

FOUNDATIONS OF CONTEMPORARY MICHIGAN LEGAL CULTURE

The Lawmaking of Judge
Augustus Woodward and
Governor Lewis Cass

By Richard Cole

It has now been more than two centuries since the American administration of the Michigan Territory began in 1805. The legal order for the new territory was significantly simpler than the legal order that regulates Michigan's citizens today. Nevertheless, the lawmaking of two leaders of Michigan's territorial government provided important foundations for significant features of Michigan's legal culture in the present day, including the deep divisions in recent years of the justices of its Supreme Court concerning the proper approach of judges in deciding individual cases that come before the Court. One of those lawmakers was Augustus Brevoort Woodward, who became the most influential judge of the new territory's Supreme Court. The other was Lewis Cass, who gained national renown as the governor of the Michigan Territory from 1813 to 1831. Their lawmaking demonstrates that current differences concerning the role of the legislature and courts in lawmaking in Michigan have precedents in its earlier history.



Woodward and Cass often clashed in their views concerning the sources of law and how to apply them. The differences in their views of lawmaking reflected a number of contrasts that separated the two leaders. For example, though both men were lawyers and well educated, Woodward was something of a dreamer, while Cass was a more pragmatic man of affairs. Further, the two leaders held contrasting views concerning the purposes of lawmaking. These differences were related to their separate visions for how the new community that was forming in Michigan during the territorial period should unfold and were sufficiently deep that, in 1824, when the Michigan Territory moved to a new phase of administration, Cass successfully opposed Woodward's reappointment to the territorial Supreme Court.

Together Woodward and Cass bequeathed to Michigan's later legal culture a rich and, in important ways, diverse legacy. To understand the legacies of these two men for contemporary Michigan legal culture, however, it is necessary to understand the preferences of Woodward and Cass concerning the sources of Michigan law and how it should develop, as well as their related views that shaped the lawmaking of both men.¹

Judge Woodward

Woodward was a close friend of President Thomas Jefferson. Like Jefferson, Woodward was committed to Enlightenment principles and to popular politics. These commitments led Woodward to favor lawmaking that would be rooted in the community and suited to the circumstances of Michigan. In a letter that he wrote to Jefferson in 1805, Woodward observed that all laws "must be adapted to the geography of a country, to its temporary circumstances and exigencies, and to the particular character of the persons over whom it is to operate."² Important to its circumstances was that Michigan was a territory of the new American republic, with a constitutional government that was distinctly more popular than had been the governments of earlier republics in Western history.

These views led Woodward to support legislation as the primary source of law in Michigan. Indeed, he supported the drafting and adoption of comprehensive legislative codes as the basis for the new territory's legal system. Woodward favored codes of laws for the territory because lawmakers could draft them to suit the legal culture of the new republic and reflect its popular values.

Woodward's advocacy for codes for the Michigan Territory bore some fruit. In 1816, Governor Cass and the territorial judges adopted what became known as Cass's Code. Four years later they adopted the Code of 1820. Though the latter code would be adopted in Wisconsin, Iowa, and Minnesota, neither it nor Cass's Code was extensive. These codes made it clear to Woodward that there would be no comprehensive codification of territorial law.

This is why, as time passed, Woodward increasingly supported the common law as another source of Michigan law. Since the common law is a very old body of law, having its origins in the Anglo-Saxon communities of England even before the Norman Conquest in the eleventh century, Woodward's instinct was to



Augustus Brevoort Woodward

view it as alien to the republican culture of the new American nation. Nevertheless, there were certain features of the common law that appealed to Woodward. One was its concern for the rights of individuals. For example, Woodward highly praised the common law for not recognizing a status of slavery for any human being.³ Further, though the common law is basically a body of judge-made law, trial by jury was one its important institutional features. As I will address later, Woodward's approach to jury trials fostered the input of juries into the development of the common law.

Woodward's ambivalence concerning the common law led him to conclude that it should not be blindly adopted as a source of territorial law. Instead, Woodward wanted only to adopt the "Solid and Valuable trunk of english jurisprudence" and to excise "its Superfluous and incongruous appendages...."⁴ Consistent with this view, as a judge, Woodward would sometimes mold the adopted common law to the new circumstances and values of Michigan's community and the emerging American republic.

Woodward also strongly supported lawmaking that was rooted in community, which again he believed would be suited to the circumstances of Michigan and the republican spirit of American government. He therefore supported a robust and popular form

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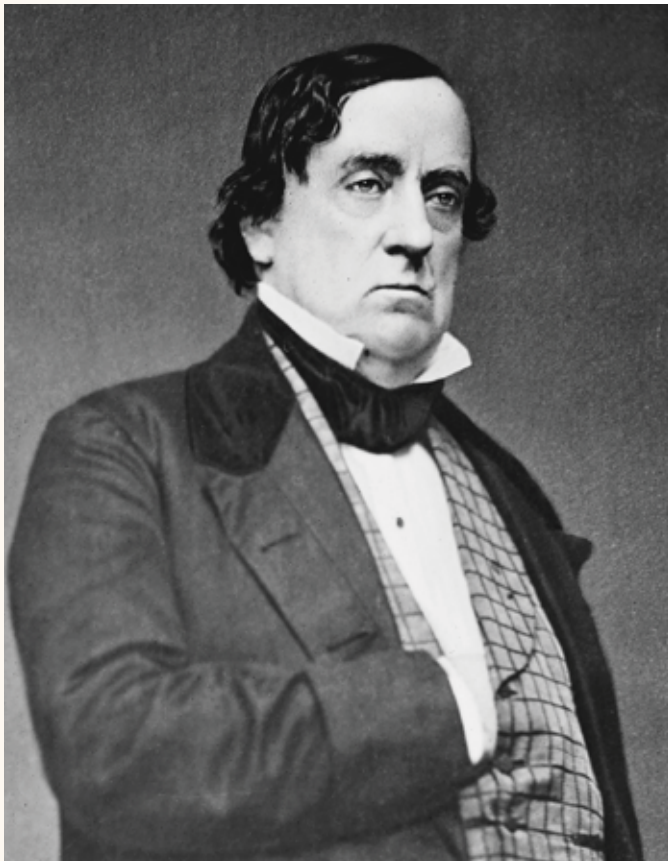
of trial by jury. He and his fellow judges resisted an effort to abolish the use of juries in small civil claims heard by justices of the peace (though they did allow for juries composed of fewer than 12 persons in those cases). Woodward also stated the view that judges must affirm jury verdicts, even if the jury viewed the law differently from the court, unless a jury verdict supported a gross injustice. Further, the judges favored empaneling jurors who were only taxpayers, not freeholders. Finally, the judges also adopted common-law precedent that allowed for juries *de medietate*. In civil and criminal cases involving aliens, this practice allowed for one-half of the jurors to be drawn from the country of the alien.

Woodward's support for juries *de medietate*, as well as for allowing nonfreeholders to sit as jurors, provides insight into a foundational theme of Woodward's entire legal thought (one that distinguished his legal thought from that of his mentor, Jefferson). This was his vision for a territorial legal culture that fused elements of the law of the French community that existed in Michigan, namely in Detroit, at the inception of the territory with the legal culture of the Americans who would be settling the Michigan Territory as time passed.

Considerable evidence for this vision exists. Two proposals made to the legislative council in 1808 by an ally of Woodward support it. One was the publishing of territorial laws in French as well as in English. Another called for the appointment of French justices of the peace and district court judges. Clearest is a petition Woodward sent to Congress in 1806. In it, Woodward described a process of "legislation gradually and delicately to assimilate the customs of a foreign people to the American, and thus reducing all to one consistent and uniform system..."⁵ Woodward, however, never demonstrated the intent to include any law of Native Americans as part of the new legal fusion.

When Woodward wrote his petition to Congress, he was envisioning legislative codes as an ideal vehicle for the development of this new body of territorial law. But as his advocacy for code law foundered, Woodward began to consider judicial lawmaking as a vehicle for this purpose. By 1818, in his opinion in *Grant v Earl of Selkirk*, Woodward sought to provide a model for

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Governor Lewis Cass

such judicial lawmaking by citing a vast and disparate array of legal authorities, including foreign law, to support the conclusion that the delivery of legal process on Sunday was illegal and unenforceable.⁶ Woodward opined that the "total inhibition of judicial proceedings," including the "*exemption from arrest in civil cases*," are "civil characteristics" of Sundays in the legal culture of the United States.⁷ Woodward's citation of this authority also demonstrated his continuing attachment to Enlightenment principles, even as his contemporaries were becoming increasingly reliant on American sources for their lawmaking.

Governor Cass

Cass shared Woodward's perception that a community's legal culture shaped its community and general culture. In an address to the territory's legislative council in 1826, Cass observed that it was of utmost importance "to erect wise and wholesome laws to create general views and feelings among our population, to form a unity of sentiment and action... and so to consolidate our social and political relations."⁸

In contrast to Woodward, however, Cass envisioned the development of a community in Michigan based solely on American values. This community would be an enterprising one, whose

economy would be largely agricultural. Its sources of law would be Anglo-American.

Like Woodward, Cass was a Jeffersonian in his politics. In contrast to Woodward, however, Cass believed that there were two fundamental features of a proper legal order. One was a relatively stable body of law that did not overly regulate human activities. The other was a strong legal protection of vested property rights. Together, these principles would provide the basis for the enterprising American community that Cass envisioned for the Michigan Territory. By the time Cass resigned as the territory's governor in 1831 to be President Jackson's Secretary of War, Cass's vision was fast becoming a reality. Particularly because of the completion of the Erie Canal in 1825, the territory was rapidly becoming settled by Americans and developing a burgeoning economy based on commercial agriculture.

By the time Cass left Michigan, an educated legal profession was growing within the territory, and the use of trial by jury was declining.

Both of Cass's basic principles of lawmaking made him an adamant opponent of the codification of Michigan law. Not only did Cass oppose Woodward's advocacy for adopting codes, but in his annual addresses to the legislative council, Cass often urged caution in the adoption of legislation. Cass recognized that during the first half of the nineteenth century, American daily life and general culture were experiencing dramatic changes. These required some changes in the law. But Cass believed that many of the evils of society were beyond the ken of legal regulation. Adopting too many laws could also lead to legal confusion, and to some laws not being properly executed. Above all, Cass viewed frequent changes of the law as threatening vested property rights. He urged the council to give the laws it did enact prospective effect only. He even opined that, if no moral principles were involved, it would often be best to maintain a bad law than for lawmakers to constantly tinker with alternatives to those laws.

Cass's opposition to robust legislative lawmaking was also rooted in a separation of law and politics. In an address to the council in 1824, Cass encouraged its members "to look beyond the present state of society" in establishing a foundation "for a system of legal and political institutions" in the territory. He wanted the council to adopt laws not in response to the political sentiments of the

moment, but in response to the longer experience of humankind, creating a more permanent body of law.⁹ Further, as a young lawyer in Ohio, Cass had also supported the concept of constitutionally based judicial review of legislation.

Cass's support for a more permanent body of law emanating from human experience led him to favor judicial lawmaking, and specifically the historic common law, as the primary source of Michigan law. It developed legal doctrine in an evolutionary manner, in accordance with a framework of basic legal principles. The common law's strong emphasis on the sanctity of property rights also endeared this body of law to Cass. During his last year as governor of the territory, in 1831, Cass observed that it was "true wisdom" to leave unchanged "the great principles, which protect the rights of persons and property in our country."¹⁰

Like Woodward, however, Cass supported the establishment of institutions of local justice. For example, he supported expanding the jurisdiction of the justice of the peace courts, the operation of the Mayor's Court in Detroit, and the continued operation of a reformulated circuit court system. But Cass's general approach to local justice differed from Woodward's. Cass supported institutions of local justice to facilitate the convenient, swift, and economical resolution of claims, especially debt claims, which were pervasive during that period. Nevertheless, Cass did not want to allow the possibility of diverse local lawmaking. Again, Cass's preference for a uniform and stable body of law protecting property rights led him to seek mechanisms that would ensure that local lawmaking conformed to the general body of legal principles set forth in the caselaw and the statutory law of the territory. Considerable evidence demonstrates this impulse during Cass's tenure as governor. One example is a statute adopted in 1820 that commanded justices of the peace to decide cases according to settled principles of law and equity. Another important example is Cass's efforts to ensure the publication and dissemination of Michigan's statutory laws.

Cass's desire that local lawmaking be uniform also shaped his approach to trial by jury. Though he accepted trial by jury as an important feature of the common law, Cass supported the modern distinction made between questions of fact and law. He believed that juries should decide only questions of fact and that all questions of law should be left to judges. In the litigation of circuit court cases, also, important questions of law were reserved for the territory's Supreme Court judges to decide. Further, Cass supported the development of high standards of legal education for lawyers, so that they would advocate established legal principles in the arguments they made to both judges and jurors. By the time Cass left Michigan, an educated legal profession was growing within the territory, and the use of trial by jury was declining.

Decisions of the late territorial Supreme Court of Michigan generally adhered to Cass's views of lawmaking, as well as of the common law and trial by jury. Two cases that graphically illustrate this are *Younglove v Sanford*¹¹ and *United States v Sheldon*,¹² in which the Court articulated a historical test for when a party might claim a right to trial by jury. These cases were in accord

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with the Court's decision in *Lariviere v Campau*,¹³ in which the Court affirmed a historical test for the adoption of common-law principles in Michigan. Judge Solomon Sibley dissented in *Lariviere*, however, arguing that judges in common-law cases had altered, and should continue to alter, common-law principles to keep them in conformity with the changing conditions of a nation and its culture.¹⁴

Legacies for Contemporary Michigan Legal Culture

Despite a gulf of 200 years and a much simpler legal system than exists in Michigan today, the views of Woodward and Cass concerning law still exercise some influence in contemporary Michigan's legal culture. Concerning the sources of law, as Cass had hoped, the common law remains an important source of Michigan law. In spite of the failure of Woodward's advocacy for the codification of territorial law, however, legislation—including federal statutes—also became an important source of Michigan's law during the twentieth century. Judicial review of legislation, based on both federal and state constitutional law, is also now a prominent feature of Michigan's legal system. Again, as Cass had hoped, one of its purposes continues to be affording ample protection for private property rights (with the protection of intellectual property rights being of particular importance today).

Concerning judicial lawmaking, the differing views of Cass and Woodward have a substantial number of advocates today. This is illustrated most graphically by recent divisions among justices of the Michigan Supreme Court. Some of the justices, as had Cass, emphasize the stability of law. Those justices, like a majority of the judges of the late territorial Michigan Supreme Court, have supported a historical test for determining the law applied in individual cases and the extent of rights that individuals can claim. In this approach, a judge's sense of what constitutes a just result in the case is not a relevant consideration. But there are also Michigan justices who have supported Judge Woodward's view, and also that of Judge Sibley, that lawmaking should be adaptable. These justices are willing to modify established common-law principles in an attempt to keep them relevant to the changing conditions of a society and its legal culture. They are more willing to embrace new law, including law protective of individual rights, than are justices who stress the importance of the stability of principles of judicial lawmaking. Together, this division of Michigan's justices creates a dynamic that has been important in shaping the recent course of Michigan's law.

Local justice, though it still remains a feature of Michigan's legal order, reflects Cass's view that it should be uniform and conform to the law of the state. The broad movement since the early nineteenth century to publish federal caselaw as well as decisions of each state's highest court contributes to this end. Further, as Cass had hoped, jurors, after receiving instructions on the relevant law from the trial court judge, decide only questions of fact.

A final observation is in order. Cass's American community emerged by the end of the territorial period and prevailed in Mich-

igan throughout the nineteenth century. But during the twentieth century, and especially since the end of World War II, Michigan's population has become increasingly diverse. As Woodward had suggested, perhaps this important change calls for some rethinking of Michigan law. ■

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The late Richard Cole joined the faculty of the Western New England School of Law in 1976, previously teaching at the Detroit College of Law. Professor Cole was active in the American Society of Legal History. His published works considered American legal history in the period from the Revolution to the Civil War and appeared in such publications as the Legal Studies Forum and the

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We are indebted to his daughter, Ashley Cole, and brother, David Cole, for reviewing and approving our editorial suggestions before posthumous publication of this article, which Professor Cole submitted shortly before his passing.

FOOTNOTES

1. The material in this article concerning the views of Woodward and Cass is taken from Richard Cole, *Law and community in the new nation: Three visions for Michigan, 1788–1831*, 4 S Cal Interdis LJ 161 (1994).
2. 1 American State Papers 229, 231, available at <<http://memory.loc.gov/cgi-bin/ampage?collid=llsp&fileName=028/llsp028.db&recNum=240>>. All websites cited in this article were accessed July 13, 2011.
3. *In re Denison*, Case No. 60 (1807), in 1 Blume, ed, *Transactions of the Supreme Court of the Territory of Michigan* (University of Michigan Press, Ann Arbor: 1935–1940) [Blume's Transactions], p 385; *In re Pattinson*, Case No. 76 (1807), in 1 Blume's Transactions, p 414.
4. *In re David*, Case No. 227 (1809), in 1 Blume's Transactions, pp 500–501.
5. *Law and community*, n 1 *supra* at 203–204, citing 1 American State Papers, n 2 *supra* at 462.
6. *Grant v Earl of Selkirk*, Case No. 581 (1818), in 3 Blume's Transactions, pp 432–451 (and, in particular, pp 445–448).
7. *Id.*, in 3 Blume's Transactions, p 439.
8. Records of the Michigan Territorial Legislative Council Journal (held at the University of Michigan Law School and also at the Bentley Historical Collection of the University of Michigan).
9. *Id.*
10. *Id.*
11. *Younglove v Sanford*, Case No. 1307 (1829), in 5 Blume's Transactions, pp 317–326.
12. *United States v Sheldon*, Case No. 1315 (1829), in 5 Blume's Transactions, pp 342–367.
13. *Lariviere v Campau*, Case No. 1232 (1828), in 5 Blume's Transactions, pp 308–309.
14. *Id.*, in 5 Blume's Transactions at 309–313.