



# Society Update

The Official Publication of the Michigan Supreme Court Historical Society

Fall 2015

## Thomas McIntyre Cooley

By Carl W. Herstein, Society Vice President



“God cannot alter the past but historians can.”

So wrote Samuel Butler.<sup>1</sup> 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 President is remembered in Michigan both 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 minor and tarnished. Despite more recent scholarship that has made some effort to restore what had been a towering reputation in American law during Cooley's lifetime, the opprobrium of progressive era historians so undermined it that his achievements and contributions have been largely ignored.<sup>2</sup>

It is the great irony of Cooley's work that the reason that 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*,<sup>3</sup> was perceived as creating the support for the key aspects of the United States Supreme Court's decision in *Lochner v New York*. 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".<sup>4</sup> While more recent scholarship has cast substantial doubt on the narrative about *Lochner*,<sup>5</sup> 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 8th Edition. Cooley had ceased being the reviser of the text after the 5th Edition. Furthermore, 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.<sup>6</sup> As Shakespeare had Brutus remark: "The evil that men do lives after them, the good is oft interred with their bones".<sup>7</sup> I come to praise Cooley not to bury him.

Born in 1824 in upstate New York, at nineteen, he had no college education but began the study of law in 1842 under New York lawyer and politician Theron Strong. A year later, at age 19, Cooley moved to Michigan and was admitted to the Bar in 1846. He married Mary Horton that year as well. Cooley's initial efforts as a lawyer brought him no great distinction, but he was politically active. While he joined the Free Soil party in the 1850's, 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 he moved on to the new Republican party that was born in Jackson, Michigan, in 1854. He formed a law partnership in 1855 with future Republican Governor Charles Croswell. In 1857, he was appointed by Michigan's Republican legislature 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 new Law Department at the school. It was an inspired choice.<sup>8</sup>

Most of Cooley's first years at the University of Michigan were coextensive with the Civil War—1861 to 1865. The same year that the war ended, he was elected to the Michigan Supreme Court. But he continued his teaching career and, in 1868, he published the first edition of *Constitutional Limitations* based upon his lectures.

Cooley taught a wide array of courses. He published his first edition of *A Treatise on the Law of Torts* in 1879;<sup>9</sup> like its author, it is much underappreciated. It was used as a textbook at the Columbia Law School when Benjamin N. Cardozo was a student there.<sup>10</sup> Cardozo is celebrated for, among other things, his lectures that were published as a book entitled *The Nature of the Judicial Process*.<sup>11</sup> 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 very 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 or not that is so, Cooley plainly prefigured the concept for which Cardozo is not un-

justly celebrated.

Cooley's time on the Michigan Supreme Court spanned twenty years, from 1865 until October of 1885, when he resigned 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 famous as "The Big Four" and have been considered Michigan's greatest court.<sup>12</sup>

The Cooley court rendered a number of notable decisions. It gained a reputation as non partisan by holding unconstitutional a statute allowing soldiers the right to vote outside their districts, even if serving on active duty during the Civil War.<sup>13</sup> While the former case is cited as an example of adherence to "plain meaning", that case, and such subsequent decisions as *People v Salem*, where the Court declared unconstitutional legislation permitting local jurisdictions to levy taxes to pay railroad bonds that they had authorized to finance the construction of lines to their communities as serving a private, not a public, purpose,<sup>14</sup> and *People ex rel Leroy v Hulbut*, dealing with the constitutional principals involved in local self government,<sup>15</sup> 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 to permit taxation to support local high schools,<sup>16</sup> and to reverse the Detroit Board of Education's effort to racially segregate its schools.<sup>17</sup> Cooley dissented in *Atkinson v Detroit Free Press*,<sup>18</sup> arguing for a loosening of libel law in a case involving newspaper accounts that were said to have wrongfully damaged a person's reputation because Cooley took a broad view of what constituted the public interest in such matters.<sup>19</sup>

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 States of America*". The book is available as a reproduction (in the form of the 1889 3rd Edition which was co authored and revised by a fellow Michigan professor) and one can still benefit from reading it.

Not only did Cooley help create the Michigan Law

School, he helped establish the Political Science Department as well, trading his position at the Law Department for a post as a professor of U.S. History and Constitutional Law in the “literary department” (the future school of Literature, Science and the Arts) in 1884.

By 1886, *Constitutional Limitations* was in its 5th 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 that year Harvard invited Cooley to deliver the address to commemorate 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 only as an onlooker.<sup>20</sup> In 1890, it was said of Cooley (in connection with a lecture compiled in a “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”), “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.”<sup>21</sup>

After serving as the 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 their central role in the movement of goods and raw materials throughout the country.

He was asked to deliver the first of what became the very famous Storrs lectures at Yale Law School in 1890–91, speaking about the Interstate Commerce Act.<sup>22</sup>

In 1893, he was elected President of the American Bar Association, but his health was in a state of decline and his last several years were spent as an invalid. Cooley died in 1898.

#### ENDNOTES

<sup>1</sup> Samuel Butler, *Prose Observations*, c. 1670.

<sup>2</sup> The disparaging literature is summarized and cited in Paul Carrington, “The Constitutional Law Scholarship of Thomas McIntyre Cooley,” 41 *Am J of Legal History* 369 (1997).

<sup>3</sup> Thomas M. Cooley, “A Treatise on the Constitutional Limitations Which Rest Upon the Legislative

Power of the States of the American Union”, 1868 (1st Edition).

<sup>4</sup> For a summary of the traditional theory of the role of Cooley and his book, See P. Kens, “*Lochner v New York*: Economic Regulation on Trial”, pp. 98-101.

<sup>5</sup> See the excellent summary by Keith Whittington: The Troublesome Case of *Lochner*, March 1, 2012, Library of Law and Liberty.

<sup>6</sup> See, for example, the discussion in Harold Hyman, “A More Perfect Union”, p. 352.

<sup>7</sup> Julius Caesar, Act 3, Scene II.

<sup>8</sup> For biographical details on Cooley, See e.g., Jerome C. Knowlton, “Thomas McIntyre Cooley”, 5 *Mich L Rev* 309 (1907); Paul Carrington, “Stewards of Democracy” (1999), and David Chardavoyne with Paul Moreno, *Michigan Supreme Court Historical Reference Guide*, Second Edition (2015).

<sup>9</sup> Thomas M. Cooley, “A Treatise on the Law of Torts: Or the Wrongs That Arise Independently of Contract”, 1879 (1st edition).

<sup>10</sup> See Andrew Kaufman, Cardozo, pp. 47-48 (1998).

<sup>11</sup> B. Cardozo, *The Nature of the Judicial Process*, 1921.

<sup>12</sup> Edward M. Wise, “The Abelest State Court: Michigan’s Supreme Court Before 1885”, 33 *Wayne L Rev* 1509 (1987).

<sup>13</sup> *People ex rel Twitchell v Blodgett*, 13 *Mich* 127 (1865).

<sup>14</sup> *People ex rel Detroit & Howell R. R. Co. v Twp. Bd. of Salem*, 20 *Mich* 452 (1870)

<sup>15</sup> *People ex rel Leroy v Hurlbut*, 24 *Mich* 44 (1871).

<sup>16</sup> *Stuart v School District No. 1 of Kalamazoo*, 30 *Mich* 69 (1874).

<sup>17</sup> *People v Board of Education of Detroit*, 18 *Mich* 400 (1869).

<sup>18</sup> 46 *Mich* 341 (1881).

<sup>19</sup> On these cases generally, see Paul Carrington, “Deference to Democracy” in P. Finkelman and M. Herschok, Editors, *The History of Michigan Law* (2006).

<sup>20</sup> Paul Carrington, *Stewards of Democracy*, p. 7.

<sup>21</sup> *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*, Introduction at p. 14.

<sup>22</sup> E. Forgeus, *The History of the Storrs Lectureship in the Yale Law School: The First Three Decades, 1890–1920* (1940).



# Donation of Cooley Letter

By Judge Don Binkowski, Retired

Cooley was appointed Dean of the University of Michigan Law School, a position he held until 1884. Thomas M. Cooley Law School of Lansing, Michigan, was named after Justice Cooley to recognize his contribution to American jurisprudence. Also, Cooley High School in Detroit and Cooley Elementary School in Waterford, Michigan, are commemoratively named in Justice Cooley's honor. Justice Cooley is recognized by the State Bar of Michigan in a "Michigan Legal Milestone." He was placed on a commission to investigate issues involving railroads. That venture led him to serve as Receiver of Wabash Railroad. In March 1887, President Grover Cleveland appointed him Commissioner to the Interstate Commerce Commission.

Samuel Freeman Miller (April 5, 1816–October 13, 1890) was an associate justice of the United States Supreme Court who served from 1862 to 1890. He was a physician and lawyer. Justice Miller wrote more opinions than any other Supreme Court Justice, leading future Chief Justice William Rehnquist to describe him as "very likely the dominant figure" on the Court in his time. When Chief Justice Salmon P. Chase died in 1873, attorneys and law journals across the country lobbied for Miller to be appointed to succeed him, but President Ulysses Grant was determined to appoint an outsider; he ultimately chose Morrison Waite.

The letter at right was donated to the Society by retired judge Don Binkowski. It was written to U.S. Supreme Court Justice Samuel Freeman Miller on December 3, 1883, by Michigan Supreme Court Justice Thomas M. Cooley. It reads:

My dear sir,  
Please accept thanks for the copy opinion in the Civil Rights Cases. I had no thoughts of publishing anything respecting these cases, but having been requested by a Political Science Club to make them the subject of a brief talk, I was surprised to find I could not put my hand upon a complete copy of the prevailing opinion. It has now, I perceive, been given in the Albany Law Journal.

The result of the Cases is such as I had been looking for.

Very Respectfully Yours,  
T. M. Cooley



*Am Arbor Dec. 3. 1883*

*My dear Sir -*

*Please accept thanks for the copy opinion in the Civil Rights Cases. I had no thoughts of publishing anything respecting these cases, but having been requested by a Political Science Club to make them the subject of a brief talk, I was surprised to find I could not put my hand upon a complete copy of the prevailing opinion. It has now, I perceive, been given in the Albany Law Journal.*

*The result of the Cases is such as I had been looking for.*

*Very Respectfully Yours*  
*T. M. Cooley*

*U. S. Justice Miller -*

# First Women on the Court

On Tuesday, October 13, 2015, the Society was pleased to participate in the opening of a new, permanent exhibit in the Michigan Supreme Court Learning Center. The state-of-the-art exhibit features the first three women to serve on the Michigan Supreme Court: Mary Stallings Coleman, Dorothy Comstock Riley, and Patricia J. Boyle. The exhibit was financed with donations made in memory of Chief Justice Dorothy Comstock Riley, upon her death in October 2004.



Society President Emeritus Wallace D. Riley and Michigan Supreme Court Justice Bridget Mary McCormack.



Chief Justice Robert P. Young, Jr., speaks to a group of fourth grade students. The students participated in the opening of the new exhibit, then toured the Learning Center and visited the Courtroom.



Learning Center Coordinator Rachael Drenovsky helps a student use the new touch-screen.



All seven of the Justices were in attendance for the opening, including the Court's newest Justice Joan Larson, and many of the Society's Board of Directors. The judicial robe in the background belonged to Chief Justice Dorothy Comstock Riley.



# ADVOCATES GUILD

## MICHIGAN SUPREME COURT HISTORICAL SOCIETY

### Appellate Advocates and the Sound of Defeat

By Mary Massaron, First Chair



Each year, the Advocates Guild is privileged to hold a dinner with the justices and chief clerk of the Michigan Supreme Court. It is always an elegant evening filled with warmth and collegiality as advocates and justices share a few rare moments together when we are outside the formal setting of the courtroom for oral argument. This year, as part of the evening, I shared a few remarks on winning and losing as advocates before the Court. I had no written script but this short piece is an effort to share the essence of those remarks for readers of this newsletter.

Theodore Roosevelt once said, “Far better to dare mighty things, to win glorious triumphs, even though checkered by failure ... than to rank with those poor spirits who neither enjoy nor suffer much, because they live in a great twilight that knows not victory or defeat.” As appellate lawyers arguing close issues of unsettled law before the Michigan Supreme Court, we have experienced this by arguing before the Michigan Supreme Court, the highest court of our state. When

we appear for argument, we all hope for a victory. But we have probably all suffered a defeat at least once or twice during our career. We can also think of great lawyers who worked for years on the losing side in order to eventually vindicate an important principle: appellate advocates like Thurgood Marshall trying to establish civil rights and to overturn *Plessy v Ferguson* or Justice Ginsburg who worked to establish equal rights for women. And others who labored for years to represent clients seeking to stand on some principle or vindicate some right although the law goes the other way. It’s certainly less fun to lose, than to win.

But the Court is a winner when it has outstanding advocates on both sides in the cases that come before it. While I have never served as a justice, I know from my experience as a law clerk to Justice Patricia J. Boyle on this Court how important the quality of the advocates’ work is to the process. The work of the advocates who gain a victory and those who count the case a loss helps the Court understand the issues, the legal framework, and the implications of a holding that is broad or narrow. The advocates’ arguments help the Court understand the impact of the decision and the rationale that will undergird the holding.

The Advocates Guild dinner is a time to recognize and applaud that work, and to recall that we are all working together to continue the great traditions of the Michigan Supreme Court. Each of us do our part to try to assure that the Court will continue to effectuate the rule of law in our state.

And since I am writing this recap just before the holidays, I’ll end as Tiny Tim did so long ago in Dickens’ wonderful holiday story, by saying, “God bless us, every one!” I hope you have wonderful holidays however you celebrate them.





Photos by Dave Trumpie



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***Mission Statement***

The Michigan Supreme Court Historical Society, a non-profit 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.

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*Society Update* is published quarterly by the Michigan Supreme Court Historical Society.

Writing submissions, article ideas, news, and announcements are encouraged!

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