as M. Cooley. In that year he was selected to compile the laws of the state which had been in an unsatisfactory condition before that time. He was given a year to do the work, but he had it finished in nine months. This gave him prominence and the next year, 1858, he was made clerk of the supreme court. During his incumbency of that office he compiled eight volumes of reports. Another year and Thomas M. Cooley was made professor of law for the newly formed law school at Ann Arbor. From that time on his life was a matter of common knowledge. His ability, when given the needed contact with the important affairs of life, made him famous.

Those who remember Justice Cooley and know his son Eugene F. Cooley, here in Lansing, say that while they do not look alike, as the saying is, nevertheless there exists a strong family resemblance. The general demeanor of Justice Cooley is said, by those who remember him, to have been that of a literary type rather than the type customarily thought of as that of the lawyer.

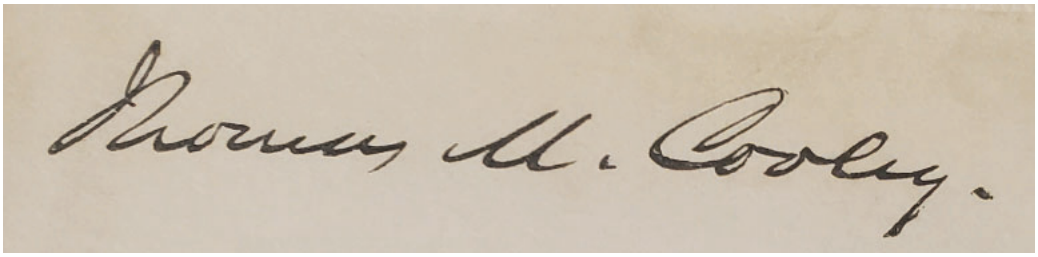
One of the characteristics of Justice Cooley was his love of children. One who knew of the life of the Cooley family in Ann Arbor says the Cooley home was the rendezvous of the children for blocks around. The youngsters instinctively knew that they were welcome. It is also related that when Justice Cooley was in his study it never annoyed him to have three or four little ones climbing over him. Doubtless there is ample material to afford some serious and painstaking biographer occasion for a book of the life of Thomas M. Cooley, Michigan's foremost jurist.

Thomas M. Cooley, the Constitutional Scholar

Thomas Cooley has regularly been a subject of presentations before the Society Annual Luncheon from Paul Carrington's remarks on April 18, 2007, to Chief Justice Bridget Mary McCormack's vignette on April 18, 2019. Most recently, Sixth Circuit Court of Appeals Judge Joan L. Larsen spoke at the April 20, 2023, luncheon on "Lessons from Thomas M. Cooley." These remarks are presented below in full:

Good afternoon.[1] My thanks to the Michigan Supreme Court Historical Society and Chief Justice Clement for inviting me to present the John W. Reed lecture. It's such a pleasure to see some of my former colleagues in attendance and, of course, to see so many friends here.

I thought I would begin with a few words about John W. Reed, who was a long-time member of this Society and an institution at the University of Michigan Law School. John devoted 65 years of his professional life to Michigan Law, serving on its faculty from 1949 to 2018—with time out for a four-year stint in the 1960's, where he served as Dean of the University of Colorado Law School. One of my former colleagues at the Law School described John as "the Fred Astaire of the law school world. There was a deeper kinship than prowess on the dance floor. There was the same clean line in gesture and speech, the same trimness of content and grace of expression, and the same understated empathy with all manner of people."[2] In my experience, all of that was true—and the latter especially so. John spent his 99 years as a friend of the law—but more so of people. May we all live so well.



Those of you who have knocked around this Historical Society long enough likely know about John's tremendous scholarly contributions. Today, I want to spend some time talking about another important legal scholar, Thomas M. Cooley.

When I speak to national audiences about Cooley, I usually start by saying that Thomas McIntyre Cooley is surely the most important legal scholar they have never heard of. But I can't say that to you—you are Michiganders (or Michiganians, if you prefer), and some of you graduated from the law school that bears Cooley's name. But still, I bet you don't know much about Cooley. So let me introduce you.

To say that Cooley was a prolific writer and a powerful force in American law is an understatement. In the decade immediately following the ratification of the Fourteenth Amendment, he produced three influential legal treatises: one on Constitutional Law, one on Tax, and one on Torts. He also edited and revised both Blackstone and Story.[3] The United States Supreme Court has cited Cooley's work more than 700 times.[4] And he accomplished all of this while holding down three other jobs.

Though separated by a century and a half, I had the great pleasure to do two of those jobs—though I likely did them less well, was surely less prolific, and applied my efforts to them one at a time, instead of, like Cooley, all at once. Cooley was the 25th Justice of the Michigan Supreme Court; I was its 111th. Cooley was one of the founding faculty members of the University of Michigan Law School, where, like Cooley, I taught Constitutional Law, a course Cooley may have invented.

So if anyone should have taken the time to learn about Thomas Cooley, it seems it should have been me. But until just a few years ago, I had not done so. I knew generally, of course, of his professorship and Deanship at Michigan Law and of his 20-year service (1864–1885) on the Michigan Supreme Court. But beyond that, I didn't know much.

I had encountered Cooley professionally only once—when, in a 2016 decision, the Michigan Supreme Court was asked to decide a case defining the basic relationship between municipal governments and the state. The question was whether municipalities had "all powers relating to local concerns that were not expressly denied [to them]" by the State, or whether municipalities could "wield only those powers expressly . . . granted?"[5] We decided the former under Michigan's 1963 Constitution. That view would likely have been close to the view of Michigan's 1850 Constitution.

Cooley was an ardent proponent of local control. And what became known as the "Cooley Doctrine" posited that municipalities possess inherent local sovereignty. It made no sense to Cooley to think that municipalities could derive their authority over local affairs from the State; after all many municipalities predated the states that later subsumed them. Moreover, Cooley just thought local control was good.[6] "[T]he management of purely local affairs," he thought, "belongs to the people concerned, because they will best understand, and be most competent to manage them."[7]

And that is about all I knew about Thomas Cooley—he was a prominent Michigan Justice, a staunch advocate of local control, an early Dean and member of the Michigan Law faculty. These are all impressive and important contributions to public life, to be sure; but they are hardly the stuff of Giants.

But a Giant he surely was. Professor Paul Carrington explained his importance well. Writing about Cooley, Professor Carrington invites us back to November 1886, when Harvard was celebrating its 250th anniversary. As Carrington describes the scene:

> [I]t was a time for self-praise in Cambridge. Among the events marking the occasion was the award of an honorary doctorate to Thomas McIntyre Cooley of Ann Arbor, Michigan. At this time, Cooley was the most respected lawyer in America and among the most widely respected persons in American public life. Nothing [supposed Carrington] could have been more appropriate than that he be invited to honor Harvard with a ceremonial utterance."[8]

This, indeed, portrays a great man.

And yet, my own contemporary sense, working in Cooley's very halls at Michigan was that there must have been something vaguely disreputable about him. At the law school at least, Cooley seemed rather like a Crazy Uncle, asked to stay in his room when company comes. Though Cooley's bust remains in the corner of

the faculty lounge—he was rarely mentioned, and then in a bit of a whisper. Why was this? If Cooley was, in the middle of the 19th Century, widely acknowledged to be "the most respected lawyer in America," why had his candle dimmed so?

Given the time at which he lived and worked, I worried at first that he might have been on the wrong side of the slavery question. But that appears not to have been the case. He was raised in Western New York, in a family active in Democratic politics.[9] And he wrote for Democratic newspapers.[10] But in 1848 he founded the Michigan Branch of the Free Soil Party, which opposed the Westward expansion of slavery.[11] And in 1856, he left the Democrats for good, joining the Republican Party because of his opposition to slavery.[12] Michigan Law School, whose faculty he joined in 1859, and which he led as Dean for many years (from 1871–1883), appears never to have refused admittance to African Americans on the basis of race.[13]

And in 1869, just one year after the ratification of the Fourteenth Amendment, and 85 years before *Brown v Board of Education*, Justice Cooley authored what, to modern eyes, seems like an astonishing decision for its time.[14] The facts were these: In April 1868, Joseph Workman attempted to enroll his son in his local public school in Detroit.[15] The school refused him admittance based on his race, saying he could instead attend one of the city's schools for Black children.[16] Raising claims that would be echoed for decades to come, Workman complained that, because of his race, his son had been denied the opportunity to attend the school closest to his home; and because the schools for Black children did not teach at the higher levels, he had been denied an education that fit his academic ability.[17] Justice Cooley's decision required that Workman be admitted to his local school.[18]

Cooley, although perhaps alluding to constitutional concerns,[19] decided the question on statutory grounds. An 1867 amendment to Michigan's Primary School Law, required that:

> All residents of any district shall have an equal right to attend any school therein. Provided that this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places when deemed expedient.[20]

The dissent seemed to suggest that this provision did not speak to the assigning pupils to schools by race.[21] But to Cooley the answer seemed quite plain from the face of the statute, which after all, applied to "all residents" and made only one exception: for ability.[22]

> It cannot be seriously urged[, Cooley wrote,] that with this provision in force, the school board of any district which is subject to it may make regulations which would exclude any resident of the district from any of its schools, because of race or color, or religious belief, or personal peculiarities. It is too plain for argument that an equal right to all the schools, irrespective of all such distinctions, was meant to be established.[23]

The only mildly difficult question for Cooley was whether this provision applied *to Detroit*, whose school board had been granted significant policymaking authority and had, since the grant of these powers in 1841, maintained schools segregated by race.[24] Cooley, his affinity for local control notwithstanding, concluded that Detroit was subject to the general law in many other respects and could see no reason why the "equal access" provision would be different.[25] In the end, Mr. Workman got his writ.

So if Cooley was not aligned with pro-slavery forces, what, then, was Cooley's sin? It turns out that his fall from grace came decades after his death, when a series of mid-20th century academics accused him of having invented the "legal ideology" of Laissez-faire, which would embed itself in the Due Process Clause during the *Lochner* era.[26] In the 1960's, one scholar would condemn Cooley's Treatise as "the work most responsible" for "establishing the courts as the ultimate censors of virtually all forms of social and economic legislation."[27] Another, writing in the 1940's, accused Cooley of "ma[king] up many of the[se Laissez Faire] principles out of his own head."[28] But for all his purported influence, it is surprising to see that Justice Peckham did not actually cite Cooley in *Lochner*, nor in *Allgeyer v Louisiana*.[29]

Still, Academics have written a fair amount lately to try to expiate Cooley from the sin of *Lochner*. Some have argued that Cooley was misunderstood. He was no "laissez-faire ideologue but [instead] a Jacksonian Democrat committed to the doctrine of equal rights."[30] Others say he was a rather conventional thinker of

the time, who recognized the legitimacy of the police power, but thought it limited by its classical purpose—to "preserve rights, rather than infringe upon them."[31] Other scholars have taken a different approach, arguing that the purported "sins" of *Lochner* were no transgression at all, or, at the least, have been greatly exaggerated.[32] I will leave it to the Professors to have those debates.

Whatever the merits—or demerits—of Cooley's one chapter dealing with property rights, and the uses to which it was put, there can be little doubt that Cooley's *Treatise on Constitutional Limitations* was the most influential law book of its generation. An 1883 reviewer described it as:

> not only a standard authority, but almost exclusively sovereign in its sphere. It is cited in every argument and opinion on the subjects of which it treats, [it is] not only . . . authoritative as a digest of the law, but its author's opinions are regarded as almost conclusive.[33]

Another reviewer called Cooley's treatise, "the chiefest American law book."[34]

Reading Cooley's *Treatise* with 21st Century eyes one thing stands out. This—*the* definitive work on American Constitutional law—was a book almost entirely about *state* Constitutional law. The first edition's one chapter on the U.S. Constitution consumes 15 fleeting pages; the other 616 pages concern the states. And the chapter on the U.S. Constitution deals almost entirely with structure—laying out the various federalism and separation of powers provisions of the national charter, with little commentary or analysis.

The book was, of course, a product of its time. In 1868, the year the Fourteenth Amendment was ratified, Cooley's ratio would have been about right: American constitutional law was probably about 2 parts federal, and 98 parts state. And with respect to limits on the powers of state legislatures, state Constitutions were almost the only game in town. Remember that in 1833, the U.S. Supreme Court's opinion in *Barron v. Baltimore* had concluded that the federal Bill of Rights had nothing to say about the operation of state government.[35] And that meant, of course, that state courts were the primary interpreters and enforcers of individual rights.

Fast forward to the 21st Century, and the world looks starkly different. No contemporary treatise on Constitutional Law gives more than a passing nod to the idea of *state* constitutionalism as a robust and independent topic. State *courts*, too, are often treated in law schools and elite legal circles as if they were the little siblings of their more sophisticated federal brethren. But that attitude reflects a profound misunderstanding. There can be no denying that, even today, the work of state courts matters—and measured either by volume or content, we might contend that the work of state courts matters a great deal more, to a great many more people, than the work of any federal court.

In 2016, roughly 400,000 cases were filed in the nation's 94 federal district courts; meanwhile, 84 *million* cases were filed in the courts of the 50 states.[36] And many of those 84 million state cases involved questions that concerned ordinary people. The disputes that most Americans have with one another generally sound in tort, contract, or real property—quintessential state law topics.[37] Most criminal law, and nearly all family law, is still the province of the states. And so the things that matter most to most people—their livelihoods, their liberty, their families —are governed by state, and not federal law. And most of these disputes will be adjudicated in state courts.

But if 84 million cases are filed in state court every year, how many turn on peculiar questions of state, as opposed to federal, *constitutional* law? That figure I do not have. But my sense is "not many." Though it is surely growing.

The Chief Judge of my court, Jeff Sutton, has recently written two thoughtful books on just this topic. Judge Sutton's books are in part a quest to understand and reverse the demise of state constitutions as a source of individual rights protection.[38]

Early in his first book Judge Sutton offers a metaphor. He asks us to imagine the *final* minutes of "the Final Four of the NCAA Men's College Basketball Tournament."[39] (I'm afraid Wolverine fans will really have to use their imaginations this year; Spartans less so.). Anyway, Judge Sutton casts his metaphor using neither Spartans nor Wolverines. He posits that "the University of Kansas faces the University of Kentucky, a storied matchup that leads to an epic game. Toward the end of regulation, with the game tied, a Kentucky player

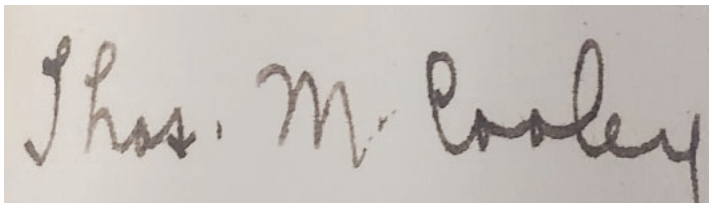
drives the lane, and a Kansas player fouls him in the act of shooting, just as time expires. The shot rims out but the Kentucky player has two free throws . . . .Two chances to win the game."[40] "But how [Judge Sutton asks] "would the . . . fans react if the coach ordered his player to take just one of those free throws, giving him just one chance, not two, to win?"[41] Giving that instruction, he rightly argues, "would be unforgivable."[42] But, if that is so, Judge Sutton wonders: "Why is it that when we switch from American basketball to American law, we see American lawyers regularly taking just one shot rather than two to invalidate state or local laws...?"[43]

I have some thoughts about why American lawyers rarely take two shots; and also some thoughts about what sorts of interpretive theories might be compatible with a renewed emphasis on state constitutional law. In my view, for example, there are even fewer reasons for departing from text and history when construing a constitution that is so much more responsive to democratic change. But I will not develop those points here.

Instead, I will note that while Judge Sutton's book aims at state judges, and state courts, in an attempt to encourage them to pay closer attention to state constitutional law, there are important lessons here for federal judges too. If we are serious about the idea that state courts should protect and interpret the unique heritage of the various state constitutions, then we federal judges need to tread with special care upon state constitutional grounds, certifying questions, for example, where that makes sense. Although we are unquestionably called upon to decide state law questions as part of our diversity and supplemental jurisdiction, we must not treat the state courts as the warmup squad. Here, at the very least, state courts are the starting lineup. We federal judges must (if you will pardon the pun) sit on the bench.

And this brings me back to Cooley, and a basic insight that unites principles of judicial federalism with Cooley's ideas about local control—that authority over most affairs should, in Cooley's words, "belong[] to the people concerned, not only because of it being their own affairs, but because they will best understand, and be most competent to manage them."[44] If the resurgence of Cooley studies has any lasting significance, I hope it will also remind us not only of the forgotten prominence of Thomas Cooley, but also of the respect we owe the state and local institutions he served.

Thank you.



ENDNOTES

1 Portions of this speech are derived from my earlier remarks prepared for the Case Western Law School 2018 Sumner Canary Memorial Lecture. *See* Joan L. Larsen, *State Courts in a Federal System*, 69 Case W. Rsrv. L. Rev. 525 (2018).

2 Theodore J. St. Antoine, *In Memoriam: John W. Reed*, 116 Mich. L. Rev. xiv (2018).

3 Paul D. Carrington, *The Constitutional Law Scholarship of Thomas McIntyre Cooley*, 41 Am. J. Legal Hist. 368, 368 (1997).

4 Id. n.9.

5 *Associated Builders & Contractors v. City of Lansing*, 880 N.W.2d 765, 769 (Mich. 2016).

6 Cooley elaborated on this view in his famous concurrence in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 93 (1871). There, Cooley acknowledged the prevailing view that municipal bodies were "mere agencies which the state employs for the convenience of government, clothing them for the time being with a portion of its sovereignty, but recalling the whole or any part thereof whenever the necessity or usefulness of the delegation is no longer apparent." *Id.* at 96. Cooley believed that view ignored the fact that the state constitution had been created against the backdrop of a society that relied on local control. *Id.* at 97–98. To Cooley, management of local concerns was a fundamental principle in the "general framework of government" and embedded in the state constitution. *Id.* at 98.

7 Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 343 (1880), https://repository.law.umich.edu/books/47.

8 Paul D. Carrington, Law as *"The Common thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 Stan. L. Rev. 495, 495 (1997).

9 Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 The J. of Am. Hist. 751, 753 (1967).

10 *Id.*

11 *Id.*

12 Charles W. McCurdy, *The Problem of General Constitutional Law: Thomas McIntyre Cooley, Constitutional Limitations, and the Supreme Court of the United States, 1868–1878*, 18 Geo. J. L. & Pub. Pol'y 1, 4 (2020).

13 Randy E. Barnett and Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 17 Geo. L. J. 1, 11 (2018); Margaret A. Leary and Barbara J. Snow, *Gabriel Franklin Hargo: Michigan Law 1870* (2009), https://repository.law.umich.edu/miscellaneous/143.

14 See P*eople ex rel. Workman v. Detroit Bd. of Educ.*, 18 Mich. 400, 404 (1869).

15 The Michigan Supreme Court Historical Society, *Racal Equality in Nineteenth Century Michigan*, http://www.micourthistory.org/wp-content/uploads/verdict_pdf/workman/Brief_Summary_of_Workman.pdf (last visited December 8, 2023).

16 *Id.*

17 *Id.*

18 *Id.*

19 He ends the opinion saying: "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." *Workman*, 18 Mich. at 414; see also Carrington, supra note 8.

20 *Workman*, 18 Mich. at 409 (quoting Act of Feb. 28, 1867, No. 34, vol. 1, 1867 Mich. Laws 42, 43).

21 *Id.* at 415–16 (Campbell, J., dissenting).

22 *Id.* at 409–10 (emphasis added).

23 *Id.*

24 *Id.* at 412–13.

25 *Id.* at 413.

26 Joseph Postell, *The Misunderstood Thomas Cooley: Regulation and Natural Rights from the Founding to the ICC*, 18 Geo. J. L. & Pub. Pol'y 75, 77 (2020) (quoting Sidney Fine, *Laissez Faire and the General Welfare State: A Study of Conflict in American Thought: 1865–1909*, 126, 142 (1964)).

27 *Id.*

28 *Id.* (quoting Benjamin Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* 33 (1942)); see also Marver H. Bernstein, *Regulating Business by Independent Commission* 32–33 (1955).

29 See *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

30 Postell, *supra* note 26, at 78.

31 *Id.* at 85.

32 See David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 Geo. L. J. 1, 5–7 (2003).

33 Carrington, *supra* note 7.

34 Lawrence B. Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 Geo. J. L. & Pub. Pol'y 49, 50 n.2 (2020).

35 *Barron v. Baltimore*, 32 U.S. 243 (1833).

36 Jeffrey S. Sutton, *A Response to Justice Goodwin Liu*, 128 Yale L.J. Forum 936, 942 (2019).

37 Joan L. Larsen, *State Courts in A Federal System*, 69 Case W. Rsrv. L. Rev. 525 (2019).

38 Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* (2022); Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018).

39 Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 7 (2018).

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 Cooley, *supra* note 7, at 343.