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Jacobs: Law Writers and the Courts

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LAW WRITERS AND THE COURTS. By *Clyde E. Jacobs*. Berkeley: University of California Press. 1954. Pp. x, 223. \$3.50.

To what extent do the writers of legal treatises—the “publicists”—influence the courts in the decision of controversies before them? The author of this monograph has undertaken this difficult quest with respect to two principles (liberty of contract and the public purpose requirement of taxation) and three text writers of the post-Civil War period.

The first, Thomas M. Cooley, was chosen by the Michigan Senate to codify the state statutes, served as reporter and later as a Justice of the Supreme Court of Michigan, was a member of the first faculty of the University of Michigan Law School, and was appointed a member and later chairman of the Interstate Commerce Commission. His *Constitutional Limitations*, “the most fecund source of laissez faire constitutional principles available during the [post-Civil War] period” (p. 30) was published contemporaneously with the ratification of the Fourteenth Amendment.

The second, Christopher G. Tiedeman, was successively a member of the faculty of the University of Missouri Law School, the law school of the University of the City of New York, and Dean of the law school at the University of Buffalo. At the age of twenty-nine he published his *Limitations of Police Power*—a work which, in Mr. Jacobs’ opinion, “far more clearly sustained and developed laissez faire constitutional principles than did that of Cooley, and it was second only to the work of the latter in the influence it was to exercise on bench and bar.” (pp. 58-59)

The third, John F. Dillon, was both a physician and a lawyer, a member of the Iowa Supreme Court and later United States Judge in Iowa, and still later a professor in the Columbia University Law School as well as counsel for the Union Pacific Railroad. Best known to most lawyers for his treatise on *Municipal Corporations*, he is characterized as one of the “foremost spokesmen for laissez faire principles.”

Mr. Jacobs concludes that “the works of Cooley and Tiedeman were instrumental in the formulation, development, and application of the liberty of contract principle as a limitation upon the police power of the states and the commerce power of the national government, and that the treatises of Cooley and Dillon were of equal importance in making the public purpose maxim an important restriction upon the taxing and spending powers of state and local governments.” (pp. v-vi) The three commentators selected, “not less than the judges and the lawyers, were responsible for the popularization within their profession of constitutional principles which encompassed the laissez faire policies demanded by industrial capitalists.” (p. 4) He also concludes that the influence of Cooley and Tiedeman was “most pronounced” in cases reviewing statutes protecting labor unions, (p. 76) and that by supplying the judiciary “with the materials whereby due process of the Fourteenth Amendment was given life and whereby the corresponding clause of the Fifth Amendment was

subsequently reanimated, the publicists contributed to a constitutional revolution paralleling the industrial revolution which was then taking place." (p. 22)

As a survey of the development of liberty of contract and public purpose tax doctrines, especially in state constitutional interpretation, this monograph deserves the attention of constitutional lawyers and historians. As a brief for the influence which three publicists exercised during the half-century following the Civil War, it is not persuasive, for five reasons.

First, the author requires the reader, in scores of instances throughout the book, to accept court citation of a treatise as establishing a cause-and-effect relationship between the cited material and the decision reached.

Second, the cogency of the influence argument is diminished by the author's admission that one of the reasons for the success of Cooley's *Constitutional Limitations* was "the fact that the treatise, as its title indicates, emphasized limitations upon power rather than power itself" and this made it "readily compatible with prevailing economic and political ideas of the time." (p. 30) While it is possible for works to be "readily compatible" with prevailing ideas and still be influential, it is also suggestive that such works are caught in the tide of influence stemming from an earlier change of direction in social or economic thought.

Third, an advocate of the Jacobs' position might be troubled by the statement that Cooley's concepts of restraints upon the police power were "enormously suggestive" yet "in many respects, they were somewhat vague." (p. 106) Similarly, the author concedes that Cooley's ideas on public purposes for taxation were "not altogether consistent" yet they were "warmly received by bench and bar." (p. 109) This may indicate Cooley's influence upon the courts, but it is at least equally plausible that the ambiguity of Cooley's writings furnished convenient receptacles into which the judges might pour their preconceptions as to governmental power.¹

Fourth, allegiance to the Jacobs thesis is also thwarted by several deficiencies in the internal consistency of his argument. For example, we are told that "much of the force and prestige" of Tiedeman's work "undoubtedly derived from its logical consistency and rigor." (p. 62) Yet the author announces this conclusion almost immediately after pointing out that Tiedeman "rejected the notion that the courts could invalidate legislation because they regarded it as contrary to principles of natural right and of abstract justice. But the force of this idea was almost wholly destroyed by his acceptance, apparently without reservation, of the doctrine of implied limitations on legislative power." (p. 60) Similarly, the non sequitur of the following statement is apparent: "To a large extent the rapid development of laissez faire in the state courts was due to the influence

¹ A similar inference, as to the influence of Tiedeman, might be drawn from this statement. "When other authorities were lacking on a given proposition of laissez faire or when they were hostile to that proposition, the bench and bar might confidently refer to the works of Tiedeman for support. It was in this respect that he made his most notable contribution." p. 62.

of Cooley, for that writer exercised far greater influence upon those tribunals than upon the United States Supreme Court." (p. 49) The fact that Cooley exercised less influence upon the United States Supreme Court than upon the state courts hardly establishes that the rapid development of laissez faire in the latter was "due to the influence of Cooley."

Fifth, in an effort to accentuate the influence of his three selected writers, Mr. Jacobs found it necessary to minimize the importance of other commentators in a way which invites rebuttal. Thus we are told that Ernst Freund's *Police Power, Public Policy and Constitutional Rights* "was less original than were the works of Cooley and Tiedeman . . ." and "did not become a standard citation in judicial opinions," (p. 94) and that the reliance of state tribunals upon the works of Cooley was "unparalleled in American judicial history." (p. 41) One may doubt whether the author has adequately documented these conclusions so as to subordinate to the work of these three men the writings of such commentators as Kent and Story.

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