviii-xix (H. White trans. 1959); H. Rommen, supra note 5, at 80, 115; J. Randall, Jr., supra note 36, at 403; P. Novick, That Noble Dream: The "Objectivity Question" and the American Historical Profession 27 (1988). Thus even at its origins, historism was employed to support conservative political sentiments. See J. Randall, Jr., supra; H. Rommen, supra; P. Novick, supra; P. Stein, supra note 14, at 89, 112-13 (saying turn to history was "[t]o counteract Benthamism").


39. See, e.g., P. Stein, supra note 14, at 15-19, 23-50, 54, 56-57, 64, 74, 77, 83, 90; R. Collingwood, supra note 18, at 77-78.

40. See L. Poliakov, The Aryan Myth, A History of Racist and Nationalist
words, even the arcane subject of philology showed historist theorists that refined social practices were not "made" through will or "discovered" through reason: they "grew" through unconscious and uncoordinated popular action.  

Whatever its sources, nineteenth-century social theorists generally shared historism's post-classical but premodern outlook. From its base in social anthropology and philology, historism spread to every one of the social sciences: law, ethics, politics.

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41. The metaphor of growth is discussed generally in M. MANDELBAUM, supra note 13, at 47-48.

42. See, e.g., G. GOOCH, HISTORY AND HISTORIANS IN THE NINETEENTH CENTURY 42 (1913); P. STEIN, supra note 14, at x; M. MANDELBAUM, supra note 13, at 4; E. CASSIRER, supra note 36, at 118-327; ROSS, supra note 13; MANHEIM, HISTORICISM, in ESSAYS ON THE SOCIOLOGY OF KNOWLEDGE 84-86 (P. Kecskeméti ed. 1952).

43. See, e.g., F. SAVIGNY, supra note 40; H. MAINE, supra note 35; P. STEIN, supra note 14. It should be noted that nineteenth-century legal studies were not only a part of that century's historism, they were at its forefront. Montesquieu's Spirit of the Laws (written in 1748) and Maine's Ancient Law (written in 1861) are celebrated historist studies of legal systems that inspired legal and nonlegal scholars. Savigny's historist writings on German and Roman law were renowned throughout the West. They not only established him as the "greatest" European jurist of his time, but they helped crystallize the entire shift from rationalism to historism as the basic approach to Western social theory. See, e.g., P. STEIN, supra, at 15-19, 56-65, 87-101; G. GOOCH, supra note 42, at 47-53; J. BURROW, EVOLUTION AND SOCIETY: A STUDY IN VICTORIAN SOCIAL THEORY 137-78 (1968); UTZ, MAINE'S ANCIENT LAW AND LEGAL THEORY, 16 CONN. L. REV. 821, 822-24, 838-52 (1984); ELLIOTT, supra note 14, at 40-45; VINogradoff, The Teaching of Sir Henry Maine, 20 L.Q. REV. 119 (1904), reprinted in 2 THE COLLECTED PAPERS OF PAUL VINOGRA DOFF 173-89 (1928). In Professor Beale's view:

[T]he impulse given to legal study by the work of Savigny and his school has in the last generation spread over the civilized world and profoundly influenced its legal thought. . . . In England a small but important school of legal thinkers have followed the historical method, and in the United States it has obtained a powerful hold. . . . We have abandoned the subjective and deductive philosophy of the middle ages, and we learn from scientific observation and from historical discovery.

Beale, The Development of Jurisprudence During the Past Century, 18 Harv. L. Rev. 271, 283 (1905).

In addition, it should be noted that many legal philosophies not usually thought of as historist were decisively influenced by it. For example, see infra note 64 for an argument that nineteenth-century analytic philosophy was premised upon historist jurisprudence.


45. See, e.g., S. COLLINI, supra note 44, at 183-246; J. BURGESS, supra note 35; Burgess, Political Science and History, in ANN. REP. OF THE AM. HIST. A. 203 (1896). See
sociology, economics, history and philosophy. Social theorists as diverse as Europe's Comte, Hegel, Marx and Spencer, and America's Bancroft, Lieber, Sumner, Adams, Ely and Burgess, shared its general perspective. As this listing indicates, one of historism's strengths was its ability to encompass substantially different schools of thought. However, nineteenth-century social theorists mainly developed historism's implications in three different modalities: rationalist, positivist and teleologic.


46. See A. Small, Origins of Sociology (1924); American Masters of Social Science 177-79 (H. Odum ed. 1927) (discussing Small's view of the history of sociology); 2 J. Randall, Jr., The Career of Philosophy: From the German Enlightenment to the Age of Darwin 479-80 (1965) (discussing Comte); J. Burrow, supra note 43. Sociology, in fact, was founded upon historism by Comte, and elaborated under its aegis by Spencer. See infra notes 50, 62, 64, 73, 78 (sources discussing Spencer and Comte). On the role of historism, see also A. Small, supra.


48. See, e.g., E. Cassirer, supra note 36, at 217-43; Ross, supra note 13.

49. See, e.g., G. Hegel, The Philosophy of History (J. Sibree trans. 1956) (1st Ger. ed. 1837) 8-11; G. Hegel, The Philosophy of Right 4-5, 16-18 (T. Knox trans. 1972) (1st Ger. ed. 1821); H. Schneider, A History of American Philosophy 380-414 (1946) (discussing "genetic social philosophy" and "desperate naturalism"). See generally J. Buckley, supra note 38, at 6 (quoting H. Meyerhoff, Time and Literature 97 (1955) that in the "nineteenth century all the sciences of man ... became 'historical' sciences in the sense that they recognized and employed a historical, genetic, or evolutionary method"); F. Pollock, Oxford Lectures and Other Discourses 41 (1890) (reprint ed. 1970) ("[H]istorical method is not the peculiar property ... of any ... branch of learning. It is the newest and most powerful instrument, not only of the moral and political sciences, but of a great part of the natural sciences, and its range is daily increasing ... "); S. Collini, supra note 44, at 247 (quoting T.E. Cliffe Leslie that "[e]very branch of the philosophy of society, morals and political economy not excepted, needs investigation and development by historical induction ... ").


51. These modalities are ideal types which may be discerned from the perspective of history. They are not distinctions which were apparent to the people who exemplified them. See infra text accompanying notes 77-80. Ross and Saveth, without using these terms,
Rationalistic historism adapted the traditional philosophy of rationalism to the nineteenth century's new outlook. For more than two thousand years, rationalism had taught that through the power of intuitive and discursive reason the mind could recognize self-evident moral principles and deductively elaborate them into a body of objective subtraths.\(^{52}\) In the nineteenth century, rationalist social theorists understood social change as resulting from the mass of humanity's slowly increasing realization and implementation of reason's fundamental truths.\(^{53}\) Traditional rationalists and rationalistic historians differed, however, in that traditional rationalists tended to seek reason's eternal truths through introspection,\(^{54}\) while rationalistic historians tended to seek them through the study of history. Both believed that truth was universal and timeless. But traditional rationalists thought truth was directly accessible through intuitive reason, and rationalistic historians thought it was winnowed slowly from the interaction between human reason and events.\(^{55}\) Thus, traditional rationalists discerned

discuss the first two modalities. Ross, supra note 13, at 915-27; Saveth, supra note 22, at 1-7; Mandelbaum and Iggers, also without using these terms, discuss the latter two modes. M. Mandelbaum, supra note 13, at 41-77; Iggers, supra note 11, at 2-9. See also Randall & Haines, supra note 22, at 23-41 (illustrating all three modalities). Ross, supra, at 915, and Randall & Haines, supra, at 29, also illustrate a fourth modality: theism. Theism conceived that history was developing according to God's plan and saw continual divine intervention in history. This Article has excluded it because none of the legal commentators discussed evidence it, and because it is not fully historicist in that it involves non-secular causation. For an example of a legal theorist who verges on theistic historism, see J. Bishop, The First Book of the Law 128-31, 152-55 (1868) (discussing divine intervention in judicial decisionmaking and legal treatise writing).


55. Indeed, rationalistic historians taught that truth was discernible not by individual
moral reality through an a priori, and rationalistic historists through an a posteriori, method. 56

An example follows to illustrate the distinction between traditional rationalism and rationalistic historism. In discussing the issue of laissez-faire versus regulatory government, both traditional rationalists and rationalistic historists would say that laissez-faire was (or was not) divinely ordained social policy. Traditional rationalists, however, would deduce the conclusion from a few self-evident principles of human nature and morality, whereas rationalistic historists would claim the conclusion was the result of a valid induction from the course of human history. In addition, traditional rationalists might claim to be able to delimit the entire theory. Rationalistic historists might claim that human understanding and appreciation of the theory was a slow, and quite possibly still unfinished, process. 57

In contrast, positivistic historism grounded itself in the emergent philosophy of positivism. 58 Positivism taught that the mind could induce the laws that governed events from the study of those events. 59 Positivist social theorists understood social change as the product of the constant operation of complexly-interacting laws of social development. 60 It is true that positivism's laws were only the efficient causes—the means, not the ends—of phenomenal reality. 61 But given intellects, no matter how cultivated, but by the common opinions of the masses. See generally G. Bancroft, supra note 53. This tends to support the idea that truth is discovered by the slow contemplation of the lessons of experience rather than direct intuition.

56. See, e.g., H. Maine, supra note 35, at 2 (criticizing the law of nature and social compact theories on these grounds). A few traditional rationalists—Hugo Grotius, for example—were a posteriori in their approach. See P. Stein, supra note 14, at 4 (discussing Grotius). However, Grotius believed that by studying history he could induce the entire body of natural law. Rationalistic historists were more modest in their claims. They thought that although many truths had been discovered, many remained unknown. In addition, they believed, as Grotius and other pre-nineteenth-century rationalists did not, that human progress raised continually new relations with accompanying challenges to determine the "natural" rules for those relations. Traditional rationalists assumed a static society governed by a wholly static body of law.

57. See, e.g., R. Mott, Due Process of Law 559-60, 569-73 (1972) (criticizing as an incorrect application of a valid principle the holding in Lochner v. New York, 198 U.S. 45 (1905) that regulating bakers' hours was not a health measure).


61. See, e.g., J. Mill, supra note 59, at 213 (terming them "physical" rather than "efficient" causes); P. Stein, supra note 14, at 76-77; 2 W. Wallace, Causality and Scientific Explanation 128-41 (1972) (discussing Mill); 2 J. Randall, Jr., supra note 46, at 476-77.
the nineteenth-century assumption of a benevolent God, any statement of what "had to be" had a tendency to be converted into a statement of what "should be." Nineteenth-century positivism frequently crossed the "is-ought" boundary through the implicit assumption that it was revealing the "secondary causes" that God had implanted to govern his creation. In the nineteenth century, many positivist social theorists studied history to induce the inviolable laws that the divinity designed to order social phenomena. By way of illustration, on the

62. See, e.g., R. Hofstadter, supra note 50, at 40-44, 59, 66 (discussing Spencer and Sumner); Iggers, supra note 11, at 3-6; R. Soffer, Ethics and Society in England: The Revolution in the Social Sciences, 1870-1914 15-16 (1978) (discussing assumption that inductively determined laws really were "inherent forces"); B. Kuklick, The Rise of American Philosophy 36-37 (1977); infra note 63.

63. God's will is the "primary" cause. See, e.g., B. Kuklick, supra note 62, at 35-37 (discussing Bowen's belief that the constant operation of His will is the true source of causation); K. Pearson, supra note 59, at 103-10 (describing and criticizing prescientific notions).

Comte, who crystallized positivism as a philosophy, is notorious for using it to cross the "is-ought" boundary. See M. Mandelbaum, supra note 13, at 68-69; R. Aron, Main Currents in Sociological Thought 65-66, 84-85, 100 (R. Howard & H. Weaver trans., 1965). This is true also for Spencer. See R. Hofstadter, supra note 50, at 40 (quoting Spencer that "[m]y ultimate purpose ... has been that of finding for the principles of right and wrong in conduct ... a scientific basis"). Though John Stuart Mill was more circumspect (see J. Mill, supra note 59, at 619-22), he attempted to argue normatively in J. Mill, Utilitarianism 34-63 (1979) (1st ed. 1861). Consider also how Darwin's evolutionary theory was interpreted by the theologically minded Asa Gray, James McCosh and Francis Wharton. R. Hofstadter, supra note 50, at 18-19, 26-29; P. Boller, American Thought in Transition: The Impact of Evolutionary Naturalism, 1865-1900 29-31 (1969); B. Kuklick, supra note 62, at 22-23; F. Wharton, Commentaries on Law 68-70 (1884). Consider also that as late as the early twentieth century, the pragmatist philosopher, John Dewey, trench ed on crossing the is-ought boundary. See M. White, The Revolt Against Formalism 21, 29 (1949) (citing J. Dewey, Logical Conditions of a Scientific Treatment of Morality, reprinted in Problems of Men 211 (1946)).

The gist of the positivist perspective may be illustrated by saying that intuitive reason had claimed that the planets moved in circles because circles were the most perfect shape. Positive study revealed that God designed parabolic orbits. Similarly, reason taught that the economic system required charging a "just price," but positive study revealed that God designed a system governed by self-interest.

64. M. Mandelbaum, supra note 13, at 47-49; 63-76; Ross, supra note 13, at 921-24; P. Stein, supra note 14, at 76-77, 86-91, 98; K. Popper, supra note 13, at 50-54, 73-74 (on inviolable laws); F. Hayek, supra note 13 (same). Hayek calls positivist historism "scientific." F. Hayek, supra, at 15-16, 53-79. Nearly all early positivist social science drew its data from history and was positivistic historism. Consider that this statement applies to such seminal positivists as Comte, Spencer and Marx. See M. Mandelbaum, supra note 13, at 63-76. Consider also that both Auguste Comte and John Stuart Mill, the seminal figures in the formulation of positivist methodology, recommended the use of history in social scientific studies. See J. Mill, supra note 59, at 594-616; id. at 585 (commenting on Comte). Mill thought, on the one hand, that controlled experiments in social studies were impossible, and on the other hand, that history could provide data to be inductively reasoned from according to his four methods of inductive reasoning. See J. Mill, supra, at 594-606.

Finally, consider that nineteenth-century analytical jurists, the most famous positivist school of legal philosophy, drew their "necessary" legal concepts not from reason but from study of the two main "mature" systems of law—the Roman and the English law. Analytic
issue of laissez-faire versus regulatory government, a positivistic historian might claim to have induced from a historical study of the world’s cultures the conclusion that laissez-faire was (or was not) a social policy that all progressive societies did, and had to, adopt in the penultimate stage of their development.65

Teleological historism66 studied history to determine the vital forces immanent in society that drove society towards what it should be.67 Thus, teleological historism drew from both traditional ration-

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65. See, e.g., H. Maine, supra note 35, at 100 (concluding that “[t]he movement of the progressive societies has hitherto been a movement from Status to Contract”) (emphasis in the original). Although Maine is most identified with this adage, the thought it conveys did not originate with him. It was widely shared in the nineteenth century. See, e.g., P. Stein, supra note 14, at 84-85 (quoting J. McClennan); R. Hofstadter, supra note 50, at 7-8 (quoting Sumner).

66. The term “teleological” is drawn from M. Mandelbaum, supra note 13, at 127-34.

67. See id. at 47-61, 127-34; Berlin, supra note 13, at 76-77. For clear examples of teleological historism, see J. Burgess, supra note 35, at 1-48; Burgess, supra note 45; Bryce, The Influence of National Character and Historical Environment on the Development of the Common Law, 31 Rep. A.B.A. 444 (1907); F. Savigny, supra note 40. Both Burgess and Savigny were Hegelians. Teleological historism’s dependence upon the survival of Aristotelian notions of causation is discussed in M. Mandelbaum, supra, at 127-29.
alism and emergent positivism. Like rationalism, teleological historism posited that final causes influenced actual events.68 Accordingly, teleological historism determined the principles and tendencies, not the necessary laws, of social and moral phenomena. Like positivism, however, teleological historism distrusted intuitive reason and sought to discover truth by inducing it from the study of events.69

However, in important respects, teleological historism drew from neither rationalism nor positivism. Unlike rationalism and positivism, teleological historism did not necessarily determine eternal and universal truths. Rationalism sought to determine the teleological truths, and positivism the necessary truths, that applied to all human beings, at all times and in all places. In this respect, nineteenth-century rationalistic and positivistic historism carried on the Enlightenment project of discerning the universal nature or condition of humanity.70 Teleological historism, in characteristic Romantic-era fashion, focused on the variety of humanity.71 Teleological historism did not deny that human beings shared some features of a common nature and had some common ends. Humanity, it conceded, may have started out with one nature or may be tending toward eventual union.72 Teleological historism's minimum assertion was that the world's cultures differed at present because of substantial and durable differences in the character of the world's peoples.73 Consequently, teleological historism taught

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68. This represented a survival of Aristotelian notions of causation. See M. Mandelbaum, supra note 13, at 127-34. The survival of teleological notions of causation into the nineteenth century may seem remarkable from a modern perspective. Nonetheless, it is found in no less a seminal pragmatist philosopher than Charles Sanders Pierce. See R. Wilson, In Quest of Community: Social Philosophy in the United States, 1860-1920 58 (1968).

69. See, e.g., Burgess, supra note 45, at 210.

70. M. Mandelbaum, supra note 13, at 47-48.

71. White, supra note 37, at xviii (discussing Herder).

72. See, e.g., G. Bancroft, The Doctrine of Temperaments, in Literary and Historical Miscellanies 1, 2 (1855) (common origins); G. Bancroft, supra note 35, at 506-08.

73. Historists had a host of explanations for the variety in human nature. Separate creation of the world's races was one explanation. L. Poliakov, supra note 40, at 7-8, 41, 60, 64-65. The influence of disparate environments and the inheritance of acquired characteristics was another. White, supra note 37, at xviii (discussing Herder); Bryce, supra note 67, at 444, 449-51; G. Bancroft, supra note 72, at 2; H. Maine, supra note 35, at 69. The power of habit was another. These explanations were not mutually exclusive. See also G. Bancroft, supra, at 2-6 (relating racial variety to medical theory: the differences in the balance among the six bodily humors).

The influence of different environments and inheritance of cultural characteristics is a notion of evolution that is associated with the pre-Darwinian claims of Lamarck. See Hovenkamp, supra note 33, at 648-49. Not all historists clearly asserted the actual inheritance of acquired characteristics. Some did not specify the mechanism. All that mattered to historists was that conditions had produced a rather permanent and distinctive "common consciousness" among a group of people. See J. Burgess, supra note 35, at 2. Lamarck's view of evolution and inheritance, however, maintained a significant following even to the end of
that each culture was an expression of a different nature and had ends and innate principles that were unique to it.\textsuperscript{74} Holistically conceived subunits of humanity, variously termed "races," "nations" or "peoples," were the central focus of teleological historism.\textsuperscript{75} In short, rationalistic and positivistic historism tended to determine the appropriate or necessary moral precepts of all societies, whereas teleological historism tended to determine the appropriate moral precepts of each society.\textsuperscript{76}

Again, by way of illustration, on the issue of laissez-faire versus regulatory government, some teleologic historians would induce from a study of the history of world's races and cultures the conclusion that laissez-faire was (or was not) the objectively appropriate social policy for all societies at a particular stage of their development. Other teleologic historians would study the history of a particular society (and its predominant racial group) and limit their conclusions to what was


\textsuperscript{74} See, e.g., J. Burgess, supra note 35, at 1-40; G. Bancroft, supra note 72; G. Lee, Historical Jurisprudence 2 (1900) (saying that historical jurisprudence "[i]s essentially a progressive science as the law which it endeavors to comprehend and systematize is progressive and aims with ever-closer approximation to approach the ideals of the race in which it obtains").

\textsuperscript{75} See, e.g., J. Burgess, supra note 35, at 1-48; F. Lieber, Manual, supra note 5, at 6; F. Lieber, Civil, supra note 45, at 21, 40; F. Savigny, supra note 40, at 24-27; Bryce, supra note 67, at 444, 449-51. Race was a centrally important consideration in nineteenth-century social theory. See J. Barzun, Race: A Study in Modern Superstition (1937); L. Poliakov, supra note 40; J. Burrow, supra note 43, at 128-36; P. Novick, supra note 37, at 74-81; J. Gould, The Mismeasure of Man (1981); Hankins, Race as a Factor in Political Theory, in A History of Political Theories 508-48 (C. Merriam & H. Barnes eds. 1924); R. Hofstadter, supra note 50, at 170-200; Blanckaert, On the Origins of French Ethnology: William Edwards and the Doctrine of Race, in Bones, Bodies, Behavior: Essays on Biological Anthropology (G. Stocking, Jr. ed. 1988). The point is that rationalists and positivists were using race to speak of the future development of all mankind. Teleological historians were content to explore individual cultures. For examples of rationalistic and positivistic historists' use of race, see G. Bancroft, supra note 72, at 2-6 (rationalist); infra text accompanying notes 122, 151 (Pomeroy); H. Maine, supra note 35, at 9-14 (positivistic).

The term "race" is used in this Article as it was used (unfortunately) by many nineteenth-century social theorists. As the sources in this note show, many nineteenth-century social theorists believed that humanity was divided into essentially distinct groups endowed with significantly different physical and mental characteristics. Social theorists differed on whether these differences were the product of separate creation or separate development. But whatever the causes, they agreed that the present differences were fairly stable, if not permanent, products of biological differences. These biological differences were not sufficiently pronounced, however, to turn the separate races into separate species.

Perhaps the difference was technical: species could not cross-propagate, while races could. Races, therefore, were variants within species that had the ability to cross-breed despite their significant physical and mental differences. Accordingly, many nineteenth-century social theorists believed that major cultural differences were less the products of nurture than fairly permanent natural differences in the various human subgroups' mental endowments.

\textsuperscript{76} Thus teleological historism was a blend of a traditional belief in a transcendent Christian God, Aristotelian notions of causation and modern perceptions of empiricism and change through time.
objectively appropriate for that society. Neither type of teleologic historian would say that all societies did, or had to, adopt their objectively appropriate social policy. Some teleologic historians would admit that the appropriate social policy for one society did not correspond to that of another.

This division of historism into rationalist, positivist and teleologic modalities is, of course, a statement of ideal types. Whether one or another mode better captures an individual historian social theorist is not always clear. All historians saw truth in history. However, historians often did not indicate explicitly whether the truth they saw in history was taught by history or by right reason. Historists frequently did not indicate distinctly whether the truth they saw in history was a law or a tendency. In addition, many historians acknowledged racial distinctions among the earth’s cultures and studied particular societies without indicating whether the truth they enunciated was applicable to all cultures or only the society under study. Yet this three-fold typology of modalities is useful. It reveals clear distinctions in the thought of some historians, and it reveals tensions, ambiguities and inarticulate assumptions in the thought of others.

In sum, most nineteenth-century social theorists were historians. They recognized that social norms and institutions qualitatively changed over time and that these changes were the product of temporal

77. See, e.g., Ross, supra note 13, at 915-19 (discussing Bancroft); I G. BANCROFT, HISTORY OF THE UNITED STATES OF AMERICA FROM THE DISCOVERY OF THE CONTINENT 3, 605, 611-12 (reprint ed. 1967) (author’s last rev’d ed. 1803). At least one theorist made clear distinctions between the two sources of truth. See F. LIEBER, ESSAYS, supra note 5, at 30; F. LIEBER, MANUAL, supra note 5, at 39-41.

78. H. MAINE, supra note 35, at 13-15 is an interesting example because he seems to say that all societies evolve through certain stages, but he is writing only of advanced societies and indicates that some societies, chiefly the oriental ones, have not evolved at all. See P. STEIN, supra note 14, at 93-95. Other writers, such as Herbert Spencer were clear that they were writing of necessary laws. See J. BURROW, supra note 43, at 205-07.

79. See, e.g., supra sources cited in note 43 (discussing Maine’s Ancient Law). Other writers were clear that they were speaking only of the society that they studied. See, e.g., Bryce, supra note 67; F. SAVIGNY, supra note 40.

80. At the least, recognizing historism’s various branches sheds light on the similarities and differences among Pomeroy, Cooley and Tiedeman. In addition, it must be said that distinctions—such as the difference between necessary and teleological laws and the difference between learning truth from intuitive reason (introspection) and history (observation)—may have been only partially understood by, or seemed less important to, nineteenth-century social theorists. Nineteenth-century social theorists may well have not felt it incumbent to observe them.

81. In Europe, most social theory was historian until the 1870s. In America, historism remained dominant until 1900. See infra note 84 and text following note 719; F. NIETZSCHE, THE ABUSE OF HISTORY (A. Collins trans. 2d rev. ed. 1957); Meyerhoff, supra note 22, at 14-18; Iggers, supra note 11, at 1. Thus historism collapsed in America some 30 years after it did in Europe. See M. WHITE, supra note 63, at 11-38 (discussing historism but using the term “formalism”); Ross, supra note 13, at 909 (implying that Europe adopted a modern historical perspective early in the nineteenth century).
causes. In addition, they conceived this social evolution in a non-Darwinian manner. That is, they believed that social change was not random but reflected moral ordering principles.\footnote{82}

Within this overarching agreement, however, nineteenth-century social theorists differed greatly. They differed at the specific level of the identity of the moral ordering principles.\footnote{83} They also differed at the more abstract level of the nature of the ordering principles: whether they were immanent or transcendent, whether they were principles or necessary laws, and whether they applied to all men or only to particular cultures. In short (and not by coincidence), nineteenth-century social theorists were the first to attempt to understand an evolving social and physical universe, and the last to know, with certainty, that a transcendent Christian God ruled both heaven and earth.\footnote{84}

\footnote{82} On random, rather than purposeful, variation as the hallmark of the Darwinian revolution, see J. Barzun, \textit{supra} note 28, at 10-11.

\footnote{83} Marx and Hegel, for example, certainly differed on the governing laws of history. Consider also the debate that surrounded Savigny's notion that national legal development was determined by the "volksgeist." P. Stein, \textit{supra} note 14, at 59-60; C. Allen, \textit{Law in the Making} \textit{93-95, 103-07, 118-24, 126-29} (1964).

\footnote{84} See, \textit{e.g.}, Iggers, \textit{supra} note 11; P. Novick, \textit{supra} note 37, at 27 (discussing Ranke and Hegel). This comment does not mean that all nineteenth-century social theorists attempted to come to terms with an evolving physical and moral universe. Nor does it mean that they all retained a belief in a transcendent Christian God. Marx and Comte certainly come to mind as exceptions to the latter part of the comment. Thus, the comment is meant to describe the preponderant views of nineteenth-century theorists taken as a group. The comment even more fully captures the thrust of American theorists and the ultimate focus of this Article is on American developments.

Having described what this Article means by historism, its relationship to historicism and to Professor Ross' concept of prehistorism may be explored. Historicism is the philosophy of history that is most identified with historism's first tenet as stated above, \textit{supra} text accompanying note 20. Historicism rejects, or is at least agnostic concerning, historism's second and third tenet. See \textit{supra} text accompanying notes 21-22.

Accordingly, historicism is the general doctrine that societies qualitatively change through secular causes. The term historicism has been applied to all schools of thought that adopt this perspective. Consequently, historicism embraces two distinct phases: an early phase in which the perception of secularly caused social dynamism was thought consistent with the existence of moral reality; and a later phase in which the perception undermined the belief in moral reality. The early phase of historicism collapsed in Europe in the 1870s and in American in the 1900s. \textit{See supra} sources cited in note 81. In other words, historicism is an evolving historical consciousness that has passed through two significantly different periods. In its first period, historical studies were undertaken to reveal the moral principles that order social change. In its second period, historical studies were undertaken to reveal the "differentness" of the past and the relativity of social norms. \textit{See, \textit{e.g.},} Iggers, \textit{supra} note 11, at 1-17; J. Barzun, \textit{supra} note 28, at 1-11; Randall & Haines, \textit{supra} note 22, at 17-34; M. Mandelbaum, \textit{supra} note 30, at 17-174; White, \textit{supra} note 30, at 660-71; Saveth, \textit{supra} note 22, at 1-9; Ross, \textit{supra} note 13, at 915-27; M. Mandelbaum, \textit{supra} note 13, at 1-113; Meyerhoff, \textit{supra} note 22, at 9-14. \textit{See also supra} text accompanying notes 20-25, 30-32 (implicitly discussing the similarities and differences between historicism and the later phase of historicism). Historicism and historicism are further discussed \textit{infra} text following note 719.

Thus, this Article's concept of historicism encompasses the early phase of historicism, the phase when social evolution was conceived as purposeful and reflecting moral reality. Yet historism and the early phase of historicism are not identical. Historism includes social
III. The Commentators

This part analyzes the private and public law jurisprudence of John Norton Pomeroy, Thomas McIntyre Cooley and Christopher Gustavus Tiedeman. Cooley and Tiedeman are studied because they were the leading publicists of laissez-faire constitutionalism. They view their central to understanding that doctrine's jurisprudential grounding.

Other than Cooley and Tiedeman, no late-nineteenth-century constitutional commentator is an indispensable subject in a study of that era's dominant jurisprudence. Pomeroy's contribution warrants consideration because he is among the most eminent of that era's lesser known pro-laissez-faire constitutional commentators and because his theorists, particularly the rationalistic historians, who had such a diminished sense of qualitative social change wrought by mundane causes that prior scholars have not included them in their discussion of historicism. This last comment is also applicable to, and explains why, this Article's concept of historicism is not identical with Professor Ross' concept of prehistoricism. See Ross, supra note 13. Professor Ross conceives social theorists as prehistorist only if they fully accept that societies are driven by secular causes into truly qualitative changes. She does not include as prehistorism social theories that conceive social evolution as the manifestation of eternal reason.

Nevertheless, the 'rationalistic historian' group does represent a significant step away from traditional rationalism. They are part of the transition from traditional to modern social (and legal) thought. Accordingly, they have been included as historists in this Article.

I am indebted to Professor Ross for her effort to help me understand historicism and prehistoricism and their relationship to historicism.

85. See infra text accompanying notes 316-19, 503.

86. Professor Thayer and Dean Pound are excluded because they opposed laissez-faire constitutionalism. Their thought would be essential to a study of late nineteenth-century anti-laissez-faire constitutionalism. See infra text accompanying notes 721-31 (discussing Justice Holmes) for a few comments about this emergent but nondominant mode of constitutional thought.

87. C. Larsen, Commentaries on the Constitution, 1965-1900, Table of Contents (unpublished Ph.D. thesis, 1952) lists John Dillon, John Hare, Samuel Miller, John Ordronaux, Henry Black, Roger Foster and John Tucker as authors of constitutional law treatises during the late nineteenth century. Only Dillon and Miller (because he was a Supreme Court Justice) were more prestigious jurists than Pomeroy. They would seem preferable subjects for this Article. Pomeroy was selected, however, because his work is far more theoretically acute and articulate. S. Miller, Lectures on the Constitution of the United States (1891) is wholly descriptive. J. Dillon, Treatise on the Law of Municipal Corporations (1872) is not only mainly descriptive but its constitutional discussion focuses on the public purpose doctrine only. See C. Jacobs, Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon Upon American Constitutional Law 121 (1954). Dillon's more jurisprudential work, J. Dillon, The Laws and Jurisprudence of England and America (1894), is in fact not very theoretically articulate. In any event, it gives only brief attention to constitutional matters, at which point it is fairly historicist.

It is submitted, however, that the commentators not studied here conform to the conclusions of this Article. See, e.g., J. Dillon, Laws, supra, at 212 (Magna Charta and fourteenth amendment described as continuously unfolding their implicit meaning); J. Tucker, The Constitution of the United States 3, 44, 107-77 (1899) (describing the divine basis of human rights and tracing the historic development of the Constitution from the prehistoric Aryan race); Tucker, British Institutions and American Constitutions, 15 Rep.
attention to legal theory is more complete and thoroughgoing than any other “second rank” commentator. In addition, his views form a striking complement to those of Cooley and Tiedeman.

This Article shows that, in their legal writings, Pomeroy grounds himself as much in natural law as in historism, Cooley grounds himself almost exclusively in historism, and Tiedeman grounds himself equally in historism and legal positivism. By analyzing the views of Pomeroy in the context of Cooley’s and Tiedeman’s perspectives, we see the rationalism and theism of the past fading, the positivism and agnosticism of the present emerging, and the historism of the nineteenth century mediating this fundamental transition.

A. John Norton Pomeroy

John Norton Pomeroy was born in 1828 and died prematurely in 1885 at the height of his career. He was a gifted law teacher and a prolific, incisive scholar. He was a prominent treatise writer during the era in which the massive, formalist treatise became the preeminent form of legal literature. Although he is the least celebrated of the writers examined in this Article, Pomeroy enjoyed great standing

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A.B.A. 213 (1892). On Justice Miller, see his opinions in Loan Ass’n v. Topeka, 87 U.S. (20 Wall.) 655, 663-65 (1875) (mentioning natural rights and the social compact but deciding the case on “the course and usage of the government”); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-79 (1872) (employing historical arguments to define a “taking” of property).


89. From 1865 until 1870 (when illness forced him to resign), he was a professor in the law department of the University of the City of New York. Pomeroy conducted his classes through the case method even before Dean Langdell popularized the method. From 1878 until his death, Pomeroy was a professor in the Hastings College of Law in San Francisco. Hastings was organized in 1878, and Pomeroy was its first, and for several years its only, full-time faculty member. He delivered the school’s inaugural lecture and taught most of the courses in the curriculum that he framed. See Slack, Hastings College of Law, 1 Green Bag 518, 519-20 (1889). That curriculum was the first three-year curriculum in the West. See also Pomeroy, Jr., supra note 88, at 98-99, 101-02, 134-35 (Elihu Root’s reminiscences of Pomeroy as a teacher).


91. On Pomeroy’s stature among his contemporaries consider the warm acceptance and regard he enjoyed from such eminent scholar-lawyers as Bryce, Holmes, Root, Binney and Redfield. See id. at 96-98, 103-04, 108, 123, 134-35.

among his contemporaries. His works were well-received, and his major treatises dominated their fields until well into the twentieth century.

Over a period of twenty years, despite bouts of illness and time spent in active practice, Pomeroy composed a general commentary on American law and treatises on constitutional law, code pleading, specific performance and equity jurisprudence. He wrote treatise-length articles on the California Civil Code and water rights, as well as numerous shorter pieces on international law, criminal procedure, community property and constitutional law.

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94. See, e.g., Pomeroy, Jr., supra note 88, at 96, 103-04, 112-13, 116-17, 126-27, 129.

95. See infra notes 99, 101 (saying that Pomeroy's major works on code pleading and equity jurisprudence were republished until 1929 and 1941, respectively).

96. Pomeroy regarded the time he spent in active practice as neither noteworthy nor remunerative. Late in life, he litigated the nationally famous County of San Mateo v. Southern Pac. R.R., 13 F. 722 (C.C.D. Cal. 1882) and Santa Clara County v. Southern Pac. R.R., 18 F. 385 (C.C.D. Cal. 1883) which were among the cases that established corporations as persons under the fourteenth amendment. He also litigated the locally famous Woodruff v. North Bloomfield Gravel Mining Co., 16 F. 25 (C.C.D. Cal. 1883); affd' on other grounds 18 F. 753 (C.C.D. Cal. 1884) which effectively enjoined the California mining industry from polluting the state's streams, harbors, and agricultural land through "hydraulic" mining. See Pomeroy, Jr., supra note 88, at 117-18.

97. J. POMEROY, AN INTRODUCTION TO MUNICIPAL LAW (1864) [hereinafter J. POMEROY, MUNICIPAL], discussed infra text accompanying notes 113-74.

98. J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (1868) [hereinafter J. POMEROY, CONSTITUTIONAL], discussed infra text accompanying notes 201-71. In writing this Article, I used the tenth edition of this work, which was edited by E. Bennett in 1888, a few years after Pomeroy's death. The relation between this edition and the original is discussed at infra note 201.

99. J. POMEROY, REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION ACCORDING TO THE REFORMED AMERICAN PROCEDURE (1876) [hereinafter J. POMEROY, REMEDIES]. This work, with a name change to CODE REMEDIES, went through five editions, the last of which was published in 1929.

100. J. POMEROY, A TREATISE ON SPECIFIC PERFORMANCE OF CONTRACTS (1879).

101. 1-3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA (1881-1883) [hereinafter J. POMEROY, EQUITY], discussed infra text accompanying notes 178-91. This work went through five editions, the last of which was published in 1941.

102. Pomeroy, The True Method of Interpreting the Civil Code, 3 W. COAST REP. 585, 691, 717 (1884) [hereinafter Pomeroy, True]; 4 id. at 49, 109, 145.

103. Pomeroy, The West Coast Doctrine of Riparian Rights, 1 W. COAST REP. 5, 787 (1884); 2 id. at 1, 835 (1884); 3 id. at 65, 497 (1884). These articles were collected posthumously into a treatise. J. POMEROY, A TREATISE ON THE LAW OF WATER RIGHTS AS THE SAME IS FORMULATED AND APPLIED IN THE PACIFIC STATES (H. Black ed. 1887).

104. See, e.g., Pomeroy, The Virginius Case, 8 AM. L. REV. 470 (1874); Pomeroy, The Proposed Codification and Reform of the International Law, 9 AM. L. REV. 181 (1875); Pomeroy, The Laws of Warfare, 9 AM. L. REV. 605 (1875).

105. Pomeroy, Criminal Procedure, 93 N. AM. REV. 297 (1861); Pomeroy, German
law. He edited and annotated works of deceased authors on statutory and constitutional construction, on criminal procedure and on the writings of Justice Field (with whom he enjoyed a warm and intimate friendship).

Today, Pomeroy is most remembered for his later writings, the massive *Equity Jurisprudence* and the seminal *Code Pleading.* But it was his early treatises surveying American private and public law that brought him to prominence: his *Introduction to Municipal Law* and *Introduction to Constitutional Law,* published in 1864 and 1868, respectively.

1. POMEROY’S PRIVATE LAW JURISPRUDENCE

a. Pomeroy’s Municipal Law

*Municipal Law* is a general study of American law. The treatise’s latter sections are an overview of many areas of public and private law, written in the style of Blackstone’s and Kent’s Commentaries. But Pomeroy introduces and undergirds his discussion of substantive doctrine with an extended disquisition on the nature, sources

and French Criminal Procedure, 15 L. Rev. 86 (1851); Pomeroy, American and English Criminal Procedure, 92 N. Am. Rev. 297 (1860).


110. Pomeroy, Introduction to Some Account of the Work of Stephen J. Field (J. Pomeroy ed. 1881) [hereinafter Pomeroy, Introduction]. In addition to his published works, at the time of his death, Pomeroy was working on a treatise on equity procedure and was projecting a multi-volume expansion of his work on constitutional law.

111. See, e.g., Bone, supra note 92, at 28-45 (focusing an analysis of late-nineteenth-century civil procedure on an analysis of these two works). These works were well received in their time. For several decades following their publication, they were regarded as their era’s definitive writings on their respective subjects. Holmes, for example, much preferred Pomeroy’s treatment of equity to Langdell’s. See Pomeroy, Jr., supra note 88, at 126-27.

112. See the discussion of the reception of these works in P. Paludan, supra note 88, at 224 and Pomeroy, Jr., supra note 88, at 96-98, 102-05. See also C. Larsen, supra note 87, at 28 n.64 (observing that *Constitutional Law* established Pomeroy’s place in the literature of American political science).

113. J. Pomeroy, Municipal, supra note 97.

114. Id. at 358-544.


116. 1-4 J. Kent, Commentaries on American Law (1826-1830).
and methods of American law. Since Pomeroy views America as a branch of the English and European family of nations, his analysis is in large measure a study of the nature, sources and methods of Western law and legal systems.

In Municipal Law, Pomeroy's jurisprudence is expressly and thoroughly historist. On the opening page of the preface, Pomeroy states:

[O]ur form of government, political ideas, jurisprudence, and civilization are so completely the product of the past, that an intimate acquaintance with history would seem to be an essential element in the education of American citizens. Especially is this true of that portion of history which embodies the origin and development of the national jurisprudence... Its character and that of our language are very similar. The germs of both are found among peoples widely scattered and different; both have been powerfully affected by the union of several races into one nationality; both have steadily developed, and are constantly changing; and in both an unbroken chain connects the forms and principles of to-day with those of the most remote periods.

The remainder of the volume is an extended proof and application of these sentiments.

Municipal Law shows Pomeroy's historism as founded upon two staple assumptions of nineteenth-century historist thought. The first assumption is that there is a transcendent God, who is the author of "immutable principles of right and wrong." The second is that

117. J. POMEROY, MUNICIPAL, supra note 97, at 1-357. This is nearly two-thirds of the text. The first 213 pages (40% of the text) discusses the nature and methods of law. The next 143 pages (slightly more than a quarter of the text) discuss the historical sources of American law.

118. J. POMEROY, MUNICIPAL, supra note 97, at v-vi. Pomeroy knew that America was formed by a variety of "racial" influences, but he argued that they had blended into one nationality. See id. at 13, 172.

119. See supra text accompanying notes 21, 26-29, 74-75, 84.

120. See, e.g., J. POMEROY, MUNICIPAL, supra note 97, at 194. Concerning Pomeroy's religious beliefs, his son wrote:

Of Puritan and clerical ancestry, [my father] was a man of devout and earnest religious faith, which pervaded every thought and action of his life. Brought up in all the strictness of an old-fashioned Presbyterian training, after his marriage he joined the Episcopal communion...; in the liberal English theologians of the Broad Church school,—Farrar, especially,—he found, in his last years, a most congenial study.

Pomeroy, Jr., supra note 88, at 122-23.

121. J. POMEROY, MUNICIPAL, supra note 97, at 7 (referring to the existence of these distinctions). See also 1 J. POMEROY, EQUITY, supra note 101, at 60 (referring to "eternal verities of right and justice").
humanity is divided into different "nations" or "races," each "animated with a different ethnic life."\(^{122}\)

From the first assumption, Pomeroy develops the view that there is a "natural law, which, without the interposition of any national authority but from the very nature of the relations of mankind to each other and to God, applies equally to all people and directs its commands to all persons."\(^{123}\) These "pure ethical maxims,"\(^{124}\) however, are principles of moral obligation. They are not self-enforcing: they have little or no efficient\(^{125}\) power of their own. Whatever enforcement they receive is due to their adoption by a national authority. The study of ancient legal systems shows that in remote times and among barbarian peoples the "innate principles of natural justice"\(^{126}\) were neither clearly recognized nor greatly accepted. Ancient legal systems were typified by "arbitrariness" and "rude forms."\(^{127}\)

But as "a nation advances in civilization," Pomeroy says "we uniformly find" that its law is more frequently reasoned from, shaped according to, and placed in greater agreement with natural law's "all-pervading and fruitful principles."\(^{128}\) Then "[e]quity displaces force; right supplants might; [and] fewer instances of hardship and injustice occur in the actual working of the [legal] system."\(^{129}\) Thus, over time, the laws of the Western nations have "assume[d] more and more the

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\(^{122}\) *J. Pomeroy, Municipal, supra* note 97, at 170. *See also id.* at 168 ("civilization is a product of religion, philosophy, letters, arts, trade, commerce, government, and *above all, the ethnic life of a people . . . "*) (emphasis added).

Pomeroy also employs a third assumption: that legal development must pass through three stages. This assumption, which reflects some positivistic historism (see *supra* note 78 (discussing Henry Maine's "stage" theory)), is not generally important to his work. However, it may support some of his Western chauvinism and his notion that Western law is near perfection. *See infra* text accompanying note 162.

\(^{123}\) *J. Pomeroy, Municipal, supra* note 97, at 10. Pomeroy expresses his belief in natural law through innumerable synonyms. *See, e.g., id.* at 1 ("purest and simplest morals"); *id.* at 8 ("pure ethical maxims" and "abstract right and natural justice"); *id.* at 9 ("natural rights," "maxims of justice and pure right"); *id.* at 10 ("natural right and justice"); *id.* at 176 ("pure ethical principles"); *id.* at 177 ("pure morality"); *id.* at 179 ("perfect morality"). At times the context makes clear that his use of the simple term "ethics" refers to natural law. *See id.* at 7. Pomeroy gives as examples of natural principles "that contracts once entered into shall be equitably enforced; that property shall be retained in the hands of its owners; that personal freedom shall be ensured; that crimes shall be punished." *Id.* at 8.

\(^{124}\) *Id.*

\(^{125}\) To say that something has no efficient power is to say that it does not, by itself, produce any effects in the phenomenal world. Something that has no efficient power is not a cause of anything, if cause is understood in its modern sense.

\(^{126}\) *Id.*

\(^{127}\) *Id.* *See also id.* at 168-69; *J. Pomeroy, Remedies, supra* note 99, at 6-9; 1 *J. Pomeroy, Equity, supra* note 101, at 20-21, 68. *See also infra* text accompanying note 164 (additional comments by Pomeroy indicating that natural law is not law until adopted by a national authority).

\(^{128}\) *J. Pomeroy, Municipal, supra* note 97, at 8. *See also id.* at 176.

\(^{129}\) *Id.* at 8.
shape of pure ethical maxims," and now largely accord with their teachings.\textsuperscript{130}

From the second assumption,\textsuperscript{132} Pomeroy develops the view that there is a particular law appropriate for each polity, which "distinguish[es] the jurisprudence of each country from that of all other states."\textsuperscript{133} Despite the gradual recognition and inclusion of the "purest and simplest morals" into Western law, Pomeroy maintains that no "system or code of law" has ever been, or even claimed to be, in "exact agreement with [their] teachings."\textsuperscript{134} "Thus," he concludes, "the maxims of justice and pure right which enter into every system of [law] . . . are and must be modified by the influence of the past, by the national history and institutions, by the manners, customs, and religions, in short, by the ethnic life of the people."\textsuperscript{135}

From these tandem assumptions Pomeroy develops the view that law "as actually administered in Europe and America, is composed of ethics and history."\textsuperscript{136} By his reference to history, Pomeroy does not mean "the outside history, the record of shifting dynasties, of wars and battles, of political intrigues and ambitious projects."\textsuperscript{137} Rather, he means the

causes which produced all these movements on the surface—
the life of the races, the planting, struggling growth, and final flowering and fruitage of the seeds of institutions—those causes which at once precede, accompany, and follow, an advancing civilization. Such a history is not one of dates and

\textsuperscript{130} Id.
\textsuperscript{131} This point is made more distinctly in his treatise on equity. See, e.g., 1 J. Pomeroy, Equity, supra note 101, at 67-71. But see infra text accompanying notes 134-35, 140-41 (discussion of Pomeroy's view that Western law is not today, and never will be, entirely in accord with natural law).
\textsuperscript{132} That is, that humankind is divided into different nations or races. See supra text accompanying note 122.
\textsuperscript{133} J. Pomeroy, Municipal, supra note 97, at 9.
\textsuperscript{134} Id. at 8. See also id. at 191.
\textsuperscript{135} Id. at 9 (emphasis added). For example, due to these considerations, law sometimes permits that which is immoral. See infra text accompanying note 141.
\textsuperscript{136} Id. at 7. Pomeroy completes his thought here by saying, "It is impossible to neglect either of these elements." Id. Consider also that at the outset of his study, Pomeroy says:

The science of Law is multiform. It reaches out, seizes, and draws in its methods and materials from many departments; here it sends down a root into the undefined and almost hidden traditions of the past, and now supports itself upon the premises and conclusions of the purest and simplest morals; its deductions are sometimes cast in the mould of severest logic, and again assume the form of historical narrative. It extends from the birth of a nation or race, over generations and centuries, to the busy life of the present day.

Id. at 1.
\textsuperscript{137} Id. at 9.
events, but of principles; not of the outward form, but of the animating spirit.\textsuperscript{138}

By "history," Pomeroy means the distinctive principles which form the foundation of a nation's ethnic life and their manifestation, expression and development over time.

By his reference to ethics,\textsuperscript{139} Pomeroy does not mean that all the principles and conclusions of natural justice are law. As indicated above,\textsuperscript{140} national ethnic life delimits and modifies the parts of natural law that have become (and can become) legally cognizable. Even in modern Western legal systems there are many "provisions forbidding . . . what would otherwise be praiseworthy; rendering . . . illegal, acts which . . . [are] in strict harmony with the law of nature and with Christian morals."\textsuperscript{141} At bottom, as Pomeroy says in his preface, law is "completely" dependent on history.\textsuperscript{142}

Rather, what Pomeroy means by his reference to ethics is that so much natural law has in fact been integrated into Western law that the separate study and appreciation of natural law provides a solid foundation for understanding and further developing the positive law. The animating spirit of the Western peoples is such that the principles of natural law have obtained a substantial and frequently determinative influence in their legal systems.\textsuperscript{143}
Pomeroy is, of course, aware that Western legal systems are concretely "composed" by a myriad of concrete rules. But he conceives these rules as wholly founded upon, shaped by, reasoned from, and in a very real sense "caused by," the principles of natural law and national spirit. These two sets of principles differ in that natural law is common to all humanity while the national spirit is particular to a single nation; natural law is transcendent to, national spirit inherent in, the race; natural law may not be, while national spirit of necessity always is, shaping legal development.

Nonetheless, the principles of natural law and national spirit are similar in that they both are immutable and eternal. No matter how imperfectly recognized, within them "lie the germs" of all future development. They are the "seeds" from which "the ever-ripening fruit of the present is produced." For example, in discussing the Anglo-Saxon contribution to American institutions, Pomeroy says:

It must not be supposed that we shall find any resemblance between the actual legislation of the Saxons, and our own private laws. They have given to us potentialities, the seeds, rather than the fruits, or even a growth begun. They have bequeathed to us a strong and vigorous race life, pervading the mass of sturdy and sensible middling classes; the instincts of personal freedom; the confident self-reliance; the disposition to self-government. We shall find these tendencies, which characterize the English and Americans of the present day, evidently at work at the very foundation of the Anglo-Saxon

ethnic life. Whether they are or are not determinative is disclosed by a study of history, i.e., of the judicial precedents. Pomeroy's view here is most clearly elaborated and illustrated in his monumental treatise, 1 J. POMEROY, EQUITY, supra note 101, at 58-71.

144. J. POMEROY, MUNICIPAL, supra note 97, at 198.
145. See, e.g., supra text accompanying note 138.
146. J. POMEROY, MUNICIPAL, supra note 97, at 9.
147. See supra text accompanying notes 124-27, 140-43. Thus, in a sense, the principles of ethnic spirit are more important than the principles of natural law because the former ultimately determine the shape and content of a nation's legal system. The principles of natural law are coeval with the Creation. The principles of national ethnic life are coeval with the birth of the race, which may well post-date the Creation. Yet from the perspective of the nation, they are eternal, having existed as long as the nation has.

148. The principles of natural law are coeval with the Creation. The principles of national ethnic life are coeval with the birth of the race, which may well post-date the Creation. Yet from the perspective of the nation, they are eternal, having existed as long as the nation has.

149. J. POMEROY, MUNICIPAL, supra note 97, at 169.
150. Id. at 19. See also id. at vi. Pomeroy employed a cornucopia of biological growth metaphors in making his points. See id. at vi, 169 ("germs"); id. at 26 ("plastic form"); id. at 176 ("kernel of grain"); id. at 18-19 ("we find in the tribal customs the seeds, the germinating powers of many legal principles"); id. at 198 ("ever-germinating principles"). He also employs an analogy to language. Id. at vi, 169. In one sentence he even mixes biological with geological metaphors. See id. at 169 (saying that growth of legal system "has been continuous, broken by no faults or displacements in successive strata, extending with one common life from the germ to the matured fruit"). For a discussion of "germs" as a premodern limitation upon the notion of change, see Ross, supra note 13, at 917-18, 923-24.
polity. The meagre development of these principles among our early ancestors, was suited to the age in which they lived; their form with us has been modified by the complete change in outward circumstances, but the essential ideas are still the same.  

In short, the principles of natural law and national ethnic life not only enable, but also constrain and direct, all legal development. Law evolves, but not through random selection. Pomeroy’s view of legal evolution does not imply an amoral universe devoid of purpose. For him, history reflects two sets of eternal ordering principles. Legal evolution is partly a process of the gradual recognition, reception and refinement of God’s transcendent principles of moral obligation. It is partly the gradual growth in refinement and self-consciousness of each race’s immanent principles of ethnic life. And finally, legal evolution is the application to, or expression of, “these truths” to the “thousand changing circumstances which make up the daily life,” and to the “new demands” and “ever-changing circumstances of society.”

Pomeroy’s historism is tellingly illustrated, and its power shown, by its ability to turn his many modern perceptions toward largely traditional conclusions. For example, Municipal Law is wholly informed by the perception that the laws and legal systems of the nations of Europe and America “have steadily developed, and are constantly changing.” Moreover, Pomeroy asserts that these changes stem from

152. Pomeroy clearly asserts that the specific rules of law make the “animating principles ... applicable to particular cases,” id. at 6, and that it is primarily “the reasoning of the courts ... [that] evolv[es] the new out from the old, the particular ... out from the general....” Id. at 179. See also infra text accompanying notes 168-72. Pomeroy details his view of how judges develop new law within the constraints of the old and indicates his preference for their technique over legislative enactment in id. at 168-213. For examples of Pomeroy’s view that law consists of concrete rules teased out of the abstract principles of natural law and national ethnic life by a course of “necessary deduction,” see, e.g., 1 J. POMEROY, EQUITY, supra note 101, at 487-514 (natural-law principles); infra text accompanying notes 224-40 (ethnic life principles).
153. In other words, Pomeroy’s conception of evolution is non-Darwinian. The existence and survival of non-Darwinian conceptions of evolution in the nineteenth century is discussed supra text accompanying note 82, and supra note 73.
154. This is, of course, just the implication with which Darwinian evolution is most associated. It is the implication that lies at the root of modern historical consciousness. See supra text accompanying notes 26-29, 33. The absence of this implication exemplifies Pomeroy’s evolutionary yet premodern outlook.
155. J. POMEROY, MUNICIPAL, supra note 97, at 2 (referring to natural law).
156. Id. at 19.
157. Id. at 198. Examples of changing circumstances that impacted on the expression of the ethnic life of the Anglo-American people include the advent of Christianity, (id. at 193-94), feudalism, (id. at 14, 242-44) and the development of commerce and trade (id. at 14, 351).
158. Id. at vi. See also id. at 168 (stating that their jurisprudence has been “built up”).
shifts in public attitudes. Yet, he cabins the modernism of these perceptions with the claim that “[t]his growth has been continuous, broken by no great faults or displacements in successive strata, extending with one common life from germ to the matured fruit,” and that “from small and meagre beginnings ... [Western laws and legal systems] have gradually and steadily progressed, until they have reached, or are approaching, their culminating point.”

Consider also that Pomeroy’s Municipal Law expresses the view that the courts are the main authors of legal development. Legal change may generally result from social progress, but it specifically results from legislative statutes and judicial decisions. Nothing is law, he writes, until it has “received the sanction some competent tribunal.” Until very recent times, however, legislative activity has been sporadic. Thus, Pomeroy concludes that “[n]o one will question” that the law has been “evolved” largely “by the persistent action of the courts.”

In observing that judicial decisions are the preeminent vehicle for legal development, Pomeroy becomes one of the first mainstream American jurists to adopt the view that judges make law. Indeed, he asserts this point clearly, emphatically and repeatedly. In Municipal Law, Pomeroy observes an increase in legislative attention to the law only “within the last fifty years.”

159. *Id.* at 168 (saying that the changes reflect “the people’s attainment in general culture”). Pomeroy’s remarks have an oblique implication that progressive development was a unique attribute of Western societies and that non-Western nations were static societies, mired in barbarism. This view was a staple of nineteenth-century historist thought and was probably meant by Pomeroy. The thought was central to, and popularized by, H. Maine, *infra* note 35, at 15, 45-46, whom Pomeroy regarded highly. See J. Pomeroy, Remedies, *supra* note 99, at 6-7.

160. The modernism is the perception that laws change due to changes in public attitudes.


162. *Id.* at 169. *See also* *id.* at 168 (changes are “progressive improvement”).

163. *Id.* at 170.

164. *Id.* at 187. *See also* *id.* at 19-20 (stating that writings of treatise writers and the beliefs and actions of citizens may have influence, but “it is not until a competent court has put its seal of approval upon them” that they cease to be “speculations” and become part of the “supreme law of the land”). These comments also further indicate Pomeroy’s view that natural law is not actual law until adopted by a national authority. *See supra* text accompanying notes 124-27.

165. *Id.* at 186 (saying statute law is “fragmentary”). Pomeroy observes an increase in legislative attention to the law only “within the last fifty years.” J. Pomeroy, Remedies, *supra* note 99, at 22.


167. *Id.* at 177.

168. This position frequently is associated with positivist jurisprudence. In addition to Pomeroy, many historist jurists voiced it. See, e.g., *infra* text accompanying notes 396, 530 (Cooley and Tiedeman); H. Maine, *supra* note 35, at 15-17. Other historists adhered to the “discovery” theory. *See, e.g.*, F. Lieber, *Legal and Political Hermeneutics* 327-28 (W. Hammond 3d ed. 1880) [hereinafter F. Lieber, Legal]; F. Wharton, *supra* note 63, at 56-73, 79; J. Bishop, *supra* note 51, at 73, 141. Given the qualifications which Pomeroy adds to his view, *see infra* text accompanying notes 171-74, Pomeroy may well be said to have adhered to the “discovery” theory.

169. At one point, for example, he says:
Historism in Constitutional Thought

Pomeroy conceives Western law not only as slowly evolving, but also as "built up, created, ... [primarily] through the exercise of the judicial legislative function of the courts operating by the decision of individual cases." This conception is strikingly modern. Yet, it is wholly cabined by Pomeroy's historist assertion that "the progress of the nation is more powerful than the edicts of legislatures, and irresistibly carries with it [legislatures], courts, institutions, and laws." Legislatures and courts, he says, "have but followed the leadings of the national life; they have both been compelled by the same vital forces in their work of production."

In other words, Pomeroy explicitly rejects (and ridicules) the traditional theory that judges "discover" law only to embrace an enlarged version of it. The real purpose of his remarks is to assert the uniquely nineteenth-century view that legislation is effectively determined, not by the legislator's arbitrary will, but by the "organic" life of the people. Pomeroy claims that courts make law so that he may more easily undercut the notion that lawmaking must be a willful, arbitrary process. His immediate purpose is to buttress the claim that the edicts of legislatures are products of the "principles of national life." His remote purpose is wholly to reject the modern "will theory" of law, which was then coming into vogue under the aegis of English analytic jurisprudence, and wholly to embrace a "historical theory," applicable to legislatures as well as to courts.

Under our polity, both courts and legislatures legislate. It is an entire misconception of the functions of the judicial tribunals, to describe them as wanting the legislative power, but as possessing only the capacity to declare the law to exist, as though from time immemorial a legal principle or rule had lain hidden and unnoticed, awaiting a discoverer, until an adventurous judge had brought it to light.

J. POMEROY, MUNICIPAL, supra note 97, at 176.

At another point he says "it is folly, a mere perversion of language to support a theory, to say that the [judicial] tribunals have not legislated as really and as effectively as has the [legislature]." Id. at 177. See also id. at 187 (nothing is law until it has "received the sanction of some competent tribunal"); and supra note 164. In a subsequent work, Pomeroy characterizes "discovery theory" as "conclusively shown to be not only false, but absurd." J. POMEROY, REMEDIES, supra note 99, at 66.

170. 1 J. POMEROY, EQUITY, supra note 101, at 21 (emphasis in original). Pomeroy's analysis in MUNICIPAL LAW of how judges do this is important for understanding his conception of legal formalism. See J. POMEROY, MUNICIPAL, supra note 97, 168-213.

171. J. POMEROY, MUNICIPAL, supra note 97, at 174 (emphasis added).

172. Id. at 176 (emphasis added).

173. See supra note 169.

174. The capstone of his argument is a lengthy analysis of why the judicial method for following the "leadings of national life," J. POMEROY, MUNICIPAL, supra note 97, at 176, is preferable to the legislative method. Accordingly, he opposed the codification movement in favor of the traditional common law. Id. at 194-213. Pomeroy was an avid and leading supporter of supplanting common law with code pleading. See J. POMEROY, REMEDIES, supra note 99, at viii, 7. But this was a matter of adjective, not substantive, law. In this regard,
In sum, in *Municipal Law* Pomeroy presents a jurisprudence in which law is determined by history. Pomeroy conceives law as reflecting the immanent principles of a nation’s ethnic life and as evolving through the application of these principles to the changing circumstances in which the nation finds itself. Western law, in particular, is premised upon the unique principles of the Western races (history) which have in large measure recognized and accepted the principles of natural law (reason). Western law is therefore both a socially responsive and moral order.

**b. Pomeroy’s later private law writings**

Although Pomeroy expressed his historism first and most fully early in his career, he maintained that perspective throughout his life. In his 1878 inaugural lecture as professor of municipal law at the Hastings College of Law, for example, he said that “[i]n the first place, I most profoundly believe that the law must be studied historically.” And he went on to indicate that, properly conducted, a historical study would “teach[... the actual jurisprudence of the American states ... [by] present[ing the] ... living principles and doctrines which are embodied in that jurisprudence.”

In addition, Pomeroy’s historist jurisprudence informed his great treatise, *Equity Jurisprudence.* In this work, Pomeroy presents the conventional view of Anglo-American law as divided by its history into two departments: common law and equity. The common law, he writes, “has in the course of its development adopted moral rules, principles of natural justice and equity, notions of abstract right, as the foundations of its doctrines, and has infused them into the mass of its particular rules.” Unfortunately, primarily due to the common law’s...
"mode of procedure," this development occurred rather late. Accordingly, the common law long retained the characteristics of all ancient Western law: it "had comparatively little of this moral element; it abounded in arbitrary dogmas...."

Anglo-American equity, therefore, originated in early attempts to infuse moral principles into a legal system dominated by the arbitrary rules of the ancient common law. In this attempt, early English chancellors determined cases according to their personal understanding of the requirements of natural law. But at least by the seventeenth century,

[a]fter its growth had proceeded so far that its important principles were all developed, equity became a system of positive jurisprudence ... founded upon and contained in the mass of cases already decided. The Chancellor was no longer influenced by his own conscience, or governed by his own interpretation of the Divine morality. He sought for the doctrines of equity as they had already been promulgated, and applied them to each case which came before him.

Given this history, Pomeroy conceives modern equity as largely drawn from moral principles. "[T]he doctrines and rules of equity jurisprudence are not arbitrary," Pomeroy writes, "they are, to a very great extent, based upon and derived from those essential truths of morality, those unchangeable principles of right and obligation which have a juridical relation with and application to the events and transactions of society." In addition, Pomeroy conceives modern equity

180. Id. at 26-33, 69. For a discussion of other reasons for the common law's rigidity, see id. at 18-22. Pomeroy describes the common law's mode of procedure as "narrow [and] technical ... [,] admitting growth in only one direction, granting but few remedies, and incapable of enlarging their number or changing their nature...." Id. at 69. Pomeroy was second only to David Dudley Field in preeminence in advocating code pleading, and he was second to none in writing treatises on the codes that were adopted. See J. Pomeroy, Remedies, supra note 99.

181. 1 J. Pomeroy, Equity, supra note 101, at 68.

182. Id. at 55-58.

183. Id. at 59-60. Modern equity's "conscience," therefore, is "a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals, and by which it tests the conduct and rights of suitors,—a juridical and not a personal conscience." Id. at 59. Therefore, the modern chancellor frequently may draw his standard of judgment from "conscience" but his "conscience" is "civilis and politica," not "naturalis and interna." Id. (quoting Lord Nottingham in Cook v. Fountain, 3 Swanst. 585, 600, 36 E.R. 984, 990 (Ch. 1676)). It is a "kind of judicial conscience, limited by and acting according to definite rules, and constituting a fixed and common standard of right recognized and followed by all the equity judges." 1 J. Pomeroy, Equity, supra note 101, at 58 (emphasis in original).

184. 1 J. Pomeroy, Equity, supra note 101, at 488.
as evolutionary;\textsuperscript{185} for "these principles, based as they are upon a Divine morality, possess an inherent vitality and capacity of expansion, so as ever to meet the wants of a progressive civilization."\textsuperscript{186}

Nonetheless, Pomeroy asserts, "It does not follow . . . that [modern] equity . . . is absolutely identical with natural justice or morality. On the contrary, a considerable portion of its rules are confessedly based upon expediency or policy, rather than upon any notions of abstract right."\textsuperscript{187} Although to a lesser extent than law, equity still is affected by

[t]he influence of ancient institutions, the motives of policy, the primary importance of certainty, the necessity of rules which shall correspond with the average conduct of men . . . these and other facts of equal importance [which] must exist in every society, and must prevent a determinate part of its law from being constructed upon a basis of morality, and from admitting the creative force of purely moral principles.\textsuperscript{188}

In sum, Pomeroy’s \textit{Equity Jurisprudence} presents both departments of American law—common law and equity—as founded upon principles drawn from history and morals.\textsuperscript{189} Admittedly, history dominates the common law, as morality dominates equity.\textsuperscript{190} However, to

\begin{footnotes}
\footnote{185.} This evolution is non-Darwinian. He says the moral principles “are . . . the fruitful germs from which [equity’s] doctrines and rules have grown by a process of natural evolution.” \textit{Id.} at 489. See also \textit{supra} text accompanying notes 153-57 (discussing Pomeroy’s conception of evolution); \textit{infra} text accompanying note 192 (same). Moreover, he says the “vast proportion of the actual doctrines and rules” of equity are fashioned by a process of “necessary inferences” from these principles. \textit{Id.} at 489.

\footnote{186.} \textit{Id.} at 62. Thus equity “is . . . constructed upon comprehensive and fruitful principles . . . [and] possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age.” \textit{Id.} at 70. Accordingly, equity, more than law, “render[s] the national jurisprudence as a whole adequate to the social needs.” \textit{Id.}

\footnote{187.} \textit{Id.} at 71.

\footnote{188.} \textit{Id.} at 68-69. For examples of divergence between equity’s doctrines and rules and “pure morality,” see \textit{id.} at 524-30 (discussing narrow application of maxim that “he who seeks equity must do equity’’); \textit{id.} at 543, 550-53 (limitations on “clean hands” doctrine); \textit{id.} at 1244-45 (discussing knowledge and actual fraud); \textit{id.} at 1264-65 (discussing materiality of misrepresentation and actual fraud). However, natural law so dominates equity that these examples are few and far between. See also \textit{id.} at 488 (saying equity rules “are, to a very great extent, based upon and derived from . . . essential truths of morality”).

\footnote{189.} In addition to the material presented \textit{supra} text accompanying notes 178-88, consider that Pomeroy’s son, a noted law professor in his own right, said that for his father “[t]he boundaries of the ethical and the juridical fields were . . . always sharply defined.” Pomeroy, Jr., \textit{supra} note 88, at 125.

\footnote{190.} 1 J. \textsc{Pomeroy}, \textit{Equity}, \textit{supra} note 101, at 71 (saying that “the department which we call equity is, as a whole, more just and moral in its creation of right and duties than the correlative department which we call the law”); \textit{id.} at 69 (implying that equity is consistent with morality); \textit{id.} at 488 (saying “ethical truths” have been applied by courts so that they do not lose their “inherent ethical nature”). So much is equity fashioned from the norms of natural law, that if only that department of the legal system were considered it
some degree both departments, and certainly the system as a whole, are drawn from the national ethnic life and natural law. The fundamental principles of national ethnic life and natural law, Pomeroy says, are “ever reaching out and expanding [their] doctrines so as to cover new facts and relations, but still without any break or change in the principles or doctrines themselves.”

c. Conclusion: historism in tension with natural law

Pomeroy’s private law jurisprudence reflects historist social theory. In Pomeroy’s view, Western law is a progressive development. The law’s evolution is neither random nor the outgrowth of the mere brute power of the fittest. Rather, the law’s evolution is both a realization of immutable principles that are inborn in Western races and a movement toward fuller expression of God’s eternal and universal law.

That Pomeroy conceives law’s evolution as equally reflecting these two sources creates an irresolvable tension in his approach to legal inquiry. Pomeroy presents race principles and natural-law principles...
as ultimate sources of American legal norms. He presents legal inquiry as involving the full realization of these principles through their recognition, elaboration and application in discrete controversies. Pomeroy should be content therefore to draw evenhandedly from race and natural-law principles.

Yet, Pomeroy's *Equity Jurisprudence* reveals that he vastly prefers the principles of natural law to the principles of race. Throughout that massive study, he implicitly disparages law that is not based on natural principles. He never instances an example where race and natural-law principles conflict in which he is content to let race principles have their due. At bottom, Pomeroy is emotionally and normatively committed to a natural-law vision of American law; but he is compelled by the intellectual outlook of the age in which he lives to work this out through the study of history. He is essentially a rationalist jurist living in an age of historist social thought. He resolves the contradiction by seeking the reason of history and discovering instead the history of reason.

Perhaps the best way to understand Pomeroy's private law jurisprudence is to compare it to eighteenth-century natural-law thought. Eighteenth-century natural-law jurists were certain that God's eternal law was directly and fully accessible to human intelligence through intuitive reason. Moreover, by writing the treatises they did, eighteenth-century natural-law jurists unabashedly implied that God's eternal law was directly and fully accessible to their intelligence.

Pomeroy's claims are more circumspect. He never claims that God's eternal law is fully accessible to human intelligence. More importantly, he does not claim that natural law is cognizable by intuitive reason. In sharp contrast to eighteenth-century natural-law ju-

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194. Indeed, given that he presents race principles as controlling the recognition of natural-law principles, Pomeroy might, to some extent, give precedence to race principles. His treatise on code pleading adopts the same stance even more clearly. See J. Pomeroy, *Remedies*, *supra* note 99, at xiii, 31. That is, Pomeroy clearly despises the historical principles of Anglo-American procedure. He clearly prefers the new code system based upon rational speculation. It is, of course, not usual to describe a procedural system as based upon natural law, since natural law usually is used to describe substantive rights and obligations. Nonetheless, Bone, *supra* note 92, shows the extent to which Pomeroy thought of code pleading as presenting the ideal form of adjective law.

195. See *supra* sources cited in note 188. One might argue that this is a misleading observation because in Pomeroy's view equity is the central place where natural-law principles have been developed. But the same observation is true concerning all his work.

196. See *supra* sources cited in note 188. One might argue that this is a misleading observation because in Pomeroy's view equity is the central place where natural-law principles have been developed. But the same observation is true concerning all his work.


198. In addition to the points made in the text, it also should be noted that eighteenth-century natural-law jurists did not, and Pomeroy did, emphasize the existence of practical and public policy limitations on the implementation of natural-law norms in human society.

199. Admittedly, his practice underrides his modesty.
rists, Pomeroy conceives himself discovering natural law not through a priori speculation, but through an empirical and inductive study of precedent. He believes that natural law is only slowly, painstakingly and tentatively realized through the thoughts and efforts of generations of judges struggling to do justice in human controversies.

In other words, Pomeroy's private law jurisprudence presents natural law in transformation and on the verge of decline. Pomeroy believes there is a truth outside of time, but he believes it is discoverable only through a long and patient study of events and experiences in time. In his view, God's eternal law is revealed in history, not reason. In sum, Pomeroy's approach to legal inquiry is historist even when, as in Equity Jurisprudence, he belies his theoretical remarks and sees American law as composed exclusively of natural-law principles. His approach to legal inquiry is historist because, even then, he spurns intuitive reason and claims to discover objective moral values through the study of history.200

2. POMEROY'S CONSTITUTIONAL JURISPRUDENCE

a. Pomeroy's Constitutional Law

Four years after publishing Municipal Law, Pomeroy released a treatise devoted solely to American constitutional law. An Introduction to Constitutional Law201 is an elaborate application of Pomeroy's historism to American public law,202 as will be shown through analyses of Pomeroy's discussions in that work of constitutional theory, the permanence of the Union, and constitutional interpretation.203

200. In other words, Pomeroy exemplifies rationalistic historism. See supra note 192. However much Pomeroy employs the concept of natural law, his approach to its discovery departs from the methodology of traditional rationalism and shows traditional rationalism already being transformed by the "devouring gaze" of history.

201. J. POMEROY, CONSTITUTIONAL, supra note 98. As indicated supra note 98, I used the 1888 edition edited after Pomeroy's death. The editor, however, preserved the text of Pomeroy's third edition and indicated, on the one hand, the changes Pomeroy made between the first and the third, and on the other hand, the changes the editors had made since the third edition. Thus, the original 1868 text is readily apparent.

202. Pomeroy's greatest writing, the three volume treatise Equity Jurisprudence, should be considered as an example of the application of Pomeroy's historism to a branch of American private law. A familiarity with both these works is essential to a full understanding of Pomeroy's historism, because they each emphasize different aspects of his thought. Constitutional Law, in Pomeroy's view, is drawn mostly from the principles of American ethnic life; Equity Jurisprudence from natural justice. For a partial explanation of the different emphases of these two works, see infra text between notes 292 & 300.

203. These are the three major discussions of the treatise. They occupy the introductory chapter and all of parts 1 and 2. See J. POMEROY, CONSTITUTIONAL, supra note 98, at 1-100.
(i) Pomeroy's discussion of constitutional theory

Pomeroy begins *Constitutional Law* with a statement of general constitutional theory. Constitutional theory, in his view, revolves around the nineteenth-century conception of a "nation." A nation, he says, is people, who through "common origin, interests, and necessities" and "their proximity, their one language and religion" have formed an "organic will" to be "an independent, separate, political society, with its own organization and government ... [that] knows no superior to itself."

From this conception, Pomeroy develops three corollaries. The first is that a nation possesses political sovereignty. As a nation "is not subordinate to any other political society," Pomeroy describes it as "a political unit which alone possesses dominion in itself." It has, he says, "a collective will and ... the faculty of wielding and disposing those forces which obey that will." He concludes, therefore, that a nation "possess[es] in itself inherent and absolute powers of legislation."

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204. This discussion encompasses his introductory chapter and the first chapter of Part 1. *See id.* at 1-32.
205. Pomeroy notes that he focuses on this secular conception because constitutional theory "speak[s] only of the character of civil societies in their relations to each other and to their own members." *Id.* at 30. Accordingly, Pomeroy must "purposely put out of view the supremacy of God over nations as well as over individual men ..." *Id.* At one point in the treatise, however, Pomeroy draws on his religious convictions to state that "the People of the United States ... [are] destined in the providence of God ... to be the example and teacher to all the nations of the earth ... [and] being made perfect through suffering, [they] shall wield an influence over humanity even surpassing that exerted by the deathless empire of Rome." *Id.* at 41.
206. *Id.* at 81. This description first appeared in an article Pomeroy wrote in 1871. *See* Pomeroy, *Nationality*, supra note 107, at 445. Pomeroy incorporated it into the treatise in the third edition.
207. J. POMEROY, *CONSTITUTIONAL*, supra note 98, at 34.
208. *Id.* at 30.
209. *Id.* at 29. In general, Pomeroy presents no satisfactory analysis of the origin and composition of national identity among people. The concept and its attributes are simply posited. Perhaps this indicates that Pomeroy thought of it as sufficiently established in the general culture to be already known to, and accepted by, his readers. Perhaps he felt he had dealt sufficiently with the concept of nationality in his *Municipal Law.*
210. *See, e.g.,* J. POMEROY, *CONSTITUTIONAL*, supra note 98, at 29-30. Indeed, Pomeroy says "[t]he facts represented by these words [i.e., nation and sovereignty] necessarily imply or presuppose each other. There can be no nation without political sovereignty, and no political sovereignty without a nation. I shall not be able ... to separate these ideas, and to present each as distinct from the other. As well might one attempt to give a scientific description of light and of color without reference to their mutual relations and combined existence." *Id.* at 27-28.
211. *Id.* at 29.
212. *Id.* at 28.
213. *Id.* at 5 (describing his concept of sovereignty).
214. *Id.* at 29.
The second corollary is that a nation is distinct from its government. A government, Pomeroy says, is "the permanent agent[] which [the nation] has established to make efficient its organic will."215 A government "may have any organization, from the purest democracy, to the most absolute monarchy,"216 but "[t]he idea that the rulers, whether one or many, compose the state, is a thing of the past, a notion which has been swept away in the resistless march of social development."217

The third corollary is that a nation, and not its government, possesses sovereign power. "The people themselves," Pomeroy writes, "the entire mass of persons who compose the political society, are the true nation, the final, permanent depositary of all power. The organized government, whatever be its form and character, is but the creature and servant of this political unit..."218 This corollary holds true whether or not a nation has delegated all its sovereign powers to its government.219 It means, on the one hand, that even when government ordinarily operates under no de jure restrictions sovereignty "still potentially exist[s] in the nation, ready to be called forth whenever the people shall see fit... to put their inherent, paramount force in motion."220 On the other hand, it means that the existence of national sovereignty is perfectly compatible with the existence of a limited, complexly structured government in which no organ, branch or level of government ever exercises absolute power.221

Pomeroy's general constitutional theory, therefore, envisions a world divided by common origin, interests and proximity into distinct

215. Id. at 30.
216. Id. at 30.
217. Id. at 29. Pomeroy employs the term "state" as a synonym for "nation." Pomeroy's distinction between a "state" and the "government" is a staple part of historist analysis. See, e.g., infra text accompanying notes 514-23; J. Burgess, supra note 35, at 57.
218. J. Pomeroy, Constitutional, supra note 98, at 28. See also id. at 4-6.
219. Id. at 4-6, 28-29.
220. Id. at 28. Concerning the acceptability and importance of the third corollary as well as its implication here, Pomeroy writes:
It is certainly unnecessary for Americans to argue in favor of the correctness of this principle. Our whole political structure, our whole civilization, is based upon it. So true is it to nature and humanity, that not only have European publicists adopted it, but even European governments do not now reject it. . . .

Id. at 29.

221. Concerning the importance of this implication of the third corollary, Pomeroy says, "The intentional ignoring, or tacit rejection of the ... [principle], is the fallacy which runs through the whole of Mr. Austin's elaborate lecture upon the nature of sovereignty found in the first volume of 'Province of Jurisprudence,' and which thus destroys much of the usefulness of that treatise." J. Pomeroy, Constitutional, supra note 98, at 29. See also id. at 6 n.1 (Austin "either too much narrows the meaning of the term sovereign power, and confounds it with the mere capacity to exercise that according to the constituted order of things in a particular state; or else he utterly ignores the idea that sovereignty resides in the totality of members of a state as a political unit").
peoples, known as nations. Nations are holistic groups; they are sovereign; they are distinct from their government. These are all conventional nineteenth-century historist beliefs. Pomeroy’s general constitutional theory, therefore, employs fundamental conceptions and terms that unmistakably place it in historism’s community of discourse.

(ii) Pomeroy’s discussion of the permanence of the Union

Throughout the antebellum and Civil War era, the Union’s permanence was a central subject of constitutional debate. In the war’s aftermath, the issue was no less central, for the war’s legality and justness turned largely on the view that the southern states had no right to secede. Accordingly, it is a topic that Pomeroy treats prominently and at length in his Constitutional Law. His analysis is a revealing application of his historist jurisprudence to a specific constitutional issue.

In Pomeroy’s view, as is typical for nineteenth-century constitutional commentators, the issue of whether the union was permanent, or whether it was destructible through state secession, turned on another inquiry: is the Constitution an organic act of a single sovereign or of thirteen separate sovereigns? Is America, in other words, essentially a single nation or a league of thirteen separate nations?

In conducting this inquiry, Pomeroy turns to his fundamental view that sovereignty lies with a nation (i.e., the people) and not any government, and that “nationality” is a “feeling of unity” among people, a feeling that is “deep[[]” and “intens[e]” and has “result[ed] in united acts . . . which should proclaim that people one nation.” From this

222. See, e.g., infra text following note 420 and accompanying notes 578-79; G. Bancroft, supra note 72; F. Lieber, Manual, supra note 5, at 233-38, 259, 261; J. Burgess, supra note 35, at 1-67. Though less fully wrought, the basic concepts of Pomeroy’s constitutional theory parallels Burgess’ political theory. But Pomeroy’s overall philosophical perspective seems closer to Lieber, with its belief in the existence of a natural law that is both discovered in, and supplemented by, historical experience. See F. Lieber, Manual, supra note 5, at 58-63, 119; F. Lieber, Essays, supra note 5, at 26-31.


225. J. Pomeroy, Constitutional, supra note 98, at 32-82. It is the topic to which he turns immediately upon concluding his remarks on his general constitutional jurisprudence.

226. J. Pomeroy, Municipal, supra note 97, at 34.
Historism in Constitutional Thought

foundation, Pomeroy argues that whether America is a single nation or is composed of thirteen nations depends upon whether the populace, during the Revolution and Constitution-making era, felt and acted as one people or as thirteen separate peoples. He then recounts events surrounding the Declaration of Independence and the subsequent war to determine that from

their first appeal to arms, in their first movement toward separation from the British empire, the people of the colonies acted as a unit. . . . The revolt was not the work of colonies acting separately and independently, in any assumed sovereign capacity, but of the people of all of these local communities acting together through their representatives in the Continental congress, which assembly, though revolutionary, provisional, tentative, and loosely organized, was essentially national. 227

Accordingly, concludes Pomeroy, "from this epoch dates our national existence, dates the birth of a political society now known as the United States of America." 228

This newly formed political society evolved its governing structure through a series of stages—first, the Continental Congress; second, the Articles of Confederation—that culminated in the Constitution of 1787. But these arrangements were mere governmental superstructures that did not constitute the nation. "Historically, the nation preceded the Constitution; it took its rise with the first united movement of the

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227. J. POMEROY, CONSTITUTIONAL, supra note 98, at 35. Pomeroy continues: On the 5th of September 1774, delegates to the first Congress assembled in Philadelphia. There were appointed from the different colonies. . . . The government thus formed was, in truth, revolutionary; it was not intended to be permanent; but it exercised in fact and of right a sovereign authority, not as the delegated agents of the local governments of the separate colonies, but in virtue of original power granted by the people. Their acts were all of a national character. Id. He also says: What is the result to be deduced from these events. Prior to the Declaration of Independence, the colonies, separately or unitedly, did not assume to be, nor were they, independent sovereign states. . . . [I]n their progress toward independence they acted in concert from the beginning, and this concert was not one of mere league or compact, but of organic unity. The boundaries which separated one colony from another were unaltered . . .; but so far as they asserted independence it was the assertion of the nation and not of thirteen sovereign nations. Nor did the delegates derive their authority in fact from the colonial legislatures, but from the one people acting behind and superior to these legislatures, acting as a political society, and exercising the attribute of sovereignty which belongs to such a body politic. Id. at 36.

228. Id. at 35. Pomeroy concedes, of course, that "[b]eyond all question the ideal of nationality was not distinctly presented to [the people's] minds; they did not evolve a completed theory of the nature of their civil polity, and proceed to carry out that theory. They were guided by circumstances, and as events led them to acts of nationality they followed them unhesitatingly." Id. See also id. at 40-41.
colonies,” Pomeroy says. The nation was not created by the Constitution of 1787. It was “called . . . into being [by] the People” with “the first expression of their organic will” at the outset of the Revolution. Since the United States was formed by one people, not thirteen separate peoples (let alone thirteen separate state governments), the argument for secession—dependent as it is on the notion of state sovereignty—falls, and the Civil War is justified.

This long argument is historist in two ways. First, the argument depends upon Pomeroy’s general constitutional theory and thus incorporates its historism. But also, in Pomeroy’s mind, the argument’s linchpin—whether the rebellious colonial populace acted as one people or thirteen peoples—turns upon plain historical facts, not with theories, nor with disputed questions of intention. Whatever these facts may be, we cannot change them by argument, nor escape from their legitimate consequences. I repeat, the condition and character of the political society prior to, and at the time of, the adoption of the Constitution, [and therefore the answer to our inquiry,] is a fact, to be ascertained in the same manner as any other matter within the province of history.

In other words, Pomeroy self-consciously conceives his perspective as grounding the inquiry about the permanence of the Union neither in speculative reason (i.e., what Pomeroy calls “theory”), nor in the dictates of arbitrary will (i.e., the intent of the Constitution’s framers),

229. Id. at 81. This comment first appeared in Pomeroy, Nationality, supra note 107, at 445. Pomeroy incorporated it into the treatise in the third edition.


231. Id. at 38.

232. The notion that the American nation was born in 1776, not 1787, is not unique to Pomeroy. Lincoln expressed it in his Gettysburg Address. As Professor Levinson points out, the Declaration of Independence of 1776 was written “fourscore-and-seven” years before Lincoln’s Gettysburg Address in 1863. S. LEVINSON, CONSTITUTIONAL Faith 65 (1988).

233. Pomeroy notes that “[n]o single colony . . . revolted and claimed separate independence.” J. POMEROY, CONSTITUTIONAL, supra note 98, at 37. And “[t]here never was, in fact, a moment’s interval when the several states were each independent and sovereign.” Id. at 38.

234. Id. at 34. As Pomeroy says at another point, the “key to the whole position,” id. at 39, is this “grand historical fact.” Id. at 40 (emphasis in original). And he asserts: It is demonstrable as a fact of history, as to which there can be no mistake, and which cannot be changed to suit the demands of conflicting theories, that the people of the United States, through their own positive act done in their own name by their delegates [to the Continental Congress], sprang into self-existence as an organic political society possessing sovereignty, and that the separate states, as individual bodies politic, were never independent, never clothed with the attributes of nationality.

Id. at 40.
but in "historical fact." Pomeroy spurns a rationalist approach because rationalism produces theories that can be changed to suit the demands of the inquirer. He also spurns a positivist approach, because positivism produces interminable disputes about ambiguous legislative intent. In their place, Pomeroy adopts a historist approach which he believes settles questions upon the "solid foundations" of "fact." Thus, in discussing the permanence of the Union, Pomeroy shows that historism dominates not only his general constitutional theory but also his derivation of the constitution's fundamental principles and their application to particular issues.

235. See also infra text accompanying notes 273-75.
236. See supra text accompanying note 234.
237. See supra text accompanying note 234.
238. J. POMEROY, CONSTITUTIONAL, supra note 98, at 33. See also infra text accompanying notes 273-75.
239. For other examples of Pomeroy grounding constitutional principles in historical facts, see id. at 105-08 (discussing the division of powers among levels of government) and id. at 110-13 (discussing the separation of powers among the branches of government). Indeed, speaking generally of his approach, Pomeroy wrote, in the preface to his third edition, that "[i]n determining the principles [of American constitutional law]... an attempt has been made to construct a harmonious system of interpretation founded, not upon theoretical and a priori speculation, but upon historical facts..." Id. at v.

Pomeroy's view evidently involves the premodern conception of "facts" as objectively determinable, as existing "out there," and as much an object of perception as physical reality. On this conception of "fact" and its rejection by many twentieth-century historians, see Saveth, Scientific History in America: Eclipse of an Idea, in ESSAYS IN AMERICAN HISTORIOGRAPHY 1, 9 (D. Sheehan & H. Syrett eds. 1960); White, The Art of Revising History: Revisiting the Marshall Court, 16 SUFFOLK U.L. REV. 659, 660-63 (1982).

It also should be noted that inquiries into framer intent may be conceived as historical and as searching for facts. Accordingly, it is important to point out that this is not the historical inquiry historians like Pomeroy called for. They spurned inquiries into framer intent in favor of inquiries into societal intent, i.e., the "organic will" of the people as expressed in their history and through their actions. They conceived the framers as incorporating that intent—and occasionally crystallizing and perfecting it—in the Constitution. See J. POMEROY, CONSTITUTIONAL, supra note 98, at 103-05, 110-13; and infra text accompanying notes 444-47, 587-94 (discussing Cooley and Tiedeman).

240. For another example of this observation, consider Pomeroy's discussion of the permanence of the Union's companion issue—the issue of the independence of the states. In addressing this second crucial issue, Pomeroy employs the same argumentative tactics that have just been discussed. On the one hand, he argues in general that sovereignty is in the whole people. Accordingly, the national government is not sovereign, and is not able to impose its arbitrary will on the states. On the other hand, he argues specifically that the people are sovereign, and their will established separate governments, each authoritative within a certain sphere. In this regard, the federal and the state governments are equal. He says:

Historically, the states existed also from the beginning... They and their separate and local rights and powers are inseparably bound up with it, and cannot be destroyed without blotting out the present system. The Supreme Court has thus, in this judgment, placed the nation and the states upon exactly the same footing...
Constitutional interpretation is one of the most fundamental issues of modern constitutional jurisprudence.\textsuperscript{241} In Pomeroy's day, it was of subsidiary, but growing, importance.\textsuperscript{242} Pomeroy apparently appreciated its increasing centrality. He treats the topic immediately after his discussion of constitutional theory and the permanence of the Union,\textsuperscript{243} and he devotes a substantial section of his introduction and an entire "Part" of his treatise to it.\textsuperscript{244}

In many ways, Pomeroy's views on constitutional interpretation are conventional for his day and, from a modern perspective, simplistic.\textsuperscript{245} Nonetheless, his general stance dramatically illustrates the role of his historist jurisprudence: it highlights the unconventional positions that mode of thought enabled him to take. His discussion of constitutional interpretation is both methodological and structural. It is methodological in that he presents in broad brush stroke an analysis of interpretative technique. It is structural in that he presents in great detail an analysis of whether the Supreme Court's interpretation is final.

Pomeroy's views on the technique of constitutional interpretation is rooted in the conventional nineteenth-century view of law as fundamentally divided into two species: written and unwritten.\textsuperscript{246} In the past, he says, constitutions have been either wholly unwritten, or partially written and partially unwritten.\textsuperscript{247} The U.S. Constitution is unique in that it is "all written."\textsuperscript{248} It is, therefore, "in all respects, a statute, . . . an expression of legislative will."\textsuperscript{249} Constitutional interpretation, accordingly, is focused on "explanation and interpretation of the written word,"\textsuperscript{250} and "must be constantly restrained and limited
by the letter itself of the written instrument." Nonetheless, he continues:

[T]his written instrument is so much one of enumeration rather than one of description; is so much an expression of general grants of power rather than the embodiment, in a codified form, of minute detail—that an appeal to history, to the analogies of other political organizations, and to fundamental ideas of civil polity, of justice and equity, is not entirely superseded, nay, is often absolutely necessary.  

Pomeroy, therefore, generally describes constitutional interpretation as his contemporaries described and practiced it: not as directed towards a narrowly conceived verbalism or search for framer intent, but as informed by general principles drawn from a variety of nontextual, even nonlegal sources.

Pomeroy’s views on the structure of constitutional interpretation are drawn from the “national” theory explicated in his discussion of the Union’s permanence. That theory obviously implies the conclusion that the federal government is the ultimate arbiter of constitutional disputes. He develops it further to advance the theory that is known today as “judicial supremacy” that the Supreme Court’s views on constitutional matters are final and binding.

However, Pomeroy is quick to argue that this position does not imply judicial supremacy. In his argument, he deploys a number of conventional arguments predicated on the observation that the Court

251. Id. at 12.
252. Id. at 17-18. Pomeroy continues: “[T]he work of the interpreter is not alone verbal; he may, to a considerable extent, strengthen his conclusions by a reference to the doctrines of General Political Law.” Id. at 18. And, although the “careful, textual, lawyer-like mode is indispensable” to constitutional interpretation, “there is still room for . . . more free, wide, and statesmanlike methods.” Id. at 15. In short, “[t]he lessons taught by history, drawn from the experience of other nations, suggested by the analogies of other governments, contained in the principles of justice and equity, may always exert their due influence upon him who studies and expounds our Constitution.” Id. at 15-16.
253. See, e.g., R. Cover, supra note 242, at 135-40; G. White, supra note 34, at 114-19, 125-27, 137, 144-45.
254. See supra text accompanying notes 224-39. Pomeroy’s emphasis on the structure, not the method, of constitutional interpretation stems from the entire discussion being an extension of his discussion of his national view of the nature of the federal union. See J. Pomeroy, Constitutional, supra note 98, at 85.
255. See id. at 85-90.
256. See, e.g., Levinson, Book Review, 75 VA. L. REV. 1429, 1451-52 (1989). Although Professor Levinson, correctly I think, says that the norm of judicial supremacy is of recent vintage, Pomeroy presents it as clearly adopted, nearly universal in practice and receiving “general assent.” J. Pomeroy, Constitutional, supra note 98, at 90-91. He also sees it as supported by lines of argument that are “absolutely irresistible.” Id. at 91.
257. For Pomeroy’s discussion, see J. Pomeroy, Constitutional, supra note 98, at 90-101.
"must wait until a 'case' be brought to it by litigant parties." But most fundamentally, he deploys a two-part argument that, for its time, is wholly unconventional: that judicial interpretation of the constitution is evolutionary and is controlled by popular will.

Pomeroy founds his argument upon the historist view that in determining the laws by which a people live, the "nation" and not any organ of government is supreme. Constitutional interpretation is no exception to this fundamental perspective. Government is and can be no more than the Constitution's "proximate" interpreter. "In truth," Pomeroy says,

as a practical fact resulting from the nature of our institutions, the people themselves, the aggregate of individuals who compose the body politic, are, through their electors, the final arbiters who must judge ... and give construction to the instrument which they themselves have framed. ... If the people are dissatisfied with [their government's view of constitutional interpretation], they put other persons in the place of those rulers who have failed to represent the nation's wish; a new policy is inaugurated, and the error is thus corrected.

This truth applies to the Court as well as to Congress and the president.

In the two great political departments ..., this change can be speedily made. ... In the judicial department the process must be slower, but it is none the less finally certain; judges, though appointed for life, will, at last, utter the opinion of the nation upon questions of constitutional power. The courts are a balance-wheel; they give steadiness to the progress; they equalize the development; they cannot be a barrier in the way of all onward movement.

The argument is then recycled from a rebuttal of the claim that judicial finality implies judicial supremacy, to an affirmative claim of the wisdom of judicial finality. Understanding that "courts do yield to the pressure of the popular will" and that their "movement ... will be generally more slow and uniform than that of legislatures and executives," Pomeroy says, "is a consideration of great weight in favor

258. Id. at 98.
259. See supra text accompanying notes 215-23.
260. J. POMEROY, CONSTITUTIONAL, supra note 98, at 87.
261. Id. at 86-87.
262. Id. at 87. For a modern, fuller and more sophisticated development of this position, see Ackerman, The Storrs Lecture: Discovering the Constitution, 93 YALE L.J. 1013 (1984) (discussing validity of amending the Constitution through interpretation).
263. J. POMEROY, CONSTITUTIONAL, supra note 98, at 97.
Historism in Constitutional Thought

of giving to the [Court] the function of interpreting the Constitution."^{264}

For

[t]hat instrument, as the organic law of the whole people, is the source of all other legislation. Its meaning should be measurably fixed and certain. Congress may readily and frequently change its policy; its work may be done under the influence of a momentary pressure; it may commit mistakes which require speedy amendment; and the consequences, though evil, are transitory; they do not reach to the very foundation of the political structure. But rapid and sudden alterations in the construction of the organic law, assumptions of powers one day which are denied the next, affect the entire body-politic; they place every citizen in a state of constant uncertainty as to his rights and duties; they produce a condition of partial anarchy. England has its traditions, its social classes, its reverence for the past, to give steadiness to political progress. We have rejected these as inconsistent with our republican institutions. If we also reject the Judiciary as a controlling element in our civil polity, we shall be left without any thing to give stability to the administration of affairs, to render the growth which all desire, healthy and permanent, the progress continuous and sure.\textsuperscript{265}

Drawing thus from his historist jurisprudence, Pomeroy conceives a theory of judicial review that is both evolutionary and responsive to the popular will.\textsuperscript{266} Of course, popular will, and therefore constitutional evolution through judicial interpretation, reflects and is directed by the basic principles of national ethnic life.\textsuperscript{267} Accordingly, Pomeroy's ev-

\textsuperscript{264}. \textit{Id.} at 97.

\textsuperscript{265}. \textit{Id.} at 97-98. After saying that the popular will "in the course of time" determines the view of all governmental organs, Pomeroy says "[t]here are times... when the constituted authorities do not reflect the present thought and wish of a majority of the citizens; and the whole scheme was so contrived with checks and balances, that the governmental action should be steady, the changes gradual, and progress uniform." \textit{Id.} at 86. For Cooley's and Tiedeman's expression of this view, see \textit{infra} text accompanying notes 363, 446, 674.

\textsuperscript{266}. Pomeroy expressly says that "[o]ur whole history testifies to this inherent capacity of the people to interpret their own organic law." J. POMEROY, \textit{CONSTITUTIONAL}, \textit{supra} note 98, at 86. But he does not point to any particular episode. Nor does he highlight any particular instance of evolution through judicial interpretation. But he verges on doing this in his analysis of the commerce clause. See \textit{id.} at 306. See also Pomeroy, \textit{Repudiation}, \textit{supra} note 107, at 709 (discussing recent changes in judicial protection of property).

\textsuperscript{267}. Pomeroy never expressly states this in \textit{Constitutional Law}, but it is implied on a variety of occasions. For example, in discussing the first principles of the American nation, he says:

The whole civil polity is thus based upon two grand ideas as its foundations and supports; the idea of Local Self-Government, and the idea of Centralization. The first was borrowed from the tribal customs of the Saxons and other Germanic tribes
olutionary and will-based constitutional law was neither Darwinian nor positivist. It was nineteenth-century historist. That any respected nineteenth-century treatise writer should maintain such views does not conform at all to modern views of nineteenth-century constitutional jurisprudence. But more startling is the fact that other—even more respected—nineteenth-century constitutional commentators adopted essentially the same perspective and conclusions.

who invaded Western Europe; the second is a heritage from Rome. The one is the safeguard of liberty; the other the source of power,—liberty and power, two elements which should enter into every political society.

J. POMEROY, CONSTITUTIONAL, supra note 98, at 103-04.

Pomeroy also observes that every polity must strike a balance between these two antagonistic principles, and “[o]ur fathers, by an almost divine prescience, struck the golden mean, and devised a scheme in which these opposing forces meet, not to neutralize and destroy, but to support and strengthen each other." Id. at 105.

In addition, in discussing the permanence of the principle of local self-government despite the absence of express textual constitutional guaranties in state constitutions, Pomeroy says:

[An alteration [of the principle] would be antagonistic to the principles which are part of our race life. For we did not invent this method of distributing legislative and administrative functions among local communities, this scheme of dividing the labors and duties of government, and allotting a special portion to that body most capable of performing it. The germs of this policy are to be found among the rude Saxons in England at the earliest period which history permits us to reach in our explorations of the past. . . .

We have thus a plain, historical origin of the principle of local self-government. This element lay at the foundation of the whole Saxon polity. . . . In many of the American states it is guarded with even more jealousy than in the mother-country. We have extended the principle a step further; to our towns and counties we have added the states. But all of this scheme is but the outgrowth from the primitive germ that existed in the Saxon Tything.

J. POMEROY, CONSTITUTIONAL, supra note 98, at 106-08.

268. Will-based in the sense of grounded in the nation's will, not the judge's will. The judges are bound to follow the historic nation's, not their own, view. See supra text accompanying note 262 (discussing Pomeroy's view that national opinion dominates judicial review). See also supra text accompanying note 174 (discussing role of national opinion in shaping judge-made private law).

269. As a representative of nineteenth-century historism, Pomeroy does not fall into the Darwinian and positivist trap that "whatever is is right." In subsequent editions of his treatise and in a lengthy law review article, Pomeroy excoriated court decisions which he felt violated proper principles. See infra text accompanying notes 276-92. Pomeroy's view was perhaps best articulated by Professor John Burgess who argued that although political science generally was a product of history, there were times in which philosophy led history. See Burgess, supra note 45, at 210.

270. Twentieth-century scholars describe their nineteenth-century predecessors as conceiving their task as discovering natural law, importing it into the due process clause and thus developing a static constitution separate from existing societal norms and needs. See, e.g., B. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 280-81, 288-92, 298-300 (1931); Pound, Liberty of Contract, 18 YALE L.J. 454, 460-68 (1909); Horwitz, The Meaning of the Bork Nomination in American Constitutional History, 50 U. PITT. L. REV. 655, 657-58 (1989); Horwitz, supra note 3, at 393, 395-96, 398-402 (1988).

271. See infra text accompanying notes 591-606 (discussing Tiedeman). Cooley was more traditional and tended to deny that constitutional law evolved through judicial interpretation. See infra note 452.
Historism in Constitutional Thought

b. Pomeroy's later constitutional writings

In his later constitutional writings, Pomeroy maintains his historist perspective. His historism taught him that sovereignty lay in the nation, and that the nation antedated and constituted the present national and state governments. These convictions formed the basis for Pomeroy's subsequent commentary on the Supreme Court. He drew from them when he reviewed the Court's decision that, despite secession and Civil War, the southern states had never left the Union. Pomeroy read this decision as adopting his historist contentions that the sovereign nation had constituted an indestructible union of indestructible states. Accordingly, he commended the Court's judgment. The Court, he said, had "struck the solid ground of historic fact" and thus lay its decision on a "firm basis,—firm, because historically and logically true." Pomeroy also drew from his historist perspective when he reviewed the Court's initial decisions dealing with the emergent problems of industrial regulation. These decisions—which allowed the states to grant monopoly status to corporations engaged in the slaughtering business and to regulate the rates of private grain elevators—upheld broad governmental discretion to control private property. Pomeroy read them as adopting a "strict construction" approach to interpreting the Constitution's express limitations of governmental power. In his view, "strict construction" is a traditional doctrine for

272. See supra text accompanying notes 218-21, 229.
274. There is no direct cite to Pomeroy, but the language on the pages cited supra note 273 is close to his and Chief Justice Chase sent Pomeroy a letter saying "you have doubtlessly seen traces of your own thinking in the late judgment...." See J. POMEROY, CONSTITUTIONAL, supra note 98, at 81 n.1. Pomeroy's views on the subject are discussed supra text accompanying notes 204-39.
275. See J. POMEROY, CONSTITUTIONAL, supra note 98, at 81-82 (this language first appeared in Pomeroy, Nationality, supra note 107, at 445, and was incorporated into the third edition). It also appears in his commentary on Justice Field's work. Pomeroy, INTRODUCTION, supra note 110, at 52.
277. Munn v. Illinois, 94 U.S. 113 (1877).
278. These decisions were taken over strong dissent. Slaughter-House Cases, 83 U.S. (16 Wall.) at 83-111 (Field, J., dissenting); id. at 111-24 (Bradley, J., dissenting); id. at 124-30 (Swayne, J., dissenting); Munn 94 U.S. at 136-54 (Field, J., dissenting). Laissez-faire constitutionalism traces its roots to these dissents. Nonetheless, it was not a majority doctrine in the United States Supreme Court until the 1890s. It emerged in the states in the mid-1880s.
279. See Pomeroy, Repudiation, supra note 107, at 703, 714. The express limitations that Pomeroy saw the Court reading "strictly" were the "privileges and immunities," "due process" and "obligation of contract" clauses. See U.S. CONST. art I, § 10; id. at amend. XIV, § 1.

In Pomeroy, Repudiation, supra, Pomeroy focuses on Munn 94 U.S. at 113, and, even more, on the decisions allowing states to repudiate their debts. See, e.g., Louisiana v. Jumel, 107 U.S. 711 (1883). The discussion in the text of this Article, on the one hand, eliminates
interpreting documents that are concessions from government to its citizens\(^2\) and for discerning limitations that sovereign governments voluntarily impose on themselves.\(^2\)

But according to Pomeroy's constitutional theory, America's government is not sovereign, and, therefore, the Constitution's express limitations are not concessions of a sovereign government to its people. Rather, they are "safeguards"\(^2\) established by the sovereign nation in creating their government

> to protect the private rights which exist anterior to all governments, and which are declared by the Declaration of Independence to be inalienable,—these limitations, I say, are the very portions of the constitution which, more than all others, should receive a broad, extensive, liberal interpretation in favor of the citizen against the government[]. All experience shows that these fundamental rights are the most exposed to injurious legislation; and it often needs the whole moral force of the judiciary to shield them from invasion.\(^2\)

Pomeroy argued that, prior to the early industrial regulation decisions, the Court always had construed the Constitution's express limitations liberally in favor of the fundamental rights of the true national sovereign.\(^2\)

Thus, "liberal construction" of constitutional limitations was both the proper and precedent approach to constitutional interpretation. Adherence to it would mean that the new fourteenth amendment would be read broadly to protect not just the few rights conceded to be under national protection by the *Slaughter-House* majority,\(^2\) but the full

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Pomeroy's reference to repudiation of state debts because that issue is not a unique problem of industrial regulation. On the other hand, this discussion extends Pomeroy's reference to the *Slaughter-House Cases*. Pomeroy criticizes the majority in the *Slaughter-House Cases* in *J. Pomeroy, Constitutional*, supra note 98, at 178-80; Pomeroy, *Introduction*, supra note 110, at 54-55. In Pomeroy, *Introduction*, supra, he specifically refers to the majority position as a "narrow interpretation" of the amendment. *Id.* at 54. Pomeroy may have been hesitant to use the *Slaughter-House Cases* as the earliest example of the Court's new and (in his view) incorrect interpretive technique because he thought the case arguably defensible in result. See *J. Pomeroy, Constitutional*, supra, at 178 (criticizing Court's reasoning but saying that statute "might perhaps have been sustained" as a police power measure).


282. *Id.*

283. *Id.* at 718.

284. *Id.* at 704-09, 718.

285. That is, the right to travel through the states and reside in any one of them. *See Slaughter-House Cases*, 83 U.S. at 79-80; *J. Pomeroy, Constitutional*, supra note 98, at 180.
panoply of civil rights claimed by that case’s minority. These rights were the liberties upon which laissez-faire constitutionalism was built.

In sum, Pomeroy’s latter writings elaborate his historist constitutional theory into a foundation for laissez-faire constitutionalism. This elaboration was of great moment, for he hoped to reverse the Supreme Court’s initial permissive response to industrial regulation. He believed that “the spirit of communism and socialism [was] rapidly spreading throughout large portions of the country.” He thought that spirit “at war with the principles of political economy upon which society rests.” And he was “firmly of the opinion that the battle with [it] must ere long be fought and either won or lost in the Supreme Court of the United States.” Accordingly, he excoriated the Court’s early industrial regulation decisions as “shocking to the moral sense of the nation . . . [and] departing from well settled and fundamental principles.” He argued for and predicted the decisions’ overturning, saying that “respect for the court must not outweigh devotion to the law, to truth, and to justice”—a law, truth and justice revealed by the study of history and morality, and embedded in the Court’s prior precedents.

c. Conclusion: historism in tandem with natural law

If anything, Pomeroy’s constitutional jurisprudence is even more unambiguously historistic than his private law thought. In discussing
constitutional theory and constitutional doctrine, he refers only to the principles of race and the facts of history. There is not one mention of natural law in any of his constitutional writings.

This is nonetheless misleading. The bulk of Pomeroy’s writings predate the conflict between private property and state regulatory power. He wrote primarily at a time when constitutional issues focused on the structure of the Union. Structural problems are less likely than substantive rights to be conceived in terms of natural law. Of course, it is significant that Pomeroy wrote only in terms of precedented principles in his few direct analyses of state regulation of private property. He had, but did not take, an opportunity to speak in terms of natural law.293

Nevertheless, in his later writings, Pomeroy indicated that his historist constitutional theory founded substantive doctrines that protected the “principles of political economy upon which society rests.”294 His referent is not just to American society, but all societies. This implies that he knew the “true” and “eternal” principles of society (though they may have been revealed in time).295 In addition, Pomeroy admired Justice Field.296 He particularly complimented Field’s dissents in the Slaughter-House Cases297 and Munn v. Illinois.298 Field tended to ground himself in natural law as well as the historical principles of the Anglo-American people.299 It is doubtful that Pomeroy would have admired Field as he did had Pomeroy not essentially felt the same way.

293. Pomeroy did write that the rights protected by the Constitution “exist anterior to all governments.” See supra text accompanying note 283. This is usually taken as indicating a natural-law perspective. But historists viewed rights as socially derived yet existing before governments because society precedes and constitutes government. See infra text accompanying notes 455-58 (discussing Cooley’s view); H. MAINE, supra note 35, at 4-5 (criticizing Austin’s and Bentham’s positivist jurisprudence on this ground).

294. See supra text accompanying note 288. I am assuming at this point that Pomeroy’s version of political economy was the rationalistic classical economics of Adam Smith and John Stuart Mill. For the pervasiveness of this approach to economics in late-nineteenth-century America, see, e.g., May, Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918, 50 OHIO ST. L.J. 257, 262-88 (1989); Hovenkamp, supra note 4, at 394-439. Yet, there was a developing notion of economics as a historist study. See supra text accompanying note 47.

295. Pomeroy also spoke of his theory that sovereignty lay with the people as an organized body politic as the true theory, not just the American theory. See, e.g., Pomeroy, Repudiation, supra note 107, at 716 (speaking of the “correctness” of the theory).

296. See supra text accompanying note 110.

297. 83 U.S. (16 Wall,) 36, 83-111 (1873). For Pomeroy’s view see J. POMEROY, CONSTITUTIONAL, supra note 98, at 178; Pomeroy, Introduction, supra note 110, at 54-55.

298. 94 U.S. 113, 136-54 (1877). For Pomeroy’s view see Pomeroy, Introduction, supra note 110, at 56-57. Consider also that Pomeroy said that from Field’s “opinions alone, a complete and consistent system of constitutional law might be composed, in which the American citizen would find an perfect text-book of political science.” Id. at 61.

299. See, e.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 86, 95-96 101-05 (1873) (Field, J., dissenting); Butcher’s Union Co. v. Crescent City Co., 111 U.S. 746, 755-57 (1884) (Field, J., concurring); infra notes 472, 479 (discussing Field’s dissent in Munn v. Illinois).
It is a viable conjecture that Pomeroy thought that both race principles and natural-law principles supported laissez-faire constitutionalism.

The conclusion of this analysis of Pomeroy's constitutional jurisprudence, therefore, is that Pomeroy maintained the same outlook in constitutional law as in private law. Given that so many of the constitutional issues he discusses involve governmental structure, Pomeroy draws his principles from the history of the American people more frequently in his constitutional discussions than in his private law discussions. But where fundamental substantive rights are involved, Pomeroy would, in all probability, find them supported by both history and reason.

Yet, though bottomed on both history and reason, Pomeroy's constitutional thought displays none of the tension evident in his private law thought. Perhaps, the absence of tension is due to the diminished role of natural law in his constitutional thought. More likely, it is because in Pomeroy's constitutional jurisprudence, race principles and natural-law principles work in harmony. It is possible that he envisioned American constitutional law, more clearly than American private law, as involving a perfect coincidence of historic principles and God's principles. In any event, Pomeroy may have been more, but certainly not less, of a historist in constitutional law than in private law.

B. Thomas McIntyre Cooley

Thomas McIntyre Cooley lived between 1824 and 1898. He was one of the most respected and distinguished members of the late-nineteenth-century bar. His career was as diverse as it was

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300. See supra text accompanying notes 193-200 (discussing Pomeroy's private law jurisprudence).


302. In particular, see the assessment of A. Jones, supra note 301, at 1 (describing Cooley as "one of the most distinguished citizens of late nineteenth century America" and "the nation's elder statesman on matters of constitutional law"); B. Twiss, supra note 301, at 34 (saying Cooley had "a tremendous personal influence upon his contemporaries" and was regarded as "the greatest authority on constitutional law in the world"); C. Jacobs, supra note 87, at 29 (saying Cooley "left an inefaceable impression upon legal and political institutions in the United States," and that his writings "surpass[ed] even those of Kent and Story in prestige and authority"); P. Paludan, supra note 88, at 249 (describing Cooley as "the most influential legal author of the late nineteenth and early twentieth centuries"); id. at 252 (saying Cooley's "ideas . . . profoundly influenced law in America").
accomplished. He engaged in practice and politics from 1846 to 1864, led the prestigious Michigan Supreme Court from 1865 to 1885, and chaired the Interstate Commerce Commission from its inception in 1887 until ill health forced his retirement in 1891. In addition to these accomplishments, Cooley taught and wrote about American law. He was a professor at the University of Michigan Law School from its founding in 1859 until 1884. During that tenure he composed well-received treatises on constitutional law, taxation and torts, edited and annotated editions of Blackstone's

303. Although his practice was not overly lucrative, its quality was such that the Michigan legislature in 1857 selected him to compile the state's statutes, and the state supreme court chose him to report its decisions from 1858 to 1864 (when he relinquished that position and joined the court). On the reasons for these appointments, see A. Jones, supra note 301, at 67-68; 4 Dictionary, supra note 301, at 392.

304. For a study of the Michigan Supreme Court during this period and Cooley's role on it, see Jones, Thomas M. Cooley and the Michigan Supreme Court: 1865-85, 10 AM. J. OF LEG. HIST. 97 (1966).

305. Cooley's work on the ICC is recounted in Jones, Thomas M. Cooley and the Interstate Commerce Commission, 81 Pol. Sci. Q. 602 (1966). See also 4 Dictionary, supra note 301, at 393 (saying that Cooley "in great degree shaped the policy of the commission" during the years of his tenure); C. Larsen, supra note 87, at 26 (describing these years as involving a "painful lack of accomplishment" but that Cooley "was usually the first to arrive in the mornings at the offices of the Commission and the last to leave at night"). Before his appointment to the Commission, Cooley had distinguished himself as an arbitrator of railroad disputes and as a court appointed receiver in a complex railroad bankruptcy case. Id.

306. Cooley was also the only resident professor and dean of the law school during most of this time. As a law teacher, he influenced generations of American students. Cooley was an incisive lecturer. He usually wrote his lecturers and delivered them verbatim. Many are preserved in the original or in student notes in the University of Michigan Historical Collection. Among his students was George Sutherland, United States Supreme Court justice from 1922 to 1938. Justice Sutherland, who was one of the last and most dedicated Lochner-era justices, is said by one of his biographers to have absorbed and carried forward Cooley's ideas. See J. Paschal, Mr. Justice Sutherland 16-20, 170-72 (1951).

After leaving the law school, Cooley was appointed Dean and Professor of American History and Constitutional Law in the university's School of Political Science. He was active in this capacity for only one year before having to divert his attention to the national railroad problem. However, he continued to deliver occasional lectures at the university in his new capacity. See C. Larsen, supra note 87, at 25; 4 Dictionary, supra note 301, at 392-93.

307. T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (1868) [hereinafter T. COOLEY, CONSTITUTIONAL]; T. Cooley, The General Principles of Constitutional Law in the United States of America (1880) [hereinafter T. COOLEY, PRINCIPLES]. The former was a treatise for the bar. For its reception see infra text accompanying notes 316-19. The latter was a popular college text and student's guide. See P. Paludan, supra note 88, at 251; C. Larsen, supra note 87, at 18-19.


309. T. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract (1880) [hereinafter T. COOLEY, TORTS]. According to Professor Andrew McLaughlin (who was one of the nation's leading historians in the first half of the twentieth century) this work "was long considered the authoritative American treatment. Cooley himself thought this book his best." 4 Dictionary, supra note 301, at 393.
Commentaries\textsuperscript{310} and Story's Constitutional Law,\textsuperscript{311} wrote numerous articles on a variety of subjects,\textsuperscript{312} and gave many public lectures.\textsuperscript{313}

Thus, Cooley was a respected judge, scholar, teacher and administrator.\textsuperscript{314} But the foundation of his fame and his central contribution was his first major publication: \textit{A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union}.\textsuperscript{315} Published in 1868, this work was the most popular and influential constitutional law treatise of the late nineteenth century.\textsuperscript{316} For over forty years, it was regarded as "an indispensable companion for every one interested in constitutional problems."\textsuperscript{317} Historians have described it as "the groundwork of all laissez faire constitutional doctrine,"\textsuperscript{318} and "a basic authority for [the fourteenth amendment's] elaboration" during the \textit{Lochner} era.\textsuperscript{319}

\begin{enumerate}
\item\textsuperscript{310} W. Blackstone, Commentaries on the Laws of England (T. Cooley 3d ed. 1870). For this work, Cooley wrote a particularly revealing introduction, entitled Suggestions Concerning the Study of the Law. See 1 id. at v-xxiii.
\item\textsuperscript{311} J. Story, Commentaries on the Constitution of the United States (T. Cooley 4th ed. 1873). For this volume, Cooley wrote new chapters on the fourteenth and fifteenth amendments. See 2 id. at 632-92.
\item\textsuperscript{313} Address by Thomas M. Cooley and poem by D. Bethune Duffield on the dedication of the Law Lecture Hall, in Ann Arbor, Michigan (1863); lecture by Thomas M. Cooley: Changes in the Balance of Governmental Power, in Ann Arbor, Michigan (1878); Cooley, The Lawyer's Duty to the State, in PROCEEDINGS OF THE 4TH ANN. MEETING OF THE BAR ASSOCIATION OF TENNESSEE 79 (1886); lecture by Thomas M. Cooley: The Influence of Habits of Thought Upon Our Institutions, in Ann Arbor, Michigan (1887).
\item\textsuperscript{314} In addition, Cooley wrote a history of Michigan: T. Cooley, Michigan: A History of Governments (1885).
\item\textsuperscript{315} His contemporaries' esteem is indicated by his election, despite ill health, to the Presidency of the American Bar Association in 1893, see C. Larsen, supra note 87, at 27, and the contemporary commentary at his death. See, e.g., Note, supra note 301; Note, Thomas M. Cooley, 21 REP. A.B.A. 674 (1898).
\item\textsuperscript{316} T. Cooley, Constitutional, supra note 307.
\item\textsuperscript{317} See C. Larsen, supra note 87, at 7, 14-15; C. Jacobs, supra note 87, at 29-30; B. Twiss, supra note 4, at 18, 34-35.
\item\textsuperscript{318} B. Twiss, supra note 4, at 18. See also C. Jacobs, supra note 87, at 30 (describing
Clearly, Cooley's jurisprudence is a major indicator of late-nineteenth-century constitutional thought. His standing and the reception accorded his *Constitutional Limitations* is a testament as much to his ability to reflect and crystallize, as to mold and create, his contemporaries' beliefs.\(^{320}\) It is unfortunate that he left no work systematically explicating his legal philosophy. Nonetheless, a fairly complete picture of Cooley's legal thought can be pieced together from an analysis of the body of his work.\(^{321}\)

1. **Cooley's Private Law Jurisprudence**

Cooley was primarily a scholar of American law. His writings contain views about law in general, but they usually are expressed and interwoven into discussions about the common law. This section somewhat artificially separates the two strands. Cooley's general legal thought is discussed first. Then, due to its peculiar importance to his constitutional jurisprudence,\(^{322}\) additional comments are made concerning Cooley's views on the common law.

**a. Cooley's philosophy of law**

Although Cooley was not given to overt expressions of his religious beliefs, he was a devout Protestant who was attentive to life's religious and moral dimension.\(^{323}\) He believed in a transcendent Christian God and in a transcendent moral order.\(^{324}\) In his view, there was a "law of God"\(^ {325}\) establishing "immutable principles of right and justice."\(^ {326}\)

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320. For analyses that attribute Cooley's popularity to his reflection of thoughts corresponding to his generation's "felt necessities," see id. at 29-31; B. Twiss, *supra* note 4, at 18-41.
321. The most recent and most extended consideration of Cooley's thought is A. Jones, *supra* note 301. Like this Article, it finds Cooley's jurisprudence suffused with history, not rationalism or positivism. See also B. Twiss, *supra* note 4, at 22-24, 40-41 (noting the role of history in Cooley's thought).
322. See infra text accompanying notes 460-88.
324. Professor Jones describes Cooley's faith as involving "the concept of a God who gives meanings, who shows passionate and sinful man the Right, who is a great law-giver in a Newtonian-ordered universe." *Id.* at 15. Professor Jones also points out that Cooley rarely mentioned God in his writings. Yet there are occasions, even in his legal writings, in which it occurs. See, e.g., 1 W. Blackstone, *supra* note 310, at ix-x, 122 n.4.
325. 1 W. Blackstone, *supra* note 310, at x. See also id. at 40 n.2.
326. *Id.* at x. Cooley continues these remarks by saying that these principles "cannot rightfully be ignored." *Id.* However, Cooley uses the term "rightfully" here as a word of moral obligation. See infra text accompanying notes 335-41 (discussing Cooley's legal positivism); T. Cooley, *Constitutional*, *supra* note 307, at 72-73, 164-68 (saying that courts may not void legislation solely for violating the norms of natural rights and natural justice).
Without doubt, Cooley's jurisprudence had a natural law component.\textsuperscript{327} Nonetheless, Cooley tightly confines the natural law component of his legal thought through three presuppositions. First, he posits that natural law only reaches controversies with a moral dimension. Since, in his view, most human activities require rules that have no "moral quality,"\textsuperscript{328} he concludes that most laws cannot be emanations of natural justice.\textsuperscript{329}

Second, Cooley asserts that "the standards of ... right are not always plain to natural reason."\textsuperscript{330} Without doubt, he believes that God intended human beings to enjoy rights to life, liberty, property, contract and family relations.\textsuperscript{331} Nonetheless, he also believes that the specific

\textsuperscript{327} Significantly, Cooley's belief in natural law did not entail acceptance of a Lockean state of nature and its attendant axioms that natural rights antedate society and are of superior obligation. "[S]uch a state of nature," Cooley said, "is mere fancy[;] ... it never did and never can exist, for the individual is never found outside of society and of the reach of human law." \textit{1 W. Blackstone, supra} note 310, at 122 n.4 (saying also "a state of nature without government must be a state of savagery . . . . It cannot for a moment be admitted that nature indicates or even tolerates such a state; it indicates on the other hand, society and organization, and laws to protect and perpetuate them"). \textit{See also T. Cooley, Tort, supra} note 309, at 5-6. In determining the contours and contents of natural law, Cooley drew, as had Lieber, from biological considerations, and as had Grotius, from historical evidence. \textit{Id.} ("if it is found that by the very law of our being certain rights are essential to the purposes for which we seem to exist, and especially if we find that these have met with general recognition at all times and in all countries, we may very properly say that these rights are indicated by the law of nature, and are natural rights"). \textit{But see Cooley, Principles That Should Govern in the Framing of Tax Laws, 4 S.L. Rev. (n.s.) 180, 181 (1878) [hereinafter Cooley, Tax] ([the theory that government is founded in contract may answer a good purpose, though historically it is baseless]).

\textsuperscript{328} T. Cooley, Tort, supra note 309, at 6 n.1. \textit{See also id.} at 4; Cooley, \textit{Comparative, supra} note 312, at 343 (referring to situations in which "the rules of morality and right give little or no guidance"). Consider, for example, traffic regulations. Cooley points to more troubling instances of controversies involving honest mistake, or losses inflicted upon two innocent parties. In general, Cooley says, even if all men were perfectly moral, rules of law would be necessary to delimit legal right because "morality is very far from being adequate to the adjustment of a large proportion of all the controversies in which conscientious men . . . find themselves involved." \textit{T. Cooley, Torts, supra, at 6 n.1.

329. Cooley, Uncertainty, supra note 312, at 368 (commenting that "[m]uch of legal right was conventional at its origin"). Cooley did believe that the duty to observe the law was a moral obligation. \textit{T. Cooley, Torts, supra} note 309, at 4. His point is that we are morally obligated to obey the many rules of law that have no intrinsic moral quality. Indeed, he even argues that we must obey the law even when we think it violates natural law. \textit{1 W. Blackstone, supra} note 310, at 40 n.2 (saying that this "is an evil which is inseparable from established and regular government, and insignificant when compared with the blessings which government confers").

330. Cooley, Uncertainty, supra note 312, at 368 (referring to the standard of "legal right"). \textit{See also T. Cooley, Torts, supra} note 309, at 6 n.1 (saying that "nature ha[s not] indicated any clear line which the human intellect and conscience would infallibly recognize"); \textit{1 W. Blackstone, supra} note 310, at 40 n.2.

331. \textit{1 W. Blackstone, supra} note 310, at 122 n.4. These rights comprise Cooley's entire list of natural rights, \textit{id.}, which he says are "few and simple" in comparison to conventional rights which are "far more numerous and complicated." \textit{Id.} at 124 n.5. Cooley says these natural rights are derivable by reasoning from man's nature and history. \textit{Id.} at 122 n.4.
rules meant to define and govern humanity's natural rights are not at all clear.\textsuperscript{332} Cooley's view is that despite general agreement that natural law entails certain abstract rights, there is no similar consensus concerning their detailed elaboration.\textsuperscript{333} Natural rights are abstractions that are fleshed out and given determinate content by rules that are not themselves divinely ordained.\textsuperscript{334}

Finally, Cooley confines the natural law component of his legal thought through his view that natural law has no efficient power.\textsuperscript{335} Natural law, he knows, is not self-enforcing.\textsuperscript{336} Essentially, he thinks natural law prescribes "rights which are so fundamental, and so essential that they ought to be universally conceded as belonging to man as man, and universally recognized and protected by government."\textsuperscript{337} Unless they are recognized and protected by government, natural rights remain in the domain of morals, not law.\textsuperscript{338} In Cooley's view, natural law and, indeed, all moral claims are relevant to jurisprudence only to the extent that they have been adopted by an earthly sovereign.\textsuperscript{339}

\begin{itemize}
\item[332.] Cooley, \textit{Uncertainty}, \textit{supra} note 312, at 368 (observing that "close thinkers differ as to what is right in the acquisition, holding and enjoyment of property, in the making of contracts, and even in the rules that should govern the domestic relation"); 1 W. Blackstone, \textit{supra} note 310, at 40 n.2 ("under no circumstances do mankind differ more widely than when they undertake to apply their fallible judgments to the determination of what the law of God commands or what it forbids") (context makes clear that Cooley is using the phrase "law of God" as a synonym of the law of nature).
\item[333.] \textit{See supra} note 330 and accompanying text. For Cooley's view that laws should be certain and generally self-applicable to the facts they govern, see Cooley, \textit{Limits}, \textit{supra} note 312; T. Cooley, \textit{Constitutional}, \textit{supra} note 307, at 172 (saying the judiciary should not have power to decide cases based on principles that are "undefined").
\item[334.] Neither are they necessary deductions from the original principles.
\item[335.] Efficient power is discussed \textit{supra} note 125.
\item[336.] \textit{See, e.g.}, 1 W. Blackstone, \textit{supra} note 310, at vii-viii; \textit{id.} at 122 n.4 (saying that even though certain rights "are indicated by the law of nature it would not necessarily follow that human laws would always recognize them; and until recognized by human laws they would be without the necessary sanction for their protection").
\item[337.] \textit{Id.} at 122 n.4 (emphasis added).
\item[338.] \textit{See T. Cooley, Torts, supra} note 309, at 5 ("[i]n the domain of speculation or morals a right might be whatever ought to be respected . . ."); 1 W. Blackstone, \textit{supra} note 310, at vii ("abstract consideration of rights may answer the purpose of the mere theorist, but it is not sufficient for the lawyer; he must deal with principles as they have found recognition in the legal system, with all the limitations which state necessity or policy may have imposed").
\item[339.] This includes use of natural law to determine (or interpret) what the sovereign has adopted. \textit{See 1 W. Blackstone, supra} note 310, at xi; T. Cooley, \textit{Constitutional},
In other words, although Cooley believes in natural law, he posits a variety of inherent limitations to its ability to provide society with effective law. He thinks that few controversies are within natural law's scope; and even when they are, natural-law principles frequently compel no determinate resolution.\textsuperscript{340} In addition, his jurisprudence has a rigorous positivist dimension that further confines its natural law component.\textsuperscript{341}

Cooley's view that natural law is not self-enforcing is a correlative of his positivist notion that law involves rules "to which the state gives its sanction."\textsuperscript{342} Law involves not moral\textsuperscript{343} but legal rights, and "[l]egal rights become such at the will of the sovereign, and this will may convert them into mere moral claims or abolish them at discretion."\textsuperscript{344} In Cooley's view, "in law that only is a right which can be defended before legal tribunals."\textsuperscript{345} And he quotes John Austin, the fountainhead of legal positivism, to say "[s]trictly speaking, there are no legal rights but those which are creatures of law."\textsuperscript{346}

Despite these observations, Cooley is not a legal positivist. His positivist views are cabined by a panoply of historist notions. He may maintain that law ultimately depends upon the sovereign's will. Nevertheless, he indicates through staple historist presuppositions that the sovereign's will is not free and arbitrary, but is confined to effectuating popular sentiments and traditions.\textsuperscript{347}

\textsuperscript{supra} note 307, at 164-65; \textit{T. COOLEY, TORTS, supra} note 309, at 277 (discussing due process). \textit{Cf. infra} text accompanying notes 460-88 (using common law to interpret constitutional text).

\textsuperscript{340} For these reasons, even though Cooley viewed America as having incorporated natural-law norms into its legal system, \textit{infra} text accompanying notes 412-20, he refers to, and draws from, natural rights and natural justice only rarely in his writings.

\textsuperscript{341} The legal positivist component of Cooley's thought has a logical priority to his natural law. How much his positivism dominates and confines his rationalism depends upon the extent to which he finds the sovereign has adopted natural-law norms. \textit{See supra} note 340; \textit{infra} text accompanying notes 412-20.

\textsuperscript{342} 1 W. BLACKSTONE, \textit{supra} note 310, at 122 n.4.

\textsuperscript{343} Cooley divides rights into natural, moral and legal. All natural rights are moral rights, indeed they are the most fundamental. But between natural and moral rights on the one hand, and legal rights on the other, "[t]here is no necessary identity or even relation." \textit{Id.}

\textsuperscript{344} \textit{Id.}

\textsuperscript{345} \textit{T. COOLEY, TORTS, supra} note 309, at 5.

\textsuperscript{346} \textit{Id.} at 5 n.2. \textit{See also} Cooley, \textit{Sources, supra} note 312, at 522 (expressing agreement with "what is so concisely said by Austin in his \textit{Jurisprudence}, that 'the philosophy of positive law is concerned with law as it necessarily is, rather than with law as it ought to be, with law as it must be, be it good or bad, rather than with law as it must be if it be good' ") (emphasis in original).

\textsuperscript{347} For Cooley's discussion of judges and legislators as limited by popular sentiments see Cooley, \textit{Labor, supra} note 312, at 505-70; \textit{T. COOLEY, TORTS, supra} note 309, at 11-17. The following paragraphs recount Cooley's version of the staple historist assumptions that the sovereign power in a state is not the government but the people, and that the will of the people is not arbitrary but is determined by their race and history. \textit{See, e.g.}, \textit{supra} text accompanying notes 210-23. \textit{See also} T. COOLEY, \textit{CONSTITUTIONAL, supra} note 299, at 1
Throughout his writings, Cooley maintains that a nation’s laws are determined by “the common reason of the people.”\(^{348}\) This “reason,” he says, is the “final and settled conviction of the people as to what the rule of right and conduct should be.”\(^{349}\) Law drawn from this source, he asserts, will be obeyed “spontaneously”\(^{350}\) and “cheerfully.”\(^{351}\) Law drawn from any source—whether it be the arbitrary fiat of a ruler with despotic power\(^{352}\) or the teachings of the purest morality\(^{353}\)—simply “will be disobeyed whenever it seems safe to do so.”\(^{354}\) Indeed, Cooley says, law that “lacks popular approval[] can seldom in the full and proper sense be a law at all.”\(^{355}\) Moreover, throughout his writings, Cooley maintains that a nation’s laws should be determined by the “common reason of the people.” In his view, law drawn from this source promotes the ideal of participatory self-government.\(^{356}\) In addition, law drawn from this source is best “fitted” to the nation it governs.\(^{357}\)

(“The terms nation and state are frequently employed... as importing the same thing; but the term nation is more strictly synonymous with people... [and] a single nation will be sometimes so divided as to constitute several states”) (emphasis in original).

348. Cooley, Administration, supra note 312, at 342. Cooley uses a host of synonyms for this concept. See Cooley, Labor, supra note 312, at 503 (“settled conviction of the people as to what the rule of right and conduct should be”); Cooley, Administration, supra note 312, at 341 (“outgrowth of the habits, desires and needs of the people themselves”); Cooley, Sources, supra note 312, at 519 (“public sentiment”). Cooley’s concept of the “common reason of the people” is further elaborated and discussed infra text accompanying notes 363-86.

349. Cooley, Labor, supra note 312, at 503.

350. Id. at 504.

351. Cooley, Administration, supra note 312, at 342. See also T. Cooley, Torts, supra note 309, at 10 (“cheerfully acquiesced in”); id. at 10 (law reflecting the people’s “reason” will be obeyed “habitually”). The role of habit is discussed infra text accompanying notes 380-86.


353. Cooley, Labor, supra note 312, at 507. On the limited power of political leaders and moral teachers to influence legal development, see infra note 366.

354. Id. See also Cooley, Administration, supra note 312, at 342 (“the code which the people themselves have gradually and imperceptibly brought into existence, and which only expresses the common reason of the people, will be cheerfully respected and obeyed; while another [code] in theory equally just and right will produce in its enforcement continual unrest and disquietude”); Cooley, Uncertainty, supra note 312, at 368 (saying that when law is drawn from popular sentiment, a citizen “yields as by a sort of instinct to what the law, expressing the common opinion, has settled upon as right, and the law is a master which he follows without seeing, and obeys without waiting for a command”). Cooley instances the fate of laws out of harmony with popular convictions in Cooley, Abnegation, supra note 312, at 215-17.

355. Cooley, Labor, supra note 312, at 507. For this reason, Cooley refers to “the people” as “our law-makers.” Id. at 516. See A. Jones, supra note 301, at 282 (remarking that this article originally was a speech entitled “Our Law-makers, the People”). Cooley’s point here is also drawn from his concept of the nature and function of law. His view is that law is a body of “settle[d] principles which... [the people] can understand and appreciate, and by which they may... regulate their actions.” T. Cooley, Torts, supra note 309, at 10. Since only rules drawn from the people’s common reason will be obeyed, only rules drawn from that source can be law.

356. Cooley, Sources, supra note 312, at 522-23. According to Cooley:
Law, Cooley says, springs from human nature, but it "is moulded and shaped by time, place and circumstance of national development and growth." In consequence, law is best when derived from concrete experience, not abstract reason. Accordingly, he concludes that "the fruits of speculative genius in government are of little value, and ... permanent institutions must be the work of time and circumstances, must grow out of actual needs, and have their excellencies tested in the practical wisdom of the people from whose aspirations and exigencies they have sprung." A corollary of this view, Cooley says, is that a nation's laws are best when fashioned from "the collected sense of the people respecting their own affairs." Indeed, on this point he asserts the extreme position that law is best drawn from a social consciousness beyond the "collected sense" of the present generation. "If the enlightened reason of any age," he writes,

were certain to be, in all particulars, in advance of the age which preceded it, we might justify ourselves ... in cutting loose from the traditions and conclusions of the past. But in truth this would only be casting over board the wisdom of experience, and giving ourselves up to the winds of mere speculative abstractions. In nothing can the judgments of our ancestors be of more value than the matters of customary law, and in nothing can speculative reasoning be more at fault.

It is an idea that takes strong grasp upon the social sentiments and affections, reminding us as it does that we ourselves with our families and friends and the whole social circle of which we are a part are and are to be an active and formative element in our legal and political institutions, which we believe to be perennial, but which are never precisely the same as they come to and are transmitted by us.

Id. For Cooley's views on the norm of self-government, see Cooley, Abnegation, supra note 312.

357. See Cooley, Sources, supra note 312, at 516; 1 W. Blackstone, supra note 310, at vi (quoted infra note 383).
358. Cooley, Sources, supra note 312, at 517-18.
359. See id. at 518 (saying in considering a nation's laws, one "must judge of its excellencies by the aid of observation rather than of introspection"); infra note 360 and accompanying text. For this reason, the law of one people is not suited for another; and law of one time is not suited for another. See 1 W. Blackstone, supra note 310, at vi-vii.
360. Cooley, Sources, supra note 312, at 520-21. For a telling illustration of Cooley's belief that experience is more important than abstract reason, see his discussion of sovereignty in Cooley, Sovereignty, supra note 312, at 81, 84, 87, 88-89, 93 (emphasizing that theory must be fitted to the facts, not the facts to theory). See also Cooley, Sources, supra, at 530 (saying that to a lawyer "the theory is fact to him if in the trial of experience it has produced good results").
361. Cooley, Abnegation, supra note 312, at 211. See also Cooley, Uncertainty, supra note 312, at 365-66 (indicating that a law that "speaks the best thoughts of the people ... is better than could be made by the wisest single lawgiver, for the plain reason that 'everybody is cleverer than anybody'; the whole know better what is suited to their condition and needs than any one can know").
362. Cooley, Sources, supra note 312, at 517. See also id. at 530 (referring to "the
In other words, when Cooley says that law is and should be determined by the "common reason of the people," he conceives law as flowing not from the daily flux of public opinion, but from "the deliberate judgments of the people" over generations of time.

Cooley's view that nations have enduring commitments to particular values coexists with a view that national laws are mutable. "New conditions," he says, have always "called for new rules." In addition, Cooley believes that it is God's plan that mankind and its laws "advance from age to age, from a lower to a higher state of being." Thus he conceives laws as continuously evolving. Legal ev-

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[Note: The text continues with citations and further elaboration on Cooley's views, law's development, and its relationship with public opinion and divine leading.]

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[Note: The text concludes with a summary of Cooley's comprehensive view on law's evolution and its connection to broader social and divine factors.]

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[Note: The text wraps up with a final remark on the importance of recognizing Cooley's ideas within the broader context of legal and political thought.]
olution, however, is "steady and almost imperceptible." He describes a nation’s legal and political institutions as an “inheritance” which "we believe to be perennial, but which are never precisely the same as they come to and are transmitted by us." In time, he says, “[t]here have been revolutions in many things, but the onflow of the law has been as steady as it has been majestic; as peaceful as it has been res-istless.” In other words, Cooley conceives legal development as mirroring—indeed, as a process—of “natural growth.” Legal development is a process in which change coexists with “stability, order, regularity, patience and certainty; those great enduring qualities upon which the Mighty Founder has constructed the Universe, and which He has made equally essential in the founding and development of a solid structure of government.”

In sum, Cooley depicts law as determined by “the common sense of the people.” He depicts that “common sense” as mutable yet dominated by “a vigorous conservative power” which preserves “the collected wisdom of the ages as it has been developed in the history of . . . [the] people.” His jurisprudence involves a conception of an ineffably wise yet developing “national mind” that embraces both a present and an “ancestral” nation. No doubt, Cooley’s conception is as grand and complex as it is unmodern. Yet, Cooley explains its mechanics through—and thereby founds his entire jurisprudence upon—two principles of the human condition.

those opinions are “so far in harmony with the great body of the law that it may naturally be taken and deemed to be a component part of it.” T. COOLEY, TORTS, supra, at 13. See also id. at 16; infra text accompanying notes 387-420 (describing Cooley’s common law jurisprudence).

368. Cooley, Sources, supra note 312, at 521 (describing Burke’s views). See also Cooley, Administration, supra note 312, at 342 (saying that to colonial Americans the common law was a “cherished inheritance”).
369. Cooley, Sources, supra note 312, at 523. Rights, he says, “are slowly and only with toil and endeavor enacted in laws and moulded in institutions.” 1 W. BLACKSTONE, supra note 310, at viii.
370. Cooley, Uncertainty, supra note 312, at 366. See also T. COOLEY, TORTS, supra note 309, at 13 (saying that common law principles “grow and expand, and . . . actually become more comprehensive, though so steadily and insensibly . . . that for the time the expansion passes unobserved”); id. at 15 (describing common law development as “moderate and steady” and involving “steady and almost imperceptible change”).
371. Cooley, Sources, supra note 312, at 522.
372. Id. at 525.
373. Id.
374. Id. at 530 (speaking particularly of the American people). See also Cooley, Uncertainty, supra note 312, at 366 (describing American law as “preserv[ing] whatever of value had been worked out for them in the struggles and vicissitudes of ancestral history”).
375. “National mind” is in quotes because it is a term of art. Cooley did not use it. However, he does speak of such entities as “national thought” and “national judgment.” See Cooley, Comparative, supra note 312, at 354.
376. For Cooley’s mention of “ancestral” history, see sources quoted supra note 374.
377. These two principles may be thought of as the foundation of his jurisprudence from which all else follows.
One principle which Cooley draws from occasionally, and develops superficially, is "race."

"Law," he says in his only extended disquisition on this principle,

begins with the race. No people is without law, yet no people have the same laws as any other people. It has been aptly said by a great thinker of a former age that all civil laws are derived from the same fountains of justice, but just as natural waters take tinctures and tastes from the soils through which they run, so do the civil laws vary according to the regions and governments where they are planted, though they proceed from the same fountains. Happily and beautifully this figure explains a great truth. Justice is the common concern of all mankind, but the Justice of each nation must necessarily partake of the national peculiarities.

The other principle, which Cooley draws from more frequently and develops more fully, is "habit." Even though "[m]uch of legal right [is] conventional in its origin," Cooley says,

legal rules long observed create a reason for themselves, and the citizen conforms to them without question as he does to the laws of nature whose operations he perceives about him. He yields as by a sort of instinct to what the law, expressing the common opinion, has settled as right, and the law is a master which he follows without seeing, and obeys without waiting for a command.

Perhaps a partial explanation for Cooley's nondevelopment of the race principle is contained in his conclusion of the disquisition quoted infra text accompanying note 379: "The subject is barely alluded to; the idea is too familiar to be dwelt upon." Cooley, Sources, supra note 312, at 516. Perhaps most of the explanation is that Cooley largely drew from Burke, and Burke focused on the force of habit (which is Cooley's other principle). See infra text accompanying notes 380-82.

378. Perhaps a partial explanation for Cooley's nondevelopment of the race principle is contained in his conclusion of the disquisition quoted infra text accompanying note 379: "The subject is barely alluded to; the idea is too familiar to be dwelt upon." Cooley, Sources, supra note 312, at 516. Perhaps most of the explanation is that Cooley largely drew from Burke, and Burke focused on the force of habit (which is Cooley's other principle). See infra text accompanying notes 380-82.

379. Id. For other instances in which Cooley explicitly connects national law with race, see T. COOLEY, CONSTITUTIONAL, supra note 307, at 22; Cooley, The Federal Supreme Court—Its Place in the American Constitutional System, in CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW: A COURSE OF LECTURES BEFORE THE POLITICAL SCIENCE ASSOCIATION OF THE UNIVERSITY OF MICHIGAN 29, 30 (1890) [hereinafter Cooley, Federal]. Significantly, in both these instances he is speaking of American constitutional law. See also Cooley, Grave Obstacles to Hawaiian Annexation, 15 Forum 390, 395, 398-99 (1893) [hereinafter Cooley, Grave] (arguing that one reason why the annexation of Hawaii is unconstitutional is that the Constitution contemplates a nation composed of states "populated almost exclusively by one European race" and, therefore, has institutions suitable for them).

380. Cooley, Uncertainty, supra note 312, at 368. Cooley's view here is a theme in Western jurisprudence that dates back to Aristotle's conception of humans as having a "second nature" that is acquired through experience, a conception that was an important facet of Aristotle's philosophy of ethics and justice. See J. RANDALL, supra note 52, at 267-68; Siegel, Aristotelian, supra note 52, at 38 (discussing the role of education and communal praise in directing a person towards worthy ends).
Habit, Cooley observes, breeds "respect and obedience" and "deprives the numerous restraints of the law of all seeming hardship that might have been felt originally."\(^{381}\) Through habit, the law's "restraints come to be understood and appreciated in their true character as being severally the representatives of rights secured and protected, and the feeling they give is one of security rather than of restiveness and oppression."\(^{382}\)

In Cooley's view, therefore, race and habit conjoin to establish the norms that are best "fitted" to govern a particular nation.\(^{383}\) The norms established by race and habit are best "fitted" because they are the norms by which the people most want to be governed.\(^{384}\) They are best "fitted" because they are the norms by which the people are most prudentially governed.\(^{385}\) And in any event, race and habit conjoin to establish the norms by which the people must be governed.\(^{386}\) They conjoin to establish the relatively stable body of usage and principles that is both the "common reason of the people" and the law itself.

\section*{b. Cooley's common law thought}

Consonant with his general legal philosophy, Cooley conceives the common law as determined by the usages, customs and ideas of the

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\begin{itemize}
\item \(^{381}\) T. Cooley, Torts, supra note 309, at 10.
\item \(^{382}\) Id. See also id. at 15; Cooley, Uncertainty, supra note 312, at 366; Cooley, Comparative, supra note 312, at 354 (observing that the difference between laws based upon habit and laws based on any other source "[t]o the citizen . . . is the difference between freedom and oppression"). For these reasons, Cooley concludes that "an imperfect law let alone may be much more conducive to the peace of society and the happiness of the people than a better law often tampered with." T. Cooley, Torts, supra note 309, at 15.
\item \(^{383}\) See, e.g., 1 W. Blackstone, supra note 310, at vi:
\begin{quote}
We cannot understand a political system, and judge of its value and probable influence and permanency, without a knowledge of the people who have adopted it, and of the manner in which they are likely to give its theories practical effect; for nothing is more evident than that what will conduct one people to ruin, may lead another, which has had a different history and training, and whose natural and acquired tendencies are different, on the high road to national greatness and prosperity.
\end{quote}
See also T. Cooley, Constitutional, supra note 307, at 21; Cooley, Grave, supra note 379, at 392-93, 395; infra text accompanying notes 438-40.
\item \(^{384}\) See supra text accompanying notes 349-51.
\item \(^{385}\) See supra text accompanying notes 356-76.
\item \(^{386}\) See supra text accompanying notes 352-55. In other words, given the people's sovereign power and their preferences on the subject, race and habit establish the only norms the people can be governed by. Cooley's reliance on habit means, of course, that many laws could originate in the willful, arbitrary dictates of government officials to which people have acquiesced. But Cooley indicates that contemporary legal systems have "obscure" but "traditional" origins in prehistoric times. See T. Cooley, Torts, supra note 309, at 11. He implies that the principles of race and habit have always antedated and, therefore, confined national rulers. In any event, Cooley is certain that in recorded times national rulers have been so bound. Id.
\end{itemize}
He describes it as "springing from the nature of the people themselves," as "the outgrowth of [their] habits of thought and action," and as uniquely suited to them. The common law, he says, is a "species of popular legislation," and its popular determinants are as vigorous in the present as in the past.

Cooley maintains these views despite his contention that law requires governmental sanction. To Cooley, that the common law is a body of "traditionally rather than statutory" rules means that "a very considerable proportion of the common law has had its real origin in judicial action, which has accepted many things for law, and rejected many others, and by a sifting process has made the law what we find it now." This, he admits, is a process of continuous "judicial legislation." Cooley sees judges legislating, however, by giving state sanction to rules established by the populace through their behavior and beliefs.

In effect, Cooley conceives the common law as "consist[ing] in the established usages of the people" and as something more than a body of usages; it is that, indeed, but it also embraces the principles which underlie the usages, or which so harmonize with them that the courts are justified in accepting them as the basis for judicial action, and as forming with the usages a consistent body of law.

He thinks common law courts legislate by enforcing rules of conduct spontaneously established by the people or, where none exist, by fashioning rules to fit the circumstances of the case.

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387. Id. at 11, 14; T. COOLEY, CONSTITUTIONAL, supra note 307, at 21-22; Cooley, Administration, supra note 312, at 344 ("ideas and customs"); Cooley, Labor, supra note 312, at 503 ("steady modification of the common law by public sentiment, noticeable only when it has crystallized in general custom"). Cooley claims that usage and custom not only was, but largely still is, the basis for common law development. See Cooley, Labor, supra, at 504-06.

388. T. COOLEY, CONSTITUTIONAL, supra note 307, at 21. See also Cooley, Administration, supra note 312, at 342.


390. Id. at 21.

391. Cooley, Labor, supra note 312, at 504.

392. Id.

393. See supra text accompanying notes 342-46.

394. T. COOLEY, TORTS, supra note 309, at 11. See also id. at 14 (common law consists of "principles which have grown up irrespective of statutes").

395. Id. at 15.

396. Id. at 11.

397. See Cooley, Labor, supra note 312, at 505.

398. T. COOLEY, TORTS, supra note 309, at 14. See also Cooley, Labor, supra note 312, at 503.

399. T. COOLEY, TORTS, supra note 309, at 14-15. See also 1 W. BLACKSTONE, supra note 310, at xii (describing the law as a matter of principle more than precedent). For Cooley's discussion of the fact, necessity, propriety and limits of judicial legislation, see id. at 11-19.
ioning a rule that "may be readily fitted in and accommodated to the common law system, that, in fact, . . . seems to belong there."400 He concedes that the power to determine and apply the law's principles involves a "very broad" discretion.401 Nevertheless, he is certain that whether courts draw from the people's "established usages" or "the principles which underlie" them, courts legislate the people's prevalent norms of behavior.402 "Neither the courts nor the laws," Cooley believes, "have lagged behind the public sentiment."403 In other words, he considers the common law as the product of a mutual interaction of judicial power and public sentiment. Formally, the common law is determined by judicial declaration. Substantively, it is determined by "popular legislation" that reflects the people's race and habits.

Also consonant with his general jurisprudence, Cooley conceives the common law as evolutionary.404 "The common law," he says, "in its very nature is subject to continuous change."405 It changes "steadily and insensibly"406 as the people modify their habits and ideas,407 and as judges grapple with "new conditions . . . [and] endeavor[ ] to fit and conform the old law to them."408 Thus, the common law grew as "one by one, important principles [were] recognized, through adjudications which illustrate them."409 Common law rights were "slowly and only with toil and endeavor enacted in laws and moulded in institutions."410 The common law is "the growth of ages."411

400. T. COOLEY, TORTS, supra note 309, at 15. See also id. at 13 (saying that the judge, when resolving a case of first impression, must fashion a rule that is "so far in harmony with the great body of the law that it may naturally be taken and deemed to be a component part of it"). Legislatures are called upon when legal reform requires going beyond established principles. See id. at 15-16; Cooley, Labor, supra note 312, at 506. This is because legislators, given their elective tenure, clearly are subject to "deferring to public sentiment." Id.


402. For Cooley's discussion of the necessity, propriety and limits of judicial legislation, see id. at 11-19; Cooley, Labor, supra note 312, at 503-06.

403. Cooley, Sources, supra note 312, at 519.

404. See, e.g., T. COOLEY, TORTS, supra note 309, at 11 (saying "that it could only be by the most enlarged intendment that the law of to-day could be recognized as the common law of even the time of Lord Coke").

405. Cooley, Labor, supra note 312, at 506. Cooley draws the following progressive lesson from these remarks:

The judge who turns a deaf ear to popular clamor at all times, and means to heed only the voice of the law, is still compelled to bear in mind, when dealing with common law questions, . . . that he is always concerned with it as it is at the time, and can consider what it has been only as an aid in determining its present state. Id. Constitutional law, however, is frozen at the time of its adoption, excepting textual amendment only. See infra note 452.


408. T. COOLEY, TORTS, supra note 309, at 11.

409. Id. at 13.

410. 1 W. BLACKSTONE, supra note 310, at viii.

411. Cooley, Administration, supra note 312, at 343.
In one regard, however, Cooley thinks the common law is unique: in its content. To a degree that is unique among systems of national law, the common law incorporates—indeed, is “founded on”—principles of civil liberty and natural law.412 As the common law originated in the “maxims” of “a sturdy and independent race, accustomed in an unusual degree to freedom of thought and action, and to a share in the administration of public affairs,”413 Cooley says, “arbitrary power and uncontrolled authority were not recognized in its principles.”414 Rather, the common law “recognized the worth, and sought especially to protect the rights and the privileges of the individual man.”415 Thus, the common law “was the best foundation on which to erect an enduring structure of civil liberty that the world has ever known.416

Of course, Cooley does not maintain that the common law’s protection of civil liberty and natural justice appeared full blown. At its inception, he says, “[m]any of [the common law’s] features were exceedingly harsh and repulsive, and gave unmistakable proofs that they had their origin in times of profound ignorance, superstition and barbarism.”417 Cooley’s view is that it was “only with care and steadiness and tenacity of purpose that those guaranties [were] forged which are the securance of freedom.”418 The modern common law’s protection of liberty, he says, was “worked out . . . in the struggles and vicissitudes of ancestral history.”419 It is, Cooley says, the “perfect work of centuries.”420

c. Conclusion: historism ascendant

Cooley’s private law jurisprudence is premised upon a conception of a people as formed by race and habit into a holistic group. Cooley depicts a people as possessing a “common reason”—a sovereign but not arbitrary will—that determines their own law. Law is thus presented

412. T. COOLEY, CONSTITUTIONAL, supra note 307, at 21-22; Cooley, Administration, supra note 312, at 344; Cooley, Sources, supra note 312, at 519.
413. T. COOLEY, CONSTITUTIONAL, supra note 307, at 22.
414. Id. at 22.
415. Id. Cooley acknowledges that for a period a considerable portion of the English populace were “villeins or slaves.” Id. at 295. But he also notes that through “imperceptible steps,” id., villeinage was abolished. He lists among the causes that “the common law presumed every man to be free until proved to be otherwise.” Id. at 296.
416. Id. at 22.
417. Id. See also Cooley, Administration, supra note 312, at 344.
418. 1 W. BLACKSTONE, supra note 310, at viii.
419. Cooley, Uncertainty, supra note 312, at 366.
420. Id. (speaking of the state and federal “bills of rights” which come from the common law). Thus due both to its origins and growth, Cooley concludes that the common law was “a useful code in barbarous and despotic periods, and it has not been any the less so in enlightened periods and under free governments.” T. COOLEY, TORTS, supra note 309, at 11.
as founded upon the mundane forces of race and habit, but as capable of incorporating God's divine code.\textsuperscript{421} Law always involves principles that are unique to the nation\textsuperscript{422} but which may also involve principles that are universal and ahistoric. Cooley presents law as stable yet imperceptibly evolutionary and adaptive. He conceives law as reflecting traditional and ancient wisdom more than novelty and current speculation. Clearly, his jurisprudence is a historist vision of law.

It is, however, a historist vision that contrasts markedly with Pomeroy's. Cooley's legal system is more exclusively a product of historical experience and race principles than Pomeroy's. Pomeroy presents natural law as a constant and powerful component of legal thought.\textsuperscript{423} For Pomeroy, race principles and natural law are co-equal sources of legal norms. Cooley, however, presents natural law as subject to such inherent infirmities that it has a significantly diminished presence in his legal theory and legal system.\textsuperscript{424} Cooley presents historical experience, race and habit as the dominant, if not exclusive, source of legal norms.

It is true that in discussing the common law Cooley does not entirely break the Anglo-American legal system's tether to natural law. Natural law, he assures us, does exist; unlike other legal systems, the common law is "for the most part" founded upon it.\textsuperscript{425} These assurances of American "exceptionalism"\textsuperscript{426} are of great importance in understanding Cooley's thought and its appeal to his contemporaries. It is important to note, however, that with far greater frequently and emphasis, Cooley grounds his thought in the view that most law is "conventional in its origin; but legal rules long observed create a reason for themselves."\textsuperscript{427} Similarly, it is important to note his insistence on the ability and right of holistically conceived societies—and not divine command, the state of nature, arbitrary sovereigns, or current majorities—to create, empower and validate their legal systems. Cooley's vision of American "exceptionalism" depends upon neither divine intervention nor direct intuitive access to the tenets of right reason.

\textsuperscript{421} It should be noted that even when natural law is incorporated, it potentially determines far less of the content of Cooley's legal system than Pomeroy's. \textit{Compare supra} text accompanying notes 128-31 \textit{with} text accompanying notes 328-34.\textsuperscript{422} \textit{See supra} text accompanying notes 348-86; \textsc{1} \textsc{w. blackstone, supra} note 310, at vii ("[a]ll history teaches us that different peoples, or even the same people in different stages of advancement, are not to be governed by the like modes and forms").\textsuperscript{423} \textit{See supra} text accompanying notes 128-31, 192-96.\textsuperscript{424} \textit{See supra} text accompanying notes 328-39.\textsuperscript{425} Cooley, \textit{Administration, supra} note, at 342; \textit{supra} text accompanying note 412.\textsuperscript{426} American "exceptionalism" is the doctrine that America was a Providentially-favored nation, with a divinely designed and fostered mission. This doctrine, drawn from America's Protestant millennialism, underlies much of the cultural resistance to modern historicism. It is what made historicism last so long in America. \textit{See} Ross, \textit{supra} note 13, at 909-10, 911-14.\textsuperscript{427} Cooley, \textit{Uncertainty, supra} note 312, at 368. \textit{See supra} text accompanying notes 380-82.
Rather, it stems from the mundane race principles and habits of the Anglo-American people—principles and habits that are discovered and given determinate content through historical study.

Moreover, Cooley does no more than assure his readers that the American legal tradition comports with natural law. He never directly reasons from or traces particular rules to it. In Cooley’s view, American law comports with natural law. But the life of the law is history.428

2. COOLEY’S CONSTITUTIONAL JURISPRUDENCE

Like his private law jurisprudence, Cooley’s constitutional thought has natural-law, legal positivist and historist aspects. The positivist and natural-law strands of Cooley’s constitutional jurisprudence, however, are just aspects of his historism.

a. Cooley’s theory of constitutional law

As late-nineteenth-century America’s leading constitutional jurist, Cooley wrote about constitutional law both descriptively429 and normatively.430 Of course, these are two substantially different undertakings: the former attempts to understand what constitutions are; the latter attempts to understand what they should be. In an ideal world, positive and normative constitutional theory are the same; in Cooley’s world, they were not. Descriptively, Cooley thinks constitutions are products of power and will; normatively, he thinks they should be products of race and habit.

Accordingly, Cooley founds his descriptive constitutional theory on the premise that “[i]n every sovereign State there exists an uncon-

428. Cooley seems to exemplify teleologic historism, hedged (perhaps) with a dash of rationalistic historism. Cooley’s historism is not rationalistic because he conceives the principles of Anglo-American society as largely unique to that culture. The principles are universal only at the highest level of abstraction. That is, the institution of private property is natural and universal; but all the concrete and particular rules of the institution are conventional and particularly appropriate to the Anglo-American race. Cooley’s historism is not positivistic because the principles he perceives are tendencies that unfold, not constantly operating necessary laws.

429. Descriptive is used here as a synonym for positive. Descriptive/positive theory approaches law as it is, not as it ought to be. Positive is the usual locution, but I avoid it here to avoid confusing a positive approach to law with the theory of legal positivism. In law, a positive approach may result in “positivism” which claims that law is premised upon the will of the state. But it is possible that a positive approach will yield something else. This section argues that Cooley’s positive approach yielded legal positivism when he talked about constitutions in general, but it yielded historism when he talked about American constitutions. See infra text accompanying notes 431-61.

430. T. COOLEY, CONSTITUTIONAL, supra note 307, contains the best statement of his descriptive constitutional theory and law. Cooley, Comparative, supra note 312, is the best statement of his normative theory.
trolled power” of lawmaking. He observes that whenever there is a written constitution, “[w]hat is right, what is expedient, what is proper, what constitute the inalienable rights of individuals, and what is necessary to be inserted in their constitution of government to protect them, the people who frame it must judge.” Although he agrees that a written constitution implies judicial review of legislative acts, he maintains that courts “cannot run a race of opinion upon points of right, reason, and expediency with the [legislature].” Courts cannot void legislation for violating natural rights, the “fundamental principles of republican government,” or “a spirit supposed to pervade the constitution, but not expressed in words.” His view is that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance.

Normatively, however, Cooley asserts that constitutional jurisprudence’s “most important principle . . . [is] the principle of growth and expansion.” In his view, “a good constitution must be of gradual formation; it must result from the history and experiences of the people,

431. T. Cooley, Constitutional, supra note 307, at 172. Cooley refers to this statement as the accepted theory. He discusses sovereignty at length and qualifies this view in terms of the facts of organized social life in Cooley, Sovereignty, supra note 312. See also Cooley, Power, supra note 312 (asserting there are implied limits to the scope of amendments authorized by U.S. Const. art. V). These qualifications do not affect the analysis here.

432. 1 W. Blackstone, supra note 310, at xi. See also Cooley, Sovereignty, supra note 312, at 81 (observing that “every people[’s]” theory of government determines the rights established in their country); id. at 86. As will become evident, the referent of Cooley’s phrase “the people who frame it” is not the convention that drafts the constitution but the people of the nation that adopt it. See infra text accompanying notes 452-61.


434. Id. at 164-68. Indeed, concerning legislative violations of natural right, Cooley says “if this be an evil, it is an evil which is inseparable from established and regular government, and insignificant when compared with the blessings which government confers.” 1 W. Blackstone, supra note 314, at 40 n.2.


436. Id. at 171.

437. Id. at 168. On this subject, see also id. at 72-73 (discussing “unjust” constitutional provisions). Cooley did believe that law and constitutional provisions which appear to be “unjust” should be subject to close scrutiny to be certain that was their true meaning. See id. at 73, 164-65.

Cooley’s positivism is such that he believes the only means for changing the constitution is formal amendment. See infra note 452.

438. Cooley, Comparative, supra note 312, at 347.
and be the natural and deliberate expression of their thoughts, wishes, and aspirations in government." This is because

[n]o constitution otherwise formed can so completely adapt itself to the needs and thoughts of the people as the one that springs directly from the national life, and has been moulded by the events of national history, and constitutes an expression of the popular idea of government, and of what are its proper functions and limitations. It then fits as a garment, and no other will.

In sum, Cooley's general constitutional theory is that constitutional law is a matter of power, but it should be a matter of history. Obviously, these two perspectives mean that constitutions can exist which depart from what they should be. Constitutions can be established by force, through demagoguery, or upon principles drawn from abstract reason rather than national experience. They can allow for too little or too rapid a capacity for change. However, these two

439. Id. at 349. See also id. at 356-57 (saying with regard to written constitutions that the “best is that which is written with close hold on the past, but which, with foreseeing eye, prepares the way for appropriating the lessons of a progressive future”). A written constitution “prepares the way” through allowing amendment. Id. at 351-52. Cf. 1 W. BLACKSTONE, supra note 310, at vii-viii (saying that “rights... are established... slowly and only with toil and endeavor enacted in laws and moulded in institutions. It is only with care and steadiness and tenacity of purpose that those guaranties are forged which are the securance of freedom”).

440. Cooley, Comparative, supra note 312, at 346. See also id. at 356:
Of all the constitutions which may come into existence for the government of a people, the most excellent is obviously that which is a natural outgrowth of the national life, and which, having grown and expanded as the national thought has matured, is likely at any particular time to express the prevailing sentiment regarding government, and the accepted principles of civil and political liberty. See also Cooley, Abnegation, supra note 312, at 221. Cooley also states the correlative of this proposition:
Of all the constitutions which a people ever accepts for its organic law, the least valuable is that which it suffers to be made for it on the principle of turning the back upon the national experience, disevevering the nation’s future from the past, and laying the framework of government in ideal perfection. Such a constitution may possibly in time acquire permanence, but it can never be predicated of it that the people will so far appropriate its ideas, adapt themselves to its methods, and allow it to take root in their every-day life as to convert it into an institution. In proportion as it differs from governmental thoughts and systems which are displaced by it, the probabilities are not only against its usefulness while it stands, but they are against its stability also.

441. Cooley, Comparative, supra note 312, at 349 (saying that unwritten constitutions are more likely to have “antecedents that lead directly and naturally up to it, while those... [that are] written are liable to be affected by force, fraud, accident, or the misleading of the facile tongues or pens of demagogues or doctrinaires”) (emphasis in original); id. at 356 (quoted supra note 440).

442. Id. at 351-56.
perspectives also mean that constitutions can exist which adhere to his normative views.

b. Cooley's theory of American constitutional law

America's constitution, Cooley thinks, adheres to his normative theory. In America, he says, the people are sovereign. At the founding, they exercised their "uncontrolled power" to ordain a constitution "framed on the plan of embodying the settled principles already evolved and manifested in the history of the people, and of crystallizing them in exact form, instead of leaving them vague and indeterminate...." Moreover, the people included within their Constitution a cumbrous amendment process that allows constitutional change but compels it to reflect "the thought...not the whim of the people." Accordingly, Cooley says, "there is not in all history a fundamental law which is a more genuine growth" than the United States Constitution was at its inception and remains to this day.

443. See, e.g., T. COOLEY, CONSTITUTIONAL, supra note 307, at 28, 87, 172; Cooley, Comparative, supra note 312, at 352-53; Cooley, Federal, supra note 379, at 32-33; Cooley, Sovereignty, supra note 312, at 88. Implicitly, Cooley is aware of a distinction between de jure and de facto sovereign power. According to Cooley's general jurisprudence, the people always wield de facto sovereign power. However, Cooley notes that de jure sovereign power need not be lodged in the people. In Russia, for example, the Czar may have it; in England it is possessed by Parliament. T. COOLEY, CONSTITUTIONAL, supra note 307, at 172; Cooley, Sovereignty, supra note 312, 85 (implication). But Cooley's point here is that, in America, sovereign power is lodged de jure in the people, which, he says, is its only "rightful" place. Cooley, Comparative, supra, at 352. But see infra note 446 (Cooley's argument that in America there is limited power to made de jure amendments).

444. Cooley, Comparative, supra note 312, at 349. See also Cooley, Uncertainty, supra note 312, at 366 (describing "our bills of rights" as the "perfect work of centuries").

445. See U.S. CONST. art. V.

446. Cooley, Comparative, supra note 312, at 350 (also comparing "the thought evolved in excitement or hot blood" to the "sober second thought, which alone if the government is to be safe, can be allowed efficiency"). Cooley discusses the American amendment process in id. at 351-54. He was of the view that the amendment process worked well. See id. at 352; Cooley, Power, supra note 312, at 113. He did not have the modern view that the process is so cumbrous that it simply is "a dead letter." Carter, Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 YALE L.J. 821, 842 (1985). See also E. CHEMERINSKY, supra note 241, at 67-69 (1987) (observing that one argument for constitutional change through judicial interpretation is the inutility and disuse of the amendment process).

Cooley also voiced the position that there were implied limitations on the scope of constitutional amendments. To Cooley, the word "amendment" carried with it the notion of change consistent with the basic principles of the original plan. Thus, although the people had ultimate power to rebel and impose revolutionary changes, legal change was limited. The people had, in effect, limited the legal power not only of their government, but of themselves. See Cooley, Power, supra; Letter from Thomas M. Cooley in 2 MICH. L.J. 334 (1893). The concept of implied limitations on article V amendments is discussed in L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION 87-126 (1942).

447. Cooley, Comparative, supra note 312, at 349-50.

448. As Cooley said in a public lecture:
Cooley thus believes that his descriptive and normative theories coincide in the Constitution. As in any other nation, the American sovereign determines its fundamental law and defines "what is right."

In America, however, the people are sovereign, and they have decided to determine their fundamental law and define "right" according to the traditions of their ancestral nation. Cooley's descriptive analysis of America's fundamental law yields a historist Constitution.

c. Cooley's theory of constitutional interpretation

As discussed above, Cooley's descriptive theory premises constitutional law upon power and will. An aspect of this theory is that a written constitution provides whatever "the people who frame it" decide. To Cooley, this means that the "object of [constitutional] con-

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448. As Cooley said in a public lecture:
The American [Constitution], as truly as that of England, is a growth, and the wisdom of the founders . . . was shown chiefly in this: that in perfecting the general government they disturbed as little as possible the existing institutions which were the growth of ages, and which were as much a part of their race inheritance as were their own physical and mental peculiarities and tendencies. At the same time by the provision they made for the amendment of their work, they took care that there should be no ironbound structure by which growth in the future should be precluded. In short, the establishment of government under the Constitution was preservative even more than it was creative; . . . and to perpetuate the principle of constitutional growth. What was particularly noticeable . . . is chiefly this: that the framers of the Constitution adhered so closely to the lessons of experience, and trusted so little to their own speculations and inspirations. In so far as the Constitution was a new creation, it was limited strictly to what seemed to be the necessities of the case. Cooley, Federal, supra note 379, at 30. See also Cooley, Sources, supra note 312, at 530 (saying American revolution devoted to "the preservation of institutions, not their destruction").

449. See supra text accompanying note 432.

450. Cooley's constitution is historist because it is a "growth" embodying principles evolved in the history of the American people. See supra text accompanying note 444. The remainder of this section details this claim. See infra text accompanying notes 451-88.

451. See supra text accompanying notes 431-32.

452. See supra text accompanying note 432. In this regard, Cooley disagrees with Pomeroy and Tiedeman who thought judicial interpretation could vary the original intent of the constitutional provisions. See supra text accompanying notes 261-62; infra text accompanying notes 597-606. Cooley limited constitutional change to the amendment process. Cooley, Power, supra note 312, at 110 (denying that American constitutions insensibly change); Cooley, Comparative, supra note 312, at 351, 353; Cooley, Federal, supra note 379, at 31; T. COOLEY, PRINCIPLES, supra note 307, at 38-39; T. COOLEY, CONSTITUTIONAL, supra note 307, at 55. However, he did conceive that as social facts change, the old law might apply differently. See Cooley, Comparative, supra, 354-56 (discussing changes in interstate commerce); T. COOLEY, PRINCIPLES, supra, at 38-40 (same). He also understood that in interpreting the Constitution judges had to resolve issues that the framers never anticipated. See Cooley, Codification, supra note 312, at 332-33. But see Cooley, Labor, supra note 312, at 504-05 (when law is unclear "'precedents which are supposed to show what the law is, may only tend to confuse and mislead when the movement of the time has been away from them'"); Cooley feels that it is through the amendment process that the Constitution has kept pace with the public sentiment. See Cooley, Comparative, supra, at 351-52.
struction . . . is to give effect to the intent of the people in adopting it."

Yet, Cooley's historist understanding of the American constitution fully cabins the positivist implications of his descriptive theory. To Cooley, the perception that America's Constitution adheres to his normative theory of constitutional law entails more than a general sense of opprobrium. It entails a specific technique of constitutional interpretation. That the Constitution is a "growth" means that it was drafted and adopted in neither a vacuum nor a state of nature, but rather in a historic society. "Designed for [the people's] protection," Cooley says, "in the enjoyment of the rights and power which they possessed before the [Constitution] was made, [the Constitution] is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought." Accordingly, he asserts that the key to interpreting the intended mean-

453. T. COOLEY, CONSTITUTIONAL, supra note 307, at 55 (emphasis omitted). Cooley considers his approach to constitutional interpretation, i.e., looking to the intent of the people in adopting the constitution, as an application of the fundamental principle applicable to "all written laws": seek "the intent of the lawgiver." Id.

The disjunction between the quote in this and the preceding sentence should be noted: the first sentence refers to the people who frame the constitution, and the second sentence refers to the people who adopt it. The scope of the word "frame" is broad enough to encompass the people who adopt it. Quite probably, Cooley conceives the people who adopted the constitution as de jure the people who framed it. In any event, the second sentence is from his landmark treatise and is the opening sentence of his discussion of the search for intent as the central focus of constitutional interpretation. Significantly, in the original, it is printed in italics. The second sentence probably was his most considered statement.

Whether Cooley's notion that constitutional interpretation should seek the intent of the people who adopted the constitution evidences a positivist or historist mode of thought is indeterminate. Nineteenth-century positivism, as well as nineteenth-century historism, may well have considered the people the "makers" of the constitution. When, how and why American positivist theory began to consider the intent of the drafters as determinative of constitutional meaning is a nice question of constitutional history and theory. See Kahn, Reason and Will in the Origins of American Constitutionalism, 98 YALE L.J. 449, 451, 494-506 (1989) (arguing that by the Civil War constitutional interpretation had become positivistic, but ambiguous on whether that focus was on intent of the founding generation or the framers); Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885, 886-87, 944-47 (1985) (same, but clearly saying that focus was on the framers' intent).

454. It is less elegant, but more accurate, to say Cooley's historist understanding of the American constitution "historicizes" the positivism of his descriptive theory.

455. For Cooley's specific repudiation of the state of nature concept, see supra note 327.

456. T. COOLEY, CONSTITUTIONAL, supra note 307, at 37 (quoting Hamilton v. St. Louis County Court, 15 Mo. 3, 13-14 (1851) (argument of Bates, J., for the County Court). Note the natural rights, state-of-nature ring of this claim. But in context, the rights that pre-exist government are not pre-political, natural and eternal, but determined by the concrete society that pre-existed and ordained the government. See also T. COOLEY, CONSTITUTIONAL, supra, at 416-17 (arguing that the common law defines the state constitutions' speech clauses because the common law defines the pre-existing rights that American constitutions were adopted to protect). But see 1 W. BLACKSTONE, supra note 310, at xi (indicating that natural rights may well be the rights a society means its Constitution to protect).
ing of constitutional provisions is to read them in light of their "known source,"457 which "the people must be supposed to have had in view in adopting them."458 Since Cooley regards the common law as the preeminent expression of America's "pre-existing...laws, rights, habits, and modes of thought," this assertion entails drawing from the common law to interpret constitutional text.459 In sum, his central technique of constitutional interpretation is to read the constitutional text through the prism of the Anglo-American common law.460 This interpretative technique and its evident historism461 is illustrated in the following section.

d. Cooley's practice of constitutional interpretation

(i) Cooley's discussion of the phrase "legislative power"

Cooley's descriptive theory of constitutional law allows courts to void legislation only when it conflicts with "some constitutional provision."462 Judicial review is predicated upon conflict between constitutional text and legislative enactment. Yet, in discussing American state constitutions, Cooley asserts this does not mean "that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed."463 He proffers as an example the general powers of American legislatures.

Almost invariably, articles in nineteenth-century state constitutions describing the legislative branch of government begin with phrases such as: "The legislative power of this State shall be vested in a senate

457. T. COOLEY, CONSTITUTIONAL, supra note 307, at 37.
458. Id. at 59.
459. See id. at 37, 59-61, 175; Cooley, Limits, supra note 312, at 237; Cooley, Administration, supra note 312, at 343; Cooley, Labor, supra note 312, at 504; 1 W. BLACKSTONE, supra note 310, at vii; infra text accompanying notes 462-88. See also 1 W. BLACKSTONE, supra, at x-xi (discussing the relevance of natural law to constitutional interpretation).
460. That is, Cooley determines the founding generation's intent by considering the Constitution's text in light of the Anglo-American common law. Cooley did not maintain that the common law was determinative of constitutional meaning because constitutional provisions occasionally were meant to change the common law. And he warned that the maxim statutes in derogation of the common law should be strictly construed "could seldom be properly applied to constitutions." T. COOLEY, CONSTITUTIONAL, supra note 307, at 61.
461. In general, Cooley's interpretative technique is historist because the reasons that support it—the premise that the Constitution is to be read in light of the traditional norms of the ancestral nation that it presupposes—are historist. See supra text accompanying note 456. More importantly, it is historist because of Cooley's historist conception of the common law. See supra text accompanying notes 387-420.
462. See supra text accompanying notes 437, 433-36.
463. T. COOLEY, CONSTITUTIONAL, supra note 307, at 174. For other examples of Cooley's argument, see infra text accompanying note 473; infra notes, 483-86.
and assembly.” To Cooley, these phrases are grants of power whose scope and limits are defined by the common law. “The maxims of Magna Charta and the common law,” he asserts, “are the interpreters of constitutional grants of power.” In consequence, he maintains that

[to Cooley, the Parliament of Great Britain, as possessing the sovereignty of the country, has the power to disregard fundamental principles... Yet the rules which confine the discretion of Parliament within the ancient landmarks are rules for the construction of the powers of the American legislatures; and however proper and prudent it may be expressly to prohibit those things which are not understood to be within the proper attributes of legislative power, such prohibition can never be regarded as essential, when the extent of the power apportioned to the legislative department is considered... The absence of such prohibition cannot, by implication, confer power.]

Therefore, even in the absence of express textual prohibitions, American legislatures cannot adopt declaratory acts, grant new trials or authorize someone to judge his own cause. Similarly, even in the absence of express textual prohibitions,

a legislative enactment to pass one man’s property over to another would nevertheless be void. If the act proceeded upon the assumption that such other person was justly entitled to the estate... it would be void, because judicial in its nature; and if it proceeded without reasons, it would be equally void, as neither legislative nor judicial, but a mere arbitrary fiat.

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464. N.Y. Const. of 1846, art. III, § 1. See also, e.g., Ill. Const. of 1848, art. III, § 1 (“The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people”); Pa. Const. of 1838, art. I, § 1 (“The legislative power of this commonwealth shall be vested in a general assembly, which shall consist of a senate and a house of representatives”); N.C. Const. of 1868, art. II, § 1 (“The legislative authority shall be vested in two distinct branches, both dependent on the people, to-wit: a Senate and House of Representatives”). The federal constitution introduces its legislative article by saying: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. Const. art. I, § 1. Some state constitutions had express separation of powers clauses. See, e.g., Ga. Const. of 1865, art II, § 1; Mass. Const. of 1780, pt. 1, art. XXX.

465. T. Cooley, Constitutional, supra note 307, at 175.

466. Id. at 175-76.

467. Id. at 93, 95, 410-13.

468. Id. at 175. See generally id. at 85-129 (discussion of legislative power). This line of reasoning was not original with Cooley. It was a generally accepted perception in antebellum America. See T. SEDGWICK, supra note 108, at 118-52 (especially at 138 n.(a) by J. Pomeroy); Mendelson, A Missing Link in the Evolution of Due Process, 10 Vand. L. Rev. 125 (1956), reprinted in W. MENDELSON, SUPREME COURT STATECRAFT 194 (1983).
Cooley's discussion of the power of American legislatures to control the charges of private enterprise

One of the most important constitutional issues of the last third of the nineteenth century was the power of American legislatures to regulate the charges of private enterprise.469 The Supreme Court decision in Munn v. Illinois,470 that legislatures had power to regulate rates of any enterprise that was “affected with a public interest,”471 was extremely controversial. Cooley was among the many jurists who protested the decision. He wrote a long article premised on the view that the constitutional law on the subject turns upon common law principle.472

Cooley’s attitude is reflected at the very start of his analysis, where he observes that “the express provisions of the [state] constitutions can give little assistance. They always contain the general guaranty of due process of law to life, liberty, and property, but in other particulars they for the most part leave protection to principles which have come from the common law.”473 With this said, Cooley reviews a variety of common law precedents, such as Edward II’s proclamation regulating the prices of ox, sheep, hogs, geese, pigeons, and eggs, and colonial wage legislation that illustrate full governmental power to control prices.474 Yet, he spurns these precedents and the principle that follows from them on the ground that the common law is developmental.475 “Whatever in modern times has generally been looked upon as being outside the sphere of legislation,” he asserts,

should be regarded as finally eliminated from state authority.

To do this is only to take notice of the steady growth of the

469. For a review of this issue, see Siegel, Understanding, supra note 3, at 187-232.
470. 94 U.S. 113 (1877).
471. Munn, 94 U.S. at 126.
472. This was the approach of both the majority and the minority in Munn, 94 U.S. at 125-52; id. at 149-54 (Field, J., dissenting). The majority opinion, for example, after saying that the Constitution did not define property, continued “[I]looking, then, to the common law, from whence came the right which the Constitution protects . . . .” Id. at 125-26. In Munn, the dispute in the Court was not over whether common law principle was determinative, but over what the common law counseled.
473. Cooley, Limits, supra note 312, at 237. Or as Cooley alternatively put it: “fundamental principles, aided by such light as legal and constitutional history may throw on them.” Id. See also id. at 240:
Where [limits of governmental power] are not prescribed by the constitution of a state, probably it will be said they must be sought in the common law and in the constitutional history of the people. This is the common and necessary resort when questions arise concerning the proper functions of government.
474. Cooley, Limits, supra note 312, at 240-43.
475. Cooley also undercuts the binding force of these precedents by arguing that, in general, “if you assume that the government may do whatever it may find precedents for in constitutional history, you assume the existence of a practical legislative omnipotence.” Id. at 240. This follows from Cooley’s view of the early common law. See supra text accompanying note 417.
free principles which have come from common-law rules and usages, and of their gradual expansion with the general advance in intelligence and independent thought and action among the people. The gradual transition from despotism to freedom has been mainly accomplished by dropping out one by one of obnoxious and despotic powers, and by the recognition of the changes effected as permanent modifications of the constitutional system.\textsuperscript{476}

In Cooley's view, modern "usage" supports the conclusion that government may control the charges of only those enterprises that have undercut their "private" status through acquisition and use of special governmental privileges.\textsuperscript{477}

In reaching this conclusion, Cooley was most troubled by the strong tradition of laws against usury. Money lending, after all, requires no state-granted privilege. Yet, as Cooley acknowledges,

[w]hen America severed her connections with Great Britain, usury was a penal offence, and the regulation of the interest of money was thought to be one of the most imperative duties of the government. It was furnishing protection for the weak against the strong, the helpless against the grasping and extortionate. American constitutional history consequently begins with money in thrall; from time immemorial the government had established regulations, not only as a matter of course, but in the supposed performance of a great governmental duty.\textsuperscript{478}

But Cooley counters the force of the anti-usury tradition with telling comments that are worth quoting in full:

[No conclusion in favor of the constitutional right to limit the profits from kinds of property that were never in thrall can be drawn from the fact that corresponding restrictions are

\textsuperscript{476} Cooley, \textit{Limits}, \textit{supra} note 312, at 269. \textit{See also} id. at 243 ("It is not understood to be now pretended that any general right to fix the price of commodities or to limit the charges for services can exist as a part of any system of free government. It seems to be tacitly understood, that whatever power may once have existed for that purpose has been lost or taken away, and that business in general is protected against the interference of the state in such matters"); \textit{id.} at 269-70 (discussing "extreme powers" and "questionable powers long disused").

\textsuperscript{477} \textit{id.} at 256. The privileges Cooley mentions are such things as use of public easements and tax subsidies. \textit{Id.} Cooley's position was widely shared. For its further explanation, see Siegel, \textit{Understanding}, \textit{supra} note 3, at 200-07. Significantly, though he never says so explicitly, it is implicit throughout his analysis that the modern common law principle on price control had crystallized by the time America proclaimed its independence and wrote its state and federal constitutions. \textit{See, e.g., infra} text accompanying notes 478-81 (discussing usury).

\textsuperscript{478} Cooley, \textit{Limits}, \textit{supra} note 312, at 246.
not yet wholly removed from property that was never eman-
cipated. To appreciate the illogical character of such a con-
clusion, there must be kept in view the manner in which the
constitutional principles have come to America. They have
not, to use the language of Burke in his Letter to the Old
Whigs, “been struck out at an [sic] heat by a set of presump-
tuous men,” but they have been evolved slowly, and under
great trials and difficulties; some of them attained full and
rounded proportions before others came to be more than
faintly recognized; the growth of all has been historical, cir-
cumstances first giving to one a prominence and a vigor, and
afterwards another. With such a growth, a barbarous anomaly,
ever yet wholly eradicated, and standing among free prin-
ciples as a great and striking exception, ought to be neither
surprising nor misleading. Had the facts been otherwise, had
all constitutional principles been planned and settled upon by
a body of men meeting for the purpose, and embodying them
in a written instrument as an aggregate and harmonious
whole, there would be good reason to demand harmony in
their construction, and to assume that what seemed an anom-
aly could only be a principle misunderstood or misapplied.
The historical development of a constitution, however, never
was and never can be entirely symmetrical; and it must be
admitted that the grand old common law, of which American
constitutional principles formed a part[,] . . . had embodied
in it more than one feature of barbarism, and indeed, as many
believe, is not yet wholly relieved of serious anomalies.
Whoever believes that the principles he accepts as funda-
mental form, when taken together, a complete and perfect
code, and insure to the people all the protection that is needful,
may glorify it as such; but the wise statesman, though he may
insist that the Constitution is the best ever known, will never-
theless admit that it has not yet reached that state of perfection
in which it may be regarded as incapable of improvement.
And he would be a bold lawyer who would venture to affirm
that any code of laws now in existence is wholly free from
incongruities.479

Perhaps this is but a prolix way of arguing that anomalous and
vestigial precedents which were fully respected at the time of the Con-
stitution’s drafting must be accepted,480 but they do not establish prin-

479. Id. at 246-47. Compare the trouble the usury precedents gave to Justice Field
in his dissent in Munn, and the role of history in his response. Munn, 94 U.S. at 153 (Field,
J., dissenting).
480. As Cooley said on another occasion, usury legislation “is an exception difficult
principles for further expansion and application to new cases. Given the historical and developmental character of the common law, insight is required to determine the precedents that represent the vital principles that underlie and inform the general phrases in America's written constitutions.

In sum, Cooley asserts that courts may not void legislation "unless those rights are secured by some constitutional provision," but argues that constitutional provisions encompass much that is not expressly textual because they are to be construed in light of common law principles. In Cooley's view, the common law gives the general terms of the Constitution—not only "legislative power," but others such as "taxation," "eminent domain," "freedom of speech," and "due process"—a content that is sufficiently specific to be justiciable.

to defend on principle; but 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." T. COOLEY, PRINCIPLES, supra note 307, at 235.

481. As Justice Peckham, when he was on the New York Court of Appeals, wrote in discussing the general scope of governmental power to control prices of private enterprise:

The fact that certain rules of the common law have come down to us unimpaired, although based upon a view of the relations of government to the people which obtained in the seventeenth century, should certainly furnish no reason for extending those rules to cases which, but for such extension, would be regarded as clearly within the protection of the constitutional limitations contained in our bill of rights. People v. Budd, 117 N.Y. 1, 47-48, 22 N.E. 670, 687 (1889) (Peckham, J., dissenting).

482. T. COOLEY, CONSTITUTIONAL, supra note 307, at 168. See also text accompanying note 437.

483. Consider, for example, Cooley's views that the tax power is implicitly limited to "public purposes." Id. at 487-95; T. COOLEY, TAXATION, supra note 308, at 67-123. Consider also his unsuccessful effort to establish uniformity and equality as constitutional norms of taxation. T. COOLEY, CONSTITUTIONAL, supra note 307, at 175; T. COOLEY, TAXATION, supra, at 144-54, 175-83; Cooley, Tax, supra note 327. Consider, finally, his faith that common law principles would properly adjudicate the difficult line between the state's need for efficient tax collections, and the citizen's need to protect his or her property from summary tax sales. 1 W. BLACKSTONE, supra note 310, at xxii-ii. Regarding tax title disputes, he said:

The thoughtful lawyer cannot doubt that the old and well-settled principles of law are to be applied in these cases as in all other cases, nor that they are sufficient, if rightly applied, for the protection alike of the interest of the state and of the individual rights of the citizen. . . .

Id. at xxii.

484. Cooley says that eminent domain does not encompass condemnation whenever there is an apparent benefit to the public because "the common law has never sanctioned [condemnation]... based upon [this] consideration[] alone; and any such appropriation must therefore be held to be forbidden by our constitution. The settled practice of free governments must be our guide." T. COOLEY, CONSTITUTIONAL, supra note 307, at 532-33. Cooley also argues against condemnation for private purposes because "there is no rule or principle known to our system" which sanctions it. Id. at 357.

485. Id. at 416-17 (justifying turning to the common law to interpret state constitutional "speech" clauses because constitutions "do not create new rights, but . . . protect the citizen in the enjoyment of those already possessed").

486. Cooley's argument on the power of legislatures to regulate the charges of private
Cooley's historism allows him to see principles in the Constitution's text that modern scholars see as nontextual; it allows him to find determinate law where modern scholars see discretionary value choices. Thus, Cooley's historism turns his positive approach to constitutional law into a vision of America as founded upon principles of civil liberty and natural law.488

e. Conclusion: historism ascendant

Cooley's constitutional jurisprudence parallels his private law thought, except for the concession that there are instances in which a nation's constitutional law is an imposition upon, rather than a growth from, the nation's intrinsic race principles and historic enterprise is a specific attempt to use the common law to find determinative content in the open textured "due process" clauses. See supra text accompanying note 473. In general, Cooley's view is that "due process" constitutionalizes "those principles of civil liberty and constitutional defence which have become established in our system of law," and it allows only "the exertion of the powers of government as the settled maxims of law sanction." Id. at 356. See also id. at 355 (adopting Justice Johnson's definition of due process as the "established principles of private rights and distributive justice"). Examples, which Cooley gives, are that eminent domain for private use violates due process because "there is no rule or principle known to our system" which sanctions it, id. at 357; and that the Slaughter-House Cases are wrong because "[t]he grant by the State of monopolies in trade...were long since decided to be illegal in England." T. COOLEY, TORTS, supra note 309, at 277. See also Cooley, Limits, supra note 312, at 262 (criticizing the Slaughter-House Cases because they imply the principle that government may create monopolies in ordinary trades).

487. It is important to note that Cooley did not claim that common law principles gave undebatable content to the general terms of the Constitution. In private law, Cooley acknowledged that judges had a "very broad" discretion in determining what common law principles were and how they applied. See T. COOLEY, TORTS, supra note 309, at 16, discussed supra text accompanying notes 395-403. His public law views were similar. In discussing due process, for example, he said:

[What is due process of law can never be settled as an abstract question: it has a new phase with every new case, and judicial history shows that judges differ concerning it at the present day when peculiar cases arise, as radically as they did when ship-money was in question, and when the king's warrant was supposed by some to be sufficient justification for an arrest, though it specified no cause. Cooley, Limits, supra note 312, at 237. See also Cooley, Codification, supra note 312, at 332 (saying that the contract clause "has in fact been merely a text, in which the judicial commentators have discovered a great deal of meaning which was never in the minds of its authors").]

488. It is evident that Cooley believes American constitutional norms are consonant with natural law. Yet, he never draws directly from that source, and his landmark treatise mentions such concepts as natural justice only rarely. See, e.g., T. COOLEY, CONSTITUTIONAL, supra note 307, at 166 (mentioning "principles of eternal justice"). In some measure, this is to be expected, given Cooley's view of the inherent limitations of natural law when applied to actual controversies. See supra text accompanying notes 329-39. Cooley evidently believed that the general institutions of American law, such as property and family, may have had a support in natural law, but that the specific rules for their protection were worked out through experience, not abstract reason. Nonetheless, at several points, Cooley suggests that an understanding of natural law is necessary to an understanding of the meaning of constitutional provisions. See T. COOLEY, CONSTITUTIONAL, supra note 307, at 73, 164-65; 1 W. BLACKSTONE, supra note 310, at x-xi.

489. See supra text accompanying note 441.
Historism in Constitutional Thought

In Cooley's view, American constitutional norms, when described at the highest levels of abstraction, comport with natural law. But the emphasis of Cooley's discussions and his solution to concrete and practical problems lie in discussions of history. Historical study is the method for deriving the appropriate operational norms of American constitutional law.

Clearly, Cooley would have described himself as a historist and denied that he was a natural-law jurist. Modern scholars may see through Cooley's ideology and conceive his historism as a mask that preserved by updating an essentially natural-law philosophy. But to Cooley, at least, historism was more than an ideological mask. He understood natural-law and historist jurisprudence as distinct enterprises. He thought natural-law jurisprudence derived from an outmoded epistemology of social science that did not provide—and historist jurisprudence derived from a sound epistemology that did provide—an adequate understanding of social phenomena.

To Cooley, understanding, approaching and "doing" constitutional law through the method of natural law was wrong, but understanding, approaching and "doing" constitutional law through the method of historism was right. At bottom, he was unaware that the transition from natural-law to historist jurisprudence was part of a larger transformation of social thought. It was that larger transformation which changed the distinctions between natural law and historism that Cooley thought significant to the differences modern scholars overlook because they are inconsequential.\footnote{490}

\textit{C. Christopher Gustavus Tiedeman} \footnote{491}

Christopher Gustavus Tiedeman was born in 1857 and died in 1903 at the age of forty-six. Coming from a prosperous South Carolina family, he received an extensive education. By the time he was twenty-two, he had earned bachelors and masters degrees from the College of Charleston, spent two years studying in Germany at the Universities of Göttingen and Leipzig,\footnote{492} and graduated from the Columbia University Law School. Shortly after completing his studies, Tiedeman entered upon a career of law teaching and scholarship. At various times,

\footnote{490. See infra text accompanying notes 729-31.}
\footnote{491. The comments on Tiedeman's life are drawn from C. Jacobs, supra note 87, at 59-63; B. Twiss, supra note 4, at 122-27; C. Larsen, supra note 87, at 47-49; 18 Dictionary, supra note 301, at 531. The comments in this study of Tiedeman's jurisprudence may be compared to the comments in C. Jacobs, supra, at 60-63; B. Twiss, supra, at 122-27; A. Paul, supra note 4, at 16-18, 24-27; C. Tiedeman, The Unwritten Constitution of the United States: A Philosophical Inquiry into the Fundamentals of American Constitutional Law iv-vii (reprint ed. 1974) (1st ed. 1890) [hereinafter C. Tiedeman, Unwritten].}
\footnote{492. At Göttingen, Tiedeman read Roman and German law and came under the influence Europe's most famous late-nineteenth-century jurist, Rudolf von Ihering. See infra note 548 (discussing von Ihering).}
he held professorships in the law schools of the Universities of Missouri and the City of New York. At the time of his death, he was the Dean of the University of Buffalo Law School.

During his short life, Tiedeman was a prolific scholar. He wrote one book on constitutional theory, treatises on constitutional law, real property, commercial paper, sales of personal property, municipal corporations, equity jurisprudence, and bills and notes; and numerous articles on various aspects of public law, private law and legal education.

Today, Tiedeman is remembered chiefly for the work that propelled him to fame at the age of twenty-nine: his *Limitations of Police Power*. This work is regarded as one of the two treatises most responsible for the rise and formulation of laissez-faire constitutionalism. It is one of the central texts of the *Lochner* era. Considered apart from the body of his work, Tiedeman's *Limitations of Police Power* seems the work of a natural-law jurist. Indeed, the first words of the treatise's first paragraph are:

> The private rights of the individual . . . do not rest upon the mandate of municipal law as a source. They belong to man

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493. C. Tiedeman, Unwritten, supra note 491; infra text accompany notes 514-54, 584-675.
494. C. Tiedeman, A Treatise on the Limitations of Police Power in the United States (1886) [hereinafter C. Tiedeman, Limitations]. The second edition of this work was extensively enlarged and published under the title C. Tiedeman, A Treatise on State and Federal Control of Persons and Property in the United States (1900) [hereinafter C. Tiedeman, State].
495. C. Tiedeman, An Elementary Treatise on the American Law of Real Property (1884) [hereinafter C. Tiedeman, Elementary].
499. C. Tiedeman, A Treatise on Equity Jurisprudence (1894) [hereinafter C. Tiedeman, Equity].
500. C. Tiedeman, A Treatise on the Law of Bills and Notes (1898) [hereinafter C. Tiedeman, Bills].
Tiedeman also authored an innovative casebook on real property to be used in teaching in conjunction with his treatise on that subject. C. Tiedeman, Selected Cases on Real Property (1897).
502. C. Tiedeman, Limitations, supra note 494.
503. See, e.g., C. Jacobs, supra note 87, at 59-60; B. Twiss, supra note 4, at 122. The other treatise is T. Cooley, Constitutional, supra note 307.
in a state of nature; they are natural rights, rights recognized and existing in the law of reason. . . . Government and municipal law protect and develop, rather than create, private rights.\textsuperscript{504}

Also, the treatise's arguments are mainly logical deductions from the premise that the "conservation of private rights is attained . . . [by] enforcing the legal maxim, which enunciates the fundamental rule of both the human and the natural law, \textit{sic utere tuo, ut alienum non laedas}."\textsuperscript{505}

Nonetheless, the year before publishing \textit{Limitations of Police Power}, Tiedeman wrote a book review in which he indicated his belief that "law, both public and private, is . . . the resultant of social forces . . . ; and as the relative strength of these forces changes from time to time, so likewise will the resultant be subject to modification."\textsuperscript{506} In addition, when he delivered the Annual Address to the Missouri Bar Association the year after publishing that treatise, he said, "[t]here 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."\textsuperscript{507} Moreover, in the second edition of \textit{Limitations of Police Power}, Tiedeman distanced himself from his opening comments by adding a footnote indicating that he was making them as a legal scholar duly reporting on the conceptions found in judicial precedent.\textsuperscript{508}

Tiedeman clearly was not a natural-law jurist. Rather, his jurisprudence was expressly and articulately historist.\textsuperscript{509} This will be shown

\textsuperscript{504} C. Tiedeman, \textit{Limitations}, supra note 494, at 1-2.
\textsuperscript{505} \textit{Id.} at 2. Tiedeman argues that vice, which is a type of moral wrong that involves no trespass, is beyond the reach of state legislation. He also finds prohibition, gambling and Sunday laws "constitutionally objectionable." \textit{Id.} at 148-56, 175-88.
\textsuperscript{506} Tiedeman, Book Review, supra note 501, at 949. Tiedeman criticized the book he reviewed for maintaining that constitutional principles remain static over time.
\textsuperscript{507} Tiedeman, \textit{Annual Address: The Doctrine of Natural Rights in Its Bearing Upon American Constitutional Law}, in \textit{Report of the Seventh Annual Meeting of the Missouri Bar Association} 97, 111 (1887) [hereinafter Tiedeman, \textit{Annual}]. See also \textit{Id.} at 109: [T]here is no fixed, invariable list of natural rights. These natural rights vary and their characters change with the development of the ethical conceptions of the people, the development of legal rights keeping pace with, and following behind, the development of natural or ethical rights. Indeed, the natural rights with which all men are proclaimed in the American Declaration to be endowed by their Creator, have been developed within the historical memory of man.
This speech became one of the essays in C. Tiedeman, \textit{Unwritten}, supra note 491, at 66-90. It is discussed \textit{infra} text accompanying notes 640-58.
\textsuperscript{508} C. Tiedeman, \textit{State}, supra note 494, at 1. He also specifically referred readers to his "scientific criticisms" of the doctrine in his \textit{Unwritten Constitution}. See \textit{infra} text accompanying notes 640-58.
\textsuperscript{509} As will be discussed, Tiedeman's historism had more elements of modernism that either Pomeroy's or Cooley's. See \textit{infra} text accompanying notes 575-83. Tiedeman, after all, had studied under von Ihering who had broken with nineteenth-century historism to develop the modernistic sociological jurisprudence. See \textit{infra} note 548.
by considering his book devoted to constitutional theory, The Unwritten Constitution of the United States: A Philosophical Inquiry into the Fundamentals of American Constitutional Law. That work contains one chapter elaborating his private law jurisprudence, three chapters extending that perspective to constitutional theory, and eight chapters discussing specific examples from American constitutional law to illustrate and further substantiate his theoretical claims.

1. TIEDEMAN’S PRIVATE LAW JURISPRUDENCE

a. Tiedeman’s Unwritten Constitution

Tiedeman begins his jurisprudential discussion in Unwritten Constitution by considering Blackstone’s famous and “generally accepted” definition of law as “a rule of conduct prescribed by the supreme power of the state.” This definition, Tiedeman says, is formally correct. Nonetheless, it has led jurists, lawyers and laymen into “a most serious error” concerning the origin, development and nature of law.

In Tiedeman’s view, Blackstone’s definition of law is formally correct in that law involves those rules of conduct of which society stands ready to compel the observance. Yet Blackstone’s definition has frequently proven “false and misleading” because of the prevalent misconception that the “government” is the “supreme power of the state.” The “supreme power of the state” is not the government but the “people who compose the body politic.”

About this, Tiedeman is emphatic. “The vast majority of a people,” he says, “are a law unto themselves.” Accordingly, the “morality commonly and uniformly practiced by the masses” is the
The function of law is “to compel a rebellious minority to conform to the moral habits and customs of the people.” Tiedeman concludes that law “is, therefore, fashioned after the prevalent sense of right.”

Unfortunately, Tiedeman does not elaborately discuss the factors that mold the “popular sense of right.” He says that it is “the resultant” of all the “social forces, both material and spiritual, which go to make up [a] civilization.” He mentions that individuals, social classes, and, in legal affairs, the legal profession all have influence. He gives primary importance to the interaction between “moral teachers” and “national character.” In his jurisprudential writings, however, Tiedeman thinks it important to establish “not how or by whom it is created” but only that “whatever is the prevalent sense of right is the norm by which legal rules are formulated.”

In maintaining that law is determined by the “popular sense of right,” Tiedeman acknowledges that government makes law. Indeed, he emphatically asserts that both courts and legislatures make law. He claims, however, that when judges and legislatures legislate, they are “bound down by [the]...
prevalent sense of right to a fixed line of conduct, from which [they] cannot successfully swerve.”

Tiedeman thinks the fact that judges are so “bound” is too evident to require discussion. In defending the proposition that legislatures are also so limited, Tiedeman admits that legislatures can enact statutes which depart from the “prevalent sense of right.” He also concedes that whenever this occurs,

[p]opular opinion, for prudential reasons, requires of the individual obedience to the written word, until the power which enacted it can be induced or forced to repeal it. To this extent can the legislative will, as a factor in the making of law, influence its development in opposition to the popular desire.

Nonetheless, Tiedeman says, “I assert emphatically that the legislature cannot completely enslave the popular will by an enactment not endorsed by the prevalent sense of right.” Laws which depart from its norms “result[] in nothing but the production of dead letters, still born laws, that never did and never could have become a living rule of conduct.” The paths through which the popular will eventually triumphs are various. Tiedeman’s primary instance, however, is jurisprudentially intriguing (and important for his analysis of constitutional law). He says that, before courts enforce a law not in conformity with popular sentiment, they change “its practical operation . . . by interpretation and construction to conform to the prevalent sense of right, as far as this is possible without nullifying the letter of the law.” But whatever the path, Tiedeman is certain that beyond the irrebuttable literal meaning of words, statutes—let alone judicial pronouncements—departing from the “popular sense of right” never establish “a living law.”

531. Id. at 7.
532. Id. See also id. at 2 (indicating that judge-made law is neither “purely arbitrary” nor “only reflect[s] the sentiments of the occupants of the judicial bench”); at 44 (discussing constitutional law). See infra text accompanying notes 562-72 for Tiedeman’s most refined statement concerning how public opinion binds judges.
533. Id. at 7-8. This point provides a very important axiom in Tiedeman’s discussion of constitutional interpretation. See infra text accompanying note 599.
534. Id. at 7.
535. Id. at 5-6. Thus law can neither be in advance of the people’s sentiments, nor be used to effect their moral elevation. See supra note 522.
536. See infra text accompanying notes 597-606.
537. C. TIEDEMAN, UNWRITTEN, supra note 491, at 8. Tiedeman continues: “It frequently happens that the effect of the statute will in this manner be completely changed, and will, as it is enforced, produce an entirely different effect from what had been intended.” Id. He then offers the Statute of Uses, 1536, 27 Hen. VIII, 10 as an example of this process. Id.
538. C. TIEDEMAN, UNWRITTEN, supra note 491, at 6. See also id. (speaking of “a living rule of conduct”).
Also, in maintaining that law is determined by the "prevalent sense of right," Tiedeman does not mean that law is always consonant with it. "The popular sense of right," he says, "does not remain stationary. In its growth and evolution it follows an easily recognized law of development. [It] rises with the increasing enlightenment of the ethical teachers."539 A fortiori, the law develops with the "ethical and spiritual development of the people."540 The law's evolution, however, inevitably lags behind the people's ethical development. This is due in part to the recognized benefit in legal stability.541 In addition, Tiedeman says private interests develop in reliance upon every established rule of law.542 Thus,

[although the legal rule reflects the popular sense of right, prevalent when it was formulated, it ... usually does not[] conform altogether to the popular sense of right in its later stages of development, and very frequently there is so great a variance between them as to cause serious popular dissatisfaction.543

Finally, in maintaining that law is determined by the "prevalent sense of right," Tiedeman does not mean that legal evolution is conflict-free. On any particular issue, some people may favor legal stability or their vested interest while others prefer the law's ethical development.544 He also maintains that on some issues people have serious disagreements over fundamental principles.545 Accordingly, Tiedeman rejects the earlier historists' view that the "prevalent sense of right's," and the law's, evolution is "the quiet, smooth, uneventful development[] which is found to prevail in the growth of ... language."546

539. Id. at 9.
540. Id. at 10.
541. Id. at 12.
542. Id.
543. Id. at 9. Tiedeman uses the law of fraud as an instance of his comments at this point. See id. at 10-11. From his jurisprudential perspective, Tiedeman mocks "philosophical enthusiasts" who claim the disparity between law and the populace's sense of right results solely from the imperfections of language in which legal rules are necessarily expressed. Id. at 9-10.
544. Id. at 12.
545. See id. at 80 (discussing property rights); at 156-58 (discussing the clash of views on "the effort to reconcile the claims of legal order and personal freedom"). With regard to views on the states' right to secede from the Union, the proposition in the text is implied in id. at 110-11, but is stated explicitly in Tiedeman, Book Review, supra note 501, at 949. It is important to note that all Tiedeman's examples are drawn from public, not private law. Private law, he says, is generally left to the legal profession. C. TIEDEMAN, UNWRITTEN, supra note 491, at 9. This indicates an absence of controversy over fundamental principle in private law.
546. C. TIEDEMAN, UNWRITTEN, supra note 491, at 11 (referring to the views of the German legal scholars Savigny and Puchta). Pomeroy and Cooley adhered to the view Tiedeman rejected. See supra text accompanying notes 161, 370-72.
Rather, he expresses the then-current German "sociological" jurists'\textsuperscript{547} tenet that "every material modification of an existing principle of law, as well as every new principle of law, is never firmly fixed in the jurisprudence of a country except after a vigorous contest between opposing forces."\textsuperscript{548} In other words, in Tiedeman's view there is usually within a nation more than one notion of how law should reflect its evolving "sense of right." Indeed, there is more than one extant "sense of right." Consequently, Tiedeman asserts that law is determined not just by the "popular sense of right," but the sense that is "prevalent."\textsuperscript{549}

Tiedeman's \textit{Unwritten Constitution} shows that his jurisprudence centers on the proposition that law "is the product of social forces, reflecting the prevalent sense of right."\textsuperscript{550} By "social forces," Tiedeman primarily means "national character" and moral belief.\textsuperscript{551} By "prevalent sense of right," Tiedeman means the tenets of the vast majority of the people.\textsuperscript{552} These tenets cannot be changed by legislatures and courts; on the contrary, legislatures and courts can only serve and effectuate them.\textsuperscript{553} These tenets do change, however, with the "ethical and spiritual enlightenment of the people."\textsuperscript{554}

\footnotesize{\textsuperscript{547} On sociological jurisprudence see infra note 548. On Tiedeman's relation to this school, see infra notes 581-83.}

\footnotesize{\textsuperscript{548} C. TIEDEMAN, \textit{UNWRITTEN}, supra note 491, at 12 (citing and quoting von Ihering). Von Ihering began as a historist but broke with it and founded the school of sociological jurisprudence. Sociological jurisprudence, which analyzed law in terms of its function, was one of the first modern jurisprudences. The notion of law as the outcome of social struggle was one of von Ihering's perceptions that helped him make the transition out of historism. If not cabined by other perceptions, it is another facet of von Ihering's modernity. The argument of this Article is that Tiedeman did cabin it. See infra text accompanying notes 581-83, 685. On von Ihering and sociological jurisprudence, see J. STONE, \textit{THE PROVINCE AND FUNCTION OF LAW} 299-314, 391-417 (1946); Pound, \textit{The Scope and Purpose of Sociological Jurisprudence} (pts. 1-3), 24 HARV. L. REV. 591, 611-19 (1911), 25 HARV. L. REV. 140 passim, 489 passim (1911-12).}

\footnotesize{\textsuperscript{549} As an addition point, Tiedeman says that although the law is determined by the "popular sense of right," it does not mean that "every rule commonly practiced by the mass of people, becomes a legal rule." C. TIEDEMAN, \textit{UNWRITTEN}, supra note 491, at 13. For reasons he does not explain, Tiedeman says that the public never demands sanctions unless departures from its favored rules involve injury or trespass to others. Id. at 14-15. This point is important for understanding the libertarian bent of Tiedeman's substantive constitutional law. See, e.g., C. TIEDEMAN, \textit{LIMITATIONS}, supra note 494, at 148-53 (discussing the unconstitutionality of criminalizing vice).}

\footnotesize{\textsuperscript{550} C. TIEDEMAN, \textit{UNWRITTEN}, supra note 491, at 9. See also id. at 5, 7, 15.}

\footnotesize{\textsuperscript{551} See supra text accompanying notes 526-28.}

\footnotesize{\textsuperscript{552} Or "a" people, as Tiedeman frequently says. See, e.g., C. TIEDEMAN, \textit{UNWRITTEN}, supra note 491, at 5. As Tiedeman summarizes his argument: "the substantive law is essentially nothing more than the moral rules, commonly and habitually obeyed by the masses." Id. at 15.}

\footnotesize{\textsuperscript{553} See supra text accompanying notes 531-38.}

\footnotesize{\textsuperscript{554} See supra text accompanying note 528 and infra text accompanying note 577. Remarks on whether Tiedeman's private law discussion in \textit{UNWRITTEN CONSTITUTION} exemplifies historism are postponed until after discussion of his later private law writings. See infra text accompanying notes 575-83.}
b. Tiedeman's later private law writings

No extended analysis is needed to show that Tiedeman adhered to the views expressed in his Unwritten Constitution for the remainder of his life. For example, Tiedeman introduced his 1893 treatise on equity jurisprudence with the same theories, saying that he had “more fully explained” them in his Unwritten Constitution.\(^{555}\) He also restated and refined his views in an 1896 article on the doctrine of stare decisis.\(^{556}\) In that article, he explicates how judicial rulings come to express the national will.

Tiedeman’s explanation is part of an argument that stare decisis is a useful but overly broad doctrine. In Tiedeman’s view, stare decisis has two branches: one gives precedential force to the result of a case;\(^{557}\) the other gives that force to the necessary parts of the judge’s reasoning.\(^{558}\) The first branch of the doctrine is a “precious heritage”\(^{559}\) that “protect[s] vested interests against any popular attacks exerted through a change of judicial opinion.”\(^{560}\) In contrast, Tiedeman says the second branch of the doctrine is unsound.\(^{561}\) The core of his argument is that “judges reflect the national will or prevalent sense of right only when they pronounce judgment.”\(^{562}\) In contrast, the reasons judges assign in rendering judgments are personal to them: their reasons are “interpretation[s] of the national will, and not the national will”\(^{563}\) itself.

Tiedeman’s point is twofold.\(^{564}\) On the one hand, one can never be sure that any particular decision reflects the true national will. The national will is discernible only in the pattern formed by an aggregate

\(^{555}\) C. Tiedeman, Equity, supra note 499, at 1.

\(^{556}\) Tiedeman, Doctrine, supra note 501.

\(^{557}\) By “result of a case” Tiedeman means the judgment that on “the proved facts of the case, plaintiff should or should not recover.” Id. at 17-18.

\(^{558}\) Id.

\(^{559}\) Id. at 17.

\(^{560}\) Id. Stare decisis, therefore, is a private law analogue for a written constitution in public law. See infra text accompanying note 670. Tiedeman also observes that this branch of the doctrine is an unique principle of modern Anglo-American law. He notes that the principle is not followed in any other legal system, and moreover, is a recent growth even in the common law. Id. at 14-16. Tiedeman accounts for this phenomenon by saying that the doctrine arose because “vested interests are . . . more seriously threatened among Anglo-Saxon peoples by the onward march of Democracy than among other peoples.” Id. at 17.

\(^{561}\) Id. at 18.

\(^{562}\) Id. at 19.

\(^{563}\) Id. In considering this position, consider that the nation is affected only by the ruling, not the reasons assigned. Thus, the nation exerts its pressure only for or against the result. It does not know or care about the rationale and whether that rationale only fortuitously agrees with its sense of right.

\(^{564}\) Although the proposition is a refinement of the theories presented in Unwritten Constitution, it is a conventional view for premodern nineteenth-century jurists. See J. Pomeroy, Municipal, supra note 97, at 180-83; J. Bishop, supra note 51, at 65, 77, 140-41, 151-53.
of decisions. In other words, any one decision may be a sport. Only aggregates, or patterns, of decisions express the law "which has been forced upon [the court], whether consciously or unconsciously by the pressure of the popular sense of right."

On the other hand, Tiedeman's point is that although decisional patterns have a high probability of reflecting the prevalent sense of right, the reasons offered by the judiciary do not. Judges are focused on deciding cases, "in the holy desire to do concrete justice to . . . [the] particular parties. . . ." Absorbed in this task, they have comparatively little time to discern the principle underlying a decisional pattern and to formulate an accurate statement of it. Judges may understand their own minds, but not necessarily the national mind that drives the judicial enterprise. Judicial expression of governing principles cannot serve as a "foundation of a scientific jurisprudence" or a "safe guide[] in future litigation."

In Tiedeman's view, it is the jurist—the treatise writer—who is best suited to the task of discerning and accurately stating the living principles of the prevalent sense of right. Jurists have the time and distance to articulate the unseen principles of national character that determine the resolution of concrete cases. Jurists, therefore, are "charged with the duty of formulating a scientific, and hence comparatively exact, analysis and exposition of the law, as it has been evolved in the course of actual litigation out of the national will." Tiedeman's position is that the national will is discoverable through positive study and careful induction of the principles that account for the historic record of judicial decisionmaking.

565. Tiedeman's words are: "If, in a series of decisions, the Courts have adhered to a particular judgment on the same or similar facts, the ruling of the courts may be accepted as the correct presentation of the prevalent sense of right in such cases. . . ." Tiedeman, Doctrine, supra note 501, at 19.

566. As a formalist jurist might say, the judge's ruling may be affected by any number of disturbing factors. It may be an experiment gone awry.

567. Tiedeman, Doctrine, supra note 501, at 19. See also id. at 18-19 ("not unlikely that in the vast majority of cases judges are unconscious of popular influence in the rendition of [their] judgments . . . ; but there can be no doubt that their judgments, so far as they actually become a part of the permanent jurisprudence of the country, have their foundation in the national will or prevalent sense of right. Any other doctrine would be most monstrous in its consequences").

568. Id. at 19-21.

569. Id. at 20.

570. Indeed, judges have little time to discern the pattern itself.

571. Tiedeman, Doctrine, supra note 501, at 20.

572. Id. at 20. Tiedeman observes that the attention paid to the "phraseology used by the court" in stating its decisional principles is "[t]he most fruitful source of litigation in this country." Id.

573. Id. at 22.

574. In The Doctrine of Stare Decisis, Tiedeman suggests that stare decisis be limited to the result of a case. Id. at 25. He proposes that judicial opinions no longer be published
c. Conclusion: historism in tension with legal positivism

Tiedeman's private law thought no doubt bristles with many aspects of modernity. In describing law as "a product of social forces, reflecting the prevalent sense of right," Tiedeman evinces legal positivism in four ways. First, he depicts law as an entirely secular phenomenon. In Tiedeman's jurisprudence, there is no mention of God or teleology—no mention of extra-mundane influences of any kind. Second, he depicts law as embodying a relativistic morality. Law may be determined by the dominant moral beliefs of the people. But Tiedeman is careful neither to state nor to imply that this morality is "true" or has any ontological status higher than its mundane source. Third, he depicts law as the outcome of social struggle. Implicitly, Tiedeman's nation is less holistic than Pomeroy's and Cooley's; it is affected, to at least some degree, by faction and vested interest. Fourth, he depicts law ultimately as a matter of power. Surely, Tiedeman asserts that the moral beliefs of the people are critical; but they matter only because the people are the "supreme power of the state" who inevitably impress their beliefs upon the law. At bottom, Tiedeman views society as "moved and controlled by two fundamentally different forces, moral suasion and physical force." As the people have paramount physical force, they can be moved only by moral suasion.

and that their place should be taken by reports that state only the facts and result of a case. Id. In addition, he proposes that the state should create a commission of jurists charged with writing commentaries on the law, and updating them annually in light of each year's decisions. Id. at 26. These commentaries would not be binding. The courts, Tiedeman says, "[would] retain their present right to overrule the existing law, and... at least in the appellate courts, to yield no more obedience to the expositions of the commission than they now show to their own prior judgments." Id.

Significantly, Tiedeman distinguishes his proposed commentaries from legislative codification because the latter attempts to control judicial judgments. Codification is undesirable, Tiedeman says, because it attempts to make immobile "what is essentially and inherently mobile." Id. at 25. Codification, Tiedeman thinks, may only "hamper and check... [the] expression" of the national will. Id. Codification is appropriate, he says, for the American nation when it is a finished people, when they have reached that period of national decadence and disintegration... [so] that the jurisprudence of the American people in their palmiest days may be preserved from the blight of oblivion, not only for the admiration and worship of our own degenerate posterity, but more particularly that it may live again in the juridical consciousness of nations yet to come into being.

Id. In making this point, Tiedeman draws an analogy to the composition and function of the Roman Corpus Juris Civilis. Id.

575. See supra text accompanying note 550.
576. As Tiedeman says, in discussing why the law must reflect the morality of the masses rather than the moral teachings of the most enlightened ethicists (let alone Pomeroy's "perfect morality"): "The stream can never rise higher than the source." C. Tiedeman, UNWRITTEN, supra note 491, at 6. But see id. at 126-27 (mentions that a claim may have an "inherent" moral character, but sharply distinguishes it from its legal character which depends entirely on the views of those in power).
577. Id. at 14.
Nonetheless, these modern perceptions are reigned in by certain nineteenth-century historist assumptions. Most fundamentally, although Tiedeman sees "a people" as less holistic and homogenous than earlier historists, he still sees them as sufficiently whole to talk almost invariably of "a people" and the beliefs of "the vast majority."578 As compared to earlier historists, Tiedeman may see "a people" as less an organic continuation of their ancestors. Tiedeman, however, is sufficiently unmodern to conceive of civilization as a process in which races express their "national character" and attendant moral beliefs.579

In sum, although Tiedeman sees law as the product of mundane, relativistic and conflicting social forces, he ultimately only acknowledges their presence and accords them some influence. He primarily sees law as the product of "national character" and its moral beliefs. These may be mundane forces, but they have moral status higher than self-interest; they resonate with associations that imply either a natural or Divine origin.580 Thus, Tiedeman's private law jurisprudence artfully combines historist assumptions with the premises of sociological jurisprudence,581 enabling him to draw from both schools of thought. From a modern perspective, there is a deep tension in Tiedeman's thought, a clash between inherently antithetical perceptions. His legal philosophy captures sociological jurisprudence (which is a form of legal positivism) emerging from historism.582 On balance, his jurisprudence trenches on modernism, yet remains cabined in a nineteenth-century historist framework.583

578. See supra text accompanying note 520.
580. In addition, although Tiedeman sees law as a matter of power, his analysis of power is still sufficiently antique to envision the government as inevitably the servant of the people. Tiedeman never doubts that legislatures generally, and courts always, effectuate the vast majority's wishes.

In other words, Tiedeman's jurisprudence is bereft of any inkling of such modern notions of legislation as interest group trade-offs, of legislation as primarily—rather than occasionally—"rent seeking." He never indicates any understanding of "agency capture" by interest groups. In short, Tiedeman's legal realism, so to speak, is most rudimentary and is limited to the legislature. It touches the courts only to the extent of asserting that they necessarily follow the prevalent sense of right.

581. On sociological jurisprudence, see supra note 548.
582. Correlatively, it exemplifies historism deteriorating into modern historicism. On the distinction and the relationship between historism and modern historicism, see supra note 84 and infra text following note 719.
583. One key to this balance is the impression that Tiedeman uses his modernism only in the discussion of less essential points. On fundamentals, he draws from his historism. In addition, the discussion of Tiedeman's constitutional views will further substantiate and illustrate the premodern-modern tension in Tiedeman's thought and its ultimate historism. See infra text accompanying note 685. But see C. TIEDEMANN, UNWRITTEN, supra note 491, at v-vi (Professor Grey emphasizing Tiedeman's positivist commitments).

An aspect of Tiedeman's diminished adherence to historism is the difficulty of ascribing him to one of the three branches of historism discussed supra text accompanying notes 51-
2. TIEDEMAN'S CONSTITUTIONAL JURISPRUDENCE

a. Tiedeman's Unwritten Constitution

In Unwritten Constitution, Tiedeman divides his consideration of constitutional jurisprudence into descriptive and normative parts. He opens the descriptive part with a discussion of constitutional theory that focuses on America and its uniquely written constitution. This discussion is followed by a detailed analysis of eight areas of constitutional law, an analysis designed to illustrate, elaborate and further substantiate Tiedeman's theoretical claims. The descriptive part is followed, and the book concluded, by a normative analysis.

(i) Tiedeman's constitutional theory

At the outset of his discussion of constitutional theory, Tiedeman posits the obvious inference from his general jurisprudential perspective. "[T]he conclusion is irresistible," he says, "that the fundamental principles which form the constitution of a state 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." Unwritten constitutions, Tiedeman says, certainly exemplify this dictum. The burden of his book is that America's written constitution is subject to "this invariable law of constitutional development." Accordingly, Tiedeman focuses on establishing two
propositions. The first is that when the Constitution was framed there was a "complete harmony of its principles with the political evolution of the [American] nation." The second is that since the founding, despite its written text, "American constitutional law follows and registers all material changes in public opinion, as unerringly as the needle follows the magnetic meridian."

Tiedeman regards the first proposition as uncontroversial. He defends it cursorily with a conventional review of the Constitution's provisions to show that they are "but natural sequential developments of the British Constitution, modified as to detail and as to a few fundamental principles by the new environment." In sharp contrast, Tiedeman describes the second proposition as highly controversial, requiring elaborate defense. This is especially so, since he opens his discussion of it by disavowing the amendment process as an important means of constitutional change. The cumbrous amendment process, he observes, seems to be used only for controversies as infrequent and large as that which produced the Civil War.

Rather, Tiedeman asserts that the American Constitution changes "by judicial interpretation, in obedience to the stress of public opinion or private interests." He says that through judicial interpretation "the [Constitution's] express limitations . . . are made to mean one thing at one time, and at another time an altogether different thing." In tracking the mutations in popular will, judicial interpretation is hemmed in only by the "bald letter of the Constitution."
Tiedeman’s claim is that the Constitution is written only in part: mostly it is unwritten. The written Constitution “contains only a declaration of the fundamental and most general principles” which serve as the body politic’s “skeleton.” The “flesh and blood,” the “real, living constitutional law . . . which the people . . . feel around and about them . . . is unwritten; not to be found in the instrument promulgated by . . . [the] convention, but in the decisions of the courts and acts of the legislature.” This unwritten constitution “is . . . flexible, and yields . . . to the mutations of public opinion.” It is “constantly changing with the demands of the popular will;” limited only by the populace’s insistence upon minimal “obedience to the written word.” Having made this observation, Tiedeman next turns to elaborating “striking examples of the mutations of constitutional law,” which he thinks will “incontestably prove” his thesis.

(ii) Tiedeman’s analysis of constitutional law

(a) Tiedeman on the contract clause

Reviewing the “history of the times” in which the Constitution was framed, Tiedeman concludes that the framers intended the contract

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See, e.g., id. at 133-34 (discussing the Louisiana Purchase). Indeed, the accepted act of any governmental institution may indicate the living constitution. See, e.g., id. at 46-50 (discussing the electoral college). Consider also his discussion of the constitutional principles that the president may serve for only two terms. Id. at 51-53.
clause\textsuperscript{607} to encompass "nothing ... but debts and other obligations issuing out of contracts."\textsuperscript{608} Nonetheless, in the \textit{Dartmouth College} case,\textsuperscript{609} the Court broadened the clause's scope to encompass corporate charters by arguing that these charters were within the definition of a contract.\textsuperscript{610} This change itself produced a reaction when its "injurious effect ... was appreciated."\textsuperscript{611} In Tiedeman's analysis, due to the developing "power of private corporations ... and ... the popular fear of an usurpation by them of control of the government[,] the popular demand for ... [their] control ... became so great and so urgent, that it was impossible for [legislatures] or the courts to ignore it."\textsuperscript{612} Laws were passed "impairing" charter rights, but the Court upheld them.\textsuperscript{613} It did so through fashioning "the strict construction" and the "inalienable police power" doctrines,\textsuperscript{614} and by eliminating any apparent inconsistency with \textit{Dartmouth College} by narrowly reading that case.\textsuperscript{615}

Thus, Tiedeman says, by the "aid of technicalities and refinements of verbal meanings,"\textsuperscript{616} the Court has been able to "claim there has been no repudiation"\textsuperscript{617} of the letter of the \textit{Dartmouth College} decision. In truth, the \textit{Dartmouth College} rule has been "substantially modified, if not abrogated altogether."\textsuperscript{618} There has been, he concludes, "a change in public opinion, and a consequent change in the constitutional rule."\textsuperscript{619}

\begin{itemize}
\item \textsuperscript{607} U.S. CONST. art. I, § 10 ("No State shall ... pass any ... Law impairing the Obligation of Contracts ... ").
\item \textsuperscript{608} C. TIEDEMAN, UNWRITTEN, supra note 491, at 54.
\item \textsuperscript{609} Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).
\item \textsuperscript{610} C. TIEDEMAN, UNWRITTEN, supra note 491, at 55. See also id. at 152. Tiedeman specifically quotes from this case to demonstrate that Chief Justice Marshall's approach to constitutional construction was not to follow framer intent but to adopt any permissible shade of meaning demanded by current popular opinion.
\item \textsuperscript{611} Id. at 56.
\item \textsuperscript{612} Id. at 58.
\item \textsuperscript{613} Id. at 57-66.
\item \textsuperscript{614} Id. The "strict construction" doctrine said that all corporate charters should be construed in favor of the public. The "inalienable police power" doctrine said that charter provisions could never limit the legislature's exercise of its power to promote the public health, safety, morals and general welfare. These doctrines and their limitation of \textit{Dartmouth College} are discussed in Siegel, \textit{Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence}, 60 S. CAL. L. REV. 1, 35-54 (1986) [hereinafter Siegel, \textit{Contract}].
\item \textsuperscript{615} C. TIEDEMAN, UNWRITTEN, supra note 491, at 60 (speaking of the police power). Tiedeman thinks this denial is specious. He points to two recent decisions, Stone v. Mississippi, 101 U.S. 814 (1879), and Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878), which he shows are wholly irreconcilable with \textit{Dartmouth College}. C. TIEDEMAN, UNWRITTEN, supra note 491, at 60-66.
\item \textsuperscript{616} C. TIEDEMAN, UNWRITTEN, supra note 491, at 59. See also id. at 58 (discussing Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 432 (1836)).
\item \textsuperscript{617} C. TIEDEMAN, UNWRITTEN, supra note 491, at 60.
\item \textsuperscript{618} Id. at 66. Tiedeman says that "[n]othing but a profound respect and reverence for the great Chief-Justice who penned the decision in the Dartmouth College case has compelled [the Court to claim an] indorsement of its principles in [its] later decisions ... ." Id.
\item \textsuperscript{619} Id. See also id. at 57-58 (discussing \textit{Charles River Bridge}). Tiedeman's analysis
In addressing the tenth amendment, Tiedeman observes that the Court always has interpreted it to allow the national government to exercise powers that are expressly delegated to it, or fairly implied to effectuate those that are delegated. This interpretation, he "freely admit[s] ... is without doubt what the Framers of the amendment intended." Despite the claims of "strict constructionists," it is, and has always been, the "prevailing interpretation."

Nonetheless, Tiedeman asserts that on occasion the national government has exercised powers which, on the one hand, are "deemed necessary by public opinion" but, on the other hand, are beyond these limits. The Court has invariably upheld these assumptions of power. In consequence, the country has often been presented with the spectacle of ... judges ... engaged in justifying questionable but necessary assumptions of power by the general government, by laboriously twisting, turning, and straining the plain literal meaning of the constitutional provisions, seeking to bring the powers in question within the operation of some express grant of powers.


620. U.S. CONST. amend. X ("[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people").

621. C. TIEDEMAN, UNWRITTEN, supra note 491, at 131.

622. Id. at 143.

623. Id. at 130-32. In Tiedeman's view the tenth amendment codified the dominant "[p]opular opinion, concerning the fundamental character of the Federal Government ..." Id. at 129. The Court adopted its position over objection from a party of "strict constructionists" that recognized express powers only. Id. at 130-32. In saying that the Court's decisions have been uniform, Tiedeman notes that for nearly two decades Mr. Justice Daniel dissented on the grounds of "strict constructionism." Id. at 131-32.

624. Id. at 143.

625. Id. at 136.

626. Tiedeman recounts the Louisiana Purchase, id. at 133-34, and the Legal Tender Acts, id. at 134-36, as clear examples because they are "two extreme cases." Id. at 133.

627. In saying that the Court upholds these assumptions of power, Tiedeman is aware that the Legal Tender Acts, which made U.S. treasury notes legal tender for all debts, were first voided by the Court. However, in response to the public outcry, the Court, with three new Justices, dramatically reversed itself in a controversial series of decisions. See id. at 134-36.

Also in saying that the Court upholds these assumptions of power, Tiedeman is aware that not all these actions were challenged. Tiedeman says the Louisiana Purchase was so "plainly beneficial to the whole country that it was generally acquiesced in." Id. at 133. Still, Tiedeman describes the indirect legal authority in favor of the purchase: Justice Story's discussion in his constitutional law treatise, and Chief Justice Marshall's opinion in American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828) (power to purchase foreign territory implied from the power to make treaties). C. TIEDEMAN, UNWRITTEN, supra note 491, at 133-34.

628. C. TIEDEMAN, UNWRITTEN, supra note 491, at 132-33.
This is unfortunate, Tiedeman says, though not because we [can] expect to prevent altogether this tendency to strain and force the literal meaning of the written Constitution, in order to bring it into conformity with that unwritten constitution, which is the real constitution, and which embodies the living rules of conduct; for this unwritten constitution is steadily but slowly changing under the pressure of popular opinion and public necessities, checked only by the popular reverence for the written word.  

This is unfortunate because it is based upon "an erroneous interpretation of the grammatical meaning of the written Constitution." There is, Tiedeman says, a grammatically-permissible reading of the tenth amendment that allows the Court to validate these hitherto questionable national acts without speciously claiming that they are necessarily related to delegated powers. Thus, in these cases the Court can reach the popularly desired result without rendering "palpably untenable" interpretations of the Constitution's text.

The core of Tiedeman's argument establishing his grammatically-permissible reading of the tenth amendment is straightforward. The tenth amendment's text clearly and expressly prohibits the national government from exercising nondelegated powers that are allowed to the states. The amendment, however, does not speak to nondelegated powers that are prohibited to the states. A literal reading of the tenth amendment does not bar the national government from exercising non-delegated powers so long as those powers also are prohibited to the states. Therefore, the amendment's "accepted interpretation," which requires that all national powers be expressly delegated or fairly implied

629. *Id.* at 136.
630. *Id.*
631. *Id.* at 133.
632. *See supra* note 620.
633. *See supra* note 620.
634. *Tiedeman* does not consider whether any other language in the Constitution limits the national government to the exercise of delegated powers or powers fairly implied from them. *See, e.g.*, U.S. CONST. art. I, § 1 ("All legislative power herein granted shall be vested in a Congress of the United States . . ."). Nonetheless, the tenth amendment has always been taken as the source of the rule. *See, e.g.*, L. TRIBE, *supra* note 3, at 297-98 (rule may be derived from art. I, § 1, but it is made explicit by the tenth amendment).
to effectuate the delegated powers, is not the only grammatical meaning of the amendment.\textsuperscript{635}

Of course, Tiedeman acknowledges that his grammatically-permissible reading of the tenth amendment does not comport with the framers' intent.\textsuperscript{636} He even says that the amendment's framers were wholly unaware of it.\textsuperscript{637} Nonetheless, his literal reading is the amendment's "real meaning"\textsuperscript{638} because the intentions of our ancestors cannot be permitted to control the present activity of the government, where they have not been embodied in the habits of thought of the people . . . or in the written word of the Constitution. Where the written word is equally susceptible of two constructions, one of which reflects more accurately the intentions of the power that speaks through the word, that construction must prevail. Now the living power, whose will is given expression in the written word, is not the men who framed or voted for the written word, but the present possessors of political power. The present popular will must indicate which shade of meaning must be given to the written word.\textsuperscript{639}

\begin{footnotesize}
\textsuperscript{635.} Tiedeman prefaces his analysis of the amendment's text with a political science argument establishing that government should be conceived as the "general agent" of the people, and like a general agent should possess all powers within its general authority except those specifically denied. America's government is, of course, bifurcated and complexly structured. But Tiedeman's argument is that it can be conceived as a totality and all governmental powers that are not expressly prohibited should be presumed lodged in that level of government to which it is most appropriate. C. TIEDEMAN, UNWRITTEN, supra note 491, at 137-38. This political science argument creates a presumption that the national government should possess national powers that are neither delegated nor denied to it when those powers are specifically denied to the states. This presumption is not the core of Tiedeman's argument, but it lends some support to it. See infra note 639.

\textsuperscript{636.} See supra text accompanying note 622.

\textsuperscript{637.} C. TIEDEMAN, UNWRITTEN, supra note 491, at 137.

\textsuperscript{638.} Id. at 140. In making this claim Tiedeman does not imply that it has always been the amendment's true interpretation. A facet of Tiedeman's constitutional jurisprudence is that the text's true meaning may vary over time with changes in the populace's prevalent sense of right. He says this explicitly with regard to the right to secession and government ownership of public utilities. See Tiedeman, Book Review, supra note 501, at 949; Tiedeman, Government, supra note 501, at 486. The national government's rightful exercise of nondelegated powers that are prohibited to the states seems another example. See id. at 137, 143 (indicating that the founding generation may well have wished confine national power to the amendment's traditional interpretation).

\textsuperscript{639.} C. TIEDEMAN, UNWRITTEN, supra note 491, at 144. As Tiedeman prefaces his core argument with an argument drawn from political science that served to indicate the wisdom of what he eventually showed to be the amendment's literal reading, see supra note 635, he significantly concludes the statement in the text by saying:

And that interpretation becomes the only possible one, when it may be shown by the experience of a century, that the alternative construction, which reflects the intentions of the original enactors of the written word, is pernicious to the stability
(c) Tiedeman on natural rights

As previously noted,640 Tiedeman thought "[t]here is . . . no such thing . . . as a[] . . . natural right."641 In Unwritten Constitution, he commences his discussion of natural rights in American constitutional law by reviewing the history of the doctrine to show that the "so-called natural rights"642 are a variable list that "change with the . . . ethical conceptions of the people."643 Since he believes that "commands of the sovereign are always law, and hence legally right,"644 Tiedeman opines that the notion of natural rights

reaches the extreme limits of absurdity in the social contract, in the claim that all governmental authority, and hence the binding force of law, is derived from the agreement or consent of the governed; and that all men are possessed of certain natural rights, rights enjoyed by them in a state of nature, and which no government can rightfully infringe or take away.645

Despite all this, Tiedeman nonetheless concludes that natural rights are a part of American constitutional law. He observes that, although absurd, the "doctrine of the social contract has dominated modern thought in a more or less modified form to the present day."646 Therefore:

since 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[; since e]very legal principle is the resultant of some two or more social forces; and [since] popular notions are usually more powerful than physical facts[; . . . the doctrine of natural rights has moulded the principles of the law, [and] a recognition of the doctrine will be necessary to a comprehension of the law.647

of the government, and in violation of the soundest principles of political science.

Id. In other words, Tiedeman's view is that law ultimately is power, the power of the vast majority of the people. See supra text accompanying notes 520-23. But the lessons of political science, i.e., rational knowledge, have an influence on the prevalent conception of right.

640. See supra text accompanying note 507.
641. C. TIEDEMAN, UNWRITTEN, supra note 491, at 76.
642. Id. See also id. at 71.
643. Id. at 73. See also id. at 76. Natural rights, therefore, are a historical artifact, not products of reason. Tiedeman emphasizes this point by saying "[i]n deed, the natural rights with which all men are proclaimed in the American Declaration of Independence to be endowed by their Creator, have been developed within the historical memory of man." Id. at 73.
644. Id. at 71.
645. Id. at 70-71. See also id. at 153 ("groundless doctrine of the social contract").
646. Id. at 71.
647. Id. at 72.
In short, the notion of natural rights may be false, but it is “prev-

alent.” The founding generation “formulated [them] and made
[them] a part of the organic law of the land.” Their textual location is in the various state and federal bills of rights, in what have been
called these constitutions’ “glittering generalities.”

Tiedeman’s point, of course, is not that natural rights are part of
the contemporary Constitution merely because the framers intended
them to be. Rather, they are part of the contemporary Constitution
because the present generation continues the framers’ beliefs on this
point. He is claiming also that such general provisions as the state
and federal due process clauses are “sufficient authority for judicial
interference.” Throughout American history, Tiedeman says, there
are “numerous” cases in which general constitutional provisions have
been given specific content by the courts.

Tiedeman’s argument is that natural rights and the judicial en-
forcement of nonspecific constitutional guarantees are part of the Amer-
ican tradition. Thus, on the one hand Tiedeman says he finds the entire
notion of natural rights “absurd[,]” and on the other hand says he
“applaud[s] the disposition of the courts to seize hold of these general
declarations of rights as an authority for them to lay their interdict
upon all legislative acts which interfere with the individual’s natural
rights.” Absurd as the doctrine may be, it reflects America’s traditional
and current unwritten constitution.

648. Id. at 78.
649. Id. Tiedeman is speaking at this point of both the state and federal constitutions.
He is not making any claim that the federal constitution’s recognition of natural rights applied
to the states.
650. Id.
651. Id. at 79. The first use of this phrase that I have seen is Judge Redfield’s com-
mentary in 19 AM. L. REV. 372, 373 (1871) (discussing the Illinois Supreme Court’s voiding
the state reform school act on due process grounds).
652. C. TIEDEMAN, UNWRITTEN, supra note 491, at 78. See also id. at 70-71 (saying
notion of social contract arose after the Middle Ages and dominates to this day).
653. Tiedeman is ambiguous on whether the content of natural rights have evolved
since the Revolution in a more laissez-faire direction. He correlates the spread of the laissez-
faire philosophy “with the general growth and spread of popular government.” C. TIEDEMAN,
UNWRITTEN, supra note 491, at 78. See also C. TIEDEMAN, LIMITATIONS, supra note 494, at
v-vi. But he does not specifically date that growth, which he may conceiv as an eighteenth-
as well as a nineteenth-century phenomenon.
654. See, e.g., U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person
of life, liberty, or property, without due process of law . . .”).
655. C. TIEDEMAN, UNWRITTEN, supra note 491, at 81.
656. Tiedeman instances the 1785 case in which the Massachusetts Supreme Judicial
Court abolished slavery in that state on the grounds of the state constitutional provision that
“all men are born free and equal, and have certain natural, essential, and inalienable rights.”
Id. Tiedeman’s analysis of the Marshall Court’s interpretation of the contract clause exempli-
ifies his point also. See supra text accompanying notes 608-11. Cooley maintained the same
perspective. See supra text accompanying notes 483-87.
657. See supra text accompanying note 645.
658. See, e.g., C. TIEDEMAN, UNWRITTEN, supra note 491, at 81.
(iii) Tiedeman’s normative theory

Having established that the written Constitution constantly and gradually evolves with the growth of the popular sense of right, Tiedeman engages in a short normative justification of this fact. He begins with the philosophical point that words are not perfect “vehicles of thought.” Words may have “a certain and common meaning . . . . But within the limits of the general meaning of a word, there may be, and usually are, various shades of meaning, which the word alone cannot unfold, and which must be learned from other sources.”

Tiedeman then recasts his argument as the claim that in selecting among the constitutional text’s “shades of meaning,” the Court endeavors to discover not the shade intended by the framers but the shade desired by the current populace.

This is as it must be. “No people,” he says, “are ruled by dead men, or by the utterances of dead men.” In the past, the living thought themselves ruled by God or by their ancestors. Then, the goal of judicial interpretation was to discover the true intent of the original law giver. Now, it is realized that law does not “emanate[] from some power above and beyond us;” that “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.” This realization means that “we are obliged, in construing the law, to follow and give effect to the present intentions and meaning of the people.”

This realization also reveals the “real value” of the written Constitution. It allows the Court, staffed by

659. See supra text accompanying notes 606-58.
660. C. TIEDEMAN, UNWRITTEN, supra note 491, at 146.
661. Id. at 147.
662. Id. at 148-49. Importantly, Tiedeman enters the caveat that in extreme cases the need for departing entirely from the written word may be necessary and in obedience to popular demands, it is done by governmental authority. Still, as explained [in the discussion of general jurisprudence] the cases are rare in which a court safely disregards the written word of the legislature, for the prevalent sense of right usually requires a strict observance of the written word, however much violence is done by interpretation to the plain intention of the legislature.
663. Id. at 149-50. See also id. at 141.
664. Id. at 150.
665. Id. at 153. Tiedeman equates the doctrine of the divine right of kings with the notion of rule by God. He equates the “groundless doctrine of the social contract” with the notion of rule by one’s ancestors. Id.
666. Id.
667. Id. at 150. See also id. (“the present possessors of political power, and not their predecessors, are the lawgivers for the present generation”); id. at 154 (“the present will of the people is the living source of law”).
668. Id. at 154. Tiedeman probably uses the word “obliged” to connote physical necessity. Still, the word’s implication of moral requirement should not be missed.
669. Id. at 156.
distinguished men, whose ... life-tenure ... serves to withdraw them from all fear of popular disapproval ... to plant themselves upon the provisions of the written Constitution, and deny to popular legislation the binding force of law .... It legalizes, and therefore makes possible and successful, the opposition to the popular will.670

Judicial power to nullify the popular will, however, does not mean judicial supremacy. "[J]udges themselves," Tiedeman observes, "fall under the influence of the prevalent sense of right, and ordinarily in their decisions give an accurate expression of it."671 The popularly elected branches also possess the power of appointment. They can re-compose the bench over time or, when the occasion demands, do so immediately "by an increase in the number of judges and the appointment to the newly created judgshhips of men who will do the people's bidding."672

Therefore, the judiciary inevitably "does not serve as a complete barrier to the popular will."673 It "is but an obstacle 'in the way of the people's whim, not of their will.' "674 This, Tiedeman thinks, is as it should be. For "[i]f one professes any faith at all in popular government, he must confess a desire that the popular will shall prevail, and that the danger to the commonwealth lies not in the people's will but in their whims and ill-conceived wishes."675

b. Tiedeman's later constitutional law writings

Once again, no extended analysis is necessary to show that Tiedeman never departed from the views expressed in his Unwritten Constitution. In 1895, Tiedeman analyzed the Court's decision to invalidate the national income tax by saying that the divisions on the Court re-

670. Id. at 163-64. See also id. at 163 (commenting that if the judiciary were elected for short terms the "written Constitution would serve very little purpose").

671. Id. at 164.

672. Id. at 162. In other words, it can make ideological appointments or even "pack" the Court.

673. Id. at 164. See also id. (describing judicial veto as "only a dilatory proceeding").

674. Id. (quoting James Russell Lowell). In other words, judicial review allows an appeal from "Philip drunk to Philip sober." For Pomeroy's and Cooley's expression of this idea, see supra text accompanying notes 265, 363, 446.

675. Id. at 164. In any event, Tiedeman thinks this is as it must be. He concludes the quote in the text:

And even if [one] does not have any faith in popular government, he must admit that, with an enlightened and spirited people, who know their strength, and who know that the living power in all municipal law proceeds from them, it is an absolute impossibility to suppress the popular will.

Id. Tiedeman concludes this thought with the observation that the written Constitution enables the United States "to enjoy the blessings of popular government, while at the same time it is protected from the evils of hasty and passionate legislation." Id. at 165.
flected divisions in society. He further said that the income tax clearly was what the framers proscribed as a "direct tax," but that in reaching its decision the Court had to overrule a century of precedent that indicated the contrary. The prior precedent, Tiedeman said, reflected the fact that prior public sentiment on the issue of direct taxation differed from the framers' sentiment. The court was able to decide the income tax case in accordance with the framers' intent because public opinion had shifted on the subject and now was more in accord with the Constitution's original design. Thus, the income tax case was but another example of his dictum that in interpreting constitutions (and statutes) courts follow "present public opinion . . . except [when] . . . the written word [is] . . . not susceptible of more than one construction." In addition, as previously mentioned, in 1900, in the second edition of his most famous work, Limitations of Police Power, he qualified his exposition of natural rights theory by placing a footnote citing his readers to the views expressed in his Unwritten Constitution.

c. Conclusion: historism in tension with legal positivism

Tiedeman's constitutional jurisprudence parallels in every way his theory of private law. They differ only in that the former casts into

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676. Tiedeman, Income, supra note 500, at 81-82.
677. Id. at 76-81.
678. Id. at 79-81. Since Tiedeman views the framers as having written a Constitution that generally reflected public sentiment, perhaps it would better catch Tiedeman's thought to say that prior public sentiment on direct taxation differed from the framers' anticipation of public sentiment on the issue. Id. at 80.
679. Id. at 81-82. Tiedeman admitted that although only a (large) minority of the public opposed the income tax law, the Court voided it because of a (slight) majority of the justices' "profound disbelief in the economic merits of the income tax law." Id. Tiedeman's point is that the closeness of public sentiment allowed the Justices to follow their own views. This point does not undercut his view that judges follow the national will, because the national will is manifested by a series or pattern of decisions. See supra text accompanying notes 565-67. At times, the national will may be emergent and speaking through a minority that will grow into a majority. In addition, as he said in Unwritten Constitution, see supra text accompanying note 674, and repeated in Tiedeman, Income, supra, at 82-83, at times legislation reflects a passing "whim" of the people and not their settled "will."
680. Tiedeman, Income, supra note 501, at 73 (also noting that courts do not follow current public opinion when there is prior precedent which they "feel[ ] bound . . . to follow"). Tiedeman refers to his views in Unwritten Constitution in Tiedeman, Income, supra, at 83.
681. See supra text accompanying note 508.
682. The second edition was given a different title. See supra note 494.
683. C. Tiedeman, State, supra note 494, at 1. Tiedeman also cited to a work of his entitled "Liberty and Equality in the United States." Id. I have been unable to find any publication of his under that title.
684. Tiedeman's private law jurisprudence is discussed supra text accompanying notes 514-74.
greater relief the latter's mix of historist and sociological premises. Its modern aspects include the perception that constitutional law is a matter of power, that it evolves with shifts in the balance of conflicting social forces, and that judicial decision-making is neither autonomous nor static. Most importantly, Tiedeman presents the people's fundamental principles as fairly malleable. Doubtless his thought represents a great move toward modernism.

Nonetheless, his modern perceptions are cabined by historist views. Tiedeman still thinks that "a people" have a "national character," that the prevalent sense of right changes gradually and slowly, and that the people's views are still sufficiently unitary and stable for courts to divine them and fashion law in their image. This last point is, perhaps, the key to understanding Tiedeman as a historist. Tiedeman's nation is not yet so fractured and malleable, its change not yet so fast and large, that the popular sense of right (and, therefore, the law) cannot be apprehended by the juridical intellect. In Tiedeman's thought, the national sense of right—indeed, the national will (to give it its most modern ring)—is not yet a metaphor. The nation is still a whole, not just the sum of its parts. The national will is both knowable and distinct from the results of the legislative process.

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685. The mix of premises is discussed supra text accompanying notes 575-83.
686. If Tiedeman's private law and constitutional jurisprudences differ, it is only that the latter jurisprudence takes both the historist and modern aspects of his thought to greater extremes. For example, it is in his constitutional theory that he most clearly speaks of the holistic concept "national character." Yet it is also in his constitutional writings that he gives instances in which the nation's fundamental principles have changed.
687. Unlike Cooley (and Pomeroy in practice), Tiedeman maintains that constitutional change occurs not only through application of the fundamental principles in altered circumstances, but also through change in the principles themselves. See supra text accompanying notes 506, 607-19, 679.
688. Accordingly, Tiedeman does not conceive law as the product of legislative will. To Tiedeman, law is a composed of harmonious principles rather than nonrational trade-offs. Law still reflects the morality of the vast majority of the people. Tiedeman's writings on legal education best exemplify his view that law is a matter of discoverable principles. See Tiedeman, Methods, supra note 501, at 154-57. See also C. TIEDEMAN, ELEMENTARY, supra note 495, at v; C. TIEDEMAN, BILLS, supra note 500, at iii; and supra text accompanying notes 562-74 (describing Tiedeman's view of how the juridical intellect discovers the national will).
689. Tiedeman details how the national will is known in Tiedeman, Doctrine, supra note 501, at 18-22, discussed supra text accompanying notes 562-74.
690. Perhaps the tension in Tiedeman's thought is such that he should be presented as caught in the midst of a transit from historism to modernism. Still, this indicates that historism plays a significant, though reduced role, in his thought. At the least, this presentation establishes that this leading Lochner-era jurist did not conceive law as embodying the static, eternal verities of natural law.

This analysis also shows that historism is a tradition of thought that may encompass jurists with fairly different beliefs. It certainly shows that historism is a mode of thought not identified with any particular conclusions. Pomeroy and Cooley differed, for example, over
IV. Conclusion: From Natural Law to Historism to Legal Positivism

This Article shows that John Norton Pomeroy, John McIntyre Cooley and Christopher Gustavus Tiedeman understood their laissez-faire constitutionalism as grounded in history rather than in natural law. No doubt, they thought America's constitutional norms were consistent with reason. But they approached them as the products of history, justified as the result of the historical process rather than as the teachings of abstract reason. Historism was the fulcrum of their constitutional thought. It reconciled their contradictory commitments to natural law and legal positivism; it encouraged and supported their attempt to resolve the issues of their day by constitutionalizing a progressive model of the common law.691

Yet, despite their disclaimers,692 Pomeroy, Cooley and Tiedeman may still be understood as natural-law jurists. Throughout this Article, natural law has been defined as a rationalistic jurisprudence that posits direct intuitive access to the fundamental principles of moral reality.693 St. Thomas Aquinas' theologically-informed and John Locke's secularly-informed speculations upon the rules that should govern society are the jurisprudences that paradigmatically exemplify this conception of natural law. Natural law was defined in this manner not only because it is the dominant form of natural-law thought in the Western tradi-

691. For cases that illustrate the constitutionalization of a progressive common law, see Holden v. Hardy, 169 U.S. 366, 387-91 (1898); Hurtado v. California, 110 U.S. 516, 530 (1884). Traditional natural-law thought could never support a constitutionalization of the common law, let alone a progressive model of it. Thus, the thesis of this Article explains why, as scholars occasionally observe, the common law was regarded as natural during the Lochner era. See, e.g., Sunstein, Lochner's Legacy, 87 COLUM. L. REV. 873, 882, 885, 917 (1987).

692. Cooley and Tiedeman expressly distanced themselves from natural-law jurisprudence. See supra text accompanying notes 327-46, 640-58. See especially supra note 327 (Cooley's rejection of the notion of a "state of nature"). Pomeroy implicitly distances himself, albeit to a lesser extent that Cooley and Tiedeman. See supra text accompanying notes 192-200, 293-300. The application of this comment to Pomeroy turns upon the particular definition of natural law in this Article. See supra text accompanying notes 195-200 and infra text accompanying notes 693-95.

693. See supra note 5 and text accompanying notes 197-200.
tion, but also because it is the notion of natural law that most contemporary critics and subsequent scholars have associated with laissez-faire constitutionalism.

Nevertheless, natural law is a concept that is broader than the Christian and rationalist conception of it. In Western social thought, the term "natural" has long been an "essentially contested concept": a complex and culturally significant idea whose meaning is the focus of extensive disagreement. Over time, the term "natural" has acquired a wide variety of connotations. Among them is the notion that what is "natural" exists independently of human opinion on whether it exists or should exist. In this sense, what is natural is not constituted by human choice. Law is "natural" if its existence is attributable to a source other than human convention. Natural law encompasses behavioral precepts which are not ordained by man's arbitrary will.

The concept "natural law," therefore, is broad enough to encompass a variety of specific conceptions that differ substantially from the Christian and rationalistic tradition with which it most frequently has been identified. "Natural law" may describe positivistic jurisprudences that trace themselves to Adam Smith's classical economics,700 Jeremy

694. See, e.g., H. ROMMEN, supra note 5, at 3-123; L. STRAUSS, supra note 5; R. TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT (1979) (discussing theories until 1700); P. STANLIS, EDMUND BURKE AND THE NATURAL LAW 3-28 (1958).
695. See, e.g., supra sources cited in notes 1-3. But see Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (attributing the doctrine to Herbert Spencer's Social Statics); Hovenkamp, supra note 4 (grounding the doctrine in classical economics).
696. The concept "natural law," therefore, is broad enough to encompass a variety of specific conceptions that differ substantially from the Christian and rationalistic tradition with which it most frequently has been identified. "Natural law" may describe positivistic jurisprudences that trace themselves to Adam Smith's classical economics,700 Jeremy

697. See S. LEVINSON, supra note 232, at 124-25. Liberty and equality are examples of such concepts in Western culture. See also G. WHITE, supra note 34, at 4, 58 (discussing Union and property as such ideas in early-nineteenth-century America but calling them "cultural signifiers" and "cultural surrogates").
698. See, e.g., 7 OXFORD ENGLISH DICTIONARY 35-38,41-42 (1933); D. HUME, TREATISE, supra note 54, at 168, 474-76, 484; B. WRIGHT, supra note 3, at 331-41; J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 48-54 (1980). Thus, in discussing whether justice was a "natural" or "artificial" virtue, David Hume observed that "[t]he word natural is commonly taken in so many senses and is of so loose a signification, that it seems vain to dispute whether justice be natural or not." D. HUME, ENQUIRIES, supra note 54, at 307 (emphasis in original). See also J. ELY, supra, at 48-54.
699. D. HUME, TREATISE, supra note 54, at 168; B. WRIGHT, supra note 3, at 333-35, 337-39; Moore, supra note 28, at 1144 (moral reality depends upon the view that "it is the nature of things, and not social conventions, that determines the extension of a moral word").
Bentham’s utilitarian ethics or Herbert Spencer’s evolutionary naturalism. It also may describe law premised upon historism, for historicist jurisprudence’s essential claim is that “law itself is subject to law, that it is no arbitrary expression of the will of the law-giver, but is itself a thing obedient to a cosmic process.” Indeed, aware of the various meanings of the term “natural law,” some historicist jurists affirmatively chose to describe themselves as natural-law jurists. From this perspective, Pomeroy, Cooley and Tiedeman essentially refurbished natural law as they abjured it.

Thus, the truism with which this Article began, that the early proponents of laissez-faire constitutionalism grounded themselves in natural-law jurisprudence, is not entirely inaccurate. Though this Article has recast the type of natural law they believed in, one central implication of the truism remains: the jurists who dominated late-nineteenth-century constitutional law believed that American law reflected moral reality, and that American institutions were natural rather than conventional.

Nonetheless, other important implications of the truism do not fare as well. Consider that the truism supports a historiography of American constitutional law that emphasizes the economic and social determinants of laissez-faire constitutionalism to the near exclusion of its intellectual determinants. This historiography observes that, by the time laissez-faire constitutionalism arose, rationalistic natural-law thinking not only was in decline but had been abandoned in most branches of social theory. Given this context, the claim that early laissez-faire constitutionalists grounded themselves in rationalistic nat-

702. See, e.g., R. Hofstadter, supra note 50, at 6, 40-41, 72-75, 145.
704. See, e.g., J. Miller, Destruction of Our Natural Law by Codification (1882) (a paean to historically developed law); J. de Montmorency, supra note 703.
705. See Pound, supra note 548, at 600 (discussing the German historical school but the implication extends to all historicists); R. Cohen, Reason and Nature 373-76, 402-04 (2d ed. 1953) (same). This repeats a pattern of many nineteenth-century theorists. It has long been observed that Bentham, for example, expressly attacked natural law only to offer another variant of it. See, e.g., F. Pollock, supra note 45, at 119-20.
706. A. Paul, supra note 4; B. Twiss, supra note 4; L. Tribe, supra note 3, at 566-68. This emphasis is characteristic of most twentieth-century American history writing. See Siegel, Book Review, supra note 35, at 913; Siegel, Contract, supra note 614, at 4 n.4.
707. B. Wright, supra note 3, at 280-81, 301-19, 330-31; C. Haines, supra note 3, at 219; A. Lowell, supra note 7, at 182-88; H. Maine, supra note 35, at 2, 43-44 (mentioning the “confusion” and “deficiencies” of traditional natural-law philosophy); R. Hofstadter, supra note 50, at 7, 66 (discussing Sumner); supra note 327 and text accompanying notes 640-48 (Cooley’s and Tiedeman’s criticisms of rationalistic natural-law thinking). This Article implicitly agrees with this observation.
ural law implies the claim that they clung to a theory that no respectable social theorist accepted any longer. The suggestion is not just that laissez-faire constitutionalism was wrong because its jurisprudential premises were wrong, but also that its premises were so anachronistic that they were not taken seriously even by their advocates. The conclusion inevitably follows that laissez-faire constitutionalists used natural-law jurisprudence merely to have some justification—however untenable—for a doctrine that they desired upon grounds that were inadmissible in legal argument. Their jurisprudence was a mask for their true and sole motivation: a panicked reaction to the rising tide of immigration, socialist fervor, and labor unrest mixed with an inbred sympathy for the interests of the wealthy elite.

This Article, however, shows that laissez-faire constitutionalism's early proponents drew from the dominant mode of social thought of their time. They were very much in—not out of—the mainstream of American intellectual life. At the least, the intellectual determinants of laissez-faire constitutionalism were not so inherently implausible that the bona fides of its advocates are suspect. Quite the opposite: for many of the early proponents of laissez-faire constitutionalism, it may well be that the dominant mode of social thought of their time helped channel and limit their understanding and response to the major social and economic transformations around them. Historism directed them to be faithful to the lessons of an evolving Anglo-American culture. They conceived laissez-faire constitutionalism as one of those lessons. Especially in light of the recent studies that trace the roots of

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708. Consider Professors Corwin's and Paul's treatment of Cooley and Tiedeman. Professor Corwin presents Cooley as either cynical or disingenuous when he describes Cooley as a not "altogether unbiased commentator" and when he says that in discussing constitutional interpretation Cooley "ostentatiously expelled" natural law "from the door" only to "prepare[] a window for [its] readmission in different guise." E. CORWIN, supra note 2, at 67-68, 117. Professor Paul presents Tiedeman as consciously cynical—and anything but disingenuous—when he says Tiedeman showed his fellow lawyers how the doctrine of natural rights could be "properly manipulated . . . [to] serve as the chief instrument of conservative defense." A. PAUL, supra note 4, at 24. Paul also implies this view of Tiedeman when he notes that Tiedeman gave vent to this anti-natural views in a speech "delivered to a select group of professional colleagues" but not in his "textbook . . . intended for use in law schools and courts. . . ." Id. at 25 n.15. In these pages, Paul tars the entire profession with his view of Tiedeman by implying that Tiedeman's total rejection of natural law was exceptional only in its being articulate.

709. See, e.g., A. PAUL, supra note 4; B. TWISS, supra note 4; C. JACOBS, supra note 87; C. HAINES, supra note 3, at 122, 210-16, 219-24; Graham, Justice Field and the Fourteenth Amendment, 52 YALE L.J. 851, 865, 866-67, 888-89 (1943).

710. The view this Article takes of Pomeroy's, Cooley's and Tiedeman's thought fairly well parallels Professor Ross' analysis of late-nineteenth-century American social theorists in a variety of fields. See Ross, supra note 13.

711. See T. COOLEY, PRINCIPLES, supra note 307, at 235; Cooley, Limits, supra note 312, at 269; supra text accompanying notes 652-58 (discussing Tiedeman); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 114-15, 119-21 (1873) (Bradley, J., dissenting); People v. Budd,
the doctrine back at least seventy years to the era of Jacksonian Democracy and antebellum abolitionism, this seems a plausible belief.

Thus, this Article's demonstration that the early proponents of laissez-faire constitutionalism drew from historism, not rationalistic natural law, means that there was a believable coincidence between jurisprudence and conservative self-interest. It supports the unsurprising (yet revisionist) conclusion that ideology, as well as self-interest, influences the course of American constitutional development and suggests that legal philosophy is shaped by a culture's general intellectual life. (Lawyers, it seems, more readily believe that "thinking like a lawyer" is a legitimate enterprise when it reflects the culture's general criteria for legitimate thought.) It also suggests that the rise of laissez-faire constitutionalism reflects the model of intellectual development elaborated in Thomas Kuhn's seminal study of scientific thought: when new problems present themselves, a professional community's initial reaction is to attempt to resolve them from within its pre-existing framework of analysis. When the results of this attempt prove unsatisfactory, some members of the community tenaciously cling to the

117 N.Y. 1, 44-48, 22 N.E. 682, 686-87 (1889) (Peckham, J., dissenting). See also Ives v. Southern Buf. Ry. Co., 201 N.Y. 271, 293-94, 94 N.E. 431, 439 (1911) (claiming the fault principle was the law of the land when the Constitution was adopted).


713. In any event, the belief was truly held. Pro-laissez-faire constitutionalists tended to believe that the doctrine either had become part of the common law tradition before the nation's founding or had been crystallized by it. See supra sources cited note 711. Their position is even more compelling if, as would seem appropriate, the date by which the tradition needs be crystallized is 1868—the year in which the fourteenth amendment due process clause became effective. Justice Harlan took this position in Hurtado v. California, 110 U.S. 516, 556-58 (1884) (Harlan, J., dissenting). In addition, it should be noted that many areas of nineteenth-century social theory seemed to support the notion that laissez-faire constitutionalism was the fruit of civilization's progressive development. See, e.g., H. MAINE, supra note 35, at 100 (concluding that "[t]he movement of the progressive societies has hitherto been a movement from Status to Contract") (emphasis in original); R. HOFSTADTER, supra note 50, at 7-8 (quoting Sumner to the same effect).

714. "Coincidence" is not meant to imply "coincidental." The argument of this Article is not that self-interest is irrelevant to historical development, but that ideology and self-interest interact in complex ways. They are mutually determinative in ways that require further exploration.


716. This theme is pursued in Siegel, Aristotelian, supra note 52, at 21, 58-59.

old framework (perhaps even denying that the results are unsatisfactory), while other (usually younger) members of the community begin the arduous task of reconstructing or abandoning their inherited beliefs.\(^\text{718}\)

Consider, also, that the truism supports the view that the fall of laissez-faire constitutionalism represents the demise of natural law and the triumph of legal positivism in American constitutional thought. This Article suggests that the fall of the doctrine involved a correlative transformation in American social and legal theory: the demise of historism and the triumph of modern historicism.\(^\text{719}\)

Modern historicism is the philosophy of history that expresses and undergirds twentieth-century social thought.\(^\text{720}\) It is the historical consciousness that displaced historism in Europe in the 1870s and began to influence American social thought at the turn of the century. The rise of modern historicism is part of the sea of change in Western social theory brought about by the collapse of the assumption that the universe has an ethical meaning that is accessible to human intelligence. Modern historicism is like historism in that it conceives societies, social norms and institutions as the outgrowth of continuous change effected by secular causes. Modern historicism, however, is unlike historism in that it does not conceive social change as reflecting moral ordering principles, let alone principles that are discoverable through historical studies. Modern historicism tends to see social change as a Darwinian process in which random variation and power set the course of social evolution. Indeed, under the aegis of modern historicism, historical study tends to support a belief in moral relativity, not moral reality. But whether modern historicism denies or is merely agnostic towards the existence of moral reality, one of its fundamental tenets is that historical studies cannot reveal objective moral values. Modern historicism teaches that historical studies are not normative. It conceives historical study as a descriptive, not a prescriptive, enterprise.

\(^{718}\) Id. at 52-91, 151-52. As Kuhn points out, the decision to remain loyal to a paradigm or to reform or replace it is not entirely determined by intellectual considerations. A telling example is that Kepler's commitment to the Copernican system was partly predicated upon sun worship. See id. at 152-53 (citing E. \text{BURTT, THE METAPHYSICAL FOUNDATIONS OF MODERN PHYSICAL SCIENCE} 44-49 (rev. ed. 1932)). The desire for simplicity and elegance in intellectual systems is fundamentally an aesthetic, not rational, criteria. At times these desires lead scientists to propound theories that later have to be abandoned. See, e.g., T. \text{KUHN, THE COPERNICAN REVOLUTION} 217-19 (1957) (discussing Kepler's preference for laws of planetary motion based upon mathematical harmony and regularity).

\(^{719}\) Modern historicism is the latter phase (i.e., twentieth-century phase) of historicism as discussed \textit{supra} note 84. As noted there, historicism conceives historical study as a normative study that could prescribe social values. Modern historicism conceives historical study as a descriptive enterprise that tends to teach the relativity of social values.

\(^{720}\) For support for the comments in this paragraph, see \textit{supra} note 84 and text accompanying notes 17-32.
Thus, this Article suggests that the jurisprudential debate over laissez-faire constitutionalism—which has long been conceived as a debate between natural law and legal positivism—is more fully understood as part of the process by which modern historicism displaced historism as a foundation tenet of American social, legal and constitutional thought. The writings of Justice Holmes, who was among the first to oppose laissez-faire constitutionalism under the banner of modern constitutional theory, illustrate this point.

Where historist jurists tended to criticize natural-law jurisprudences drawn from John Locke's state of nature, Holmes attacked all natural-law philosophies. Just as distinctively, Holmes also denied historical studies any prescriptive power. Holmes' position on historical studies certainly was not due to any lack of historical learning or passion for its study. Holmes was devoted to historical study. In his landmark book, The Common Law, Holmes predicated his philosophical consideration of the law wholly upon historical analysis. Throughout his career, he maintained that "[t]he rational study of law is still to a large extent the study of history." But at least by the 1890s, Holmes came to believe that "[h]istory must be a part of the study [of law],... because it is the first step toward an enlightened

721. See supra note 327 (Cooley rejecting "state of nature" theories); supra text accompanying note 645 (Tiedeman criticizing all natural rights philosophies but saying that it "reaches the extreme limit of absurdity in the social contract" theory); H. MAINE, supra note 35, at 2; A. LOWELL, Introduction, supra note 7, at 8-19; A. LOWELL, Theory, supra note 7, at 182-88; F. LIEBER, supra note 168, at 321-22, 327-28 (Hammond referring to seventeenth- and early-eighteenth-century natural-law theories, which are the rationalistic systems); F. LIEBER, supra note 5, at 24-25.

722. O. HOLMES, Natural Law, in COLLECTED LEGAL PAPERS 310 (1920). For example, Holmes says in this piece: "The jurists who believe in natural law seem to me to be in that na"ive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere." Id. at 312. In addition, Holmes indicates in a review of Holdsworth's History of English Law that he "believe[s] in the superiority of the artificial to the natural" and, therefore, wishes that "man-kind yet may take its own destiny consciously and intelligently in hand." O. HOLMES, Holdsworth's English Law, in COLLECTED LEGAL PAPERS 285, 289-90 (1920). See also infra text accompanying note 731 (expressing similar desire). Not by coincidence, Holmes also derided the notion that there was a discoverable objective truth in moral affairs. O. HOLMES, Natural Law, supra, at 310-11 (saying "the truth may be defined as the system of my (intellectual) limitations[;] what gives it objectivity is the fact that I find my fellow man to a greater or less extent... subject to the same Can't Helps"). But at the time Holmes made these latter remarks they probably were more a personal than a representative view.

723. O. HOLMES, THE COMMON LAW (1881).


725. This phrase is used because it is possible that earlier in his career, for example when he wrote THE COMMON LAW, supra note 723, Holmes was a historist. The parallel between Holmes' approach in that book and Sir Henry's Maine's Ancient Law (1861) is remarkable. In addition, Maine's book brought him the fame and reputation that Holmes was at this stage in his career anxious to achieve. It is plausible that in writing THE COMMON LAW, Holmes was attempting to establish himself as the "American Henry Maine."
scepticism, that is, toward a deliberate reconsideration of the worth of [its] rules.\textsuperscript{726} History, he thought, helped

you get the dragon out of his cave on to the plain and in the daylight, [where] you can count his teeth and claws. . . . But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.\textsuperscript{727}

In the latter endeavor, Holmes advocated drawing from disciplines other than history.\textsuperscript{728} For Holmes, history was not a normative study.

From the perspective of this Article, Holmes' most revolutionary aphorism is not the oft-quoted reminder that "[t]he life of the law has not been logic: it has been experience."\textsuperscript{729} Historist jurists would have agreed with this sentiment. Instead, Holmes' break with convention is most succinctly captured in his ironic claim that "continuity with the past is only a necessity and not a duty."\textsuperscript{730} To historist jurists, "continuity with the past" was a duty. Small wonder that they conceived a constitutionalism that was insufficiently transformative for their legal positivist opponents who believed that such "continuity simply limits the possibilities of our imagination . . . ."\textsuperscript{731}

\textsuperscript{726} Holmes, supra note 724, at 469.

\textsuperscript{727} Id. Consider also Holmes' commendation of Morris Cohen's critique of historism in O. Holmes, Ideas and Doubts, in COLLECTED LEGAL PAPERS 303 (1920) (referring to Cohen, History versus Value, 11 J. of Philo. 701 (1914), reprinted in M. Cohen, supra note 705, at 369-85).

\textsuperscript{728} Id. Holmes mentions economics and statistics.

\textsuperscript{729} O. Holmes, supra note 723, at 1. Indeed, Holmes continues with the very historist comment that "[t]he law embodies the story of a nation's development through many centuries. . . . In order to know what it is, we must know what it has been, and what it tends to become." Id.

\textsuperscript{730} O. Holmes, Law in Science and Science in Law, in COLLECTED LEGAL PAPERS 210, 211 (1920).

\textsuperscript{731} Id.