Thomas M. Cooley and the Michigan Supreme Court: 1865-1885

by Alan Jones

IN 1865 Thomas M. Cooley began a twenty-year tenure on the Supreme Court of Michigan. In the previous ten years his rise from a politically-minded young country lawyer in Adrian, Michigan had been rapid. In 1857 he had been given the task of compiling the statutes of Michigan; in 1858 he had been appointed Reporter to the Supreme Court, and in 1859 he had been named as one of the first three professors in the newly-opened law department of the University of Michigan. In the years after 1865 Cooley went on to win national eminence as a judge, a teacher, a writer of legal treatises, and as first chairman of the Interstate Commerce Commission.

Now, a century later, Cooley’s reputation is much diminished, particularly in the area of his greatest interest—constitutional law. Leading constitutional historians have given him an undeserved recognition among most students of American history as a legal patron of American capitalism. Benjamin Twiss’ 1942 assessment has been influential:

1868 marks a turning point in American constitutional law. In that year laissez-faire capitalism was supplied with a legal ideology in Thomas M. Cooley’s Constitutional Limitations almost as a direct counter to the appearance a year earlier of Karl Marx’s Das Kapital.¹

Other commentators have repeated this charge and, like Twiss, have judged Cooley by the use late nineteenth-century corporation lawyers made of scattered dicta in his 1868 treatise.² Those who have judged Cooley in this way have neglected a great mass of evidence which

¹ Twiss, Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court 18 (1942).
² The full title of Cooley’s book is A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union (1st ed. 1868). It is cited hereafter as Constitutional Limitations. See the references to it in Corwin, Liberty Against Government: The Rise, Flowering, and Decline of a Famous Judicial Concept (1948); Jacobs, Law Writers and the Court: The Influence of Thomas M.
points to a consistently democratic tone in Cooley's political value system.

This is not the place to develop the roots of that value system, but it can be pointed out that Cooley was brought up as a radical Jacksonian Democrat and that in the years around 1848 he had a reputation as a radical and a reformer. A believer in equal rights and equal liberty, Cooley participated in a number of reform causes at mid-century: free soil, free trade, free education, and free discussion. And in poem and editorial he declaimed against war, slavery, and special corporate privilege. The radicalism of Cooley's youth ebbed as he grew older and as legal and historical sensibilities replaced poetic enthusiasm. Common-law traditionalism inclined him to a somewhat romantic view toward the past, yet he always maintained rudiments of the democratic hope for the future that marked the progressivism of his youth. One only needs to look at the special lecture on "Corporations" that he delivered to law students at Ann Arbor in 1871 to assess his anti-corporate sentiments, or to look at the footnote on the Dartmouth College Case which he appended to the second edition of his treatise:

It is under the protection of the decision in the Dartmouth College Case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations having greater influence in the country and upon the legislation of the country than the states to which they owed their corporate existence.\(^3\)

An examination of Cooley's constitutional views on the Michigan Supreme Court between 1865 and 1885 should help restore the deserved democratic reputation which is his. In addition to revealing him as something other than a single-minded patron of property rights, such a study also highlights a significant constitutional controversy on the Michigan court between Cooley and Justice James Campbell and points up the broader political context of the decisions of the Michigan court in an important period of legal and constitutional history.

When Cooley came to the bench in 1865, his fellow justices were Isaac P. Christiany, a political friend of Cooley's Free Soil days; James V. Campbell, Cooley's colleague in the law department at

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\(^3\) Constitutional Limitations 335 (2d ed. rev. 1871). Also see the notes of Cooley's special lecture on "Corporations" in the Law Notebook of H. B. Swartz, II, 243, in the University of Michigan Historical Collections, Ann Arbor.
Ann Arbor; and George Martin, who died in 1868 and whose place was filled by Benjamin F. Graves. The court of Cooley, Campbell, Christiancy and Graves won enduring fame in Michigan law as the “Big Four.” Christiancy left the court in 1875 after his election to the United States Senate. Isaac Marston, a very close friend of Cooley’s, replaced Christiancy and remained on the bench until 1883. In the spring of 1884 the first two Democrats to sit on the post-Civil War court were elected: Thomas R. Sherwood, who replaced Marston, and John Champlin, who took the seat that Graves retired from in 1884. Cooley was defeated by still another Democrat, Allen B. Morse, in 1885, and only Campbell remained on the bench of 1865.4

The judges, especially after Graves replaced Martin, were all conscientious and hard-working, and there were no difficulties about each taking his share of the court’s work. Business was quickly dispatched, and the twenty years from 1865 to 1885 saw forty-five volumes of decisions reported. Except for a rather consistent difference of views between Cooley and Campbell, the court worked smoothly and with an unusual unanimity of opinion. Cooley was respected as a natural leader on the court, but all the justices were strong and able men, and no one judge dominated.

One has the impression that with Cooley the role of supreme court justice was a fairly simple and matter of fact job, easily accommodated to his other activities as professor and writer. This does not mean he was complacent about his role as justice; his opinions were often long and full of obiter that showed his personal involvement in his decisions. These decisions often reflected the political views of his past, as will be noted below, and one reason for the easy association of Cooley, Graves, and Christiancy was their common background in mid-century Democratic and Free-Soil politics. Their Republicanism after 1865 was of the independent variety, as was Campbell’s, but the latter’s Whig background helps explain some of his dissents from the other three and his differences with Cooley. It is doubtful that this helps explain the fact that Cooley's personal relationships with Campbell were less intimate than they were with the other justices.5

The Michigan Supreme Court’s independent aloofness from the excesses of partisanship and popular excitement in the post-war years was one of the basic reasons for the respect the court earned after 1865. Several decisions in these years give this impression,


5 See the entries in Cooley’s Diary on November 4, 1882 and July 9, 1884 on his lack of intimacy with Campbell. The Diary is in the Cooley Papers in the University of Michigan Historical Collections.
and because Cooley wrote opinions in these cases, this is the place to begin an examination of his constitutional views.

In one of the first cases of his career, *People v. Blodgett*, the court antagonized popular and partisan feeling by holding a soldier's vote law unconstitutional. The recognized injustice of depriving fighting men of their vote at the height of the Civil War did not interfere with Cooley's idea of constitutionalism. The case was clear; a different conclusion would establish such a precedent for the perversion of constitutional language that, as Cooley said:

The principle of constitutional permanency and inviolability which in times like these constitutes the anchor of our safety, will cease to have force, and the temporary will of the majority will be practically uncontrolled. And believing as I do, that a high and sacred regard for the law and constitutional order is being begotten of these times, I regard it as important that the judiciary should do nothing to postpone or check this result by decisions which strain or bend the meaning of words to meet unexpected emergencies.\(^6\)

War made constitutionalism more basic than ever, and for one firmly committed, as Cooley was, to constitutional government, the decision was not difficult. It nevertheless disturbed Republican partisans who had gained by the vote law, even though Cooley, speaking for the court in *People v. Mahaney* later in the year, did not question the legislature's right to keep members who, by the decision in the *Blodgett* case, had been illegally elected, even though the vote of such members had been essential to the passage of the act in controversy in the *Mahaney* case.\(^7\)

Two other cases in 1865, *Price v. Hopkins* and *Groesbeck v. Seeley*, saw the court assert its independence and strike down legislation on grounds that it violated the "due process of law" clause of the Michigan constitution. In the *Price* case, Cooley held that a statute of limitations which destroyed a previous right of action without allowing a "reasonable" time, or any time, in fact, to bring suit after the passage of the act violated due process.\(^8\) In the *Groesbeck* case, Justice Campbell strongly condemned an act which allowed absolute title to lands bid off by the state after the expiration of five years. This was a deprivation of a legal title without a hearing and by the mere lapse of time, thereby violating due process and "endangering the entire foundations of constitutional protection to


\(^7\) *People v. Mahaney*, 13 Mich. 481 (1865).

property." 9 These cases were the occasion of complaint by individuals interested in speculating in tax titles, but an 1866 decision of the court which dealt with the right to vote of a man who was part Negro roused greater popular protest, especially from Republicans. Once again the setting was important: the war to free the slaves was over and advocates of equal rights to negroes were at the height of their influence. The Michigan Constitution restricted the suffrage to "white male citizens," and in People v. Dean Justice Campbell interpreted this to mean that all persons "in whom white blood so far preponderates that they have less than one-fourth of African blood" could vote. 10 This allowed Dean, who was one-sixteenth negro, to vote, but in 1866 the rule looked like an unusual and unequal stretching of the meaning of the word "white." Justice Martin strongly dissented and accused the court of setting arbitrary standards. 11

In the legislature that met early in 1867 a bill was introduced to require a unanimous concurrence of supreme court justices in their decisions. 12 The bill failed, but criticism of the court's decisions in the Blodgett, Groesbeck, and Dean cases continued. When Cooley came up for renomination in 1869, one Republican paper attacked him—partly because the Democrats at their recent state convention had almost nominated him on their ticket. Complaining of the Blodgett and Dean decisions, the paper added that Democratic antecedents and proclivities seemed to be the qualifications Republicans sought in their nominees with the result that while the Republicans did the electing, the Democrats got all the decisions. 13 But the Republicans respected the court's independence; their convention unanimously renominated Cooley, and he won the election by a great plurality.

If Cooley and the court were building a reputation by their disregard of partisan feeling between 1865 and 1869, the year 1870 was to see a decision that created greater controversy, that again won the praise of Democrats, and that fully established the court's integrity and independence. This was the case of People v. Salem, and Cooley's decision in this case is of fundamental importance for an understanding of his ideas. Although his opinion has been commented on, it has not been discussed meaningfully, either as to its

10 People v. Dean, 14 Mich. (1866).
11 On Cooley's application of his strong equal rights views to the civil rights of negroes see footnote 72.
12 See the editorial "The Supreme Court Under Ban" in the Ann Arbor paper, The Michigan Argus, March 1, 1867.
13 Michigan Argus, March 19, 1867.
importance in Michigan or for its insights into Cooley's own thought.\textsuperscript{14}

Involved in the case was the problem of public participation in internal improvements, more particularly, public aid to private railroads. The Michigan Constitution of 1850 severely limited state participation in internal improvements; this restriction was the result of the state's and nation's unfortunate experience with such improvements in the 1830's and 1840's. In addition, Jacksonian antipathy to state aid to special interests lay behind Michigan's prohibition as it lay behind similar limitations in other states. But public aid of one kind or another to developing railroad interests attained a new vigor in the 1860's, especially in the years between 1865 and 1873. On the national level railroads were aided by land grant and loan; in the states, resort was made to municipal aid through subscription to stock, purchase of bonds, the loan of credit and outright donation—all financed by taxation. Special laws reciting the "public use and benefit" of railroads enabled local governments to commit public funds, and scores of communities across the nation enthusiastically and speculatively applauded.\textsuperscript{15}

The Michigan legislature passed numerous special acts in 1865 and 1866 allowing local aid to railroads, but in 1866 and 1867 Republican Governor Henry H. Crapo antagonized legislators by vetoing most of these acts as unconstitutional.\textsuperscript{16} The State Constitutional Convention of 1867 framed clauses allowing municipal aid, and the Republican State Central Committee advocated the approval of these clauses. The new constitution was repudiated by the voters in 1868, but in 1869 the legislature passed, with Governor Baldwin's approval, a General Railroad Aid Law authorizing municipalities (under a number of restrictions) to levy taxes for aid to railroad companies.\textsuperscript{17}

By this time the question of railroad aid had become one of the state's chief political issues, and while the question naturally lent itself to local interests and factions, the Democratic party was mov-

\textsuperscript{14} Jacobs, \textit{Law Writers and the Courts} 118, sees Cooley's decision as consciously playing into the hands of minority propertied interests in their opposition to legislative extension of the fiscal powers of government.


\textsuperscript{16} See the editorial "Public Aid to Railroads" in the \textit{Michigan Argus}, February 7, 1868.

ing to issue a challenge to Michigan Republicans by opposing railroad aid of any kind. All this was the background of the Supreme Court's controversial decision in May of 1870 in People v. Salem. Also in the context was the great weight of judicial authority upholding such legislation as constitutional. And to appreciate Cooley's opinion one must keep in mind his Jacksonian past, his distaste for the speculative craze of the postwar years, his resentment of the federal government's subsidies and loans to railroads, and his antipathy to the corruption and special privileges connected with these activities. One must also note what he said in his treatise about taxation for public purposes and what he said about equal rights and partial legislation.

By a special act of the legislature in 1864, the township of Salem had been authorized, along with a number of local governments, to pledge its credit in aid of the Detroit and Howell Railroad. The case arose when the railroad applied for a writ of mandamus to compel the township board to execute and issue its bonds in aid of the railroad. In a twenty-four page opinion Cooley denied the writ and held the special act of 1864 unconstitutional because it violated the maxim that taxation must be for a public purpose. He spelled out his ideas on the power of taxation, and he began by saying that it was conceded that "there are certain limitations upon this power not prescribed in express terms by any constitutional provision, but inherent in the subject itself . . . and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words." Cooley's argument was based on the logic and definition of the word "taxation." By its definition, taxation "must be imposed for a public and not a private purpose." In the case in controversy taxation was not being used for a public purpose:

Primarily . . . the money when raised is to benefit a private corporation; to add to its funds and improve its property; and the benefit to the public is to be secondary and incidental, like that which springs from the building of a gristmill, the estab-

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18 See the decisions reviewed at length in Talcott v. Township of Pine Grove, 1 Flippin 144 (1871). In this case (similar to People v. Salem but involving out-of-state bondholders) Federal Circuit Judge H. E. Emmons repudiated the ruling of People v. Salem and cited ninety-one cases in twenty-six states which he said sustained doctrines overlooked by Cooley. His opinion was specifically directed at Cooley.

19 See Constitutional Limitations, 479-522, 523-571.

20 People v. Salem, 20 Mich. 473 (1870); Cooley upheld the Salem decision in 1871 in People v. State Treasurer, 23 Mich. 499, where significantly, he placed the maxim of no taxation except for a public purpose within the "due process of law" clause of the Michigan Constitution.
lishment of a factory, the opening of a public inn, or from any private enterprise which accommodates a local want and tends to increase local values.\textsuperscript{21}

Cooley admitted that in some respects a railroad was a public highway, particularly because of its use of the power of eminent domain. But while a railroad might be considered public for purposes of regulation, he denied that it was a “public purpose” to be supported by taxation. “An object may be public in one sense and for one purpose, when in a general sense and for other purposes, it would be idle and misleading to apply the same term.” \textsuperscript{22} Railroads in private hands were private property and should be regarded outside the purposes for which taxation existed. That railroads seemed necessary to the public, that they might be regulated by the public, made no difference; many things that were necessary to society—religion, newspapers, and all varieties of businesses and professions—were best left to private enterprise, private liberality, and the laws of supply and demand.

Cooley decided the case against the rule of his treatise that a court should not overrule the legislature in tax matters unless it was “plain and palpable” that the public benefit was in no degree involved.\textsuperscript{23} The prevailing judicial opinion in almost all the states where the matter had come up said quite plainly that railroads could be viewed as public purposes in matters of taxation. That Cooley had no reasonable doubt that it was unconstitutional to aid railroads by taxation was an important comment on his conviction that state power should not be used for private interests and a testimony to the persistence of the equal rights persuasion of his Jacksonian past.\textsuperscript{24} His lack of doubt was a clue to the strength of his political preconceptions—preconceptions evident in his comment on bounty laws. Noting in the counsel’s argument a reference to the common practice of such laws, Cooley said that any law which under the name of bounty furnished funds from public taxes to private parties was void. Not citing any authorities, he continued:

But the discrimination between different classes or occupations, and the favoring of one at the expense of the rest, whether that

\textsuperscript{21} People v. Salem, 20 Mich. 477 (1870). Elsewhere in his opinion Cooley shows that he did not have a narrow range of public purposes for which taxation could be levied. And see his opinion in Attorney General \textit{v. Burrell}, 31 Mich. 25 (1874).

\textsuperscript{22} People \textit{v. Salem}, 20 Mich. 478 (1870).

\textsuperscript{23} See the discussion in his \textit{Constitutional Limitations}, 488-495.

\textsuperscript{24} See the public purpose restrictions he put on the power of eminent domain in \textit{Ryerson \textit{v. Brown}}, 35 Mich. 333 (1877); this case also illustrates Cooley’s historical view of law.
one be farming, or banking, or merchandising, or milling, or printing, or railroading is not legitimate legislation, and is a violation of that equality of right which is a maxim of state government. . . .

Cautioning that the state could have no favorites, and that its business was "to protect the industry of all, and to give all the benefit of equal laws," he warned that once the state entered upon the business of subsidies, it was most likely that the strong and powerful interests were likely to control the legislation, and that "the weaker will be taxed to enhance the profits of the stronger." 25

That the few would use the state against the many: this was Cooley's political theory speaking, his Jeffersonian and Jacksonian fear of special corporate privileges. What Cooley was doing was making a deliberate effort to write his political theory into constitutional law. The year was 1870, a year notorious for the almost universal phenomenon of special interests seeking special privileges from legislatures. Cooley was alarmed at these efforts and in a lecture to law students called them "illegitimate," "unjust," and "corrupt." 26 The depth of his indignation can be measured in his highly personal opinion in the Salem case—an opinion that violated his own canons of construction and that stood apart from every other decision he delivered in its disrespect for the legislative will.

Because the decision contradicted rulings by courts of last resort in at least twenty states, because it came from a judge of high repute, and because it had great implications for current controversies in the nation, the legal profession everywhere noted Cooley's ruling. 27 The decision shocked many, and there is reason to believe that Cooley meant to shock, meant to play a Marshallian role as maker of law, meant the decision to be a political act, rallying sentiment for a review of the national practice of subsidy, grant, aid, and protection to special interests, especially railroads.

The solidly Democratic New York World saw it this way: the paper said that "the whole absurdity of the modern doctrine of internal improvements is laid bare." 28 "Thieves" who used slogans

26 See footnote 3 above.
27 See "Taxation to Build Railroads," 1 Bench and Bar (New Series) 1 (April, 1871); Kent, "Municipal Subscription and Taxation in Aid of Railroads", 9 American Law Register (New Series) 649 (1870); the critical note in 5 American Law Review 126 (1870); and the laudatory comments by Dillon and Redfield in 9 American Law Register (New Series) 487 (1870).
28 Cited in a broad survey of press opinion in the Ann Arbor Penninsular Courier, June 10, 1870.
of "development" and "opening-up" were put in their place, and railroading, like other businesses, was returned to private enterprise; the Michigan decision restored the "old Democratic doctrine," and the paper hoped the Michigan decision would be affirmed by other courts.

Cooley meant to rouse this kind of sentiment, but insofar as he hoped to see his ideas affirmed in other courts he was disappointed. Legal opinion did not follow him, and his was a rather lonely comment against the political and economic spoilsmen, who, at their height in 1870, only slowly began to fade away in the following decades. Yet Cooley's contribution to the growing revulsion against the excesses of the Gilded Age was not without significance, and it is highly ironic that his decision in the case has been interpreted as a defense of special economic interests.

In Michigan the decision in People v. Salem had direct political effects and contributed to a reform movement in the state. Initial reaction to the decision was mixed; some editors heaped abuse on the justices and the "old fogyism" of the opinion; others praised the independence and integrity of the court. Governor Baldwin called a special session of the legislature and asked that something be done about the claims of bondholders, since the decision destroyed seven million dollars worth of bonds, over a million of which had passed into the hands of third parties. Railroad men met in convention to plan their attack; there were cries that the court must be "reconstructed," and there was also evidence that Cooley's statement of the evils of municipal aid to railroads was meeting popular approval.

When the fall election campaign got under way, the Democrats chose the question of railroad aid as the chief state issue, and Democratic success in the election gave new strength to reform elements in the state. A reversal of feeling on railroad aid had occurred, and constitutional amendments to validate the claims of existing bondholders failed of adoption. The case of People v. Salem was behind the switch and behind the reform movements. As the historian of these years of Michigan politics has commented: "It was in all probability the abstract principle of taxation of the public for private gains, as set forth clearly in the decision, which crystallized sentiment and caused the revulsion against the Republican Administration." 31

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29 See the surveys of press comment in the Peninsular Courier, June 10 and June 17, 1870, and in the Hillsdale Standard, June 7, 1870.
In 1872 the Democrats denounced "the class legislation of the Republican Party by which immense private fortunes are being consolidated in the hands of the few to the detriment of the many." 32 Democrats fused with Liberal Republicans, and Cooley was asked to become a candidate for Governor; he also seems to have considered a nomination to Congress by the fused parties. 33 Despite the failure of the reform ticket in 1872, Democrats did gain power in the state in the next few years and gave an unprecedented repulse to the Republicans in 1874. In that year Cooley, along with Justices Christiany and Campbell, was considered as a possible reform candidate for the United States Senate seat held by the "stalwart" leader of the Republican party in Michigan, Zachariah Chandler. 34 Christiany was elected by a vote of sixty Democratic legislators, joined by seven anti-Chandler Republicans, and this was the high point of reform in Michigan politics in the 1870's. One can safely say that the Supreme Court played a prime role in the process of breaking the Republican machine; one can also surmise that Cooley's leadership in these events helped prevent his nomination to the United States Supreme Court. But his outspoken comments on the course of national Republican politics in these years also prevented any consideration from that party; the major effort to secure his nomination to the Court in 1881 impressed lawyers, but not politicians. 35

In strictly judicial matters, the case of People v. Salem did not stand alone as evidence of Cooley's continued Jacksonianism and of his opposition to privileged corporate power. Views of public policy

33 See the letter from O. B. Clark to Cooley on August 4, 1872 and from C. Justin to Cooley on September 6, 1872, in the Cooley papers; also the September 17, 1872 issue of the Michigan Argus and Peninsular Courier on the Liberal Republic-Democratic Congressional Convention.
34 See the letters to Cooley from Henry H. Smith, December 14, 1874 and from Austin Blair, December 18, 1874, in the Cooley Papers.
35 Cooley noted in his Diary on December 16, 1883 that he had several times heard the rumor that Chandler had prevented his appointment to the Court during the Grant Administration; the Cooley Papers in the winter and spring of 1881 have numerous letters from lawyers supporting him for an appointment by either Hayes or Garfield. Stanley Matthews was named, however, and Cooley wrote James Burrill Angell, President of the University of Michigan and a close friend: "It is probable that no name has ever been more strongly endorsed. Mr. Matthews, on the contrary, has lobbied his own way through with the aid of the Central Pacific and some other railroad interests, and secures at last a bare one majority, with nearly all the lawyers of the Senate against him." Cooley to Angell, May 16, 1881, James Burrill Angell Papers, University of Michigan Historical Collections.
similar to those in the railroad aid case were especially evident in his 1869 decision in *East Saginaw Manufacturing Company v. The City of East Saginaw* 30 Here he accepted Taney’s rule on the strict interpretation of charters as contracts and offered some negative comments generally about the “obligations of contracts” clause. The case concerned an 1859 law passed to encourage salt manufacturing; the state offered both a bounty of ten cents for each bushel of salt produced and the exemption of property from taxes. The act had been amended in 1861; a limit was placed on the amount of bounty money that could be paid out, and the tax exemption was restricted to a period of five years. Five years had expired, and to escape taxes on their property the East Saginaw Manufacturing Company asked for an injunction to prevent collection. The company claimed that the exemption act of 1859 was a contract protected as a vested right. A circuit court acting as a court of chancery had granted the injunction and the case was appealed.

Cooley denied the injunction and denied that any vested right had been acquired. The Act of 1859 was not a contract in Cooley’s opinion; it was a mere bounty law, and the promise not to tax was not a perpetual exemption. In a long dictum, significant because it exhibited his fear of railroads and other corporations, Cooley digressed on the evils that would occur if the court viewed the act as a contract. He said that railroads and others would be at work seeking similar promises, and that one would not be a vain alarmist who predicted that special interests would soon have millions of dollars of property forever exempt from taxation. He concluded:

If . . . every careless and every corrupt act of legislation which scheming individuals or powerful interests might secure in their favor were to be instantaneously clothed with the attributes of an irrepealable character by virtue of the Constitution of the United States . . . the question might be presented . . . whether the clause of their national constitution, inhibiting the violation of the obligation of contracts, was not, as expounded and enforced, productive of more evil, injustice, and corruption, than could be reasonably expected from leaving the legislatures of the States as much untrammeled in this particular, as are the legislative bodies of free states generally. 37

This dictum echoed the sentiments of *People v. Salem*, illustrated the constant doubt Cooley had about the *Dartmouth College

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Case, and reflected the impress of older Jacksonian values on his thought. These latter values were especially evident in the years 1868-1871, years close to the date of his Treatise on Constitutional Limitations. Cooley's decisions in the area of contracts offer important evidence that his treatise should be understood as a classic statement of Jacksonian constitutional theory rather than a legal apology for the judicial protection of property rights. His discussion of the relationship between legislatures and contracts easily refutes the charge that he was a defender of corporate capitalism. He spoke directly to this point in the East Saginaw case and also in the 1871 case of Gale v. Kalamazoo, where he took occasion to utter a far-ranging dictum on the inalienability of legislative power. The case dealt with the relation of contracts and public power, and Cooley said that the breach of a contract between a municipality and an individual which had given the latter a monopoly could not be remedied if the municipality chose not to fulfill its obligations. He went on in strong language:

Indeed it is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. These powers are conferred in order to be exercised again and again, as may be found needful or politic, and those that hold them in trust today are vested with no discretion to circumscribe their limits and diminish their efficiency, but must transmit them unimpaired to their successors.38

When it came to denying that these powers could be limited or bargained away, Cooley was more firm than his colleague, Justice Campbell, who dissented from Cooley in the leading case of East Saginaw Manufacturing Co. v. The City of East Saginaw and held the tax exemption clause of 1859 a contract.39

Campbell's difference with Cooley in the area of contracts was but one aspect of their disagreement on constitutional questions. Another significant area of conflict was apparent in cases dealing with the related area of judicial review. In these cases one sees that, contrary to Cooley's reputation as a foremost nineteenth century patron of the judicial protection of property rights, he should be recognized as a judge who was marked by his sense of judicial self-restraint. This belief in limitations to judicial power was ap-

39 See also the conflict of views in Walcott v. the People, 17 Mich. 68 (1868), when Campbell dissented from a Graves opinion which Cooley supported.
parent in his 1868 treatise, especially in his remark that judges could not "run a race of opinion upon points of right, reason, and expediency with the law-making power." 40

A contract case in which Cooley protected chartered rights can introduce his emphasis on judicial self-restraint since his decision here is particularly explicit on the relations between legislative and judicial authority. The controversy arose when the charter of a plank-road company was repealed by the legislature. The charter contained a provision that it should not be repealed unless the company violated some provision of the charter. The legislature repealed the charter without showing cause, and Cooley said that a violation had to be shown and that the question of violation was a judicial question and required a hearing to show cause. The legislature could not repeal until it had been informed of the violation by some judicial authority, and Cooley concluded that repeal without a hearing was an arbitrary exercise of legislative power. He reached his conclusion after a long discussion of matters which were not of judicial cognizance. His argument (which showed far more concern with overruling legislative action than did his decision in People v. Salem) proceeded dialectically. He began by taking exception to authorities which gave the judiciary a right to judge matters of fact as well as of law:

We are unable to understand why this is not a setting of the court above the legislature as an appellate tribunal in matters both of law and fact, which wholly ignores the division of powers in the constitution. . . . It is not consistent with legislative independence and dignity that the courts should assert a right to sit in judgment upon legislative action or to attribute to the legislature erroneous or oppressive conduct in the exercise of its proper legislative functions. 41

Continuing by stressing the "indecorous" and "objectionable" aspects of judicial review of matters of fact, Cooley reached the conclusion that since the legislative authority must be respected in this area, so must the judicial authority be respected in matters of law. This view of the separation of powers, of judicial review, and of the distinction between law and fact was one of the most basic elements in Cooley's constitutional thought.

40 Constitutional Limitations, 178. One reviewer of this section of the book noted: "There is, perhaps, a disposition on the part of the author to lean too much toward the absolute power of the legislative department, and yet his arguments go far toward carrying conviction." 1 Bench and Bar 28 (April, 1869).

In two other cases, *Sutherland v. The Governor* and *Benjamin v. Manistee River Improvement Company*, Cooley repeated his sense of judicial self-restraint and his respect for the principle of the separation of powers. In the first case he showed respect for executive power, and in the second he refused to review the charges fixed by the State Board of Control for running logs in the Manistee River. Anticipating his understanding of the relations between the Interstate Commerce Commission and the courts, he said in the latter case that “over all these matters we have no control because the law has given none, and administrative questions are not in their nature judicial questions.” One would not be wrong in calling Cooley’s conception of judicial review democratic, and this was the view of the late nineteenth century’s most famous spokesman for judicial self-restraint, James Bradley Thayer, who acknowledged his indebtedness to Cooley.

Justice Campbell differed with Cooley on the subject of judicial review as he did on other matters. He dissented from Cooley’s willingness to give a broad discretion to municipal authorities in the apportionment and assessment of taxes for street improvements; he was more willing than Cooley to strike down legislation which supervised the activities on municipal government; in addition he dissented when Cooley refused to enjoin the collection of a tax because of legal irregularities. Cooley in turn dissented from what he thought was a high-handed use of the power of injunction in the 1875 case of *Conrad v. Smith*, anticipating here his opposition in the 1890’s to the beginning phase of “government by injunction.” Campbell agreed with Graves in this case in allowing an injunction to stay proceedings in the laying out of a ditch along a highway; Cooley repeated his belief that the court should not review matters of fact which had been decided by public officers with undoubted jurisdiction and “entitled to the presumption that they acted honestly and according to their best judgment.”

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44 See the references to Cooley in Thayer’s noted article, “The Origin and Scope of the American Doctrine of Constitutional Law,” *7 Harvard Law Review* 129 (1893); also see the letter from Thayer to Cooley, March 24, 1885, Cooley Papers.


Courts neither ought to nor can sit in review of the judgment of highway officers, and the law does not intend that they shall. To stop the improvement of a public highway on the ground of irreparable injury, in a case so doubtful as this, seems to me a dangerous or at least a mischievous assumption of authority.47

The greatest difference between Cooley and Campbell on the question of judicial review occurred in 1884 when the question of the constitutionality of the Michigan Tax Law of 1882 was before the court.48 Cooley upheld the law, and Campbell declared it void. The latter's views bothered Cooley and provoked him to offer his resignation from the bench. In an entry in his diary under the notation, "Leaving the Bench," Cooley remarked that when the Tax Commission consulted him for advice in framing the act, he had told them that Campbell was the person to talk with since it was he "whose notions on constitutional questions were likely to be peculiar." 49 He also noted: "This is not the only case in which I have had occasion to feel hurt by Judge C's. action as a Judge, but it is the most marked case."

The Tax Law of 1882 had been questioned because of the supposedly irregular participation of the State Tax Commission in the legislative debates on the act and because the act allegedly contained provisions setting up improper procedures to determine the validity of tax titles.50 In upholding the act, Cooley dismissed the objection that an unconstitutional delegation of legislative power had occurred when the Tax Commission participated in the debates; his argument was full of dicta on the merits of legislative consultation of experts. He also dismissed the objections to the procedure of determining the validity of tax titles that the act set out—denying that trial by jury was necessary, denying that a chancery court could not try titles to land, and denying that the legislature could not cut off appeal from the decision of the chancery court on questions of the admissibility of evidence. His feelings about Campbell's dissent and about judicial review were evident when he said that while judges had often said that the law-making power was not responsible to the judiciary for the wisdom of its acts, there was reason to believe that the rules were more often laid down than observed on this matter: "There is ground for the belief that statutes have been assaulted by courts on objections that purported to be grounded

49 Diary, July 9, 1884, Cooley Papers.
50 The facts of the case are set out in the arguments of counsel when the case was reheard in Appeal from Wayne, 54 Mich. 417 (1885).
in the constitution, but which, if plainly stated, would resolve themselves into this: that the judges did not like the legislation."  

The court was split evenly on the case, Champlin agreeing with Cooley, Sherwood with Campbell. Cooley was amazed when a circuit judge subsequently threw out the act; an appeal from the latter’s ruling came before the court in April, 1885, and the court again split the same way as before. By this time Cooley’s feelings had grown bitter, as the following comment reveals:

Personally I have little care how this case shall be decided, but it seems to me that on constitutional questions the court is drifting to this position: that those statutes are constitutional which suit us, and that those are void which do not. My own views of the proper distinctions between legislative and judicial authority do not permit my concurring.  

This comment is crucial to an understanding of Cooley’s views on judicial self-restraint. It is related to his denial that the Tax Law of 1882 violated “due process of law,” a denial which raises the general question of Cooley’s views on this important topic. Cooley has been given credit for far-ranging views on the matter of due process; historians have said his 1868 treatise contained a substantive definition of due process and that this definition was arrived at to bring the courts to the protection of property rights against legislative encroachment. Neither Cooley’s treatise nor his court opinions support this judgment.

His longest discussion of the “due process of law” clause of the Michigan Constitution occurred in the 1874 case of Weimar v. Bunbury. Here he held that a statute authorizing summary process against delinquent tax collectors did not violate “due process of law.” He made special note of the fact the due process did not necessarily mean judicial process:

There is nothing in these words, however, that necessarily implies that due process of law must be judicial process. Much of  

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52 Appeal from Wayne, 54 Mich. 446 (1885).
54 Weimar v. Bunbury, 30 Mich. 203 (1874); Cooley had used the due process clause in declaring public tax aid to private railroads unconstitutional in People v. State Treasurer, 23 Mich. 499 (1871); and in People v. The Common Council of Detroit, 28 Mich. 228 (1873), he used the clause in a significant way by declaring that the clause applied to such artificial persons as municipal and business corporations.
the process by which government is carried on and the order of society maintained is purely executive or administrative.\textsuperscript{55}

Cooley's standard of due process was the same in \textit{Weimar v. Bunbury} that it had been in his 1868 treatise. Principles existing before a constitution was written and the benefit of which it was assumed the constitution intended to perpetuate interpreted the language of the constitution. More particularly, the established principles of the common law lay behind the bills of rights of American constitutions and gave them their meaning. And Cooley's common-law historicism told him that in the past all process had not been judicial process:

\textquote{Nothing previously in use, regarded as necessary in government, and sanctioned by usage can be looked upon as condemned by it. Administrative process of the customary sort is as much due process of law as judicial process. \ldots We should meet a great many unexpected and very serious embarrassments in government if this were otherwise. \ldots To require that the action of the government in every instance where it touches the right of the individual citizen shall be preceded by a judicial order or sentence after a hearing, would be to give the judiciary a supremacy in the state and seriously to impair and impede the efficiency of executive action.}\textsuperscript{56}

These are very important lines for an understanding of Cooley's constitutional ideas. They show his sense of history and of common law, his respect for the coordinate branches of government, and the self-restraint of his idea of judicial power. He also spoke here to what was to become a crucial aspect of later due process adjudication. All that he said was consistent with his belief that courts should judge law, not fact, and with his view that judges should not run a "race of opinion upon points of right, reason, and expediency with the law-making power." What he said was consistent with his view of the relation of judge and juries in determining negligence in tort cases, and squares with his opinion as Chairman of the Interstate Commerce Commission that courts could not use the doctrine of due process to interfere with administrative findings and deci-

\textsuperscript{55} \textit{Weimar v. Bunbury}, 30 Mich. 203, 211 (1874).

\textsuperscript{56} \textit{Weimar v. Bunbury}, 30 Mich. 203, 214 (1874). Compare the definition in his treatise at 356: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."
sions on the reasonableness of rates.\textsuperscript{57} Cooley's respect for administrative process was qualified, perhaps, by his common-law historicism, but he always believed that legal history had ample precedent for processes that were not judicial. Those commentators who try to make Cooley a defender of judicial supremacy and judicial superiority in the process of government simply misunderstand him.

On the basis of what has been said so far it can be concluded that Cooley's constitutional decisions intimate democratic views. His view of the judicial function, his treatment of taxation for a public purpose, and his decisions dealing with the obligations of contracts all reveal Jacksonian and Jeffersonian presuppositions. These presuppositions help explain the continuing differences with Justice Campbell on constitutional questions, and help explain what Cooley meant when he thought Campbell's constitutional notions were "peculiar." This conclusion is supported by Cooley's decisions and Campbell's dissents in several other areas—notably in cases dealing with local self-government, with the freedom of the press, and with public education.

Cooley's decisions in cases dealing with municipal government show both the intensity of his Jeffersonian belief in the virtue of local self-government and of his Jeffersonian belief in judicial self-restraint. The resulting ambiguity on these matters is best expressed in his decision in the 1871 case, \textit{People v. Hurlbut}.\textsuperscript{58} In this case the court was asked to issue a writ of \textit{quo warranto} to remove sewer and water commissioners in Detroit after the passage of a statute which created a Board of Public Works whose members were given the function of these commissioners. Cooley agreed to the writ and upheld the constitutionality of the statute.

His opinion was notable for the efforts he made to follow the canon of construction which said that constitutionality must be presumed wherever possible. Campbell did not follow this reasoning and held that the statute must fall. Cooley saved the act, although he modified and qualified the meaning of legislative language in several respects to insure the maintenance of local self-government in Detroit. He took particular exception to the possibility that the statute meant to allow the legislature to make permanent appointments to the Board of Public Works. The Michigan Constitution said that the officers of cities and villages "shall be elected or ap-


\textsuperscript{58} \textit{People v. Hurlbut}, 24 Mich. 44 (1871).
pointed as the legislature may direct.” 60 To Cooley, this clause had the implicit meaning (drawn from established usage) that officers should be elected or appointed only by local citizens or their representatives. He arrived at this conclusion by an historical essay on the vital tradition of local self-government. His argument revealed the value he placed on this Jeffersonian tradition, and it is also important as evidence of his belief that the established traditions of history interpreted constitutional clauses. Like the principle of taxation for a public purpose, the principle of local self-government was one of the implied restrictions on government contained within the definition of constitutionalism; Cooley said that the Michigan constitution had been framed with this restriction in view and that one would fall into the grossest absurdities if he undertook “to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations.” 60

Cooley's Jeffersonian faith in the principle of local self-government was evident in other cases, especially in the 1873 case of People v. The Common Council of Detroit, where he gave a strong opinion on the established principle of local control of local taxation. 61 But unlike Campbell, Cooley always hesitated to strike down statutes which infringed local rights. This hesitancy was again evident in Cooley's opinion in an 1874 case of People v. The Common Council of Detroit. This case concerned a statute which created a Board of Public Works and gave it quasi-legislative powers. Not believing that there was a clear invasion of local rights at issue, Cooley admitted that the boundaries between state and municipal power were indistinct and that “more than the usual force should be allowed to the legislative judgment as to what is proper and admissible in the particular case.” 62 No established principle applied here, and Cooley showed great respect for the legislative judgment—more than did Campbell, who dissented.

In cases dealing with the freedom of the press, Cooley again gave evidence of the democratic assumptions of his youth and repeated the judgments of his 1868 treatise. Once again Cooley and Campbell had sharply differing views. These were most apparent in the 1881 case, Atkinson v. The Detroit Free Press Co. Atkinson was a lawyer for a member of the Detroit Board of Trade who had been involved in fraudulent activity and who had left town. The Free Press discussed the fraud and Atkinson's relationship to his client. The court, Campbell writing the opinion, found the paper

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60 People v. Hurlbut, 24 Mich. 98 (1871).
61 People v. Common Council of Detroit, 28 Mich. 228 (1873).
guilty of libel. Cooley dissented; he considered the Board of Trade a public institution, and he said that to expose fraud in that institution was to perform a public duty and that the exposure was entitled to be privileged. The dissent was full of interesting dicta—on the public nature of the Board, on the importance of having such an institution honorable and trustworthy and free from suspicion of fraud, and on the comparative valuation of private reputation and public information. Pointing out the implications of Campbell's denial of privilege, Cooley gave a strong plea for liberty of the press:

If such a discussion of a matter of public interest were *prima facie* an unlawful act, and the author were obliged to justify every statement by evidence of its literal truth, the liberty of public discussion would be unworthy of being named a privilege of value. It would be better to restore the censorship of a despotism than to assume to give a liberty which can only be accepted under a responsibility that is always threatening and may at any time be ruinous. . . . It is a plausible suggestion that strict rules of responsibility are essential to the protection of reputation; but it is most deceptive, for every man of common discernment who observes what is taking place around him and what influences control public opinion, cannot fail to know that reputation is best protected when the press is free.\(^{63}\)

These were basic views for Cooley; their roots were in his older experience as a journalistic advocate of mid-century reform. And Cooley carried the Court with him a year after the Atkinson case in his important decision in *Miner v. The Detroit Post and Tribune*. Here Cooley upheld the privileged character of press criticism of a judge who ordered a man confined without a charge and who set excessive bail. Cooley said the judge's actions touched on important guaranties of constitutional freedom and were "matters of public concern."\(^{64}\) Campbell again dissented; he protested: "Character is as sacred as property and everyone is entitled to its protection under the law as a fundamental legal right." John Logan Chipman, a prominent Michigan Democrat, wrote Cooley in reference to the *Miner* decision: " Permit me to compliment you with all my heart on what I believe to be a great legal advance."\(^{65}\) And Cooley could say with pride in another libel case: "No court has gone further than has this in upholding the privileges of the press, and very few so far."\(^{66}\)

One final area, that of education, can conclude the discussion

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\(^{64}\) *Miner v. The Detroit Post and Tribune*, 49 Mich. 338 (1882).

\(^{65}\) Chipman to Cooley, November 2, 1882, Cooley Papers.

of the continuing democratic views of Cooley on questions of public policy. In *Stuart v. School District No. 1 of Kalamazoo*, he gave an opinion in the field of public education which was of national importance in the growth of tax-supported high schools. In the old interests of his youth lay behind his decision; it repeated his 1851 hope in free education available to all classes, a hope he expressed thusly: "The interest, the safety, the glory of the state demands that she furnish the means of instruction to all, and especially that in her institutions of learning, the distinction of wealth shall be broken down, and they shall thus become the schools of a true democracy." The purpose of the suit in the Kalamazoo case in 1874 was to get a judicial determination of the right of school authorities to levy taxes upon the general public for the support of free high schools offering, without restriction, an advanced curriculum including foreign language study. The Michigan Constitution of 1850 said that the legislature, within five years, should "provide for and establish a system of primary schools, whereby a school shall be kept without charge for tuition, at least three months in each year." Cooley said that this clause could sanction high schools teaching Latin. His decision gave a powerful historical review of the ideal of public education that had prevailed in Michigan when the constitution was written. Praising the vision of John D. Pierce, the mid-century reformer important in the development of public education in Michigan and a delegate at the 1850 Constitutional Convention, Cooley quoted Pierce's statement in the Convention that the object of common schools was "to furnish good instruction in all the elementary and common branches of knowledge, for all classes of the community, as good indeed, for the poorest boys of the state as the rich man can furnish for his children with all his wealth." Cooley also cited Pierce's reply to the demand that the English language alone be taught in the schools: "He would not adopt any provision by which any knowledge be excluded." The clause on education had been passed without restrictions in 1850, and Cooley saw none in 1874.

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67 *Stuart v. School District No. 1 of Kalamazoo*, 30 Mich. 69 (1874); on the important influence of this decision see Cubberly, *Public Education in the United States: A Study and Interpretation Of American Educational History* 198-99 (1919).

68 This is from an 1851 speech of Cooley's, entitled "The Next Half-Century". A long excerpt is printed in the Adrian *Michigan Expositor*, April 8, 1851 and gives a good summary of Cooley's mid-century reform ideas.

69 Michigan Constitution (1850), Art. XIII, sec. 4.

Cooley gave another important opinion in the area of education in the 1869 case of People v. The Board of Education of Detroit. And the case is of central significance because of its connection to the issue of equal civil rights for negroes. The General School Law of Michigan had been amended in 1867, and a new clause was added which said that all residents within any school district were to be eligible for admission to the schools in the district so long as this did not interfere with the grading of schools according to the intellectual level of students. Despite special legislation pertaining to the Detroit school district, where schools had been segregated by race, Cooley held that the Law of 1867 applied to Detroit and that the new clause placed colored children on the same footing with white children.\textsuperscript{71} He granted a writ of mandamus ordering the school board to accept a negro boy who had been refused admittance to a white school solely on account of race. Since negro schools were only elementary schools, the boy had also been deprived of the right to an advanced education. Campbell dissented in this opinion also; he said that special legislation governing education in Detroit already existed and that only the local school board or the legislature had the authority to overrule a policy of segregation which had existed for almost thirty years. Cooley intimated that the court could have intervened even without the new clause in the General School Law; one can only surmise what he meant, but it is possible that he meant that the "due process of law" clause of the Michigan Constitution protected the boy's right to equal educational opportunity. In 1873 he discussed the meaning of the word liberty as it was used in the due process clause of the Fourteenth Amendment and said that it meant "freedom of speech, the freedom of religious worship, the right to self defense against unlawful violence, the right to buy and sell as other men, and the right in the public schools (italics added)."\textsuperscript{72} Here, as in his 1869 decision, Cooley's belief in the old democratic doctrine of equal rights had implications for the civil rights of negroes.

In these education cases Cooley maintained the old hopes of his youth, just as he maintained in other opinions older views on the virtue of local self-government and older fears that legislatures could too easily violate the maxim of equal rights by special class legis-

\textsuperscript{71} People v. Board of Education of Detroit, 18 Mich. 400 (1869).

\textsuperscript{72} Cooley's discussion is in a special chapter on the Fourteenth Amendment which he added to his edition of Joseph Story, Commentaries on the Constitution of the United States 668-69 (1873). See his comment (689-690) on the Fifteenth Amendment: "The last amendment crowns the edifice of national liberty. Freedom is no longer sectional or partial. There are no longer privileged classes."
lation for privileged interests. He similarly held to his older belief in the necessity of full and free discussion of all questions of public policy. Above all, his canons of construction show him to have been as much concerned, if not more concerned, with unbridled judicial authority as with unbridled legislative authority.

Almost all of Cooley's constitutional decisions have been noted; key controversies, especially where differences with Campbell sharpened the issues, have been emphasized. It should be apparent that the judgment of Cooley as a single-minded patron of property rights is repudiated by his decisions on the Michigan court. His influence on the law of Michigan lay in quite another direction, one that can be called democratic in the historical sense of that word as it had meaning in the Jeffersonian-Jacksonian political tradition. Cooley's sense of history and of the common law merged with his democratic assumptions and gave his thought an ambiguous and a conservative cast. But in the rapidly changing America of the post Civil War decades, the effort to maintain Jacksonian values required a certain conservative bias. In those decades Cooley looked back nostalgically to a simpler America. Yet his persistent democratic values and his historical sensitivity to the inevitability of change allowed him to balance his conservatism with continued hope for the future. He summed up that hope in an 1884 address entitled “The Lawyer's Duty to the State”:

The State, as a political organism, is for the time, in a measure committed to our charge for conservation, and if need be, renovation. The State is not for us to live upon, prey upon, grow wealthy and great upon, but it is to be passed along tenderly and lovingly, and the better for the handling. Some persons are perpetually looking back for all that is pure and good, and the past with them is always the golden age; it is ever better and more patriotic, its women fairer and more noble. There is a weakness about this which is pitiable because it leads to inertness, to deficiency of public spirit, to loss of hope and trust. The golden age should always be in the future, because in the order of Providence we are put here to make the future better than the past.73

The mixture of conservatism and forward looking hope in this statement, like the combination of common-law tradition and continued democratic impulse which is evident in Cooley's constitutional decisions, gave his thought in the post-Civil War decades its particular quality. That there was a tense ambiguity involved is evi-

dent. But if compelled to make a judgment, one must say that his constitutional decisions offer evidence for considering him not as a conservative advocate for the judicial protection of property rights, but as a democrat anxious to conserve the equal rights traditions of his Jacksonian past. Nostalgia was present but did not prevent his acknowledgment of the inevitability of change. On the Michigan Court, in the classroom, in scores of lectures and articles, and as Chairman of the Interstate Commerce Commission, he strenuously sought to maintain earlier democratic values and transmit them to a changing and improving future. His 1889 advice to the North Dakota Constitutional Convention on the relation of constitutional questions to these matters illustrates both the continuity of the democratic hopes of his youth and the degree to which he changed his earlier estimate of legislation as a device which favored the privileges of the few over the rights of the many to an understanding of legislation as the means to maintain the rights of the many against the privileges of the few:

In your constitution-making remember that times change, that men change, that new things are invented, new devices, new schemes, new plans, new uses of corporate power. And that thing is going to go on hereafter for all time, and if that period should ever come, which we speak of as the millenium, I still expect that the same thing will continue to go on there, and even in the millenium people will be studying ways whereby—by means of corporate powers—they can circumvent their neighbors. Don't in your constitution-making legislate too much. In your constitution you are tying the hands of people. Don't do that to any such extent as to prevent the legislative power hereafter from meeting all evils that may be within the reach of proper legislation.74

This is the essential Cooley, the Cooley that deserves to be remembered.

74 Bismarck Tribune, July 18, 1889 (clipping in Cooley Scrapbook, Cooley Papers).