

THE VERDICT OF HISTORY

The History of Michigan Jurisprudence Through Its Significant Supreme Court Cases



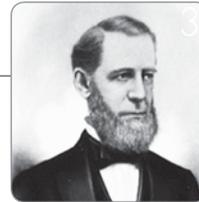
Welcome to this first issue
exploring the following cases:

The Formative Years: 1858–1870

It is a great pleasure for me to introduce to the lawyers of Michigan the “Verdict of History: The History of Michigan Jurisprudence Through Its Significant Supreme Court Cases.” It has been my good fortune to have the opportunity to write this history for the Michigan Supreme Court Historical Society. The Society’s goal in undertaking the Verdict of History Project is to publicize and arouse interest in the history of the Michigan Supreme Court through some of its most important decisions.

When the Society, in 2004, sent out a call for an author, its “top cases committee” had already put a great deal of work into the selection of cases. The initial plan was to tell the story of the 10 most important decisions in the Court’s history. The committee had solicited suggestions from members of the state bar and bench as to the cases they viewed as most significant. They had also compiled lists of the most frequently cited Michigan decisions from databases such as Westlaw. By the time I joined the committee, there were dozens of case candidates.

The committee knew that no 10 cases would satisfy everyone, that inevitably a favorite would be left out, and some would think lesser significant cases were included. The committee also realized that no perfectly objective set of criteria like citation could do all of the selection work. In the end, the committee expanded the list to 20 and settled on those cases that would work together to tell the story of the decisional history of the Court as a whole.



The Pond and Maher Cases: Crime and Democracy on the Frontier



The Workman Case: Racial Equality in Nineteenth-Century Michigan



People v Salem: Taxation and Class Legislation

The most important factor in the decision to include a case was the way in which it influenced and reflected the life of Michigan over the years, recognizing that law both shapes and is shaped by politics, society, culture, and economics. The committee has tried to include cases that span the full chronological range of the 150-year-old Court. As the committee surveyed the life of the Court, it noticed a pattern of four distinct periods.

- I. The Formative Years, 1858–1870
- II. The Forgotten Years, 1870–1940
- III. The Mid-20th Century, 1940–1970
- IV. Michigan and the Culture Wars, 1970–

The first was the Court’s founding era, associated with the famous “Big Four”—Thomas MacIntyre Cooley, Isaac Christiancy, James Campbell, and Benjamin F. Graves. Some of the best-known of the cases came from the Civil War period. Then came what might be called the dark ages, or “forgotten years,” of the Court, the late nineteenth and early twentieth centuries. In this period several cases presented themselves as important illustrations of how Michigan’s people, culture, economy, and politics developed, a period during which the state became urban, industrial, and modern. The next major period was the era of what could be called liberal judicial activism, the 1950s and 1960s, a period associated with Governor and later Justice G. Mennen Williams. The last period, that after the 1960s, naturally

drew the largest number of cases, being of the greatest interest to our contemporary world. This is the period in which the Court dealt with many issues that grew out of what has been called the “culture wars” of our own day.

In addition to choosing cases that spanned the chronological life of the Court, the committee also tried to choose cases that illustrated the great variety of subjects that the Court had to deal with. My own area of expertise is political and constitutional history; however, the life of the Court encompasses a wider and more popular set of issues. Thus, the cases deal with contracts, negligence, legislative apportionment, civil rights, murder, employment and labor unions, adoption, sovereign immunity, nudism, suicide and the like. The great variety of the lives of Michiganders is displayed in the range of cases discussed.

Finally, certain of the cases were chosen for the peculiar personalities or subject matter involved. For example, it would be unimaginable not to include an opinion by Justice Cooley. And the committee could not resist including an opinion by Justice Voelker, the colorful novelist (a/k/a Robert Traver) and “backwoods barrister” who wrote *Anatomy of a Murder*. Also, a committee of lawyers could never leave out *Sherwood v Walker*, the famous “cow case” taught to generations of law students to the present day.

In sum, the Historical Society hopes that these cases will provide the bar and bench of Michigan a survey of the rich history of our Supreme Court. Every state supreme court should be so fortunate

as to have the historical society that Michigan does. This work contributed a great deal to my own fund of knowledge as a scholar, teacher, and citizen, as I hope it will for all who read it. Above all, the Society hopes that its presentation will pique your interest in the story of the Michigan Supreme Court, of which the committee knows this project barely scratches the surface. ■

—Paul Moreno, 2008



Paul Moreno is the William and Bernice Grewcock Professor of History (Associate) at Hillsdale College. Paul received his doctorate of philosophy from the University of Maryland at College Park, MD, in 1994 and his MA from the State University of New York at Albany, Albany, NY, in 1988. In the 2005–2006 academic year, Paul served as a Visiting Fellow in the James Madison Program in American Ideals and Institutions at Princeton University. He has written and published two books, Black Americans and Organized Labor: A New History (Baton Rouge: Louisiana State University Press, 2006) and From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933–1972 (Baton Rouge: Louisiana State University Press, 1997). He has also published over a dozen articles and encyclopedia entries in his field. Paul has been invited to present lectures and papers at many conferences and universities, most recently to the American Political Science Association and The Free Society: Foundations and Challenges at Princeton University.

The Board of Directors of the Michigan Supreme Court Historical Society is pleased to present the Verdict of History Project to the members of the Michigan bench and bar. The multi-year project is a study of the Michigan Supreme Court’s development of Michigan jurisprudence as it affects the lives of Michigan citizens.

A committee of six members of the Board of Directors (whose misplaced modesty requested they remain nameless) began working in 2003 to select a list of the most significant cases. Originally, the committee members sought to create a list of criteria that would allow them to identify the “most significant cases” objectively. They quickly discovered that a purely objective selection would be impossible. After submitting their own case nominations and reviewing nominations from the State Bar of Michigan, the Michigan Supreme Court, and the deans of each of Michigan’s law schools, the committee members spent nearly a year researching, reviewing, and debating until the number of cases was narrowed to 20.

The 20 cases that made the list of “top cases” may not be the best written, have the best diction, settle an important or obscure point of law, or be of the greatest economic consequence. But they are for the most part Michigan Supreme Court decisions that had a profound effect on the everyday lives of Michigan citizens of the then and now—more so than just the parties to the matter. Of the over 30,000 cases reported in 480 volumes of the Michigan Reports by the 104 justices who have written while serving on the Court, there surely are more than our selected 20. But as you review them, you may be willing to admit, we have made a good start.

The Michigan Supreme Court Historical Society, created in 1988 by then Chief Justice Dorothy Comstock Riley, has been working for the past 20 years to fulfill its mission—to promote the study of the history of Michigan’s courts and to increase public awareness of Michigan’s legal heritage. The Verdict of History Project is perhaps the most ambitious and comprehensive project yet undertaken. The project is presented in four segments in the December 2008 and January, February, and March 2009 issues of the *Michigan Bar Journal*.

On behalf of the Board of Directors, I invite you to visit the Society’s website (www.micourthistory.org) to learn more about the Society. You are welcome to join the Society and help record the history you are making in Michigan jurisprudence.

—Wallace D. Riley, President

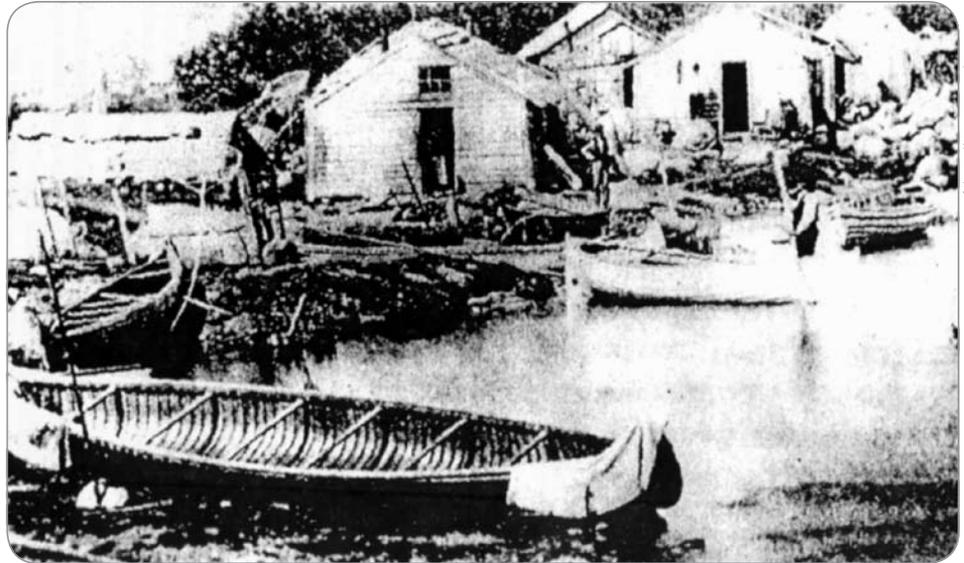
The *Pond* and *Maher* Cases: Crime and Democracy on the Frontier

8 Mich 149 (1860); 10 Mich 212 (1862)

The earliest significant cases in Michigan Supreme Court history involved frontier justice. The Court made it easier for citizens to defend themselves and mitigated the criminal law of murder. These decisions reflected the conditions of life and politics in Michigan in the 1860s.¹ People were close to the state of nature and believed fiercely in the right of popular self-government. In *Pond v People* (1860), the Court held that a man whose life and property were being attacked could use deadly force to defend them. It recognized the principle that “a man’s home is his castle,” and affirmed that all citizens had not just the right, but the duty, to combat crime. In *Maher v People* (1862), the Court reinforced the doctrine that crimes committed in the heat of passion could not be judged by the same standard as cold-blooded assaults.

The *Pond* and *Maher* decisions helped the Michigan Supreme Court begin to establish its reputation. Michigan had joined the Union in 1837 and displayed the radically democratic political culture typical of western frontier settlements of the era. Andrew Jackson was the period’s symbolic figure, viewing himself as the virtual embodiment of the American people, and he governed according to the principle that “the majority is to rule.” Michigan’s 1835 constitution placed great faith in the ability of ordinary people to govern themselves, particularly in its extension of the right to vote to all adult white men. The constitution provided for a Supreme Court of three justices, who would be appointed to seven-year terms by the governor with the consent of the Senate.

Disillusionment with abuses of legislative power, particularly with state promotion of internal improvements (especially railroads), led Michiganders to call for a new constitution within a decade. The 1850 constitution sought to make government still more responsive to popular will, mostly by placing limits on legis-



Seul Choix Point Fishing Village, 1859.

lative discretion.² Michigan Supreme Court Justice James V. Campbell later wrote that the 1850 constitution was based on the idea that “no one is to be trusted”—nobody with governmental power, that is.³ Perhaps most radical of all, the 1850 constitution made all judgeships elective.⁴ Initially, eight judges of the circuit courts constituted a Supreme Court. But the constitution empowered the legislature, after six years, to establish a separate Supreme Court. In 1857, after complaints that the judges were “overworked and underpaid,” and that the public “feared that the high tribunal’s interrelation with the circuit courts jeopardized the impartial

The Pond case established an important principle in criminal law, that there was no “duty to retreat” when one’s home was invaded, and extended the basis for self-defense.

appeals process,” the legislature created a new Supreme Court, consisting of a chief justice and three associate justices elected for eight-year terms. The terms of the judges on the new court began on the first day of 1858.⁵ This act allowed the newly dominant Republican Party to take control of the Court. Michigan

The Pond and Maher Cases

Remote as it was, the area already had a remarkable demographic history. The earliest known settlers, Ojibwa (commonly called Chippewa) and Ottawa Indians, had surrendered the territory by treaty in the 1830s and 1840s. The French, the first Europeans in the area, came next and had given it many place-names like *Seul Choix* (pronounced *shi-shwa* by later settlers), “only choice,” capturing the isolation of the point, which was the only shore haven within miles. On Beaver Island, across from *Seul Choix*, a band of Mormons had established a polygamous “kingdom” in the 1840s. Their leader, James Strang, who called himself “King James, Vice-regent of God on Earth,” was elected to the legislature and was able to get a new county (Emmet) created, with its seat on Beaver Island. In 1856, Strang was assassinated and the Mormons were driven off the island. In the years before the Civil War, a large number of Irish had settled in the area, turning Beaver Island into “America’s Emerald Isle.” Michigan attracted its share of the new immigrants, especially Irish and German, who filled the North and Midwest in the 1840s and 1850s.¹

Not surprisingly, people often dispensed rough-and-ready justice in this environment. Justice Campbell later wrote that it was difficult to find jurors in the U.P., and “it was inevitable that many irregularities should exist, and that the people winked at things which they could not improve.” It proved impossible, for example, to bring to justice those who had driven the Mormons off Beaver Island, but it was widely believed that the Mormons themselves had grasped the island illegitimately. “Speedy and irregular remedies were not much blamed where there was great provocation,” Campbell observed. But, “With such temporary variations from the regular process of law, there was a general respect for substantial justice, and for judgments of competent tribunals, and no disposition to lawless wrong.”² The law would be a potent force for civilization. As Campbell later wrote, “It might be imagined by those who are ignorant of the early western ways that these canoe voyagers led to the temporary abandonment of civilized habits. But no mistake could be greater.”³

1. Dunbar & May, *Michigan: A History of the Wolverine State*, 3d ed. (Grand Rapids, 1995), p 302; Edwards, *The Castles of Seul Choix*, in Fischer, ed., *Seul Choix Point*, (Gulliver, MI, 2001), p 20.
2. Campbell, *Outlines of the Political History of Michigan* (Detroit: Schrober and Co, 1876), pp 551–553.
3. Campbell, *Biographical Sketch: Charles C. Trowbridge* (State Pioneer Society of Michigan, 1883), p 12. See also Brown, *Judge James Doty’s Notes of Trials and Opinions, 1823–1832*, 9 *Am J Legal Hist* 17 (1965).

Republicans absorbed all the egalitarian democracy of the Democrats and extended it to antislavery and, sometimes, civil rights causes.

The *Pond* and *Maher* cases both came from the Upper Peninsula (U.P.), the least developed part of a newly settled state. Most of the U.P. lay outside of the Michigan territory in 1835, when Michigan wrote its constitution and applied for admission to the Union. Ohio disputed Michigan’s possession of the outlet of the Maumee River, and was able to get President Jackson and Congress to prevent Michigan’s admission until it gave up the claim. A brief and rather comical border skirmish between the states ensued, showing that commitment to the principle of “popular sovereignty” could lead the people to take the law into their own hands. In the end, Michigan reluctantly accepted the western part of the Upper Peninsula, plus a share of the treasury surplus, in exchange for the Maumee strip. But the legislature expressed its resentment about the bargain, calling the U.P. “a sterile region on the shores of Lake Superior, destined by soil and climate to remain forever a wilderness.”⁶ In time, after the explorations of the area by geologists Henry Schoolcraft

and Douglas Houghton, its huge stores of timber, copper, and iron attracted many settlers and made the state rich.

Fish presented one of the first U.P. attractions. Augustus Pond and his family fished for a living at *Seul Choix* point in Delta County, about 75 miles west of Mackinac Straits (today part of Schoolcraft County). Settlers there faced harsh, frontier conditions. In 1860, the entire state of Michigan was home to 750,000 people, over half of whom had been born in other states. Only 20,000 lived in the U.P., and fewer than 1,200 in Delta County.

In this environment, Pond lived with his wife and three children, one an infant, in a 16' × 16' rough-hewn wooden house with one room, one window, and one door secured by a leather strap and a wooden peg. He also possessed a similarly constructed “net-house” where his two hired hands, Daniel Whitney and Dennis Cull, slept. For reasons not entirely clear, Pond had run afoul of David Plant. Plant appears to have been a carouser and rabble-rouser, allied with Isaac Blanchard, Jr., the six-foot seven-inch, 240-pound son of a Mackinac Island judge, and another man named Joseph Robilliard. “Plant spoke of the three of them as being an army,” court testimony recalls, “and said that he was captain, Robilliard was Bonaparte, and Blanchard was the soldier, and was to do as they ordered.” The controversy between Pond and Plant may have arisen out of ethnocultural tensions, for Plant was an Irishman and Blanchard accused Pond of “abusing an Irishman” and “not using his neighbors right,” but there is no record of Pond having given offense to Plant or anyone else. Rumor also had it that either Plant or Blanchard was enamored of Pond’s wife.⁷

On June 16, 1859, Plant and a group of 15 or 20 men threatened Pond. Plant assaulted him, but Pond walked away and continued to avoid his adversary. That night, Plant came looking for him, so Pond slept at a friend’s house. The next day, after a drink together in Pond’s net-house, Plant and his allies besieged Pond in his house; Pond hid under the bed and his wife kept his assailants at bay. Plant grabbed her arm through the door and grasped it so roughly that she fainted. Plant and his confederates then went to look for Pond elsewhere.

Meanwhile, Pond got a shotgun loaded with birdshot. Later that night, Plant returned to the Pond home. “Pond has to be abused,” Plant said. “I must have a fight with Gus Pond, and if I can’t whip him, Isaac will whip him.”⁸ After again being turned away by Mrs. Pond, they began to tear apart Pond’s net-house and attacked his hired hand, Dennis Cull. Pond heard the ruckus and Cull’s choking screams and came out with his shotgun. After twice shouting, “Leave, or I’ll shoot,” Pond fired. He hit Blanchard, who crawled into the woods and was found, dead, after daybreak.

The Pond and Maher Cases

Pond tried to turn himself in to his brother, Louis, but Louis denied that he had authority to take his brother in. Pond then got Whitney and Cull to take him to Beaver Island to surrender himself, perhaps because the Blanchards had less influence there. But Plant, Robilliard, and three others overtook them by boat. Pond was brought to trial in Mackinac Island City Hall. He was convicted of manslaughter and sentenced to 10 years' hard labor at the Jackson state prison. The trial court held that a man could not use deadly force to defend himself against a "mere trespass"; rather, he had a "duty to retreat" to avoid using force. Pond's net-house was not his home; nor did the assault on Cull justify the killing. Pond appealed his conviction to the Michigan Supreme Court.

Michiganders had elected George Martin, Randolph Manning, Isaac P. Christiancy, and James V. Campbell to the newly reorganized Court. Only Martin had served on the old Court, and he was made chief justice, a position that he held until his death in 1867. Justice Campbell wrote the opinion for a unanimous Court, overturning Pond's conviction. Pond, the Court opined, was justified in using deadly force to resist an attack on his home, family, and servants.

Martin "remains a shadowy figure for historians." He was a Vermont native and Whig before he became a Republican, able to win elections in a



Justice
George Martin

heavily Democratic state. His colleagues seem to have held Martin in low regard. Described by one historian as "a man of rather easy-going conduct," he wrote few opinions and missed many Court decisions. "He was constitutionally indolent," another history notes, "and, like other indolent judges, too much inclined to dispose of cases on some technical ground that would avoid the labor of disposing of them upon their merits." The son of a tavern-keeper, he became an alcoholic in his later years.

Randolph Manning was a New Jersey Democrat, known for integrity and harshness, who became a Republican in 1854. Isaac Christiancy was the most politically active of the original justices. An antislavery New York Democrat, he often bolted the party to support free-soil candidates and helped form the Republican Party in Michigan. He served on the Court until elected to the U.S. Senate in 1875. Campbell was a New York Whig; he was the wealthiest and most sophisticated of the justices. He served on the Court until 1890. Christiancy and Campbell were two of the "Big Four" who, when later joined by Benjamin F. Graves and Thomas M. Cooley, established the Court's national reputation for greatness.¹

1. Shelly, *Republican Benchmark: The Michigan Supreme Court, 1858–1875*, Mid-America 77 (1995), pp 97–101; Vander Velde, *The Michigan Supreme Court Defines Negro Rights, 1866–69*, in Brown et al., eds, *Michigan Perspectives: People, Events, Issues* (Dubuque: Hunt Publishing Co., 1974), p 108; Reed, ed, *Bench and Bar of Michigan* (Chicago: Century Publishing and Engraving Co., 1897), p 12; Volpe, *Isaac P. Christiancy*, in Garraty et al., eds, *American National Biography*, 24 vols (New York: Oxford University Press, 1999); Wise, *The Ablest State Court: The Michigan Supreme Court Before 1885*, 33 Wayne L R 1509, 1529–1532 (1987); Chaney, *The Supreme Court of Michigan*, Green Bag 2 (1890), 388. See generally, *Michigan Supreme Court Historical Reference Guide* (Lansing: Michigan Supreme Court Historical Society, 1998).

The attack presented not a mere trespass, but a felonious assault. "Instead of reckless ferocity, the facts display a very commendable moderation" on Pond's part, Campbell noted. The trial court should have considered the net-house as part of Pond's home, for, "It is a very common thing in the newer parts of the country... to have two or more small buildings, with one or two rooms in each, instead of a large building divided into apartments." Thus, the Court extended the common-law rule that "a man's home is his castle" to frontier circumstances and ordinary citizens.⁹

Most significantly, Campbell maintained that individuals who defended themselves against criminals were performing a public service. "The rules which make it excusable or justifiable to destroy [life] under some circumstances, are really meant to insure its general protection," he wrote. "They are designed to prevent reckless and wicked men from assailing peaceable members of society." Campbell noted that, "It is held to be the duty of every man who sees a felony attempted by violence, to prevent it if possible," and that citizens have "the right and duty to aid in preserving the peace." Indeed, Pond had practically helped to suppress a riot, considering the "rabble" that Plant conspired with. Moreover, Campbell insisted that the Court consider the circumstances as they appeared to the person defending himself—the subjective standard of an ordinary man. Finally, Campbell ruled that all these questions were for the jury's consideration. This reduced the power of the judge and expanded the role of the jury, a tendency that was common in early nineteenth-century criminal law and characteristic of a democratic society that trusted popular institutions.¹⁰ As a result, Pond was entitled to a new trial in which the jury could consider these principles. He seems to have died before the new trial, however.¹¹

The *Pond* case established an important principle in criminal law, that there was no "duty to retreat" when one's home was invaded, and extended the basis for self-defense. The federal courts adopted the rule of "no duty to retreat" in 1921.¹² In 1925, Ossian

The *Pond* decision continues to be celebrated by Second Amendment, gun-rights advocates who are very active in Michigan. Of course, there is always the danger that the popular right of self-defense, and the duty to suppress crime, might become an invitation to lawless anarchy. One late nineteenth-century commentator noted that the Court "has been so mighty a bulwark of personal liberty as to provoke the reproach that it really shielded the guilty."¹ Thus, the courts have resisted reckless extension of the "castle doctrine." In 2002, in *Michigan v Riddle*, the Michigan Supreme Court emphasized that the use of deadly force is justified only in extreme circumstances, and that the "home" includes inhabited dwellings, but not areas surrounding them. The 2002 Court also pointed out that Augustus Pond was acting not only in self-defense, but in defense of his servants.²

1. Chaney, *The Supreme Court of Michigan*, Green Bag 2 (1890), p 396.
2. *People v Riddle*, 467 Mich 116; 649 NW2d 30 (2002); Crider, *Case Digest*, 81 U Det Mercy L R 129 (2003).

The Pond and Maher Cases

Sweet, a black physician, moved his family into an all-white neighborhood in Detroit. Shortly thereafter, a mob of whites besieged the house, attempting to drive the Sweets out. One of the occupants shot and killed one of the mob, and the entire Sweet household was tried for murder. Famed civil libertarian attorney Clarence Darrow defended the Sweets, urging that the principle that “a man’s home is his castle” applied to blacks as well. Judge Frank Murphy, later Detroit mayor, Michigan governor, and United States Supreme Court justice, presided over the decisions in Michigan circuit court that exonerated the Sweets.

In evaluating Pond’s decision to use deadly force, Justice Campbell noted, a jury must consider his state of mind, or how dangerous the situation appeared to him. Legal rules, he said, “must be in some reasonable degree accommodated to human character and necessity.”¹³ Two years after the *Pond* decision, the Court applied this democratic principle in another notable case from the Upper Peninsula. In the village of Houghton, on the Keweenaw Peninsula that juts into Lake Superior (copper country that is even more remote than Seul Choix), William Maher ran, sweating and agitated, into a saloon. He ran up to Patrick Hunt and shot him in the head, causing Hunt to lose his hearing and confining him to bed for a week. Maher was convicted of assault with intent to commit murder. The judge did not allow Maher to present evidence to the jury that he had seen his wife and Hunt emerge from the woods together a half-hour before the assault, and had been told just minutes before the assault that his wife and Hunt had engaged in sexual intercourse there. Nor was the jury allowed to consider Maher’s statement of these facts.

Maher, represented by the same defense team that had won Pond’s case, Buel & Trowbridge, appealed to the Michigan Supreme Court and had his conviction overturned. Justice Christianity wrote that the excluded evidence showed that Maher did



1881 Drawing of City of Houghton.

not, in a cold and calculating way, intend to murder Hunt. The evidence established that the assault was committed “under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control.”¹⁴ That is, the crime would have been manslaughter, not murder, if Hunt had died. Again, the Court, citing *Pond* as a precedent, insisted that the situation, the total context as it appeared to an ordinary man, must be presented to the jury. “In determining whether the provocation is sufficient or reasonable, *ordinary human nature*, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard.”¹⁵ Again showing its faith in the ability of citizen-jurors to judge these circumstances, Christianity noted:

Besides the consideration that the question is essentially one of fact, jurors, from the mode of their selection, coming from the various classes and occupations of society, and conversant with the practical affairs of life, are, in my opinion, much better qualified to judge of the sufficiency and tendency of a given provocation, and much more likely to fix, with some degree of accuracy, the standard of what constitutes the average of ordinary human nature, than the judge whose habits and course of life give him much less experience of the workings of passion in the actual conflicts of life.¹⁶

In the midst of a civil war that Lincoln described as “essentially a people’s contest” and a test of whether free men could govern themselves, the highest court of Michigan added its voice to the chorus that they could, and disclaimed any pretense to establish an aristocracy of bench or bar.

The *Maher* decision mitigated the common law rule that, to claim derangement due to passion, the accused must have witnessed his spouse and lover in the act of adulterous intercourse—

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Charles C.
Trowbridge

Union) in 1837!

Charles C. Trowbridge was deeply involved in the early history of Michigan. Like many of the founders of the state, he was born in New York. Trowbridge had accompanied the great geographer Henry R. Schoolcraft in his pioneering explorations of the state, and spoke French and some Chippewa. He ran as the Whig candidate for governor, losing to Stevens T. Mason (the “boy governor” who led the territory in its fight to get into the

1. Campbell, *Biographical Sketch: Charles C. Trowbridge* (State Pioneer Society of Michigan, 1883), p 12. See also Brown, *Judge James Doty’s Notes of Trials and Opinions, 1823–1832*, 9 *Am J Legal Hist* 17 (1965).

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in *flagrante delicto*. Justice Manning dissented on these grounds, adding that, since the state had abolished the death penalty for murder, and divided the crime into murder in the first and second degree, “there is not now the same reason, namely, the severity of the punishment, for relaxing the rules in favor of a party committing homicide as before.”¹⁷ His dissent suggested that the Court’s democratic stance in criminal justice was too soft on criminals.

In these cases, the state Supreme Court reflected the radically democratic political culture of mid-nineteenth century Michigan. It also shaped the law and made policy in a deft and subtle way. One historian observes, “While neither resorting to instrumentalism nor consciously relaxing rigorous standards of jurisprudential methodology”—that is, not boldly and willfully making law—the Court “repeatedly factored considerations of ‘sound public policy’ into judicial calculations. The justices denied that the courts properly played any active role in policy-making. They invoked ‘sound public policy’ with the air of stating obvious maxims,” but were actually writing Jacksonian democracy and Republican liberalism into state law.¹⁸ They were engaged in a moderate kind of “judicial activism,” in keeping with the views of the people, and adjusting the common law to new situations.

By the end of the decade, the Michigan Supreme Court had acquired an enviable national reputation. In 1868, the *American Law Review*, considered the premier legal publication in the country, said that “the Michigan reports are among the best in the country at the present time... the judges are candid, able, and well-informed.” Similar praise came from other observers.¹⁹ Few institutions can be said to have reconciled the often conflicting American principles of democracy and the rule of law as well as the Michigan Supreme Court. ■

FOOTNOTES

1. Finkelman & Hershock, eds, *The History of Michigan Law* (Athens, OH: University Press, 2006), p 1 (emphasizes the significance of geography and environment on the law).
2. Hershock, *To Shield a Bleeding Humanity: Conflict and Consensus in Mid-Nineteenth Century Michigan Political Culture*, *Mid-America* 77 (1995), pp 33, 38, 41.
3. Campbell, *Outlines of the Political History of Michigan* (Detroit: Schrober and Co, 1876), p 535.
4. Mississippi had been the first state to adopt an elective judiciary. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920*, *American Bar Foundation Research Journal* (1984), p 345.

5. Shelly, *Republican Benchmark: The Michigan Supreme Court, 1858–75*, *Mid-America* 77 (1995), p 97; Dunbar, *Michigan Through the Centuries*, 4 vols. (New York: Lewis Historical Publishing Co, 1955), I: 235, II: 156.
6. Dunbar, *supra* at II: 314.
7. *Pond v People*, 8 Mich 149 (1860); *The Way It Was: A Man's Home Is His Castle*, Beaver Beacon, November 2002, p 9; Edwards, *The Castles of Seul Choix*, in *Seul Choix Point*, ed, Marilyn Fischer (Gulliver, MI: 2001), p 28.
8. *Pond*, *supra* at 158. The Court noted that “we have their language as rendered by an interpreter, who was evidently illiterate, or at least incompetent to translate into very good English, and it is impossible for us to determine the exact force of what was said.” *Id.* at 180.
9. *Id.* at 181.
10. *Id.* at 172, 176; Friedman, *A History of American Law* (New York: Simon & Schuster, 1973), p 155.
11. Edwards, *supra* at 17, 27. Blanchard’s descendants claim that Pond was released and never tried for what they considered a murder.
12. *Brown v United States*, 256 US 335; 41 S Ct 501; 65 L Ed 961 (1921).
13. *Pond*, *supra* at 37.
14. *Maher v People*, 10 Mich 212, 218 (1862).
15. *Id.* at 220. (emphasis in the original).
16. *Id.* at 221.
17. *Id.* at 228. Further reflecting its position as a liberal and democratic state, Michigan was the first to abolish capital punishment for murder (though it retained it for treason). Reformers hailed this 1846 move and said that “the sun had risen in the West and its light had finally penetrated the darkness of the East” when other states followed Michigan’s lead. Davis, *The Movement to Abolish Capital Punishment in America, 1787–1861*, *American Historical Review* 63 (1957), 43. See also Wanger, *Historical Reflections on Michigan’s Abolition of the Death Penalty*, *Thomas M Cooley L R* 13, 755 (1996).
18. Shelly, *supra* at 106.
19. Wise, *The Ablest State Court*, 33 *Wayne L R* 1509, 1534 (1987).

THE VERDICT OF HISTORY

The Verdict of History: The History of Michigan Jurisprudence Through Its Significant Supreme Court Cases is proudly sponsored by the Michigan Supreme Court Historical Society, with the generous assistance of an Administration of Justice Grant from the Michigan State Bar Foundation.* The project includes 19 essays about 20 significant Michigan Supreme Court cases written by Professor Paul Moreno.

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The *Workman* Case

Racial Equality in Nineteenth-Century Michigan

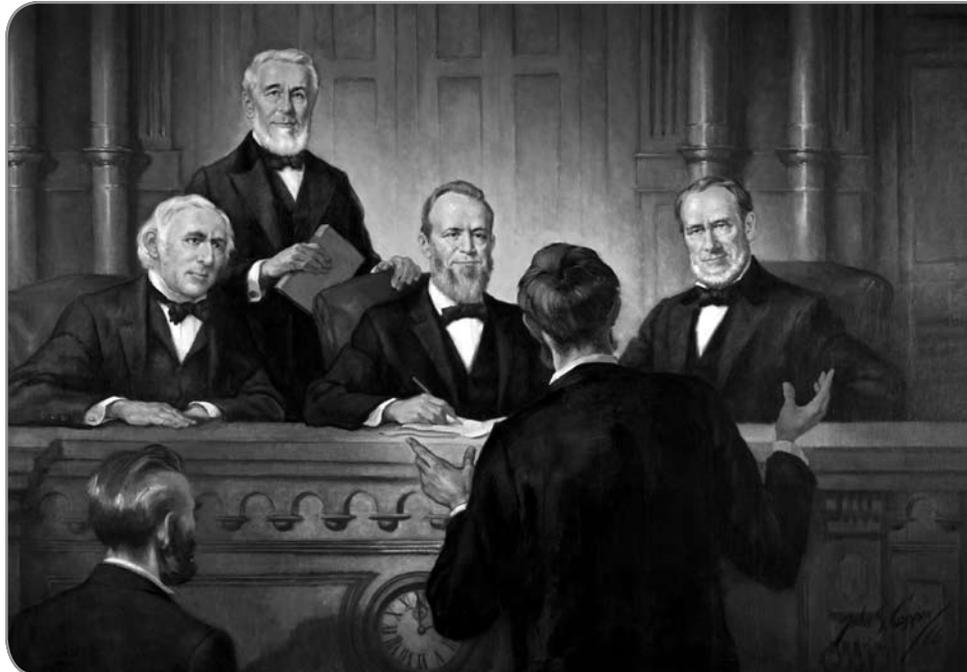
18 Mich 400 (1869)

Image courtesy of the Michigan Supreme Court Historical Society

The second significant Michigan Supreme Court decision confirmed that the state prohibited racial segregation in Detroit public schools. The Court decided *People ex rel. Joseph Workman v The Board of Education of Detroit* in the same year (1869) that Michigan ratified the Fifteenth Amendment, which prohibited states from depriving citizens of the right to vote on the basis of race. Michigan simultaneously amended its own laws to enfranchise blacks; it did this at the high point of the post–Civil War effort to reconstruct the former Confederate states and guarantee equal rights to blacks throughout the nation.

Michigan had been among the most antislavery states in the Union, where abolitionists enjoyed relative safety and through which many fugitive slaves escaped to Canada via the “underground railroad.” The threatened expansion of slavery into the western territories turned Michigan almost overnight from a solidly Democratic into a fiercely Republican state. Indeed, Jackson has the best claim to having been the birthplace of the Republican Party. All the justices on the Michigan Supreme Court were antislavery men, and in the *Workman* case they simply followed the policy of the state legislature. Yet the origin, and especially the results, of this case also show the limits of nineteenth-century Michigan’s commitment to racial equality.

Very few blacks lived in the original territory of Michigan. According to a British census of 1782, 179 slaves (in addition to Indian slaves) lived among the 2,200 people along the Detroit River. The act that organized the territory, the Northwest Ordinance of 1787, declared, “There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted.” But governors of the territory interpreted this provision to mean that no new slaves could be brought into the territory. Augustus D. Woodward, the first territorial judge in Michigan, owned slaves himself and refused to emancipate slaves already held in the territory. The Jay Treaty of 1794 also guaranteed the property rights of resident slave owners. Twenty-four slaves lived in the original Michigan territory according to the 1810 census; 32 were counted in 1830. Fugitives ran in both directions across the border; some Canadian slaves escaped into Michigan before slavery was abol-



Compilation painting of the “Big Four” donated to the State Bar of Michigan in 1972.

ished in Canada in 1833, and some Michigan slaves escaped into Canada. The three slaves living in Michigan in 1835 were freed by the state constitution’s abolition of the institution.¹ When the Civil War began, 6,800 free blacks resided in the state, one-quarter of them in Wayne County.

Free blacks in the antebellum North possessed a range of rights and suffered a range of discrimination, but in no state did they enjoy complete equality before the law. Nineteenth-century Americans viewed rights according to a hierarchy that has largely been forgotten. The most fundamental were natural rights—the rights to which all human beings were entitled—referred to in the Declaration of Independence as “life, liberty, and the pursuit of happiness.” Slavery denied people these basic rights, but a former slave (“freedman”) might enjoy no rights other than being out of the control of his former master. “Civil rights,” held by citizens, included a wider range of rights, including the right to make civil contracts (including marriage), to inherit and bequeath property, and to have access to the courts to enforce these rights. Beyond these were “political rights,” such as the right to vote, hold office, and to serve on juries and in the militia. Above all were “social rights,” the right not to be discriminated against in places of public accommodation (restaurants, theaters, hotels, railroads) or in

private transactions such as employment or housing sales and rentals. No hard-and-fast rule distinguished these levels of rights. For example, some considered the right to vote a civil right. Although women were generally regarded as citizens, they faced many civil disabilities—especially married women—in all states. In the *Dred Scott* decision (1857), the United States Supreme Court held that free blacks might be citizens with full equality in some states, but could never be citizens of the United States.²

At the time of the Civil War, black Michiganders enjoyed most civil rights, but not political or social rights. The 1850 constitution limited the right to vote to adult white males. Blacks could not marry whites, and school districts could segregate pupils on the basis of race. In 1846, a convention of black citizens petitioned the Michigan legislature to extend the right to vote to blacks. The legislature refused, a senate committee declaring, “Our government is formed by, and for the benefit of, and to be controlled by, the descendants of European nations, as contradistinguished from all other persons. The humane and liberal policy of our government at the same time, extends its protection to the person and property of every human being within its limits, irrespective of color, descent, or national character.”³ Whites had an interest in maintaining control of the government, and extending the right to vote to blacks might only attract more of them to Michigan and enable them to take over the state. On the other hand, Austin Blair, a legislator and future governor, wrote a dissenting report arguing that depriving blacks of the right to vote violated the principles of the Declaration of Independence.⁴ Michigan’s policy—civil but not political or social equality—was relatively liberal for the antebellum United States. Racial equality in Michigan did not go as far as in Massachusetts or other northeastern states, but further than it did in most other states.

Michigan enacted stringent “personal liberty laws” to protect free blacks from being kidnapped as fugitive slaves, and zealously supported the Republican Party and the waging of the Civil War. But white Michiganders were unsure about how far race relations should be altered. Detroit became a center of anti-Republican sentiment, experiencing anti-war and especially anti-draft riots that targeted blacks in 1863. In 1867, white Michigan voters, like voters in other northern states, rejected a proposed constitution that would have given blacks the right to vote.⁵

The Michigan Supreme Court largely reflected this popular ambivalence about racial equality. In 1858, the Court unanimously affirmed a lower court’s judgment for John Owen, a steamship operator who refused to provide cabins for black passenger William Day. While such common carriers could not exclude blacks entirely, they could restrict their privileges if they believed it was for the good of the community. This position reflected the fact that white prejudice against blacks placed limits on “social equality.”⁶ As one historian notes, “The Court recognized that widespread beliefs about race—many of which the jus-

tics consciously or unconsciously shared—demanded some degree of deference.”⁷

Shortly after the war, however, the Court seemed to recognize a more liberal shift in popular opinion. A year after the Civil War ended, William Dean was arrested for voting in a Michigan election, because officials claimed that he was not white. Dean answered that his dark complexion was due to Indian ancestry and that he was well over half white. An “expert witness,” Dr. Zina Pitcher, testified that Dean was no more than one-sixteenth black. His judgment rested primarily on the shape of Dean’s nose. The trial judge instructed the jury that this made Dean sufficiently non-white to be convicted. Dean appealed, and the state attorney general frankly stated the racist basis of the law. “Our legislation, wherever it has been prejudicial, on account of color, was so framed as to almost always bring within its purview all such persons. And the same is more or less true of the ruling class throughout the United States.”⁸

The majority of the Michigan Supreme Court overturned the conviction, but not the law. Michigan might limit the right to vote to whites, the Court held, but people as white as Dean were qualified as white. Justice Martin dissented and ridiculed the majority decision. “If this be the correct rule, we had better have the constitution amended, with all speed, so as to authorize the election or appointment of nose pullers or nose inspectors to attend the election polls... to prevent illegal voting.” Appealing to the spirit of the antislavery movement and the Civil War, he asked, “Can we not at this day, and in a free state, rise above this rule of slavery, and occupy a still more liberal and humane ground?” But Martin’s opinion smacked of a kind of judicial supremacy that the majority disclaimed, especially when it was so far ahead of public opinion.⁹

Much like the steamship operator in *Day*, the city of Detroit provided only second-rate services for blacks. The city established “colored schools” in 1839, and the legislature affirmed this policy two years later. By the start of the Civil War, there were three colored schools for 185 black students in a system with 7,000 whites. The colored schools were “primary,” providing rudimentary education for six years without grades, and were often located farther away than neighborhood schools reserved for whites. Blacks were excluded from graded secondary and high schools. In 1842, the legislature established Detroit as a single, autonomous school dis-

...the origin, and especially the results, of this case also show the limits of nineteenth-century Michigan’s commitment to racial equality.

trict, with “full power and authority to make by-laws and ordinances relative to the regulation of schools, and relative to anything that may advance the interests of education, the good government and prosperity of the free schools in said city, and the welfare of the public concerning the same.”¹⁰ Dr. Zina Pitcher, the

The Workman Case

racial ethnologist in the *Dean* case, was the principal author of the law.

Civil rights activists objected to the separate and inferior status of black schools and lobbied for integration. The antislavery movement and the Civil War's turn to emancipation helped their cause. Former Republican Governor Austin Blair attempted to force the Jackson public schools to admit George Washington, a black student, and in 1867 the legislature enacted a new school law. The new act declared, "All residents of any district shall have an equal right to attend any school therein."¹¹ A subsequent act of 1869 repealed the 1842 Detroit charter and granted a new one that included the 1867 act's language. The 1867 act was principally aimed at Detroit, the city in which most blacks lived, and the one most resistant to desegregation.

In April 1868, Joseph Workman attempted to enroll his son, "a mulatto, of more than one-fourth African blood," into the Tenth Ward school, where he lived and paid school taxes. The school refused to admit him, claiming that it was exempt from the new laws. A group of civil rights activists, including the Second Baptist Church and future Governor John J. Bagley, then brought suit in the Supreme Court for a writ of *mandamus*—a judicial order compelling a public officer to do his duty.¹²

Justice Manning had died in 1864, and the voters chose Thomas McIntyre Cooley to fill his seat. Chief Justice Martin died at the end of 1867, and Cooley became chief justice, while Martin's place was filled by Benjamin F. Graves. Along with Justices Campbell and

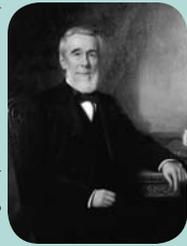


Image courtesy of the Michigan Supreme Court Historical Society

Official Court portrait of Benjamin F. Graves

Benjamin F. Graves came from New York to Battle Creek and became a Michigan circuit court judge in 1857, serving briefly on the old Supreme Court, which was composed of circuit court judges. In 1866 he resigned from the Court because of his frail physical constitution. But the next year the voters returned him to the new Supreme Court, where he served until his retirement in 1883. Described as "mild and self-effacing," Graves "enjoyed the fondness of his colleagues." Despite his physical frailty, he lived to be almost 90.¹

1. Shelly, *Republican Benchmark: The Michigan Supreme Court, 1868–75*, *Mid-America* 77 (1995), p 104.

Christiency, Cooley and Graves filled out what came to be called the "Big Four," the most renowned bench in Michigan Supreme Court history, from 1867 until 1875.¹³

The *Workman* case was a rather straightforward one. Workman claimed that the 1867 legislation requiring equal access applied to Detroit and that to exclude black pupils from the benefits of public education was not a reasonable "regulation." The school board denied these claims and, among other arguments, emphasized that segregation served the interests of public order. The board's lawyers said, "There exists among a large majority of the white population of Detroit a strong prejudice or animosity against colored people, which is largely transmitted to the children in the schools, and this feeling would engender quarrels and contention if colored children were admitted to the white schools."¹⁴ "The jurisdiction of the board is a large and populous city, comprehending many conflicting and antagonistic elements," the board members continued. "They are the best judges, and are and should be the sole judges of what is the best method of harmonizing and directing these elements so that they will not clash."¹⁵

The idea that the public had an interest in keeping the peace between hostile racial groups had been used to justify segregation in the *Day* case, and would be accepted by the United States Supreme Court when it upheld Louisiana's segregation statute in *Plessy v Ferguson* (1896). The school board claimed that separating white and black pupils was no less reasonable than separating male and female ones and pointed out that Michigan's law against interracial marriage showed a policy favorable to racial classifications. The *Day* decision provided judicial authority for their case; even the Supreme Court of Massachusetts, the most racially liberal state in the Union, had accepted segregated schools in the city of Boston.

Negative 94.263, Archives of Michigan, Lansing



John Bagley, future governor, and others brought suit against the Detroit school board.

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Fannie Richards was a teacher at Detroit's first black school, which was housed in the Second Baptist Church.

Photo by Britany West



The Second Baptist Church, which still stands at 441 Monroe Street in Detroit.

Before the day of the *Workman* decision, John Bagley and Fannie Richards prearranged a signal that would let her know the outcome of the case. Fannie, a pioneering black school teacher who had opened a private school for black children in Detroit in 1863, worked as a teacher in Detroit's segregated Colored School No. 2. As a teacher who passionately believed in desegregation, and one of several liberal-minded citizens who helped finance the *Workman* lawsuit, she had a large stake in the Court's decision. If the decision was favorable, John Bagley, future Michigan governor and fellow funder of the suit, would wave a white handkerchief out the window of the afternoon train. Richards and her pupils waited in suspense for the train to come. When it finally came, John Bagley was waving a white handkerchief. Fannie and the children cheered; they knew the Court had ended segregation in Detroit public schools. Fannie went on to become Detroit's first black teacher in the integrated school system.

In this case, though, the Michigan legislature's intent to forbid segregation was quite clear. Cooley noted that, "It is too plain for argument that an equal right to all the schools, irrespective of all such distinctions [of race or color, or religious belief, or personal peculiarities], was meant to be established."¹⁶ It was equally clear that the legislature did not intend to exempt Detroit from the equal-access statute. As Justice Cooley went on to say, "That the Legislature seriously intended their declaration of equal right to be partial in its operation, is hardly probable."¹⁷ Indeed, Cooley surmised quite accurately that the law was enacted with Detroit, and a few other cities, in mind. It is possible that Cooley also thought that the segregation policy violated the state constitution's due process clause. "As the statute of 1867 is found to be applicable to the case, it does not become important to consider what would otherwise have been the law," he concluded.¹⁸

Cooley's decision marked the high point of civil rights activism in postwar Michigan. Two months before the decision, the Michigan legislature ratified the Fifteenth Amendment, and a November referendum to amend the constitution to allow blacks to vote passed by a 54,000–51,000 vote.¹⁹ *Workman* confirmed the Court's antislavery and egalitarian disposition, and must have been especially satisfying for Cooley, who always regretted that he had not enjoyed greater educational advantages, and who had great faith in the power of education to level social distinctions and provide upward social mobility.²⁰ Years later, Cooley would write with pride of Michigan, "No commonwealth in the world makes provision more broad, complete, or thorough for the general education of the people, and very few for that which is equal."²¹

Justice Campbell entered a dissenting opinion, arguing that the state legislature had not been specific enough to override the great discretion given to the Detroit school board by earlier statutes. *Workman*'s case, he said, "depends much, if not entirely, upon the effect to be given to a changed condition in public affairs, and whatever corresponding change that condition may have wrought upon public opinion concerning the treatment of colored persons." In effect accusing the majority of legislating from the bench, he warned, "Public opinion cannot have the force of law, until it is expressed in the forms of law." Campbell further noted that the colored schools were "in no respect...differing from, or inferior to, other schools."²² His legal formalism served illiberal ends. His dissent was typical of the social and cultural distance that often separated the self-made Cooley and the aristocratic Campbell. One historian notes that Campbell, the only Whig among the Big Four, was also the only one "to the manor born."²³

Workman's legal victory did not immediately open all Michigan schools to black pupils. Detroit continued to drag its feet, refusing

It is tempting to wonder how the history of the constitutional law of civil rights might have differed if Cooley had ever joined the U.S. Supreme Court. Cooley had a very broad and liberal view of the rights secured by the Fourteenth Amendment, which he expressed in his 1873 edition of Joseph Story's *Commentaries on the Constitution*. Addressing the amendment's guarantee that no state shall deprive any person of life, liberty, or property without due process of law, he wrote, "It should be observed of the terms life, liberty, and property, that they are representative terms, and are intended and must be understood to cover every right to which a member of the body politic is entitled under law... [T]he guarantee is the negation of arbitrary power in every form which results in a deprivation of right. The word we employ to comprehend the whole is not, therefore, a mere shield to personal liberty, but to civil liberty, and to political liberty also so far as it has been conferred and is possessed."¹ Cooley might well have interpreted the Congress' intent in the Fourteenth Amendment as liberally as he did the Michigan legislature's intent in the 1867 school access act. He is usually depicted as one of the fathers of "substantive due process," a doctrine that served to protect property rights between 1890 and 1937, and which might have been applied (and sometimes was applied) to the rights of racial and ethnic minorities. On the other hand, Cooley was not a doctrinaire advocate of substantive due process, denied from the outset that the Fourteenth Amendment had revolutionized the American federal system, and moved in a more conservative direction in the 1870–1880s. Indeed, his lack of fidelity to the Republican Party is probably what kept him off the U.S. Supreme Court in the first place.²

1. Story, *Commentaries on the Constitution of the United States*, 4th ed, with notes and additions by Thomas M. Cooley (Boston: Little, Brown & Co, 1873), vol II, p 668. For a contrasting interpretation, see Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (Bloomington: Univ of Ill Press, 1975), pp 252–270.
2. Story, *supra* at vol II, p 682.

admission to blacks until legal challenges forced it to, by which time it was usually too late in the school year to make any difference. The city finally gave in after black enfranchisement allowed black Detroiters to exercise their political power. "Detroit's school system had accepted integration as slowly as the courts would permit, resisting change at every point," one historian concludes.²⁴ After blacks entered white schools, administrators then attempted to establish racially segregated classrooms. When that failed, they made a last gesture to segregate by doing away with double desks within the classrooms, so that whites and blacks did not sit too close together. Smaller Michigan cities defied the law and maintained segregated schools into the twentieth century.²⁵

In the second half of the twentieth century, federal courts began to enforce orders against de facto school segregation. Whereas Detroit schools were no longer segregated by the law (de jure), discrimination in the housing and employment markets and other kinds of unequal

The judicial impact on integration of Michigan public schools in the nineteenth century makes an interesting comparison to the twentieth-century attempt.

treatment established residential patterns that left the city's schools segregated in fact (*de facto*).²⁶ This led to court-ordered integration via busing, a highly unpopular policy that accelerated “white flight” to suburbs or private schools. The United States Supreme Court placed limits on integration in the 1974 case of *Milliken v Bradley*: busing stopped at the city limits. In the meantime, Detroit lost over half of its population and 74 percent of its white students between 1967 and 1978. Today its public schools are only 6 percent white.

The judicial impact on integration of Michigan public schools in the nineteenth century makes an interesting comparison to the twentieth-century attempt. A strong case can be made that the nineteenth-century Michigan Supreme Court believed that for its decisions to be effective, it was necessary to be sensitive to the importance of acting in reasonably close accord with public opinion and legislative will. It can also be argued that the federal courts in the twentieth century were less considerate of majoritarian views and felt compelled to act without regard to the need for broad popular support. In both cases, there were significant limitations on what was accomplished. The shortcomings that resulted from the more recent approach have led many legal scholars to recognize the limits of judicial power in a democracy, a limitation that the Big Four well understood.²⁷

FOOTNOTES

- Stephenson, Jr., *Integration of the Detroit Public School System During the Period 1839–69*, *Negro History Bulletin* 26 (1962), p 23; Walker et al., *African Americans in Michigan* (East Lansing: Michigan State Univ Press, 2001), p 5; Dancy, *The Negro People in Michigan*, *Michigan Historical Magazine* 24 (1940), p 222; Chardavoyne, *The Northwest Ordinance and Michigan's Territorial Heritage*, in *The History of Michigan Law*, Finkelman & Hershock, eds (Athens, OH: Ohio Univ Press, 2006), pp 20, 87.
- Hyman & Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–75* (New York: Harper & Row, 1982); Fehrebacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford Univ Press, 1981). Cf. Norris, *A Perspective on the History of Civil Rights Law in Michigan*, *Detroit College of Law Review* (1996), p 569. [*Dred Scott v Sanford*, 60 US 393; 15 L Ed 691 (1857).]
- Report of the Select Committee* (Detroit: Bragg & Harmon, 1847), in *The Making of Michigan: A Pioneer Anthology*, Kestenbaum, ed (Detroit: Wayne State Univ Press, 1990), p 312.
- Id.*
- Vander Velde, *The Michigan Supreme Court Defines Negro Rights, 1866–69*, in *Michigan Perspectives: People, Events, Issues*, Brown et al., eds (Dubuque: Hunt Publishing Co, 1974), p 106; Dunbar, *Michigan Through the Centuries*, 4 vols (New York: Lewis Historical Publishing Co, 1955), I: 289.
- Day v Owen*, 5 Mich 520 (1858).
- Shelly, *Republican Benchmark: The Michigan Supreme Court, 1868–75*, *Mid-America* 77 (1995), p 115.
- Vander Velde, *supra* at 113.
- People v Dean*, 14 Mich 406, 438, 434 (1866); Vander Velde, *supra* at 108. Vander Velde points out that the Court refused to allow soldiers in the field to vote in Michigan elections, despite the overwhelming popular support for the policy, in deference to the plain text of the Michigan constitution, which required residency for voting. *People v Blodgett*, 13 Mich 127 (1865). Martin dissented in this case, too.
- People ex rel. Joseph Workman v Board of Education of Detroit*, 18 Mich 400 (1869); Stephenson, *Integration of the Detroit Public School System*, p 25; Thrun, *School Segregation in Michigan*, *Michigan History* 38 (1954), pp 16–18.
- Workman*, *supra* at 408; Peebles, *Fannie Richards and the Integration of the Detroit Public Schools*, *Michigan History Magazine* (Jan/Feb 1981); Katzman, *Before the Ghetto: Black Detroit in the Nineteenth Century* (Urbana: Univ of Illinois Press, 1973), p 84.
- Workman*, *supra* at 400; Peebles, *supra*.
- The phrase “Big Four” apparently originated in Herschel H. Hatch’s memorial tribute to Justice Graves, *In Memoriam Benjamin F. Graves*, 143 Mich xxiii (1907).
- Workman*, *supra* at 406.
- Peebles, *supra*; *Workman*, *supra* at 405–406.
- Workman*, *supra* at 409. The Massachusetts legislature had reacted similarly to the decision upholding Boston’s segregation ordinance, legislating against separate schools.
- Id.*
- Workman*, *supra* at 414.
- Dunbar, *Michigan: A History of the Wolverine State*, 2d ed. (Grand Rapids: Eerdmans, 1970), p 467. Michigan permitted interracial marriage in 1883, and enacted a statute forbidding segregation in public accommodations when the federal Civil Rights Act was struck down. Norris, *A Perspective on the History of Civil Rights Law in Michigan*, p 577.
- Jones, *The Constitutional Conservatism of Thomas McIntyre Cooley: A Study in the History of Ideas* (New York: Garland, 1987 [1960]), p 203; Shelly, *supra* at 102.
- Cooley, *Michigan: A History of Governments*, 7th ed (Boston: Houghton Mifflin, 1895), p 328.
- Workman*, *supra* at 414–419.
- Shelly, *supra* at 104.
- Katzman, *supra* at 87–89.
- Id.*
- The Michigan Supreme Court recognized that this kind of segregation was not illegal. In *Ferguson v Gies*, 82 Mich 358 (1890), it held that “separate schools for the education of blacks and whites *might* exist, where the accommodations and advantages of learning were fully equal one with the other.” Thrun, *supra* at 10.
- Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: Univ of Chicago Press, 1991).

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The Michigan Supreme Court Historical Society, a nonprofit 501(c)(3) corporation, collects, preserves, and displays documents, records, and memorabilia relating to the Michigan Supreme Court and the other courts of Michigan, promotes the study of the history of Michigan’s courts, and seeks to increase public awareness of Michigan’s legal heritage. The Society sponsors and conducts historical research, provides speakers and educational materials for students, and sponsors and provides publications, portraits and memorials, special events, and projects consistent with its mission.

The Society was established in 1988 by then Michigan Supreme Court Chief Justice Dorothy Comstock Riley, who sought to preserve court artifacts, collect memorabilia, and inform and educate the students and citizens of Michigan about their state’s judicial history.

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People v Salem

Taxation and Class Legislation

20 Mich 452 (1870)

In 1870, the Michigan Supreme Court handed down what was probably its most renowned and controversial decision, holding that the promotion of railroad building was not a public purpose for which the power of taxation could be used. In *People ex rel. Detroit & Howell Railroad v Township of Salem*, the Court took on some of the most powerful economic interests in the state in what proved to be a very popular decision. The Court expressed the widespread revulsion against the public corruption associated with the “Great Barbecue” of the late nineteenth century, as federal and state governments engaged in a profligate campaign of economic development. The case also stands out as an exercise of judicial activism for a court more characteristically restrained in its use of judicial power. The case provoked national attention, though few other states followed its reasoning.

Railroads were the leading industry in nineteenth-century America. Most often, state and local governments aided in their construction in hopes that they would spread economic activity throughout the polity, allowing farmers and manufacturers to move their crops and goods to distant markets. They also created new demand in the coal, iron, steel, timber, and other industries. Railroads began to be built in the 1820s. In the 1860s, the federal government joined the effort, and the first transcontinental railroad was completed in 1869.

Throughout the nineteenth century, arguments flared over the proper role of government in promoting the economy in American politics. The issue provided the basis for the first political parties in American history. Alexander Hamilton and the Federalists urged an active government role in economic development, including a system of protective tariffs, national banks, and “internal improvements”—canals, turnpikes, and later railroads. Thomas Jefferson and the Republican Party opposed federal promotion of the economy. Such projects lay beyond its constitutional power, they believed, and ought to be left to the states or to private parties in the free market. The Federalist policy was picked up by the Whigs and the new Republican Party; the Jacksonian Democrats forwarded the old Republican policy.

An orgy of corruption often accompanied the construction of the railroads. Railroad companies bribed legislators, established self-dealing construction companies, watered their stock, went

Photograph by Andrew J. Russell. Wikipedia contributors, “Transcontinental railroad,” *Wikipedia, The Free Encyclopedia*, http://en.wikipedia.org/w/index.php?title=Transcontinental_railroad&oldid=232791795 (accessed August 20, 2008)



The first transcontinental railroad, shown here during the ceremony for the driving of the golden spike at Promontory Summit, Utah, was completed in 1869.

bankrupt before construction was completed, laid down shoddy and dangerous roads, and failed to provide the exaggerated promises of economic boom. State and local governments were often left holding the bag for the costs of these failed projects.

Michigan chartered 20 railroads before it became a state. Only one, the Erie and Kalamazoo, was in operation by 1837.¹ The first state constitution provided that “Internal improvements shall be encouraged by the government of this state; and it shall be the duty of the Legislature, as soon as may be, to make provisions for the proper objects of improvement.”² Michigan borrowed millions to build its own system of railroads, just before the depression of 1837 set in. The state ended up being bilked by two banks that sold its bonds to English investors without giving any of the proceeds to the state. Michigan, like many other states, repudiated some of its debts. This produced a widespread backlash against corporations in general and banks and railroads in particular. Justice Cooley later wrote, “By common consent it came to be considered that the State in entering upon these works had made a serious mistake.”³ The state sold the railroads in the 1840s for a fraction of what they had cost.

Ordinary Michiganders often vented their animus against state promotion of railroads, especially when trains destroyed crops and livestock. In the Jackson County “badlands,” mobs sabotaged Michigan Central trains in the “Great Railroad Conspiracy.”⁴ The

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1850 constitution limited the state's role in promoting internal improvements. It stated that, "The state shall not be a party to, nor interested in, any work of internal improvement, nor engaged in carrying out any such work." It allowed municipalities to do so, but limited the amount of debt that they could incur in such projects.⁵ "These were very positive provisions," Justice Cooley later wrote, "and by adopting them the people believed they had rendered it impossible that projects of doubtful wisdom and utility should be engaged in at public cost."⁶

Michigan was a solidly democratic state from its admission to the Union until the mid-1850s. As such, its leaders had always opposed federal promotion of internal improvements. Under the 1835 constitution, the Democrats eagerly embraced state promotion. Under the 1850 constitution, improvements were left to town and county governments, within limits. The general principle to which the Jacksonian Democrats appealed was that public power should only be used for genuinely public purposes. This was one of the oldest ideas in the history of western civilization: that in a republic, government concerned itself only with public things—*res publica*, the good of the whole. Monarchs and aristocrats often used public power for their own ends, but democratic majorities—or well-organized minorities—were also capable of using public power for private interests. Thus, republican or democratic government depended on constitutional safeguards against all such partial or "class legislation." James Madison gave classic expression to this idea in *Federalist 10*, and the federal Constitution withheld certain powers from the states (enacting laws that impaired the obligation of contracts, for example). Most states went further and enacted their own constitutional limitations.

In 1864, the Michigan legislature enacted a law permitting several townships located in the counties of Livingston, Oakland, Washtenaw, and Wayne to pledge their credit for the construction of a railroad from Detroit to Howell.⁷ Salem electors, upon a majority vote at a special town meeting, did so, and the track was built, but the township board then refused to issue the bonds to pay for the construction. The railroad company sued, seeking a writ of mandamus ordering the township to issue the bonds and tax its residents to redeem them in accordance with the state statute. There were several questions about the procedures that the

state followed in this case. Serious doubt existed as to the constitutionality of the 1864 act, as well as the vote taken by the Salem township board. While the Michigan legislature insisted that both were constitutional and regular, the voters of the state rejected a constitution proposed in 1867 to make such acts easier.⁸

The *Salem* case consumed eight days of argument before the Supreme Court in April and May 1870. The attorneys for Salem pointed to the sections of the Michigan Constitution that prohibited state aid for internal improvements, and noted that the constitution required a two-thirds supermajority for local aid bills. The act was "not a law, but an attempted license to an act of spoliation," they claimed, "an imperial edict or ukase," and "a forced loan or donation to a railroad company."⁹ They also noted the unhappy experience with railroad promotion that led to the 1850 constitution, and remarked that "in most of the states where municipal subscription to railroad stock has been maintained by the courts, the revulsion of public sentiment has been so strong as to lead to prompt prohibitory constitutional amendments."¹⁰ The railroad, however, claimed that no provision of the constitution explicitly prohibited such aid, and insisted that, for a court to declare a legislative act unconstitutional, the act "must be prohibited by the express words of the constitution, or by necessary implication," thus appealing to the self-restraint so often shown by the Court.¹¹ Public aid to private corporations for internal improvements was acceptable if the enterprise was "in the *least degree* of a public nature, or bears *any* relation to the public prosperity." The railroad claimed that the railroad was such a public benefit, and "benefit to the corporation is merely an indirect and collateral result." Nearly every other state court and the United States Supreme Court had upheld such acts.¹²

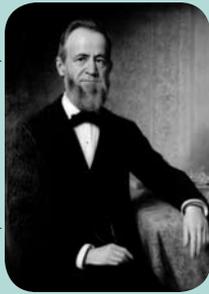
The case did not turn on these arguments, however. Each justice wrote an opinion. Justices Campbell and Christiancy concurred with Justice Cooley's sweeping majority opinion, which cut to the very heart of the relevant constitutional principles. The power of taxation could only be exercised for public purposes, Cooley noted, and must be fairly apportioned. These were "fundamental maxims in the law of taxation. They inhere in the power to impose any taxes whatsoever," regardless of the specific provisions of the Constitution.¹³ Thus, Cooley's opinion rested not on the text of the Constitution, but on basic principles of justice and taxation. Cooley and other judges of that era believed that there were important substantive principles behind the concrete, textual provisions of a constitution. This idea was something like the ancient and medieval idea of "natural law," and came to be called "substantive due process." In short, the idea was that some rights were so fundamental that the government could not abridge them even *with* ordinary process of law. Cooley had recently published the first edition of his famous treatise, *Constitutional Limitations*, which made this argument more fully. In the years 1890–1937, when federal and state courts struck down "progressive" legislation regulating business, they often cited Cooley's treatise. He thus acquired a reputation as the father of "laissez-faire" constitutionalism. In recent years, however, historians have shown that the progressives exaggerated

Image courtesy of Salem Area Historical Society, P.O. Box 75011, Salem, MI 48175



This photo of the Salem depot and elevator was taken around the time of the *Salem* case.

Image courtesy of the Michigan State Supreme Court Historical Society



Official court portrait of Justice Thomas M. Cooley

Cooley was certainly the biggest of the Big Four in terms of national reputation. He was best known as a writer of legal treatises, most especially his 1868 *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union*. It went through five editions in his lifetime and influenced more than a generation of lawyers and scholars. He also taught at the University of Michigan Law School from 1859 until 1884.

Like the other Big Four, Cooley was born in New York—in Attica. When Cooley was born, Attica sat at the western end of the nearly completed Erie Canal, which served as the gateway to the Midwest for thousands of families like the Cooleys, of seventeenth-century New England Puritan lineage. Like the great United States Chief Justice John Marshall, Cooley was one (the tenth) of fifteen children. His family faced straitened circumstances, if not dire poverty.¹ Cooley left New York in 1843. Chicago was his destination, but he ran out of money and finally settled in Adrian, Michigan. The frontier world that he found there reminded him of his own origins in western New York.

A rude log cabin for a home, and the bare necessities of life for their families contented them while they were clearing their lands; and the lessons of industry and economy would have been forced upon them by the situation even if they had not learned them before, as many of them had.... Hard labor and the chills of fever incident to the clearing of a new country gave them sallow complexions and made them prematurely old; but in coming [West]...they had calculated not so much upon their own immediate advantage as upon giving their children an opportunity "to group up with the country"; and they accomplished all they had counted on if they could see that year by year their possession increased in value, and could rely with confidence upon giving their children the rudiments of education and a fair start in the world, and on being independent in their circumstances in their old age. Even now, though they could not supply all their wants from their farms, they contracted few debts, but postponed purchases when they had nothing to barter for the articles they desired.²

Cooley here expressed the pioneering spirit of the American dream and "Protestant" work ethic that predominated in Victorian American culture. By hard work, of a kind that one of his children said amounted to a "narcotic" for him, Cooley rose slowly but surely in society.³

Cooley helped to improve the legal practice of Michigan, which he perceived as rather primitive. Michigan, Cooley wrote, "had its full share of lawyers, many of whom were well trained in their profession, and would be a credit to it anywhere." But, he continued, "Others were untrained, unlettered, and unkempt, and their vulgarity and insolence would be tolerated nowhere but in the woods. They tried small cases for smaller pay on still smaller knowledge, and were never so well satisfied as when they gained a suit by a trick."⁴ He became a lawyer and edited a magazine, became active in antislavery politics, and was selected to compile Michigan's statutes and to be the first reporter for the new Supreme Court.

1. Jones, *The Constitutional Conservatism of Thomas McIntyre Cooley: A Study in the History of Ideas* (Garland Publishing, 1987), depicts the Cooleys in middling conditions; Reed, *Bench and Bar of Michigan: A Volume of History and Biography* (Chicago: Century Pub and Engraving Co, 1897), p 227, describes harsher circumstances.
2. Quoted in Carrington, *Law as 'the common thoughts of men': The law-teaching and judging of Thomas McIntyre Cooley*, 49 *Stanford L R* 504 (1997).
3. Jones, *supra*.
4. Cooley, *Michigan: A History of Governments* (Boston: Houghton Mifflin, 1895), p 248.



Cooley's 1868 *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union* went through five editions in his lifetime.

the extent of such judicial use of substantive due process, and wrongly attributed it to Cooley. Far from being a defender of big business, Cooley reflected the antebellum Jacksonian animus against monopoly, special privilege, and class legislation.¹⁴

Cooley did not deny that railroads benefited the public, or that they were subject to public regulation as "common carriers," or even that it was constitutional to use the power of eminent domain in their construction. But the Detroit and Howell Railroad Company was privately owned; the public did not own shares in the company, partake of its management, or share in its profits. The public benefits that the railroad provided were incidental by-products of private enterprise—as indeed all useful business activity produced. "The incidental benefit which any enterprise may bring to the public, has never been recognized as sufficient of itself to bring the object within the sphere of taxation," he wrote.¹⁵ Cooley denied that the legality of such railroad aid was settled. "The best judgment of the legal profession, so far as I have been

able to judge, has always been against the lawfulness of this species of railroad aid," he wrote, and opposition was growing.¹⁶

The Court denied the Detroit and Howell Railroad Company's request for a mandamus. "The case before us is that of a private corporation demanding a gratuity," Cooley concluded, and the state had no power to enforce such a demand. Justices Christianity and Campbell concurred with Cooley's fundamental point that, as Campbell put it, "taxation for private purposes is no more legal than robbery for private purposes."¹⁷ The decision amounted to a sharp blow against state abuse of the "police power"—the general power to legislate on matters of public health, safety, welfare, and morals.

Justice Graves, however, entered a lengthy dissent. He primarily took issue with the majority's use of judicial power, in a doubtful case, to overturn a legislative act. "The judiciary has no pre-eminent claim to infallibility," he warned, saying that republican government relied primarily on representation and diffusion of

power in the political branches to prevent the abuse of power.¹⁸ A constitutional violation had to be patent, obvious, and manifest, he argued, for the Court to overturn it. Moreover, the majority's admission that railroads could use the power of eminent domain showed that they were, to some degree, public bodies.

The decision caught the nation's attention, and sparked a firestorm of controversy. It seemed to defy a United States Supreme Court decision in the 1864 case of *Gelpke v Dubuque*, which held that a city had to redeem bonds that it had issued in excess of a state constitutional limitation.¹⁹ Michigan Governor Henry P. Baldwin warned that it rendered worthless millions of dollars of bonds issued by other Michigan townships. Railroads were alarmed, and legal scholars noted the decision's bold departure from text and precedent. But the decision was popular among voters, who condemned the power and corruption of railroads.²⁰ Michigan Democrats rallied around the decision, and gained seats in the 1870 elections. Cooley reaffirmed the holding the next year.²¹ Nevertheless, other state courts did not follow the principles of *Salem*.²² Nor did the federal courts, which in these years enforced state and local obligations to pay railroad bonds already issued.²³ At the same time, the United States Supreme Court upheld widespread use of state "police power" to promote and regulate the economy.²⁴ The federal courts held that Michigan and other states had to redeem such bonds held by out-of-state citizens.²⁵ The United States Supreme Court did affirm Cooley's fundamental point that states could use taxation only for public purposes, but it assumed that railroads were public purposes.²⁶ It was not until the 1890s, and then not directly, that the broad libertarian principles of *Salem* acquired some influence.

In later years, Cooley reflected his pride in the decision. Political agitation to overturn the decision failed, he observed, "and the excitement soon died out. The people had taken the 'sober second thought.'"²⁷ But Cooley suffered from the political fallout of the decision, which angered the pro-railroad Republicans. Cooley drifted away from the party, like many who called themselves "liberal Republicans" in the 1870s, and eventually returned to the Democratic Party. He thus lost what would otherwise have been an excellent chance to be appointed to the United States Supreme Court.²⁸ In 1885, Cooley lost a bitter re-election bid, largely because of the enmity of the Detroit *Free Press* and *News*. Notwithstanding the *Salem* decision, the *News* claimed that Cooley was pro-corporation and pro-railroad, and denounced him as "the acute casuist, the ingenious sophist, the second Francis Bacon." In fact, the yellow-journalistic *News* launched this demagogic campaign against Cooley as vengeance for a libel judgment against the paper that the Supreme Court had upheld.²⁹ The election was "one of those inexplicable convulsions of the popular vote that will now and then deprive the state of the services of its ablest citizens," a legal commentator observed in 1890.³⁰ Two years after the election, President Grover Cleveland made Cooley the first chairman of the Interstate Commerce Commission, created by Congress to regulate railroads. Having lost the battle to stem the public promotion of privileged corporations, Cooley now had the chance to begin their public control.

Justice Christiancy left the Court for the U.S. Senate in 1875 and Justice Graves retired in 1883. Only Justice Campbell remained of the "Big Four" after Cooley's 1885 defeat. *Salem* displayed the political independence of the Michigan Supreme Court under these justices, a trait that contributed greatly to its eminent reputation. The questions of the limits of legislative power and the exercise of judicial review, which prompted Graves' dissent, are inevitable in any system of democratic government with an independent judiciary. We are no closer today to providing easy answers to these questions than Cooley was.

FOOTNOTES

1. Dunbar, *Michigan: A History of the Wolverine State*, 2d ed. (Grand Rapids: Eerdmans, 1970), p 330.
2. Const 1835, art XII, §3.
3. Dunbar, *supra* at 340; Cooley, *Michigan: A History of Governments*, 7th ed (Boston: Houghton Mifflin, 1895), p 290.
4. Hershock, *The Paradox of Progress: Economic Change, Individual Enterprise, and Political Culture in Michigan, 1837–1878* (Athens: Ohio Univ Press, 2003), pp 42, 47, 81; Ladd, *The Michigan Central Railroad Conspiracy Trial of 1851*, *American Law Review* 24 (1890), p 98.
5. Const 1850, art XIV, §9; Const 1850, art IV, §49.
6. Cooley, *supra* at 292.
7. The law was Act No. 49, entitled "an act to authorize the several townships in the counties of Livingston, Oakland, Washtenaw, and Wayne, to pledge their credit, and the County of Livingston to raise by tax a loan of money to aid in the construction of a railroad from some point near the city of Detroit to Howell, in the County of Livingston."
8. *People ex rel. Detroit & Howell Railroad Co v Township of Salem*, 20 Mich 452, 472 (1870); Jones, Thomas M. *Cooley and the Michigan Supreme Court, 1865–85*, *American Journal of Legal History* 10 (1966), p 102.
9. Salem, *supra* at 453–460.
10. *Id.* at 460.
11. *Id.* at 461.
12. *Id.* at 463, 468 (emphasis added).
13. *Id.* at 474–475, 495; Chaney, *The Supreme Court of Michigan*, Green Bag 2 (1890), p 397.
14. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, *Supreme Court Historical Society Yearbook* (1983); Jones, *supra*; Wise, "The Ablest State Court": *The Michigan Supreme Court Before 1885*, 33 *Wayne L R* 1509, 1540 (1987).
15. Salem, *supra* at 488.
16. *Id.* at 493.
17. *Id.* at 495.
18. *Id.* at 503.
19. *Gelpke v City of Dubuque*, 68 US 175; 17 L Ed 520 (1864).
20. Dunbar & May, *Michigan: A History of the Wolverine State*, 3d ed (Grand Rapids: Eerdmans, 1995), p 370.
21. *People ex rel. Bay City v State Treasurer*, 23 Mich 499 (1871).
22. Carrington, *Law as "the Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, *Stanford L R* 49, 542–543 (1997); Jones, *supra* at 105.
23. Gelpke, *supra*.
24. *Slaughter-House Cases*, 83 US 86; 21 L Ed 394 (1873); *Munn v Illinois*, 94 US 113; 24 L Ed 77 (1877).
25. *Taylor v Ypsilanti*, 105 US 60; 26 L Ed 1008 (1881); *Pine Grove v Talcott*, 86 US 666; 22 L Ed 227 (1873). Some Michigan courts nevertheless continued to abide by *Salem*. See Wendell, *Relations Between the Federal and State Courts* (New York, 1949), p 159 and Freyer, *Harmony and Dissonance: The Swift and Erie Cases in American Federalism* (New York: New York Univ Press, 1981).
26. *Loan Association v Topeka*, 87 US 655; 22 L Ed 455 (1872).
27. Cooley, *supra* at 293.
28. Jones, *supra* at 107.
29. Edwards, *Why Justice Cooley left the bench: A missing page of legal history*, 10 *Wayne L R* 490 (1964).
30. Chaney, *The Supreme Court of Michigan*, Green Bag 2 (1890), p 391.