

Michigan Lawyers in History

Thomas McIntyre Cooley

By Carl W. Herstein



The state of Michigan was built by the lumber and auto industries, agriculture, and the lawyers who lived, studied, and practiced here. The articles in this occasional series highlight some of those lawyers and judges and their continuing influence on this great state.

"God cannot alter the past, but historians can," wrote Samuel Butler.¹ Those of us who admire the work of Thomas McIntyre Cooley can only smile ruefully and assent to the wisdom of this comment.

Although the former newspaper editor, city clerk, lawyer, Supreme Court reporter, Michigan Supreme Court justice, professor of law and political science, author, head of the Interstate Commerce Commission, and American Bar Association president is remembered in Michigan with one law school that bears his name and another that honors him with a distinguished professorship, his legacy on a national scale is both minimal and tarnished. Despite recent efforts to restore what had been a towering reputation in American law during his lifetime, the scorn of progressive era historians so undermined it that Cooley's achievements and contributions have been largely ignored.²

It is the great irony of Cooley's work that the reason he was impugned by so many writers on law and legal history was that one of his great contributions to the law—his groundbreaking book known today as *Constitutional Limitations*³—was perceived as creating support for the key aspects of the United States Supreme Court's decision

in *Lochner v New York*.⁴ This case, the bête noire of the progressive legal movement, has been held up for 75 years as the embodiment of reactionary judicial activism in service of entrenched propertied interests and laissez-faire capitalism, and the origin of the illicit concept of "substantive due process."⁵ While more recent study has cast substantial doubt on the narrative about *Lochner*,⁶ nevertheless, the flaws and merits of that decision remain open for robust debate.

What should be far less controversial, however, is Cooley's role. He died seven years before *Lochner* was decided. At that point, *Constitutional Limitations* was in its eighth edition. Cooley had ceased revising the text after the fifth edition, and the citation in question does not even provide clear support for the proposition for which it is cited. The notion that Cooley should best be remembered as the father of laissez-faire constitutionalism is a crude caricature.⁷ As Shakespeare had Brutus remark, "The evil that men do lives after them, the good is oft interred with their bones."⁸ I come to praise Cooley, not to bury him.

Born in 1824 in upstate New York, Cooley had no college education but began the study of law under New York lawyer and

politician Theron Strong in 1842. A year later, at age 19, Cooley moved to Michigan. He was admitted to the Bar in 1846, the same year he married Mary Horton. Cooley's initial efforts as a lawyer brought him no great distinction, but he was politically active. Although he joined the Free Soil Party in the 1850s, he ran as a Democrat for district judge of common pleas (court) in Toledo in 1854, but lost the election.

An opponent of slavery, it wasn't long before Cooley moved to the new Republican Party born in Jackson, Michigan. He formed a law partnership in 1855 with future Republican Governor Charles Crosswell. In 1857, Michigan's Republican legislature appointed Cooley to compile the state's statutory law and thereafter to serve as the reporter for the state Supreme Court, a post he retained until 1864. By 1859, his skills in organizing and documenting the law were such that the dynamic president of the University of Michigan, Henry Tappan, selected the 35-year-old Cooley to be one of the first faculty members of the school's new Law Department. It was an inspired choice.⁹

Most of Cooley's first years at the University of Michigan coincided with the Civil War—1861 to 1865. The same year the war ended, he was elected to the Michigan



Thomas McIntyre Cooley

Supreme Court. He continued his teaching career, however, and in 1868, he published the first edition of *Constitutional Limitations* based on his lectures.

Cooley taught an array of courses. He published his first edition of *A Treatise on the Law of Torts* in 1879;¹⁰ like its author, it is underappreciated. It was used as a textbook at the Columbia Law School when Benjamin N. Cardozo was a student there.¹¹ Cardozo is celebrated for, among other things, his lectures that were published as a book entitled

The Nature of the Judicial Process.¹² That work is celebrated for articulating and candidly explaining that judges not only interpret the law, but in a meaningful sense, create law as well. One need only read past the first dozen pages in Cooley's book on torts for a clear explanation of the process by which "a species of judicial legislation" occurs as courts successively interpret statutes. That Cooley's comments may have had a significant, if unrecognized, influence on Cardozo hardly seems far-fetched, but whether that is true or not, Cooley plainly prefigured the concept for which Cardozo is not unjustly celebrated.

Cooley's time on the Michigan Supreme Court spanned 20 years from 1865 until 1885, when he resigned that Octo-

ber after failing to win reelection. Cooley joined two of his colleagues from the Michigan Law Department on the Court—James V. Campbell and Isaac P. Christiancy—both of whom had been elected in 1858, as well as Benjamin F. Graves, appointed by the governor in 1857. Collectively, they became known as "The Big Four" and are considered Michigan's greatest court.¹³

The Cooley Court rendered a number of notable decisions. It gained a reputation as nonpartisan by holding unconstitutional a

statute allowing soldiers the right to vote outside their districts, even if serving on active duty during the Civil War.¹⁴ While the former case is cited as an example of adherence to "plain meaning," that case and subsequent decisions such as *People v Salem*¹⁵ (in which the Court declared unconstitutional legislation permitting local jurisdictions to levy taxes to pay railroad bonds they had authorized to finance the construction of lines to their communities as serving a private, not a public, purpose), and *People ex rel Leroy v Hurlbut*¹⁶ (dealing with the constitutional principals involved in local self-government), may be better explained as resulting from a careful review of the historical context and the most reasonable reconstruction of the intended meaning and purpose of the legislation or constitutional provision, as well as careful attention to the words that were used.

This method is also on display in the Cooley Court's decisions permitting taxation to support local high schools¹⁷ and reversing the Detroit Board of Education's effort to racially segregate its schools.¹⁸ Cooley dissented in *Atkinson v Detroit Free Press*,¹⁹ arguing for a loosening of libel law in a case involving newspaper accounts said to have wrongfully damaged a person's reputation, because he took a broad view of what constituted the public interest in such matters.²⁰

Notwithstanding his workload on the Court, he published in 1880 a series of lectures under the heading *The General Principles of Constitutional Law in the United*

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States of America. The book is available as a reproduction (in the form of the 1889 third edition, which was coauthored and revised by a fellow Michigan professor), and one can still benefit from reading it.

Not only did Cooley help create the University of Michigan Law School, he helped establish the Political Science Department as well, trading his position in the Law Department for a post as professor of U.S. History and Constitutional Law in the “literary department” (the future College of Literature, Science, and the Arts) in 1884.

By 1886, *Constitutional Limitations* was in its fifth edition and widely admired as the most authoritative and scholarly work on American law. Cooley’s stature among his contemporaries is exemplified by the fact that in 1886, Harvard invited Cooley to deliver the address commemorating the school’s 250th anniversary. The now vastly more celebrated Oliver Wendell Holmes, who published his famous book *The Common Law* in 1881 and joined the Harvard Law faculty in 1882, was present as a spectator.²¹ In 1890, it was said of Cooley—in connection with a lecture compiled in *Constitutional History of the United States as Seen in the Development of American Law: A Course of Lectures Before the Political Science Association of the University of Michigan*—that “by common consent he has come to be considered the most eminent constitutional jurist of his generation, the successor of Mr. Justice Story as an expounder of the Constitution.”²²

After serving as receiver for the Wabash Railroad in 1886, Cooley was asked in 1897 to become the head of the Interstate Commerce Commission. Creating such an administrative body was a novel concept, and because it involved the railroads, it was of particular economic and symbolic importance given the central role of the railroads in moving goods and raw materials throughout the country. Cooley was asked to deliver the first of what became the very famous Storrs lectures at Yale Law School in 1890–1891, speaking about the Interstate Commerce Act.²³

In 1893, Cooley was elected president of the American Bar Association, but his deteriorating health prevented him from taking the post. He was an invalid during his last several years before his passing in 1898. ■

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ENDNOTES

1. Samuel Butler, *Prose Observations*, c. 1670.
2. The disparaging literature is summarized and cited in Carrington, *The Constitutional Law Scholarship of Thomas McIntyre Cooley*, 41 *Am J of Legal History* 369 (1997).
3. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (New York: Little, Brown & Company, 1868).
4. *Lochner v New York*, 198 US 45; 25 S Ct 539; 49 L Ed 937 (1905).
5. For a summary of the traditional theory of the role of Cooley and his book, see Kens, *Lochner v New York: Economic Regulation on Trial* (Lawrence: University Press of Kansas, 1998), pp 98–101.
6. See the excellent summary by Whittington, *The Troublesome Case of Lochner* (March 1, 2012) <<http://www.libertylawsite.org/2012/03/01/keith-whittington-the-troublesome-case-of-lochner/>> (accessed March 27, 2016).
7. See, e.g., the discussion in Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Alfred A. Knopf, 1973), p 352.
8. Shakespeare, *Julius Caesar*, act III, sc II.
9. For biographical details on Cooley, see Knowlton, *Thomas McIntyre Cooley*, 5 *Mich L R* 309 (1907); Carrington, *Stewards of Democracy: Law as a Public Profession* (Boulder, Westview Press, 1999); Chardavoyne & Moreno, *Michigan Supreme Court Historical Reference Guide* (2d ed) (East Lansing, Michigan State University Press, 2015).
10. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independently of Contract* (1st ed) (Chicago: Callaghan & Company, 1879).
11. See Kaufman, *Cardozo* (Cambridge: Harvard University Press, 1998), pp 47–48.
12. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921).
13. Wise, *The Abele State Court: Michigan’s Supreme Court Before 1885*, 33 *Wayne L R* 1509 (1987).
14. *People ex rel Twitchell v Blodgett*, 13 *Mich* 127 (1865).
15. *People ex rel Detroit & Howell RR Co v Twp Bd of Salem*, 20 *Mich* 452 (1870).
16. *People ex rel Leroy v Hurlbut*, 24 *Mich* 44 (1871).
17. *Stuart v School District No. 1 of Kalamazoo*, 30 *Mich* 69 (1874).
18. *People ex rel Workman v Detroit Bd of Ed*, 18 *Mich* 400 (1869).
19. *Atkinson v Detroit Free Press*, 46 *Mich* 341 (1881).
20. On these cases generally, see Carrington, *Deference to Democracy: Thomas Cooley and His Barnburning Court* in Finkelman & Herschok, eds, *The History of Michigan Law* (Athens: Ohio University Press, 2006), pp 108–125.
21. *Stewards of Democracy*, p 7.
22. Cooley et al, *Constitutional History of the United States as Seen in the Development of American Law: A Course of Lectures Before the Political Science Association of the University of Michigan* (New York: GP Putnam’s Sons, 1890), p 14.
23. Forgeus, *The History of the Storrs Lectureship in the Yale Law School: The First Three Decades, 1890–1920* (New Haven: Yale University Press, 1940).