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The Jurisprudence of Thomas M. Cooley:
Why One of the Most Important Jurists of the
Nineteenth Century Still Matters

By Angus Kirk McClellan

Claremont Graduate University
2020

Approval of the Dissertation Committee

This dissertation has been duly read, reviewed, and critiqued by the Committee listed below, which hereby approves the manuscript of Angus Kirk McClellan as fulfilling the scope and quality requirements for meriting the degree of Doctor of Philosophy in Political Science.

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Abstract

The Jurisprudence of Thomas M. Cooley: Why One of the Most Important Jurists of the

Nineteenth Century Still Matters

By Angus Kirk McClellan

Claremont Graduate University: 2020

The purpose of this dissertation is twofold: to examine and critique key elements of the jurisprudence of the late 19th-century judge and treatise writer Thomas M. Cooley; second, to determine the extent to which his work can be applied to modern legal debates. The conclusions of this study are that Cooley was legally oriented in his jurisprudence and dedicated to upholding the American constitutions and the common law as it had been adopted in the states. Further, those written constitutions and other principles of law are still relevant and applicable, and so jurists and scholars should consider Cooley's perspectives in their legal debates and scholarly work. Indeed, Cooley was once recognized as the most important legal commentator on American constitutional law, second only perhaps to Supreme Court Justice Joseph Story, and yet today he is largely forgotten. Cooley's position as a legal authority diminished decades after his death, either coincidentally or causally around the time a handful of scholars produced flawed and superficial studies on the jurist, casting him as either an ideologue or politician whose work deserved little attention. Later scholars largely deferred to these studies. This dissertation demonstrates how those attacks were largely speculative and contrary to clear textual evidence. The most criticized aspects of Cooley's thought were the topics of the chapters of the study: retrospective civil legislation and vested rights; the broad protections of the due process clauses; the public purpose requirement for taxing and spending laws; and constitutional interpretation

and constitutional change. His positions were based on judicial precedents, authoritative treatises, legal history, constitutional text, and the common law as adopted in the states, not political preferences or economic ideology. The final chapter demonstrates how some of his views and principles can be applied to retrospective civil legislation cases; the definition of “tax” as reviewed in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012); and the basis and extent of the president’s power to remove principal officers from independent agencies in *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. ____ (2020).

Dedication

This dissertation is dedicated to my late father, Dr. James Paul McClellan, a true thinker and scholar of American constitutional law whose example I have tried to follow.

Acknowledgements

I would like to thank my friends, family, professors, the Rumsfeld Foundation, and the University of Michigan's Bentley Historical Library for their support and encouragement during the writing of this study. My wife, Annie, deserves a special thanks for all of her work, encouragement, and patience. It would have been far more difficult or even impossible without her help. Also, I would like to thank my mother, Parker, Darby, and the Wells family for helping to look after our daughter, Eleanor, while Annie and I worked. I would like to thank the late Dr. Michael Uhlmann, my primary constitutional law professor at Claremont Graduate University, who died before he was able to see this final project. I would also like to thank the chairman of my dissertation committee, Dr. Ralph Rossum, who trusted me to explore this topic freely, as well as the other members Drs. Charles Kesler and Jean Schroedel. I want to thank the Rumsfeld Foundation and Bentley Historical Library for their financial support. The staff at the library was particularly helpful in providing me with access to Cooley's personal papers and those of his colleagues and others at the University of Michigan.

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Introduction

Michigan Supreme Court Judge Thomas M. Cooley was a common law constitutionalist. He was once recognized as the most important legal commentator on American constitutional law, second only perhaps to Joseph Story. In 1926 Rodney Mott wrote one of the most comprehensive and important treatises on due process, and as he put it, “In many respects, he did for constitutional thought in the United States what Coke had done in England two centuries before. The importance of his writings can hardly be over-emphasized.”¹ Even his critics recognized his influence on constitutional law. Almost every scholar who has written on Cooley noted that for decades, his most famous book *Constitutional Limitations* was the most cited authority in all of state and federal case law. Edward Corwin wrote it was “the most influential treatise ever published on American constitutional law.”² In many cases both plaintiffs and defendants relied on Cooley for their arguments. His work reached into some of the most important and enduring issues in constitutional law that remain subjects of legal and political debates to this day: federalism; separation of powers; limited government; eminent domain; limits of taxation; the due process clauses; constitutional change and judicial review, just to name a few. Reading Cooley, one immediately recognizes how his work could have direct relevance to ongoing legal and political debates. So why is Cooley largely forgotten?

¹ Mott, Rodney. 1973 [1926 Reprint]. *Due Process of Law: A Historical and Analytical Treatise of the Principles and Methods Followed by Courts in the Application of the Concept of the “Law of the Land.”* Da Capo Press. p. 184

² Corwin, Edward S. 1948. *Liberty Against Government: The Rise, Flowering and Decline of a Famous Juridical Concept*. Baton Rouge: Louisiana State Univ. Press. p. 18

For the past 100 years, academic revisionists along with their deferential or unwitting acolytes have pummeled his reputation into near obscurity. Most if not all scholars simply decided to apply psychological or behavioral speculations to Cooley's motivations and legal thought. This approach has ultimately undermined the legitimacy of his legal positions—he has been portrayed as little more than a politician, moralist, or economist masquerading as a jurist. These assessments run counter to much of the earliest literature on Cooley, but even those early scholars neglected to analyze Cooley's legal and constitutional positions with much depth. This study will drill into Cooley's most criticized areas of legal thought to demonstrate their soundness, to rely upon text alone rather than speculative claims, all of which will help to restore Cooley's good name and illustrate how jurists and scholars could benefit from his insights into the American constitutional order.

Despite ten decades of assault, 20th- and 21st-century progressive scholars had some difficulty attacking the heart of Cooley's jurisprudence. Typically they painted him with this or that political or ideological coating, claiming his ideas were rooted in ideology or politics rather than the laws and constitutions. Almost all of those rebukes were superficial. So often they claimed to have explained his legal thought not by the words he wrote or by the works he cited, but rather by where he lived, or by how he was raised, or by his political affiliations from his youth. Since the 1920s, the primary areas of attack on Cooley's 19th-century legal thought were his positions on vested rights, retrospective legislation, the due process clauses, and limits of taxation, among many others. More often than not, such attacks were cursory dismissals rather than exhaustive studies. Overall, Cooley emphasized constitutional and common law principles that limited the power of legislatures, while his progressive counterparts tended to argue in favor

of virtually omnipotent representative assemblies that could annihilate rights to property at will, redistribute wealth, and ignore separation of powers to instead operate on a basis of majority preference. Cooley argued for limited government based on constitutions. Whether purposeful or not, these critics had to cabin Cooley as something other than a champion of the law to destroy his reputation as a pinnacle of legal integrity, to undermine constitutional restraints, and to encourage the rise of progressivism. In denigrating Cooley from the ranks of legal authorities, on the whole they were successful.

Ultimately the critics have not reached a consensus on Cooley because they have failed to recognize the core of his constitutional thought: there is no allowance for arbitrary government under the American constitutions, and the law must always serve a public purpose. In other words, the rule of law and the purpose of the constitutions guided his legal thought, and there was almost always a clause or principle that guided, restricted, or empowered the agents of the American constitutions. He was neither a strict constructionist nor a living constitutionalist, as scholars variously claimed, but rather he sought a reasonable understanding of written words. He was no ideological individualist, as some suggested: he assured his readers that the government could annihilate individual rights entirely, but only as long as it was for a public purpose and in accordance with established rules. Nor was he collectivist or progressive as other scholars argued—he devoted chapters to emphasizing the sanctity of private property rights that later were relegated to second-tier constitutional protection. Nor was he political or ideological in his legal reasoning, as so many claimed. He emphasized repeatedly that any extraconstitutional philosophies or principles carried no weight in legal decisionmaking. It was the constitutions themselves, their implications, legal definitions, judicial precedents, and the English common

law, as the states universally and explicitly adopted it, which indeed were legitimate sources of principles for answering legal and constitutional questions. It is remarkable that seemingly every modern scholar of the past 100 years, with perhaps one or two exceptions, declared that Cooley's thought was *really* based on something other than what he emphasized repeatedly for 30 years.

Scholars reached no consensus on Cooley for at least three reasons: first, among the results-oriented progressives, they failed to examine his work with any real depth and instead deferred to earlier critics who themselves leveled speculative, behavioral, or psychology-based attacks while largely neglecting his legal work; second, they latched onto one or two of Cooley's principles and then claimed they embodied the essence of his legal thought; third, because they failed to acknowledge a simple observation: The American constitution itself, in its most comprehensive sense, is neither conservative nor liberal exclusively, but rather it established both areas of permanence and spheres for change. Cooley was devoted to the American constitutions in his legal thought, and so he fell outside of narrow, simple classifications. Further, behind the clauses of the state and federal constitutions and common law maxims lie time-tested *legal* rules and maxims that are often analogous to various, and sometimes opposing, ideological, economic, moral, social, or political positions. It was an adherence to the meaning of those constitutional clauses and their legal principles—not the ideologies or politics that mirrored them—that scholars should recognize as Cooley's deepest conviction.

Cooley did not start his career as a jurist, but from the beginning he was devoted to his studies and livelihood. He was born January 6, 1824, the son of yeoman farmer in western New York, and by the age of 18 was known as one of the “the most advanced scholar[s] for his age,”

according to the principal of his secondary school.³ This reputation as an assiduous scholar remained with him beyond his life, with some speculating that his unremitting devotion to his work contributed to his death on September 12, 1898. His father and uncle were both Democrats, the latter running for Congress in 1842. He studied law briefly in New York before moving to Adrian, Michigan, in 1843, and then passed the bar in 1846. In addition to his law practice he produced political writings, edited Democratic literature, and was active in politics, helping to organize a branch of the Free Soil Party in southeastern Michigan.⁴ He had an early affection for Jeffersonian and Jacksonian political principles. But then he joined the Republican Party in the mid-1850s. Around the time he turned thirty years old, however, Cooley shifted in his interests toward the study of the history, law, and Anglo-American constitutionalism, and with it he abandoned the political activism of his youth.⁵ In 1857 he was appointed by the state legislature to compile the statutes of Michigan; in 1858 he was appointed as the reporter for the Michigan supreme court; in 1859 he became one of the first of three professors of the law department at the University of Michigan, later serving as dean. In 1864, he was elected to the Michigan supreme court, serving until 1885, intermittently as chief justice (the position rotated according to law). In 1887, President Grover Cleveland appointed him as the first chairman of the Interstate Commerce Commission. He died in 1898, writing and editing until the end of his life.⁶

³ Jones, Alan. 1960. *The Constitutional Conservatism of Thomas McIntyre Cooley*. Garland Publishing, Inc. New York & London. p. 8-9

⁴ Jones, Alan. 1967. "Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration." 53 *The Journal of American History* 4 (March 1967). p. 753

⁵ Jones, "Thomas M. Cooley and 'Laissez-Faire Constitutionalism'" p. 757

⁶ Katzenberger, George A. 1896. "A Brief Outline of the Life and Works of Judge Cooley." 5 *Michigan Law Journal* 12.

His most recognized work was *Constitutional Limitations*, the first legal treatise to study systematically the state constitutions comprehensively and from the perspective of constitutional principles.⁷ Primarily he relied on state judicial decisions, as well as Anglo-American treatises, legal dictionaries, and historical events to demonstrate the common elements in those documents. In the first edition alone he cited some 2,700 cases. It reached its eighth and final edition in 1927. Cooley's aim was to provide jurists and students with an understanding of constitutional principles generally, with particular attention paid to an examination of the constitutional limitations that rested upon the power of the state legislatures. Topics included construction and interpretation of state constitutions, conditions required for judicial review, the extent, limits, and principles of eminent domain, police powers, and taxation, as well as principles protecting the rights to security, liberty, and property, among many others. Although Cooley consolidated the state constitutions in terms of many principles, he also recognized the diversity of state constitutions and the spheres of sovereignty that allowed state governments to develop their own particular law. Often he would state a general rule and then present exceptions to or divergences from that rule, but regardless, he was the first to bring significant order to the dozens of multifaceted American state constitutions. He wrote *The General Principles of Constitutional Law*,⁸ a work similar to *Constitutional Limitations* but focused instead on principles underlying the the federal Constitution. His two other treatises were *A Treatise on the Law of Taxation*⁹ and

⁷ Cooley, Thomas McIntyre. 1868. *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*. Little, Brown & Co.

⁸ Cooley, Thomas M. 1880. *The General Principles of Constitutional Law in the United States of America*. Boston: Little, Brown, and Company.

⁹ Cooley, Thomas M. 1876. *A Treatise on the Law of Taxation: Including the Law of Local Assessments*. Chicago: Callaghan and Company.

*A Treatise on the Law of Torts*¹⁰. These similarly relied heavily upon case law, treatises, legal dictionaries, and legal history. He also wrote a book on the history of the government of Michigan.¹¹ He produced dozens of articles and speeches on topics ranging from the implications of the Louisiana Purchase¹² to the constitutional consequences of the people's general "abnegation of self-government."¹³ He also edited an edition of Blackstone's *Commentaries on the Laws of England*, demonstrating its application to American law, as well as the 4th Edition of Joseph Story's *Commentaries on the Constitution*. He wrote most of this while teaching as a professor of law at the University of Michigan and simultaneously serving as a justice on the Michigan supreme court. According to one law student's count, during his time on the bench, Cooley produced 1,473 majority opinions, 70 concurring opinions, and 39 dissenting opinions for a total of some 5,274 pages of judicial writings from 1865 to 1885.¹⁴ Later he continued writing articles and speeches while serving as chairman of the Interstate Commerce Commission.

¹⁰ Cooley, Thomas M. 1879. *A Treatise on the Law of Torts: Or the Wrongs Which Arise Independent of Contract*. Chicago: Callaghan and Company.

¹¹ Cooley, Thomas M. 1885. *Michigan: A History of Governments*. American Commonwealths. Boston: Houghton, Mifflin.

¹² Cooley, Thomas M. 1887. "Acquisition of Louisiana." An Address Delivered Before the Indiana Historical Society. February 16, 1887. Bowen-Merrill Co.

¹³ Cooley, Thomas. 1883. "The Abnegation of Self-Government." *Princeton Rev.* 12 (1883).

¹⁴ Haughey, David O. "Statistical Study of the Cases Decided in the Michigan Supreme Court During the Time of Judge Cooley, 1865-1885." Michigan Law School, Ann Arbor, Michigan. August 19, 1947. See Bentley Historical Library, University of Michigan. Lewis G. Vander Velde Papers 1855-1975, 1933-1968. Call Number 86174 Aa 2 UAm. Box 5. §3, p. 6. (unpublished)

His output was universally recognized as extraordinary.¹⁵

¹⁵ *Articles and speeches included but are not limited to:* Cooley, Thomas M. “Address on the Dedication of the Law Lecture Hall to the Students in the Department of Law.” Ann Arbor, Michigan: Elihu R. Pond. (1863); Cooley, Thomas M. 1871. “Of the Right to Waive a Tort and Sue in Assumpsit.” *Albany Law Journal* 3 (1871); Cooley, Thomas M. 1875. “The Guarantee of Order and Republican Government in the States.” *International Review* 2 (1875); Cooley, Thomas M. 1876. “Incidental Injuries from Exercise of Lawful Rights.” *Southern Law Review* 2 (1876); Cooley, Thomas M. 1876. “Extradition.” *International Review* 3 (1876); Cooley, Thomas M. 1876. “The Cases in Which the Master Is Liable for Injuries to Servants in His Employ.” *Southern Law Review* 2 (1876); Cooley, Thomas M. 1877. “New Aspects of the Right to Trial by Jury.” 11 *American Law Review* 705 (1877); Cooley, Thomas M. 1877. “The New Federal Administration.” *International Law Review* 4 (1877); Cooley, Thomas M. 1877. “Liability of Public Officers to Private Actions for Neglect of Official Duty.” *Southern Law Review* 3 (1877); Cooley, Thomas M. 1877. “Effect of a Change in the Law Upon Rights of Actions and Defences.” *Southern Law Review* 3 (1877); Cooley, Thomas M. 1878. “Principles That Should Govern in the Framing of Tax Laws.” *Southern Law Review* 4 (1878); Cooley, Thomas M. 1878. “Liability of Public Officers to Private Actions for Neglect of Official Duty.” 3 *Southern Law Review* 531 (1878); Cooley, Thomas M. 1878. “Changes in the Balance of Governmental Power: An Address to the Law Students of Michigan University.” March 20, 1878. Ann Arbor: Douglas & Co. (1878); Cooley, Thomas M., Hewitt, A.S. 1878. “The Method of Electing the President.” *International Review* 5 (1878); Cooley, Thomas M. 1878. “Limits to State Control of Private Business.” *Princeton Review* 1 (1878); Cooley, Thomas M. “The Lawyer’s Duty to be Faithful to His Own Manhood. Closing Address to the Law Students of Michigan University. March 21, 1878. Ann Arbor: Douglas & Co. (1878); Cooley, Thomas M. 1879. “The Surrender of Fugitives from Justice.” *Princeton Review* 3 (1879); Cooley, Thomas M. 1880. “Confinement of the Insane.” *Southern Law Review* 6 (1880); Cooley, Thomas M. 1881. “Title to Lands Under Fresh Water Lakes and Ponds.” *Central Law Journal* 13 (1881); Cooley, Thomas M. 1881. “The Limits to Legislative Power in the Passage of Curative Laws.” *Central Law Journal* 12 (1881); Cooley, Thomas M.; Trumble, L.; Butler, B.F.; Dwight, T.W. 1881. “Presidential Inability.” *North American Review* 133 (1881); Cooley, Thomas M. 1881. “The Recording Laws of the United States.” Annual Report of the American Bar Association 4 (1881); Cooley, Thomas M. 1881. “Remedies of Illegal Taxation.” *American Law Register* 29 (1881); Cooley, Thomas M. 1882. “School Boards: Their Duties and Responsibilities.” A Paper Read Before the Michigan State Teachers’ Association. Lansing, Mich.: W.S. George & Co., State Printers and Binders (1882); Cooley, Thomas M. 1883. “State Regulation of Corporate Profits.” *North American Review* 137 (1883); Cooley, Thomas M. 1883. “The Remedies for the Collection of Judgments Against Debtors Who Are Residents or Property Holders in Another State, or Within the British Dominions.” *American Law Register* 31 (1883); Cooley, Thomas M. 1884. “Labor and Capital Before the Law.” *North American Review* 139 (1884); Cooley, Thomas. 1884. “Popular and Legal Views of Traffic Pooling.” *Railway Review*. (1884); Cooley, Thomas M. 1886. “Arbitration in Labor Disputes.” 1 *Forum* 308 (1886); Cooley, Thomas. 1886. “Codification.” *American Law Review* XX (May-June 1886); Cooley, Thomas M. 1886. “The Influence of Habits of Thought Upon Our Institutions.” Second Annual Address Delivered Before the South Carolina Bar Association. (December 2, 1886); Cooley, Thomas M. 1888. “The Uncertainty of the Law.” 22 *American Law Review* 347 (1888); Cooley, Thomas M. 1889. “Comparative Merits of Written and Prescriptive Constitutions.” 2 *Harvard Law Review* 8 (1889); Cooley, Thomas M. 1889. “The Interstate Commerce Act.” Address at the Dinner of the Boston Merchant’s Association (January 8, 1889); Cooley, Thomas M. 1889. “The Place of the Federal Court in the American Constitutional System: A Lecture Delivered Before the Political Science Association of the University of Michigan.” New York and London: G.P. Putnam’s Sons (1889); Cooley, Thomas. 1889. “The Constitution of the Empire of Japan.” Addressed to Students of Political Science in the Johns Hopkins University. (April 17, 1889); *continued in n. 16 ...*

The purpose of this dissertation was twofold: first, to directly challenge the motley assortment of schools on Cooley's thought to finally present Cooley as he understood himself: as a principled jurist and commentator who relied on the law, not his personal preferences or some supposed *zeitgeist* or other motivation, to direct his jurisprudence. Delving into three or four of Cooley's most criticized and questioned areas of legal thought helped to demonstrate how Cooley's positions were legally sound. This cleared the path for the second purpose: to illustrate how Cooley's thought is directly applicable to ongoing legal issues and debates, particularly in the state and federal courts. Scholars have disparaged or otherwise blatantly misrepresented Cooley and so deprived others of his insights, which may well account for the overall marked decline in references to his work in the courts and literature.¹⁷ Ultimately this study is a starting point for future studies on Cooleen thought and how it could be revived and applied to legal thinking and encourage a firmer adherence to the meanings of the American constitutions.

Chapter 1 was an extensive literature review. The considerable length was necessary because of the many schools of thought and varied assertions directed toward Cooley's work. Countering broad, often unsubstantiated positions required extensive review of his treatises, articles, and opinions to gather the evidence needed to counter such an assortment of claims.

¹⁶ ... *cont. from n. 15*: Cooley, Thomas M. 1892. "Sovereignty in the United States." 1 *Michigan Law Journal* 81 (1892); Cooley, Thomas M. 1893. "The Power to Amend the Federal Constitution." 2 *Mich. Law Journal*. 109 (1893); Cooley, Thomas M. 1893. "The Administration of Justice in the United States of America in Civil Cases." 2 *Mich. Law Journal*. 341 (1893); Cooley, Thomas M. 1894. "The Year in Its Constitutional Aspects: The Lawyer as a Teacher and Leader." *American Law Review* 641 (1894); Cooley, Thomas M. 1894. "The Fundamentals of American Liberty." 3 *Michigan Law Journal* 149 (1894); Cooley, Thomas M. 1894. "Address of the President." *Annual Report of the American Bar Association* 17 (1894).

¹⁷ See Appendix

Cooley's original reputation was that of principled, impartial jurist devoted to the law. Any personal or political biases were either minimal or otherwise played no role in his legal decisions. By the 1920s, this reputation waned in light of attacks from Charles Grove Haines, who appears to have initiated the modern disparagement against Cooley. He cast him as a natural law jurist who played a major role in the ideological continuum toward *laissez-faire* constitutionalism. In the late 1930s some scholars emphasized his supposed *laissez-faire* preferences as the ideological cornerstone of his jurisprudence. Then in the 1960s, Alan Jones shifted the perception of Cooley significantly by presenting him as a Jacksonian who harnessed common law principles and maxims to justify his own political preferences in his legal arguments. Finally, a number of more recent scholars have cast Cooley as a legal realist in the image of Benjamin Cardozo or Oliver Wendell Holmes. Throughout all of the literature, scholars have variously determined Cooley was a strict constructionist, a "higher law" constitutionalist, a judicial pragmatist, a formalist, a realist, a social Darwinist, a conservative, a liberal, a political ideologue, a Federalist, a Jeffersonian, or some combination thereof. Some claimed he based his decisions on extraconstitutional principles he created out of thin air. To others he embodied the principle of devotion to the static words of the American constitutions. And still others concluded he was a full-blooded historicist who believed the constitutions should be regularly reassessed according to the latest public opinions. Most of these claims were unfounded or speculative, as Chapter 1 will demonstrate.

Chapter 2 covered Cooley's position on vested rights and retroactive civil legislation, a common target of attack in much of the literature. At the heart of the chapter was Cooley's understanding of how separation of powers and positive affirmations of rights in constitutions

and statutes created implied limitations on American legislatures. Just as the state and federal legislatures were prohibited from passing *ex post facto* laws of a criminal nature, similarly they were prohibited from passing *ex post facto* laws of a civil nature. Critics often claimed the notion of “vested rights” was a misty, moral claim without any actual legal or constitutional support, whereas Cooley emphasized that such rights had to have been legally conferred to be protected from unlawful legislative extirpation. Generally, only the judiciary could apply the law retroactively, and positive vestments of rights implied restrictions on legislative power to divest those rights outside of established rules. As with all of the chapters examining these legal principles, this chapter relied extensively on examining Cooley’s citations, references within those citations, as well as other material beyond Cooley’s own work to verify his positions.

Chapter 3 examined one of Cooley’s most frequently attacked positions: that the due process clauses of the state and federal constitutions recognized procedural and substantive limitations on all branches of government. Typically critics claimed Cooley invented this understanding to provide courts with a vehicle for imposing their personal senses of morality or justice on otherwise legitimate legislative action. But as Cooley wrote, the due process clauses were simply redundancies that required all government to obey the constitutions. Those constitutions contained explicit protections for certain rights. In other words, there was no room anywhere for any branch of American government to act outside of established law. The due process or “law of the land” clauses simply re-emphasized that life, liberty, and property—understood according to common law maxims and principles as they had been adopted in constitutions and statutes—shall not be extinguished by any agent of government acting outside of established procedures. Cooley relied on English treatises and Anglo-American case law to

support this position, and other early American state case law was examined to determine whether Cooley was correct.

Chapter 4 was focused on another of Cooley's most bombarded legal positions: that taxing and spending must be directed toward a public purpose, and when a legislature blatantly violates this principle, then courts could strike down such laws to protect the right to people's property in money. This chapter was particularly important because it considered Cooley's most prominent judicial opinion in *People v. Salem*.¹⁸ Most scholars criticizing Cooley latched onto this opinion as evidence of his bias, but as a close examination of that opinion and subsequent opinions demonstrated, such attacks were unfounded. Cooley's principles of taxation were firmly rooted in constitutions, English common law as codified in those constitutions, as well as early state case law, not ideological preferences for *laissez-faire* economics or Jacksonian politics.

Chapter 5 covered Cooley's understanding of constitutional meaning and constitutional change. It was a broader view of Cooley's general jurisprudence. It relied on his articles more heavily than other chapters. It described at length Cooley's understanding of the American "constitution" in its most comprehensive sense, and in doing so helped to explain why the vast majority of Cooley scholars misunderstood him. He repeatedly wrote that the meanings of written constitutions remained fixed until changed through the amendment processes. They were to be interpreted according to standard Blackstonian methods, which emphasized the requirement of judges to seek the intent of the lawmakers. He also wrote that unwritten constitutions, by contrast, found in the habits, customs, and practices of the people, were fluid and could adapt to changing circumstances. Here the chapter also explored Cooley's understanding of the role of

¹⁸ *People ex rel. Detroit & H.R. Co. v. Township of Salem*, 20 Mich. 452 (1870)

popular influence on government. In legislation and in judicial decisions not bound by written constitutions or statutes, the people indeed can and should influence such judicial opinions or legislation, according to rules and principles; but in other circumstances, such as when judges were interpreting written constitutions or statutes, popular influence would be a revolutionary overthrow of the American constitutional order. Some critics tended to conflate the two spheres of written and unwritten constitutional jurisprudence to cast Cooley as some sort of a loose constructionist, but this chapter demonstrated how he applied different rules and principles to the different branches of American constitutions. Ultimately Cooley's jurisprudence was strictly legal, but certain areas of the common law itself could be fluid.

Chapter 6 shifted to applying Cooley's thought to modern legal issues. Jurists today could rely on Cooley's insights into the American constitutions to support their own legal arguments. The three selected areas of modern constitutional law were: vested rights and separation of powers; principles of taxation; and the removal power of the president. Cooley's understanding of the first issue was considered and applied broadly to ongoing litigation. Some jurists rely on the due process clauses to protect vested rights, but jurists could turn to Cooley's positions on vested rights and separation of powers to avoid criticisms tied to economic substantive due process arguments. Next, the chapter examined how one could apply Cooley's principles of taxation to the *Sebelius* case,¹⁹ in which the Supreme Court held that the "penalty" levied against individuals lacking healthcare coverage according to the Affordable Care Act was in fact a legitimate "tax." The judges failed to identify principles of taxation, and they could have used Cooley to understand the issue more thoroughly or even bolster their opinions. Finally, Cooley's

¹⁹ *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)

thought was applied to the recent Supreme Court decisions *Seila Law*.²⁰ This case considered primarily the extent of the president's power to remove principal executive officers in independent agencies who had been appointed with the advice and consent of the Senate. One can rely on Cooley's thought in this case, even though he did not examine the issue with nearly as much depth as others. This section also considered Cooley's thought on separation of powers and independent agencies generally.

Jurists today continue to rely on Coke, Blackstone, Marshall, Story, and Kent in their legal and constitutional arguments. They should return Cooley to his rightful place by their side in the pantheon of American constitutional authorities. As his fellow jurists and scholars in the 19th century recognized, Cooley was no ideologue or politician. His deep scholarship into the origins, purposes, and principles of Anglo-American constitutional law raised him far above the vast majority of his contemporaries and certainly beyond the superficiality of modern critics. Either such antagonists never understood Cooley as he understood himself, or they purposefully misrepresented his work for their own ideological or political goals. Regardless of their interpretations, Cooley's work remains, and the modern scholar or jurist would profit from a reliance on his insights.

²⁰ *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U. S. ____ (2020)

Chapter 1: Cooley and His Critics: A Literature Review

The purpose of this chapter is to demonstrate a gap in the study of Thomas M. Cooley: no scholar examined with significant depth many of the key, often-cited legal principles of Cooley from his own legal perspective. Generally these scholars summarized Cooley's legal or constitutional principles and then demonstrated how they were similar to this or that political party or ideological strain of thought. Those who indeed examined his work from a legal perspective typically made psychological speculations on his motivations or underlying ideology, dismissing the soundness of his constitutional principles. In their investigations into Cooley's most important work, *Constitutional Limitations*,²¹ almost all of them completely ignored the cited judicial precedents, and within them, the common law roots and principles, upon which the vast majority of the book was based. Since the 1920s, almost universally scholars have assumed his legal principles were actually political or ideological despite Cooley's repeated and emphatic words to the contrary. This study, by contrast, will take Cooley at his word in an attempt to understand Cooley as he understood himself: as a principled jurist whose positions were rooted in the English and American constitutions.

Virtually all of the modern scholarship on Cooley falls into one of two categories: Cooley was a natural law jurist tied to *laissez-faire* capitalism or was a defender of corporate privilege who established the foundation for the *Lochner* Era's liberty of contract doctrine. This school is

²¹ Cooley, Thomas McIntyre. 1868. *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*. Little, Brown & Co.

rooted in the work of Charles Grove Haines.²² Second, Cooley was a common law Jacksonian, so to speak, whose political support for equal rights and equal opportunity was the underlying basis of his jurisprudence. This assessment is rooted in the work of Alan Jones.²³ A handful of scholars in the past few years have cast Cooley as a legal realist in the image of Benjamin Cardozo or Oliver Wendell Holmes. All of these schools are ultimately one and the same, however, because they assume Cooley allowed extraconstitutional elements to guide his jurisprudence. If one examines the literature dating back into the late 19th and early 20th centuries, much of which remains unpublished in the University of Michigan archives,²⁴ one finds that ultimately there are two broader schools of thought on Cooley: (A) Cooley was strictly legal and relied only on constitutions and neutral, accepted legal principles when drawing his conclusions, up to and including a recognition of common law, natural law, or natural rights that had been constitutionalized within the federal and state documents. This was Cooley as he was originally understood. (B) Second, Cooley sought political or economic ends, and he relied on extraconstitutional theories, political ideology, economic principles, or otherwise arbitrarily turned to extraconstitutional justifications when drawing legal conclusions. This is the revisionist school. Almost all of the modern scholars lie somewhere in school (B), and it appears all scholars except the new realists defer to some degree to Haines, Jones, or their acolytes.²⁵

²² Haines, Charles Grove. 1930. *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with Special Reference to the Development of Certain Phases of American Constitutional Law*. Harvard Studies in Jurisprudence, Vol. IV. Cambridge, Mass: Harvard University Press.

²³ Jones, Alan R. 1987 [1960 dissertation]. *The Constitutional Conservatism of Thomas McIntyre Cooley : A Study in the History of Ideas*. American Legal and Constitutional History. New York: Garland.

²⁴ Bentley Historical Library, Ann Arbor, Michigan.

²⁵ See Appendix for analysis

Most broadly the common target was Cooley's doctrine of implied limitations on legislatures. Judges often cited Cooley's understanding of these implied limits to protect "vested rights," and critics routinely charged that Cooley and others had created both the limits and rights out of thin air to impose their will on democratic legislatures. In general, scholars typically attacked Cooley's implied limitations based on separation of powers; his support for vested rights; his expansive understanding of the due process or "law of the land" clauses; and his position that a "public purpose" was required for taxation and government expenditures, among other similar restraints on legislatures. The general problem with these critics is they looked at Cooley's legal or constitutional principles, often superficially, found correlative principles in politics, philosophy, or ideology, and then claimed he was driven by whatever political, philosophical, or ideological strain resembled his legal position. Their great error was that they were looking for a politician or an economic ideologue rather than trying to understand the jurist. Few if any investigated Cooley's legal arguments independently. Clyde Jacobs and Paul Carrington may be exceptions, but their research was limited in scope, and still they relied on Haines or Jones to couch Cooley within broader legal or political movements. The bias of Cooley was taken for granted. So far there has been little drilling into Cooley's actual citations in his treatises, articles, and judicial opinions, at least absent of any such fundamental assumptions.

To map this chapter broadly, scholars have variously considered Cooley to be a legal jurist of school (A), or they have fallen into school (B) wherein Cooley was portrayed as a natural law jurist, a *laissez-faire* constitutionalist, a Burkean-Jacksonian hybrid, a Jacksonian-Progressive, or an outright judicial realist. Each will be examined in turn.

Cooley's Preface

Before examining the schools and sub-schools, a particular piece of supposed evidence in Cooley's work requires some brief attention. Authors from group (B) presented as Cooley's self-admitted bias a passage from his preface in *Constitutional Limitations*. At least ten authors who cited page iv claimed it illustrated or at least strongly suggested Cooley's overt willingness to inject his own theories into constitutional law. It appears that perhaps only Jones and Carrington dismissed the claims.²⁶ Haines was the first to argue it demonstrated overt bias.²⁷ Here it is in its entirety:

In these pages the author has faithfully endeavored to state the law as it has been settled by the authorities, rather than to present his own views. At the same time he will not attempt to deny—what will probably be sufficiently apparent—that he has written in full sympathy with all those restraints which the caution of the fathers has imposed upon the

²⁶ Carrington, Paul. (1997). "The Constitutional Law Scholarship of Thomas M. Cooley," 41 Am. J. Legal Hist. 368. (1997). p. 374. Jones, Alan R. 1987 [1960 dissertation]. *The Constitutional Conservatism of Thomas McIntyre Cooley : A Study in the History of Ideas*. American Legal and Constitutional History. New York: Garland. p. 138

²⁷ Lewis, William Draper, ed. 1907. *Great American Lawyers: The Lives and Influence of Judges and Lawyers Who Have Acquired Permanent National Reputation, and Have Developed the Jurisprudence of the United States: A History of the Legal Profession in America*. "Thomas McIntyre Cooley," by Harry Burns Hutchins. Philadelphia: John C. Winston Company. p. 474. Hutchins's citation and comment is ambiguous: he wrote the book was "safely conservative but at the same time abundantly suggestive." ; Haines, *The Revival of Natural Law Concepts*. p. 116 n. 4; Twiss, Benjamin Rollins, and Edward S. Corwin. 1942. *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court*. Princeton: Princeton University Press. p. 18; Corwin, *Liberty Against Government*. p. 117; Paschal, Joel Francis. 1951. *Mr. Justice Sutherland : A Man against the State*. Princeton, N.J.: Princeton University Press. p. 18; Jacobs, Clyde Edward, and University of California Press. 1954. *Law Writers and the Courts : The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon Upon American Constitutional Law*. Berkeley: University of California Press. p. 30; Fine, Sidney. 1956. *Laissez Faire and the General-Welfare State: A Study of Conflict in American Thought, 1865-1901*. University of Michigan Publications. History and Political Science, V. 22. Ann Arbor: University of Michigan Press. p. 142; Jones, *The Constitutional Conservatism of Thomas McIntyre Cooley*. p. 137; Paul, Arnold M. 1960. *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895*. Ithaca, N.Y: Published for the American Historical Association by Cornell University Press. p. 12; Gillman, Howard. 1993. *The Constitution Besieged : The Rise and Demise of Lochner Era Police Powers Jurisprudence*. Durham: Duke University Press. p. 56; Olender, Robert Allan. 2014. "From Commonwealth to Constitutional Limitations : Thomas Cooley's Michigan, 1805-1886." Dissertation, Producer not identified. University of Michigan Law School. p. 351.

exercise of the powers of government, and with greater faith in the checks and balances of our republican system, and in correct conclusions by the general public sentiment, than in a judicious, prudent, and just exercise of unbridled authority by any one man or body of men, whether sitting as a legislature or as a court. In this sympathy and faith he has written of jury trial and other safeguards to personal liberty, of liberty of the press, and of vested rights; and he has also endeavored to point out that there are on all sides definite limitations which circumscribe the legislative authority, aside from the specific restrictions which the people impose by their constitutions. But while he has not been predisposed to discover in any part of our system the rightful existence of any power created by the Constitution, and by that instrument made unlimited save its own discretion, neither, on the other hand, has he designed to advance new doctrines, or to do more than to state clearly and with reasonable conciseness the principles to be deduced from the judicial decisions. Those decisions he has made reference to and in many cases quoted from; not, however, deeming it important to cumber his pages with many references to the English reports on those points on which the American authorities were sufficiently numerous and uniform to be fairly regarded as having settled the law for this country. And trusting that fair criticism may discover in his work sufficient of practical utility to justify its publication, he submits it to the judgment of an enlightened and generous profession.²⁸

Claiming evidence of his bias, the authors typically pointed to these clauses: "... At the same time he will not attempt to deny—what will probably be sufficiently apparent—that he has

²⁸ Cooley, *Constitutional Limitations*. p. iv.

written in full sympathy with all those restraints which the caution of the fathers has imposed upon the exercise of the powers of government ...” Further, “[T]hat there are on all sides definite limitations which circumscribe the legislative authority, aside from the specific restrictions which the people impose by their constitutions.” Haines determined this was evidence that Cooley “aimed to give greater scope to the term ‘law of the land,’” Corwin deferred to Twiss and claimed Cooley “frankly avowed his intention of pushing certain views of his own as opportunity might offer,” and so on.

Here are the often-ignored clauses in the preface one could cite as evidence Cooley believed he sought impartiality: “... the author has faithfully endeavored to state the law as it has been settled by the authorities, rather than to present his own views”; “... neither, on the other hand, has he designed to advance new doctrines, or to do more than to state clearly and with reasonable conciseness the principles to be deduced from the judicial decisions.” Carrington wrote, “He was therefore affirming nothing more than that he accepted the premise of *Marbury v. Madison*, that government and its officers are bound by the law.” Jones wrote “the demurrer can be accepted as true, that he had not ‘desired to advance any new doctrines’ ...”²⁹

This author’s interpretation of this preface is that Cooley was simply pointing out that he agreed with the constitutional “authorities” or otherwise the “fathers” of the Anglo-American constitutions in terms of the limitations they saw fit to impose on government. Perhaps that approval was based on some personal ethic, or perhaps it was based on legal or philosophical reasons. Regardless, pointing out that he sympathized with others failed to indicate bias. He could have been totally unsympathetic with their legal principles or conclusions yet still gone on

²⁹ *Supra* n. 27

“to state the law as it has been settled by the authorities.” When he wrote there are implied limitations on legislatures, he was referring to the implied limitations found within constitutions themselves or rooted in constitutional law or the common law as adopted by the states, as he subsequently described at length in the book. His limitations were based on expressly protected individual rights, jurisdictional limitations housed in separation of powers clauses, and the common law as the states explicitly adopted it in their constitutions and reception statutes, among other legally grounded sources for his jurisprudence.

The statements from the preface standing alone did not indicate bias. They simply reflected his agreement with legal conclusions. They were not admissions that he was about to dump his own extraconstitutional theories into his legal doctrine or that he was relying on extraconstitutional justifications for his positions. He wrote concretely and without ambiguity that he was *not* biased. He wrote other statements one could cite to make a chain of inferences to conclude that *perhaps* he was biased. Almost all of the authors simply quoted the statements, claimed he was biased, and then moved on without recognizing his other points. In general, scholars seem to have wanted to claim Cooley was everything except what he claimed himself to be—an impartial jurist relying on existing laws, precedents, and principles.

The Legal and Constitutional Cooley

In 1898 former attorney general of Michigan Otto Kirchner, by then a University of Michigan professor, wrote an article for *The Inlander*, a student literary magazine.³⁰ In it he assessed perhaps two of Cooley’s most often-cited judicial opinions in *People v. Salem*³¹ and *People v.*

³⁰ Kirchner, Otto. *The Inlander*. 1898. “Thomas M. Cooley.” Vol. 9 (1898) p. 54-58. *See full typescript article at Bentley Historical Library, University of Michigan. Lewis G. VanderVelde Papers 1855-1975, 1933-1968. Call No. 86174 Aa 2 UAm. Box 5.*

³¹ *People v. Salem*, 20 Mich. 452 (1870)

Blodgett.³² Many Cooley scholars have presented his *Salem* and *Blodgett* opinions as evidence of his ideological or political bias, but Kirchner thought otherwise. In *Salem*, the law in question authorized local municipalities to levy taxes to aid in the construction of privately owned railroads, a common practice in many states at the time. Instead of simply following other states' practice, Cooley "disposed of it on principle." He held taxing people for the benefit of a private party is not taxation, but rather is an unconstitutional "confiscation," as Kirchner recounted. Tax revenue by definition had to be spent for public purposes only. Otherwise, the legislature would be empowered to "plunder" one set of private citizens for the direct benefit of another. "[T]he opinion of Judge Cooley is characterized by independence of thought, clearness of mental vision, and the vindication of the ethical aspects of the controversy, by legal judgment." Still, although superficially supporting Cooley as a legalist, Kirchner's assessment of Cooley lacked rigorous analysis of the constitutional principles and court opinions underpinning his conclusions. From where and how exactly did Cooley determine legislatures could lay taxes only for "public purposes"? What was the justification for courts imposing this requirement?

In *Blodgett*, the Michigan legislature had passed a law allowing deployed soldiers to vote in local elections, even though the state constitution required electors to be present in their respective townships ten days preceding any election.³³ The absent soldiers were overwhelmingly Republican, and had Cooley upheld the law he would have helped to support his

³² *People v. Blodgett*, 13 Mich. 127 (1865)

³³ Constitution of Michigan 1850, Article VII, Sect. 1:

In all elections, every male citizen, every male inhabitant ... shall be an elector and entitled to vote; but no citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he ... has resided in this State three months, and in the township or ward in which he offers to vote, ten days next preceding such election.

own political party.³⁴ But the court, led by Cooley, struck it down. As Kirchner concluded, “The manner of its disposition forever silenced all doubts of the freedom of the court from partisanship or political bias.”³⁵ This conclusion appears obvious, but some scholars such as Carrington argued that this decision was just another example of Cooley’s political calculations.

Eight years before Cooley’s death, his successor at Michigan Law School, Professor Henry Wade Rogers, wrote an article on him for inclusion in *Distinguished American Lawyers*.³⁶ He also wrote an unpublished biography on Cooley from 1902 to 1905.³⁷ In *Distinguished American Lawyers* he offered repeated praise of Cooley’s legal thought and judicial opinions. In the latter he wrote an entire chapter detailing Cooley’s political affiliations and preferences from the 1840s until his death, and there was no hint in his writings that Cooley was anything but legal in his judicial reasoning. From the time he assumed the bench, Rogers wrote, “[N]otwithstanding he was comparatively a young man and had just taken his seat upon the bench he was already a great judge, a masterful interpreter of the constitution, and that he possessed a clear insight into fundamental principles, that he had a judicial mind of a high order and that independence without which no man can be a great jurist.”³⁸ Further, “His judicial opinions are distinguished by vigor

³⁴ Cooley had defected from the Democratic Party sometime in the late 1850s likely on the slavery issue; state judges ran in partisan elections in Michigan.

³⁵ Bentley Historical Library, University of Michigan. Henry Wade Rogers papers 1873-1920. Call No. 852211 Aa 2. Box 1. Folder “Judge of the Michigan Supreme Court.” p. 6-7. *See also* Kirchner, Otto. *The Inlander*. 1898. “Thomas M. Cooley.” Vol. 9 (1898) p. 54-58. *See full typescript article at* Bentley Historical Library, University of Michigan. Lewis G. VanderVelde Papers 1855-1975, 1933-1968. Call No. 86174 Aa 2 UAm. Box 5.

³⁶ Scott, Henry Wilson, and John James Ingalls. 1891. *Distinguished American Lawyers : With Their Struggles and Triumphs in the Forum*. New York: C.L. Webster. p. 205-234

³⁷ Rogers, Henry Wade. Bentley Historical Library, University of Michigan. Henry Wade Rogers papers 1873-1920. Call No. 852211 Aa 2. Box 1.

³⁸ Rogers, Henry Wade. Bentley Historical Library, University of Michigan. Henry Wade Rogers papers 1873-1920. Call No. 852211 Aa 2. Box 1. Folder “Judge of the Michigan Supreme Court.” p. 6-7

of thought and clearness of expression, as well as for their common sense; they show a clear comprehension of all the law and facts connected with the case. ... [P]erhaps this generation has not seen his superior on the American Bench as a writer of judicial opinions,” he wrote.

Michigan selected judges via partisan elections during this era, and even though Cooley ran as a Republican in 1869, the Democrats seriously considered him for their nomination. The general impression, according to Rogers, was that Cooley was an impartial, legal-minded judge who had Democratic political principles, the latter of which played little or no role in his judicial decisions. Yet it appears there was an early recognition that certain Jacksonian political principles found their parallels in Cooley’s legal principles. He pointed out how “[l]eading Democrats strongly advocated [that he receive the Democratic nomination] upon the floor of the convention. Hon. J.C. Wood, of Jackson, a member of the State Senate, made a speech advocating it in which he declared that Judge Cooley as a jurist was one of the most distinguished of Americans. That he was not in any respect a politician, and if he was such he was at heart much more of a Democrat than a Republican. That in every essential principle Cooley then stood with the Democrats ... There was no question but that Cooley was a good and impartial judge.”³⁹ In 1893 the American Bar Association elected Cooley president, an honor Rogers emphasized was a further demonstration of the legal community’s recognition of Cooley’s legal integrity. “[O]nly its most eminent members are chosen to the presidency of the body,” he wrote.⁴⁰ It would be erroneous to conclude by this statement that Cooley was

³⁹ Rogers, Henry Wade. Bentley Historical Library, University of Michigan. Henry Wade Rogers papers 1873-1920. Call No. 852211 Aa 2. Box 1. Folder “Judge of the Michigan Supreme Court.”

⁴⁰ Rogers, Henry Wade. Bentley Historical Library, University of Michigan. Henry Wade Rogers papers 1873-1920. Call No. 852211 Aa 2. Box 1. Folder “President of the American Bar Association.”

Democratic in his jurisprudence. Jacksonian principles such as equal rights and the rule of law transcend the political and find a firm foundation in accepted American legal doctrine.⁴¹

Rogers also related some anecdotal evidence of Cooley's freedom from personal bias. He quoted a story from Judge Benjamin Graves, who served alongside Cooley from 1868 to 1883. Very early in his tenure Graves prepared an opinion that was read before the court, but the "losing counsel, a gentleman of standing and experience, and not lacking in self-confidence, requested a re-argument and a revision of the opinion," he recalled. "He wished the court to understand and the 'puisne judge' in particular, that the derided opinion was palpably against the law. . . . Judge Cooley, however, instantly remonstrated. He took the matter up and said NO—that he would not consent—that the opinion was quite right, and for one he did not propose to submit to pure captiousness, come from whatever quarter it might. . . . The circumstance was all the more striking in my eyes since it was well known that the dissatisfied counsel was a very close, personal friend of Judge Cooley."⁴²

Rogers' work was largely a general biography rather than a critical analysis of his judicial philosophy, however. He presented some anecdotal evidence that Cooley was at least perceived as being free from political ideology or personal bias in his role as a judge, but it remains unclear whether and to what extent Cooley ever allowed extraconstitutional theories, ideologies, or other influences to weigh on his decisions and legal positions.

⁴¹ Note that President Jackson's veto message, which Carrington claimed was for Cooley "only slightly less sacred than the Declaration of Independence," was actually a constitutional argument, as Jackson pointed out repeatedly, not necessarily a political statement exclusively. See Carrington, P. D. 1998. "Law and Economics in the Creation of Federal Administrative Law: Thomas Cooley, Elder to the Republic." *Iowa Law Review* 83 (2). p. 363

⁴² Rogers, Henry Wade. Bentley Historical Library, University of Michigan. Henry Wade Rogers papers 1873-1920. Call No. 852211 Aa 2. Box 1. Folder "Judge of the Michigan Supreme Court." p. 29-30

In 1907 Harry Burns Hutchins, dean of the Michigan Law School, submitted what appears to be the first scholarly, lengthy article on Cooley for publication in *Great American Lawyers*, a book highlighting influential American jurists.⁴³ He styled Cooley's politics as mild and separate from his legal thought, but he nonetheless suggested a higher sense of justice may have sometimes influenced Cooley's decisions. Commenting on Cooley's legislative appointments in the late 1850s, he noted, "Doubtless political influence had something to do with his appointment, for Judge Cooley was acting with the dominant party [Republican], and was always considerable of a politician, though never an extreme partisan."⁴⁴ Marking a divide between his political and legal thought, he wrote that Cooley "always gave the impression that he was bringing to the consideration of the case his best thought and judgment. No one ever detected in him the slightest tinge of prejudice. He always preserved the judicial attitude." He responded directly to Charles A. Kent's 1899 claim (below) that Cooley's legal thought was skewed by his personal experiences, writing, "These criticisms are probably just, but it may be said, I think, that few men similarly situated have been less influenced by environment and habit than was Judge Cooley."⁴⁵ His general opinion appears to be that Cooley indeed had political and personal opinions—as does every man in such positions—but he consciously set them aside to instead focus on law.

Hutchins praised Cooley and seems to have argued that his application of any sense of higher justice was limited to equity jurisprudence:

⁴³ Lewis, *Great American Lawyers*. p. 431-491

⁴⁴ Lewis, *Great American Lawyers*. p. 442

⁴⁵ Lewis, *Great American Lawyers*. p. 484

*From premise to conclusion his argument is always logical, compact, and definite. ... While precedents were useful to him, they were not his master. ... Yet Judge Cooley's opinions clearly indicate a safe conservatism. ... He recognized fully the difficulties and dangers that inevitably follow a departure from the fundamental principles of our jurisprudence. But notwithstanding his conservatism, it is distinctly apparent in his opinions that his mind was always on the alert to discover the equities of the case. While he would enforce a hard and fast rule of law that was grounded in principle, if the case came squarely within its provisions, yet his sense of justice would not allow this if oppression would follow and there were equities with which he might temper his conclusions.*⁴⁶

Hutchins pointed to Cooley's very first opinion in *Laing v. McKee*⁴⁷ to demonstrate his point, writing that Cooley "refused to allow a case to be governed by the letter of the statute of frauds, the facts clearly indicating that to do so would convert the statute into an instrument of fraud."⁴⁸ Equity jurisprudence was limited by rules and dated back many hundreds of years into English legal history.⁴⁹ It was never considered a license to make legal decisions arbitrarily. The text of the opinion reveals that *Laing* came up to the Michigan supreme court on appeal in chancery—that is, equity—from the Clinton County Circuit. Further, the case itself was a classic example of

⁴⁶ Lewis, *Great American Lawyers*. p. 460-461

⁴⁷ *Laing vs. McKee*, 13 Mich. 124 (1865)

⁴⁸ Lewis, *Great American Lawyers*. p. 461

⁴⁹ McClellan, James. 2000. *Liberty, Order, and Justice : An Introduction to the Constitutional Principles of American Government*. 3rd ed. Indianapolis: Liberty Fund. p. 36-38

the statutorily sanctioned reason within the state constitution whereby courts could make exceptions to the strict letter of the law: fraud.^{50,51}

In that case, a property owner, who had temporarily sold the defendant his property because of delinquent taxes, was legally entitled to redeem his deed by paying the defendant his bid plus a twenty-five percent interest, as long as he paid it before the expiration date of the certificate. The owner tried to pay on time, but the defendant delayed receiving the payment while promising to accept the money after the expiration date. The owner agreed to the temporary delay, but the defendant, instead of accepting the money as promised, took his certificate and obtained the deed to the property from the auditor general after the expiration date. He then refused to sell it back to the original owner. One may argue that Cooley's opinion was erroneous, but his decision fails to demonstrate an arbitrary, extraconstitutional or extralegal application of subjective justice. The man presented evidence he had been swindled, and the law provided for remedies in such cases. Hutchins couched Cooley's sense of higher justice within accepted American equity jurisprudence as protected under statute and constitution.

In 1907, Jerome Knowlton, another professor and dean at Michigan Law School, presented a fairly thorough, lukewarm assessment of Cooley's judicial philosophy, touching on a few of his most often-cited issues in constitutional law: constitutional interpretation and

⁵⁰ Cooley, Thomas. 1857. *The Compiled Laws of The State of Michigan*. Vol. II. Hosmer & Kerr. Title XXI, Chapter LXXXVII §2659: "A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power, might himself lawfully perform." §2709: "Instruments in execution of a power are affected by fraud, both in law and equity, in the same manner as conveyances by owners or Trustees." Note that Cooley himself had compiled the laws of Michigan under an act of the Michigan legislature.

⁵¹ See McDowell, Gary L. 1982. *Equity and the Constitution : The Supreme Court, Equitable Relief, and Public Policy*. Chicago: University of Chicago Press. p. 4. "In particular, equity, which was originally understood as a judicial means of offering relief to individuals from 'hard bargains' in cases of fraud, accident, mistake, or trust, and as a means of confining the operation of 'unjust and partial laws' ..."

construction; judicial review; separation of powers; municipal autonomy from state authority; implied limits of taxation; natural rights and state of nature theories; and class legislation. Later scholars writing on Cooley routinely focused on some of these same issues. Of those cases he examined with some depth, Knowlton largely supported his doctrines as legally or constitutionally justified, but he also suggested his personal background may have had played a subordinate role in his jurisprudence.

He had undiluted praise for Cooley's legal integrity by writing he was "never regarded as a strong advocate on the trial of an issue of fact; his strength was before the court on an issue of law. Here it was that those near him soon observed his ability as a lawyer in the highest sense; one with capacity to interpret the law and apply it wisely to admitted facts."⁵² In praising his method of constitutional interpretation and construction, he wrote that it was "frequently said that Judge Cooley was a strict constructionist of our national constitution." In terms of judicial review, Knowlton quoted Cooley's dissent at length in the *State Tax Cases*⁵³, an opinion which read that laws must stand unless the legislature "fail[s] to observe some express constitutional direction."⁵⁴ Cooley's reluctance to strike down legislative acts was based on his understanding of separation of powers and his great respect for the constitutional authority, independence, and equality of "coordinate departments in government and its necessity to the safety of representative institutions."⁵⁵

⁵² Knowlton, Jerome C. 1907. "Thomas McIntyre Cooley." *Michigan Law Review* 5 (5). p. 312

⁵³ *State Tax-Law Cases* 54 Mich. 350 (1884)

⁵⁴ *State Tax-Law Cases* (1884)

⁵⁵ Knowlton, "Thomas McIntyre Cooley." p. 320

Further, quoting almost a page of Cooley's opinion in *Sutherland*⁵⁶, Knowlton pointed to the judge's views on separation of powers in terms of his refusal to transmit a writ of mandamus to the governor to compel him to issue a certificate of operation to a private corporation, even though the law read the governor was required to do so. Cooley emphasized that it is up to the governor—not the judiciary or legislature—to execute the law in accordance with his constitutional, executive discretion. According to Knowlton he had “no confidence in that distinction between ministerial and discretionary powers of the governor referred to by Chief Justice Marshall” in *Marbury*.⁵⁷ Checks and balances indeed played roles in preventing political or judicial overreach, but as Cooley put it, “[I]n each of these cases the action of the department which controls, modifies, or in any manner influences that of another, is had strictly within its own sphere ... [I]f they are disregarded in any case, and power is usurped or abused, the remedy is by impeachment, and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the constitution is its equal.”⁵⁸

Knowlton suggested Cooley's personal background played a slight role in his legal views supporting local autonomy, private property, and personal liberty, as well as his opposition to class legislation. “He was of New England ancestry,” he wrote, “and came west prejudiced in favor of the town meeting and of local self-government in cities and villages. He recognized the private powers and capacities of a municipality and held that these were beyond legislative dictation.”⁵⁹ Further, granting special licenses to some individuals or corporations and denying

⁵⁶ *John L. Sutherland v. The Governor* 29 Mich. 320 (1874)

⁵⁷ Knowlton, “Thomas McIntyre Cooley.” p. 319

⁵⁸ Knowlton, “Thomas McIntyre Cooley.” p. 319-320

⁵⁹ Knowlton, “Thomas McIntyre Cooley.” p. 320

others the right to pursue normal businesses “were equally objectionable on constitutional grounds, and as against the best interest of society.”⁶⁰ “It is easy to understand how a man, who had, of necessity, lived a life of self reliance, dependent only on individual effort, should guard jealously the rights of property and personal liberty,” Knowlton surmised. Cooley never suggested any of this in his professional work or in his diaries available in the archives. At most this seems to match with Cooley’s preface in *Constitutional Limitations*: his personal affections may have coincided with constitutional principle, but they did not govern his jurisprudence.

The first scholar to analyze Cooley’s understanding of due process or “law of the land” was Rodney Mott, who in 1926 wrote an oft-cited legal treatise on the topic.⁶¹ Paramount to understanding Cooley is considering his interpretation of the due process or analogous “law of the land” clauses of the state and federal constitutions. Almost universally, scholars who claimed Cooley was biased in favor of *laissez-faire* constitutionalism pointed to his broad procedural and substantive understanding of that clause, particularly as he argued it applied to the protection of property rights. As Mott put it, “*Constitutional Limitations* was by far the most important treatise in the entire development of the American idea of due process of law.” Further, “In many respects, he did for constitutional thought in the United States what Coke had done in England two centuries before. The importance of his writings can hardly be over-emphasized.”⁶² Coke is known to have supported the claim that the Magna Charta’s due process or law of the land provision placed procedural and substantive limits on the king and Parliament. Cooley echoed Coke, and in particular he emphasized the substantive protections of personal property under the

⁶⁰ Knowlton, “Thomas McIntyre Cooley.” p. 323

⁶¹ Mott, *Due Process*.

⁶² Mott, *Due Process*. p. 184

clauses found in state constitutions. Cooley, Mott claimed, was the first to produce a legal treatise that explained clearly and with evidence that the due process clauses imposed at least some procedural and substantive limitations on all branches of American governments. His timing could not have been more significant: *Constitutional Limitations* was first published in 1868, the same year as the 14th Amendment. Mott and others pointed out Cooley's work was the most-cited authority in all of state and federal case law for decades.⁶³

Mott and Cooley were largely of like minds. Mott's exhaustive work covered the scope of understandings from its first appearance in Magna Charta up through its application in the American colonies and states. He argued that dating back to the medieval era, the law of the land or due process clause of the Magna Charta imposed both procedural and substantive limitations on both the king and Parliament, and he cited similar evidence for substantive limits on legislatures based on early judicial decisions in the states, among other points.⁶⁴ Mott argued the purely procedural interpretation of due process was the "layman's" interpretation that misguided American jurists for decades, and it was Cooley who led them all "out of the maze in which [they] had been entrapped."⁶⁵ "Cooley was the first to make a thorough analysis of these cases and to correlate the principles upon which they rested. Other writers had received their inspiration from political philosophy or lay discussions, but Cooley went directly to the source of the law." Cooley cited more than 350 cases in his chapter on "law of the land," Mott noted. His

⁶³ See Clark, G.J. 1895. *Life Sketches of Eminent Lawyers*. Kansas City, Mo., Lawyers' International Publishing Co. p. 204. See also Mott, *Due Process*. p. 186; Fine, *Laissez Faire*. p. 142; Aumann, Francis R. 1938. "Some Problems of American Legal Development During the Period of Industrial Growth, 1865-1900." 12 *U. Cinn. L. Rev.* 519 (1938) p. 529; Twiss, *Lawyers and the Constitution*. p. 34. Corwin, *Liberty Against Government*. p. 116.

⁶⁴ Mott, *Due Process*. p. 42-43

⁶⁵ Mott, *Due Process*. p. 184

conclusions were a result of “his careful study of the judicial decisions. ... Cooley took those decisions and made from them a coherent system of legal thought.”⁶⁶

Mott was less enthusiastic about Cooley’s supposed application of the 14th Amendment’s due process clause to limiting the legislatures’ police powers, taxation, and even eminent domain powers based on the public purpose maxim. Cooley had argued that the public purpose maxim limited legislatures’ powers in these areas—each must be done for public purposes, and in some cases the judiciary could step in to strike down legislation. “His thought in this regard was not as clear cut as it was in many other respects,” Mott wrote, “and the organization of the *Constitutional Limitations* does not bring out clearly the close relationship between the limitation and each of these powers.”⁶⁷ Still, Mott wrote that Cooley successfully demonstrated how the public purpose maxim was part of American constitutionalism and agreed upon in terms of class legislation. He just needed more and clearer evidence, Mott implied, to justify the extension of the principle to other areas of legislation.

Since Mott, Cooley’s name has endured decades of disparagement and accusations of political and ideological bias that remain the dominant interpretations to this day. Sporadically, however, scholars who touched on Cooley noted his freedom from such bias or otherwise emphasized his adherence to legal or constitutional doctrine more or less strictly. But such flashes of the old judicial virtue were usually intertwined with claims of bias or loose constructionism. In 1980 Thomas Peebles contrasted the supposed *laissez-faire* Cooley with the

⁶⁶ Mott, *Due Process*. p. 185

⁶⁷ Mott, *Due Process*. p. 186

looser *laissez-faire* jurists by writing he supported “static constitutionalism”⁶⁸ in support of property rights. In 1983 Raoul Berger cited Cooley’s principle that judiciaries cannot void statutes based on natural, social, or political rights abstractly, but must rely upon constitutional guarantees only,⁶⁹ but Berger took a firmly procedural position on the due process clause in opposition to Mott and with which Cooley would have disagreed. In 1990 Stephen Siegel, although writing on Cooley’s supposed historicism as dictated by “the common sense of the people,” noted that for Cooley, any natural law or common law doctrines required sanction under the law, and yet he was “not a legal positivist.”⁷⁰ William LaPiana was more favorable and wrote of Cooley’s reliance on Anglo-American history as a source of enduring constitutional principles that were housed in constitutions, Cooley’s inductive approach to discovering law, and how the “legal theories of thinkers like ... Cooley ... provide the basis for a ‘formalistic’ view of law and judging.”⁷¹ In his 1999 praise of Cooley’s “constitutional vision” of semi-autonomous municipalities, David Barron wrote that scholars who cast Cooley as a Jacksonian sometimes “overreached” and that Cooley “rooted his legal defense of local independence in an interpretation of the state constitution,” and he added that unwritten “constitutional norms” such

⁶⁸ Peebles, Thomas H. 1978. “A Call to High Debate : The Organic Constitution in Its Formative Era, 1890-1920.” *University of Colorado Law Review*, Vol. 52, No. 1 (Fall 1980). p. 71

⁶⁹ Berger, Raoul. 1987. *Selected Writings on the Constitution*. “Insulation of Judicial Usurpation: A Comment on Lawrence Sager’s ‘Court-Stripping’ Polemic.” Cumberland, Va.: James River Press. p. 234n. This is not to suggest that Berger agreed with Cooley on every point. It is important to note that Berger argued strongly against substantive due process as a means for judiciaries to strike down legislation in the book’s “‘Law of the Land’ Reconsidered” chapter. Although he critiqued Mott and reviewed state judicial opinions, he did not mention Cooley. Berger agreed that jurists such as Kent were trying to constitutionalize the doctrine of vested rights by expanding the due process clause to include judicially enforceable substantive restraints on legislatures.

⁷⁰ Siegel, Stephen. 1990. “Historicism in Late Nineteenth-Century Constitutional Thought.” *Wisconsin Law Review*, Vol. 1990, No. 6. p. 1490-1491, 1494, 1498

⁷¹ LaPiana, William P. (1992) “Jurisprudence and History and Truth.” 23 *Rutgers L.J.* 519 (Spring 1992). p. 557

as “equality of freedom” and government neutrality found within constitutions also grounded his jurisprudence.⁷² But Barron still favored Jones’s assessment that Cooley was Jacksonian.

Cooley the Natural Law Jurist

Professor Charles A. Kent joined the Michigan Law School faculty in 1868. He succeeded Cooley as dean of the law school in 1883 and died in 1917. Upon Cooley’s death in 1898 he wrote and presented a memorial address on campus in his honor, but with a mixed assessment.⁷³ He considered Cooley “one of the most distinguished, perhaps the most distinguished, of American jurists.” He noted that despite participating in politics in the 1840s and 1850s, “[H]e was never an extreme partisan. He never believed in high protective duties. He always exercised the liberty of voting for men of the opposite party, whenever he thought the public good required their election.”⁷⁴

Commenting on the Michigan Supreme Court, however, Kent wrote that “[S]ometimes, in their eagerness to do what seemed just in a particular case, the judges [of the Michigan Supreme Court at that time, including Cooley] may have forgotten that their chief business is not to make the law, but to declare it, as they found it in the statutes and previous decisions.”⁷⁵ Also, despite apparent praise for *Constitutional Limitations*, writing of its place as “a work of the highest authority,” he offered another slight. “To construe a constitution is to interpret its exact

⁷² Barron, David J. 1999. “The Promise of Cooley’s City: Traces of Local Constitutionalism.” *University of Pennsylvania Law Review* 147 (3) p. 511-513

⁷³ Kent, Charles A. Bentley Historical Library, University of Michigan. Law School University of Michigan publications 1859-2017. Call No. 9784 Bimu C61 2. Box 1. “Memorial Discourses: Address on Thomas McIntyre Cooley, by Charles A. Kent, A.M.; Address on Edward Lorraine Walter, by Richard Hudson, A.M.” 1899.

⁷⁴ Kent, “Memorial Discourses: Address on Thomas McIntyre Cooley.” p. 9

⁷⁵ Kent, “Memorial Discourses: Address on Thomas McIntyre Cooley.” p. 13

words,” he wrote, so Cooley’s attempt to consolidate all of the distinctive state constitutions in his famous tome “had the disadvantage that sometimes a principle is stated which it is hard to deduce from the words of any constitution.”⁷⁶ He also claimed that Cooley’s personal life—such as his position as a judge rather than a lawyer—skewed his legal thought.⁷⁷ Still, he wrote, “The great merit of Judge Cooley as a writer of legal text books, is that he states with accuracy and brevity the principles found in a multitude of cases, and cites the authorities which support his text. He seldom undertakes to give conclusions not found in the decisions. In this he was wise.”⁷⁸

Charles Grove Haines is particularly important because he laid the foundation for many modern perceptions of Cooley. He was a professor of political science at the University of California, and he was a particularly vociferous antagonist toward *Lochner* era jurisprudence. Working closely with Charles Beard, he appears to have been opposed to judicial review or what he considered “judicial supremacy” in general.⁷⁹ He opposed the free market, supported administrative regulation of the economy, and supported a European model of special judicial enforcement of agency rules.⁸⁰ He attacked Mott, Cooley, and Edward Coke, among others whom he considered natural law jurists, just four years after the publication of Mott’s *Due*

⁷⁶ Kent, “Memorial Discourses: Address on Thomas McIntyre Cooley.” p. 15

⁷⁷ Kent, “Memorial Discourses: Address on Thomas McIntyre Cooley.” p. 25. “He had, perhaps, too much confidence in the power of argument. He made an able address before the Georgia State Bar Association, seeking to show, contrary to the common opinion, the certainty of the law. If he had spent his life at the bar trying to ascertain what the courts will decide on questions which arise in litigation, his views might have been different. ... I think he had more faith than history will justify in constitutional objections to national expansion. Such matters are usually determined by the aspirations of the people, as voiced by their political leaders. Constitutions bend to their will, and against annexation the courts are powerless.”

⁷⁸ Kent, “Memorial Discourses: Address on Thomas McIntyre Cooley.” p. 16

⁷⁹ Haines, Charles Grove. 1914. *The American Doctrine of Judicial Supremacy*. The Making of Modern Law. New York: Macmillan. vii, 17-18

⁸⁰ Haines, Charles Grove. 1919. “Efforts to Define Unfair Competition.” 29 *Yale Law Journal* 1. p. 27-28

Process.⁸¹ He was the first to identify Cooley with mid-century economic conservatives, but he placed Cooley in the middle of the 100-year timeline during which jurists, theorists, politicians, and business conservatives developed various but fundamentally similar doctrines to stave-off the perceived rash and unjust practices of American legislatures. In his book he lumped together all theories or judicial doctrines he believed constituted “higher law” channels for courts to impose implied limits on legislatures. These included judicial invocations of natural law, natural right, natural justice, natural equity, principles of the social compact, principles of civil liberty, fundamental principles of a free republican government, the spirit of a written constitution based on popular sanction, the nature of free governments, vested rights doctrine, common law maxims, separation of powers, and others, all of which judges used to strike down laws despite lacking explicit constitutional text on which to base their decisions. Clauses in American constitutions, such as those covering due process, law of the land, equal protection, contracts, and takings, were used by jurists and legal thinkers as vehicles to import such limiting theories into jurisprudence, often for the primary purpose of protecting property from radical, popular, legislative majorities.⁸²

Old Federalists such as Hamilton, Marshall, Story, Kent, and Webster, Haines wrote, championed the doctrines of express and implied limitations on legislatures to protect individual rights and property, often harboring their natural law theories in the contract clause or vested rights doctrines or otherwise relying on general principles of free governments. Second, during the Jacksonian era and soon afterward, the states’ excessive borrowing, crushing debts, and

⁸¹ Haines, *The Revival of Natural Law Concepts*. p. 104-139 See also Index in book for more references to Mott, Cooley, and Coke.

⁸² Haines, *The Revival of Natural Law Concepts*. p. 75-139

floundering investments for internal improvements created the financial panics of 1837, 1857, and 1873. Many state constitutions were re-written or amended to limit such activity, but nonetheless, “Just as Coke interpolated his ideas of limitations on the King and Parliament into common law decisions, so Cooley injected his own theories of desirable limits on legislative action into his commentaries on constitutional law.”⁸³ As part of the “new Federalism” or “new conservatism” movement, as Haines appears to have coined it, Cooley expanded the meaning of due process to allow judges broader authority to limit legislatures. He joined Story and Kent as a member of “a triumvirate of three great jurists” allied with conservatives to protect individual and vested property rights from legislatures “both constitutionally and extra-constitutionally.”⁸⁴ Rooted in “natural rights and the inherent limitations on legislatures,” rather than actual constitutional clauses, Cooley applied the “dogmatic” public purpose principle to limit the power to tax and take property.⁸⁵ Finally, in the third era of this movement, the Supreme Court adopted *laissez-faire* economic theory and led efforts to impose “even greater limits on the role of legislative action that the most extreme advocates of the principles of the original Federalism could have imagined.”⁸⁶

Although critical of Cooley’s claims, Haines himself reluctantly admitted that scholars such as Mott had found some evidence that Magna Charta’s due process clause had been used to void, or at least not enforce, actions of Parliament deemed contrary to the common law;⁸⁷ he

⁸³ Haines, *The Revival of Natural Law Concepts*. p. 117

⁸⁴ Haines, *The Revival of Natural Law Concepts*. p. 118

⁸⁵ Haines, *The Revival of Natural Law Concepts*. p. 127-134

⁸⁶ Haines, *The Revival of Natural Law Concepts*. p. 139. *See also* Cooley, *Constitutional Limitations*. p. 354

⁸⁷ Haines, *The Revival of Natural Law Concepts*. p. 107-108 n. 2

admitted natural law theories and common law principles and rules were woven into American law and constitutions;⁸⁸ he found at least some states adopted Coke's understanding and similarly believed that their due process clauses included implied, substantive limits on legislatures;⁸⁹ and at least some state judiciaries had struck down laws based on that interpretation.⁹⁰ Apparently he just didn't like it. So the question is not whether American judiciaries could strike down laws that violated substantive, implied limitations on legislatures via the due process clause—they did.⁹¹ Rather, it is whether those judicially imposed limitations were constitutionally justified, whether Cooley expanded on those implied limitations, and whether he created totally extraconstitutional limits on his own.

Haines claimed Cooley imported his own theories of justiciable, vague, “dogmatic” limits on legislatures that prohibited them from passing arbitrary or unjust laws. To establish Cooley's definition of “due process” and understanding of judicial review, Haines turned to *Constitutional Limitations*. He claimed that Cooley first noted the “vague and indefinite meaning of the term ‘due process of law’” and simply “fell back on the general language of Daniel Webster”; that he “aimed to give greater scope to the term ‘law of the land’”; and that Cooley “quoted approvingly” Justice Johnson's seemingly philosophical “rendering of the meaning of the term ‘law of the land’: ‘after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the

⁸⁸ Haines, *The Revival of Natural Law Concepts*. p. 79

⁸⁹ Haines, *The Revival of Natural Law Concepts*. p. 78

⁹⁰ Haines, *The Revival of Natural Law Concepts*. p. 107

⁹¹ Berger disputes the legitimacy of some state judicial decisions that voided legislation based on substantive due process or “law of the land” in the early 19th century, but nonetheless he admits that it did occur. Berger, Raoul. 1987. *Selected Writings on the Constitution*. “‘Law of the Land’ Reconsidered.” Cumberland, Va.: James River Press. p. 140-143

individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.” He quoted Cooley’s judicial review chapter, in which he wrote that courts need not find “some specific inhibition which has been disregarded, or some express command which has been disobeyed” in order to strike down legislation. Cooley, Haines wrote, then indicated “various means by which legislative acts may be regarded as invalid, if contrary to the general spirit, purposes, and principles of constitutional government.”⁹²

This is an extraordinary misrepresentation. Turning to *Constitutional Limitations*, one finds first, Cooley did not claim the definition of due process was “vague and indefinite.” Rather, he wrote that the “definitions of these terms [due process, law of the land, due course of law] to be found in the reported cases are so various that some difficulty arises in fixing upon one which shall be accurate, complete in itself, and at the same time applicable to all cases.” Second, he did not simply “fall back” on Webster’s definition, but rather he wrote, “No definition, perhaps, is more often quoted” than Webster’s definition. So Cooley was looking to actual judicial opinions for the most common definition of due process, not throwing up his hands and then arbitrarily selecting one that suited a personal plan to expand the meaning beyond its existing definitions.

Third, Cooley indeed quoted Johnson’s definition of due process approvingly, but Haines chopped off the first clause of the statement, which read: “As to the words from the Magna Charta incorporated in the constitution of Maryland, after volumes spoken ...”⁹³ So Haines presented Cooley’s definition of due process as someone else’s half-quoted, untethered,

⁹² Haines, *The Revival of Natural Law Concepts*. p. 116-117

⁹³ Cooley, *Constitutional Limitations*. p. 351-355

philosophical prohibition on “arbitrary” legislative power as a requirement to ensure “distributive justice.” It is undeniable that Johnson was referring to the underlying intent of the explicit words of the Maryland constitution and the Magna Charta. Haines neglected to present Cooley’s actual definition, found in the next paragraph, in which Cooley based the meaning of due process on established principles, common law maxims, American judicial opinions, and explicit rights protections found in the constitutions:

*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.*⁹⁴

Fourth, Haines exaggerated Cooley’s position that legislation “may be regarded as invalid if contrary to the general spirit, purposes, and principles of constitutional government,” as he put it. It is unclear exactly how Haines determined Cooley supported judicial review on the basis of the “general spirit ... of constitutional government.” He indeed wrote that “fundamental rules or maxims” of constitutional government protect individuals from arbitrary government,⁹⁵ which was actually based on the rule of law, common law as adopted by the states in their constitutions, and constitutionalism itself, but in terms of the “spirit” of anything, Cooley instead wrote, “Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a *spirit* supposed to pervade the constitution, but not expressed in words.”⁹⁶ Cooley denied the authority of higher law or extra-constitutional limitations, although he indeed claimed that constitutional

⁹⁴ Cooley, *Constitutional Limitations*. p. 356

⁹⁵ Cooley, *Constitutional Limitations*. p. 3

⁹⁶ Cooley, *Constitutional Limitations*. p. 171

principles and common law maxims sanctioned in actual constitutions could limit legislative power. In perhaps one instance he argued limitations on legislatures were not necessarily prescribed by constitutions, but rather “spring from the very nature of free government.”⁹⁷

At first glance this brief note of Cooley’s may appear to be a broad and indefinite limitation based on an extraconstitutional standard, but upon closer examination it appears grounded in common law as adopted by the states. It is rooted in the maxim: “The legislature is to make laws for the public good, and not for the benefit of individuals,” as Cooley wrote.⁹⁸ Cooley and others recognized the presence of this maxim most clearly in clauses such as those governing eminent domain,⁹⁹ but Cooley was applying it to taxing and spending limitations, the absence of which would allow legislatures to “plunder the citizen.”¹⁰⁰ By definition, legislative power in free governments does not extend to taking money under the guise of taxation and then giving it to another private individual for a private purpose, regardless of the absence of any explicit constitutional prohibition, Cooley argued. Cooley’s “dogmatic” principle, as Haines put it, of applying the public purpose maxim to taxation, spending, and other areas of legislation and then supporting judicial review in light of that maxim would become a common target.

⁹⁷ Cooley, *Constitutional Limitations*. p. 129

⁹⁸ Cooley, *Constitutional Limitations*. p. 129

⁹⁹ Cooley, *Constitutional Limitations*. p. 530. “It is conceded, on all hands, that the purpose for which this right may be exercised must be a *public* purpose; and that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to a public use to which it is to be applied. *See also* p. 357: “But there is no rule or principle known to our system under which private property can be taken from one man and transferred to another for the private use and benefit of such other person, whether by general laws or by special enactment. The purpose must be public, and must have reference to the needs of government. No reason of general public policy will be sufficient to protect such transfers where they operate upon existing vested rights.” It is worth noting that Cooley believed (with exceptions, primarily under police powers) that vested rights are protected under due process or law of the land clauses. *See* p. 358

¹⁰⁰ Cooley, *Constitutional Limitations*. p. 488

Rather than simply creating the “public purpose” maxim in terms of taxation on his own, however, Cooley cited a great many prior judicial opinions that relied on this doctrine in his treatise on taxation, as Haines himself reluctantly noted,¹⁰¹ as well as in *Constitutional Limitations*.¹⁰² He also cited two law dictionaries when he paraphrased the definition of “taxation” itself: “Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes.”¹⁰³ Even Cooley’s most convincing critic, Clyde Jacobs—perhaps the only scholar to examine Cooley’s references and citations on this particular topic—agreed that the existence of this principle in Anglo-American constitutionalism is “incontrovertible.” Indeed, many noted that money was akin to property in terms of principles underlying taxation and eminent domain: compensation and a public purpose were required for their confiscation. These principles and their supporting judicial opinions and other material will be addressed in the chapter on taxation and the public purpose maxim given that it is one of the primary targets for scholarly criticism of Cooley.

For some twenty years, Haines’s basic argument was the dominant interpretation of Cooley.¹⁰⁴ Several authors cited Haines categorically, echoing his claims that the economic conservative Cooley shrouded his higher law philosophy in his legal and constitutional pronouncements. Many targeted his public purpose doctrine for taxation in particular or his

¹⁰¹ Haines, *The Revival of Natural Law Concepts*. p. 130

¹⁰² Cooley, *Constitutional Limitations*. p. 488-494, 530 n. 3

¹⁰³ Cooley, *Constitutional Limitations*. p. 479

¹⁰⁴ See Appendix for analysis of prominent literature.

defense of property rights more generally.¹⁰⁵ Even much later, Laurence Tribe also wrote that Cooley followed in the natural law tradition of Chase, Marshall, and Story.¹⁰⁶ Haines set the ongoing trend of Cooley scholarship: His ideology, not the law, guided his jurisprudence.

Cooley the Laissez-Faire Ideologue

Benjamin Twiss was heir to Haines, citing him outright and generally deferring to his speculations, but he presented some independent analysis of Cooley's legal thought and similarly focused on his individual rights and property jurisprudence. Future scholars often cited Twiss. Overall he argued Cooley was an ideological *laissez-faire* constitutionalist in all but name and that he fabricated at least some of his principles out of thin air. His *Constitutional Limitations* "answered a positively felt need of the times" and was an expression of "individualistic philosophy"¹⁰⁷ that was simply expressed in political and legal language. He admitted he "perhaps painted a rather one-sided picture of Cooley, showing as it does chiefly the way in which he expressed what are now looked upon as conservative ideas of individualism and property rights."¹⁰⁸ Even though one-sided, and essentially lacking any real investigation from a legal or constitutional perspective, and in some places highly speculative, most of his analysis was more thorough and honest than that of Haines. Edward Corwin oversaw his thesis and

¹⁰⁵ Lerner, Max. 1932. "The Supreme Court and American Capitalism." *Yale Law Journal* Vol. 42, (1932/33). p. 689, 692; Seligman, Edwin R. A, and Alvin Saunders Johnson. 1931. *Encyclopedia of the Social Sciences*, Seagle, William. "Cooley, Thomas McIntyre." Vol. 4. New York: Macmillan. p. 356-357; Aumann, "Some Problems of American Legal Development." p. 529-533. Aumann didn't quote Haines directly, but he quoted the Haines-based encyclopedia article, and in general his article echoed them both.; Fine, *Laissez Faire*. p. 128-130.

¹⁰⁶ Tribe, Laurence H. 1978. *American Constitutional Law*. University Textbook Series. Mineola, N.Y.: Foundation Press. p. 429 n15

¹⁰⁷ Twiss, *Lawyers and the Constitution*. p. 18

¹⁰⁸ Twiss, *Lawyers and the Constitution*. p. 39

actually helped to get it published soon after the 28-year-old's tragic death.¹⁰⁹ Later Corwin simply deferred to him on Cooley, helping to establish the major assumption that Cooley was ideological.¹¹⁰

Few would disagree that lawyers and judges who supported the liberty of contract doctrine frequently cited Cooley in their arguments and opinions during the *Lochner* era. For this reason Twiss and others considered *Constitutional Limitations* to be the “groundwork for all *laissez faire* constitutional doctrine,”¹¹¹ and indeed it may well have been, but they tended to argue it was *not* a conscious effort on Cooley's part to protect corporate businesses from regulation.¹¹² Nonetheless Twiss echoed Haines in claiming Cooley was “in direct line” with the judicial movement to protect vested property rights from legislatures through the due process clause rather than the contract clause efforts of Marshall and other Federalists. Lawyers with “skillful tongues” later converted his legal thought on due process into liberty of contract. As with so many scholars who assessed Cooley, Twiss took for granted that Cooley was twisting the meanings of constitutional clauses and doctrines, and he failed to investigate Cooley's citations or legal roots that defined due process and vested rights.

Despite having no apparent background in psychology, Twiss wrote Cooley's ideological “bias” was based on his personal background. Although he recognized in his *Constitutional Limitations* that Cooley cited individualist thinkers, and even though “his chief reliance was

¹⁰⁹ Twiss, *Lawyers and the Constitution*. p. xii

¹¹⁰ Corwin, *Liberty Against Government*. p. 117.

¹¹¹ Twiss, *Lawyers and the Constitution*. p. 18

¹¹² Jacobs. *Law Writers and the Courts*. p. 64-97. Jacobs echoed Twiss on the overall role of Cooley as a major underlying force behind developing the liberty of contract doctrine.

upon the great commentators Blackstone, Story, and Kent,” Twiss claimed Cooley supported individualism and property rights because “his background was typically American.” As “one of fifteen children, he had to work hard on the farm.”¹¹³ He had to leave school and largely self-educate himself after the age of 15, which thus encouraged a sense of independence, which thus led him to set aside judicial precedent in favor of independent and “creative” legal thought.¹¹⁴ Adding to his tenuous chain of inferences, he cited the Haines-based *Encyclopedia of Social Science* article from 1930, writing that “his pioneer background gave him an idea of property as chiefly an individual possession or attribute.”¹¹⁵ It is striking that Twiss gave only a cursory mention to Cooley’s reliance on legal history, judicial precedents, and legal treatises, and the roots and meanings of constitutional clauses and legal doctrines, the entire bases of his positions.

Despite these bold speculations, Twiss presented five general propositions summarizing Cooley’s constitutional thought. Although brief and superficial, they appear mostly accurate both as a reflection of at least some of Cooley’s thought and as the common understandings of constitutional principles among legal thinkers, the founders, and American statesmen of the 18th and 19th centuries. Yet Twiss considered all of them “abstract.”¹¹⁶ Among others, they included the idea that the Constitution embodied the permanent, popular, sovereign will, and it controlled the operations of government and limited political majority will—popular sovereignty and constitutionalism, in short. Also, individual rights, many of which were rooted in the English common law, existed before the creation of the state constitutions, were adopted by the ratifiers,

¹¹³ Twiss, *Lawyers and the Constitution*. p. 21-22

¹¹⁴ Twiss, *Lawyers and the Constitution*. p. 22-26

¹¹⁵ Twiss, *Lawyers and the Constitution*. p. 22

¹¹⁶ Twiss, *Lawyers and the Constitution*. p. 24

and the purpose of government was to protect those and other rights sanctioned in constitutions. Positive protections of rights in constitutions created implied limits on legislatures. Other principles in constitutions included separation of powers, the sanctity of property, and the public purpose maxim. Finally, judges with the power of judicial review could set aside as void legislative actions they considered contrary to the constitutions. Some of these are more directly inferable from constitutional text than others, but Twiss's claim that all such principles are "abstract" is evidence of a particularly evasive mentality toward some of the most obvious and easily defensible principles of the American constitutional order.

The problem with Twiss is that he is at once extremely positivist, and at the same time extremely speculative. Even the most extreme strict constructionists agreed that the people of the states, at least, were the highest sovereign authorities, and the Constitution was indeed the supreme law of the land and controlled government. It's written explicitly in Article VI. It is also undeniable that Americans recognized that "organized society existed before the formation of the government and the constitution." With the separation from Britain in 1776, the "organized society" as it existed indeed formed new governments and constitutions, and those constitutions indeed were created to protect pre-existing rights. The revolutionaries cited their charter rights and English rights in the Declaration of Colonial Rights, in the Declaration of Causes and Necessity for Taking Up Arms, and even the Declaration of Independence listed British violations of existing rights of Englishmen in addition to the natural rights theory. Together all three cited the rights to life, liberty, and property they had inherited from their ancestors dating back to the Magna Carta. The state constitutions often explicitly listed the rights to life, liberty, and property, which were pre-existing and clearly created an implied limit on legislative power.

Cooley never described vested rights as vague, natural rights that were totally protected from all government, but rather he wrote they were protected under constitutions and statutes, subject to regulation or even abrogation in special circumstances according to law and custom. State constitutions and reception statutes explicitly adopted the English common law—a point that Twiss failed to mention. Further, the separation of powers principle was often expressly written in state constitutions, and the division of powers in those constitutions, even without express statements, implied both separation of powers and checks and balances. To deny that these were constitutional principles of the new American order after the Revolution is just silly. Judicial review, by contrast, is more debatable, but it is true that from the earliest days of liberation, state courts voided legislation that ran contrary to the state constitutions, as will be demonstrated with more depth in the following chapters on due process and constitutional interpretation.

It is true that some of these principles are more clearly inferable from the constitutional text than others, but Twiss considered them all “abstract” without analysis or investigation, and he argued they were really based on Cooley’s personal *laissez-faire* assumption that the basis of society was private. This is a major speculation, and Twiss failed to produce any evidence from Cooley himself that he based these principles on economic theory or preferences. He failed to provide a single piece of evidence beyond the circumstantial. There was no rigorous legal analysis. He merely drew parallels between Cooley’s legal principles and *laissez-faire* individualism and sanctity for property rights. Nonetheless Twiss claimed Cooley believed economic enterprise should be private and not run by government, government shouldn’t compete with businesses, and so on. He also attributed Cooley’s opposition to class legislation to his *laissez-fare* ideology, not his understanding of liberty, property, and rule of law provisions

found in the constitutions. It may well be that Cooley had a personal affection for such economic principles, and indeed some of his *dicta* in his judicial opinions reflected that, but he never claimed to base his legal arguments or constitutional principles on such extra-constitutional ideology. Indeed, he vehemently and repeatedly opposed the imposition of such external theories. “Like John Marshall and other famous legal publicists,” Twiss nonetheless concluded, “he made up many of the principles out of his own head, and many of them had no citations to back them up.”¹¹⁷ It is curious that Twiss failed to cite any specific examples of Cooley failing to cite his principles on these issues.

Others echoed Twiss. Corwin, Twiss’s co-author and mentor, produced a legal history book four years later focused on “liberty” as a juridical concept used by American courts to limit legislatures. He looked at the rise, development, and decline of vested rights as an extraconstitutional doctrine incorporated into constitutional law via economic substantive due process. He argued American courts took it upon themselves to protect individual property rights and other individual rights from legislatures under the new doctrine. He essentially deferred to Twiss and claimed Cooley was part of this movement, and he pointed to his bias in the often-misunderstood preface in *Constitutional Limitations*.¹¹⁸ Soon after, Paschal went so far as to consider Cooley an outright social Darwinist, “a Spencerian disciple of the highest standing.”¹¹⁹ Fine generally claimed Cooley supported extraconstitutional justification for judicial review, and

¹¹⁷ Twiss, *Lawyers and the Constitution*. p. 33

¹¹⁸ Corwin, *Liberty Against Government*. p. 117

¹¹⁹ Paschal, *Mr. Justice Sutherland*. p. 9

he cited and echoed Haines and Twiss on Cooley's supposedly specious public purpose maxim as applied to taxation,¹²⁰ among other standard criticisms directed toward his *laissez-faire* bias.

Jacobs was one of the few scholars to analyze Cooley from his own legal perspective. He largely echoed Twiss and Corwin on Cooley's role as a precursor to liberty of contract, but he provided a thorough legal analysis of the public purpose maxim that would factor so prominently into the general criticism of Cooley. It is interesting that Jacobs affirmed that the public purpose maxim "is an ancient principle of political science that government powers should be exercised for public purposes only, and, as an abstract proposition, it is incontrovertible."¹²¹ Jacobs simply demonstrated by looking at treatises and case law how the judiciaries assumed a position over the legislatures to make that determination. He assumed the shift was on behalf of *laissez-faire* ideology, but nonetheless he at least looked at the case law and held Cooley's treatise and judicial opinions to the fire by examining his own references and citations. Jacobs noted that although there were indeed some precedents that supported Cooley's claim that courts could strike down tax laws that failed to direct funds toward a public purpose, it was only after the publication of *Constitutional Limitations* that the judiciary could enjoy a more accepted role as the final decider. Jacob's work deserves great attention and will be considered in more detail in the later chapter on taxation and the public purpose maxim.

For decades this interpretation of Cooley as a *laissez-faire* ideologue who laid the foundation for liberty of contract and protection of vested property rights was the dominant interpretation. Soon this property-focused interpretation of Cooley began to merge with the

¹²⁰ Fine, *Laissez Faire*. p. 129

¹²¹ Jacobs, *Law Writers and the Courts*. p. 100

broader liberty-focused perception that Cooley's judicial philosophy was based on the general Jacksonian affinities for equal rights and privileges, not just individual property rights. Jones was the first to produce a major study on this perception of Cooley.

Cooley the Burkean-Jacksonian Hybrid

Alan Jones's dissertation of 1960 and some of his later articles mark an often-cited shift in thought on Thomas Cooley. He cast Cooley's overall jurisprudence primarily as a broad, Burkean-Jeffersonian-Jacksonian amalgamation rooted in English common law history and political preferences dating back to his youth. He also suggested he was an early Progressive, and he noted his early Free Soiler politics influenced his legal thought. Primarily, however, Jones wrote his Jeffersonian or Jacksonian politics were overlaid in his treatises, speeches, and judicial decisions with common law maxims, constitutional principles, or legal reasoning. In other words, at core he was a Democrat, not a constitutionalist or common law jurist. He downplayed the claims of Haines, Twiss, and Jacobs who focused on his *laissez-faire* economics and how they benefited corporate lawyers, arguing instead that such hands-off government principles were more in keeping with his general affinity for equality under law and opposition to class legislation of the Jacksonians.¹²²

Harmonizing Burkean traditionalism and a reliance on English common law with Jacksonian democracy may seem an impossible task, and indeed, Jones failed to do so. Instead of demonstrating any consistent philosophy between these near-polar ends of popular government, he basically ignored his legal reasoning. Jones wrote Cooley's repeated reliance on written constitutions, common law maxims, and Anglo-American legal history was largely a cover for

¹²² Jones, *Constitutional Conservatism*, p. 127

his underlying Jacksonian affinities for equal rights, equal opportunity, and opposition to elites. Cooley simply used such legalism with political principles and outcomes in mind.

The problem with Jones is threefold: He provided no direct evidence from Cooley himself that he was writing treatises or deciding cases to further Jacksonian politics. Also, he failed to analyze Cooley legally, instead merely speculating on the reasons behind his positions. Third, he failed to demonstrate Cooley was Jacksonian at all, and indeed, many aspects of Cooley point more toward an affection for Federalist or Republican politics, if any. Whether it was Cooley's legal treatises or opinions touching on due process, separation of powers, common law rules, police powers, class legislation, his thoughts on liberty, or the public purpose maxim, Jones chalked *all* of it up to his underlying Jacksonian politics, even though in general, Cooley repeatedly rested his positions on constitutions, legal principles, and judicial precedent, as well as a number of principles that aligned more clearly with anti-Jacksonianism. Instead of digging into the legal background of Cooley's positions, Jones simply summarized his writings on legal issues, mentioned Cooley's reasoning superficially, then dismissed them and pointed to similar Jacksonian principles and ends that happened to align.

For example, Jones noted Cooley argued written constitutions prohibited arbitrary government, particularly when legislation favored or discriminated against certain groups without some justifiable basis.¹²³ Cooley claimed repeatedly that this prohibition on government acting outside of law and without constraint was based on the principle that American governments are limited under constitutions. He routinely cited treatises, judicial precedents, and Anglo-American legal history, remarking how at no time was the allowance for arbitrary power

¹²³ Jones, *Constitutional Conservatism*, p. 140-141

an accepted maxim of government. Yet Jones nevertheless wrote that Cooley's opposition to arbitrary power was based on his latent Jacksonian affinities for opposition to class legislation, equality under law, and broad individual liberty. He "translated his fear of arbitrary power into constitutional law."¹²⁴ Jones cited Cooley's early political activism from the 1850s that indeed demonstrated his Democratic sympathies, but he produced no evidence directly from Cooley that he retained his youthful political passions and applied them to his legal reasonings. Instead of accepting Cooley's point that Anglo-American constitutional history, common law precedents, and the very idea of the rule of law prohibited government from acting totally outside of law or custom, Jones simply pointed to his long-passed, youthful affinity for the Democratic politics. Jones repeatedly made this claim throughout his book when considering the roots of Cooley's legal thought, even though Cooley emphasized repeatedly that extraconstitutional politics, theories, and ideologies should play no role in constitutional interpretation. Lots of political and philosophical camps held similar views under different banners. Although noting his Burkean sympathies and reliance on common law in his arguments, Jones essentially depicted Cooley's 30-year legal career as one big charade.

Many aspects of Cooley were quite the opposite of Jackson's and Jefferson's. On one hand, for example, Jefferson was an ardent supporter of the theory of natural rights and the social compact theory, and he even argued that presidents should act outside of the Constitution for the good of the people—not just in emergencies—under a Lockean prerogative theory.¹²⁵ Cooley, by

¹²⁴ Jones, *Constitutional Conservatism*, p. 147

¹²⁵ Jefferson, Thomas. "Letter to John Colvin." 20 Sept. 1810.

contrast, rejected the state of nature theory on the same grounds as Burke,¹²⁶ and he was emphatic that the Constitution was the supreme law of the land at all times and under all conditions.¹²⁷ Jones himself claimed Cooley was a loose constructionist by going “beyond the specific provisions of written constitutions to find reasons to declare statutes unconstitutional,”¹²⁸ and indeed, Cooley wrote that courts could strike down legislation based on common law maxims (which he nonetheless claimed underpinned express clauses). Regardless, the Jeffersonian Republicans and the Jacksonian Democrats were, for the most part, champions of strict constructionism, at least compared with many Federalists, and in general they viewed legislatures as the primary means of furthering their democratic agendas. They were no friend to English common law, and Cooley was no friend to the Democratic principle that majorities should necessarily rule. Having courts void democratic legislation in the name of common law maxims was far from highest of Jeffersonian or Jacksonian political values. It was the Jacksonians in the legislatures who were opposing the Federalists in the judiciaries—not vice versa.¹²⁹ It is common knowledge that Jefferson was generally hostile to common law, except

¹²⁶ “We must discard alike the idea of a divine origin for government, and the theoretical social compact, and acknowledge rightful authority in the physical power of the stronger to subject the weaker to his will, before we can accede to the doctrine that the greater number of votes is necessarily to hold absolute sway, or that the voice of the people is always to be accepted as the voice of Deity. Even when convened to consider what shall be the terms of their compact of government the people are not without law, and are not at liberty to regard themselves as under no restraints.” Blackstone, William; Cooley, Thomas M. 1870. *Commentaries on the Laws of England*. Chicago, Ill.: Callaghan and Cockcroft. Preface. p. ix.

¹²⁷ “The Constitution itself never yields to treaty or enactment; it neither changes with time, nor does it in theory bend to the force of circumstances. It may be amended according to its own permission; but while it stands, it is ‘a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.’” (Quoting *Ex parte Milligan*, 4 Wall. 2, 120.) Cooley, *General Principles*. p. 33

¹²⁸ Jones, *Constitutional Conservatism*, p. 151

¹²⁹ Aumann, “Some Problems of American Legal Development.” p. 530-531.

perhaps where it had been specifically adopted via legislative action in the states.¹³⁰ Cooley, by contrast, recognized that the states had adopted the common law in their constitutions or statutorily, and legislatures had to explicitly extirpate elements of such broad adoptions. By the time Cooley was a judge, he was submerged in Coke and Blackstone and quoting them quite approvingly, writing how the common law helps to guide jurists in understanding state constitutions. If one wished to be as cynical as Jones, he could simply ask: Why would a politically minded Jacksonian such as Cooley be so emphatic about helping a handful of judges check the popular, democratic will by relying on English common law principles?

Other counterexamples come readily to mind that suggest Cooley was more Republican or even apolitical: He abhorred political patronage, or the “spoils system,” largely a Jacksonian creation. He rejected codification, another Jacksonian torch.¹³¹ Cooley left the Democratic party in the 1850s and was running as a Republican by the 1860s. Both the Republicans and the Democrats wanted to nominate him for his judgeship in 1869. A number of his judicial and professional colleagues wrote that as a judge he was free from politics or was at best mildly political. Jones failed to consider that perhaps Cooley’s principles were, in fact, based on legal reasoning, and any correlations with those of political parties were just that—mere correlations.

Jones failed to take Cooley seriously on a legal level. He was looking for a politician or philosopher rather than trying to understand a jurist. He neglected to drill down into the legal reasonings and legal evidence that Cooley presented, and so he was left with basing his

¹³⁰ Caldwell, Lynton K. 1943. “The Jurisprudence of Thomas Jefferson.” *Indiana Law Journal* Vol. 18 (1943). p. 19200. As he put it in a letter to John Tyler in relation to the role of common law in Virginia courts, “We may doubt, therefore, the propriety of quoting in our courts English authorities subsequent to that adoption [of the new government].”

¹³¹ Cooley, *A Treatise on the Law of Torts*. p. 18-19

conclusions on occasional parallels and psychological speculations. Indeed, because he was simply drawing isolated parallels, he was forced to mention that Cooley's politics may have been conservative or liberal¹³² or he may well have been an early Progressive¹³³ in addition to his general conclusion that he was actually Jacksonian. For these reasons Jones never really understood Cooley at all. In the end, he had to conclude Cooley was just "ambiguous."¹³⁴

Later scholars echoed this general confusion by continuing to attribute certain legal outcomes or principles to political or ideological preferences. In 1972, Paludan re-emphasized that Cooley was Jacksonian in his affinity for popular liberty, but he tempered his zeal with a Burkean respect for order and common law once he became a judge.¹³⁵ In 1985, Les Benedict deferred to Jones entirely on Cooley's Jacksonianism,¹³⁶ but he indeed supported a notion that at least some of Cooley's legal positions had constitutional validity. In 1986, Williams wrote how Cooley was at core Jacksonian or a "Progressive Democrat," but he "combined" liberal and conservative principles. She similarly rooted Cooley's legal thought in his supposed politics, essentially deferring to Twiss, Jacobs, and Jones, but she noted that Jones's assessment "seems established in the historical literature."¹³⁷ In 1993 Gillman agreed with Mott that the public

¹³² Jones, *Constitutional Conservatism*, p. 245, 377

¹³³ Jones, *Constitutional Conservatism*, p. 378. "Had he lived in his full vigor he would have added that greatest of Progressives, Woodrow Wilson, to his constellation of heroes," Jones wrote.

¹³⁴ Jones, *Constitutional Conservatism*, p. 376

¹³⁵ Paludan, Phillip S. 1972. "Law and the Failure of Reconstruction: The Case of Thomas Cooley." *Journal of the History of Ideas* 33 (4). p. 602

¹³⁶ Les Benedict, Michael. 1985. "Laissez-Faire and Liberty: Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism." 3 *Law & History Review* 293 (1985). p. 319. It should be noted that Les Benedict's overall point in his article is to demonstrate how the *laissez-faire* doctrine of opposition to class legislation had constitutional roots, up to and including the express incorporation of such legislative limitations in almost all state constitutions by 1861. See p. 297-298, 321

¹³⁷ Williams, Joan C. (1986). "The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law." 1986 *Wis. L. Rev.* 83 (1986). p. 138-146 n. 232

purpose maxim was not only a “mainstay of constitutional jurisprudence,” but it had been “incorporated into the constitution of virtually every state”¹³⁸ in terms of prohibiting class legislation. Still, he entirely deferred to Jones in writing Cooley was driven by his early Jacksonian politics. Similarly in 2004, even though he noted that Cooley argued the public purpose maxim was a legal and constitutional principle, Ely still simply deferred to Jones in rejecting Twiss and Jacobs and then echoed his assumption on Cooley’s political motivations.¹³⁹

Paul Carrington wrote that Cooley was no *laissez-faire* capitalist, that he was “safe” and tried to base his positions on authorities, but ultimately he dismissed him as little more than a Jacksonian/Progressive activist relegated to the dustbin of legal history, arguing that he “did not presume to write for the ages.” Remarkably, Carrington indeed examined Cooley from a legal perspective, analyzing his treatises and opinions with some considerable depth, yet he made the same error as so many others: He found correlations between his constitutional principles and the political or ideological principles of others to conclude Cooley was ideologically or politically motivated. As a judge, “Cooley always recognized that his judicial office was a political one and he did not recoil from giving political reasons for judicial decisions.”¹⁴⁰ He leaned on Jones for his general assessment of Cooley, writing that he was more “balanced” than Twiss and Jacobs, and he cabined Cooley and his principles to his time and place, presenting him as a consistent political Jacksonian whose “vigilant attention” and constitutional law scholarship was anchored primarily in a concern for the welfare of the common man. Indeed, Carrington argued Cooley’s

¹³⁸ Gillman, *The Constitution Besieged*. p. 55

¹³⁹ Ely, J. W. 2004. “Thomas Cooley, ‘Public Use,’ and New Directions in Takings Jurisprudence.” *Michigan State Dcl Law Review* 2004 (4). p. 848-850.

¹⁴⁰ Carrington, Paul D. 1997. “Law As ‘the Common Thoughts of Men’: The Law-Teaching and Judging of Thomas McIntyre Cooley.” *Stanford Law Review* 49 (3). p. 532

concern for the “common man” was the consistent thread between his Jacksonianism and his status as being “among the first American Progressives,”¹⁴¹ a suggestion that Jones had also made as an aside. Cooley’s affection for Jacksonian-era opposition to class legislation and monopolistic charters indeed contained the common thread of hands-off government that such lawyers invoked to protect monied interests in federal courts, but this was something “hardly imaginable to Cooley in 1868.”¹⁴² Cooley himself supported Progressive doctrines of local governance, prohibition, restrictions on the timber trade, and health and safety laws, Carrington pointed out, and “[t]here is no reason to believe that Cooley, had he been alive and on the Court, would have joined the majority of *Lochner*” in striking down the bakery law on liberty of contract grounds.¹⁴³

Cooley the Realist

In 1925 Douglas Weeks of the University of Texas appears to be the first to suggest pointedly that Cooley was some sort of a conservative-realist-Wilsonian Progressive hybrid, and modern scholars Brian Tamahara and Carl Herstein later made many similar points, even though it appears they failed to cite Weeks. Jones and Carrington had suggested Cooley was an early Progressive when considering Cooley’s thoughts on labor disputes or regulation, but they never seem to have cast Cooley as a judicial realist in the image of Holmes and Cardozo. Certainly there may be some overlap between Burke and the realists in terms of historicism, but Burke and Cooley recognized natural law was embedded in time-tested legal principles, and certainly they

¹⁴¹ Carrington, “The Constitutional Law Scholarship of Thomas M. Cooley.” p. 370

¹⁴² Carrington, “The Constitutional Law Scholarship of Thomas M. Cooley.” p. 382

¹⁴³ Carrington, “The Constitutional Law Scholarship of Thomas M. Cooley.” p. 395

were no legal positivists of the Holmesian persuasion. More to the point, Weeks was an outlier for his time and was borderline manipulative, and he may have even fabricated evidence.

On one hand, according to Weeks Cooley was “essentially a conservative.”¹⁴⁴ He rejected the idea of a higher “social constitution” above the written document;¹⁴⁵ he argued that it was the duty of the federal courts to “preserve the constitutional system” and that they “should not declare acts unconstitutional unless they clearly violate a principle of the Constitution.”¹⁴⁶ In the same article, however, Weeks wrote that Cooley was essentially a Wilsonian Progressive. He had “a keen grasp of the new spirit of the Constitution and the necessity for its expansion to meet the needs of a rapidly changing economic and social life.”¹⁴⁷ He “believed in the organic and evolutionary character of all constitutions, written or unwritten;”¹⁴⁸ “the Federal Constitution,” as Weeks quoted Cooley, “though it is the same in words, is not, as a living and effective instrument, the same to-day that it was when made.”¹⁴⁹ Further, noting Cooley’s echoing or even presaging Wilsonian positions, “As for the separation of powers and the checks and balance system, Cooley believed them at best faulty. ... [T]he success of government did not depend upon such mechanical devices but rather upon a proper sense of fair play and a willingness on the part of governmental officials to cooperate.”¹⁵⁰ As he concluded, “[I]t may be said that

¹⁴⁴ Weeks, O. Douglas. 1925. “Some Political Ideas of Thomas McIntyre Cooley.” *The Southwestern Political and Social Science Quarterly* 6 (1). p. 30

¹⁴⁵ Weeks, “Some Political Ideas of Thomas McIntyre Cooley.” p. 35

¹⁴⁶ Weeks, “Some Political Ideas of Thomas McIntyre Cooley.” p. 37

¹⁴⁷ Weeks, “Some Political Ideas of Thomas McIntyre Cooley.” p. 30

¹⁴⁸ Weeks, “Some Political Ideas of Thomas McIntyre Cooley.” p. 30-31

¹⁴⁹ Weeks, “Some Political Ideas of Thomas McIntyre Cooley.” p. 33

¹⁵⁰ Weeks, “Some Political Ideas of Thomas McIntyre Cooley.” p. 33

Cooley's position was one of measured progress in the expansion of the Constitution and the development of law. ... The power of government, the rights of society, will grow at the expense of the individual ... The courts, in exercising their function of interpretation, must, therefore, consider carefully each move. They should not be guided by precedent alone, for our institutions are not static; they must keep abreast with a changing society... Cooley was, therefore, not a legalist; he followed rather the middle of the road."¹⁵¹

Weeks either misunderstood or misrepresented Cooley's work. Wilsonian Progressive tenets include the idea that the Constitution is a malleable document whose meaning can change without amendment; separation of powers and "mechanical" checks and balances should be set aside in favor of a separation of politics and administration with a consolidated, cooperative administrative state headed by a president who is the popular, legislative leader with an ear for popular sentiment; and similarly, popular preferences should have weight in judicial decisionmaking and constitutional interpretation. Weeks suggested subtly or overtly that Cooley supported these ideas. To some extent and with more context, Weeks was arguably reflecting some of Cooley's points. But he manipulated, exaggerated, or perhaps even fabricated some of Cooley's statements on these issues. Also, the majority of the Weeks' article is based on a handful of Cooley's papers,¹⁵² so he failed to consider the many other writings that directly contradicted some of his claims.

Weeks made a major mistake that other scholars echoed: he equated Cooley's understanding of *written* constitutions with his view of the *unwritten* American constitution. He

¹⁵¹ Weeks, "Some Political Ideas of Thomas McIntyre Cooley." p. 38-39

¹⁵² See Cooley, "Changes in the Balance." ; See also Cooley, "Comparative Merits of Written and Prescriptive Constitutions."

suggested that Cooley believed the Constitution to be an organic, living document—a key element of Progressive thought. But in context, rather than adhering to the Progressive doctrine of a malleable Constitution, Cooley was referring to the organic *origins* of the American constitutional system as a whole, as well as the necessity to rely strictly upon amendment processes to change written constitutions. One must look first to Cooley’s comprehensive understanding of the American “Constitution” from these Weeks-cited articles. As Cooley described the inclusive breadth of the Constitution:

*In a broad sense the Constitution of the United States embraces, not the written charter merely, but the whole body of laws properly denominated fundamental. By this we mean that every citizen of a State, and of the United States, when he speaks generally of the constitutional law of his country, does not limit his conception to the written instrument constituting the bond of union of all the States, but with the utmost propriety embraces also the constitutional securities which are thrown around him by his own State.*¹⁵³

The comprehensive American “Constitution” included the federal Constitution, the constitutions of the states, as well as the common law maxims and Anglo-American legal principles adopted by the states, as well as the unwritten rules, norms, and habits of the people. Obviously the latter area of the “constitution” changes without formal amendment. He wrote the Constitution was “framed on the principle and with the purpose of preserving for America everything in the British constitution which was suited to the condition and circumstances of the new world; and

¹⁵³ Cooley, “Changes in the Balance.” p. 6-7

there is not in all history a fundamental law which is a more genuine growth.”¹⁵⁴ In other words, the colonial and state governments had slightly modified and incorporated the organic, unwritten English common law as well as English statutory law and judicial precedents into their now-static written constitutions. The overall Constitution was organic or evolutionary in origin, but some of the most important rules were codified in the highest written documents, changeable only through written amendment. Other areas of the Constitution were similarly codified in statutory law and were changeable more readily. The common law areas of the overall Constitution also were organic and either recognized in case law or were simply parts of the malleable habits and customs of the people.

Cooley did not see the Constitution as a revolutionary document. The purpose of the Federal Constitution was “to unite and strengthen states already free; to give to them the means of effectual protection for constitutional liberties already enjoyed,”¹⁵⁵ not to create new liberties or allow for malleability in the meaning of common law principles or definitions by mere whim. Statutory law indeed could change common law, but the principles of the common law were understood to remain in force until legislatures actually extirpated them by statute, in accordance with the constitutional clauses and statutes by which the states adopted English common law and its colonial modifications. This indeed was a “middle of the road” approach toward constitutional change, as will be explained in the chapter on constitutional interpretation and constitutional change, but Weeks extended Cooley’s views on unwritten constitutions into those of the written, static documents.

¹⁵⁴ Cooley, “Comparative Merits of Written and Prescriptive Constitutions.” p. 349-350

¹⁵⁵ Cooley, “Changes in the Balance.” p. 7

Further on this point, once the state constitutions were written, the established, unwritten common law indeed was to “be kept in view,” as Cooley put it, but it did not control the fixed, written documents. Common law rules, maxims, and definitions were to help inform interpreters of state constitutions on their meanings, but “by this we do not mean that the common law is to control the constitution.”¹⁵⁶ Cooley was not arguing that the meaning of the words of the original, written, federal or state constitutions were to change over time and in accordance with popular preference or anything outside of the original meaning. He was describing the English and colonial legal history and common law origins of the constitutions, laying down the fundamental theory of American constitutionalism, and simply recognizing that many areas of the comprehensive constitution was unwritten and therefore changeable outside of any formal amendment process.

As Cooley explained more explicitly on the static nature of the Constitution and its principles, “Recurring again to the theory of the government that was to be reared on the written constitution, we have seen that it was to be unchangeable, except as changes were brought in by express amendment. The stipulations agreed upon and introduced in the written instrument are to mean the same thing to day, to-morrow, and forever; they are formulated in order to fasten the ship of State to certain definite moorings; that is their purpose.”¹⁵⁷ Weeks completely ignored this passage from the article and neglected to mention Cooley’s position that changing or expanding written constitutions depends on amendment processes.

¹⁵⁶ Cooley, *Constitutional Limitations*. p. 60

¹⁵⁷ Cooley, “Changes in the Balance.” p. 13

Next, Weeks claimed Cooley believed “mechanical devices,” such as separation of powers, to be faulty and that the success of government required cooperation between government officials. He claimed Cooley gave “numerous examples where the equilibrium of the original design did not operate,” such as the growth in the power of the Senate, the loss of power of the president, and political impasse between Congress and the president of different parties—all of which were textbook Wilsonian grievances against the constitutional system.¹⁵⁸ The problem is that Weeks’ claims appear totally unsubstantiated. He provided no citations or references in this entire paragraph. It fell in the middle of his summary of Cooley’s “Changes in the Balance” article, yet Cooley made no reference to any of these points in that article. Further, in none of Cooley’s articles that Weeks cited in his entire paper did Cooley even consider any of those claims. Cooley’s “Changes in the Balance” article focused on the failure to check the growth of federal power at the expense of the power of the states, not the failure of separation of powers or checks and balances.¹⁵⁹ Rather than advocating some sort of governmental consolidation, Cooley repeatedly emphasized the importance of maintaining strict lines of jurisdiction between the branches in *Constitutional Limitations*, and he demonstrated the need for those clear lines in his *Blodgett* opinion. In the article Weeks cited, Cooley wrote how a series of political, legal, economic, military, and social forces had shifted power from the states to the

¹⁵⁸ Weeks, “Some Political Ideas of Thomas McIntyre Cooley.” p. 33. “As for the separation of powers ...”

¹⁵⁹ Cooley, “Changes in the Balance.” Weeks does not cite this article explicitly in his lengthy paragraph on page 33 of his article. But in the very next paragraph, he wrote, “The ‘Federal Constitution,’ therefore, Cooley concluded, ‘though it is in the same words ...’” That quote comes from Cooley’s article “Changes in the Balance of Governmental Power,” so I am assuming that Weeks is claiming that Cooley denounced separation of powers in that same article.

federal government in ways inconsistent with the original expectations of many of the founders. It was not a condemnation of the system itself.

Weeks was right that Cooley recognized public opinion had shifted power to the federal government in ways the framers had not anticipated. Cooley was not, however, claiming that public influence could or should change the meaning of laws or constitutions, or even that such political influence on the powers of government in this way was inevitable or preferable. As he explained elsewhere, direct popular influence would be unconstitutional and “revolutionary.”¹⁶⁰ Cooley was actually lamenting how the “degrading and corrupting” spoils system was the vehicle through which public opinion had shifted power from the states to the federal government in some ways. It corrupted the original constitutional order: a multitude of ambitious dependents, with support from political parties, “subordinates the States to the Union whenever any question of relative jurisdiction arises.” As he wrote, “Perhaps incredulity may be expressed here at the suggestion, that when we have a written constitution fixing and defining the exact limits of power, these can be moved back and forth by any existing public opinion. The concession will here be very freely made that they ought not to be; but it is nevertheless asserted that a general public sentiment will find its expression.”¹⁶¹ In the same paragraph, “It is impossible that these circumstances should not have their influence,” he wrote. “[T]hey do and

¹⁶⁰ Cooley, *Constitutional Limitations*, Chapter XVII “The Expression of the Popular Will.” As Cooley put it, “The voice of the people can only be heard when expressed in the times and under the conditions which they themselves have prescribed and pointed out by the Constitution; and if any attempt should be made by any portion of the people, however large, to interfere with the regular working of the agencies of government at any other time or in any other mode than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and to be resisted and repressed by the officers of government. The authority of the people is exercised through *elections*, by means of which they select and appoint the legislative, executive, and judicial officers, to whom shall be entrusted the powers of government.”

¹⁶¹ Cooley, “Changes in the Balance.” p. 16-17

they will until the public service is restored to its primitive purity as it existed under the earlier presidents, and to some extent, even afterwards.”¹⁶² Cooley was writing that the written Constitution was fixed in meaning, and usurpers had disrupted the balance of power.

One might reflect on Hamilton’s similar point in *Federalist* No. 27, in which he considered popular confidence in the federal versus the state governments: “I believe it may be laid down as a general rule, that [the people’s] confidence in, and their obedience to, a government, will commonly be proportioned to the goodness or badness of its administration.” The problem here was that the spoils system had turned affection for government based on the protection of negative rights into an affection for government based on providing position, power, and salary. Cooley was condemning the perversion of the original constitutional system and arguing that such corruption should be extirpated to help restore the balance of power between the federal and state governments. He was not arguing in favor of letting public opinion have direct influence on politics based on positive benefits.

Further, Weeks’ statement that Cooley supported the idea that judges “must keep abreast of a changing society” in their interpretation of the law and constitutions appears without citation or reference, and it is directly contrary to Cooley’s Blackstonian method of constitutional interpretation as described in his chapter on “Construction of State Constitutions” in *Constitutional Limitations*, as well as his chapter on “The Expression of the Popular Will,” as quoted in the below footnote. Cooley wrote, “What a court is to do, therefore, is to *declare the law as written*, leaving it to the people themselves to make such changes as new circumstances

¹⁶² Cooley, “Changes in the Balance.” p. 17

may require. ... In the case of all written laws, it is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself.”¹⁶³

It is true, however, that Cooley believed judges should recognize popular preferences in the area of the *unwritten* law and constitutions. For example, when certain industries—railroad or steamboats, for example—emerged to create a need or preference for a new system of rules to encourage safety or convenience, often the operators and owners within those industries developed and coordinated their own rules among themselves. Sometimes those rules were codified, as in the Steamboat Act of 1852, and other times the courts were influenced by the briefs filed by such industry experts in actual court cases. The courts were to be influenced by popular opinion only through material submitted to the court, a point Weeks neglected to mention. This will be explored with greater detail in the chapter on constitutional interpretation and constitutional change.

Overall, Weeks appears to have made unsubstantiated or suggestive claims, and then to have taken a few quotes on Cooley out of context and dumped Wilsonian, Progressive ideology into those passages. He misrepresented Cooley by suggesting he supported malleable written constitutions, that he believed in cooperation rather than separation of powers, and that judicial interpretations of written law should be made in light of social preferences. Few scholars cited Weeks, but a proto-Progressive/Holmesian interpretation of Cooley re-emerged in the 2000s.

Brian Tamahara claimed Cooley was erroneously cast as a formalist and instead supported the legislative role of judges. In at least some cases he “sounds much like a realist.”¹⁶⁴

¹⁶³ Cooley, *Constitutional Limitations*. p. 55

¹⁶⁴ Tamahara, Brian Z. 2010. *Beyond the Formalist-Realist Divide : The Role of Politics in Judging*. Princeton, N.J.: Princeton University Press. p. 19, 56

In 2013, Herstein shifted away from Carrington, seconded Tamahara, and wrote of the “discordant strands” of Cooley thought, which he described as “the amalgam of intermingled viewpoints that coalesced in the early Republican Party, with the Jacksonian strain being only part of a larger and much more diverse picture.”¹⁶⁵ He found Tamahara’s depiction of Cooley as a judicial realist “compelling,” and he affirmed that Cooley “was very much a realist.” Much like Weeks, he claimed Cooley supported living constitutionalism and that he supported “judicial legislation” along the same lines as Benjamin Cardozo, who wrote that judges make law within their gaps rather than merely interpret it. Herstein cited the same “Changes in the Balance” article as Weeks as well as Cooley’s treatise on torts to make these two points.¹⁶⁶ Again, Cooley supported static constitutionalism and was in fact commenting on the organic *origins* of the Constitution, not its supposed malleable character. Further, in the partial passage Herstein quoted from Cooley’s *Treatise on Torts*, Cooley indeed wrote that a “species of judicial legislation ... goes on regularly,” but he was referring to judicial applications of existing common law principles to new cases in the tradition of Coke and Blackstone, not the creation of new laws “interstitially” in difficult cases, often according to social preferences, as Cardozo later wrote. To quote the cited passage from the treatise:

The alternative [to relying on violence to solve disputes in a system lacking a final arbiter] would be the acceptance of the principle that the existing law governs all cases, and that the ruling principle for any existing controversy will be found, if sought for. This is substantially what is done by the English common law; and

¹⁶⁵ Herstein, Carl W. (2013). “Postmodern Conservatism: The Intellectual Origins of the Engler Court (Part I), 59 *Wayne L. Rev.* 781 (2013). p. 855-864

¹⁶⁶ Herstein, “Postmodern Conservatism.” p. 861-862

*with this principle accepted, rights have grown up under judicial regulation, and through judicial definition, much more than under legislation properly so designated. ... But a principle newly applied is not supposed to be a new principle; on the contrary, it is assumed that from time immemorial it has constituted a part of the common law of the land, and that it has only not been applied before, because no occasion has arisen for its application. This assumption is the very ground work and justification for its being applied at all; because the creation of new rules of law, by whatsoever authority, can be nothing else than legislation ...*¹⁶⁷

Cooley indeed wrote that the “code of to-day is therefore to be traced rather in the spirit of judicial decisions than in the letter of the statute,” as Herstein emphasized, but Cooley was simply referring to the judicial application of law to facts by existing common law principles in ways consistent with the intent of the legislators. He was not advocating the creation of new laws out of whole cloth according to social preferences. Cooley emphasized judicial restraint in difficult cases, not judicial activism, and he explicitly rejected popular opinion having influence on judicial decisionmaking or government in general, outside of elections or other constitutional or legal channels.¹⁶⁸ “Judge-made law,” as he criticized it in one passage, is “that made by judicial decisions which construe away the meaning of statutes, or find meanings in them the legislature never held.”¹⁶⁹ As he quoted the Indiana Supreme Court, “This power of construction in courts is a mighty one, and, unrestrained by settled rules, would ... render courts, in reality,

¹⁶⁷ Cooley, *A Treatise on the Law of Torts*. p. 12

¹⁶⁸ Cooley, *Constitutional Limitations*. p. 598-599

¹⁶⁹ Cooley, *Constitutional Limitations*. p. 57

the legislative power of the State.”¹⁷⁰ He noted that “judge-made law” may refer simply to “the law that becomes established by precedent,” which he of course accepted as being within the legitimate powers of the judiciary.

Continuing this flawed perception of Cooley as a modern realist, as recently as 2014, Robert Olender wrote that Cooley supported ideas such as “law and governance must evolve along with political, social, and economic circumstances.” He claimed although Cooley believed it was the role of the courts, rather than a fickle majority, to determine the need for change, Cooley also believed “what was once constitutional could become unconstitutional as social, political, and economic forces dictated.”¹⁷¹ Cooley was no conservative, Olender argued, nor did he advocate a “stagnant constitutionalism or the resurgence of a bygone era.”¹⁷² Drawing an overt correlation between Cooley and Holmes, Olender headed the introduction of his dissertation on Cooley with the most famous quote of the chief elder of judicial realism:

*A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.*¹⁷³

Conclusion

As the reader can readily see, the scholarly understanding of Cooley varies widely. It appears that today Cooley is considered a *laissez-faire* constitutionalist, a Jacksonian, or a realist. LaPiana may be the only modern scholar to argue he was a formalist. This confusion is a

¹⁷⁰ Cooley, *Constitutional Limitations*. p. 56

¹⁷¹ Olender, “From Commonwealth to Constitutional Limitations.” p. 7

¹⁷² Olender, “From Commonwealth to Constitutional Limitations.” p. 358

¹⁷³ *Towne v Eisner*, 245 U.S. 418, 425 (1918)

symptom of a fundamental problem of analysis: almost every scholar looked at Cooley through a political, psychological, or ideological lens. They failed to think of Cooley as he thought of himself: a jurist in the Anglo-American tradition. Scholars were forced to admit this in part, but they routinely reverted to startling speculations that his motives were other than legal and genuine by drawing mere correlations with extra-legal schools of thought. Sometimes they cherrypicked passages or read too deeply into the plain language. Perhaps only Jacobs and Carrington examined Cooley's legal thought beyond scanning his treatises and his most famous opinions. They explored some of his references and citations, but their reviews were limited in scope and often overlaid with the same old assumptions. Mott analyzed Cooley's legal thought, but the scope of his treatise on due process was limited.

There is a need to fill the gap in the literature by drilling into the roots of Cooley's jurisprudence, particularly those areas that critics routinely attacked: vested rights, due process, and the public purpose maxim. Those roots are found in the references and citations of Cooley's treatises and judicial opinions as well as other writings and judicial opinions from the earliest days of the Republic. Other material must come from Cooley himself: letters, diary entries, and other writings he produced during his time as a constitutional treatise-writer and judge. One cannot assume that Cooley maintained his political preferences, whether Jacksonian or otherwise, decades after his youthful dalliances if he wishes to understand the legal Cooley. The following chapters will examine and critique Cooley through this lens.

Chapter 2: Vested Rights¹⁷⁴ and Retroactive Civil Legislation¹⁷⁵

Scholars often attacked Cooley's summation that "there are on all sides definite limitations which circumscribe the legislative authority, aside from the *specific* restrictions which the people impose by their constitutions."¹⁷⁶ In general, few scholars have argued Cooley's constitutional limitations were based on the American constitutions themselves, despite his claims. One of the broadest limitations, and one of the most frequently attacked, was that legislatures were prohibited from annihilating the vested rights of citizens by retroactive, civil legislation. There were some exceptions, but in general, these *ex post facto* laws, although civil rather than criminal in nature, nonetheless encroached on the authority of the judiciary and the constitutional or legal rights of citizens. The purpose of this chapter is to investigate the constitutional soundness of this far-reaching implied limitation on the federal and state legislatures: in general, they were prohibited from passing retroactive civil legislation that deprived individuals of their vested rights without a public purpose or without compensation. Cooley based this implied limitation primarily on the implications of express constitutional provisions, not extraconstitutional theory, and to support his claims he cited Anglo-American principles, case law, legal treatises, and historical practice, all of which were to some extent woven into the meanings of the constitutional provisions that placed this limitation upon the legislative power of the states.

¹⁷⁴ In *Calder v. Bull*, 3 U.S. 386 (1798), Justice Chase defined vested rights as, "When I say that a right is vested in a citizen, I mean that he has the power to do certain actions or to possess certain things according to the law of the land."

¹⁷⁵ Cooley defined a retrospective law most broadly as "one which is made to operate upon some subject, transaction or contract which existed before its passage, and which is intended to give it a different legal effect from that it would have had without." See Cooley, "The Limits to Legislative Power in the Passage of Curative Laws." p. 2

¹⁷⁶ Cooley, *Constitutional Limitations*. p. iv. Emphasis added.

To map this chapter broadly, the first section will cover Cooley's understanding of the foundations of American legislative power broadly, including the implied limitations based on separation of powers and vested rights. This will lead into the next section, which will cover his understanding of implied prohibitions on retroactive legislation. The third section will scrutinize Cooley's claims by examining English common law, early state case law, and the opinions of some of the more prominent Founders of the first constitutions. The general object is to determine the constitutional validity of Cooley's claim that American legislatures were prohibited from annihilating constitutional, statutory, and common law rights vested in individuals, without public purpose, without compensation, and outside of any constitutional or statutory authority, despite the lack of explicit prohibitions on retroactive civil legislation in most of the constitutions. Important for the purposes here is determining whether Cooley's implied limitation was housed within the constitutions. Critics of Cooley's various positions will be cited and considered throughout the chapter to provide some orientation.

Section I: The Extent and Limits of Legislative Power

Foundations of American Legislative Power

To understand Cooley's broad views on the constitutional limitations which rest upon the legislative power of the state and federal governments, it is best to lay the foundation for this approach on his perspective. Often in his treatises, articles, and opinions, he stated a constitutional maxim broadly, provided evidence for its validity based on constitutional provisions, law, custom, or deduction, and then he usually qualified it based on federal and state case law from two directions: the extent of powers, and the limits of powers. Just as the legislatures enjoyed inherent, express, and implied powers, they also were checked by express

limitations and implied limitations. Among the implied limits were those based on constitutional provisions indicating the purposes of government, those dividing powers between the branches based on the constitutional character of those powers, and the substantive rights protected expressly in the constitutions. His overarching theme was this: No government can act outside of established rules or laws—arbitrary governance was unknown in the American regime—and the constitutions were the highest laws.

The Purposes of American Governments

Constitutions universally read that the purpose of free governments or the constitution was to provide for the equal or public benefit, the happiness, or the rights of the people generally.

Typically they appeared in the bills of rights, preambles, or under the “fundamental principles of government” headings. That of Maryland was typical and read, “That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole; and they have at all times, the inalienable right to alter, reform, or abolish their Form of Government, in such manner as they may deem expedient.”¹⁷⁷ All others were similar, typically emphasizing the general public or general purpose of government.¹⁷⁸ Usually the public benefit

¹⁷⁷ Maryland Constitution. 1867. Article VI, §1

¹⁷⁸ Alabama Constitution. 1868. Art. I, §3; Arkansas Constitution. 1868. Art. I, §I; California Constitution. 1849. Art. I, §2; Connecticut Constitution. 1818. Art. I, §2; Delaware Constitution. 1831. Preamble; Florida Constitution. 1868. Declaration of Rights, §2; Georgia Constitution. 1868. Preamble; Illinois Constitution. 1848. Art. III, §2; Indiana Constitution. 1851. Art. I, §1; Iowa Constitution. 1857. Art. I, §2; Kansas Constitution. 1859. Bill of Rights, §2; Kentucky Constitution. 1850. Art. XIII, §4; Louisiana Constitution. 1868. Preamble; Maine Constitution. 1820. Art. I, §2; Maryland Constitution. 1867. Art. I, §1; Michigan Constitution. 1835. Bill of Rights. Art. I, §2; Minnesota Constitution. 1857. Art. I, §1; Mississippi Constitution. 1868. Preamble; Missouri Constitution. 1865. Art. I, §4; Nebraska Constitution. 1866. Preamble; Nevada Constitution. 1864. Art. I, §2; New Hampshire Constitution. 1784. Art. I, §1, §10; New Jersey Constitution. 1844. Art. I, §2; New York Constitution. 1846. Preamble; North Carolina Constitution. 1868. Art. I, §2; Ohio Constitution. 1851. Art. I, §2; Oregon Constitution. 1857. Art. I, §I; Pennsylvania Constitution. 1838. Art. IX, §2; Rhode Island Constitution. 1841. Art. I, Preamble; South Carolina Constitution. 1868. Preamble; Tennessee Constitution. 1835. Art. I, §2; Texas Constitution. 1866. Art. I, §1; Vermont Constitution. 1786. Preamble; Virginia Constitution. 1851. Declaration of Rights, §3; West Virginia Constitution. 1863. Preamble; Wisconsin Constitution. 1848. Art. I, §1.

requirement for government was immediately followed by a reservation of the right of the people of the state to alter or abolish their forms of government should it fail in this regard. So not only was the public purpose principle one of the universal, overarching maxims of all American government, but it was the most consequential in that a departure from that principle was grounds for violent revolution. This requirement extended to the protection of vested rights: at a minimum, the legislature could annihilate vested rights only if there were a public benefit. Depending on the circumstances, compensation might also be required. The public purpose maxim will be the focus of the chapter on taxation and so it will suffice for now to simply point out that the purposes of American governments were explicitly written into the texts, and most broadly that purpose was to provide for the public benefit.

The Nature of Legislative Power in the American Regime

Before reviewing the separation of powers divide that created implied limitations, one must first consider Cooley's understanding of the extent of legislative power. His foundation for the general extent of legislative power of the states was based on the legislative power of the English or British Parliament, given the Americans adopted its general framework, usages, and customs when creating their own state legislative bodies.¹⁷⁹ Such a comparison with English government was limited, however, at least partly because of the differences in the location and understanding of sovereignty in the two countries, Cooley pointed out.¹⁸⁰ At least in theory, Parliament enjoyed

¹⁷⁹ Cooley, *Constitutional Limitations*. p. 85

¹⁸⁰ Cooley defined sovereignty as: "Sovereignty, as applied to states, imports the supreme, absolute, uncontrollable power by which any state is governed. A state is called a sovereign state when this supreme power resides within itself, whether resting in a single individual, or in a number of individuals, or in the whole body of the people." Cooley, *Constitutional Limitations*. p. 1. *See also* Cooley, "Sovereignty in the United States." p. 83-86. Here Cooley wrote that there was no sole, absolute sovereignty in the United States. The different branches can control each other, and even popular opinion—up to and including revolution—can qualify the exercise of power.

total sovereignty and legislative power over the entire country and government.¹⁸¹ Cooley wrote the theory of dual sovereignty, as it became known, was correct: deduced from “Federal decisions,” practice, and authorities such as Madison and Webster, Cooley rejected both the nationalists and states rightists, who each had claimed sovereignty was indivisible and housed either in the central government or the several states. Rather, the people of the states vested the general sovereign power in their state governments, as divided and limited according to their constitutions, and they delegated certain elements of that existing sovereign authority to the federal government. “[C]urtailed in its proportions; and out of what states surrendered, a new government would be formed, not only sovereign, but for all the purposes of existence, paramount.” The federal judiciary would keep the central and state governments within their orbits.¹⁸² Theoretically, at least, ultimate sovereignty in United States would lie with the people—the “people of the Union” vested specific sovereign authorities in the federal government, and the “people of each State” conferred the remaining sovereign power in their state governments, with limitations,¹⁸³ and ultimately it was they who could finally reallocate that power through the amendment processes.

¹⁸¹ Blackstone and Coke likely were the two English jurists who had the most influence on the American lawyers, statesmen, and the people of the founding era. Blackstone took the position that Parliament was omnipotent in his *Commentaries*. Coke famously wrote in *Dr. Bonham’s Case* that the common law controlled acts of Parliament, which may have simply been referring to a rule of interpretation, some have argued, but in his later *Institutes* he remarked that Parliament’s power is “transcendent and absolute” (4 *Inst.* 36). Blackstone quoted this and added, “[Parliament] can change and create afresh even the constitution of the kingdom and of parliaments themselves ... It can, in short, do every thing that is not naturally impossible.” Still, Blackstone had also written laws contrary to natural law or special acts that confiscated property could not be considered “law.” See Mott, *Due Process*. §21, §22

¹⁸² See also Cooley, *Constitutional Limitations*. p. 82

¹⁸³ Cooley, *Constitutional Limitations*. p. 28. Cooley wrote in his piece “Sovereignty in the United States,” *supra*, that in all reality, “the people” of the Union or respective states were really just those who could participate in government. Nonetheless he acknowledged the generally accepted theory of American government as described here.

The legislative power of the states was plenary, with exceptions, whereas the legislative power of the federal government was limited to a list of powers and their necessary implications. On a most fundamental level, as was often explicitly written in state constitutions, the people of the states enjoyed total, plenary, and inherent legislative power. In its purest form, the power to make law included the power to do anything that was not naturally impossible, as Blackstone and Coke had described the power of Parliament, including the power to confiscate property, impose regulations, tax, and divest individuals of their lives, liberty, and property without any restraint. The people of the states entrusted only some of that sovereign power to their legislatures upon forming their constitutions. The federal legislature enjoyed only delegated powers. So whereas one looked for delegated powers in the federal Constitution to understand the extent of federal legislative power, one looked for prohibitions in the state constitutions to understand the extent of state legislative power. Cooley emphasized that the inherent powers of legislatures, namely police powers, eminent domain, and taxation, even if unexpressed, *must* fall within the power of government because government itself needed those powers to exist and fulfill its purposes. Indeed, many state constitutions lacked any explicit delegation of such powers, and yet all state legislatures passed statutes under those banners. Nonetheless, no government power in the American regime was unlimited, Cooley emphasized, and such sovereign or inherent powers remained “hedged in on all sides.” The American legislatures were no British Parliament.

Jurisdictional Limitations and Separation of Powers

Every state separated its government into executive, judicial, and legislative branches. Many constitutions explicitly read that the powers were in general to remain in separate departments, barring any constitutional exceptions. Cooley emphasized implied limitations based on

jurisdiction: federalism and separation of powers implicitly limited the powers of other spheres and branches. In short, “[T]here is an implied exclusion of each department from exercising the functions conferred upon the others.”¹⁸⁴ The same applied to the state and federal spheres of sovereignty. Few would claim, for example, that the Virginia General Assembly could pass a law fixing the standard of weights and measures throughout the United States, despite the lack of such a prohibition in Article I, §10. That power was delegated to Congress, and thus implicitly it limited the power of state legislatures. Neither could Congress pass a law establishing the property tax rate for the Commonwealth. Not only was that power never delegated, but the state constitution read that the General Assembly was to establish such policies. Similarly, the General Assembly could not pass a law granting a pardon to a criminal. That power was housed in the governorship, and even though there was no express prohibition in Article IV of the Virginia constitution, implicitly it was outside of legislative power. There was an “implied exclusion of each department from exercising the functions conferred upon the others.”

Cooley saw clear lines dividing independent powers free from interference from other branches. He noted that although Chief Justice Marshall had suggested in *Fletcher v. Peck*,¹⁸⁵ “How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated,”¹⁸⁶ Cooley replied, “[H]owever interesting it may be as an abstract question, it is made practically unimportant by the careful separation of duties between the several departments of the

¹⁸⁴ Cooley, *Constitutional Limitations*. p. 87

¹⁸⁵ *Fletcher v. Peck*, 10 U.S. 87 (1810)

¹⁸⁶ Cooley, *Constitutional Limitations*. p. 89

government which has been made by each of the State constitutions.”¹⁸⁷ Indeed, as he put it elsewhere, “These charters of government, in prescribing the rights, duties and obligations of citizens, have done so with clearness and precision, and in like plain terms have fixed the bounds of governmental authority.”¹⁸⁸ Even in the judiciary, where one might have expected widely different constructions of constitutions, the supposedly major transitions from the Federalist Marshall to the Jacksonian Taney, and then to the post-war, Republican-Democratic hybrid Chase, failed to disrupt or change fundamentally the division of powers, particularly in terms of federalism, Cooley pointed out.

To further illustrate Cooley’s principle, in *Sutherland v. The Governor*¹⁸⁹, Cooley demonstrated his understanding of implied limitations based on separation of powers between the judiciary and the executive. He refused to issue a writ of mandamus to compel the governor to provide a certificate showing that the Lake Superior ship canal and harbor had been constructed to his satisfaction in conformity with the state law. The certificate would have provided a private corporation with the right to operate the canal in accordance with its state legislative grant. Even though the canal had been built, the governor refused to issue the certificate because it appeared the public would be denied access to at least some portion of it in violation of the “spirit” of the legislation, as he described. In the course of considering whether a proper construction of the law would require a ministerial or discretionary duty on the governor to issue the certificate, Cooley wrote:

¹⁸⁷ Cooley, *Constitutional Limitations*. p. 90

¹⁸⁸ Cooley, “The Uncertainty of the Law.” p. 352

¹⁸⁹ *John L. Sutherland v. The Governor* 29 Mich. 320 (1874)

Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. ... This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties. ... the legislature cannot dictate to the courts what their judgments shall be ... If it could, constitutional liberty would cease to exist....

Most broadly in terms of functions, “The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law.”¹⁹⁰ And in particular, “The legislative power is the authority, under the Constitution, to make laws, and to alter and repeal them.”¹⁹¹ In comparing the judicial power with the legislative, “In fine, the law is *applied* by the one, and *made* by the other.” Further, in terms of time, “[O]ne is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling

¹⁹⁰ Citing Chief Justice Marshall in *Wayman v. Southard*, 23 U.S. 1 (1825). Further, “Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has prescribed.” p. 91. *See also* “The Uncertainty of the Law,”: “What is law? If we call for definition it will be readily given, and we shall be told that, taken collectively, it embraces the rules of action formulated by some sovereign expression of State will, whereby the rights of citizens are established, and their privileges and duties defined and prescribed. This is a narrow and technical definition, but it will answer our immediate purpose.”

¹⁹¹ Cooley, *Constitutional Limitations*. p. 90

under its provisions.”¹⁹² Functions could not be both judicial and legislative, because rather than being abstractly categorized, their “nature” was determined by the constitutions themselves and the departments in which they were practiced: “On general principles, therefore, those inquiries, deliberations, orders, and decrees, which are peculiar to such a department, must in their nature be judicial acts.”¹⁹³ It was the constitutional actions of departments that determined their natures, not an extraconstitutional theory that determined their powers.

Further on this point, some scholars erroneously cast Cooley as something of a Cardozon who embraced the notion of “judge-made law.”¹⁹⁴ Not only was this concept an encroachment on legislative power to make laws, but it went even beyond the power of legislatures, to create what amounted to *ex post facto* or retroactive laws. By such a scheme, it was entirely possible for individuals to act in accordance with the law, as many citizens and jurists understood it, but then to be brought to court to have judges create new laws within the nebulous “gaps” and then apply them retroactively—even while admitting the law itself was unclear. The result was sometimes an extirpation of explicitly protected rights to life, liberty, or property. It appears Cooley would have rejected the notion of law made by judges within the “interstices” of the law, because such discretion would have encroached on legislative power. Judges were to construe the law as it existed based on established rules when reaching decisions. When in doubt, they were to exercise restraint, not reach for power. “Judge-made law,” as he criticized it in one passage, is “that made by judicial decisions which construe away the meaning of statutes, or find meanings in them the

¹⁹² Cooley, *Constitutional Limitations*. p. 91

¹⁹³ Cooley, *Constitutional Limitations*. p. 92

¹⁹⁴ Herstein, “Postmodern Conservatism.” p. 855-864

legislature never held.”¹⁹⁵ Again, as he quoted the Indiana Supreme Court, “This power of construction in courts is a mighty one, and, unrestrained by settled rules, would ... render courts, in reality, the legislative power of the State.”¹⁹⁶ He indeed noted that “judge-made law” may refer simply to “the law that becomes established by precedent,” a legitimate exercise of judicial power. Precedents could grow and be refined, but the principles, laws, and rules themselves were set in legal stone. This will be covered in more detail on the chapter on constitutional change, which will examine Cooley’s understanding of the role of the judiciary in the American regime.

Based on these standards, Cooley wrote, “[Legislative power] cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative.”¹⁹⁷ As Cooley was wont to do, he qualified this general maxim with examples and explications based on case law—police powers, eminent domain, taxation, certain customary laws, and other legislative powers could indeed totally annihilate vested rights under certain conditions and based on constitutional provisions, statutes, common law maxims, and precedent.

Vested Rights as an Implied Limitation on Legislatures

Cooley defined vested rights by law, not theory, and they imposed implicit restrictions on legislatures. “Every positive direction contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of that provision,”¹⁹⁸ he wrote. They included

¹⁹⁵ Cooley, *Constitutional Limitations*. p. 57

¹⁹⁶ Cooley, *Constitutional Limitations*. p. 56

¹⁹⁷ Cooley, *Constitutional Limitations*. p. 91.

¹⁹⁸ Cooley, *Constitutional Limitations*. p. 88

life, liberty, and property rights recognized or vested under constitutional, statutory, or common law. Cooley's definition of "liberty" will be examined in more detail in the chapter on due process. He tended to emphasize property rights as a contract in his analysis of case law regarding vested rights. These rights could be annihilated only through legitimate judicial or legislative action based on existing constitutions, legislation, or rules, such as criminal procedure or eminent domain, police powers, and taxation. His definition of vested rights echoed those of justices Chase and Marshall in *Calder v. Bull* and *Fletcher v. Peck*, respectively,¹⁹⁹ although it is important to note that he also agreed with Justice Iredell that "the Court cannot pronounce [a law] to be void, merely because it is, in their judgment, contrary to the principles of natural justice."²⁰⁰ As Justice Chase defined a "vested right" in *Calder v. Bull*: "When I say that a right is vested in a citizen, I mean that he has the power to do certain actions or to possess certain things according to the law of the land." The "law of the land," as will be examined in considerable depth in the chapter on due process, included constitutions, statutes, the common law, and other general, legally enforceable rules of society. He like Cooley emphasized property as a vested right. Justice Marshall put it similarly in terms of contract rights in *Fletcher v. Peck*: "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community."

Cooley did not equate vested rights with natural rights or argue natural rights were to enjoy protection under natural law, as many of his critics claimed, although he certainly

¹⁹⁹ See also Corwin, Edward. 1914. "The Basic Doctrine of American Constitutional Law." Vol. XII *Michigan Law Review* No. 4. p. 249

²⁰⁰ *Calder v. Bull*, 3 U.S. 386 (1798)

recognized the force of codified natural rights protections in constitutions and he noted the injustice of legislatures arbitrarily discriminating against particular individuals by confiscating their property without judicial process or outside of legitimate exercises of police powers or eminent domain. The term “vested rights,” he wrote, was both “narrow and technical” as “importing a power of legal control,” but in terms of equity it also implied a “vested interest” that the government could not deprive from an individual without injustice.²⁰¹ In its “narrow or technical sense,” vested rights were positive, legal limitations on legislative power—any deprivation of legal rights required reliance on existing legal processes under the rule of law. All state constitutions explicitly recognized the rights to life, liberty, and property, and many of the provisions were written in the Lockean language of natural rights, or divinely bestowed rights, or were recognized as being in accordance with “principles of liberty and free government,”²⁰² a more historically grounded yet equally forceful recognition of pre-existing rights. One of the most common wordings typically read something like, “All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property: and pursuing and obtaining safety and happiness.”²⁰³ Often the provisions were in the first section of the first article. Some simply noted that any injuries to life, liberty, or property entitled the people to

²⁰¹ Cooley, *Constitutional Limitations*. p. 357-358

²⁰² Connecticut Constitution. 1818. Art. I

²⁰³ California Constitution. 1849. Art. I, §1.

remedies under the law, among other variously worded recognitions of these rights.²⁰⁴ So when Cooley noted the supposedly nebulous “principles of free government” or the “natural rights” of the people, in all reality he was relying on the explicit and universal constitutional protections for those rights. Again, Cooley abhorred reliance on extraconstitutional theory to limit government, but he was also a champion of any theory that was written into the constitutions. This was not because he was a theorist, but rather, it was because he was a constitutionalist. He recognized the very real, pre-existing rights to life, liberty, and property long protected under Anglo-American law and custom. It was outside the power of legislatures to divest individuals of those rights outside of established law.

When governments vested property rights in individuals or corporations, such rights were protected by these constitutional clauses, statutory rules, or common law practice or custom. Some constitutions explicitly recognized them or read that “vested rights” could not be divested or impaired unless by law.²⁰⁵ The Texas constitution, for example, read, “The rights of property

²⁰⁴ Alabama Constitution. 1868. Art. I, §1; Arkansas Constitution. 1868. Art. I, §10; California Constitution. 1849. Art. I, §1; Connecticut Constitution. 1818. Art. I, §1, §12; Delaware Constitution. 1831. Preamble; Florida Constitution. 1868. Declaration of Rights, §1; Georgia Constitution. 1868. Art. I, §1; Illinois Constitution. 1848. Art. XIII, §1; Indiana Constitution. 1851. Art. I, §1, §12; Iowa Constitution. 1857. Art. I, §1; Kansas Constitution. 1859. Bill of Rights, §1; Kentucky Constitution. 1850. Preamble; Louisiana Constitution. 1868. Title I, Art. 1; Maine Constitution. 1820. Art. I, §1; Maryland Constitution. 1867. Art. XIX; Massachusetts Constitution. 1780. Part the First, Art. I; Michigan Constitution. 1850. Art. VI, §32; Minnesota Constitution. 1857. Art. I, §7; Mississippi Constitution. 1868. Art. I, §2; Missouri Constitution. 1865. Art. I, §1; Nebraska Constitution. 1866. Art. I, §1; Nevada Constitution. 1864. Art. I, §1; New Hampshire Constitution. 1784. Art. I, §2; New Jersey Constitution. 1844. Art. I, §1; New York Constitution. 1846. Art. I, §6; North Carolina Constitution. 1868. Art. I, §1; Ohio Constitution. 1851. Art. I, §1; Oregon Constitution. 1857. Art. I, §1; Pennsylvania Constitution. 1838. Art. IX, §1; Rhode Island Constitution. 1841. Art. I, §1; South Carolina Constitution. 1868. Art. I, §1; Tennessee Constitution. 1835. Art. I, §1, §8; Texas Constitution. 1866. Art. I, §16; Vermont Constitution. 1786. Chapter I, §1; Virginia Constitution. 1851. Declaration of Rights, §1; West Virginia Constitution. 1863. Art. I, §6; Wisconsin Constitution. 1848. Art. I, §1, §9.

²⁰⁵ Arkansas Constitution. 1868. Art. XV, §16; Georgia Constitution. 1868. Art. XI, §10; Louisiana Constitution. 1868. Title VI, Art. 110; Missouri Constitution. 1865. Art. IX, §9; Texas Constitution. 1866. Art. VII, §20

and of action, which have been acquired under the Constitution and laws of the Republic of Texas, shall not be divested.” Generally deprivation clauses had to be written into contracts, just compensation had to accompany eminent domain confiscations, exertions of police powers required a public purpose according to statute or legal custom, taxation on property required uniformity, judicial process was required for deprivations, and so on. Even absent of any express protection of vested rights, the whole concept of a “right” for Cooley was one that could be protected under law. These rights included titled property or otherwise an enforceable legal right: “And it would seem that a right cannot be considered a vested right, unless it is something more than a mere expectation, and has already become a title, legal or equitable, to the present or future enjoyment of property, or the present or future enforcement of a demand, or a legal exemption from a demand made by another.”²⁰⁶ In other words, one must be able to demonstrate an antecedent legal or constitutional investment to claim a vested right. Nowhere did Cooley claim “vested rights” was an abstract concept based solely on natural law or natural rights.

Cooley qualified vested rights broadly and then in relation to legislative power: “All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they become divested through the operation of these laws, it is only by way of enforcing the obligations of justice and good order.” Public necessity outweighed private rights, Cooley argued, contrary to radical individualism or *laissez-faire* ideology. Eminent domain, police powers, and taxation, among other inherent powers, could indeed totally divest life, liberty, or property, sometimes even without compensation, but always with a public purpose. Yet some vested rights, in some circumstances, lay beyond the

²⁰⁶ Cooley, *Constitutional Limitations*. p. 359

reach of legislative enactments simply because it was not within the powers of the legislatures to destroy them by way of retroactive civil legislation.²⁰⁷

Section II: Retroactive Legislation According to Cooley and His Critics

Cooley defined a retrospective law as “one which is made to operate upon some subject, transaction or contract which existed before its passage, and which is intended to give it a different legal effect from that it would have had without.”²⁰⁸ It was akin to an *ex post facto* prohibition, except it applied to civil legislation rather than criminal legislation. Cooley in many cases considered retroactive legislation a usurpation of judicial power, particularly when it encroached on vested rights outside of any established law. But he recognized that certain powers such as eminent domain, police powers, and taxation could indeed divest rights through retroactive legislation. Some constitutions expressly forbade retroactive legislation, some did not, but regardless there were implied limitations on legislative power rooted in constitutional provisions.

The principle was largely based on an English rule of construction rather than a judicially enforceable limitation on legislatures: “[A] constitution is to be construed to operate prospectively only, unless its terms clearly imply that it should have a retrospective effect.”²⁰⁹ The same rule applied to statutes,²¹⁰ and it applied to courts, Cooley argued, if they tried to create new rules upon which to abrogate rights. This rule of construction was in general uncontroversial and regularly relied upon in English and state case law. The contention was whether laws that

²⁰⁷ Cooley, *Constitutional Limitations*. p. 358

²⁰⁸ Cooley, “The Limits to Legislative Power in the Passage of Curative Laws.” p. 2

²⁰⁹ Cooley, *Constitutional Limitations*. p. 62

²¹⁰ Cooley, *Constitutional Limitations*. p. 370

explicitly read that they were to have retroactive effect, including the annihilation of vested rights, was constitutionally prohibited. Secondly, it was questioned whether courts could void such laws despite a lack of a clear constitutional provision.

If a law indeed explicitly read that it was to have retroactive effect—up to and including the destruction of vested rights—it had to remain in harmony with legal requirements based on constitutional principles, Cooley wrote. In general, the rule was that no new law could be created to reach back and destroy an already existing right created or protected under the law or contract or constitutions unless the public welfare demanded it. Legislatures could indeed pass retrospective laws that reached back and regulated or modified vested rights, and via their recognized powers they could deprive individuals of life, liberty, and property without trial, and the judiciary could entirely abrogate vested rights by criminal statute, for example, but all branches of government had to operate based on established standards under the principle of the rule of law. Untethered discretion and unconfined power had always been prohibited. Within the English common law as adopted by the states, and under the American constitutional order, as Cooley emphasized, “arbitrary power and uncontrolled authority were not recognized among its principles.”²¹¹

In *Gaines v. Buford*,²¹² for example, as Cooley pointed out, the state of Kentucky passed a law with the purpose of coercing landowners into compensating tenants or occupants for the improvements they had made to the land, should they be evicted. The law gave the owners three choices: compensate the occupants, build a certain amount of fencing at your own expense, and

²¹¹ Cooley, *Constitutional Limitations*. p. 22

²¹² *Doe ex dem. Gaines v. Buford*, 1 Dana 499, 31 Ky. 481 (1833)

if neither of those should occur, then the state would confiscate and transfer the title of the land to the occupant. There was nothing in the federal or state constitutions that explicitly prohibited the legislature from requiring owners to improve their lands, nor was there an explicit prohibition on retroactive civil legislation, and yet the court voided the law as unconstitutional. The decision was not based on a vague notion of higher law or justice. The legislature had usurped power from the judiciary and had encroached on vested property rights, principles housed in the explicit protection of property in the state constitution as well as the contract, bills of attainder, and takings clauses, as explained in the opinion. Both the preamble to the 1799 Kentucky constitution as well as Article X recognized the citizens' right to property. The contract clauses of the constitutions prohibited states from "tak[ing] back land and resum[ing] title, against the assent of the grantee," as the court put it. "Nor is there a principle, which will allow the government to annex new conditions, unknown at the time of the original contract; and for a violation of them seize the land, [and] divest the citizen of his title ..." Also, the constitutions forbade the passage bills of attainder (including pains and penalties)—such as a law depriving individuals of vested property rights with or without the commission of a crime. Further, "The legislature has no power to take the property of one citizen and transfer it to another, or to apply it to public use ... without just compensation being previously made to him." Also, as Cooley put it, this law was neither an exercise of eminent domain, nor taxation, nor a police regulation.

The point is that Cooley's implied limitation on retroactive lawmaking was based variously on the force of legal, constitutional, or common law rights,²¹³ on the explicit

²¹³ "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away." See Cooley, *Constitutional Limitations*. p. 362

prohibitions on legislative powers, and on power of the judiciaries alone to confiscate property outside of established legislative powers. Even though there was no explicit constitutional clause prohibiting the state legislature from requiring owners to build fences, implied limitations based on vested rights and jurisdictional boundaries “hedged in” the legislative power. Also, there was no lengthy definitions of the meaning and extent of contracts, bills of attainder, legitimate takings, police powers, or property rights in the Kentucky constitution, but rather, the court depended on common law maxims and understandings of those words to determine the limit of legislative power. Ultimately the law in the Kentucky case was arbitrary because the legislature was acting upon no existing law, no constitutional power, and no common law maxim to divest an individual of his vested right to property.

Note that Cooley never claimed *regulation* on vested rights was prohibited—here he was referring to outright legislative confiscation or deprivation of established property or common law rights without a preexisting law and without a public need. The exercise of the police powers was based on the ancient maxim *sic utere tuo ut alienum non laedas*²¹⁴ as well as *salus populi suprema lex esto*.²¹⁵ As he cited in his chapter on police powers, “All contracts and all rights, it is held, are subject to this power; and regulations which affect them may not only be established by the State, but must also be subject to change from time to time, with reference to the general well-being of the community, as circumstances change, or as experience demonstrates the necessity.”²¹⁶ Contract rights and other rights explicitly protected from retroactive legislation via

²¹⁴ “Use your own property in such a manner as not to injure that of another.” This maxim dates at least to Bracton in the 13th century and was regularly cited. See Smead, Elmer. 1936. “Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power.” 21 Cornell Law Review 2 (February 1936). p. 276-277

²¹⁵ “The good of the people should be the supreme law.”

²¹⁶ Cooley, *Constitutional Limitations*. p. 574

the constitutional provisions, he wrote, did not receive different treatment under police powers. Rather they “are only thereby placed upon the same footing with other legal rights and privileges.”²¹⁷ Police powers standards were based on existing legislative power, statutory enactments, the common law maxims as adopted and employed in the state judiciaries, rights established in contracts, as well as the jurisdictional argument protecting vested rights. Given the widely varying circumstances under which the state needed to employ police powers, Cooley affirmed that a concrete rule was difficult to establish. He could do little more than point to rather broad principles and then demonstrate the application of those principles in case law.

Cooley cited a number of cases that applied to both private corporations under government contract as well as private individuals and their lives, liberty, and property. He concluded the following in regard to private corporations: regulation must be based on the safety or welfare of the public; it must not conflict with any provision in the charter or contract; and it cannot “take from the corporation any of the essential rights and privileges which the charter confers.”²¹⁸ *If the public welfare demanded it*, legislatures could indeed totally annihilate a vested right, however, even if a contract provided no clause explicitly allowing such an abrogation. At the same time, even if a provision in the charter allowed for altering, modifying, or even repealing the charter entirely, no subsequent act *on pretence* of amendment or police power could deprive the corporation of property, even for public use. In the Vermont case *Pingry v. Washburn*,²¹⁹ Cooley noted, a private corporation was chartered to establish a toll road. No clause was included to allow for subsequent amendment, and yet a later statute authorized a

²¹⁷ Cooley, *Constitutional Limitations*. p. 577

²¹⁸ Cooley, *Constitutional Limitations*. p. 577

²¹⁹ *Pingry v. Washburn*, 1 Aiken 264 (~1830)

certain class of individuals to pass freely. The court held the subsequent law void. In this case, the law served no public welfare purpose, the contract did not allow it, and it divested the right to levy tolls. In *Miller v. Railroad Co.*,²²⁰ a railroad under charter was ordered by subsequent law to build a highway crossing over its tracks at its own expense. The law was again held void. Such a crossing would indeed serve the public to some degree, and a clause in the charter allowed for amendments, but this act of government was more akin to eminent domain, and so compensation was required.²²¹

At the same time, “Under the police power the State sometimes for the time being, and perhaps permanently, the value of property to the owner, without affording him any redress.”²²² Examples included “quarantine regulations” that could divest individuals of their liberty or require the destruction of their contaminated property;²²³ prohibitions on keeping of gunpowder in unsafe quantities in cities or villages; the sale of poisonous drugs; allowing unmuzzled dogs to be at large, etc.²²⁴ All of these were legitimate police powers that could divest individuals of their vested property rights without compensation. In the most “striking light” in which the police power of the legislature may totally destroy the value of property, in a host of liquor prohibition

²²⁰ *Miller v. N.Y. & Erie R.R. Co.*, 21 Barb. 513 (1856)

²²¹ Cooley himself relied on these same standards in *Detroit v. Detroit & Howell Plank Road Co.* 43 Mich. 140 (1880). In 1848, under a general act, the Michigan state legislature incorporated the Howell company for the purpose of building and maintaining a toll road from Detroit to the village of Howell. Two later acts sought to modify the charter, including one allowing localities to order corporations to entirely remove certain booths—which they did. Not only was the vested statutory right being extirpated, but as Cooley wrote, taking from individuals or corporations their property, regardless of how it was acquired, without compensation and without public purpose “has been forbidden in England ever since Magna Charta, and in this country always.”

²²² Cooley, *Constitutional Limitations*. p. 384

²²³ Cooley, *Constitutional Limitations*. p. 584

²²⁴ Cooley, *Constitutional Limitations*. p. 595-596

cases, the merchants' property of liquor was regulated out of existence under police powers to prevent "intemperance, pauperism, and crime, and for the abatement of nuisances."²²⁵ Such laws required the utmost justification for public welfare, Cooley wrote, but nonetheless fell within police powers. He emphasized that such an exercise of power "must be justified upon the highest reasons of public benefit."

Another notable category of allowable retrospective laws were curative or confirmatory statutes that corrected past laws, "[made] good proceedings in which statutory requirements have not been observed," or otherwise reoriented the law toward the lawful intent of the lawmakers while refraining from depriving anyone of their vested rights.²²⁶ If the legislature exercised its valid authority and conferred a power to act, for example, and prescribed a particular mode by which the law should be carried out, if it is "defectively or irregularly exercised, and for that reason invalid," the legislature may pass another law to cure or confirm or perhaps clarify the law already passed.²²⁷ Cooley admitted that distinguishing constitutional from unconstitutional curative laws required judicial discretion that may well depend on a sense of justice, but he wrote that this was an unsatisfactory condition created by "the course of legislation itself."²²⁸

Criticisms

²²⁵ Cooley, *Constitutional Limitations*. p. 583. The Supreme Court later upheld this limit of vested property rights and the extent of police powers in *Mugler v. Kansas*, 123 U.S. 623 (1887)

²²⁶ Cooley, *Constitutional Limitations*. p. 371, 376, 381-382. *See also* Black, Henry Campbell, and West Publishing Company. 1968. *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*. Rev. 4th edition. St. Paul, Minn: West Pub. "Ex post facto law."

²²⁷ *People ex rel. Ira C. Bristol et al. v. The Board of Supervisors of Ingham County* 20 Mich. 95 (1870)

²²⁸ *See also* Cooley, "The Limits to Legislative Power in the Passage of Curative Laws." p. 3-4. Here he cited *Terry v. Anderson*, 95 U.S. 628 (1877)

Many critics of this doctrine seem to misrepresent it or were simply confused. Bryant Smith wrote that it was “impossible” to define a vested right.²²⁹ Also, “[A] law is retroactive if it extinguishes or impairs legal rights already acquired by the individual under the laws previously existing.” He then claimed, based on this definition, “[A]ll exercises of police power, and, indeed, all laws of any kind whatsoever are retrospective. There is no such thing as a law that does not extinguish rights, powers, privileges, or immunities acquired under previously existing laws. That is what laws are for.”²³⁰ In short, the doctrine was nonsensical, he claimed. But he failed to recognize the difference between mere regulation and total revocation. Ultimately he fell back on the standard misperception: Vested rights were simply those that the judges believed were based on “eternal justice” or abstract “principles of free government,” and judges simply used this extraconstitutional, substantive limitation to strike down legislation. Sometimes jurists relied on an equally misty claim that legislative power “by nature” prohibited retroactive legislation, he wrote. He made no reference to the constitutional provisions that implicitly restricted legislatures, nor did he consider the common law, and he devoted a single sentence, as an aside, to the entire jurisdictional argument between legislative and judicial power.²³¹

John Scurlock at least noted the common law root of the maxim, but as he put it, “The bias against retroactive legislation is more than an aversion to the destruction of private interests having economic value. It is a bias deeply rooted in Anglo-American law. Coke established the maxim ‘*Nova constitutio futuris formam imponere debet non praeteritis*.’²³²” Blackstone declared

²²⁹ Smith, Bryant. 1927. “Retroactive Laws and Vested Rights.” 5 Tex. L. Rev. 231 (1927) p. 231

²³⁰ Smith, “Retroactive Laws and Vested Rights.” p. 231-233

²³¹ Smith, “Retroactive Laws and Vested Rights.” p. 235-236

²³² “A legislative enactment ought to be prospective in its operation, and not retroactive.”

it to be a matter of justice that statutes should be made to operate in the future. The American decisions abound with condemnations of retroactive legislation.”²³³ Coke did not establish it, as will be explained shortly, but American courts indeed relied on it as a tool of statutory construction and in some cases as justification for striking down legislation. Scurlock failed to note how this rule of construction was absorbed into the American constitutions through reception statutes or state constitutions and how constitutional provisions limited legislatures. He offered psychological reasons for the doctrine’s use in American law: retroactive laws “destroy one’s feeling of security” or “seem to do violence to one’s sense of justice.” This was the basis of the 19th century vested rights doctrine, he claimed, which he styled as the “Natural or Vested Rights Doctrine” that simply held the “legislature is limited by principles of natural law.”²³⁴ He and many others simply equated the vested rights doctrine with the natural law or natural rights doctrine, even though the former relied on actual, existing, positive rights in constitutions, statutes, and common law, at least according to Cooley. As Scurlock and so many others would claim, the due process clause later served as a constitutional housing to further this “bias” against retroactive legislation.

Charles Grove Haines went so far as to claim vested rights in general was not a legal notion at all, but rather was a product of results-oriented political and sociological preferences.²³⁵ Also, in demonstrating his confusion he jumped seamlessly from the prohibition on retroactive

²³³ Scurlock, John. 1953. *Retroactive Legislation Affecting Interests in Land*. University of Michigan Law School. p. 8-18

²³⁴ Scurlock, *Retroactive Legislation Affecting Interests in Land*. p. 10

²³⁵ Haines, *The Revival of Natural Law Concepts*. p. 88 n. 1. See also Fine, *Laissez Faire*. p. 4; Jacobs, *Law Writers and the Courts*. p. 5

civil legislation to substantive due process limits protecting life, liberty or property.²³⁶ The two indeed have the same effect in limiting legislation and protecting rights, but they relied on different constitutional provisions. The former was based on separation of powers clauses and positive protections of existing rights, and it existed on its own as a legislative limitation. The second was based on the due process clauses and all of its implications, as will be examined in the due process chapter. Indeed, it is often noted that *Wynehamer* was among the first state cases to strike down a property law on substantive due process grounds, yet for generations the courts had been striking down retroactive civil laws that violated vested rights based on the jurisdictional limitations and provisions protecting such rights in other clauses.²³⁷ Scholars claimed the jurisdictional limitation transmogrified into the substantive due process limitation, even while sometimes noting that courts based decisions on both doctrines in the same opinions.²³⁸

Elmer Smead, in one of the most thorough and critical examinations of the transformation from a rule of construction to a limitation on legislatures, claimed James Kent and Joseph Story gave the maxim its new expansive meaning by their own accord. He wrote they turned the old definition of “retrospective law” from simply meaning a law that operated antecedently, to a law

²³⁶ Haines, *The Revival of Natural Law Concepts*. p. 100 n. 4

²³⁷ *Wynehamer v. People* 13 N.Y. 378 (1856). See Brockelbank, W.J. 1953. “Role of Due Process in American Constitutional Law.” 39 *Cornell Law Review* 4. p. 568 n. 36. See also Mott, *Due Process*. §82, §119

²³⁸ Mott, *Due Process*. §82. “Some courts put the cases on both grounds of due process and vested rights, but others, beginning to realize the potency of the former phrase, discontinued the expression of the vested rights and natural law doctrine in their opinions, although it is evident that they retained it in the philosophic make-up of due process.”

that commenced upon its enactment and destroyed vested rights.²³⁹ They further broadened it into a “transcendental limitation on legislative power”²⁴⁰ to allow courts to strike down legislation that was “in violation of first principles, reason, justice, or the nature of our government,” not the constitutions.²⁴¹ Cooley actually divided retrospective laws into a number of categories. Most broadly, they were simply those that were “made to operate upon some subject, transaction or contract which existed before its passage, and which is intended to give it a different legal effect from that it would have had without.”²⁴² He also wrote that certain retrospective laws were prohibitive, in certain cases, because they destroyed vested rights. Did Kent, Cooley, and Story invent this modification of the principle? Was there any real modification at all?

Section III: English Common Law, State Cases, and the Founders

At the root of the prohibition on retroactive civil legislation was a legal maxim dating at least to ancient Greece, adopted under Roman civil law, incorporated into English common law, reaffirmed in English courts, transplanted into the American colonies, and adopted and modified under the new constitutional order of American limited government. The general rule of construction was that laws were presumed to act prospectively rather than retroactively, unless the legislature explicitly indicated it was to have retroactive effect. The Supreme Court affirmed the “known rule being that a statute for the commencement of which no time is fixed commences

²³⁹ Smead, Elmer. 1936. “The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence.” 20 *Minnesota Law Review* 7 (June 1936). p. 782-783

²⁴⁰ Smead, “The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence.”. p. 789

²⁴¹ Smead, “The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence.” p. 789

²⁴² Cooley, “The Limits to Legislative Power in the Passage of Curative Laws.” p. 2

from its date” as far back as 1822.²⁴³ It remains a commonly accepted rule of construction today.²⁴⁴ Again, the broader question is whether civil legislation was necessarily void under the constitutions, even if the text indicated retroactivity, if it divested individuals of vested rights, outside of established constitutions, law, or common law practice.

The first among Cooley’s citations was the oft-cited *Dash v. Van Kleeck*²⁴⁵. Kent served on the New York court at this time. The issue in this case was whether a law divesting sheriffs of liability for the escape of prisoners could have a retroactive effect on an action already brought against the sheriff for failing to keep a certain prisoner detained. In this case, Jason Rudes was in the custody of sheriff Van Kleeck of Albany, New York, for his debts to his creditor, Dash. While still under custody, he paid the required bail in order to be allowed into the “gaol liberties”—a limited district within the city around the jail. But he “escaped” beyond the limits of the gaol liberties into another area of the city, contrary to the law, and his creditor Dash brought suit against the sheriff under the existing law. The state legislature then passed an act after the facts

²⁴³ *Matthews v. Zane*, 20 U.S. 164 (1822). See Kent, James. 1832. 2nd ed. *Commentaries on American Law*. Vol. 1. p. 454. See also *Ogden v. Blackledge*. 6 U.S. 272 (1804). Sometimes noted is the quote, “A legislature cannot declare what the law *was*, but what it *shall be*,” but this appears to be a direct quote from the reporter rather than the actual opinion.

²⁴⁴ Cooley cited a litany of court cases as well as Broom’s *Maxims* and Smith’s 1848 *Commentaries* treatise to support the “sound rule of construction to give a statute a prospective operation only, unless its terms show a legislative intent that it should have retrospective effect.” See Broom, Herbert. 1845. *A Selection of Legal Maxims, Classified and Illustrated*. Philadelphia: T & J.W. Johnson, Law Booksellers, No. 5 Minor Street.; See also Smith, E. Fitch. 1848. *Commentaries on Statute and Constitutional Law and Statutory and Constitutional Construction, Containing an Examination of Adjudged Cases on Constitutional Law Under the Constitution of the United States, and the Constitution of the Respective States Concerning Legislative Power; and Also the Consideration of the Rules of Law in the Construction of Statutes and Constitutional Provisions*. Albany: Gould, Banks & Gould; and New York: Banks, Gould & Co.; See also “Retroactive Legislation: A Primer for Congress.” Congressional Research Service. August 15, 2019. “In light of those concerns, courts have declined to construe statutes to apply retroactively absent clear evidence of congressional intent. Accordingly, if Congress intends civil legislation to have retroactive effect, it must clearly state that the law applies retroactively.”

²⁴⁵ *Dash v. Vankleek*, 7 Johns 477 (1811). James Kent was chief justice of the New York Supreme Court at this time, although he was not yet chancellor in the equity court.

but before the trial that absolved sheriffs of liability in such cases—its effect was retrospective. The court held that Dash’s vested right to bring action against the sheriff remained intact despite the change in law. “It is a principle of universal jurisprudence,” the court held, “that laws, civil or criminal, must be *prospective*, and cannot have a *retroactive* effect,” and cannot be so construed “so as to take away a vested right.” Elsewhere, simply, “The legislature cannot take away a vested right.” Further, the New York court cited the prospective maxim from *Bacon’s Abridgment*, a judicial staple of English Common Law first published in 1768 and used widely in both England and the United States from the 18th and into the 19th century. The section “From what Time a Statute begins to have Effect” reads, “It is in the general true, that no statute is to have a retrospect beyond the time of its commencement; for the rule and law of parliament is, that *nova constitutio futuris formam imponere debet, non praeteritis*,”²⁴⁶ or, “a legislative enactment ought to be prospective, not retrospective in its operation.” Kent, in his opinion, wrote, “It is a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect.” This understanding would support the claim that even if laws were intended to have a retroactive effect, the law was void if it divested individual rights outside of established rules and practices.

Kent cited English common law precedents and principles dating back to the absorption of Roman civil law into the English common law under leadership of Henry de Bracton of the King’s Bench in the 13th century. The rule actually dated back at least to ancient Greece.²⁴⁷

²⁴⁶ Bacon, Matthew. 1807. *A New Abridgment of the Law*. Vol. VI. Sixth Edition. A. Strahan. p. 370

²⁴⁷ Smead, “The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence.” p. 775-776.

Bracton wrote it as *nova constitutio futuris formam imponere debeat et non praeteritis*²⁴⁸; this maxim in turn was based on the maxim found in book fifty of Justinian's *Digest*, part of the *Corpus Juris Civilis*, which read, *Nemo potest mutare consilium suum in alterius injurium*²⁴⁹, to prevent retroactive injury. Bracton was well-known and was studied into the 16th and 17th centuries. Also, Edward Coke noted the principle as well in an opinion interpreting a statute of Gloucester, writing the act applied only prospectively.²⁵⁰ Kent further cited *Gilmore v. Shuter*²⁵¹, a case dating to Charles II in which the Court of the King's Bench considered whether a promise of marriage made before a new act, which required proof in writing of such a promise to be binding, could be applied retroactively. It could not. Although archaic by today's standards, it reflects the same principle of *Dash* that an act cannot be presumed to extinguish a vested right or "take away an action to which the plaintiff was then entitled," as Kent put it.

The principle was again reaffirmed in 1769 in an oft-cited and important case by Lord Mansfield, perhaps the most powerful and influential English jurist of the 18th century, in *Couch v. Jeffries*.²⁵² *Shuter* was recognized as an authority. In this case the defendant failed to pay a stamp duty on an indenture of apprenticeship, was by law required to pay it, and he faced an additional penalty. He paid the duty and was facing the additional fee, at least part of which was to be paid to a private individual under a *qui tam* writ. Mansfield and a unanimous court held the

²⁴⁸ Bracton, Henry. *Bracton on The Laws and Customs of England*. lib. 4 fol. 2 Lev. 227. "A legislative enactment ought to be prospective in its operation, and not retroactive." See also amesfoundation.law.harvard.edu/Bracton/index.html. Vol. 3 p. 181, visited March 8, 2020.

²⁴⁹ *Justinian Dig.* 50.17.75. "No one can change his plans to the injury of another."

²⁵⁰ "[F]or it is a rule and law of Parliament, that regularly *Nova constitutio futuris formam imponere debet non praeteritis*." 2 Inst. 292.

²⁵¹ *Gilmore v. Shuter*, 2 Mod. 310 (1677)

²⁵² *Couch v. Jeffries*, 4 Burr. 2460 (1769)

new act could not retroactively divest the “pursuer” of the cost of his *qui tam* action. “Here is a right vested; and it is not to be imagined that the legislature could, by general words, mean to take it away from the person in whom it was so legally vested, and who had been at a great deal of cost and charge in prosecuting.”²⁵³

It is important to acknowledge that the reason behind the seemingly universal condemnation of *certain* retrospective laws prior to the American Revolution was not based simply on the fact that they were retrospective. Cooley confirmed that the mere retrospective character of a law was no justification for objecting to it.²⁵⁴ In England, the general opposition was based on their injustice. “[A]n act of parliament shall never be so construed as to do an injustice,”²⁵⁵ as Coke put it broadly. Kent cited in his *Commentaries* the retrospective rule in England whereby laws took effect from the first day of the parliamentary session—not on the day the law received royal sanction. A law in England that imposed export duties on rice shipments had such a retroactive effect, taxing merchants under a new law despite their having shipped their rice out weeks before. The rule was changed under George III because of “its great and manifest injustice.”²⁵⁶ That “injustice” was based on the extent of their “injury” to individuals, as the ancient Code had put it—another way of describing a divestment of rights, before the expression of individual “rights” gained its popularity in the Renaissance and the Age of Enlightenment. The point is that critics of the doctrine were at least partially correct—the

²⁵³ Robertson, Max A., ed. *The English Reports*. Vol. CXXX. Common Pleas VIII. Containing Bingham, Vols. 1 to 6. William Green. Edinburgh. 1912. p. 1280-1281

²⁵⁴ Cooley, *Constitutional Limitations*. p. 370

²⁵⁵ Robertson, *The English Reports*. p. 1280

²⁵⁶ Kent, James. 1826. *Commentaries on American Law*. Vol. 1. p. 427-428. See Commencement Act of 1793, 33 Geo. III. c. 13.

basis of prohibiting retroactive civil legislation had long been condemned based on a higher law sense of justice, since time immemorial. But it is also important to recognize that the higher law prohibition on inflicting injury, or injustice, or depriving individuals of their rights, by whatever name, was codified in the American constitutions.

The only reason Parliament, princes, and the ancients could enact such unjust laws was because there was no higher, positive force of government to check them. All the jurists could cite was a higher natural law or the Magna Charta.²⁵⁷ As Cooley presented the quandary in England, “But in those times when the power of the Parliament was undefined and in dispute, and the judges held their offices only during the king’s pleasure, it was a matter of course that rights should be violated, and that legal redress should be impracticable, however clear those rights might be.”²⁵⁸ Rights indeed existed, but they were subject to a flawed system that allowed Parliament to violate the English constitution. Although Smead failed to examine these points in depth, he briefly noted the differences between the English and American systems of government were essential to the modification of the principle. It was “to be expected because of the absence of the rule of legislative sovereignty and the presence of the institution of judicial review” in England, he wrote.²⁵⁹ In this token aside, Smead evaded the crux of the whole adaption of the principle to the American constitutional system. The principle was not modified. It simply enjoyed more force and weight based on written constitutions and judicial review.

²⁵⁷ As will be examined in more detail in the chapter on due process, such appeals to the Magna Charta indeed could compel kings to temper their pronouncements. The point here is that there was no constitutional checks and balances in the American constitutional sense.

²⁵⁸ Cooley, *Constitutional Limitations*. p. 342

²⁵⁹ Smead, “The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence.” p. 781

Kent acknowledged that ancient despots could indeed override this principle to arbitrarily injure the rights of individuals by explicitly including retroactivity in the law itself. It is true that in England this maxim was largely a rule of construction rather than an explicit limitation on Parliament that the courts could impose. If Parliament explicitly applied a law retroactively, then it stood. The Parliament was sovereign. But America was different. As Kent pointed out, these differences included the principle that legislative power was limited, that private rights were secured in constitutional provisions, and an independent judiciary had distinct powers. Those powers included construing and applying the written and common law, including protecting rights long secured in constitutions, statutes, and common law. The separation of powers and the inherited rights of Englishmen, or “natural justice”, or “natural rights,” or whatever, that critics used to condemn retrospective legislation prior to American independence, were codified in the state and federal constitutions and made the very real, very consequential, law of the land.

Smead noted the existence of holdings in cases such as *Jeffries* in which the English court had explicitly noted disapprobation of construing laws retrospectively because of the injustice of extirpating vested rights. In a footnote he also wrote, “In some earlier American cases [before *Van Kleeck*] the validity of retroactive laws which impaired vested rights had already been called into question.”²⁶⁰ Not only were they called into question, but the entire understanding of this implied limitation on legislative power as Kent, Story, and Cooley understood it appears to have been generally accepted in the American judiciaries from the earliest days of the Republic. It was far from a mere footnote. Smead failed to address many of these. This following sampling of cases demonstrate the extent to which the new order of American higher law constitutionalism

²⁶⁰ Smead, “The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence.” p. 789 n. 41

necessarily gave new force and weight to the age-old principle. Of the cases that considered the relationship between retroactive civil legislation and vested rights, it appears that all of them during the early days of the Republic reflected Cooley's general position.²⁶¹

Early American Case Law

In 1792, for example, in perhaps the best early summary of the overall limitation, the supreme court of Virginia was considering whether a civil law respecting gifts and possession could be applied retroactively.²⁶² In 1758, to prevent debtors from fraudulently claiming goods and chattels in their possession had been gifted to someone else, Virginia passed a law requiring legal documentation proving that such gifts indeed had been transferred. Claims that gifts had been verbally transferred were inadmissible in court. In 1787, another law was passed declaring that the construction of the 1758 act required "that such gifts, at what time soever made, if accompanied with possession, shall be regarded as effectual upon all trials." In other words, under the 1758 act, if a gift was indeed verbally transferred, without documentation, and yet that gift was in the possession of the donee, then the claim of possession was admissible in court. This applied retroactively to gifts "at what time soever made." The question is whether the 1787 act could reach back retrospectively and change title to property. "And that question involves an enquiring into the different powers of legislators and judges," the court wrote:

It is the business of legislators to make the laws; and of the judges to expound them. Having made the law, the legislative have no authority afterwards to explain its operation upon things already done under it. They may amend as to

²⁶¹ Search for "Retroactive OR Retrospective AND vested;" "All state cases;" "January 1, 1776 to December 31, 1810." NexisLexis (Nexis Uni). Search conducted April 1, 2020.

²⁶² *Turner v. Turner's Ex'X*, 8 Va. 234 (1792). This case did not appear in Cooley's treatises.

future cases, but they cannot prescribe a rule of construction, as to the past. For a legislative interpretation, changing titles founded upon existing statutes, would be subject to every objection which lies to ex post facto laws, as it would destroy rights already acquired under the former statute, by one made subsequent to the time when they became vested. A power to be deprecated, as oppressive and contrary to the principles of the constitution.

Virginia had no clause in its constitution of 1776 that prohibited such retroactive civil legislation. The law of 1787 explicitly read that it was to apply retroactively, and yet the court refused to recognize the admissibility of verbal transfers of property. This case demonstrated implied limitations of legislatures based on jurisdiction, vested rights, and common law practices. Much like *Cooley*, by this opinion it appears the Virginia supreme court considered retroactive civil legislation to be just as unconstitutional as *ex post facto* criminal legislation.

Other cases aligning with *Cooley*'s understanding demonstrated under what circumstances retroactive laws were constitutional. In 1802, the Virginia supreme court heard a case regarding whether the executor of the estate of a dead debtor was liable to pay his share of an existing bond despite the passage of a subsequent law that would have exonerated him. But because the act's language failed to indicate retroactive effect, and because no vested rights were violated, the executor remained liable.²⁶³ Tennessee had a constitutional clause that explicitly prohibited retrospective legislation, but a divorce law in 1799 read that "if any person hath been or shall be injured" then there may be grounds for divorce. The husband had committed adultery before the law's passage, and so the wife "hath been" injured, and yet he protested that the law

²⁶³ *Elliott's Ex'rs v. Lyell*, 7 Va. 268 (1802)

violated the explicit prohibition on retroactive civil legislation. It divested him of half his property based on an act he committed prior to the law's passage. But adultery had already been grounds for divorce. The court held that the constitutional prohibition on retrospective legislation was "intended to embrace rights, and not modes of redress: The last, from the nature of things must be left open to legislative modification."²⁶⁴ In other words, the retroactive law modified the existing remedy for the injured wife, it did not turn an act of adultery from a non-offense into a punishable offense. In 1806, the Massachusetts Supreme Court was considering a dispute over the placement of a toll gate on the turnpike of a private corporation and held, "We are also satisfied that the rights legally vested in this, or in any corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation."²⁶⁵ A footnote added there was an "implied reservation in every legislative grant, property or right granted may be taken for public use, when public necessity or utility requires it, and paying therefor a reasonable compensation."

Retroactive civil laws were generally constitutional as long as they "do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations."²⁶⁶ Legislatures indeed enjoyed the power to pass retrospective laws, but only in conformity with express and implied limitations.

The Founders

²⁶⁴ *Jones v. Jones*, 2 Tenn. 2 (1804)

²⁶⁵ *Wales v. Stetson*, 2 Mass. 143 (1806)

²⁶⁶ Cooley, *Constitutional Limitations*. p. 359. See also Kent, James. 1826. *Commentaries on American Law*. Vol. 1 p. 426

A pressing question is what the founders thought of such retroactive civil legislation. There is evidence that the implied limitation on retrospective civil legislation violating vested rights was understood to be in effect from the founding. As Cooley and Story both pointed out, *ex post facto* in its broadest sense included prohibitions on both retroactive criminal and civil legislation, and they lamented the holding in *Calder v. Bull* that limited the common law expression to criminal legislation only. Still, Chase wrote it is “not to be presumed” that the legislatures would pass laws depriving individuals of their vested rights.²⁶⁷ Regardless of this, it appears at least some of the delegates to the Philadelphia Convention and the state ratifying conventions believed the *ex post facto* limitation on both the federal and state governments would prohibit state legislatures from interfering with *at least* existing private contracts—a civil matter—and perhaps more. Some pointed out that legislatures were already prohibited from passing retroactive laws depriving individuals of vested rights, so the clauses were unnecessary.

In the convention, Oliver Ellsworth and James Wilson argued on August 22 that the federal *ex post facto* clause was unnecessary because it was common knowledge that such laws were “void of themselves” and their illegitimacy was among “the first principles of Legislation,” respectively. Madison later commented on August 28 that the contract clause was unnecessary because prohibitions on *ex post facto* laws would cover retroactive interferences in such civil

²⁶⁷ Cooley (and Story) believed the expression referred to prohibitions on retrospective civil legislation as well. See Cooley, “The Limits to Legislative Power in the Passage of Curative Laws.” p. 2. See also Story, Joseph, and Thomas McIntyre Cooley. 1873. *Commentaries on the Constitution of the United States*. 4th Ed. Boston: Little, Brown. §1345: “The terms, *ex post facto* laws, in a comprehensive sense, embrace all retrospective laws, or laws governing or controlling past transactions, whether they are of a civil or a criminal nature. And there have not been wanting learned minds, that have contended, with no small force of authority and reasoning, that such ought to be the interpretation of the terms in the Constitution of the United States.” Although Justice Chase wrote that retroactive civil legislation fell outside of the *ex post facto* provisions, his comment in *Calder* closely reflected Cooley’s overall position: “It is not to be presumed, that the federal or state legislatures will pass laws to deprive citizens of *rights* vested in them by *existing* laws; unless for the benefit of the *whole* community; and on making full satisfaction.”

matters. It wasn't until August 29 that John Dickinson informed the convention that he had consulted Blackstone's *Commentaries* and found the definition was limited to criminal cases only. Although Dickinson was correct that Blackstone wrote *ex post facto* laws were those relating to criminal law, immediately after his categorization, one should note, Blackstone added more broadly, "All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term '*prescribed*.'" ²⁶⁸ Finally, on September 14, just three days before the end of the convention, George Mason moved to strike the *ex post facto* prohibition from Article I, Sect. 9, because he worried it would apply to civil as well as criminal law. ²⁶⁹

In the Virginia ratifying convention, Patrick Henry and Mason worried the *ex post facto* provisions would require the Commonwealth to remit "shilling for shilling" the nominal value in gold and silver to pay off her share of the depreciated Continental paper dollars—clearly a civil matter. George Nicholas responded that the legislature of Virginia had *never* enjoyed the power to make such *ex post facto* laws regardless of any explicit constitutional limitation, so the provisions were immaterial. Edmund Randolph, however, said that "taken technically," the provisions applied to retroactive criminal law only, so retroactive legislation could indeed mitigate Virginia's financial burden. Mason retorted, "I beg leave to differ from him. Whatever it may be at the bar, or in a professional line, I conceive that, according to the common acceptance

²⁶⁸ Blackstone, William, and Thomas McIntyre Cooley. 1884. *Commentaries on the Laws of England: In Four Books* (3rd ed., rev.) Chicago: Callaghan. Book I §46

²⁶⁹ See Elliot, Jonathan; eds. James McClellan and M.E. Bradford. 1989. United States Constitutional Convention (1787). *Jonathan Elliot's Debates in the Several State Conventions on the Adoption of the Federal Constitution As Recommended by the General Convention at Philadelphia in 1787*. Cumberland, Va.: J. River Press. p. 485, 515, 519, 606-607

of the words, *ex post facto* laws and retrospective laws are synonymous terms.”²⁷⁰ Mason was not a lawyer, but Henry was. Randolph was an attorney, of course, and so was Nicholas. So some opposed the limitations while others supported them, different legal minds thought *ex post facto* variously applied to civil and criminal law, and some thought that retrospective legislation in general was prohibited with or without explicit clauses. But regardless, it appears Cooley’s broad understanding of the *ex post facto* clauses and an implied limitation prohibiting retroactive civil and criminal laws was fairly common among the drafters and ratifiers.

Conclusion

Ultimately it appears that Cooley’s principle was constitutionally sound. Retroactive civil legislation that divested individuals of their rights outside of established rules was just as prohibitive as *ex post facto* criminal laws. The existence of implied limitations on legislatures was irrefutable. Separation of powers and federalism drew lines of jurisdiction between the spheres and branches of government. Positive enumeration of rights necessarily limited the power of legislatures to divest individuals of those rights, outside of their police powers, eminent domain, taxation, or other methods tied to a public purpose or benefit. Few denied that the legislature could pass retroactive civil legislation that modified remedies or corrected laws previously made, which is probably why so few constitutions included express prohibitions on retrospective laws. So ultimately it appears the presence of express prohibitions was largely irrelevant. “Every positive direction contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of that provision.”²⁷¹ Further, “[T]here is an

²⁷⁰ Eliot, Jonathan. 1836 (Reprint 1941). *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787*. J.B. Lippincott. 2nd ed. Vol. III. “Convention of Virginia, June 15, 1788.” p. 461, 471-477

²⁷¹ Cooley, *Constitutional Limitations*. p. 88

implied exclusion of each department from exercising the functions conferred upon the others.”²⁷² Positive rights provisions limited legislatures, legislatures could not exercise judicial functions, and the constitutions were supreme.

²⁷² Cooley, *Constitutional Limitations*. p. 87

Chapter 3: Due Process and Law of the Land

The purpose of this chapter is to determine the soundness of Cooley's understanding of the law of the land or due process clauses in the federal and state constitutions.²⁷³ His position has been a primary target of critics, who often claimed he expanded its meaning to limit legislatures generally beyond their constitutional restrictions to help impose judicial supremacy and to incorporate his economic, moral, or political ideology into constitutional law. Charles Grove Haines, the first to launch a major attack on Cooley's jurisprudence, wrote that he took part in the "conversion" of the due process and law of the land clauses from a limit on procedure into a general limitation on legislatures that allowed judges to "render invalid all governmental acts considered by judges to be unfair or arbitrary," based abstractly on natural law or natural rights.²⁷⁴ Later scholars, as noted in previous chapters, often deferred to Haines and his adherents in their criticisms of Cooley. Based on Cooley's citations, however, it appears he relied primarily on common law and other legal history, legal treatises and particularly Sir Edward Coke, and state judicial opinions to understand the meaning, purpose, and extent of legislative limitations and rights protections under the clause. For him, these provided the necessary insight into the underlying purpose and application of the clauses in Anglo-American history, which supported his overall claim the clauses were essentially redundancies requiring all branches of government to operate strictly within their spheres according to established rules and laws. In other words, the due process clauses provided an additional layer of explicit protection from arbitrary

²⁷³ U.S. Constitution, Amendment V: No person shall be deprived of life, liberty, or property, without due process of law." Amendment XIV: "... nor shall any State deprive any person of life, liberty, or property, without due process of law ...". State constitutions variously read "no person" or "no freeman" or "no man" shall be deprived of life, liberty, or property except by the "due process [or course] of law," or "the law of the land," and sometimes both.

²⁷⁴ Haines, *The Revival of Natural Law Concepts*. p. 121-122

government, and that protection was ultimately housed in the text of the constitutions. It is important to note from the beginning that Cooley did not argue common law imposed an implied limitation on legislatures necessarily, as some argued.²⁷⁵ Rather, the English common law provided meaning to the common law rights, he wrote, and gave statesmen and jurists the definitions for common law terms as adopted by the states through reception statutes and common law constitutional provisions, including the due process clauses.

To map this chapter broadly, the first section will cover the primary arguments levied against Cooley. The second section will analyze Cooley's position on the meaning of the due process clauses of the state constitutions by summarizing his position, comparing his claims with those of his sources to determine whether he was consistent or more creative in his interpretation, and then it will shift toward examining the case law to see whether or to what extent the state courts reflected his understanding. The third section will also consider Cooley's views on the due process clause of the 14th Amendment. Like the previous section, it will summarize his position, compare it with his sources, and then examine the case law.

Section I: Criticism of Cooley

Benjamin Twiss, Clyde Jacobs, Sidney Fine,²⁷⁶ and others echoed Haines's economic-centered assessment of Cooley's due process jurisprudence. Alan Jones wrote that Cooley "developed" an interpretation of the due process clauses that was "pregnant with possibilities" rather than firmly based on an established interpretation, and his motives were more political.²⁷⁷ Rodney Mott was

²⁷⁵ Fine, *Laissez Faire*. p. 128

²⁷⁶ Twiss, *Lawyers and the Constitution*. p. 19-20; Jacobs, *Law Writers and the Courts*. p. 32; Fine, *Laissez Faire*. p. 128

²⁷⁷ Jones, *The Constitutional Conservatism of Thomas McIntyre Cooley*. p. 126-127

one of the few scholars to affirm the legal accuracy of Cooley's due process jurisprudence.²⁷⁸

Haines was the most thorough among these commentators and wrote there have been two primary schools of thought on the meaning of due process of law: first, that "laws in their making and enforcement must not be arbitrary and must accord with natural or substantive justice; in short, must not be contrary to principles of natural law"; and second, "an individual should not be interfered with in respect to his private rights except through a regularly enacted law and formal legal procedure."²⁷⁹ In English law, Haines wrote, the clause referred to "a procedure following the ancient customary law or one rendered legal by parliamentary enactment," thus limiting the clause to legislative and judicial procedure. This understanding would allow the legislatures and judiciaries to divest individuals of their rights as long as procedural requirements were met—laws were passed by legislative rules and norms, the accused was provided an opportunity to present exculpatory evidence, and so on. The natural law understanding, by contrast, would limit the outcome of legislation based on personal ideas of fairness, rights, or morality. He wrote the English definition of due process was limited to legal judicial procedure, which excluded the notion of a judicially enforceable limit on the substance of legislation. The clause largely enjoyed a similarly limited, procedural definition in the federal and state courts until the mid- to late-19th century. "The state and federal governments were headed in a direction which, except for a rather marked change of course, would have led to conditions similar to those prevailing in England and Canada," he wrote. The "provisions for the separation of powers had little practical effect" in the states, and it was by the judicially-construed doctrine of vested rights

²⁷⁸ Mott, *Due Process of Law*. §75-§76

²⁷⁹ Haines, *The Revival of Natural Law Concepts*. p. 107

that “the principle of legislative omnipotence” in the states was overrun by judiciaries that artificially conjured the power that they could strike down legislation.²⁸⁰

Haines erroneously placed Cooley in the natural law school,²⁸¹ and he failed to describe the third school to which Cooley adhered: the due process clauses applied to all government and were redundant affirmations of a simple principle: the constitutions were the highest laws of the land.²⁸² Note the dual definition of Haines’s first school: “laws must not be arbitrary *and* must accord with natural or substantive justice” (emphasis added). From then on he ignored the prohibition on “arbitrary” governance and emphasized the supposedly abstract, natural law standard. He and others seem to have routinely defined “arbitrary” government as “arbitrary according to the opinion of the judge based on personal opinion,” rather than “arbitrary” meaning the government was acting outside of any established constitutional power, law, or legal rule. As Jacobs put it, “[D]ue process—as elaborated by Cooley—became a general prohibition against nearly everything that conservative interests might regard as arbitrary or unreasonable.”²⁸³ Cooley indeed recognized natural law and rights, but only to the extent that they had been codified in constitutions. The rights to life, liberty, and property were indeed explicitly protected in all American constitutions. As he put in his treatise on torts, “The mere suggestion of these requirements [that judges and administrators be perfectly trained and disciplined in recognizing morality] is sufficient to make clear to the mind the impossibility of

²⁸⁰ Haines, *The Revival of Natural Law Concepts*. p. 109

²⁸¹ Haines, *The Revival of Natural Law Concepts*. p. 116-117.

²⁸² *Weimer v. Bunbury*, 30 Mich. 201, 214 (1874). Cooley’s opinion: “The truth is, the bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated into the fundamental law, and thus secured against violation.”

²⁸³ Jacobs, *Law Writers and the Courts*. p. 32

making moral wrong the test of legal wrong. It follows that there must of necessity be a legal standard of right and wrong ... Nor is it possible that this standard should be established otherwise than by positive human law.”²⁸⁴ He indeed wrote that no branch of government could act arbitrarily—but not according to fanciful judicial speculations, but rather, all government branches had to act in accordance with existing written law or common law procedure, which itself was designed to protect life, liberty, and property from deprivation without law. The due process clauses, in this sense, merely reiterated the obvious principles of the rule of law and constitutionalism. They provided an express layer of protection requiring the governments, under the higher-law limits of the constitutions, to refrain from annihilating the ancient, pre-existing rights to life, liberty, and property as they were already recognized under the written constitutions and as such rights were vested in citizens by the government.

Haines overtly side-stepped another foundational element of Cooley’s argument: “It is not within the purpose of this study to deal with the numerous [American] judicial decisions which approved the doctrine that the legislatures had powers as unlimited as the British Parliament, except so far as restricted by the express provisions of written constitutions.”²⁸⁵ Cooley affirmed the fairly obvious principle that the American people had all legislative power initially upon their break from Great Britain, and they vested it entirely in their legislatures yet with constitutional restrictions, and then they delegated some of those powers to the federal government in 1787. This point, had Haines acknowledged it, would have undermined his claim that legislatures could divest individuals of their rights by mere statute. He maneuvered around Cooley’s major point that positive constitutional clauses affirming individual rights implicitly,

²⁸⁴ Cooley, *A Treatise on the Law of Torts*. p. 3-4

²⁸⁵ Haines, *The Revival of Natural Law Concepts*. p. 109

yet necessarily, limited the powers of legislatures. Just as he had casually dismissed the separation of powers clauses in state constitutions, here he ignored the force of explicitly protected rights to life, liberty, and property. He seems quite comfortable with the idea that state legislatures could legally divest individuals of their ancient rights and privileges by statute, outside of established law, as long as they followed procedure, much like Parliament had done under the efforts of Chancellor Townshend and Lord North. He failed to take the constitutions seriously, and his position teetered on the absurd: the constitutions had little real force, the judiciary was inert, and the legislatures could tread on the constitutions if they had the votes.

Cooley relied heavily on Coke, and Haines attacked Coke with as just as much fervor as he had with Cooley. He wrote with considerable accuracy that Coke's supposed claim for the supremacy of the common law over Parliament "as interpreted by the judges" had little support in English legal history. Coke, as quoted by Blackstone, actually recognized Parliament's omnipotence. But regardless, Haines failed to recognize the general notion that Magna Carta was indeed hailed as a binding and fundamental law of England that delimited all branches of government, at least in theory, and he casually downplayed a number of English cases recognizing its seat above statutory law.²⁸⁶ Further, scholars often noted that Coke expounded on the rights protected under Magna Carta as it was originally understood, and it is true that the dominance of Parliament became more generally recognized after Coke, but Haines also neglected to recognize that the expansive understanding of due process was codified under the Petition of Right, that Coke's understanding of a higher common law had considerable influence on the Americans, and that there were legal consequences to the Americans' adoption of common law, written constitutions, judicial review.

²⁸⁶ Haines, *The Revival of Natural Law Concepts*. p. 107 n. 2.

Section II: Cooley on State Due Process Clauses

Cooley argued that despite the differences in the forms of government between England and the United States, the due process clauses of the state and federal constitutions were reiterations of the same general guarantees found in the Magna Carta, as it had been clarified over many hundreds of years in English law and applied to the new American constitutional order. He supported his claim with reference to legal treatises, historical events, and state and federal judicial opinions.²⁸⁷ As with bills of rights in Anglo-American history, the purpose for the inclusion of the law of the land or due process clauses, Cooley wrote, was “to repeat the guaranty” that individual rights were to be protected under written constitutions. Magna Carta, The Petition of Right, the English Bill of Rights, the Habeas Corpus Act, the state constitutions, the federal constitution, the 14th Amendment—all of these were repeated attempts to protect existing rights from extraconstitutional, arbitrary powers of government.

Cooley on Liberty

It is important first to consider Cooley’s general definition liberty to understand his overall view of the due process clauses. That expression—life, liberty, and property—covered “every right to which a member of the body politic is entitled under law,” Cooley wrote.²⁸⁸ He rejected theories of the social contract or natural rights as reliable touchstones for understanding personal, civil, and political liberty, contrary to the claims from many of his critics. He was indeed quite Burkean on these points. As he put it in his treatise on torts:

The term natural liberty is sometimes made use of by writers on law and on politics in a sense implying that freedom from restraint which exists before any

²⁸⁷ Cooley, *Constitutional Limitations*. p. iii

²⁸⁸ Story, Cooley, *Commentaries on the Constitution*. §1950

*government has imposed its limitations. But in no proper or valuable sense has any such liberty existed or been possible. ... And where governments are established, the rights of which the law can take notice, can be those only which come from and are defined by the law itself. ... In the domain of speculation or morals a right may be whatever ought to be respected; but in law that only is a right which can be defended before legal tribunals.*²⁸⁹

Further:

*Much is said by some writers concerning natural rights and natural liberty, and of the duty of the government, instead of creating, to recognize those which come from nature. As if nature had indicated any clear line which the human intellect and conscience would infallibly recognize, on either side of which might be placed the acts permitted and the acts prohibited, according as the one or the other was by nature justified or condemned. ... [T]hey would be likely soon to discover that the rule of morality is very far from being adequate to the adjustment of a large proportion of all the controversies in which conscientious men, in the absence of law, would find themselves involved.*²⁹⁰

And yet Cooley was no positivist. “But while it is true that many things wrong in morals may not be wrong in law, it is equally true that some things which constitute wrongs in law may not be wrongs in morals.”²⁹¹ Neither was he an historicist in that he would have rejected natural justice or believed that the meaning of American constitutions pregnant with moral precepts could change over time. He simply believed that established law took precedence over philosophy

²⁸⁹ Cooley, *Treatise on the Law of Torts*. p. 5

²⁹⁰ Cooley, *Treatise on the Law of Torts*. p. 6 n. 1

²⁹¹ Cooley, *Treatise on the Law of Torts*. p. 4

when deciding legal disputes. He argued the meaning of the written constitutions remained the same until explicitly changed by amendment. Common law principles were similarly fixed and had remained the same since time immemorial, although he recognized the need for unwritten constitutions to change over time. Obviously the unwritten constitutions had been refined and adapted over time according to new circumstances, but certain principles—such as a general prohibition against arbitrary governance—had remained the rule since Magna Carta. Although he cited Blackstone’s narrow conception of liberty,²⁹² he emphasized that it must include more than simply free locomotion because of the language of the charter and the American constitutions themselves.

He embraced the concept of pre-existing rights, but only in the context of the Anglo-American legal history. Originally, “The right to personal liberty did not depend in England on any statute, but it was the birthright of every freeman,”²⁹³ as he put it. Englishmen and their American cousins were born into an ordered liberty that was recognized, delimited, embraced, and protected by law and constitution. In the context of the due process clause, “[L]iberty here employed implies the opposite of all those things which, beside the deprivation of life and property, were forbidden by the Great Charter.” In other words, “[T]he guarantee is the negation of arbitrary power in every form which results in a deprivation of right.”²⁹⁴ Pre-existing English and American rights—life, liberty, and property—were recognized since time immemorial, were explicitly protected within a constitutional sphere and were limited or divested only through established laws, rules, procedures, and settled legal maxims. Because the language of the

²⁹² Cooley, *Constitutional Limitations*. p. 339. See also Blackstone, William, and William Draper Lewis. 1902. *Commentaries on the Laws of England : In Four Books*. Vol. I. Philadelphia: R. Welsh. §134

²⁹³ Cooley, *Constitutional Limitations*. p. 342

²⁹⁴ Story, Cooley, *Commentaries on the Constitution*. §1950

Magna Carta and the constitutions in general indicated a recognition of negative rights based on limited government, the “liberty” of the due process clauses included personal, civil, and political liberty. All of it could be regulated or annihilated. Yet all of it was protected from arbitrary interference. Cooley’s emphasis was not on the nature and extent of liberty so much as it was on the extent and limits of government power. That power lay under permanent principles and rules as they had been embedded within written constitutions. The “procedural” and “substantive” delineation is immaterial from this perspective. A law, judicial pronouncement, or executive action that divested a long-protected right outside of the established rules and general laws of government violated the law of the land. The purpose for the inclusion of the due process clauses was to create explicit, secondary layers of protection for the existing, already-vested legal rights in order to withstand the “aggressive tendency of power.”²⁹⁵

Cooley on Original Meaning

It appears Cooley never provided a detailed analysis of the debates in the state constitutional conventions on the meaning of due process, but he along with others seem to have believed the meaning was largely settled by the American Revolution. Indeed, perhaps most striking about the available material on the constitutional conventions, the ratification debates on the Constitution, and the congressional debates on the Bill of Rights, was a near-total silence on the meaning of

²⁹⁵ Cooley, *Constitutional Limitations*. p. 351

the clauses.²⁹⁶ Until some of the state constitutional conventions into the 19th century, it appears the meaning of the clause, whatever it may have been, was indeed taken for granted.²⁹⁷ The state and federal founders undoubtedly based their analogous constitutional clauses on Magna Carta's thirty-ninth section,²⁹⁸ but in English legal history the language was altered, this particular section was interpreted in different ways over many hundreds of years, and even today the meanings of many of the sections of the 13th-century document are far from settled.²⁹⁹ Drove of English and American legal historians have failed to reach a consensus on whose rights it protected, which rights, which institutions it restricted, and how.

So Cooley was left with determining the meaning of the clause from the available material: legal treatises that were widely read during the founding era, historical events that highlighted the purposes behind the due process clauses, and state and federal judicial opinions. Ultimately, what mattered more than the immediate feud between King John and the barons were the later clarifications by kings, courts, and Parliament. Most important for understanding the

²⁹⁶ Mott, *Due Process of Law*. See §56: "When we turn to the formation of the federal constitution, we are nearly as much in the dark. The most careful study of the records of the Federal convention of 1787, as left us in the Journal of the Convention and Madison's Debates, fails to disclose a single time when this clause was mentioned in that body during the entire four months of its sitting." §57: "In all of this literature [between the Federalists and Anti-Federalists] there has not been found a single mention of due process of law." §65: "The lack of any intelligent discussion of the due process provision in the Fourteenth Amendment is most noteworthy. It was the least discussed of any of the provisions in the amendment. Practically no attention was paid to its meaning, although the other clauses in the same section were carefully scrutinized. ... [T]he members of Congress, with the exception of a very few first-rate constitutional lawyers in that body, really had no definite conception of what the phrase meant. ... [T]hey preferred to leave it to the decisions of the courts." There was some inferential evidence from Madison indicating the clause in the 5th Amendment, as part of the the Bill of Rights, was in general meant to apply to Congress, and certainly there were some general apprehensions toward unrestrained legislatures by 1787, but there were no real debates on the extent and limits of the clause.

²⁹⁷ Mott, *Due Process of Law*. §12; McKechnie, William Sharp. 1914. *Magna Carta: A Commentary on the Great Charter of King John* 2nd ed. Glasgow: J. Maclehose and Sons. §62

²⁹⁸ Numberings of the sections varied, and upon reissue it appeared regularly in section twenty-nine.

²⁹⁹ Mott, *Due Process of Law*. §12; McKechnie, *Magna Carta*. p. 375-395; Haines, *The Revival of Natural Law Concepts*. p. 106

meaning of the clause in this study is determining how it was interpreted and applied by statesmen and jurists in the United States.

Due Process and “Law of the Land”

A primary question is whether Cooley was correct in equating the “due process of law” clauses with the “law of the land” clauses as they variously appeared in state constitutions.³⁰⁰ Further, even if they indeed were synonymous, it remains whether the interpreter should favor the narrower “due process” meaning or the broader “law of the land” understanding as the standard for divesting individuals of life, liberty, or property. Or perhaps such a distinction is irrelevant. Cooley turned to Coke and Blackstone, both of whom were among the primary influences on early American statesmen and jurists,³⁰¹ to support the equation of the “due process” with “law of the land” clauses found within almost every state constitution. Coke’s description and understanding of the due process clause was sealed under his authorship in the *Petition of Right* in 1628 and described at length in his *Institutes*, and Blackstone cited and echoed Coke’s points in his *Commentaries*. Coke based his definition of due process or law of the land on a series of early alterations and statutory confirmations of Magna Carta dating to the reign of Henry III, who had immediately succeeded King John in the 13th century.³⁰² As Coke quoted the Great Charter:

³⁰⁰ Cooley, *Constitutional Limitations*. p. 351-353: “Indeed, the language employed is always nearly identical, except that the phrase ‘due process [or course] of law’ is sometimes employed, and sometimes ‘the law of the land,’ and sometimes both; but the meaning is the same in every case.” Cooley acknowledged that a handful of constitutions lacked the clause, but nonetheless “it is believed equivalent protection is afforded under provisions to be found in all.” See p. 351 n. 2

³⁰¹ Cooley, *Constitutional Limitations*. p. 351, n. 1; 353 n. 1. Bradford, M.E. 1987. “The Best Constitution in Existence: The Influence of the British Example on the Framers of Our Fundamental Law.” 27 *Brigham Young University Studies* 3 (Summer 1987). p. 53-54; Alschuler, Albert. 1996. “Rediscovering Blackstone.” 145 *University of Pennsylvania Law Review* 1 (November 1996). p. 2

³⁰² Coke, Edward. 2 Inst. 50. 1642. See Sheppard, Steve. 2003. *The Selected Writings of Sir Edward Coke. Vol. II*. Liberty Fund. p. 848, 858-859.

No Freeman shall be taken or imprisoned, or be disseized of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

This is the text as it appeared in the “final form” in 1225 A.D. and in the Confirmation of the Charters of King Edward I in 1297 A.D.,³⁰³ although at least one modern scholar wrote that the original Latin *vel* may be more appropriately translated as “and” rather than “or.”³⁰⁴ Regardless, Cooley cited this translation from Coke, who further pointed to confirmation statutes that equated “due process” with “law of the land.” In 28 Edw. 3 c.3, the “Liberty of the Subject Act” of 1354, a statutory affirmation of Magna Carta replaced “law of the land” with “due process of the law,” one of the earliest appearances of the latter expression. Further equating “law of the land” with “due process,” the statute 37 Edw. 3. c.8., known as the “Diet and Apparel” Act of 1363, read, “Though that it be contained in the Great Charter, than no Man be taken nor imprisoned, nor put out of his Freehold without Process of Law ...” In the Petition of Right, one of the pillars of the English constitution and arguably “the first great official interpretation of Magna Carta since the time of Edward III,”³⁰⁵ Coke quoted the law of the land clause from 1297 A.D. and immediately quoted the 1354 act, confirming the equation of “due process” with “law of the land,” or he at least confirmed that both the “law of the land” and “due process” versions were included within the law of England. Charles I ratified the Petition on June 7, 1628. In his *Commentaries*, Blackstone similarly pointed to the “law of the land” clause and its 1354 equation with “due

³⁰³ This is also identical to official translation of the 1297 A.D. confirmation at legislation.gov.uk.

³⁰⁴ McKechnie, *Magna Carta*. p. 155; 375.

³⁰⁵ Mott, *Due Process*. p. 81

process.”³⁰⁶ Coke and Blackstone were directing their admonitions primarily to the king and courts, one should note, not Parliament,³⁰⁷ but the first point here is that the two expressions had been long recognized as synonymous by the time the states wrote their constitutions. Cooley was correct to equate them, but it still remains whether the clause was understood broadly or narrowly in America.

Due Process: Judicial Proceedings or General Limitations

So the next question is whether “law of the land” or due process was limited to judicial proceedings and protecting alleged criminal from unlawful prosecution and imprisonment, or whether it limited all branches of government both procedurally and substantively, or perhaps both.³⁰⁸ Essentially this is a comparison of Story’s understanding with Cooley’s interpretation. In his *Commentaries* Joseph Story cited Coke’s equation of “law of the land” with due process, but he wrote that it was procedural: “[D]ue presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.”³⁰⁹ This was a particularly narrow interpretation limited to only certain judicial processes in certain types of cases. His interpretation of the due process clause was extremely short, consisting of only three sentences and without elaboration, and yet its influence continues to this day. Story implied that Coke’s

³⁰⁶ Blackstone, Lewis. *Commentaries on the Laws of England*. §134

³⁰⁷ The Petition of Right was issued in response to the trial of the Five Knights, a case resulting from Charles I’s imprisonment of subjects who had refused to pay the forced loan to support his efforts in the 30 Years’ War. Blackstone similarly focused his discussion on the prohibitions on arbitrary imprisonment, excessive bail, writs of *habeas corpus*, and so on, which deprived the English subjects of their common law rights. Blackstone, Lewis. *Commentaries on the Laws of England*. §134

³⁰⁸ Mott, *Due Process*. p. 180-186

³⁰⁹ Story, Cooley. *Commentaries on the Constitution*. §1789.

equation of “law of the land” with “due process” meant that “law of the land” was contained entirely within the expression “due process,” a requirement for judicial procedure only.

Cooley edited the fourth edition of Story’s *Commentaries*, and he added chapters on the Reconstruction Amendments, including commentary on the due process clause. Cooley agreed with Story that “law of the land” and “due process” were synonymous “in very many cases,” but he made a particularly insightful point: sometimes it is admissible to take life, liberty, and property without trial in common law court. Surely the requirement must extend at least to other types of processes under law. Under many circumstances the government could divest life, liberty, and property through administrative processes, not just through judicial trial, yet such procedures were constitutional and so would fail to violate the due process clause. “There are many cases in which it is admissible to take property without giving any trial in the courts,” he wrote, “and by modes somewhat arbitrary.”³¹⁰ At first glance this statement may appear alien to Cooley and directly contrary to his position that the due process clause protected property from arbitrary seizure. Few jurists emphasized this principle more than Cooley. His analysis in the *Commentaries* lacked elaboration on this point, but he provided some clarification and examples in a judicial opinion a few years later.

In *Weimer v. Bunbury*,³¹¹ Bunbury was the treasurer of the city of Niles, Michigan, and accepted the duty of collecting property taxes by giving a bond to the county treasurer, Samuel Hess. He failed to deliver all of the money, however, and so Hess issued a warrant to the sheriff, Joseph Weimer, to seize his property and sell it to pay off the difference in accordance with a

³¹⁰ Story, Cooley. *Commentaries on the Constitution*. §1941

³¹¹ *Weimer v. Bunbury*, 30 Mich. 201 (1874)

state statute.³¹² Weimer seized and sold some of his livery stock. All of this was in strict conformity with the law. Nonetheless, Bunbury sued, arguing the law allowing for such deprivation of property without trial violated §32 of Article VI of the Michigan constitution, which read that no person shall be deprived of his property without due process. Cooley wrote, “There is nothing in these words, however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative.”³¹³ Citing Blackstone, he noted a number of other examples: arrests can be made without warrants;³¹⁴ in some cases stray livestock can be disposed of without judicial process;³¹⁵ and, of course, “proceedings for the levy and collection of the public revenue. Almost universally these are conducted without judicial forms.” The power to assess the value of property, issue a tax, and then forcefully collect that tax had long been a sanctioned, extrajudicial process resulting in the deprivation of private property. As for the “somewhat” arbitrary deprivation of rights, Cooley was referring to military and martial law. “[T]he process under which men are restrained of their liberty under it is sometimes very summary and even arbitrary. But,” he added, “this law is just as much subject to the constitutional inhibitions as is the code of civil remedies.”³¹⁶ In the *Commentaries* he added, “[T]here are, nevertheless, settled rules which govern their investigation, and the tribunals that

³¹² *Compiled Laws of 1871*, §1029 (Michigan)

³¹³ *Weimer v. Bunbury*, 30 Mich. 201, 211 (1874)

³¹⁴ Blackstone, Lewis. *Commentaries on the Laws of England*. §292-293

³¹⁵ Blackstone, Lewis. *Commentaries on the Laws of England*. §297

³¹⁶ *Weimer v. Bunbury*, 30 Mich. 201, 212 (1874). Here he cited the famous *Ex Parte Milligan*, 4 Wall., 2

punish them must keep strictly within the limits of their jurisdiction.”³¹⁷ Likely in reference to Story, he concluded, “There are, unquestionably, cases in which expressions have been used implying the necessity for a common-law trial before, in any instance, a man can be deprived of his property; but they will be found on investigation to be cases calling for no such sweeping statement.”³¹⁸ There are too many instances of governmental processes that deprive individuals of life, liberty, and property without judicial process for it to be so limited.

Cooley concluded the universal definition of “due process” must at least include processes beyond judicial. Required processes for depriving individuals of life, liberty, or property applied to all branches and were established by law and custom. “The constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is.”³¹⁹ Further, “[T]he deduction is, that life, liberty, and property are placed under the protection of known and established principles, which cannot be dispensed with either generally or specifically; either by courts or executive officers, or by legislators themselves.”³²⁰ He found Daniel Webster’s quote in reference to New Hampshire’s due process clause from *Dartmouth* as perhaps the most quoted definition in case law:

By the law of the land is most clearly intended the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and

³¹⁷ Story, Cooley. *Commentaries on the Constitution*. §1947

³¹⁸ *Weimer v. Bunbury*, 30 Mich. 201, 212 (1874)

³¹⁹ *Weimer v. Bunbury*, 30 Mich. 201, 213 (1874)

³²⁰ Story, Cooley. *Commentaries on the Constitution*. §1945.

*immunities under the protection of general rules that govern society. Everything which may pass under the form of an enactment is not the law of the land.*³²¹

This is simply an explication of the rule of law and American constitutionalism. As Cooley put it, “Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs.”³²²

At first glance, Cooley’s definition may appear broader and may pose a problem in terms of the hierarchical structure of legal systems in the United States. What are these “maxims” of common law that could control legislatures? The common law reception statutes and clauses read that legislatures could indeed change common law as it had been adopted under the new constitutions. If statutory law indeed trumped common law, however, then how could a common law maxim place limitations on legislatures? The answer is again constitutionalism: some common law maxims were housed in particular constitutional clauses. The right to “liberty,” for example, required definition, and such was found in the explication and application of that word in American and English common law dating back many hundreds of years. It was beyond the power of legislatures to change the common law definitions of “liberty” or “property” or “habeas corpus,” for example. To totally destroy the right to liberty or property, the people would have had to clearly deny themselves those pre-existing rights as they were understood in their constitutions, Cooley wrote. The legislatures could indeed extirpate laws inherited from England

³²¹ *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). See New Hampshire Constitution (1784), Article XV: “No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land ... ”

³²² Cooley, *General Principles*. p. 224. See also Story, Cooley. *Commentaries on the Constitution*. §1945. See also Cooley. *Constitutional Limitations*. p. 353-356

or otherwise establish laws that overrode judicial pronouncements, but laws made in derogation of the common law were to be construed strictly, the common law was to be kept in view when interpreting the constitutions, and the legislature could not annihilate or change the meaning of constitutional clauses by mere statute. The meanings of constitutions remained static, Cooley and so many others emphasized.³²³

Among other maxims housed in constitutional clauses are those vesting “legislative power” or “judicial power” in the particular branches as well as the general separation of powers clauses. Due process or law of the land clauses re-emphasized that the branches were to remain within their spheres. As noted in the chapter on retroactive civil legislation, Cooley’s foundation for the general extent of legislative power of the states was based on the legislative power of the English or British Parliament, given the Americans adopted its general framework, usages, and customs when creating their own state legislative bodies.³²⁴ It was also assumed their judiciaries would continue exercising the same sorts of powers, such as issuing writs, sentencing criminals, and so on, as they had done before and after independence. So divisions of powers were sometimes based on practice and maxims dividing their powers by function. Among the examples were whether laws that transferred private property from individual A and gave it to private individual B, without public purpose and without compensation, were within “legislative power.” Such an act of government fell within the purview of the judicial branch, as it always had, Cooley argued, which itself had to follow established rules in both law and equity.

Legislatures could indeed pass laws that extirpated certain elements of the common law, but that

³²³ “Recurring again to the theory of the government that was to be reared on the written constitution, we have seen that it was to be unchangeable, except as changes were brought in by express amendment. The stipulations agreed upon and introduced in the written instrument are to mean the same thing to day, tomorrow, and forever; they are formulated in order to fasten the ship of State to certain definite moorings; that is their purpose.” See Cooley, “Changes in the Balance of Governmental Power.” p. 13

³²⁴ Cooley, *Constitutional Limitations*. p. 85

did not equate to the power to pass laws that annihilated the common law rights and their necessary maxims as they were explicitly protected in constitutions. As the reception statutes or clauses typically phrased it:

*The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this state, shall remain in force unless they shall be altered by a future law of the Legislature, such parts only excepted as are repugnant to the rights and privileges contained in this Constitution and the declaration of rights, &c., agreed by this convention.*³²⁵

Cooley proposed that if those processes employed by whatever branch deprived individuals of life, liberty, or property, *and* those particular processes were unknown in law or custom, then they must be void. Legislatures often passed laws that did *not* deprive individuals of life, liberty, or property, by employing processes heretofore unknown in the law or custom. They could pass laws that *indeed* deprived individuals of life, liberty, or property, but only by ways known and widely recognized in the statutory or common law. Again, police powers or certain administrative processes often were in keeping with due process because they were “such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs.” Sometimes, depending on the circumstances, vested rights could be totally destroyed without judicial process and still be in keeping with due process of law, because the law of the land still confined the exercise of power within agreed upon limits. Neither legislatures nor any other governmental entity could pass laws that totally deprived individuals of life, liberty, or property by methods never recognized or

³²⁵ Article 25, Delaware Constitution (1776)

sanctioned in the statutory or common law. Again, this is simply defining “law of the land” for what it was: the general rules of society as they were practiced, modified, and sanctioned under common law, codified in the legislatures, and chiseled into the written constitutions. Statutory rights were often outgrowths of explicitly protected rights—the right to property, for example, included statutory investment to private corporations of the right to collect charges on toll roads.

The “law of the land” was more than simply whatever the legislature promulgated, Cooley wrote. Ultimately it was the constitutions as they enjoyed their supremacy within their spheres in the federal system. Limiting the law of the land in the American context to a mere procedural requirement for legislatures would result in “an unbridled authority,” he wrote, and would render the constitutions nugatory and nonsensical. It would allow legislatures to create laws that voided explicit, constitutional provisions. Clauses prohibiting bills of attainder, *ex post facto* laws, or others that protected rights would be swallowed by mere statute.³²⁶ Again, much like the original Magna Carta, the purpose of the clauses was to erase all doubt the government lacked any extralegal, arbitrary power to deprive individuals of long-protected rights. All deprivations had to be in accordance with legal or customary processes. Although the higher law in the English tradition was foggy and often without positive force, in the American context, the Americans enjoyed the benefits of written constitutions. The supreme “law of the land” was explicitly defined as the Constitution in Article VI. Cooley wrote, and “while it stands, it is ‘a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.’”³²⁷

The 14th Amendment

³²⁶ Story, Cooley. *Commentaries on the Constitution*. §1944

³²⁷ Cooley, *General Principles*. p. 222

Cooley had a narrow view of the due process clause and the 14th Amendment in general. Although the provisions of the 14th Amendment did not disturb “the existing division of sovereignty” nor take “from the States any of those just powers of government which in the original adoption of the Constitution were ‘reserved to the States respectively,’” nor did it “[enlarge] the sphere of the powers of the general government,” nor did it create any new rights, it nonetheless created “points of contact and dependency” between the national and state governments. It at least raised blacks to equal state and national citizenship and placed the national government in a position to oversee the states’ equal application of existing laws and constitutions. As such blacks were to enjoy the same state citizen-based privileges and immunities of Article IV, Sect. 2, including “life and liberty by the law... property ... contract,” among others listed in *Corfield v. Coryell* (1823) and the Civil Rights Act of 1866. Federal citizen-based privileges to be protected were few in number and limited to those found or derived directly from the Constitution: protection from wrongful action from foreign governments; equal access to United States waters; benefit to postal laws, and so on. Basically he agreed with the *Slaughterhouse* and *Bradwell* decisions, as he pointed out in the Appendix to the fourth edition to Story’s *Commentaries*.³²⁸ Based on his point that the states continued to enjoy their spheres of authority, and given he considered *Barron v. Baltimore* to remain good constitutional law, it would not be too far to assume that Cooley would have opposed the incorporation doctrine as well as the national imposition of nationwide, judicially imposed, uniform rules limiting state legislative power. Indeed, the common law of England often varied by locality, just as it varies in the states to this day. From his point of view, the federal

³²⁸ Cooley’s edition was too advanced in the process of publication to include commentary on *Slaughterhouse Cases*, 83 U.S. 36 (1873) and *Bradwell v. Illinois* (1873) in the chapter on the 14th Amendment, but in the appendix he wrote that his views “are fortunately in harmony.”

government was in no position to dictate to the states what personal, political, or civil rights they had to recognize, excepting of course any federal privileges or immunities derived directly from the Constitution. The state constitutions explicitly protected individual rights. The purpose of the 14th Amendment was equal protection of equal rights, not judicial or congressional dictation of the rights to be protected. The federal government thus found itself in a position to provide “new securities” for national and state constitutional privileges or immunities to ensure the state governments would refrain from “possible usurpation and tyranny” or “possible abuse of power as might result from prejudice or other unworthy motive.”³²⁹ Just as with the Magna Carta, the Petition of Right, the English Bill of Rights, and the state due process clauses, the due process clause of the 14th Amendment was to provide a redundant layer of protection for existing rights for all those who were equally entitled to them under the law of the land.

Sir Edward Coke

Coke appears to have aligned more closely with Cooley than Story. Coke indeed equated “law of the land” with “due process,” and he defined “law of the land” broadly as “the Common Law, Statute Law, or Custome of England,” to include the sanctity of individual liberty as codified in chapter 29 of Magna Carta.³³⁰ He wrote that due process of law referred to legal process, such as requirements for indictments and jury trial, but he also wrote the law of the land controlled everyone within the physical territory of England, not just the king (and the courts, for that

³²⁹ Story, Cooley. *Commentaries on the Constitution*. §1968. Cooley similarly rejected any application of the Bill of Rights to state powers in accordance with *Barron v. Baltimore*, 32 U.S. 243 (1833). See *Constitutional Limitations*, p. 19. See also *Weimer v. Bunbury*, 30 Mich. 201.

³³⁰ Sheppard, *Sir Edward Coke*. Vol. II. p. 849. See Coke, 2 Inst. 46.

matter).³³¹ The law of the land provision of Magna Carta remained the overall standard for limitations on English government. Whether it was the role of the courts to strike down legislative acts that violated the common law is a different question. Whether judicial review was a sound doctrine under English law at the time is beside the point. Coke famously wrote in *Dr. Bonham's Case* that “the Common Law doth controll Acts of Parliament, and sometimes shall adjudge them to be void,”³³² a point that is separate from whether it was the role of the courts to do the actual voiding. The point is that for Coke, the “law of the land” of Magna Carta encompassed the common law; the common law controlled acts of Parliament; therefore the Magna Carta controlled Parliament, not just the king and courts.

As an example, Coke wrote in his *Institutes*, “Against this ancient, and fundamentall Law, and in the face thereof, I finde an Act of Parliament made” during the reign of Henry VII that allowed justices of the peace, by their own discretion, to hear and determine all offenses against statutes without any findings or presentments by the verdict of twelve men. In the first year of Henry VIII, Parliament itself voided the law, the “sinister” justices were executed, and the whole ordeal “should admonish Parliament” to refrain from “partiall trailles by discretion” and instead rely on “ordinary, and pretious triall by the law of the land.”³³³ In this example, the king, his judicial appointees, and Parliament were all violating the part of the law of England that required certain judicial procedures, and the result was an unlawful deprivation of life, liberty, and property under the pretext of “law.” So the act was indeed recognized as being void because

³³¹ “And it is not said, [law and custom of the king of England,] lest it might be thought to bind the King only, nor [of the people of England,] lest it might be thought to bind them only, but that the law might extend to all, it is said [by the law of the land, that is, England.] See Coke, Edward. 2 Inst. 51. 1642. See also Sheppard. *Sir Edward Coke. Vol. II.* p. 859.

³³² Sheppard. *Sir Edward Coke. Vol. II.* p. 275

³³³ Sheppard. *Sir Edward Coke. Vol. II.* p. 860

it was contrary to the fundamental law of the land and because it was unjust, although it was Parliament itself rather than the judiciary that abrogated it.

Section III: Early State Case Law

The next question is whether the state jurists adopted this Coke-Cooley understanding of the due process clauses from the beginning of the ratifications of their constitutions. In *Constitutional Limitations* Cooley relied primarily on case law dating from the 1830s to the 1850s to define the meaning of due process, which indeed supported his understanding, but it was important to further investigate whether there was a consistent Coke-Cooley interpretation of the clause dating back to the founding era. The following is an examination of some of the first state supreme court cases from some of the states that provided general definitions of their due process clauses. Largely they reinforced Cooley's findings. Important is whether the due process or law of the land clauses were perceived as fundamental, higher law restrictions on all branches of government, and particularly the legislatures, regardless of whether the courts believed they could exercise judicial review. Among the early cases there were indeed many opinions that referred to elements of the due process clause or the law of the land, such as jury trial or other judicial processes, statutes, custom, judicial decisions, and the English common law as adopted by the states, as well as the constitutions themselves, but the focus here is finding the general definitions or explanations of the scope of their particular due process clause. Some particular attention will be given to the North Carolina judiciary, which appears to have been the first to define their clause with some depth.

Haines admitted there were at least a "few indications that the provision was intended to serve as a limitation on the powers of Parliament," although he emphasized that by 1689 it was

redirected back toward the king and courts.³³⁴ But he also admitted that there were at least a few cases in which state courts extended the limitation to legislatures.³³⁵ Raoul Berger, although focused primarily on the power of judicial review, wrote that the “law of the land” in early English law “referred to the customs and laws of the realm,” but it was “not designed to fashion a paramount test for the validity of such customs and laws.” He noted that a “few poorly reasoned post-1787 cases in South Carolina, North Carolina, Massachusetts, and New York reached out for power to override legislation,” but better-reasoned cases in New Hampshire and Virginia pointed out that due process was not intended to limit legislatures.³³⁶ Opposite of Berger was A.E. Dick Howard, who argued, “[T]he overwhelming American view was quickly established to be that not any and every act of a legislative body was necessarily to be deemed the ‘law of the land.’” Further, “A very few cases—and they were small in number indeed—held the requirement of ‘law of the land’ not to be a limitation on the legislature.”³³⁷ Cooley, of course, listed more than a dozen to support his view,³³⁸ but these were largely later cases dating into the 19th century. Given these scholars seem to have given weight to one side or the other, the following analysis is largely an independent review of state cases from 1776 until the early 1800s that contain the expressions “law of the land;” “due process of law;” “due course of law;” or some derivation thereof, to bring clarity to whether and to what extent the clauses were understood to limit the procedural or substantive actions of the different branches of state

³³⁴ Haines *The Revival of Natural Law Concepts*. p. 105

³³⁵ Haines *The Revival of Natural Law Concepts*. p. 106

³³⁶ Berger, *Selected Writings on the Constitution*. “Law of the Land’ Reconsidered.” p. 147

³³⁷ Howard, A. E. Dick. 1968. *The Road from Runnymede: Magna Carta and Constitutionalism in America*. Virginia Legal Studies. Charlottesville: University of Virginia Press. p. 303-304

³³⁸ Cooley. *Constitutional Limitations*. p. 353 n. 2; 354 n. 1

governments.³³⁹ This should help to demonstrate how it was interpreted during the founding eras of the earliest American state constitutions. The following will focus primarily on cases that provided general interpretations of the clause.³⁴⁰

The first judicial opinion found providing a general interpretation indicating the extent of the due process or law of the land clause, outside of cursory references to existing judicial processes, statutes, or legal practices, was the 1787 North Carolina case *Bayard v. Singleton*.³⁴¹ It may well have been the first state case declaring a legislative act unconstitutional. The issue in this case was over competing land deeds: one was transferred from a British loyalist to his daughter, the other was secured under a state law that guaranteed title to confiscated estates. The daughter brought an ejectment suit, and the defendant moved to dismiss the suit without resorting to a jury trial, which was permitted under the confiscation act. The court noted the law of England, “which we have adopted,” allowed aliens to purchase land. Because the original landowner was an enemy alien, the court held his contract with his daughter void. Commenting on whether the legislators could pass a law in violation of the constitutional guarantee to jury trial for cases considering land confiscations,³⁴² or perhaps a law that would abolish elections to “render themselves the Legislators of the State for life,” the North Carolina supreme court wrote:

³³⁹ This is the result of searches for these key terms in LexisNexis: “due process of law” OR “due process of the law” OR “due course of law” OR “due course of the law” OR “law of the land.” All state cases only. According to Cooley’s footnote on p. 351 of *Constitutional Limitations*, these were contained within all of the forms of the expression in state constitutions by 1868. Search conducted April 4, 2020. Date range: January 1, 1776 to December 31, 1868.

³⁴⁰ Many cases reference “due process of law” or “law of the land” in terms of established judicial procedure, existing statute, or existing legal practices without providing a broader definition of whether the clauses limit the procedure or substance or actions of all government.

³⁴¹ *Bayard v. Singleton*, 3 N.C. 42 (1787)

³⁴² North Carolina Constitution (1776), Article XIV. “That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.”

But that it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.

Few excerpts could be more reflective of Cooley's interpretation. The North Carolina Constitution of 1776 read, "That no freeman ought to be ... deprived of his life, liberty, or property, but by the law of the land."³⁴³ Nowhere else does "law of the land" or "due process" appear in the constitution. Clearly the court was referring to the 39th section of Magna Carta as it was adopted in the state constitution. It equated "law of the land" with the constitution in general, not judicial process, and all legislative acts contrary to that fundamental law, whether violating accepted procedures or encroaching on the substantive rights of the citizens, were void.³⁴⁴ It was simply a redundancy—the legislature was bound under the state constitution.

A particularly remarkable dispute emerged in 1794, again in North Carolina, which pitted against each other two advocates adhering to the two primary interpretations of law of the

³⁴³ Constitution of North Carolina (1776), Article XII: "That no freeman ought to be taken, imprisoned, or disseized of his freehold liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land. "

³⁴⁴ Berger claimed this example was not an appeal to Magna Carta as justification for judicial review but was instead an appeal to an explicit constitutional clause (in this case, a jury trial for property cases). That may be, but for the purposes here the point remains that the "law of the land" clause was a virtual word-for-word replication of Chapter 39, and the court wrote that "law of the land" was synonymous with the state constitution, which limited legislatures both procedurally and substantively. *See Berger, Selected Writings on the Constitution*. "'Law of the Land' Reconsidered." p. 137

land.³⁴⁵ The issue was whether the legislature could pass a law that allowed the state attorney general to obtain judgments against delinquent receivers of public money without issuing them notice or providing them a day in court. Justice John Williams, Revolutionary War veteran and former member of the Continental Congress who had joined the opinion in *Bayard*, countered motions from Attorney General John Haywood, also a veteran, who was trying to obtain the judgments according to the statute. When Haywood appeared and tried to move for judgment against several delinquents, Williams stopped him, citing the Article XII of the state bill of rights.³⁴⁶ Writing the “law of the land” clause required a deprivation of rights “according to the course of the common law,” as Williams interpreted the clause, it guaranteed the right of the party to be heard in court to defend himself. Further and more generally, “Whenever the Assembly exceeds the limits of the constitution, they act without authority, and then their acts are no more binding than the acts of any other assembled body. ... Where then is the safety of the people, or the freedom which the constitution meant to secure?”

Haywood responded that the law of the land clause of Article XII did not restrain the legislature, but instead, it was a protection against oppression in general, and particularly from any foreign meddling in internal governance or executive violations of law. As he put it:

The meaning of the words lex terrae may therefore be thus shortly defined—a law for the people of North Carolina, made or adopted by themselves by the intervention of their own Legislature.—This definition excludes the idea of foreign legislation, of royal or executive prerogative, and of usurped power; and leaves the power of inflicting punishments, or rather of passing laws for that purpose, in

³⁴⁵ *State*, 2 N.C. 28 (1794)

³⁴⁶ Constitution of North Carolina (1776), Article XII: “That no freeman ought to be taken, imprisoned, or disseized of his freehold liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land. “

their own Legislature only. In this sense, the lex terrae of North Carolina at present is the whole body of law, composed partly of the common law, partly of customs, partly of the acts of the British Parliament received and enforced here, and partly of the acts passed by our own Legislature.

In a convincing argument, he continued that the common law—as enunciated by the court—therefore was not the sole source of the law of the land. Otherwise, “Such a construction would destroy all legislative power whatsoever, except that of making laws in addition to the common law, and for cases not provided for by that law. It would lop off the whole body of the statute law at one stroke” and replace it with the common law alone. Further, “There is no part of this Constitution that directs the process by which a suit shall be instituted, or carried on, and the Legislature are therefore free to direct what mode of proceeding in Courts they think proper: and accordingly in a great variety of instances, both in England, after Magna Charta, and in this country, since the Constitution, judgments have been rendered against Defendants without their having had any previous actual notice, and the Judges have never intimated a doubt of the constitutionality of these proceedings.” He emphasized that the people had entrusted their legislature with determining the constitutionality of its acts, and indeed, “Are these legislative bodies, charged and entrusted by their countrymen with their most important concerns, to be all regarded as men who either could not discover the unconstitutionality of a law, or were willing to countenance it?”

After a few days of reflection, Williams’ fellow justices Samuel Ashe Spruce Macay³⁴⁷ reconsidered Haywood’s motion and granted it—but Ashe “did not very well like it,” according to the Macay. After all, Ashe had written the opinion in *Bayard*, which Williams had joined and

³⁴⁷ Samuel Ashe was the future governor of the state, and Spruce Macay was the law tutor of a young Andrew Jackson.

which had supported the broad interpretation of law of the land as an operative force restricting the legislature. Based on this history, it is likely that both Williams and Ashe still understood “law of the land” to equate to the state constitution, at least as the “fundamental law of the land.” Macay very well could have as well. Ashe’s ultimate agreement with Haywood that the law was not unconstitutional did not negate his previous understanding that the law of the land clause restricted the legislature. He very well could have simply agreed with Macay that although it appeared to be contrary to the common law, it did not violate the text of the constitution. Haywood implicitly denied that the state constitution was the law of the land, but he indeed confirmed that the constitution limited legislatures. Further, nowhere in the opinion or report did the justices explicitly or even implicitly agree with his general interpretation of the clause. They merely granted the motion and agreed that the law was not unconstitutional. So on its surface, this outcome at least did not conflict with Cooley’s interpretation of law of the land, and it aligned with his point that statutory law, although it was to be construed strictly if it was in derogation of the common law, still trumped common law principles as long as it did not conflict with the clear text of the constitutions.

In a remarkable twist, in 1805 the North Carolina supreme court heard a case considering whether the legislature could repeal a law that had vested property rights in the University of North Carolina.³⁴⁸ Arguing on behalf of the plaintiffs was none other than John Haywood, the former attorney general, who had returned to private practice.³⁴⁹ Eleven years before he had claimed that the law of the land clause of the state constitution did not apply to the legislature. Now he both affirmed Coke’s interpretation that “due process” equated to “law of the land,” but

³⁴⁸ *Den ex dem. Trustees of University v. Foy*, 5 N.C. 58 (1805). Haywood was one of the original trustees of the University of North Carolina.

³⁴⁹ Haynes, Milton, ed. 1844. *South-Western Law Journal and Reporter*. Vol. I. “John Haywood.” Nashville: Cameron & Fall. p. 126

he also provided a lengthy, thorough analysis of the clause in which he affirmed without reserve its application to the lawmaking body:

Is it then justified by any thing we find in the constitution of this State? And it seems to me that there is no part of the constitution of our State, which allows to the Legislature a right to divest the citizen, or any corporation or set of citizens, of the rights of private property. There is a clause in our constitution, particularly applicable to this subject.—Bill of rights, section 10: “no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land.”

Further,

Then it does not follow that because the Legislature could create, therefore it could destroy the University and take away its property. But it does follow that if the words used in Magna Charta, as restrictive of the power of the executive, are used also in our bill of rights as restrictive of the power of the Legislature, that they must confine the Legislature here in the same manner as they do the executive in England; and consequently that the Legislature cannot interfere with the University, otherwise than by submitting to the judiciary of the country ... Upon this view of the case I submit to the court that the law in question is against the constitution and void.

The resulting opinion from Justice Francis Locke largely supported Haywood and explicitly rejected claims that the law of the land clause did not impose any restrictions on the legislature. But the judge held that the clause in the context of the state constitution applied *only* to the

legislature and not the executive and judiciary. His reasoning was that the governor and judges merely carried out, interpreted, or enforced the law—it was not within their purview to take any discretionary actions outside of the laws that *could* be contrary to the laws or constitution. Indeed, the legislature dominated the government of North Carolina. By the constitution it elected both the governor and his council for one-year terms, and it appointed the judges and attorney general without the governor’s consent.³⁵⁰ The governor was extremely weak and the judiciary, by Locke’s estimation, had “no discretionary powers enabling them to judge of the propriety or impropriety of laws. They are bound, whether agreeable to their ideas of justice or not, to carry into effect the acts of the legislature.” As the 1776 constitution read, “That all powers of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised.” Still, none could be “subject to the arbitrary will of the Legislature,” as Locke wrote. The law of the land was the constitution, and the legislature was merely its creature. Although Cooley clearly argued that the law of the land clause controlled all branches of government, in the context of this particular constitution and government so dominated by the legislature, the principle remained the same: the law of the land clause prohibited arbitrary governance.

In Virginia, a general interpretation of its state “law of the land” clause was found in *Kemper v. Hawkins*.³⁵¹ In this case, the Virginia supreme court was considering the validity of a law that granted to district courts the same powers to issue certain injunctions enjoyed in the chancery courts. The constitution read that there were to be separate chancery courts, and the judges reasoned functions of a judge in chancery could only be exercised by those particular

³⁵⁰ North Carolina Constitution (1776), Articles XIII, XV, XVI

³⁵¹ *Kemper v. Hawkins*, 3 Va. 20 (1788)

judges who were so constituted for those courts. Virginia's constitution of 1776 read that "no man be deprived of his liberty, except by the law of the land or the judgment of his peers."³⁵²

There was no separate "due process" clause. Although the case dealt with whether the legislature could pass a law vesting powers contrary to the constitution, rather than a law divesting individuals of rights, the court provided a broad definition of the law of the land clause:

The government, therefore, and all its branches must be governed by the constitution. Hence it becomes the first law of the land, and as such must be resorted to on every occasion, where it becomes necessary to expound what the law is. ... But that the constitution is a rule to all the departments of the government, to the judiciary as well as to the legislature, may, I think, be proved by reference to a few parts of it. ... From all these instances it appears to me that this deduction clearly follows, viz. that the judiciary are bound to take notice of the constitution, as the first law of the land; and that whatsoever is contradictory thereto, is not the law of the land.

The "law of the land" clause appeared in the 1790 Pennsylvania constitution in the section, "Of the rights of the accused in criminal prosecutions," and a "due course of law" clause appeared in reference to legal remedies available in courts of law. The former read, as usual, "nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land." And as one might expect, in 1811 the court affirmed:

The constitution is undoubtedly paramount to any law emanating from acts of assembly. It ought not to be supposed, that any legislative body would violate their oaths, by a voluntary breach of the constitution. But they may do it through

³⁵² Constitution of Virginia (1776), Section §8

*inadvertence or mistake. Should such a case arise and be brought judicially before this Court, they will be bound in duty to declare, that the constitution established by the people, is the supreme law of the land.*³⁵³

Although a federal case in circuit heard under diversity jurisdiction, an opinion issued by Justice William Patterson touched on the constitutionality of a Pennsylvania law that appeared contrary to the state constitution. He wrote:

*Every State in the Union has its constitution reduced to written exactitude and precision. What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it.*³⁵⁴

Delaware had a separate “due course of law” clause that referred directly to judicial procedure, and there were three appearances of “law of the land,” one of which reflected chapter 39 of the Magna Carta.³⁵⁵ For many decades, among the elements variously considered the “law of the

³⁵³ *Commonwealth ex rel. O'Hara v. Smith*, 4 Binn. 117 (1811)

³⁵⁴ *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304 (1795)

³⁵⁵ Constitution of Delaware (1792 and 1831), Art. I, §7: “In all criminal prosecutions ... nor shall be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land.”; Art. I, §9: “All courts shall be open; and every man, for an injury done, him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land...” Art. VI, §16: “An executor, administrator, or guardian shall file every account with the register for the county, who shall, as soon as conveniently may be, carefully examine the particulars, with the proofs thereof, in the presence of such executor, administrator, or guardian, and shall adjust and settle the same, according to the very right of the matter, and the law of the land ...”

land” in case law were state statutes,³⁵⁶ adopted English statutes,³⁵⁷ adopted English common law.³⁵⁸ “Due course of law” was considered a judicial procedure. It is interesting to note that “due course of law” and “law of the land” were considered separately in the constitution, which seems to suggest that the first referred to legal process while the latter referred to the legislation or perhaps the constitution. But there did not appear a general definition of the chapter 39 until 1858, when the court was considering the constitutionality of a liquor prohibition law. In that case the counsel for defendant charged with selling intoxicating liquor argued that whereas the restrictions in the Magna Carta were directed at the “sovereign power” of the Crown, “here they were designed to be restrictions on the power of the Legislature.”³⁵⁹ The court did not disagree that the constitution limited legislative power, writing, “In this State, [legislative power] exists in the people at large, or has been delegated by them to representatives with certain reservations and restrictions, expressly named in the constitution, or necessarily implied from it ...,” but it held the law to be within the discretionary police powers of the legislature. Certainly the legislature was bound under the constitution, but it remains unclear whether the court considered the actual “law of the land” clause to include the constitution and so act as a positive force in restricting the legislature. There was no explicit confirmation one way or the other.

Alabama’s case law is particularly interesting. The clause from its first constitution of 1819 read, “ ... nor shall he be deprived of his life, liberty, or property, but by due course of law.” The court determined this clause, although applicable to judicial process, created an

³⁵⁶ *Collins v. Hall*, 1 Del. Cas. 652 (1793); *Shawn v. Bishop*, 2 Del. Cas. 208 (1804); *Walker v. State*, 2 Del. Cas. 437 (1818)

³⁵⁷ *Waples v. Prettyman*, 1 Del. Cas. 65 (1795)

³⁵⁸ *Starr v. Fisher & Shockley*, 1 Del. Cas. 611 (1818); *State v. Lowber*, 2 Del. Cas. 557 (1820)

³⁵⁹ *State v. Allmond*, 7 De. 612 (1858)

implicit limitation on legislatures that was more reflective of Cooley's separation of powers jurisprudence than his broad equation of "due process" with "law of the land." In 1830 the state supreme court wrote, "nor does the phrase 'due course of law' necessarily imply a trial by jury, but rather means a proceeding carried on according to the law of the land, either with or without a trial by jury."³⁶⁰ It elaborated again on the procedural nature of the clause in 1838: "By 'due course of law,' we are to understand those forms of arrest, trial and punishment, guaranteed by the constitution, or provided by the common law; or else such as the legislature, in obedience to constitutional authority, have enacted to ensure public peace, and elevate public morals."³⁶¹ So again, it also prohibited the legislature from creating judicial processes in violation of constitutional limits. Further, "The term 'due course of law,'" the court wrote, "has a settled and ascertained meaning, and was intended to protect the people against privations of their lives, liberty, or property, in any other mode than through the intervention of the judicial tribunals of the country."³⁶² In other words, only the judiciary could deprive individuals of their life, liberty, or property. Legislatures were forbidden from divesting individuals of their vested rights by law. It was categorically forbidden. Removing any doubt of this interpretation, the court later wrote:

The expressions, "the law of the land," "due process of law," and "due course of law," as found respectively in the English charters and in the various State constitutions in the United States, are substantially identical, and have always been held to mean a judicial proceeding regularly conducted in a court of justice, as contra-distinguished from statutory enactment. Any other construction would

³⁶⁰ *Reagh v. Spann*, 3 Stew. 100 (1830)

³⁶¹ *In re Dorsey*, 7 Port. 293 (1838). Justice Collier's opinion.

³⁶² *In re Dorsey*, 7 Port. 293 (1838). Justice Ormond's opinion.

*deprive the guaranty of all its force, and put the rights it was designed to protect at the mere mercy of the legislature.*³⁶³

So although the court equated “law of the land” with “due process,” unlike *Cooley* it limited the interpretation to judicial procedure. Even in this case, however, the result was the same: because no man could be deprived of his life, liberty, or property except by due judicial procedure, he certainly could not be deprived of life, liberty, or property by a mere legislative enactment.

“[T]hat an act of the legislature is not, and nothing less than a regular judicial trial is, ‘due course of law’ within the meaning of this clause of the constitution.” Further, the court continued, “If life, liberty and property could be taken away by the direct operation of a statute, the enjoyment of these rights would depend upon the will and caprice of the legislature, and the provision would be a mere nullity. Thus construed, the constitution would read, ‘no person shall be deprived of his life, liberty, or property, unless the legislature pass a law to do so.’”

Conclusion

Cooley’s critics were wrong on multiple levels. Contrary to their claims, he did not seek to expand on the meaning of the due process clauses. His understanding was firmly anchored in English common law and accepted treatises, by the legal nature of constitutionalism, and as cemented in case law dating back to the earliest state and federal cases. Coke and Blackstone both equated “due process” with “law of the land,” and even if one disagrees on that point, both versions were ratified in the Petition of Right, part of the common law of England as adopted by the states. *Cooley*’s interpretation of the clause was both expansive and limited: it indeed applied to all branches of government, but it was limited by existing common law definitions of life,

³⁶³ *Dorman v. State*, 34 Ala. 216 (1859)

liberty, property, and legal processes. Ultimately, this was another example of Cooley arguing that no branch of government can act arbitrarily, and all are bound under the constitutions.

Chapter 4: The Public Purpose Maxim and Taxation

Running consistently throughout Judge Thomas M. Cooley's jurisprudence was the principle that unless otherwise indicated in constitutions, all laws, whether based on express, implied, or inherent powers, must serve the public interest in some way. In particular, there was a presumption that taxing and spending laws must serve primarily a public purpose; they must be levied according to some standard ratio of equality or apportionment; and as a corollary principle, the people burdened with taxation within states or districts must be the ones who benefitted from such laws. Underlying these three primary principles of taxation was the idea that taxpayers were entitled to compensation in some form, whether through the protection of rights, or an increased value of property, or some sort of provision for the general welfare as a result of taxation. It was no extraconstitutional theory, Cooley and other jurists maintained, but rather these maxims were fundamental elements lying within the definitions of explicit words and clauses of state constitutions. By definition the "tax" power itself included implied limitations on the legislative power to take and distribute public money; "money" was included in the definition of "property" in takings clauses, which universally required a public purpose and compensation for any seizures; and sometimes legal appeals were made based on jurisdictional lines that prohibited the legislature from confiscating money without judicial due process. The common law served as foundations supporting these requirements. Nonetheless, critics attacked Cooley's application of the public purpose requirement to taxation, including the power of the courts to void such legislation if the law was directed primarily toward private interests. Cooley elaborated on these principles of taxation in *Constitutional Limitations*, in his

opinions in *People v. Salem* and *Bay City v. State Treasurer*,³⁶⁴ and in his *Treatise on the Law of Taxation*. The purpose of this chapter is to determine whether and to what extent his constitutional principles underlying the tax power were sound.

Cooley's doctrine enjoyed mixed support among jurists and scholars during the late 19th and early 20th centuries. Even though the Supreme Court overturned the holding of *People v. Salem* in *Taylor v. Ypsilanti*,³⁶⁵ it affirmed his general principles of taxation in *Loan Association v. Topeka*.³⁶⁶ Harry Hutchins considered Cooley's *Salem* opinion "a model of judicial reasoning."³⁶⁷ Critics sometimes attacked the principle itself as well as Cooley's support for the role of the judiciary to determine whether a purpose was truly "public." Sometimes they claimed the taxing power was unlimited and that such discretion was left entirely to the legislatures. Since the 1920s, critics routinely attacked Cooley's position that courts could strike down tax legislation that failed to adhere to the public purpose maxim. Even Rodney Mott, who generally supported Cooley's understanding of due process, wrote, "His thought in this regard was not as clear cut as it was in many other respects."³⁶⁸ Sometimes scholars identified him as the originator of the idea. Joan Williams wrote that Cooley's "major innovation" was the idea of implied limitations, and important among these was "the public purpose doctrine, which Cooley had invented."³⁶⁹ As Sidney Fine noted, "The work most frequently cited by the courts to support the

³⁶⁴ *People ex rel. Detroit & H.R. Co. v. Township of Salem*, 20 Mich. 452 (1870); *People ex rel. Bay City v. State Treasurer*, 23 Mich. 499 (1871)

³⁶⁵ *Taylor v. Ypsilanti*, 105 U.S. 60 (1882)

³⁶⁶ *Loan Ass'n v. Topeka*, 87 U.S. 655 (1874)

³⁶⁷ Lewis, *Great American Lawyers*. p. 468

³⁶⁸ Mott, *Due Process*. p. 186

³⁶⁹ Williams, "The Constitutional Vulnerability of American Local Government." p. 147 n. 343

theory that taxes can only be levied for a public purpose was Cooley's celebrated *Treatise on Constitutional Limitations*.³⁷⁰ Charles Grove Haines, among others, tied the doctrine to the Federalists and their intellectual descendants. The vested rights doctrine of Marshall, Kent, Story, as well as Cooley's implied limitations principles, he wrote, "took on a new form and were rounded out" in doctrines such as the "public purpose requirement for taxation."³⁷¹

Although for the most part these analyses were superficial, by far the most trenchant critic was Clyde Jacobs, perhaps the only scholar to cut directly into Cooley's sources on this issue and to scrutinize them with some depth and from a legal perspective. Others attacked the doctrine in general, but Jacobs zeroed-in on Cooley in particular, namely because he believed Cooley was a primary propagator of this major tenet of *laissez-faire* constitutionalism.³⁷² Government-subsidized private businesses could choke private enterprise and disrupt the free market, especially if paired with a virtually unchecked police or regulatory power, Jacobs noted. Alan Jones directly addressed Jacobs' ultimate conclusion that Cooley had given the elite, monied interests an "exceedingly powerful weapon" to limit legislatures, arguing instead that Cooley's opposition to taxing and spending for private purposes was rooted in a Jacksonian opposition to class legislation and a penchant for equal opportunity.³⁷³ Regardless of Cooley's supposed political or economic purposes, generally the critics agreed that the public purpose maxim did not, at least by the constitutions, apply to the taxing and spending power, and in

³⁷⁰ Fine, *Laissez Faire*. p. 129

³⁷¹ Haines, Charles Grove. 1924. "Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations of Legislatures," 3 *Texas Law Review* 1. p. 38

³⁷² Jacobs, *Law Writers and the Courts*. p. 99

³⁷³ Jones, "Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration." p. 766

particular it was outside of the judiciary's role to strike down legislation on this supposedly flimsy foundation.

Despite the widespread condemnation of Cooley on this issue, a close examination of his treatises, opinions, the state constitutions, as well as the English law and early state case law demonstrates that indeed, in the American constitutional order, a required element of the power to tax and the power to spend was that such efforts must be directed toward public purposes. The other principles of uniformity, district benefit, and compensation were similarly supported by constitutional text and judicial opinions. Some constitutional clauses explicitly recognized the judiciary's jurisdiction to review tax laws, and the principle of constitutionalism itself required all laws to be consistent with the higher law of the land. Cooley's understanding of judicial review will be considered in full in the next chapter, and so although judicial review and taxation will be considered sporadically, the focus of this chapter will be on the constitutional legitimacy of the principle that taxing and spending be directed exclusively for public purposes, unless otherwise indicated in the constitutions. The other maxims will also be examined.

To map this chapter broadly, the first section will summarize Cooley's four principles related to taxation: the "public purpose" generally and as it applied to taxation; the uniformity principle of taxation; and the district principle of taxation. It will also consider the principle of compensation for taxation, which again was woven into the other principles. The second section will examine the state constitutions themselves to identify whether and to what extent these principles were explicitly or implicitly required. The third section will examine the English and state case law. The criticisms of Jacobs will be integrated throughout the sections to provide the reader with the dominant counterpoints and some orientation for Cooley's positions.

I. The Framework of the Principle Broadly

Cooley argued there were no unlimited powers under American constitutionalism.³⁷⁴ All powers were subject to compliance with existing rules, laws, jurisdictions, definitions, or practices, particularly those designed to protect constitutional rights. Even if the legislature enjoyed the simple authority to tax, limitations were integral in that power. To identify the extent of the plenary authority of the state legislatures, Cooley emphasized that one must understand the constitutional limitations which rest upon the power of the states. Just as there were express, implied, and inherent powers, so there were express, implied, and inherent limitations on all powers of government. Cooley wrote that under free, popular governments, and particularly those of the United States, all laws should serve the public good rather than benefit individuals exclusively, unless otherwise indicated in the constitutions.³⁷⁵ These points were often written explicitly into constitutions in preambles or in declarations of rights, other times they appeared in particular provisions, and other times they were implied based on either jurisdictions or the positive enumeration of rights.

Few would disagree that governments enjoy some inherent powers. With or without written constitutions, governments must have certain powers for self-preservation—waging war is an obvious example. Among the internal, inherent, and inalienable powers of all government, Cooley identified the police power, taxation, and eminent domain. Even without constitutional recognition, these powers existed under state plenary, legislative authority. Ordered society could not exist long without them, and all states exercised them even when they lacked explicit

³⁷⁴ Cooley, “Limits to State Control of Private Business.” p. 234-235.

³⁷⁵ Cooley, *Constitutional Limitations*. p. 129

constitutional recognition. These inherent powers, Cooley maintained, must have limitations, otherwise the governments would be able to annihilate certain provisions of the constitutions. Among these limitations, unless otherwise indicated in the constitutions, was that all laws must serve a public purpose or provide a public benefit. The power of eminent domain often expressly required a public purpose. The same requirement for the exertion of police powers, although often implicit, was typically recognized among jurists and scholars. Cooley and others argued it applied to taxation as well, otherwise the legislatures would be free to “plunder” the citizenry for the benefit of favored individuals. In the abstract, this principle of constitutional government was uncontroversial, but scholars and jurists have devoted volumes to arguing what exactly constitutes a legitimate “police power,” “tax,” just compensation, public use, the public good, or a public purpose, or discrimination, and many have argued over which branch of government is responsible for making those determinations. Cooley based his conclusions on the purposes of American government, Anglo-American legal history, judicial opinions or common law, legal treatises, law dictionaries, and the texts and original intent of the constitutions.

This section will explore the public purpose principle broadly, particularly in respect to Cooley’s application of that principle to eminent domain, police powers, and taxation. The requirement for “public use” was often written explicitly into takings clauses and was generally understood to be a requirement in police powers regulations. Cooley wrote that taxation was in effect a taking of private property as well, and any confiscations without compensation required judicial due process. The approach here is fitting because Cooley grouped eminent domain, police powers, and taxation together as the primary inherent powers of internal government that could deprive citizens entirely of either life, liberty, or property, and so the principles of “public

purpose,” compensation, and necessity as variously applied to eminent domain and police powers will provide some generally acknowledged reference points for Cooley’s argument on whether or to what extent those principles applied to taxation. Often he considered “public use” or “public purpose” synonymously, and underlying these definitions was the expectation that there was a public benefit.

Eminent Domain

Cooley recognized that “all species of property,” not just real estate, were subject to seizure under the legislative power of eminent domain.³⁷⁶ He defined the power as “the rightful authority which must rest in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, convenience, or necessity may demand.”³⁷⁷ In general legislatures had to meet certain constitutional requirements to appropriate property against the will of owners: there had to be just compensation of money; it had to serve a public purpose; only that which was necessary to fulfill that purpose could be taken; and common law precedent served as a guide for helping to draw the line for public versus private purposes. An element of necessity was required should the government deprive individuals of their property entirely. Monetary compensation was required because “the citizen is compelled to surrender to the public something beyond his due proportion for the public benefit,”³⁷⁸ unlike with taxes, whereby the general rule was that citizens should enjoy some sort of public benefit, such as the protection of

³⁷⁶ Cooley, *Constitutional Limitations*. p. 526. Cooley pointed to only two exceptions: money and “rights of action,” which he had included as akin to property rights in other sections of *Constitutional Limitations*.

³⁷⁷ Cooley, *Constitutional Limitations*. p. 524

³⁷⁸ Cooley, *Constitutional Limitations*. p. 559

individual rights, approaching a benefit proportional to their contributions. Constitutions typically read explicitly such seizures under eminent domain required public use or public purpose. Regardless of the absence of takings clauses in some constitutions, it was “conceded on all hands, that the purpose for which this right may be exercised must be a *public* purpose; and that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to a public use to which it has to be applied.”³⁷⁹ Further, if a seizure were to exceed that which was necessary, then “it ceases to be justified on the principles which underlie the right of eminent domain.”³⁸⁰

Cooley recognized the great difficulty in drawing clear lines between a public and private purpose. But he emphasized two primary elements that helped to distinguish the two. First, it was important to recognize that it was the purpose of the law, not the private or public character of the recipient, which primarily helped to determine the constitutionality of the seizure. Indeed, citing a litany of state case law, Cooley found that among the legitimate seizures were those for public roads, private toll roads, private railways open to the public “impartially,” canals, ferries, public buildings, dams, sewers, and aqueducts. A borderline example variously had been upheld or struck down in the states: Before the advent of steam power, sometimes the governments found it necessary to seize locations along rivers and streams from obstinate private landowners in order to construct private saw mills and grist mills, which depended on water power and supplied the local community with wood and facilities for processing grain. Still, without legislative or common law precedent, such seizures for private manufacturing would be difficult

³⁷⁹ Cooley, *Constitutional Limitations*. p. 530

³⁸⁰ Cooley, *Constitutional Limitations*. p. 540

to sustain on maxims of eminent domain, Cooley wrote. In his *Salem* opinion, he wrote that such seizures were modifications of common law principles, given the private grist mills served primarily a private benefit. In general, “The *public use*,” he wrote, “implies a possession, occupation, and enjoyment of the land by the public, or public agencies, and there could be no protection whatever to private property, if the right of the government to seize and appropriate it could exist for any other use.”³⁸¹ Mere incidental benefit to the public or an extremely liberal understanding of “public interest” were insufficient fulfillments of the requirement.

Second, although legal standards and principles drew the ultimate line between legitimate and illegitimate seizures, common practices could sometimes help to distinguish between constitutional and unconstitutional exertions of the power. “The settled practice of free governments must be our guide in determining what is a public use; and that only can be regarded as such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare.”³⁸² That “convenience” or “welfare” standing alone were insufficient justifications, and indeed the test for Cooley was a necessity for public use. For example, it was often necessary to compel the owner of a strip of land to dispose of his property in order to build a road for the public convenience of more efficient or direct travel. It is important to note that Cooley’s reference to “the practice of free governments” was not a vague standard but was rooted in actual case law based on these long-established and refined principles. Takings clauses, like so many constitutional clauses, were general and often required judicial extrapolation over time, but the principles remained

³⁸¹ Cooley, *Constitutional Limitations*. p. 531.

³⁸² Cooley, *Constitutional Limitations*. p. 533

consistent. Cooley suggested private property could be put to certain uses that would indeed benefit the public or could be put to more efficient use, but nonetheless such seizures might still be unconstitutional because they lacked a degree of necessity—dilapidated buildings or overgrown real estate could indeed be taken and beautified to encourage new settlement, which would produce some indirect public benefits, such as tax revenue, perhaps, but there was no real necessity to provide for a clear public benefit, and the “common law has never sanctioned [as] an appropriation of property based upon these considerations alone.”³⁸³

Police Powers

Cooley’s citations for the definition of the police power were consistent and broad. His citations from Blackstone, Bentham, *Broom’s Maxims*, and an extensive list of state case law all contained a public purpose element in some form or another. His understanding of the underlying principles of police powers reflected those of eminent domain, but they were broader based on the decisions of state courts. In these cases, all rights and property were subject to the police power, up to and including total annihilation, depending on the circumstances, just as property was similarly susceptible to total confiscation under eminent domain; the rights of particular individuals could be targeted rather than the people or particular classes generally, much like eminent domain; generally a public necessity was required to annihilate rights, and a primarily public purpose or benefit was required for regulation. There was no requirement for compensation, however, unlike eminent domain and taxation. Experience and common law often provided a guide for statesmen and jurists to find the proper balance between the public good and private rights.

³⁸³ Cooley, *Constitutional Limitations*. p. 532

Overall the purpose of police powers was to ensure that individual rights or interests could not trump the public health, safety, welfare, and morals of the people. And yet at the same time, the purpose of the power was also to protect commonly held individual rights generally. The state could make “extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property.”³⁸⁴ There was no necessary mutual exclusivity for the liberal goal of protecting individual rights and the republican goal of limiting such rights for the common good. Both purposes were pursued simultaneously and in many ways were one and the same. The protection of commonly held rights served the common good. All were to enjoy their individual rights as long as the exercise of those rights did not encroach on the common good or individual rights held commonly by the people. The government had the general, plenary power to regulate, and barring some necessity, could govern as long as it refrained from violating constitutional limitations. There were limits to rights just as there were limits to police powers. Some definitions provided by Cooley should illustrate the principle:

The police power of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the

³⁸⁴ Cooley, *Constitutional Limitations*. p. 597

*uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.*³⁸⁵

From Massachusetts:

*The power we allude to is rather the police power; the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.*³⁸⁶

All state legislatures enjoyed the general power to ensure the exercise of individual rights did not injure the individual rights of others. Congress enjoyed police powers as well, but only in regards to the subjects under its control according to the Constitution.³⁸⁷ States could exercise police powers but only as long as they did not conflict with any provisions of the federal Constitution.

Overall the purpose was to protect the general health, safety, welfare, morals, and, as is often neglected from inclusion on this list, the individual rights of the people. As with all powers, Cooley maintained, it was limited by the constitutions and the common law, and it required a public purpose. Those public purposes ranged from true necessities, such as taking, using, or destroying property to prevent the advance of an invading army,³⁸⁸ to simply regulating the times and manners of transacting business to facilitate more efficient and orderly trade.³⁸⁹ It appears

³⁸⁵ Cooley, *Constitutional Limitations*. p. 572. Here Cooley was paraphrasing Blackstone and Bentham.

³⁸⁶ *Commonwealth v. Alger*, 7 Cush. 84, 61 Mass. 53 (1851)

³⁸⁷ Cooley, *Constitutional Limitations*. p. 586

³⁸⁸ Cooley, *Constitutional Limitations*. p. 594

³⁸⁹ Cooley, *Constitutional Limitations*. p. 585

necessity was required for annihilation of rights while a public convenience could suffice for mere regulation. As with so many elements of general constitutions, “It would be quite impossible to enumerate all the instances in which this power is or may be exercised, because the various cases in which the exercise by one individual of his rights may conflict with a similar exercise by others, or may be detrimental to the public order or safety, are infinite in number and in variety.”³⁹⁰ Limitations on this general, inherent power had to be included in constitutions, statutes, or common law, otherwise it was assumed the legislatures were acting within established laws and customs.

Taxation (Jacobs’ Attack)

The most thorough and legally oriented critic of Cooley’s position on the public purpose maxim and taxation was Clyde Jacobs.³⁹¹ Indeed, he was one of only a handful of critics who bothered to scrutinize Cooley from a legal perspective on any topic. He examined constitutions, state and federal case law, and 19th century treatises to conclude that the public purpose maxim as applied to taxation was an unsound constitutional principle, and it was Cooley who transformed it into a supposedly legitimate maxim. Cooley’s influence on this issue, Jacobs maintained, overshadowed that of all others, and it had enormous consequences for constitutional law. Public purpose and taxation “probably occasioned more judicial discussion on the ends and function of government than did any other development in the post-Civil War period,”³⁹² he wrote, and Cooley was cited in about half of the cases that developed and entrenched this principle as a cornerstone of *laissez-faire* constitutionalism for some forty years.

³⁹⁰ Cooley, *Constitutional Limitations*. p. 594

³⁹¹ Jacobs, *Law Writers and the Courts*. p. 98-159

³⁹² Jacobs, *Law Writers and the Courts*. p. 98

Jacobs acknowledged as “incontrovertible” the principle that laws in general should be directed toward the common good rather than a private purpose. He also acknowledged that the public purpose requirement applied to police powers and eminent domain. But he claimed Cooley and friendly courts and lawyers expanded and morphed these principles it into a judicial encroachment on legislative discretion on all fiscal matters. He cited Cooley’s three requirements for taxation, which he had listed in *Salem*. In this case, the court was considering whether a state law could allow local municipalities to levy taxes for the purpose of funding a private railroad corporation. Cooley listed three principles for taxation: It must be levied and spent for a public purpose; the tax must be laid by some rule of apportionment or uniformity; and taxes levied by a tax district must be for local, public purposes within that district rather than for state-level public purposes. Elsewhere Cooley elaborated on the need for compensation to the taxpayers. Led by Cooley, the court struck down the law based only on its failure to meet the first criteria. Cooley wrote that the resultant railroad was a private enterprise no different from any other business, and only certain sectors of the public would enjoy the benefit of rail transport, and even then, they were required to pay for such benefit. “They are not, when in private hands,” he wrote, “the *people’s* highways; but they are private property, whose owners make it their business to transport persons and merchandise in their own carriages, over their own land, for such pecuniary compensation as may be stipulated.”³⁹³ Jacobs claimed that from the 1830s on, through a series of incremental opinions, the courts created these principles and extended the public purpose maxim from eminent domain and police powers, generally accepted applications, into the realm of taxation, and then to borrowing, spending, and appropriations, and then to all

³⁹³ Cooley opinion, *People v. Salem*

fiscal legislation. No longer was a legislative purpose synonymous with a public purpose. Rather, the public purpose requirement had become a tool of the judiciary to impose its will on legislatures and limit their powers to direct public money.

On “flimsy” antebellum precedents Cooley and others built the three-part constitutional maxim. With a citation to a single legal dictionary as his only direct source, Jacobs wrote, Cooley added the public purpose requirement to the definition of “taxation” to transmogrify an open-ended constitutional power into a constitutional limitation. Further, he helped to shift the basis for a tax law’s constitutionality from the ultimate aim of the law—whether private or public—to the private or public character of the recipient. Although no constitutional provision read explicitly that taxation required a public purpose, Jacobs claimed, the courts imposed that standard through judicial review to control legislatures based on their own *laissez-faire* ideology. Helping to support this injection was an arbitrary reliance on custom and practice, whereby judges were to consider as legitimate for receiving public revenue only those objects that had traditionally received tax money, thus giving “private enterprise” as it “currently operated” a constitutional status and thus protection from government competition.

Taxation (Cooley’s Position)

A number of Jacobs’ claims were flawed. For Cooley a legitimate exercise of the power of taxation was based on no fewer than *four* elements: public purpose, uniformity, a district purpose, and the principle of *compensation* woven into these fundamental maxims. Jacobs likely overlooked the final element because Cooley failed to emphasize it in his *Salem* opinion, which Jacobs and other critics tended to highlight as Cooley’s ultimate position. Cooley expounded on this latter element and its relationship with taxation, the due process clause, and the takings

clause the next year in *Bay City v. State Treasurer*.³⁹⁴ His treatise on taxation also emphasized the principle of compensation, but Jacobs neglected to recognize this point with any depth.³⁹⁵ Even though Cooley included *dicta* that clearly reflected economic *laissez-faire* policy in his *Salem* opinion, at the root of his opinion were explicit constitutional provisions, common law principles, and the definition of “taxation” itself. It’s not that Cooley was trying to protect private industry by stiff-arming government competition and subsidizing. Rather, he was trying to limit legislatures and protect individual rights by upholding constitutional provisions and principles. Plundering or robbing individual citizens or particular groups of their money, or taking the public money and diverting it to favored individuals under the banner of taxation by failing to adhere to the underlying principles and definitions, was thus no more than a “decree under legislative forms.”³⁹⁶ No branch had unlimited power in any regard, and in general it was the role of the courts to construe the law and protect rights from legislative abuse.

Cooley relied on far more sources than Jacobs claimed for his definition of “tax,” probably because it appears Jacobs considered primarily his chapter on taxation in *Constitutional Limitations* and his *Salem* opinion. In his *Treatise on Taxation*, Cooley cited Montesquieu, Blackwell’s *Treatise on Tax Titles*, two law dictionaries, and a litany of state case law that also relied upon English and American common law precedent. He defined “taxes” as “the enforced proportional contribution of persons and property levied by the authority of the state for the

³⁹⁴ *People ex rel. Bay City v. State Treasurer*, 23 Mich. 499 (1871)

³⁹⁵ Although Jacobs noted in a footnote that the Michigan Court affirmed the holding of *Salem* in the *Bay City* opinion, he failed to consider the major constitutional arguments found in the latter opinion. He also neglected to consider the compensation principle when reflecting on the *Treatise on Taxation*.

³⁹⁶ Cooley, *Treatise on Taxation*. p. 68-69

support of the government, and for all public needs.”³⁹⁷ Elsewhere he distinguished the power to tax as “based upon the idea that it is only an equal and fair contribution to the public wants.”³⁹⁸ Not all money acquired by the government was a “tax”—there were categories of appropriations. Unlike duties or customs and other appropriations, taxes were regular, orderly, uniform, applied according to a ratio of equality, and were directed primarily toward a public benefit. Subjects of taxation within the states were limited to persons, property, and businesses, and within those categories the power was essentially unlimited unless constrained by the laws and constitutions.

Important was to recognize the role of taxation in general: in a free, self-governing regime, whose objects undoubtedly included the protection of rights and the promotion of the common good, taxes were essentially grants of money from the people to their representatives for the furtherance of established government purposes that benefited those contributors. Otherwise, many of the people would be reduced to working primarily for the benefit of others, a condition that would appear more akin to slavery rather than that of a free people. As Cooley put it, these requirements for taxation, which were indeed limitations on legislatures, “spring from the very nature of free government.”³⁹⁹ Cooley received criticism for this wording, which indeed appears to describe an extraconstitutional limitation on legislatures, but again it was no less than a reliance on common law precedent and explicit constitutional provisions that led Cooley to claim such a limitation, as he explained in greater detail in his tax treatise and in his court opinions. Although Cooley agreed emphatically that the power to tax was legislative, and the objects to be taxed and the purposes for taxation were almost entirely left to the discretion of

³⁹⁷ Cooley, *Treatise on Taxation*. p. 1

³⁹⁸ Cooley, *Treatise on Taxation*. p. 175

³⁹⁹ Cooley, *Constitutional Limitations*. p. 129

legislatures, given that such power established rules for future appropriations and expenditures,⁴⁰⁰ the power did not extend to a punitive power to deprive individuals of rights or possessions or money without a public purpose or compensation. Such actions were more judicial in character and required due process.

Critics claimed that the power to tax was limitless, but the constitutions and prominent judicial opinions indicated otherwise. For example, by the constitutions state legislatures could not tax imports or exports, they could not violate the privileges and immunities clause by taxing citizens of other states by rates higher than those of its citizens, and routinely constitutions included explicit restrictions on legislative fiscal powers. In general the governments could not tax agencies outside of their jurisdictions, as demonstrated in *McCulloch v. Maryland*. Some jurists argued the seizure via tax law of citizens' money fell under the same compensation and public use requirements as "property" in takings clauses. Other constitutional and judicial examples will be examined in depth in sections II and III. But in *Salem*, admittedly it appears Cooley relied on the less obvious constitutional principle that state legislatures could not take money from the citizens "because the purpose for which the tax is demanded is not a public purpose, or because of the absence of some other essential element in taxation."⁴⁰¹

Here are Cooley's three principles required for taxation listed in his *Salem* opinion:
First,

It must be imposed for a public, and not for a mere private purpose. Taxation is a mode of raising revenue for public purposes only, and, as is said in some of the

⁴⁰⁰ Cooley, *Treatise on Taxation*. p. 32

⁴⁰¹ Cooley, *Treatise on Taxation*. p. 36

cases, when it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder.— Sharpless v. Mayor, etc., 21 Pa. 147; Grim v. Weissenberg School District, 57 Pa. 433; Brodhead v. Milwaukee, 19 Wis. 624.

Second,

The tax must be laid according to some rule of apportionment; not arbitrarily or by caprice, but so that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. A State burden is not to be imposed upon any territory smaller than the whole State, nor a county burden upon any territory smaller or greater than the county. Equality in the imposition of the burden is of the very essence of the power itself, and though absolute equality and absolute justice are never attainable, the adoption of some rule tending to that end is indispensable. Weeks v. Milwaukee, 10 Wis. 242; Ryerson v. Utley, 16 Mich. 269; Merrick v. Amherst, 12 Allen 504.

Third,

As a corollary from the proceeding, if the tax is imposed upon one of the municipal subdivisions of the State only, the purpose must not only be a public purpose, as regards the people of that subdivision, but it must also be local, that is to say, the people of that municipality must have a special and peculiar interest in the object to be accomplished, which will make it just, proper and equitable that they should bear the burden, rather than the State at large, or any more

considerable portion of the State.-- Wells v. Weston, 22 Mo. 384; Covington v. Southgate, 54 Ky. 491, 15 B. Mon. 491; Morford v. Unger, 8 Iowa 82.

It is important to note the underlying requirement for some sort of compensation as seen in the first and third maxims. Taxation or local assessments had to be “connected with the public interests or welfare” or “the people of that municipality must have a special and peculiar interest in the object to be accomplished.”⁴⁰² In other words, the *primary* benefit had to be public, and one must be able to point to something approaching equal compensation to individuals for the amount of tax money contributed to the public treasury. In his treatise on taxation, in *Constitutional Limitations*, and in *Bay City*, Cooley more clearly emphasized that some sort of compensation or benefit was required for the taxpayers, which may include something as simple as the protection of rights to life, liberty, and property, or “the increase in the value of his possessions by the use to which the government applies the money raised by the tax,”⁴⁰³ or a project serving the general welfare, even though it was sometimes difficult to quantify or even recognize such benefit or compensation with precision.⁴⁰⁴ Regardless, compensation for the taking of money was required by the due process and takings clauses. As he put it in *Bay City*:

Our constitution has carefully provided a shield against an invasion of the citizen's right to his property, in the provision which guarantees to every person due process of law. Art. VI., § 32. To take a man's property under the pretense of taxation [as in Salem], for a purpose for which taxation is not admissible, is not due process of law, but is an unlawful confiscation. ...

⁴⁰² *People v. Salem*

⁴⁰³ Cooley, *Constitutional Limitations*. p. 498

⁴⁰⁴ Cooley, *Treatise on Taxation*. p. 16-17

All our reasoning went to show that when property of the individual was taken by the state, under the forms of taxation, for the use of a private corporation, and for no other return than the expected incidental benefits, it was in effect taken for a private use, and without compensation.

Further, in *Salem* Cooley could have simply pointed to the clauses in the Michigan constitution “expressly prohibiting the state from being a party to, or interested in, any work of internal improvement, or engaged in carrying on any such work, except in the expenditure of grants made to it; and also from subscribing to, or being interested in, the stock of any company, association or corporation, or loaning its credit in aid of any person, association or corporation: Art. XIV., §§ 9, 8 and 7, [and 6]”⁴⁰⁵ as he noted in *Bay City*. As Cooley had explained in *Salem*, however, he neglected to point out these express provisions because it was “superfluous ... to consider in detail the several express provisions of the State Constitution which the respondents suppose to be violated. If the authority exercised is not within the taxing power of the State, it is quite needless to discuss whether, if it were within it, there are not restrictions which prohibit its exercise.”⁴⁰⁶ If the state lacked the power to give its credit to railroad companies, so did local municipalities. The unfortunate result of *Salem* was the appearance that Cooley based his opinion

⁴⁰⁵ Michigan Constitution. 1850. Art. XIV., §§ 9, 8 and 7: “The state shall not be a part to, nor interested in, any work or internal improvement, nor engaged in carrying on any such work, except in the improvement of or aiding in the improvement of the public wagon roads and in the expenditure of grants to the state of land or other property”; “The state shall not subscribe to, or be interested in, the stock of any company, association, or corporation”; “No scrip, certificate, or other evidence of state indebtedness shall be issued except for the redemption of stock previously issued, or for such debts as are expressly authorized in this constitution.”

⁴⁰⁶ Cooley opinion, *People v. Salem*

and the public purpose maxim as applied to taxation on questionable principles and the definition of taxation, rather than explicit constitutional provisions. He did both.

Jacobs claimed that Cooley's test for whether a tax was legitimate was based on whether the "objects for which the government could tax were the traditional objects and only those,"⁴⁰⁷ which in turn protected private industry from government-subsidized enterprises. He based this on an incomplete quote from Cooley's *Salem* opinion. Here are the complete sentences:

*We perceive, therefore, that the term "public purposes," as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality.*⁴⁰⁸

As Cooley had explained at length, indeed, unlike eminent domain and the police power, a "public need" was not the test for a legitimate tax law. But here Jacobs suggested the "public benefit" was also not one of the requisites, and he did so by eliminating the first sentence that read "or to the extent of the public benefit." He instead emphasized Cooley's categorical distinction in the second sentence: if public money had never gone toward particular types of manufacturing or businesses, then heretofore no money could go toward those particular types of manufacturing or businesses. He was trying to disparage Cooley by claiming he based a supposedly constitutional principle on a simple preference for maintaining the status quo of an

⁴⁰⁷ Jacobs, *Law Writers and the Courts*. p. 118-119

⁴⁰⁸ Cooley opinion, *People v. Salem*

economy dominated by private enterprise. But existing practice was not Cooley's test. If one reads the first sentence closely, it appears Cooley didn't claim the "public benefit" element was irrelevant to determining the legitimacy of taxation, but rather he wrote the "*extent* of the public benefit" did not give greater weight to the legitimacy of a tax law. The absolute presence of a public benefit, whether great or small, and its position as the primary purpose of a tax law indeed was one of the pillars of the test, in addition to the uniformity and compensation principles. Here Cooley was simply pointing out that there was a "manifest distinction" between "public works and private enterprises"⁴⁰⁹ that helped guide lawmakers and jurists toward identifying which purposes or benefits were primarily private and which were primarily public. This brief aside did not negate his lengthy explorations and explanations of the required principles of taxation.

Next, the district purpose principle was essentially a jurisdictional addendum to the public purpose principle generally. As Cooley worded the "universal" district purpose principle:

*The burden of a tax must be made to rest upon the state at large, or upon any particular district of the state, according as the purpose for which it is levied is of general concern to the whole state, or, on the other hand, pertains only to the particular district. A state purpose must be accomplished by state taxation, a county purpose by county taxation, or a public purpose for any inferior district by taxation of such district.*⁴¹⁰

The tax imposed on a district must both serve a local, public purpose and provide a local benefit.⁴¹¹ It was equally requisite along with the public purpose, compensation, and equality and

⁴⁰⁹ Cooley opinion, *People v. Salem*

⁴¹⁰ Cooley, *Treatise on Taxation*. p. 104-105

⁴¹¹ Cooley opinion, *People v. Salem*

uniformity principles in taxation. Statewide taxation was to be directed toward state projects clearly benefiting the general public, such as state government buildings, whereas local taxes were to be directed toward projects primarily benefitting the local people, such as schools or public parks. Public roads also served as an example for analysis: each town or county within the state was expected to furnish the tax revenue for that portion of the road falling within their boundaries, given the local residents used and enjoyed it primarily. Courts had recognized local ordinances that had subdivided cities into taxing districts to fund projects particularly beneficial to their areas or businesses, such as sidewalks. Sometimes states could double-levy a particular district if the project would benefit the state generally and that district particularly—for example, the construction of a state capital would be used by all, but particularly beneficial to the local community’s economy. Drawing the actual lines for the districts, Cooley maintained, was entirely a legislative policy matter. Courts could step in only if individuals who were being taxed received no clear or sufficiently direct benefit. It is apparent how this principle is closely related to the compensation, public purpose, and uniformity principles.

Finally, the uniformity or equality principle was the last primary requirement for taxation and was closely related to the requirement for apportionment. As Cooley defined it, “Theoretically, tax laws should be framed with a view to apportioning the burdens of government so that each person enjoying government protection shall be required to contribute so much as is his reasonable proportion, and no more.”⁴¹² This requirement was “universal.”⁴¹³ Three apportionment methods covered all types of taxation: specific taxes, such as equal license

⁴¹² Cooley, *Treatise on Taxation*. p. 124

⁴¹³ Cooley, *Constitutional Limitations*. p. 499-501

or stamp taxes; *ad valorem* taxes, such as property taxes based on the value of property; and special benefits, in which the legislature apportioned the fiscal burden between districts, for the costs of a road, for example, based on the expected benefits for each.⁴¹⁴ Regardless, all people or subjects of a class were to pay according to a standard, uniform, or equal measurement or ratio.⁴¹⁵ Exceptions were allowed, but only according to law. “It would be only when individuals of the class were singled out for exemption,” Cooley wrote, “that the inequality would be manifest.”⁴¹⁶ The rule for exceptions to this principle was established by statute and revokable policy, and it was based on the extent to which a particular trade or resource was at any time considered to contribute to the general public benefit. Such discretion was left to the legislatures. But the courts played a role in some cases. In terms of assessments for the valuation of property, Cooley wrote, officers who wholly disregarded the legal mandate to assess the values equally, perhaps out of resentment or malice, acted arbitrarily rather than within the confines and purpose of the law, and the courts could review those decisions based on the principle of uniformity and the law itself.

It is important to recognize the close relationship between these four principles of compensation, public purpose, district purpose, and uniformity. Cooley often considered them in conjunction. Adherence to one or more principles often resulted in the fulfillment of the others. For example, in *Salem* he wrote, “Taxation is a mode of raising revenue for public purposes only, and, as is said in some of the cases, when it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder.” The public

⁴¹⁴ Cooley, *Treatise on Taxation*. p. 175-176

⁴¹⁵ Cooley, *Constitutional Limitations*. p. 501

⁴¹⁶ Cooley, *Treatise on Taxation*. p. 129

purpose maxim implied a public benefit, or compensation, had to be a result. The district purpose principle similarly implied the assessed citizens enjoyed compensation. Further, if the legislature adhered to the principle of uniform apportionment and designed the law to provide a public benefit or general compensation, then the public purpose maxim was fulfilled. Similarly, the violation of one principle might lead to the violation of the others. If there were no compensation for the taxpayer in the form of protecting rights or providing for the general welfare—that is, if the law was directed toward private benefit only—then no public purpose would be apparent. Should the district purpose principle be violated, then those people within that district would be deprived of compensation. If a tax law violated the uniformity or apportionment principle by exempting certain companies from a general tax, and thus placing an unequal burden on other businesses in the same field, then it might lead to their destruction. Such would undermine the principle of compensation for those burdened businesses, and it would deprive the people in general of goods or services at competitive prices. As Cooley noted, “One reason why taxation for private purposes is inadmissible, is that its tendency is to the building up of monopolies at the expense of the public who would suffer from them.”⁴¹⁷

In general Cooley based his positions on legal and constitutional principles, not common practice or ideology or political preferences. For example, in *Salem* he noted his opposition to the employment of eminent domain along rivers to secure water power for privately owned grist mills and the seizures of land for railroads, even though legislatures and judiciaries had upheld such seizures for decades. He also opposed providing subsidies or bounties for particular businesses, such as railroads, a longtime practice. Why? In the case of the abuse of eminent

⁴¹⁷ Cooley, *Treatise on Taxation*. p. 173

domain, it was because in general, “No principle was older, and none seemed better understood or more inflexible, than that one man’s property could not be taken under the power of the government and transferred to another against the will of the owner.” The seizure of lands for these purposes had been a modification of common law principles because the primary purpose was to benefit the private grist mill owner or the private railroad corporation. As for his opposition to bounties, it was a matter of “equality of right and privilege which is a maxim in State government”—by the rule of equality under the law, “The state can have no favorites.” Critics chalked these positions up to economic ideology or Jacksonian politics, but here Cooley based his positions on legal principles. Just as a seizure of land from private party A and the transferring of it to private party B was a violation of eminent domain, so was seizing money from private party A and transferring it to private party B a violation of the power to tax. “In contemplation of law,” Cooley wrote, “it would be taking the common property of the whole community and handing it over to private parties for their private gain, and consequently unlawful.”⁴¹⁸ Coupled with the seemingly universal objects of American constitutions to provide for the public benefit, to protect individual rights to property, and to be treated equally under the law, it seems the idea that public money should be directed toward public purposes was a sound constitutional principle. Still, it is important to review the actual texts of the constitutions as they existed in 1868 to determine whether and to what extent Cooley was correct.

II. The Constitutions

Critics claimed there was little to no constitutional support for the public purpose maxim as applied to taxation. Indeed, based on their assessments, it was the weakest of Cooley’s most

⁴¹⁸ Cooley, *Treatise on Taxation*. p. 90

prominent positions. By 1868, however, arguably all of the thirty-seven state constitutions in existence read that one or more of these principles applied to taxation, including the public purpose requirement explicitly, the district purpose principle, the uniformity principle, and the power of the judiciary to review tax laws. Constitutions also routinely included a general premise that the purpose of government was to provide for the common benefit, that laws were to be applied equally and uniformly, and it was generally accepted in the course of their duties of construing the constitutions and laws, courts had the power of judicial review. All but two of the thirty-seven constitutions in 1868 included takings clauses, and it was not uncommon for judges to equate “money” with “property,” and thus directly apply the public purpose and compensation principles to taxation, as will be demonstrated in Section III. Other constitutions read that no individual or private company could receive emoluments from the treasury. Sometimes they enumerated a specific list of objects toward which appropriations could be allocated, which included only clearly public purposes, such as courthouses or jails. Some constitutions had separate clauses explicitly reading that a legislative supermajority or a special popular vote was needed to direct public money or “public credit” toward private purposes. This indicated that such legislative measures were not within the general power to “tax” given they lacked a public purpose, and so they required extraordinary procedures.

Some constitutions indicated expressly that tax revenue or public money must be directed toward public use or public purposes or that no private individuals or corporations could receive public money. For example, as part of the Virginia constitution, the Virginia declaration of rights of 1776 read, “[A]ll men ... cannot be taxed or deprived of their property for public uses without

their own consent ...”⁴¹⁹ Massachusetts’ read, “The credit of the commonwealth shall not in any manner be given or loaned to or in aid of any individual, or of any private association, or of any corporation which is privately owned and managed.”⁴²⁰ The Connecticut constitution read, “[N]o man, or set of men are entitled to exclusive public emoluments or privileges from the community.”⁴²¹ Kentucky’s was virtually the same, as was that of North Carolina, Texas, and Michigan.⁴²² Georgia’s constitution read, “The power of taxation over the whole State shall be exercised by the general assembly only to raise revenue for the support of government, to pay the public debt, to provide a general school-fund, for common defense and for public improvement ... [N]or shall the credit of the state be granted or loaned to aid any company ... for any other object than a work of public improvements.”⁴²³ Similarly, Illinois’ read, “The credit of the state shall not, in any manner, be given to or in aid of any individual, association, or corporation.”⁴²⁴ Kentucky’s was essentially the same.⁴²⁵ And California’s: “The credit of the State shall not, in any manner, be given or loaned to or in aid of any individual, association, or corporation; nor shall the State directly or indirectly become a stockholder in any association or corporation.”⁴²⁶

⁴¹⁹ Virginia Constitution, Declaration of Rights. 1776. §6.

⁴²⁰ Massachusetts Constitution. 1780. Article LXII, §1

⁴²¹ Connecticut Constitution, 1818. Article I, §1

⁴²² Kentucky Constitution. 1850. Art. XIII, §1: “[N]o man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services.”; North Carolina Constitution. 1868. Art. I, §7: “No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.”; Texas Constitution. 1866. Art. I, §2. “[N]o man, or act of men, is entitled to exclusive separate public emoluments or privileges, but in consideration of public services.” Michigan Constitution. 1835. Art. I, §3: “No man or set of men are entitled to exclusive or separate privileges.”

⁴²³ Georgia Constitution. 1868. Art. I, §27; Art. III, §6.5

⁴²⁴ Illinois Constitution, Art. III, §38

⁴²⁵ Kentucky Constitution. 1850. Art. II, §33

⁴²⁶ California Constitution. 1849. Art. XI, §13

As mentioned in the chapter on vested rights and retroactive civil legislation, the constitutions universally read that the purpose of free governments or the constitution was to provide for the equal or public benefit, the happiness, or the rights of the people generally as opposed to serve private purposes.⁴²⁷ Typically they appeared in the bills of rights, preambles, or under the “fundamental principles of government” headings. The constitution of Massachusetts, for example, read, “Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.”⁴²⁸ Those of Vermont and New Hampshire were virtually identical.⁴²⁹ Usually the public benefit requirement for government

⁴²⁷ Alabama Constitution. 1868. Art. I, §3; Arkansas Constitution. 1868. Art. I, §I; California Constitution. 1849. Art. I, §2; Connecticut Constitution. 1818. Art. I, §2; Delaware Constitution. 1831. Preamble; Florida Constitution. 1868. Declaration of Rights, §2; Georgia Constitution. 1868. Preamble; Illinois Constitution. 1848. Art. III, §2; Indiana Constitution. 1851. Art. I, §1; Iowa Constitution. 1857. Art. I, §2; Kansas Constitution. 1859. Bill of Rights, §2; Kentucky Constitution. 1850. Art. XIII, §4; Louisiana Constitution. 1868. Preamble; Maine Constitution. 1820. Art. I, §2; Maryland Constitution. 1867. Art. I, §1; Michigan Constitution. 1835. Bill of Rights. Art. I, §2; Minnesota Constitution. 1857. Art. I, §1; Mississippi Constitution. 1868. Preamble; Missouri Constitution. 1865. Art. I, §4; Nebraska Constitution. 1866. Preamble; Nevada Constitution. 1864. Art. I, §2; New Hampshire Constitution. 1784. Art. I, §1, §10; New Jersey Constitution. 1844. Art. I, §2; New York Constitution. 1846. Preamble; North Carolina Constitution. 1868. Art. I, §2; Ohio Constitution. 1851. Art. I, §2; Oregon Constitution. 1857. Art. I, §I; Pennsylvania Constitution. 1838. Art. IX, §2; Rhode Island Constitution. 1841. Art. I, Preamble; South Carolina Constitution. 1868. Preamble; Tennessee Constitution. 1835. Art. I, §2; Texas Constitution. 1866. Art. I, §1; Vermont Constitution. 1786. Preamble; Virginia Constitution. 1851. Declaration of Rights, §3; West Virginia Constitution. 1863. Preamble; Wisconsin Constitution. 1848. Art. I, §1.

⁴²⁸ Massachusetts Constitution. 1780. Art. VII

⁴²⁹ New Hampshire Constitution. 1784. Art. X. “Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.” *See also* Vermont Constitution. 1786. Art. VII

was immediately followed by a reservation of the right of the people of the state to alter or abolish their forms of government should it fail to fulfill that purpose. So not only was the public purpose principle one of the universal, overarching maxims of all American government, but it was the most consequential in that a departure from that principle was grounds for violent revolution. It is important to emphasize that the protection of rights included the protection of money from confiscation outside of established legal requirements.

A number of constitutions read that in order to appropriate money or property for private purposes a vote of two-thirds was required from each branch of the legislature. Others read that a special ballot was required. Those with two-thirds clauses included the constitutions of New York, Alabama, Georgia, and Michigan.⁴³⁰ Delaware's read that acts of incorporation required two-thirds vote in the legislature, and only those corporations with the purpose of "public improvement" were exempted from the twenty-year renewal requirement.⁴³¹ The constitution of Arkansas read, "The credit of the State or counties, shall never be loaned for any purpose without the consent of the people thereof, expressed through the ballot box."⁴³² Georgia allowed the General Assembly to "grant corporate powers and privileges to private companies,"⁴³³ but it

⁴³⁰ New York Constitution. 1846. Art. I, §9. "The assent of two thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes."; Alabama Constitution. 1868. Art. IV, §32: "The General Assembly shall not borrow or raise money ... without the concurrence of two-thirds of the members of each house; nor shall the debts or liabilities of any corporation, person or persons, or other States be guarantied, nor any money, credit or other thing be loaned or given away, except by a like concurrence of each house ..."; Georgia Constitution. 1868. Art. III, §6.2. "No vote, resolution, law, or order, shall pass, granting a donation, or gratuity, in favor of any person, except by the concurrence of two-thirds of each branch of the General Assembly, nor, by any vote, to a sectarian, corporation or association." ; Michigan Constitution. 1850. Art. IV, §45. "The assent of two-thirds of the members elected to each house of the Legislature shall be requisite to every bill appropriating the public money or property for local or private purposes."

⁴³¹ Delaware Constitution. 1831. Art. II, §17

⁴³² Arkansas Constitution, Article X, §6

⁴³³ Georgia Constitution. 1868. Art. III, §5

required a two-thirds vote in the assembly or a majority popular vote in municipalities to allocate public funds to private companies, and again, it read, “[N]or shall the credit of the state be granted or loaned to aid any company ... for any other object than a work of public improvements.”⁴³⁴

These clauses require some interpretation. On one hand, one could claim that this power to direct public money toward private individuals or corporations was among the plenary powers of state legislatures, complete and absolute unless prohibited or modified by express constitutional provisions. Standing alone, this interpretation might undermine Cooley’s claim that tax revenue could not be directed toward private purposes. But one could also argue that the power to direct money for private purposes was constitutionally forbidden given the general public purpose of government, and as a result, these clauses modified those clauses to allow for qualified exceptions. Indeed, it is interesting to note that none of the clauses considered such appropriations to be “taxes.” They were “appropriations of public moneys” or “law ... granting a donation” or “bill appropriating the public money or property.” Clauses regulating taxes appeared elsewhere in these constitutions. This might suggest that these appropriations were something of an exception to the public purpose maxim in general rather than a general recognition that taxes could be directed to private parties for private use. Given the universal constitutional principle that governments were to make laws for the public benefit, it seems these two-thirds or ballot clauses were simply exceptions to the general rule: no public money could be directed toward private purposes.

⁴³⁴ Georgia Constitution. 1868. Art. III, §6.5

All but two of the thirty-seven states included takings clauses analogous to that found in the fifth amendment of the federal Constitution.⁴³⁵ Only New Hampshire and North Carolina lacked one in 1868.⁴³⁶ Sometimes, as with the case in Alabama, these included the additional, “nor shall private property be taken for private use,” to negate any implication that property could be seized for private purposes as opposed to public purposes. Important for consideration in this clause is whether “money” was understood to be included with “property.” Although Cooley wrote that money was not included within “property” in takings clauses,⁴³⁷ he indeed wrote they were bound by the same principle. “Taxation and eminent domain indeed rest substantially on the same foundation, as each implies the taking of private property for the public use on compensation made; but the compensation is different in the two cases,” he wrote. Compensation for eminent domain was money, while compensation for taxation was protection of life, liberty, and property, as well as “the increase in the value of his possessions by the use to which the government applies the money raised by the tax.”⁴³⁸ As will be demonstrated in the case law in Section III, judges indeed placed taxation on this same foundation.

⁴³⁵ Alabama. Art. I, §25; Arkansas. Art. I, §15; California. Art. I, §8; Connecticut. Art. I, §11; Delaware. Art. I, §8; Florida. Declaration of Rights, §8; Georgia. Art. I, §20; Illinois. Art. XIII, §11; Indiana. Art. I, §21; Iowa. Art. I, §18; Kansas. Art. 12, §4; Kentucky. Art. XIII, §14; Louisiana. Title VI, §110; Maine. Art. I, §22; Maryland. Art. III, §40; Massachusetts. Part the First, Art. X; Michigan. Art. 18, §14; Minnesota. Art. I, §13; Mississippi. Art. I, §10; Missouri. Art. I, §16; Nebraska. Art. I, §13; Nevada. Art. I, §8.3; New Jersey. Art. I, §16; New York. Art. I, §6,7; Ohio. Art. I, §19; Oregon. Art. I, §18; Pennsylvania. Art. VII, §IV; Rhode Island. Art. I, §12; South Carolina. Art. I, §23; Tennessee. Art. I, §21; Texas. Art. I, §14; Vermont. Chapter I, §2; Virginia. Declaration of Rights, §6; West Virginia. Art. II, §6; and Wisconsin. Art. I, §13.

⁴³⁶ New Hampshire lacked one until 2006. North Carolina is proposing an eminent domain amendment as of 2020.

⁴³⁷ Cooley, *Constitutional Limitations*. p. 497, 527

⁴³⁸ Cooley, *Constitutional Limitations*. p. 498

Other of Cooley's constitutional principles of taxation also appeared. Some indicated the district purpose principle, drawing a line between state versus local, public purposes for taxation. Mississippi's read, "No county shall be denied the right to raise, by special tax, money sufficient to pay for the building and repairing of court houses, jails, bridges, and other necessary conveniences for the people of the county; and money thus collected shall never be appropriated for any other purposes."⁴³⁹ Illinois' constitution read, "The corporate authorities of counties, township, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes ... "⁴⁴⁰ Florida's constitution read, "The Legislature shall not pass special or local laws in any of the following enumerated cases ... for the assessment and collection of taxes for State, county, and municipal purposes."⁴⁴¹ Also, "The Legislature shall authorize the several counties and incorporated towns in the State to impose taxes for county and corporation purposes, and for no other purpose."⁴⁴² Similarly, Indiana's read, "The General Assembly shall not pass local or special laws ... Providing for the assessment and collection of taxes for State, county, township, or road purposes."⁴⁴³ Tennessee's read that the counties and towns had the power to "impose taxes for county and corporation purposes, respectively."⁴⁴⁴ States had the power to create municipalities and define the limit and extent of their powers, including their power to tax. It is important to note that no constitution appears to have read that

⁴³⁹ Mississippi Constitution. 1868. Art. XII, §16

⁴⁴⁰ Illinois Constitution. 1848. Art. IX, §5

⁴⁴¹ Florida Constitution. 1868. Art. IV, §17

⁴⁴² Florida Constitution. 1868. Art. XII, §1, §6, §8

⁴⁴³ Indiana Constitution. 1851. Art. IV, §22.

⁴⁴⁴ Tennessee Constitution. 1835. Art. II, §29

municipalities would have the power to levy taxes for state projects. If there was any mention of the local tax power, it was restricted to district purposes, often with an overt or implicit indication that local purposes were also necessarily public.

At least twenty-five of the thirty-seven states explicitly included the uniformity principle in their constitutions. For example, Louisiana’s constitution read, “Taxation shall be equal and uniform throughout the State.”⁴⁴⁵ Indiana’s constitution read, “The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation.”⁴⁴⁶ Cooley listed those that had come under recent judicial consideration: Arkansas, California, Georgia, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Ohio, Tennessee, Virginia, and Wisconsin.⁴⁴⁷ Others included the provision as well: Florida, Kansas, Nebraska, Nevada, North Carolina, Oregon, South Carolina, Texas, and West Virginia,⁴⁴⁸ for a total of at least twenty-five of the existing thirty-seven. Other states had clauses that required laws in general to be applied uniformly, including California and Florida.⁴⁴⁹

A number of constitutions read that the courts explicitly or implicitly could review tax laws. California’s constitution read, “The Supreme Court shall have appellate jurisdiction in all cases ... when the legality of any tax ... is in question ...”⁴⁵⁰ The Florida supreme court had the

⁴⁴⁵ Louisiana Constitution. 1868. Title VI, Art. 118

⁴⁴⁶ Indiana Constitution. 1851. Art. X, §1

⁴⁴⁷ Cooley, *Treatise on Taxation*. p. 132-144

⁴⁴⁸ Florida Constitution, Art. XII, §1; Kansas Constitution, 1859. Art. XI, §1; Nebraska Constitution, 1866. Art. VIII, §1; Nevada Constitution, 1864. Art. X, §1; North Carolina Constitution, 1868. Art. V, §3; Oregon Constitution, 1857. Art. I, §32; South Carolina Constitution, 1868. Art. IX, §1; Texas Constitution, 1866. Art. VII, §27; West Virginia Constitution, 1863. Art. XIII, §1

⁴⁴⁹ California Constitution. 1849. Art. I, §11; Florida Constitution Art. IV, §18

⁴⁵⁰ California Constitution, 1849. Article XI, §13; Article VI, §4

same jurisdiction over tax law,⁴⁵¹ as did the Louisiana constitution.⁴⁵² Illinois' constitution read, "The supreme court may have original jurisdiction in cases relative to revenue ..." ⁴⁵³ Georgia's read, "The courts of ordinary shall have such powers in relation to ... county funds and taxes ..." Many included general vesting clauses for judicial power, which arguably would include the power to review tax laws. Delaware's constitution read the state supreme court was to "have jurisdiction of all causes of a civil nature, real, personal and mixed ..." (Art. VI, §3). Nowhere did any constitution read that courts lacked the jurisdiction to review tax laws, although it is possible that some legislatures limited their jurisdictions in this regard. Regardless, if plenary powers for government was the rule, and exceptions required constitutional or statutory provisions limiting that jurisdiction, then it requires little strain to conclude in the absence of those limitations, the state judiciaries could review tax laws, just as they could review legislation in general. Clauses indicating this general understanding include one from Alabama: "The Circuit court shall have original jurisdiction in all matters, civil and criminal, within the State, not otherwise excepted in the Constitution."⁴⁵⁴ Any reiterations that tax laws were included within the jurisdictions of the courts were simply redundancies of the general power to review tax laws.

All of this supports Cooley's position that the public purpose, district purpose, uniformity, and compensation principles as applicable to taxation were housed in the state constitutions. Nowhere did any constitution indicate overtly that taxes could be levied for private

⁴⁵¹ Florida Constitution, 1868. Article VI, §5

⁴⁵² Louisiana Constitution. 1868. Title IV, Art. 74

⁴⁵³ Illinois Constitution. 1848. Art.V, §5

⁴⁵⁴ Alabama Constitution. 1868. Art.VI, §5

purposes, unequally, partially, or for purposes that lay outside of the benefit or interest of the people being taxed. It seems that generally, the four-part maxim was an accurate reflection of the state constitutional requirements for taxing, and the courts enjoyed the power to review tax laws to ensure their constitutionality. Courts could (and did) regularly review tax laws. The principle that taxation required compensation was less evident from the text of the constitutions, but it requires little deduction to conclude that if taxes were to be uniform and equal, and if they were to be levied for public purposes, then indeed, individuals should expect some benefit somewhat equivalent to their donation to the government. Some review of the common law as adopted by the states will help to demonstrate this conclusion.

III. The Courts and Common Law

Jacobs claimed he demonstrated in a string of case law how courts and lawyers built the principles that led to Cooley's three-part requirement for taxation: public purpose, district purpose, and uniformity. He did not list compensation as one of the required principles, but he nonetheless pointed out that the compensation principle as applied to taxation was a judicial creation rather than a constitutional requirement. His primary target was the public purpose maxim. This section will use Jacobs' claims based on case law as points of departure to critique Cooley's principles by comparison with state case law, some of which Cooley cited, as well as English common law as adopted by the states. Cooley did not cite some of these cases, but it is important to examine them because they demonstrate his principles date to the founding era.

Jacobs claimed the public purpose principle first appeared in a dissent in *Goddin v. Crump*,⁴⁵⁵ which included a consideration of the district purpose principle. It was a 1837 Virginia

⁴⁵⁵ *Goddin v. Crump*, 35 Va. 120 (1837)

case in which the city of Richmond, acting under legislative authorization, was levying taxes to pay back investors for the interest and principal on a bonded debt for stock subscriptions of a private company that was tasked with providing a canal or railway line from the James River at Richmond to the Ohio River. This scenario, one should note, was routinely the subject of litigation during this era, and the principles of taxation and public purpose were often considered. The local voters approved the law, but a minority protested. The question was whether the tax served a local purpose or whether it served a general statewide public purpose. If it were the latter only, some claimed, then the tax would be invalid because it would allow local jurisdictions to take money from local inhabitants for objects that may be outside of their benefit. The court upheld the tax, with Judge Tucker noting that it was up to the local people to decide whether they were sufficiently benefitting from the tax and subsequent transportation line, and he deferred to their decision. In his dissenting opinion Judge Francis Brooke wrote the tax was invalid because the transportation line was a “great state adventure,” and the Richmond plaintiffs derived only “some benefit remote in prospect” that was insufficient to justify the tax.

First, as noted above, it is important to recognize that Virginia’s constitution read that taxes were to be levied for public purposes only, so there was no judicial creation of the principle.⁴⁵⁶ Also, Jacobs was wrong that Brooke’s dissent was the origin of the principle that “local taxes could not be levied for a general purpose, even though that purpose was public.”⁴⁵⁷

⁴⁵⁶ Virginia Constitution, Declaration of Rights. §6. “[A]ll men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented for the public good.”

⁴⁵⁷ Jacobs, *Law Writers and the Courts*. p. 101

Indeed, Brooke directly referenced *The Case of the County Levy*⁴⁵⁸, an 1804 Virginia case in which Judge Edmund Pendleton⁴⁵⁹ affirmed that municipalities enjoyed the delegated power to tax their citizens for local purposes—not for statewide public purposes, a broad power housed in the state legislature. The primary issue of the case was whether the legislature could delegate the power to levy local taxes to the justices of the peace—unelected county administrators rather than elected representatives—who had long enjoyed this discretionary authority. So although the primary issue was whether an unelected official could tax, the court also recognized the limits of local tax power. The general power of taxation enjoyed by the legislature, Pendleton wrote, “is very distinguishable from one limited to levy on the people of a certain district the price of certain specific necessities, not for the public, but their individual use.” Citing the common law reception statute passed in 1776, Pendleton noted that the county authorities had long enjoyed the delegated but limited power “to tax their citizens for local purposes,” such as keeping up and repairing courthouses, bridges, prisons, and clearing rivers and creeks since before the American Revolution. This case demonstrated that the court deferred to common law practice rather than the explicit words of the state constitution—after all, justices of the peace indeed were unelected. It also demonstrated the power of courts to scrutinize the boundaries of local tax law. Local authorities had never enjoyed a general taxing power, and if it had tried to levy such a tax for a statewide purpose, there is little doubt the court would have struck down as unconstitutional any such exertion by the local authorities.

⁴⁵⁸ *The Case of the County Levy*, 5 Call 139, 5 Va. 139 (1804)

⁴⁵⁹ Edmund Pendleton served as a delegate of Virginia in the First Continental Congress alongside George Washington and Patrick Henry. He played a key role in revising Virginia’s legal code after independence. He also played leading roles in the independence and constitutional ratification conventions in Virginia.

Further, in 1837 Brooke did not stand alone among his colleagues on the district purpose principle or the power of the judiciary to strike down unconstitutional laws. All agreed that the judiciary had the power to void laws in violation of the constitutions. Both the majority and Brooke agreed on the rule that local municipalities could tax only for local purposes or local benefit. The disagreement was on whether it was the people of Richmond or the judiciary who should decide whether the purpose of the tax would actually serve a local interest. The court simply sided with the majority of people of Richmond by deferring to their judgment while Brooke sided with the minority of the disgruntled taxpayers. The crux of the case was who should decide whether the law served that local purpose for a local public good—not whether this underlying requirement for district-level taxation was valid or whether the judiciary *could* strike down the tax law if it violated the public purpose or district purpose maxim.

Next, in an attempt to further demonstrate the novelty of the requirements for taxation, Jacobs wrote that no court struck down a tax law on public purpose grounds for sixteen years after *Goddin* (1837-1853). He claimed courts did not apply eminent domain provisions to taxation. He claimed it wasn't until 1853 in *Sharpless v. Mayor of Philadelphia* that a court echoed the “novel” public purpose principle (while upholding the law), and it wasn't until 1861 that “a court for the first time applied the doctrine and invalidated a tax law.” All of this is either misleading or incorrect.

First, Jacobs provided only a single example of when a state court supposedly “explicitly rejected the contention that the public-use clause of the state constitution was a limitation on the

taxing power.”⁴⁶⁰ Although Jacobs was technically correct, the case, *Thomas v. LeLand*,⁴⁶¹ confirmed essentially the opposite. Some citizens in the town of Utica decided to voluntarily pay off a bonded debt in order to re-route a canal to the city, likely because it would have benefited them financially. The legislature later stepped in and allowed for the city to tax all of the citizens holding real estate for this purpose, in effect requiring them all to fulfill the original debt for the perceived public benefit of having a canal terminating near their property. The plaintiff argued the law sought to appropriate his property to the payment of a private debt due from others and was thus void. Indeed, a special collector entered the plaintiff’s premises and seized goods to satisfy the tax. The defendant, by contrast, claimed the law was no different from any other that taxed local people for local public benefits. The court sided with the defendant.

It is true the court rebuked the plaintiff for confounding the power of taxation with eminent domain. The plaintiff had argued that the law took his private property without just compensation, or any compensation. But the property taken was to satisfy a tax; it was not taken under the power of eminent domain. Justice Esek Cowen wrote that applying the monetary compensation requirement to taxation would undermine “many acknowledged powers of taxation, such as that which raises money to relieve the poor, or establish and keep on foot common schools, to build bridges, or work the highway,” because the taxpayer would fail to receive “individual pecuniary benefit.” Obviously taxpayers couldn’t receive checks in the mail equivalent to the amount of money they paid in taxes—there would be no money left to be allocated to the actual public projects. And yet the court recognized that “the improvement in

⁴⁶⁰ Jacobs, *Law Writers and the Courts*. p. 101

⁴⁶¹ *Thomas v. LeLand*, 24 Wend. 65 (1840)

question [the canal] was, in itself, a compensation to the plaintiff. ... Such, was the view taken by the Legislature; and they must be left to judge of the compensation. ... The [simple power of taxation] acts upon communities and may be exerted in favor of any object which the Legislature shall deem for the public benefit.” And so Jacobs was misleading the reader. Cooley’s principle was intact: the tax was for a public purpose, and the taxpayer received compensation in the form of access to the canal. Indeed, the very same court wrote just three years later in *Sharpe v. Spier*, “Our laws have made a plain distinction between taxes, which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city and village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement.”⁴⁶² The judge in that case failed to note that a “public purpose” implied compensation for the taxpayers as well, as Cooley had recognized, but regardless, it demonstrated that the court recognized the public purpose requirement for taxation. The point is that Jacobs’ claim that the New York court “explicitly rejected the contention that the public-use clause of the state constitution was a limitation on the taxing power” was misleading.

Even so, other courts included “money” within the “property” definition of the eminent domain clauses, or at least they recognized the same principles and requirements applied to both powers. There were a number of cases before *Goddin* and between *Goddin* and *Sharpless* in which state courts explicitly supported the district purpose principle and the public purpose principle as it applied to tax laws, and they also recognized the power of the judiciary to strike down such laws if they violated those principles, contrary to Jacobs’ claims. Judge Black himself

⁴⁶² *Sharpe v. Spier*, 4 Hill. 76 (1843)

based his opinion in *Sharpless* on *Cheaney v. Hooser*,⁴⁶³ an 1848 case in which the Kentucky supreme court was considering whether the legislature had the power to extend the boundaries of a town against the will of an adjacent landowner whose lands subsequently came under the taxing authority of that extended town. The court upheld the law, but nonetheless it wrote that the court could check legislative tax laws if violations of the principles of public or district purpose and uniformity were “palpable and flagrant,” clearly tying the eminent domain principle of compensation to laws for taxation:

The case must be one in which the operation of the power will be at first blush, pronounced to be the taking of private property without compensation, and in which it is apparent that the burthen is imposed without any view to the interest of the individual in the objects to be accomplished by it. If it be so, no matter under what form the power is professedly exercised, whether it be in the form of laying or authorizing a tax or in the regulation of local divisions or boundaries, which results in a subjection to local taxes, and whether the operation be to appropriate the property of one or more individuals, without their consent, to the use of the general or local public, or to the use of other private individuals or of a single individual, the case must be regarded as one coming within the prohibition contained in this clause or the constitution. ...

In other words, the four-part public purpose requirement applied to eminent domain and taxation, just as *Cooley* and others maintained. The taking of money or property required a public purpose. Judicial review on this basis was recognized by the court, so it *could* have controlled the

⁴⁶³ *Cheaney v. Hooser*, 48 Ky. 330 (1848). See *Cooley, Treatise on Taxation*. p. 70

legislature if the law had violated the principles of taxation. Technically Jacobs was correct that the court, at least in this case, refrained from striking down the law, but regardless, it explicitly recognized the four-part tax requirement as Cooley understood it. Routinely courts recognized the public purpose maxim housed in the tax clauses of state constitutions along the same principles that Cooley noted, and indeed, sometimes they struck down so-called “tax” laws.

For example, in the 1837 case *Sutton's Heirs v. Louisville*,⁴⁶⁴ Kentucky's highest court struck down a local assessment levied against property owners for violating these principles. The rule was:

The State constitution contains no express restriction on the taxing power. But nevertheless, this power cannot be, in all respects, arbitrary and unlimited.

The nature and object of taxation, and the spirit of justice and equality which pervades the constitution and is consecrated by the foregoing first section of the tenth article, necessarily prescribe an impassable boundary to this—which, more than any other legislative power, is constantly exercised and felt, and is always liable to be perverted and abused. And that limit is, that a common burden should be sustained by common contributions, regulated by some fixed general rule, and apportioned according to some uniform ratio, of equality.—Thus, if a capitation or personal tax be levied, it must be imposed on all the free citizens equally and alike; or if an advalorem or specific tax be laid on property, it must bear equally, according to value or kind, on all the property, or on each article, of the same kind, owned by every citizen; and no citizen or class of citizens, owning any

⁴⁶⁴ *Sutton's Heirs v. Louisville*, 35 Ky. 28 (1837)

property of the kind subjected to taxation, can be exempted constitutionally on any other ground than that of valuable and peculiar public services: for otherwise, one man or a "set of men" might be entitled to enjoy "exclusive privileges," or legal exemptions, which are substantially the same, without the only constitutional consideration of public services.

But the assessment in this case, may not be properly considered as of the nature of a public tax, because it was not a duty or contribution levied by a fixed rule, and because, also, it was not common, but was restricted to the owners of one particular lot of ground.

Few opinions could be more reflective of Cooley's understanding. Cited in this case was *Commonality of New York*,⁴⁶⁵ an 1814 case in which a similar assessment was under scrutiny. But the issue was whether churches should be exempted from a supposed "tax," as an 1801 law read, or whether they were liable to pay the assessment along with other property owners for the purpose of improving the city streets for the benefit of adjacent property owners. In this "leading case," as Cooley called it,⁴⁶⁶ the court rejected the church's claim, and in doing so defined "tax":

The word "taxes" means burdens, charges, or impositions, put or set upon persons or property for public uses, and this is the definition which Lord Coke gives to the word "talliage" (2 Inst., 532), and Lord Holt, in Carth., 438, gives the same definition, in substance, of the word "tax."

⁴⁶⁵ *In re Mayor, Aldermen & Commonality of New York*, 11 Johns. 77 (1814)

⁴⁶⁶ Cooley, *Treatise on Taxation*. p. 147

By definition, dating at least to Coke's *Institutes* and Chief Justice John Holt's opinion in *Brewster v. Kitchin*,⁴⁶⁷ taxes required a public use, the court claimed. This same quotation appeared in a similar context in *Striker v. Kelly*,⁴⁶⁸ a 1799 case also out of New York, and noted it rested on the maxim *qui sentit commodum sentire debet et onus*.⁴⁶⁹ Rooting the definition in English common law was remarkable because all of the states adopted the common law of England as it had been modified by the states. Any deviation from this definition, one could argue, would require an explicit legislative pronouncement per the common law reception statutes and constitutional clauses. Coke's chapter in his *Institutes* was an analysis of the "Statute Concerning Tallage" passed under Edward I in 1297.⁴⁷⁰ It required the "good will and assent" of Parliament to levy tallage or aid, which was re-confirmed in the Petition of Right in 1628. One also sees a semblance of this principle in Magna Carta.⁴⁷¹ These provisions primarily emphasized the need for the consent of Parliament to levy taxes, but the notion of consent was intimately tied with the various applications of the requirements for seizing property and money.

In his section on "the third absolute right" to property in his *Commentaries*,⁴⁷² for example, Blackstone included money with private property, and he considered the principles of

⁴⁶⁷ *Brewster v. Kitchin* [Kidgell], 1 Ld. Raym. 317; 1 Salk. 198; S. C. Carth. 438. (1697). Lord John Holt served as Lord Chief Justice of England from 1689 until his death in 1710.

⁴⁶⁸ *Striker v. Kelly*, 1 Lock. Rev. Cas. 442 (1799)

⁴⁶⁹ "He who enjoys the benefit ought also to bear the burden."

⁴⁷⁰ 25 Ed. I (1297)

⁴⁷¹ Magna Carta. 1215. "No 'scutage' or 'aid' may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable 'aid' may be levied. 'Aids' from the city of London are to be treated similarly."

⁴⁷² Blackstone, William, and William Draper Lewis. 1902. *Commentaries on the Laws of England : In Four Books*. Book I. Philadelphia: R. Welsh. Chapter 1, "Of the Rights of Persons." §138-140. The other two rights were personal security (life and limbs) and personal liberty.

consent, compensation, and public purpose, and their relationship with eminent domain and taxation while citing the same statutes from Coke and Holt. In short, consent was required for the government to acquire money or property. Should the legislature need to “compel the individual to acquiesce” to hand over property, then “a full indemnification and equivalent for the injury thereby sustained” was required. Providing that compensation was the same as serving a public purpose. “Besides,” as he put it, “the public good is in nothing more essentially interested than in the protection of every individual’s rights.”⁴⁷³ Even more directly, as Blackstone put it elsewhere in the chapter:

*All that a government takes out of the pocket of individuals in the shape of taxes, direct or indirect, for any other than its appropriate and legitimate purposes, is an invasion of their right to the enjoyment of the fruits of their own labour of mind or body. The power of taxation in the legislature is in fact a part of the eminent domain,—a power that must necessarily be reposed in the discretion of every government to furnish the very means for its own existence.*⁴⁷⁴

In that same section on the three absolute rights to life, liberty, and property, Blackstone wrote that in order for those rights to be protected, certain other “auxiliary subordinate rights of the subject ... serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights” of life, liberty, and property. The third of those auxiliary rights was that of “applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man’s life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein.” Parliament indeed was sovereign

⁴⁷³ Blackstone, Lewis. *Commentaries on the Laws of England*. Book I. §139

⁴⁷⁴ Blackstone, Lewis. *Commentaries on the Laws of England*. Book I. §127 n.

and could change the law, he noted, but as it stood, the English courts had the authority to provide for any redress for the deprivation of the right to security, liberty, or property. The role of the courts in fulfilling that purpose in the American regime is the subject of the next chapter.

Conclusion

The point is this: Taxation, like eminent domain, required compensation. It required a public purpose, equality and uniformity, and those taxpayers within the districts or states were to enjoy the resulting benefits of their contributions. Directing tax revenue to a primarily private purpose outside the interest of the taxpayers that only incidentally benefitted them failed to compensate and thus failed to fulfill the public purpose requirement. Such laws were unconstitutional because they failed to meet the requirements for the exercise of the taxing power, the takings clauses, and the due process clauses. Many state constitutions, state judicial precedent, and the common law emphasized this requirement in some form or another. The American courts did not create these principles. Rather, the American states inherited them from England and codified them in their constitutions.

Chapter 5: Constitutional Meaning and Constitutional Change

Some early scholars and jurists and a handful of later scholars wrote that Cooley was legally oriented in his jurisprudence and relied on the written law and maxims to reach his conclusions on legal and constitutional questions. Yet Cooley recognized the role of popular opinion in the development of constitutional law. Later critics who commented on Cooley's jurisprudence generally claimed he was either a judicial activist or pragmatist who allowed public opinion or politics to guide his decisions. Yet Cooley repeatedly and consistently urged judges to exercise restraint and to interpret only the text of constitutions, regardless of the social, economic, or political outcomes. How does one harmonize Cooley's claim that the American Constitution was an instrument of both permanence and change? To understand Cooley's views on constitutional meaning and constitutional change, one must recognize the bifurcated character of the American constitution in its most comprehensive sense. As Cooley put it:

*In a broad sense the Constitution of the United States embraces, not the written charter merely, but the whole body of laws properly denominated fundamental. By this we mean that every citizen of a State, and of the United States, when he speaks generally of the constitutional law of his country, does not limit his conception to the written instrument constituting the bond of union of all the States, but with the utmost propriety embraces also the constitutional securities which are thrown around him by his own State.*⁴⁷⁵

And elsewhere,

⁴⁷⁵ Cooley, "Changes in the Balance of Governmental Power." p. 6-7

*Perhaps an equally complete definition would be, that body of rules and maxims
in accordance with which the powers of sovereignty are habitually exercised.*⁴⁷⁶

The American “constitution” in its most comprehensive sense included the written constitutions, statutes, judicial precedents, and the habits and customs of the sovereign people that were in accordance with fundamental principles. Cooley recognized both a written and unwritten constitution, and it was this duality that established both the permanence and evolutionary mechanisms for constitutional interpretation and constitutional change. In short, the meanings of the text of the written federal and state constitutions were set at their moments of ratification, unchangeable except by the amendment processes contained therein. The meanings of unwritten constitutions, by contrast, were dictated by what they were: the product of prescription and practice of the people, often the common law as recognized by the courts, or “popular legislation” as developed and practiced by the people, and sometimes ultimately codified in statutes and written constitutions. Rules governing political parties, certain areas of commerce and industry, and others springing from new circumstances were sometimes established by the people directly involved in those activities before judges or legislatures recognized them by decision or statute. Sometimes statutory rights, such as voting rights, rose in prominence and became fixed in written, constitutional clauses. At root, all law in the comprehensive American constitution originated from the people—some was crystallized in the written constitutions, some was established by statute, and the rest was left to the people to develop through their own participation in social, political, and economic life. State legislatures and state courts took cognizance of such common law or “popular legislation,” as Cooley described it, but any such

⁴⁷⁶ Cooley, *Constitutional Limitations*. p. 2

codified or judicially sanctioned law had to remain consistent with the fixed meaning of the written constitutions. The federal courts, in the course of enforcing the 14th Amendment, were tasked with merely ensuring the states enforced their written constitutions equally.

Most scholars failed to recognize this duality and tended to describe Cooley as something along the lines of a judicial pragmatist or judicial activist. Alan Jones wrote that Cooley “always looked at law in light of public policy and made no attempt to hide this in his opinions on constitutional law.”⁴⁷⁷ Commenting on his *Salem* opinion,⁴⁷⁸ Clyde Jacobs wrote, “[Cooley] struck down legislation, which by any objective standard, could scarcely have been classified as clear usurpation.”⁴⁷⁹ Similarly, Charles Grove Haines wrote that Cooley’s “dogmatic statement” that courts should interfere in cases of taxation and the public purpose maxim was an effort to “put his own theories into practice.”⁴⁸⁰ Paul Carrington noted that as a judge, “Cooley always recognized that his judicial office was a political one and he did not recoil from giving political reasons for judicial decisions.”⁴⁸¹ Douglas Weeks wrote that Cooley had “a keen grasp of the new spirit of the Constitution and the necessity for its expansion to meet the needs of a rapidly changing economic and social life.”⁴⁸² Brian Tamahara claimed Cooley was erroneously cast as a formalist and instead supported the legislative role of judges. In at least some cases he “sounds much like a realist.”⁴⁸³ In 2013, Carl Herstein seconded Tamahara, affirming that Cooley “was

⁴⁷⁷ Jones, *The Constitutional Conservatism of Thomas M. Cooley*. p. 167

⁴⁷⁸ *People v. Salem*

⁴⁷⁹ Jacobs, *Law Writers and the Courts*. p. 108

⁴⁸⁰ Haines, *The Revival of Natural Law Concepts*. p. 128

⁴⁸¹ Carrington, “Law As ‘the Common Thoughts of Men.’” p. 532

⁴⁸² Weeks, “Some Political Ideas of Thomas McIntyre Cooley.” p. 30

⁴⁸³ Tamahara, *Beyond the Formalist-Realist Divide*. p. 19, 56

very much a realist.”⁴⁸⁴ As recently as 2014, Robert Olender wrote that Cooley believed “law and governance must evolve along with political, social, and economic circumstances,” and he “proposed that constitutional language should be reinterpreted in order to hold fast to the core of American constitutional governance – republican, limited-governance.”⁴⁸⁵ He claimed Cooley’s process for “constitutional change” was “common-law-like”⁴⁸⁶ and that Cooley believed “what was once constitutional could become unconstitutional as social, political, and economic forces dictated.”⁴⁸⁷ He similarly claimed Cooley modified the meanings of due process and taxation. For the most part, these scholars erroneously presented Cooley as something akin to a Wilsonian Progressive or otherwise a “creative” or activist jurist who embraced fluid or even popular interpretations of the written constitutions. Overall, they confounded his approach to the written constitution with his approach to the unwritten constitution in American governance, often erroneously claiming he supported the idea of letting such unwritten rules, practices, or preferences trump clear text.

The purpose of this chapter is twofold: first, to demonstrate Cooley’s understanding of how written laws and written constitutions were to be interpreted; second, to explore Cooley’s arguments on how and under what circumstances the written and unwritten American Constitution could adapt and change. Ultimately his arguments should help to demonstrate whether Cooley sought to propel the courts above the legislatures and so beyond their role as mere interpreters of laws and constitutions, as his critics claimed, or whether he sought a more

⁴⁸⁴ Herstein, “Postmodern Conservatism.” p. 855-864

⁴⁸⁵ Olender, “From Commonwealth to Constitutional Limitations.” p. 7

⁴⁸⁶ Olender, “From Commonwealth to Constitutional Limitations.” p. 351

⁴⁸⁷ Olender, “From Commonwealth to Constitutional Limitations.” p. 7

tempered judiciary and a balanced system of government in terms of separation of powers and the role of the people in constitutional change. To map this chapter broadly, the first section will examine Cooley's method of constitutional and statutory interpretation in an effort to determine whether he supported a loose, strict, or reasonable interpretation and construction of the constitutions. The former would indicate a tendency toward judicial activism, while the second or third would suggest judicial restraintism or something less than judicial supremacy. The second section will cover Cooley's understanding of both legitimate and illegitimate constitutional change. Sources for this information included Cooley's treatises and his judicial opinions, but particular attention was paid to his many legal articles, given they provided a richer insight into his thoughts on these topics.

Section I: Method of Statutory and Constitutional Interpretation

Cooley's method of constitutional and statutory interpretation reflected that of the traditional English approach as described by William Blackstone.⁴⁸⁸ One might expect this given that Cooley edited and published an edition of Blackstone's *Commentaries on the Laws of England* in 1871, which included footnoted commentary on how his work applied to the American system of law. These ancient rules of interpretation and construction were "based on sound reason, and seeking the real intent of the instrument," as Cooley wrote, and he rejected what he considered "arbitrary or fanciful" rules that were "more often resorted to as aids in ingenious attempts to make the constitution seem to say what it does not."⁴⁸⁹

⁴⁸⁸ Blackstone, Cooley. *Commentaries on the Laws of England*. §59-§62

⁴⁸⁹ Cooley, *Constitutional Limitations*. p. 39, 83

Cooley cited Franz Lieber and Bouvier's Law Dictionary to distinguish interpretation from construction of written constitutions, a distinction necessary given that the Constitution housed general clauses rather than an all-inclusive list of every possible application of delegated powers and explicit limitations. Interpretation, by this definition, was finding the "true meaning" or ideas that "the author intended to convey" in the document, while construction of text referred to "[T]he drawing of conclusions respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text." Construction included determining the meaning and fitting application of the text in relation to particular court cases.

"A cardinal rule in dealing with written instruments is that they shall receive an unvarying interpretation ... A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable."⁴⁹⁰ All departments in the course of their duties interpreted constitutions and statutes, and in some cases the final determination of constitutional meaning was left to the executive or legislative branches, not necessarily the judiciaries. It was up to the executive to determine whether or not events constituted "extraordinary occasions" to convene legislatures, for example.⁴⁹¹ The legislature could interpret laws by declaratory statutes, but such interpretations could not change judicial pronouncements given it was the province of the courts alone to "declare what the law is or has been."⁴⁹² Legislative power was prospective generally, as described in the chapter on retrospective legislation and vested rights. But the courts indeed were the final arbiters of meaning when acting within their judicial sphere: when

⁴⁹⁰ Cooley, *Constitutional Limitations*. p. 54

⁴⁹¹ Cooley, *Constitutional Limitations*, p. 41

⁴⁹² Blackstone, Cooley, *Commentaries on the Laws of England*. §59. p. 58, n. 13

jurisdiction was conferred by constitution or statute, when public or private rights were affected, or when questions of constitutional authority were open for consideration.

Cooley wrote that judges should presume that the lawmakers used precise language “*in their natural and ordinary meaning*,” leaving as little room as possible to implication. When interpreting clauses, judges should look first to the “natural signification of the words employed, in their order of grammatical arrangement”⁴⁹³ to seek “*the thought which it expresses*.” In such cases—the vast majority—no construction was needed in terms of drawing conclusions on subjects beyond the immediate text. Also, rather than examining words or clauses in isolation, which might create ambiguities, Cooley urged that “*the whole is to be examined with a view to arriving at the true intention of each part*,” and conversely, “*effect is to be given, if possible, to the whole instrument*, and to every section and clause.”⁴⁹⁴ Further, of those clauses declaring protections of certain rights clearly drawn from English charters of liberty, judges and others should understand those definitions by understanding their history, which “the people must be supposed to have had in view in adopting them.” Ultimately Cooley adhered to neither strict constructionism nor loose constructionism, but rather, “A reasonable construction is what such an instrument demands and should receive.”⁴⁹⁵

Finally, if for some reason there is still ambiguity in the meaning of a constitutional or statutory clause, judges could, with great caution, find extrinsic aid (but not meaning) in determining the lawmakers’ “true and only reason” for its inclusion by “a contemplation of *the*

⁴⁹³ Cooley, *Constitutional Limitations*, p. 57

⁴⁹⁴ Cooley, *Constitutional Limitations*, p. 58

⁴⁹⁵ Cooley, *Constitutional Limitations*. p. 61

*object to be accomplished or the mischief designed to be remedied or guarded against.”*⁴⁹⁶

Indeed, “the best aid to a proper understanding and interpretation of the law, where one's previous reading has fitted him for its consideration, is a thoughtful and patient examination of the purpose of its enactment,”⁴⁹⁷ as Blackstone had put it. For example, judges might examine an old law or constitutional clause that the new clause replaced to identify the intended change.

Evidence from constitutional convention debates should be considered noteworthy only if “the proceedings clearly point out the purpose of the provision.” Such statements were not authoritative, but rather than were merely potentially informative, and Cooley emphasized that considering the underlying purpose of laws and constitutions was only the first among the last resorts of the interpreter. “All external aids ... are of very uncertain value,”⁴⁹⁸ he wrote.

Nonetheless, he agreed with Madison that it was ultimately the state ratifiers of the proposed Constitution of 1787 that provided the truest meaning beyond the clear text.⁴⁹⁹

Mere abstract discussions on the clauses at conventions “do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause.”⁵⁰⁰ Individual statements from convention members did not indicate intent. Silence on some issues might have suggested the clause should be interpreted plainly. Indeed, one might presume some clauses were so obvious in their intent that the founders of constitutions didn't bother to discuss them at any length. If the judge could not determine the clear intent of the ratifiers of constitutions, then it

⁴⁹⁶ Cooley, *Constitutional Limitations*. p. 65

⁴⁹⁷ Blackstone, Cooley, *Commentaries on the Laws of England*. Preface, p. xi

⁴⁹⁸ Cooley, *Constitutional Limitations*. p. 82

⁴⁹⁹ Madison, James. Annals of Congress, 4th Cong. 1st Sess., 774-780; Farrand, Max, ed. 1911. *The Records of the Federal Convention of 1787*. 3 Vols. New Haven: Yale University Press. Vol. III, p. 374

⁵⁰⁰ Cooley, *Constitutional Limitations*. p. 66

was his duty to abstain from acting on his own speculations and theories. Any unexpressed “spirit” of the constitutions should carry no weight.⁵⁰¹ And neither, in particular, should political preferences:

*Something of politics the student [of law] will be inclined to learn; and it will not be surprising if the temptations of political life shall beset him early, and lead him away into excitements that are fatal to regular and dispassionate investigations; for, in politics, one reads not so much to form judgments as to gather arguments in support of pre-existing notions; and notoriety in that field is quite consistent with great ignorance on constitutional subjects.*⁵⁰²

Further, courts could not declare statutes unconstitutional on the sole ground of their violating “natural, social, or political rights of the citizens, unless it can be shown that such injustice is prohibited or such rights are guaranteed or protected by the constitution.”⁵⁰³ This statement summarized Cooley’s view on the role of theory in constitutional interpretation—it had to be written into the text to be justifiably applied to actual cases. This necessarily excluded the Declaration of Independence from having weight, except where it or analogous language had been codified into constitutional text—not an infrequent occurrence, particularly after the Civil War. As noted in the literature review, “Judge-made law,” as he criticized it in one passage, was “that made by judicial decisions which construe away the meaning of statutes, or find meanings in them the legislature never held.”⁵⁰⁴ As he quoted the Indiana Supreme Court, “This power of

⁵⁰¹ Cooley, *Constitutional Limitations*. pp. 72-73 and 171

⁵⁰² Blackstone, Cooley, *Commentaries on the Laws of England*. Preface, p. xii

⁵⁰³ Cooley, *Constitutional Limitations*. p. 164

⁵⁰⁴ Cooley, *Constitutional Limitations*. p. 57

construction in courts is a mighty one, and, unrestrained by settled rules, would ... render courts, in reality, the legislative power of the State.”⁵⁰⁵

Cooley demonstrated his adherence to excluding theories, speculations, and personal politics from decisionmaking in favor of a plain text interpretation in *People v. Blodgett*.⁵⁰⁶ The Michigan court, led by Cooley, was deciding whether a “soldier’s voting law” was in conflict with the Michigan Constitution of 1850. Abstractly, one might argue, soldiers, unless otherwise unqualified, should certainly have the natural, moral, or political right to vote. It was unlikely that the people in ratifying their constitution would have preferred to prohibit soldiers from voting. Further, the deployed soldiers were overwhelmingly Republican, and by 1865 Cooley had switched to the Republican Party. The law indeed allowed deployed soldiers to cast votes, but the text of the constitution, obviously standing higher than the statute, read that electors had to be present in their respective townships ten days preceding any election.⁵⁰⁷ The text of the constitution outweighed any theories of consent or natural rights to vote; it outweighed any assumptions one might have had about whether the people, in forming their constitution, wanted to ensure the right of soldiers to vote; and the plain text outweighed Cooley’s political preferences of gaining more votes for himself and his fellow Republicans. Cooley and the court struck down the law via classic Blackstonian methods of interpretation: “[I]ntent should be gathered from the words embraced in the instrument as adopted, if those words are free from

⁵⁰⁵ Cooley, *Constitutional Limitations*. p. 56

⁵⁰⁶ *People v. Blodgett*, 13 Mich. 127 (1865)

⁵⁰⁷ Constitution of Michigan 1850, Article VII, §1:

In all elections, every male citizen, every male inhabitant ... shall be an elector and entitled to vote; but no citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he ... has resided in this State three months, and in the township or ward in which he offers to vote, ten days next preceding such election.

doubt,” Cooley wrote. “The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern.” It was first and foremost a fair and reasonable interpretation of the text that directed Cooley’s decision. Should the people wish to override any judicial decisions, they were to simply codify such preferences in their constitution—as indeed, the people of Michigan did soon after the court handed down its opinion.⁵⁰⁸ This case and the resulting amendment demonstrated Cooley’s plain text approach, his respect for separation of powers, and his faith in the constitutional mechanisms for constitutional change.

Further, Cooley rejected claims that written law and constitutions in general were unclear or uncertain, as judicial activists have tended to claim. As mentioned earlier, he noted that although Marshall had suggested in *Fletcher v. Peck*,⁵⁰⁹ “How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated,”⁵¹⁰ Cooley answered, “[H]owever interesting it may be as an abstract question, it is made practically unimportant by the careful separation of duties between the several departments of the government which has been made by each of the State constitutions.”⁵¹¹ As he described at length elsewhere, “These charters of government, in prescribing the rights, duties and obligations of citizens, have done so with clearness and precision, and in like plain terms have fixed the bounds of governmental authority.”⁵¹² Joseph

⁵⁰⁸ Constitution of Michigan 1850, Article VII, §1, n. 1: “Amendment agreed to by the Legislature of 1869, approved by the people in 1870”:

Provided, *That in time of war, insurrection, or rebellion, no qualified elector in the actual military service of the United States, or of this State, in the army or navy thereof, shall be deprived of his vote by reason of his absence from the township, ward, or State in which he resides.*

⁵⁰⁹ *Fletcher v. Peck*, 10 U.S. 87 (1810)

⁵¹⁰ Cooley, *Constitutional Limitations*. p. 89

⁵¹¹ Cooley, *Constitutional Limitations*. p. 90

⁵¹² Cooley, “The Uncertainty of the Law.” p. 352

Story had written that the law was vast and intricate, a claim Cooley wrote was “a rhetorical exaggeration rather than a plain statement of fact.”⁵¹³ Whether in constitutional law, criminal law, family law, commercial law, or property law, Cooley maintained, the legal rules and laws governing such cases were usually clear.

For example, Cooley wrote, perhaps the most consequential and hotly debated constitutional question of the first half of the 19th century—whether or to what extent the states retained sovereignty upon ratification of the Constitution—was answered rather consistently by Marshall, Taney, and even post-war Supreme Court judges. Dual sovereignty, as it became known, was the rule, even after the passage of the 14th Amendment, as demonstrated in the *Slaughterhouse Cases*, *Ex parte Milligan*, and the Civil Rights Cases.⁵¹⁴ Largely contention was found in the administration or application of the law or in disagreements over the facts in particular cases. Uncertain facts, poor witnesses, obscure documents, and in particular, fallible or ignorant judges—these were the primary roots of uncertainty, not the text of the laws and constitutions. Cooley’s argument was that generally, particularly after the Civil War, written laws and constitutions were neutral, the text was generally clear, and if in the administration of clear, neutral laws the result was bias or discrimination or absurdity, the fault lay primarily with the administrators and judges. Even within the realm of common law, Cooley argued that the maxims generally were certain—it simply took time and effort to understand their purposes and

⁵¹³ Cooley, “The Uncertainty of the Law.” p. 348

⁵¹⁴ *Slaughterhouse Cases*, 83 U.S. 36 (1873); *Ex parte Milligan*, 71 U.S. 2 (1866); *Civil Rights Cases*, 109 U.S. 3 (1883)

meanings. Even new rules for new circumstances “have been grounded in old principles.”⁵¹⁵ As he put it:

*It scarcely seems necessary to remark that the student of American law ought to be well grounded in English history, and to have studied the development of constitutional principles in the struggles and revolutions of the English people. It is idle to come to an examination of American constitutions without some familiarity with that from which they have sprung, and impossible to understand the full force and meaning of the maxims of personal liberty, which are so important a part of our law, without first learning how and why it was that they became incorporated in the legal system.*⁵¹⁶

It is also important to note here that Cooley refused to “eulogize” the common law, which will be examined in more detail in the next section on constitutional change:

*To eulogize the common law is no part of our present purpose. Many of its features were exceedingly harsh and repulsive, and gave unmistakable proofs that they had their origin in times of profound ignorance, superstition, and barbarism. ... But on the whole, the system was the best foundation on which to erect an enduring structure of civil liberty which the world has ever known.*⁵¹⁷

So the point is Cooley rejected the extremes of both abstract theories and rigidly scientific or technical approaches for arriving at the meanings of written laws and constitutions. Overall he took a tempered, conservative approach. He found meaning through the text, within which

⁵¹⁵ Cooley, “The Uncertainty of the Law.” p. 366

⁵¹⁶ Blackstone, Cooley, *Commentaries on the Laws of England*. Preface, vii

⁵¹⁷ Cooley, *Constitutional Limitations*. p. 21

learned judges familiar with the history and principles of English and American law better understood the maxims and purposes behind those words. The courts were to apply remedies according to experience and justice, which were not abstract but rather embodied in law and well-reasoned precedent.⁵¹⁸ Judges ignorant of common law maxims, definitions, and purposes of protecting life, liberty, and property, who erroneously established precedent based on either abstract understandings or narrow, technical, or superficial definitions, did not trump the meaning of the words as originally understood. That meaning often was the product of centuries of development and nuanced applications from many minds over many generations. The American founders crystallized those meanings in the written documents, leaving other avenues open for the government and people to adapt to new circumstances. One finds the meaning of the text by repeatedly returning to intent. As George Mason noted, and as subsequent statesmen, jurists, and constitutions emphasized, “[N]o free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.”⁵¹⁹

Judicial precedent demanded respect, but it did not trump original meaning. Quoting James Kent, Cooley wrote that precedent was binding within particular territorial jurisdictions unless “the law was misunderstood or misapplied in that particular case.”⁵²⁰ Ultimately, “Acquiescence for no length of time can legalize a clear usurpation of power, where the people

⁵¹⁸ Cooley, “The Administration of Justice in the United States of America in Civil Cases.” p. 348

⁵¹⁹ Virginia Constitution. 1851. Bill of Rights. Art. 15; *See also for analogous clauses:* Illinois Constitution. 1848. Art. XIII, §16. Massachusetts Constitution. 1780. Part the First. Art. XVIII; Nebraska Constitution. 1866. Art. I, §19; New Hampshire Constitution. 1784. Part I, Art. 38; North Carolina Constitution. 1868. Art. I, §29; Vermont Constitution. 1786. Ch. I, Art. XX; Wisconsin Constitution. 1848. Art. I, §22.

⁵²⁰ Cooley, *Constitutional Limitations*. p. 50

have plainly expressed their will in the constitution.”⁵²¹ Ultimately the object was to use fixed, established common law rules to interpret the plain meaning of largely clear and unambiguous constitutional text, which was often the product of centuries of development, to minimize the discretion of judges and executives to arrive at the original intent of the lawgiver.

Section II: Constitutional Change and Popular Influence

A recent trend in scholarship has been to present Cooley as a legal realist or judicial pragmatist who supported what amounted to modern concepts of living constitutionalism. An examination of Cooley’s views on legitimate methods of amending American constitutions demonstrates this position to be largely erroneous. Cooley argued emphatically that the written federal and state constitutions could be changed only through methods found in the documents.⁵²² It was only the unwritten portions of the constitution that could change according to social, political, or economic preferences. Cooley’s “realism” was restricted to a simple observation: the federal government was exercising powers never contemplated by the founders; expansive interpretations of text, the “march of events,” and the desire for power had both expanded the reach of the federal government and had shifted power away from the states in ways beyond the intent of the founders and ratifiers of the written federal Constitution. Cooley recognized these

⁵²¹ Cooley, *Constitutional Limitations*. p. 71

⁵²² United States Constitution. Art. V: “The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.”

changes, but he did not accept them as legitimate—which is why he repeatedly emphasized the need to wrangle straying interpretations back toward original intent.

Unwritten portions of the comprehensive American Constitution, Cooley maintained, indeed could change informally, but it was the people and their representatives—not the courts—who could do so. Cooley emphatically rejected the role of judges as legislators, but he recognized that courts should consider public opinion in the common law tradition. The role of the courts was primarily to construe the written law and apply it as intended by the lawmakers—the ratifiers, in the case of written constitutions; representatives, in the case of statutes; and the people, in the case of the unwritten common law. Unwritten law emerged from the people themselves, and so it was fitting for their practices and customs to fall under judicial consideration, when the court was required to answer legal questions and when that information was presented to the court through legitimate channels. Any alteration of written constitutional meaning through erroneous construction, usurpation, trespass and popular acquiescence or indifference to fundamental principles, or other method outside of the explicit requirements, was subject to a judicial correction and reversion to the plain meaning and original intent of the documents. Wherever the Constitution had strayed from its moorings, Cooley urged a return to foundational principles. As he put it, “All Americans, it may be assumed, desire to render complete the success of their experiment in popular Government. To do this it is necessary to hold as closely as possible to the principles upon which it was founded and which have attended its development.”⁵²³

Legitimate Change to the Written Constitution

⁵²³ Cooley, “The Influence of Habits of Thought Upon Our Institutions.” p. 22

Cooley was particularly clear on how the written American constitutions could legitimately change. Some excerpts should demonstrate his position:

*The constitution, when expressed in writing and put in force by a people whose theory of government is that the sovereign power is in their hands, must stand always as written except as changes are made according to the method provided for by it. There is no such thing as imperceptible change in such a constitution. Doubtless all of you have heard the idea expressed that our constitution is something different today from what it was one hundred years ago, independent of the amendments made. That is a very grave error. Emphatically, such a statement is not true.*⁵²⁴

Elsewhere,

*Recurring again to the theory of the government that was to be reared on the written constitution, we have seen that it was to be unchangeable, except as changes were brought in by express amendment. The stipulations agreed upon and introduced in the written instrument are to mean the same thing to day, to-morrow, and forever; they are formulated in order to fasten the ship of State to certain definite moorings; that is their purpose.*⁵²⁵

And again,

We should never forget this:—The constitution stands as originally framed, and speaks its original language until it is changed in the manner provided therein; it

⁵²⁴ Cooley, “The Power to Amend the Federal Constitution.” p. 110

⁵²⁵ Cooley, “Changes in the Balance.” p. 13

*does not insensibly grow; it does not change with the ideas of the people unless they express those ideas in a constitutional and authoritative way.*⁵²⁶

Not only did Cooley emphasize a rigorous adherence to original meaning and the amending process, but he even added that there were limitations on amendments to the federal Constitution beyond the express prohibitions on denying the states equal representation in the Senate and extinguishing the slave trade until 1808. This was because of the underlying purposes of the constitutional system and the amendment process. Among the purposes of the Constitution was the protection of individual liberties, the preservation and improvement of the union, and so on, as indicated in the preamble. Similar purposes were suggested implicitly throughout the text, and the state constitutions similarly contained explicit purposes for their creation, such as providing for the common good, protecting individual rights, and providing for the general happiness of the people of the states. The purpose of the amendment process was to preserve, perpetuate, and improve on the purposes and principles found in the Constitution, not destroy them. Prohibited amendments would be those which sought to destroy the union or rights or otherwise undermine such codified purposes—such would be revolutionary in character rather than amendatory.

For example, Cooley wrote, three-fourths of the states could not legitimately pass an amendment that expelled the remaining one-fourth of the states out of the union, despite no express prohibition in Article V. Similarly, three-fourths could not pass an amendment that imposed a tax exclusively on the remaining one-fourth. No amendment could establish a ruling class or a king.⁵²⁷ Attention to the explicit, text-based, or underlying purposes of laws and

⁵²⁶ Cooley, “The Power to Amend the Federal Constitution.” p. 110

⁵²⁷ Cooley, “The Power to Amend the Federal Constitution.” p. 117-118

constitutions was a recurring theme in Cooley's work, and one should note that it was a legitimate tool for interpretation according to common law rules.⁵²⁸ The Americans had lived under arbitrary governance, their inherited and natural rights had been violated under British rule, and an insufficiently cohesive confederation had failed to provide a sufficient degree of the liberty, order, and justice in a union of states. Therefore they created the Constitution. It was designed to protect existing liberties, allow for their refinement, and to secure those rights through a powerful and cohesive union, not to provide a means for their annihilation.

Cooley reasoned that amendments directly and overtly contrary to these purposes as indicated in the texts of the constitutions must be prohibited because they were contrary to the clear intent of the ratifiers. Some scholars claimed Cooley supported a re-interpretation of written words in the Constitution to allow for change—that there was, in a sense, an implied power to amend the written constitutions informally. It appears Cooley's argument was actually beyond the opposite. He wrote that not only must written words remain static until amended formally, but there were even implied limitations on the substance of such formally ratified amendments.

Informal and Popular Influence on the Unwritten Constitution

Cooley indeed applauded extralegal influence on the constitution in its most comprehensive sense, but only within legitimate boundaries and through proper channels. "[T]he unwritten constitution is in its nature the opposite of this [written constitution]: it is at all times changeable,

⁵²⁸ Blackstone, Cooley, *Commentaries on the Laws of England*. §61: "But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it." Note that this tool for interpretation was not the same as the illegitimate, "unexpressed spirit" that some judges used as a reason to strike down legislation, as Cooley had criticized and as noted above. This was a reference to the purpose of the law as indicated in the text.

and is expected to be and must be.”⁵²⁹ Political parties, private organizations, business associations, the people generally—all of these affected the changing rules, principles, habits, and customs by which the people of society governed itself. Courts and legislatures recognized this emerging law as it developed, sometimes in judicial decisions and sometimes in legislation, but never in contradiction with the supreme, written law, and always in accordance with established, legal procedure. Cooley readily admitted that outside of common law rules and maxims, sometimes the “unwritten” constitution was “vague and indeterminate,”⁵³⁰ but this was largely irrelevant to the sanctity of the permanent rules and principles embodied and crystallized clearly within the written documents.

Unwritten common law rules and maxims not otherwise housed and fixed in the clauses of the federal, exclusively written Constitution, lay strictly within the state sphere. Congress had no power to enforce any common law—its powers were enumerated powers only, and common law affected those powers no farther than helping to define explicit terms. Cooley recognized a legitimate role of public opinion in the development of constitutional law within the sphere of the unwritten American constitution. As he put it when differentiating written and unwritten constitutions, “Public sentiment and action effect such changes [in the maxims of common law], and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving construction to a written constitution not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty.”⁵³¹ Some elements of the common law had been fixed in written statutes and

⁵²⁹ Cooley, “Changes in the Balance.” p. 10

⁵³⁰ Cooley, “The Comparative Merits of Written and Prescriptive Constitutions.” p. 349

⁵³¹ Cooley, *Constitutional Limitations*. p. 54

constitutions. Others were free from such static control, and other rules and circumstances emerged naturally under the common law of the people.

For example, when reflecting on “popular legislation” in an article on labor and capital, Cooley wrote that new circumstances and conditions during the industrial revolution were giving rise to new realms of common law outside of legal, written law and judicial precedent. In addition to the lack of being recognized by constitutional clauses or statutory law, “Some kinds of business are so entirely new in some of their features that precedents are nearly worthless,” he wrote.⁵³² Railroads in particular presented new questions for jurists. How were they to approach interpreting or understanding or recognizing any unwritten “law” governing such enterprises, should legal disputes concerning security, liberty, or property arise?

*Railroad managers, and conductors, and brakemen, and switchmen; the shippers and receivers of goods; those who travel, and those who go to the trains to receive or dismiss them; the very tramps that jump on and off the moving trains, with occasional loss of foot or arm; in fact, everybody who is concerned in providing or appropriating the comforts and conveniences the railroad affords, has been thinking upon and in some measure doing something to solve the judicial problem; and a judge finds that a store of wisdom has been accumulated by various classes and various interests wherewith he may enlighten his mind.*⁵³³

This was the role of common law within a system that was partially written and partially unwritten. It was not judge-made law, which Cooley explicitly rejected, but rather it was people-

⁵³² Cooley, “Labor and Capital Before the Law.” p. 504-505

⁵³³ Cooley, “Labor and Capital Before the Law.” p. 506

made law merely recognized by judges and legislatures. At the same time, one should note, Cooley rejected the idea that judges or legislators could delegate their lawmaking or law-deciding powers to other individuals—it was they, not the people, who enjoyed the constitutional authority to make final decisions. In 1884 he demonstrated the nuanced relationship between this common law, the creation of legislation, and the non-delegation doctrine in the *State Tax-Law Cases*.⁵³⁴ In this case, the Michigan state government had identified major defects in its revenue laws and related attempts to collect unpaid taxes on land. These tracts of land were being variously seized and auctioned or held by the state for unpaid taxes. But problems arose under existing law when these state-seized, unsold lands continued to accumulate taxes beyond their worth, which the state then had to pay to local municipalities. Further, auctioned tax titles to seized parcels failed legal tests, sometimes becoming worthless; and speculators manipulated the bidding system to acquire and sell land at enormous profits or otherwise extort the original owners, among other issues.

To fix these complex tax problems, the governor and legislature appointed an “expert” five-man commission to help revamp the tax code: three lawyers, a businessman, and a prominent farmer. Not only did the commissioners write up a bill for the legislature’s consideration, but they physically took seats on the house and senate floors during deliberations. They were heard in open sessions and were consulted as a committee regarding proposed amendments, much like legislators. The bill passed. The owner of a parcel of land that was subsequently seized and sold sued, arguing that the act was unconstitutional because, among other reasons, the members of the tax commission acted as members of the legislature to the

⁵³⁴ *State Tax-Law Cases* 54 Mich. 350 (1884)

point of being recognized as a standing committee, giving them “an influence in shaping legislation not contemplated by the Constitution” in violation of the non-delegation doctrine.

Cooley agreed that the legislature could not delegate its power, but in this case, the “legislature did not part with any portion.” Legislatures needed only to maintain the final say in the passage of laws or action to remain within this constitutional requirement. Still, the owners insisted that the participation of the commission in the proceedings was legislative in nature. Cooley wrote, however, “Not only is such a course apparently proper because of its wisdom, but it is not uncommon.” Allowing for expert testimony in hearings or otherwise relying on expert insights saves the government from “some crude and mischievous legislation.” Pushing the principle to its extreme would require legislators to reject all “the knowledge, the experience, the observation, and the good sense of others.” Legislatures get the information “where they can, and when and of whom they please. The more they endeavor to learn that which others can inform them of, the better legislators are they likely to be.”

Further, in that opinion, it is important to note that Cooley also wrote that the principle applied to judicial proceedings, but only according to established rules and procedures. Judges and jurors were restricted to making decisions “upon what is submitted” to the court. It was outside the purview of judges and jurors to consider popular opinion, or any other external considerations, unless such information appeared before the court through established channels, such as legal briefs. Neither could they investigate facts independently, and indeed, jurors who even conversed with third parties were subject to punishment. This suggested that courts were not only prohibited from making proscriptive, legislative-type decisions in their opinions, but

even if they were, they would be at a severe disadvantage compared with designated law-making bodies that were far more open to influence and information.

Even so, Cooley emphasized other limits to popular influence on legislation. Legislators should indeed consider popular sentiment when making decisions, but it was important for statesmen to recognize the difference between popular passion and a refined popular opinion.⁵³⁵

Throngs of thousands descending on the capitals did not constitute “the people of the United States,” in Cooley’s opinion, and in that sense they had no legal, constitutional, or even a moral force. Even 10,000 people from each state would constitute only a fraction of the people and could not speak on behalf of the whole. “They are self-elected representatives,” he wrote, “and the right to speak for all rests upon nothing but a baseless claim, and impudent assumption. ... Their claim must therefore be treated as absurd, because it is wholly unauthenticated and unproved.”⁵³⁶ From a constitutional perspective, representatives should ignore such crowds because they undermined the representative principle. The people of the districts elected those representatives, not the crowd, and their presence and demands were more of “a menace to stability of government”⁵³⁷ than a legitimate method for changing law. The proper constitutional mode for popular influence was through constitutional channels: namely, the rights to speech, press, and petition. Cooley did not claim such demonstrations were illegal, but he rejected such demonstrations as constitutionally protected speech or assembly, given they were so detrimental to the representative principle. As he put it in terms of original intent, “[N]o sensible people in framing their constitution of government would invite civil dissensions and attempts at bloody

⁵³⁵ Cooley, “The Fundamentals of American Liberty.” p. 151

⁵³⁶ Cooley, “The Fundamentals of American Liberty.” p. 152

⁵³⁷ Cooley, “The Fundamentals of American Liberty.” p. 155

revolutions by giving to such gatherings a constitutional sanction that even in great and dangerous crises would place them above the reach of legislative repression.”⁵³⁸

Rather than emphasizing a supposed “right” of the people to demand their legislators change the law, Cooley emphasized both the representative principle and the duty of the people, as the sovereigns, to uphold the laws and constitutions by actively helping to enforce them, wherever they had reserved such authority in their constitutions.⁵³⁹ Change was intended to be deliberate, informed, orderly, refined, and aided by constitutional mechanisms—not partial, uninformed, and driven by passionate mobs. Ultimately legislators were entitled to act according to their own judgment rather than submit to the will of the people.⁵⁴⁰ Constitutional change was in this sense entirely bound by rules—a reaffirmation of Cooley’s overall theme that there was no room for arbitrary governance, or even any allowance for unhinged constitutional change within the unwritten constitution.

Illegitimate Change to the Written, Federal Constitution

Cooley lamented how by erroneous constitutional constructions by government authorities, by the “gradual march of events,” by outright usurpations of power, and by popular acceptance, there had indeed been a change in the meaning of the written federal Constitution.⁵⁴¹ On a practical level, he conceded, the meaning of the Constitution may well be whatever the people and government recognize it to be.⁵⁴² Since at least the Louisiana Purchase and continuing with

⁵³⁸ Cooley, “The Fundamentals of American Liberty.” p. 155

⁵³⁹ Cooley, “The Abnegation of Self-Government.” p. 211

⁵⁴⁰ Cooley, “The Fundamentals of American Liberty.” p. 152

⁵⁴¹ Cooley, “Changes in the Balance.” p. 24

⁵⁴² Cooley, “Influence of Habits.” p. 6

the advent of railroads, telegraphs, party fervor, the spoils system, certain Supreme Court opinions, the Civil War, and popular acquiescence, reverence for the Constitution had dwindled, the division of authority between the federal and state governments had shifted toward the federal government, and some federal powers had expanded beyond the original intent of the founders. At root was the legal reality that the federal government had the final say on how great its power extended, including whether any state exercises of power conflicted with federal exertions.⁵⁴³ The people themselves were often either ignorant of such violations or complicit in usurpations. The states were virtually powerless to stop such expansions and encroachments, and indeed certain powers could be interpreted broadly or narrowly.

Throughout his many articles Cooley repeatedly pointed to perversions of the original meaning and intent of the Constitution. Whereas before the Civil War perhaps half of the country had rejected the claim that Congress could establish a national bank, by the late 19th century, “To call up the old Constitutional controversy and impart to it the old vigor would be as impossible now as to summon living trees from the ashes of the fireside.”⁵⁴⁴ Public support of assertions of federal power sometimes had helped to solve “doubts” about such limits—the Louisiana Purchase was an obvious example; support for reliable currency helped Congress tax state banks out of existence; business and farming interests had urged federal oversight of the rail system for protection and price control; and tens of thousands of Americans had become dependent on the federal government for their financial sustenance, directly or indirectly, by way of the spoils system, and so on. Cooley argued that some of these expansions were legitimate while others fell

⁵⁴³ Cooley, “Changes in the Balance.” p. 14

⁵⁴⁴ Cooley. “Influence of Habits.” p. 7

outside of the founders' expected range of any shifting balance of power that was inherent in a system of dual sovereignty and general, enumerated powers. He considered the destruction of state banks by way of taxation to be "startling" and added that the people did not intend to confer such power to the federal government,⁵⁴⁵ while he argued the commerce clause supported the expansion of federal power into the realm of electricity and railroad regulation, even when it conflicted with state regulations. Such an application of the clause to new circumstances was an "edifice that may rightfully be erected within the bounds of single federal powers."⁵⁴⁶

So according to Cooley, determining whether such expansions of power went so far as to violate the constitutional authority granted to the federal government depended on whether the text, original intent, and the original purposes of the Constitution supported such change. It's not that Cooley was a "realist" in the sense that he accepted perversions of the Constitution. Rather, he differentiated between legitimate and illegitimate expansions of power. Further, he in many ways echoed the expectations and observations of Madison and Hamilton, each of whom predicted power would shift to the federal or state governments, and powers would be applied to new circumstances while the meaning of constitutional authority, as it was originally understood, would remain fixed. As Cooley noted, Madison had written that liberty was in danger if there were too little or too much power in government and that such government power would either increase or recede based on popular vigor for self-protection.⁵⁴⁷ Hamilton, although erroneous in these particular predictions, had suggested that the power of the states would increase because representatives in the federal government would side with their states; he also wrote "[the

⁵⁴⁵ Cooley, "Influence of Habits." p. 10

⁵⁴⁶ Cooley, "The Comparative Merits of Written and Prescriptive Constitutions." p. 355-356

⁵⁴⁷ Cooley, "Changes in the Balance." p. 13

people's] confidence in, and their obedience to, a government, will commonly be proportioned to the goodness or badness of its administration;”⁵⁴⁸ and he recognized that levying war could be an opportunity for strengthening federal power, among other ways by which power could shift or expand. And yet Madison in particular would have agreed with Cooley that the principle of American constitutionalism and the plain text of the Constitution limited the federal authority and restricted the amending process to that contained within Article V.

The difference between illegitimate and legitimate expansion of the written federal Constitution, outside of the amendment process, according to Cooley, was this: Applying delegated powers to new circumstances in ways consistent with the text, the general purposes, and the original intent as understood by the state ratifiers was a different sort of expansion than that of adding new powers based on contradictory principles applied to purposes outside of the text and original intent.

Further, beyond the handful of individual rights, privileges, or immunities protected under the federal Constitution, as recognized in cases such as *Slaughterhouse*, any changes to constitutionally protected rights were left to the state legislatures or the people themselves. As discussed in earlier chapters, the 14th Amendment was merely a mechanism by which the federal government was empowered to ensure the states recognized and upheld the state-recognized rights of individuals and citizens equally. There was nothing in the plain text of the amendment that shifted to the federal government the authority to determine the nature of those rights. The federal courts were to enforce the particular state constitutions within the particular state spheres, not create new rights from outside the common law and apply them universally. As Cooley

⁵⁴⁸ Hamilton, Alexander. *The Federalist*. No. 27

maintained, such determinations of rights emerged from the people, who through state-level, constitutionally sanctioned mechanisms such as free speech, free press, assembly, and petition, informed and influenced their legislators to recognize such new rights. Ultimately the people could change their constitutions to recognize them. By the 14th Amendment the federal courts were to merely follow the state constitutions. Generally, the state courts, in cases without precedent or statutory guidance, could indeed recognize the rules, customs, and practices of the people in the English common law tradition, as long as such information was submitted to the courts in particular cases and through established channels.

Conclusion

The key to understanding Cooley's position on constitutional interpretation and constitutional change is recognizing both his emphasis on the requirement for rules and procedures, but also the categories, hierarchies, and purposes of the comprehensive constitution, which included all of the written and unwritten clauses, statutes, rules, practices, and customs of the people. Some of those fell within the federal sphere, and some fell within the state spheres. The written, federal Constitution was to receive a reasonable interpretation of the plain meaning of the text rather than a strict or loose interpretation based on either technical or abstract readings. There was no federal, unwritten constitution. The written state constitutions were to receive the same interpretive treatment as the written federal Constitution. The unwritten areas of the state-level constitution were a product of public practice and acceptance. Legislatures should recognize a refined popular sentiment or "popular legislation" when creating statutes, but ultimately it was their duty as representatives to rely upon their own judgment when making decisions. In cases without precedent or statutory or constitutional guidance, state courts were to recognize such

popular legislation in the course of answering legal questions rather than create their own law in a legislative capacity. The written constitutions trumped any statutory law, and the statutory law trumped any common law. Ultimately the purpose of this system of law and governance was to provide for the common good and to protect the commonly held rights to life, liberty, and property as understood by the people as they had crystallized such protections in their state constitutions. As Cooley consistently maintained, there was no room anywhere in the branches or spheres of government for arbitrary governance.

This bifurcated system of written and unwritten constitutions harnessed the virtues and suppressed the vices of each. A supreme, written constitution that crystallized the rights, rules, and principles that had emerged from the people themselves over many generations conformed to their natural preferences and helped to dispel the infighting and uncertainty of unwritten constitutions, as seen in English history. A conservative, slow, and deliberate amendment process helped to maintain that certainty. And yet leaving a sphere of easily changeable, malleable self-governance in the form of an unwritten constitution provided a means by which the people could adapt and change with fluidity. Because the written constitutions were the product of many generations of thought and experience, it remained fixed in meaning, supreme and above any unwritten constitutions, theories, or passions. As Cooley concluded, “Only such a constitution can embody the essential excellences, and can so far harmonize the conservative and the progressive principles that the one will become the complement of the other, in steadily, but cautiously and safely, moulding the instrument to greater perfection.”⁵⁴⁹

⁵⁴⁹ Cooley, “The Comparative Merits of Written and Prescriptive Constitutions.” p. 357

Chapter 6: Modern Applications of Coolean Thought

In the preceding chapters on retroactive civil legislation, due process, taxation, and constitutional interpretation and change, a number of legal and constitutional principles emerged that could be applied to modern issues. Most of these principles remain particularly important because they were not simply products of their time. They were general, time-tested, ancient rules that had long helped to guide the affairs of Anglo-American societies toward the consistent goal of providing for the common good, including the protection of commonly held individual rights. They were rooted in English common law, state common law, federal constitutional principles dating to the founding, as well as legal and political history dating back hundreds or even thousands of years. It would be foolish to dismiss Cooley because on the whole, his work was not his own. Rather, Cooley's thought was primarily the sum product of many minds over many generations, much like the written and unwritten American constitutions themselves. The political and legal experiences of the English and Americans presented consistent rules that *should* be followed to protect and improve upon a refined system of American liberty, order, and justice. If jurists, politicians, administrators, scholars, or the people themselves prefer to continue on this rooted path, then it would behoove them to read and reflect upon Cooley's many insights.

One can approach almost any modern legal and political issue from a Coolean perspective because his work considered the American constitution in its most comprehensive sense—the rules, maxims, habits, customs, and written law of the American people—and because he recognized there was no room for arbitrary governance. There was almost always a rule or principle that empowered, limited, or guided legal and political processes or qualified any results. Today, for example, many Americans are concerned with the outbreak of COVID-19 and

the rules state governments employed in their exercise of police powers. Cooley wrote that police powers were legislative, not executive, and he presented a clear argument that the non-delegation doctrine required representatives to make final decisions on rules that affected future events, among other positions.⁵⁵⁰ It is likely he would have denounced the broad, modern delegations of such power to state governors that have resulted in virtually unchecked, arbitrary rulemaking power.⁵⁵¹ As another example, some Americans are concerned that there is discrimination against African-Americans in policing or in the judicial system, and others see discrimination against whites in college admissions.⁵⁵² Cooley was a champion of suppressing legislation that favored or discriminated against particular classes.⁵⁵³ In searching for solutions to cases of discrimination against blacks, one could point out that Cooley emphasized the laws themselves were usually clear and neutral, and so the avenue for reform was often in the administration of the law rather than in the overturning of the law itself.⁵⁵⁴ If there appears to be no discrimination in the letter of the law, then perhaps reform within policing would be more

⁵⁵⁰ *State Tax-Law Cases* 54 Mich. 350 (1884). See also Cooley, *Constitutional Limitations*. p. 116-125

⁵⁵¹ See for example: Virginia Code §44-146.17.1 Powers and duties of Governor.

The Governor shall have, in addition to his powers hereinafter or elsewhere prescribed by law [in cases of state and local emergencies], the following powers and duties: (1) To proclaim and publish such rules and regulations and to issue such orders as may, in his judgment, be necessary to accomplish the purposes of this chapter including, but not limited to such measures as are in his judgment required to control, restrict, allocate or regulate the use, sale, production and distribution of food, fuel, clothing and other commodities, materials, goods, services and resources under any state or federal emergency services programs.

⁵⁵² *Fisher v. University of Texas*, 579 U.S. ____ (2016). See Thomas, dissent.

⁵⁵³ Cooley, *Constitutional Limitations*. p. 389

⁵⁵⁴ Cooley, “The Uncertainty of the Law.” See also Story, Cooley, *Commentaries on the Constitution of the United States*. §1936. Cooley’s position was that despite neutral language in the state constitutions, the administrations of those constitutions and the laws under them were sometimes discriminatory before and after the Civil War. The 14th Amendment was intended to oversee the enforcement of existing constitutions and put them on their “true foundation” of equal justice.

fitting and effective compared to disrupting a neutral system. In cases in which the law indeed discriminated, Cooley would have urged a correction in conformity with the neutral, colorblind language of the constitutions. As another example, many Americans are today concerned about how crowds of rioters are not only destroying statues, monuments, private businesses, and government buildings, but government officials are actually changing policies under the demands of those crowds. And yet at the same time, most people probably consider such large gatherings of people to be in conformity with constitutional rights or otherwise a legitimate form of popular influence on government. By contrast, Cooley wrote that such crowds lacked constitutional legitimacy because they undermined the representative principle.⁵⁵⁵

Representatives should ignore them, Cooley reasoned, not pander to their demands under a threat of violence. Constituents, not crowds, were to influence representatives. Change in laws and constitutions was intended to be deliberate, informed, orderly, refined, and aided by legal or constitutional mechanisms such as the right to petition, speak, print, and peaceably assemble. Those who today oppose such overriding influence could use Cooley's work to bolster their political or legal arguments. One could go on: whether certain "rights" under modern due process litigation deserve constitutional recognition; how far Congress can go in delegating power to bureaucracies; whether considerations of popular preferences should inform judicial interpretation of constitutional text; and so on. Again, Cooley remains relevant because he examined the American constitution comprehensively. And because there was no room for arbitrary governance, there was almost always a principle to apply to new circumstances.

⁵⁵⁵ Cooley, "The Fundamentals of American Liberty."

To further demonstrate the applicability of his work to modern issues, this chapter will first present a broad analysis of how his understanding of vested rights, retroactive civil legislation, and due process are still recognized in many state judiciaries and can play roles in future state and federal litigation. It will also point out how jurists could use his understanding of separation of powers to bolster their arguments to protect individual rights from legislative overreach. The second section is a case study intended to provide a deeper analysis of how one of his principles could apply to a major legal issue: whether the “penalty” or “tax” issued in the Affordable Care Act of 2012 would have met Cooley’s public purpose principle as it applied to the power to tax. Both the plurality and joint dissenting opinions in *NFIB v. Sebelius*⁵⁵⁶ could have used his work as a framework to consider the legitimacy of the individual monetary exaction for failing to buy health insurance. Finally, section three will be another case study on Cooley’s thought as applied to the more recent Supreme Court case *Seila Law v. CFPB*⁵⁵⁷, in which the Court considered the extent of the president’s removal power as well as the legitimacy of independent agencies, among other issues. The majority opinion in that case could have bolstered its opinion and fended off attacks from the dissent had they looked to Cooley.

Section I: Vested Rights, Retroactive Civil Legislation, and Due Process

Cooley’s understanding of retroactive civil legislation has remained remarkably relevant for the past 150 years despite the decline in citations of Cooley’s work. In the state and federal courts and within current scholarly literature, the debate continues on whether and to what extent federal and state legislatures are prohibited from violating vested rights through such laws, what

⁵⁵⁶ *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)

⁵⁵⁷ *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U. S. ____ (2020)

exactly constitutes a “vested right,” and which constitutional clauses might limit such retroactive lawmaking. As this section will demonstrate, Cooley’s views are still employed in American courts, particularly state courts, but some jurists and scholars have followed the erroneous understandings of Charles Grove Haines and others. Further, some are neglecting Cooley’s more grounded principles on separation of powers that could support their arguments in favor of protecting vested rights while avoiding charges of supporting judicial activism or subjective natural law jurisprudence. Cooley’s views on federalism and existing doctrines that reflect his view may also help buttress a sphere of state power while also ensuring greater protection of individual rights. The point is that Cooley’s articles and treatises are still relevant, and jurists should consider relying on them to help support their legal arguments.

In 2013, Professor Jeffrey Omar Usman wrote a thorough and insightful paper on how federal and state courts variously have approached retroactive civil legislation in recent years.⁵⁵⁸ Many state judiciaries have remained consistent with Cooleen thought on retroactive civil legislation and vested rights in general, holding legally vested rights—rather than philosophically defensible rights—were protected from post-facto deprivation under the state constitutions. They have relied on separation of powers clauses and principles, contract clauses, takings clauses, and clauses that explicitly prohibit certain types of retroactive civil legislation, as well as the few that prohibit such legislation generally. Cooley followed Story and Kent, and all of them

⁵⁵⁸ Usman, Jeffrey Omar. 2013. “Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions.” *Nevada Law Journal* 14 (1).

followed English common law as described earlier, and many states continue in this approach.⁵⁵⁹ They have followed the understanding that outside of eminent domain, police powers, taxation, and a few other exceptions, only the judiciary can disturb or annihilate such rights.

The Supreme Court, by contrast, since at least the end of the *Lochner* Era, has largely echoed the same argument as Haines: In general, “vested rights” are more “conceptual” and so consist of rather misty “traditions, mores, and instincts of a community that frame, through political and sociological lenses, what will be deemed vested.”⁵⁶⁰ In terms of vested property rights, the “vested rights doctrine” was considered akin to economic substantive due process, and any economic legislation that imposed burdens on property rights faced a mere rational basis test. Property rights in particular were relegated to a second-tier status beneath others found in the Bill of Rights. Since the New Deal, voting rights and the rights of “discrete and insular” minorities who might lack political power have also been elevated above property rights in federal courts.⁵⁶¹ Although this divergence between state and federal jurisprudence has hinged on the interpretation of clauses that are particular to state constitutions, primarily the differences have turned on the interpretation of the state and federal due process clauses. Usman demonstrated how jurists focusing on state constitutions, rather than the federal Constitution, had proven more successful in protecting vested rights based primarily on those interpretations.

⁵⁵⁹ As the eminent Supreme Court justice described vested rights while sitting in circuit in *Wheeler*, “Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective” and thus unconstitutional. *Soc’y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814)

⁵⁶⁰ Usman, “Constitutional Constraints.” p. 99

⁵⁶¹ *United States v. Carolene Products Company*, 304 U.S. 144 (1938)

In particular, many state courts, such as those in Florida, Arizona, Maryland, Wisconsin, Illinois, Iowa, Louisiana, and perhaps others,⁵⁶² have relied upon the state due process clauses, which included broader protections against retroactive civil legislation that deprived individuals of vested rights, an interpretation Cooley had emphasized in *Constitutional Limitations*.⁵⁶³ For example, in the 2010 case *Menendez v. Progressive Express*, the Florida supreme court wrote:

*In this case, we conclude that the Legislature intended for the statutory presuit notice provision to be applied retroactively. However, even where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty. See State Farm Mut. Auto Ins. Co. v. Laforet, 658 So. 2d 55, 61 (Fla. 1995).*⁵⁶⁴

This goes beyond the mere rule of interpretation in which laws were simply presumed to operate prospectively. Indeed, if the law impaired a vested right, prospective operation was considered a “constitutional command.”⁵⁶⁵ This was in keeping with Cooley’s position that positive affirmations of legally vested rights create implied limitations on legislative power. But the Florida court neglected to explain this reasoning and instead it applied a two-pronged test that was based in a previous holding that relied upon the due process clause.⁵⁶⁶ This all appeared to

⁵⁶² Usman, “Constitutional Constraints.” p. 96-98

⁵⁶³ Cooley, *Constitutional Limitations*. p. 378

⁵⁶⁴ *Menendez v. Progressive Express Ins. Co.*, 35 So. 3d 873 (2010)

⁵⁶⁵ Usman, “Constitutional Constraints.” p. 77

⁵⁶⁶ *Menendez*: “First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles.”

be in keeping with long-standing precedent in Florida's due process jurisprudence as well as Cooley's understanding of the due process protections, but the court could have also harnessed Cooley's position on the separation of powers clause to further ground its holding on the state constitution while avoiding charges of natural law jurisprudence or economic substantive due process.⁵⁶⁷ As Cooley had put it, the judicial branch alone could determine "what the existing law is in relation to some existing thing already done or happened."⁵⁶⁸ The power of the legislature was generally relegated to making "predetermination[s] of what the law shall be for the regulation of all future cases falling under its provisions," with clearly defined exceptions. Some courts indeed have relied on separation of powers principles, but usually in conjunction with due process arguments, and although few have cited Cooley directly,⁵⁶⁹ his work underpins at least some state jurisprudence. For Cooley, the due process clause was simply a redundancy that reiterated the existing separation of powers principles, as well as the principle of the rule of law generally. Most recently in Utah, for example, the state supreme court was considering whether the state legislature could pass a law reviving time-barred claims that would essentially deprive defendants of their statute of limitations defense—a vested right.⁵⁷⁰ Although based

⁵⁶⁷ Florida Constitution. Art. II, §3:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

⁵⁶⁸ Cooley, *Constitutional Limitations*. p. 91

⁵⁶⁹ Based on NexisLexis search for case law and Cooley citations. Terms: "vested" AND "separation of powers" AND "retroactive" OR "retrospective." Scope of search: All state case law. Dates: January 1, 1990, to June 15, 2020. Search conducted June 15, 2020. Results: 989. When "Cooley" was added to the search terms, results decreased to 32.

⁵⁷⁰ *Mitchell v. Roberts*, 2020 UT 34. No. 20170447

primarily on the due process clause, the court also noted in its section on “Original Understanding”:

*In the latter part of the nineteenth century the principle of due process was viewed at least in part through the lens of the separation of powers and the concept of vested rights. Due process thus flavored the original understanding of the “legislative power” throughout the country and specifically in Utah. And the original understanding of the ratifying public dictates our answer to the questions presented in this case.*⁵⁷¹

This was Cooley’s position. “Every positive direction [of power or rights indicated in constitutions] contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of that provision,”⁵⁷² he wrote. The division of powers prohibited the legislature from encroaching on the functions of the judicial branch, which alone could determine “what the existing law is in relation to some existing thing already done or happened,”⁵⁷³ such as the constitutional or statutory investment of a right. Indeed, the article the court cited in its opinion relied on *Constitutional Limitations*, among many other precedents and legal thought, to demonstrate how separation of powers was designed to protect vested rights on a jurisdictional basis. It was intimately tied to the due process clauses. As the author wrote, “Legislative acts violated due process not because they were unreasonable or in violation of higher law, but because they exercised judicial power or abrogated common law procedural

⁵⁷¹ *Mitchell* opinion

⁵⁷² Cooley, *Constitutional Limitations*. p. 88

⁵⁷³ Cooley, *Constitutional Limitations*. p. 91

protections.”⁵⁷⁴ Further, “Cooley’s understanding of due process in 1868 was consistent with the understanding exhibited by the late-eighteenth-and early-nineteenth-century state and federal court cases that we have canvassed.”

Usman’s suggested approach for jurists to emphasize state due process provisions to protect vested rights has indeed borne fruit, but such an approach has failed in federal courts and in some state courts. Looking to some of Cooley’s other arguments based on separation of powers might help jurists avoid getting bogged down in speculative theories of “fundamental rights” or “higher law” or “economic substantive due process” that has come to disrupt the old jurisdictional understanding of vested rights protections. As pointed out in earlier chapters, the concept of a “right” for Cooley was primarily one that could be protected under law, not theory (although he wrote that vested rights were indeed protected from arbitrary deprivation by a sense of justice, a principle rooted in English common law).⁵⁷⁵ Regardless, these rights included titled property or otherwise an enforceable legal right: “And it would seem that a right cannot be considered a vested right, unless it is something more than a mere expectation, and has already become a title, legal or equitable, to the present or future enjoyment of property, or the present or future enforcement of a demand, or a legal exemption from a demand made by another.”⁵⁷⁶ Elsewhere, “In the domain of speculation or morals a right may be whatever ought to be respected; but in law that only is a right which can be defended before legal tribunals.”⁵⁷⁷

⁵⁷⁴ Chapman, Nathan S.; McConnell, Michael W. 2012. “Due Process As Separation of Powers.” 121 Yale Law Journal 1672 (2012). n. 524

⁵⁷⁵ Cooley, *Constitutional Limitations*. p. 357-358

⁵⁷⁶ Cooley, *Constitutional Limitations*. p. 359

⁵⁷⁷ Cooley, *A Treatise on the Law of Torts*. p. 5

Cooley's separation of powers argument in relation to vested rights is more grounded in the text of state constitutions and the separation of powers principle of the federal Constitution compared to economic substantive due process.

Legally vested rights were to be protected along the same legal lines as those found in the Bill of Rights. Outside of the exceptions, rights in general were to be protected equally under law, not out-balanced based on their perceived fundamental nature or otherwise according to subjective standards of a competing or compelling government interests. According to Cooley, even those rights most explicit in the Bill of Rights were not necessarily raised above all others and so deserving of special protection, but rather they were recognized as enjoying a space on an equal legal platform. For example, as he noted, contract rights and other rights explicitly protected from retroactive legislation via the constitutional provisions did not receive different treatment under police powers. Rather, they "are only thereby placed upon the same footing with other legal rights and privileges."⁵⁷⁸ Ultimately the point is this: emphasizing the equally positive, legal nature of explicitly protected rights and the separation of powers principle as Cooley understood them would help jurists avoid delving into excessive theorizing in their legal arguments.

Federalism May Help

This approach could be augmented by reflecting on Cooley's understanding of federalism. The 14th Amendment, by Cooley's estimation, did not give the federal government the power to determine the nature of individual rights as understood in state constitutional law. Rather, it merely placed the federal government in a position to ensure the states enforced their particular

⁵⁷⁸ Cooley, *Constitutional Limitations*. p. 577

constitutions and protected individual rights equally. Cooley indeed recognized that there were universal principles of individual rights that ran consistently through state constitutions, but he also recognized that it was initially the duty of states to protect those rights according to their own particular common law. Should a question present itself under the 14th Amendment, it was the duty of the Supreme Court to uphold and enforce state constitutional provisions on an equal basis within that state, not dictate to the states the nature and extent of those individual rights on a universal level. Cooley maintained that *Barron v. Baltimore*⁵⁷⁹ remained a fixed precedent reflecting a firm division of sovereignty even after the passage of the 14th Amendment. For the Supreme Court today to expunge the incorporation doctrine would border on ludicrous, however correct, but nonetheless there are existing judicial doctrines that reflect or at least resemble Cooley's position on federalism that could encourage more deference to the state judiciaries in terms of vested rights jurisprudence.

One of those is the adequate and independent state ground doctrine as enunciated in the 1983 case *Michigan v. Long*.⁵⁸⁰ In this case the Court was considering whether a police search of a vehicle violated the defendant's Fourth Amendment rights, ultimately confirming the constitutionality of the search. The Michigan supreme court had previously held the search violated both the Fourth Amendment and the analogous clauses in the state constitution. Even though the Court examined the case in light of federal Fourth Amendment jurisprudence, it recognized the jurisdiction of state courts to hear and decide cases without federal interference if those decisions were based on "adequate and independent" state grounds. In other words, state

⁵⁷⁹ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833)

⁵⁸⁰ *Michigan v. Long*, 463 U.S. 1032 (1983)

judiciaries can rely on their own jurisprudence and state constitutions to reach decisions if they make plain statements indicating their decisions were based on those state grounds.

Justice William Brennan had indicated in a seminal article a few years before that such decisions had to meet a floor of protection that was not contrary to any federally recognized rights, but regardless, he urged state courts to rely on their own constitutions.⁵⁸¹ Cooley would have disagreed with Brennan exactly what that floor was—Cooley looked to constitutions as understood by the founders, ratifiers, and English and state common law while Brennan was far more creative—but the consistent principle throughout the *Long* decision and Brennan’s article was that the state judiciaries have the authority to deviate from federal jurisprudence of analogous state and federal clauses to augment individual rights protections. Given the Supreme Court has relegated property, economic, and other vested rights to second-tier status, it would be in keeping with these doctrines and principles for the state judiciaries to raise these and other vested rights to equal status in accordance with their own state constitutions. And again, although some state due process jurisprudence is in keeping with Cooley’s views, state courts basing such decisions on Cooley’s classic separation of powers and legally vested rights principles rather than the due process clause would help avoid criticisms tied to natural law jurisprudence and *Lochner*’s economic substantive due process.

Section II: Taxation and the Affordable Care Act

Cooley’s principles for taxation can be applied to any case in which a state or federal American court is considering whether a monetary exaction from private parties is consistent with the legislative power to tax. This chapter will consider the most debated and attacked of Cooley’s

⁵⁸¹ Brennan, William. 1977. “State Constitutions and the Protection of Individual Rights,” 90 *Harvard Law Review* 3 (January 1977): 489-504

principles of taxation: that taxing and spending laws must serve primarily a public purpose. As noted in previous chapters, few if any jurists doubted this principle⁵⁸², and so the primary area of dispute was jurisdictional: whether the legislatures or the courts should determine whether such taxing and spending laws indeed served such a purpose. As this section will demonstrate, in the “rare circumstances” the federal courts decide to rule on the legitimacy of a taxing or spending law, Cooley’s principles still apply. The other area of dispute revolved around the merits of the taxing and spending laws: what exactly was a “public purpose”; Cooley also listed considerations of whether they must be levied according to some standard ratio of equality or apportionment; and as a corollary principle for consideration, whether the people burdened with taxation within states or taxing districts must be the ones who benefitted from such laws. For Cooley, significant within these three primary principles of taxation was the idea that taxpayers were entitled to compensation in some form, much like in eminent domain seizures, whether through the protection of rights, or an increased value of property, or some sort of provision for the general welfare as a result of taxation. They were rooted in English common law as

⁵⁸² As demonstrated earlier in this study, the constitutions universally read that the purpose of free governments or the constitution was to provide for the equal or public benefit, the happiness, or the rights of the people generally as opposed to serve private purposes. As noted in the literature review, even Clyde Jacobs recognized this principle as “incontrovertible.” *See* Alabama Constitution. 1868. Art. I, §3; Arkansas Constitution. 1868. Art. I, §1; California Constitution. 1849. Art. I, §2; Connecticut Constitution. 1818. Art. I, §2; Delaware Constitution. 1831. Preamble; Florida Constitution. 1868. Declaration of Rights, §2; Georgia Constitution. 1868. Preamble; Illinois Constitution. 1848. Art. III, §2; Indiana Constitution. 1851. Art. I, §1; Iowa Constitution. 1857. Art. I, §2; Kansas Constitution. 1859. Bill of Rights, §2; Kentucky Constitution. 1850. Art. XIII, §4; Louisiana Constitution. 1868. Preamble; Maine Constitution. 1820. Art. I, §2; Maryland Constitution. 1867. Art. I, §1; Michigan Constitution. 1835. Bill of Rights. Art. I, §2; Minnesota Constitution. 1857. Art. I, §1; Mississippi Constitution. 1868. Preamble; Missouri Constitution. 1865. Art. I, §4; Nebraska Constitution. 1866. Preamble; Nevada Constitution. 1864. Art. I, §2; New Hampshire Constitution. 1784. Art. I, §1, §10; New Jersey Constitution. 1844. Art. I, §2; New York Constitution. 1846. Preamble; North Carolina Constitution. 1868. Art. I, §2; Ohio Constitution. 1851. Art. I, §2; Oregon Constitution. 1857. Art. I, §1; Pennsylvania Constitution. 1838. Art. IX, §2; Rhode Island Constitution. 1841. Art. I, Preamble; South Carolina Constitution. 1868. Preamble; Tennessee Constitution. 1835. Art. I, §2; Texas Constitution. 1866. Art. I, §1; Vermont Constitution. 1786. Preamble; Virginia Constitution. 1851. Declaration of Rights, §3; West Virginia Constitution. 1863. Preamble; Wisconsin Constitution. 1848. Art. I, §1.

supported in American constitutional law. The Supreme Court recognized a number of Cooley's tax and other principles in *Loan Association v. Topeka*, yet later scholars criticized the holding as being the "highest point" of "pure" natural law jurisprudence,⁵⁸³ among other similar charges. This section will demonstrate how a divergence from these established principles led to error and confusion in the modern Supreme Court as presented in the plurality and joint dissent opinions of the 2012 *Sebelius* case.⁵⁸⁴

In *Topeka*, the Supreme Court was considering whether a state law allowing for the issuance of municipal bonds to pay for a private bridge factory violated the legislative power to tax. Citing Cooley's *Constitutional Limitations* and his opinion in *People v. Salem*, among other precedents and sources, the Court recognized that no branch had unlimited or otherwise arbitrary power under the constitutions—in this case, the power to tax; that by definition the legislative power to tax required a public purpose; and that positive protections of rights in constitutions created implied limitations on legislatures—in this case, the right to property in money. The Court echoed Cooley's position that these principles were housed in the inherent legislative power to tax, which was recognized in the state constitution—not extraconstitutional theory. The Court recognized that it had previously overturned Cooley's *Salem* decision in *Talcott*,⁵⁸⁵ but that decision was based on a different set of facts—the building of a private railroad with tax revenue rather than a private bridge factory. The primary principle controlling the outcomes in these cases remained the same: "In all these cases, however, the decision has turned upon the question

⁵⁸³ Grant, J. J. (1931). "Natural Law Background of Due Process." 31 *Columbia Law Review* 56 (1931). p. 58 n. 10; 63

⁵⁸⁴ *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)

⁵⁸⁵ *Township of Pine Grove v. Talcott*, 86 U.S. 666 (1873)

whether the taxation by which this aid was afforded to the building of railroads was for a public purpose.”⁵⁸⁶ The key principle endured. As Clyde Jacobs put it, “Cooley and Dillon may have lost a battle [in *Olcott*,⁵⁸⁷ *Talcott*, and similar cases upholding state legislation authorizing municipalities to issue bonds to be donated to railroad companies], but they were winning a war.”⁵⁸⁸ The legislative power generally and the tax power in particular precluded the unlimited power to forcibly take money from one private party and direct it toward another without compensation and without public purpose, outside of police powers some other exceptions rooted in practice and tradition.

Indeed, between 1870 and 1910, “some forty cases involving aid to private businesses came before state supreme courts and federal courts.”⁵⁸⁹ In all but one, the courts followed *Topeka* and so Cooley’s principles. By 1914, although weakened, the “public purpose maxim was still a valid principle of constitutional law.”⁵⁹⁰ Generally, laws passed to aid private railroads were upheld while those passed to direct tax revenue to other private manufacturers were struck down. Although the public purpose requirement was later incorporated into the 14th Amendment,⁵⁹¹ giving the perception of a more grounded constitutional legitimacy, the Supreme Court recognized decades later that “*Topeka* has been substantially undermined by later Supreme Court decisions making clear that the Court will defer to the states in the area of taxation so as to

⁵⁸⁶ *Topeka* opinion

⁵⁸⁷ *Olcott v. Supervisors*, 16 Wall. 678 (1873)

⁵⁸⁸ Jacobs, Clyde Edward, and University of California Press. 1954. *Law Writers and the Courts : The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon Upon American Constitutional Law*. Berkeley: University of California Press. p. 120

⁵⁸⁹ Jacobs, *Law Writers and the Courts*. p. 134

⁵⁹⁰ Jacobs, *Law Writers and the Courts*. p. 152

⁵⁹¹ *Jones v. City of Portland*, 245 U.S. 217 (1917)

permit local economic experimentation.”⁵⁹² In what seems its last authoritative statement on the principles of *Topeka*, in *Everson v. Board of Education*, the Court noted:

*It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. Loan Association v. Topeka, 20 Wall. 655; Parkersburg v. Brown, 106 U.S. 487 [1883]; Thomas v. Consolidated Gas Utilities Corp., 300 U.S. 55 [1937]. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution.*⁵⁹³

It is important to note the Court’s decision to start deferring to the state legislatures and judiciaries to allow for experimentation and state constitutional oversight in taxation and economic policies did not destroy this principle. The Court recognized in *Topeka* that it “may not be easy to draw the line in all cases so as to decide what is a public purpose,” and so in later years the Court simply refrained from determining where that line was in particular cases. So the shift did not change what was still an enforceable constitutional principle.⁵⁹⁴ Other case law has demonstrated this principle to be housed in the federal general welfare clause.

Indeed, the public purpose principle applies to the federal taxing and spending power as well, although the Court has been particularly reluctant to strike down laws on that basis.

Nevertheless, in *Butler*,⁵⁹⁵ when considering the federal power to tax according to one of the provisions of the Agricultural Adjustment Act, the Court noted that the federal power to tax and

⁵⁹² *Common Cause v. State*, 455 A.2d 1 (Maine S.C. 1983). See also Jacobs, p. 152-157

⁵⁹³ *Everson v. Board of Education*, 330 U.S. 1 (1947)

⁵⁹⁴ Jacobs, *Law Writers and the Courts*. p. 156

⁵⁹⁵ *United States v. Butler*, 297 U.S. 1 (1936)

spend was “not unlimited,” and that it was at least confined to “public purposes” or the general welfare clause.⁵⁹⁶ In *United States v. Kahriger*,⁵⁹⁷ the Court added, “As is well known, the constitutional restraints on taxing are few. ‘Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity,’”⁵⁹⁸ in reference to Art. I, §9, §2, §8, respectively. Further, in his dissent in *Flast v. Cohen*, Justice Harlan cited both *Butler* and *Topeka* in writing that “this Court has often emphasized that Congress’ powers to spend are coterminous with the purposes for which, and methods by which, it may act, and that the various constitutional commands applicable to the central government, including those implicit both in the Tenth Amendment and in the General Welfare Clause, thus operate as limitations upon spending.”⁵⁹⁹ So in addition to the explicit restrictions in the federal Constitution, the general welfare clause limits taxing and spending laws to public purposes only.

As demonstrated in the chapter on taxation, this general requirement suggested others, most notably that the “purpose” or “welfare” implied that the people who paid the tax were to enjoy some sort of benefit approaching equal compensation. There appeared to be nothing in the particularly sparse case law on “taxing and spending” that contradicted this principle.⁶⁰⁰ So even though the Court has largely deferred in the state and federal tax law cases, the principles hedging in the power to tax remained and continued to apply—principles that one could argue

⁵⁹⁶ *United States v. Butler*, 297 U.S. 1 (1936). This case was a review of the Agricultural Adjustment Act’s provision that “tax” revenue from processors of farm products be directed toward private farmers to encourage production.

⁵⁹⁷ *United States v. Kahriger*, 345 U.S. 22 (1953)

⁵⁹⁸ *Kahriger*, citing *License Tax Cases*, 72 U.S. 462 (1866)

⁵⁹⁹ *Flast v. Cohen*, 392 U.S. 83 (1968). Harlan dissent.

⁶⁰⁰ NexisLexis search: “Supreme Court”; “taxing and spending”; January 1, 1950 to June 19, 2020. Results: 23 cases. There appeared no opinions that indicated taxing and spending could be for any private purpose exclusively or did not ultimately serve a public purpose or benefit.

the Court should consider in the “rare instances” it actually rules on the constitutionality of a tax law. The only significant case touching on the legitimacy of a supposed “tax” levied by the federal government in recent memory has been the challenge to the individual mandate penalty in the Affordable Care Act of 2012. It will serve as a case study to determine how Cooley’s work might provide some insight for jurists and legislators.

Obamacare, Cooley, and the Court

The 2012 case challenging the Patient Protection and Affordable Care Act was one of the most consequential legal cases on the power of taxation in the modern day, despite the legislative repeal of the requirement in 2017. The Supreme Court considered whether the individual mandate “penalty” for failing to buy health insurance was in fact a legitimate exercise of Congress’s taxing power.⁶⁰¹ In its plurality opinion, the Court wrote the “penalty” as described in the law was actually a tax based on its character. It recognized that there were limits to Congress’s taxing power, and those limits depended upon substantive principles. Whether an exaction was merely “labeled” as a “tax” or something else was irrelevant—a charge of superficiality leveled at the joint dissent. In listing its principles of taxation, the plurality wrote the exaction looked “like a tax in many respects”: the payment was to be paid to the U.S. Treasury when citizens filed their tax returns; the amount of the exaction was determined by factors such as taxable income, number of dependents, and joint filing status; the penalty was located in the Internal Revenue Code and was to be enforced by the IRS in the same manner as taxes; and finally, it had the “essential feature of any tax: it produces at least some revenue for

⁶⁰¹ *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)

the Government.” For this final element of taxation the Court cited *Kahriger*.⁶⁰² Further, the Court wrote that the purpose of the penalty or tax, although it “will raise considerable revenue, it is plainly designed to expand health insurance coverage.”

In their joint dissent, justices Scalia, Kennedy, Thomas, and Alito emphasized primarily how the “penalty” was indeed intended to be a penalty, not a tax. Among other points, they drew some distinctions between a penalty and a tax: “A tax is an enforced contribution to provide for the support of government; a penalty ... is an exaction imposed by statute as punishment for an unlawful act.”⁶⁰³ But whereas the plurality provided both tax and penalty principles to determine the character of the exaction, the joint dissent primarily went on to describe at length only the characteristics of a penalty or point to principles *not* indicative of a tax. “When an Act ‘adopts the criteria of wrongdoing’ and then imposes a monetary penalty as the ‘principle consequence on those who transgress its standard,’ it creates a regulatory penalty, not a tax.”⁶⁰⁴ Further, “We never have classified as a tax an exaction imposed for violation of the law.” Rather than identify the characteristics of a tax and then compare them to the penalty, it seems they simply claimed such an attempt would require them to “confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Art. I, §9, cl. 4. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear ...” They neglected to specify as clearly as the plurality exactly which principles underlie the power to tax.

⁶⁰² *Kahriger* opinion

⁶⁰³ Citing *United States v. Reorganized SC&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996)

⁶⁰⁴ Citing *Child Labor Tax Case*, 259 U.S. 20 (1922)

In its plurality opinion, it is unclear exactly where the Court obtained all of its principles for taxation. Its first principle—that the exaction goes into the U.S. Treasury—is indeed consistent with most federal taxes, but money collected from fines or penalties or other non-tax sources of revenue also go into the Treasury, so that element is not necessarily indicative of a tax. Its second—that the amount to be paid is determined by the individual’s taxable income, number of dependents, and joint filing status—these are indeed factored into the equation for determining personal income tax, but lots of taxes levied by the federal government, such as the estate tax, Social Security, Medicare, import taxes, do not consider those factors, so they are not required principles of taxation. Its third—that the code for enforcement is found in the Internal Revenue Code and the exaction is enforced by the IRS—these cannot be necessary principles for taxation because the location of a statute within the code book and the agency tasked with enforcing that statute is artificial and not necessarily indicative of the substance or character of the provision. Only the Court’s final element—that the exaction produces revenue for the federal government—appears to be a sound principle, and perhaps coincidentally it was the only one cited. In *General Principles*, Cooley similarly noted that “‘taxes,’ in its most enlarged sense, embraces all the regular impositions made by government upon the person, property, privileges, occupations, and enjoyments of the people for the purpose of raising public revenue.”⁶⁰⁵ But as the reader knows, this was not the end of it for Cooley, and as he clarified a few paragraphs later, “Constitutionally a tax can have no other basis than the raising of a revenue for public purposes, and whatever government exaction has not this basis is tyrannical and unlawful.”⁶⁰⁶ But surely this cannot be

⁶⁰⁵ Cooley, *General Principles*. p. 55.

⁶⁰⁶ Cooley, *General Principles*. p. 57

the only requirement for taxation. Again, penalties and fines also provide revenue, and it was universally acknowledged that penalties are different from taxes.

Cooley's principles could have helped both the plurality and dissenters frame their arguments. Did the purposes of the law—to raise revenue and “shape decisions” through monetary regulation—constitute a “public purpose” as Cooley would have understood it? He recognized that the purpose of revenue was required, but in reality, the motives of Congress were virtually unassailable given the difficulty in identifying the “real purpose” of legislation, as demonstrated during the tariff disputes of the 19th century.⁶⁰⁷ Cooley recognized that the “general welfare” was indeed a legitimate purpose as later recognized in *Butler* and *Sebelius*.⁶⁰⁸ Still, as noted in the taxation chapter, some sort of compensation or benefit was required for the taxpayers, which may include something as simple as the protection of rights to life, liberty, and property, or “the increase in the value of his possessions by the use to which the government applies the money raised by the tax,”⁶⁰⁹ or “the people of that municipality must have a special and peculiar interest in the object to be accomplished.”⁶¹⁰ The question, according to Cooley, was what was the primary purpose of the taxing and spending law. If the law primarily benefitted private parties and the public enjoyed only incidental or distant, indirect benefits, such a law would be more akin to plundering the individual citizen rather than providing a reciprocal benefit based on the taxpayer's contribution. Judges can determine this in certain obvious cases.

⁶⁰⁷ Cooley, *General Principles*. p. 57

⁶⁰⁸ Cooley, *Treatise on Taxation*. p. 16-17

⁶⁰⁹ Cooley, *Constitutional Limitations*. p. 498

⁶¹⁰ *People ex rel. Detroit & H.R. Co. v. Township of Salem*, 20 Mich. 452 (1870)

As the plurality in *Sebelius* noted, the money from the penalty or tax went to the U.S. Treasury. That money, in turn, ultimately paid for public services—Social Security and defense, for example, as well as “Medicare, Medicaid, CHIP, and marketplace subsidies.”⁶¹¹ This is an important point: those who paid the penalty did *not* in turn receive health insurance. They were still liable for their own healthcare expenses—they received no benefit, or at least the “benefit” of living in a community of people who enjoyed health insurance was so remote as to constitute an insufficient degree of compensation for the exacted contribution. The money went to the Treasury, which in turn ultimately transferred at least some of that money to medical subsidies for other American citizens. As one organization put it, “[W]hen someone goes without insurance they pay a penalty as part of their shared responsibility of providing health care to over 320 million Americans.”⁶¹²

Cooley would have recognized this as a clear violation of the primary principle governing taxation. As Cooley quoted one case, “Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them.”⁶¹³ It was, in effect, the government forcibly taking money from private party A and giving it to private party B without serving a primarily public purpose. Cooley indeed recognized that “Some taxes levied by the federal government are directly calculated and

⁶¹¹ Center on Budget and Policy Priorities. Visited June 19, 2020.
www.cbpp.org/research/federal-budget/policy-basics-where-do-our-federal-tax-dollars-go

⁶¹² ObamacareFacts.com. Visited June 20, 2020.
obamacarefacts.com/questions/where-does-tax-penalty-money-go/

⁶¹³ Cooley, *Constitutional Limitations*. p. 490

intended to benefit private individuals,”⁶¹⁴ such as bounties paid as rewards to soldiers, but even in this case “the primary object ... is not the private but the public interest”—it was a recognition of public service, and it encouraged others to embark on “self-denying, faithful and courageous services in the future.” But in *Sebelius*, those receiving the “tax” or “penalty” money from some Americans failed to contribute any good or service to the public at large—they simply enjoyed the fiscal support for their own healthcare. There is little doubt that by Cooley’s standard, this would qualify as one of the rare, “clear and palpable” instances in which a transfer of money served incidental or no public interest and was therefore unconstitutional.

Section III: Cooley and *Seila Law v. CFPB*

Most recently, in *Seila Law v. CFPB*⁶¹⁵, the Supreme Court considered whether Congress could impose qualifications for presidential removal of principal executive officers appointed by the president with the advice and consent of the Senate without violating separation of powers, given that such legislatively imposed requirements might encroach on presidential authority. Also, the Court considered whether the portion of a statute qualifying such a removal was severable from the rest of the law and could be struck down while leaving the remainder of the statute intact. Justice Clarence Thomas also emphasized in his opinion that the existence of independent agencies exercising so-called “quasi-legislative” or “quasi-judicial” powers violated the tripartite structure of the federal system by creating what has amounted to a fourth branch of government. The dissent agreed with the majority on severability, but it disagreed that a qualified removal provision violated the separation of powers, instead writing that the Constitution recognizes no

⁶¹⁴ Cooley, *Treatise on Taxation*. p. 74

⁶¹⁵ *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U. S. ____ (2020)

such presidential authority. Cooley's thought could have been examined and cited to bolster the removal argument in the majority opinion of Roberts in particular, as well as the broader argument on the constitutionality of independent agencies in Thomas's opinion.

The majority relied primarily on the text of Article II, first principles delineating the nature of executive power, the Decision of 1789, *Myers v. United States*⁶¹⁶, *Humphrey's Executor v. United States*⁶¹⁷, *Morrison v. Olson*⁶¹⁸, *Free Enterprise Fund v. PCAOB*⁶¹⁹, as well as tradition and practice to strike down the qualifications and demonstrate the general rule: the president was vested with all federal executive authority, and to fulfill his duty to take care the laws be faithfully executed, and to remain accountable to the people, he had the exclusive, illimitable constitutional authority to remove without cause principal and inferior executive officers who had been appointed by the president with the advice and consent of the Senate. Thomas agreed. Kagan in the dissent wrote that the Constitution made no mention of that executive power, and such decisions largely were to be left to the political branches of government. The standard was that in *Morrison*, by her estimation: Only if the restriction on presidential removal impeded his ability to perform his constitutional duty to take care the law be faithfully executed would such a provision fall outside Congress's power.

The standard in *Myers* and reaffirmed in *Free Enterprise* was based primarily on the appointments clause, the vesting clause, and the character of the officer: whether principal or inferior, executive officers who had been appointed by the president with the advice and consent

⁶¹⁶ *Myers v. United States*, 272 U.S. 52 (1926)

⁶¹⁷ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)

⁶¹⁸ *Morrison v. Olson*, 487 U.S. 654 (1988)

⁶¹⁹ *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010)

of the Senate were subject to unilateral presidential removal, and provisions in statutes qualifying such removal were invalid. Congress was free to qualify the removal of inferior officers who by law and in accordance with Article II had been appointed by alternative means: the president alone, the heads of departments, or the courts.⁶²⁰ In *Humphrey's*, the Court upheld removal qualifications, holding that the constitutionality of the requirements hinged on the character of the officer, not necessarily the mode of appointment: the officers in the Federal Trade Commission (FTC), who were principal officers appointed by the president with the advice and consent of the Senate, sat on a multi-member board and exercised no substantial executive power, but rather exercised quasi-legislative and quasi-judicial powers, and so Congress could qualify the president's power to remove them. In *Morrison*, the Court similarly upheld the removal qualifications for the independent counsel, an inferior executive officer who had been appointed by a special court, but shifted in their reasoning by holding that the constitutionality of the qualifications hinged on whether the officer excessively interfered with the president's ability to take care the laws be faithfully executed. Whether officers were considered principal or inferior, executive or non-executive, appears to have been determined on a case-by-case basis.

In *Seila*, the Court found the exceptions in *Humphrey's* and *Morrison* to be inapplicable. Instead the Court recognized much of the reasoning in *Myers* and *Free Enterprise*, in which the Court had written that the Constitution vested in the president all executive powers, and by extension, the power to control executive administrators through the removal power. The director of the CFPB was a principal officer appointed by the president with the advice and consent of the Senate; he exercised significant and unilateral legislative, judicial, and executive power; he was

⁶²⁰ In *Myers*, Taft citing *United States v. Perkins*, 116 U.S. 483 (1886)

insulated from removal by the president; and he received funding outside of standard appropriations channels. He was, in a sense, the unelected, unaccountable, supreme head of a self-sufficient, independent sphere of the federal government who exercised final authority in executive matters. Just as the president had the constitutional authority to remove without cause the secretaries of war, state, and treasury, he had the authority to remove without cause the head of the CFPB.

Cooley and Seila v. CFPB

Judge Cooley reflected on the president's removal power from both a constitutional and political perspective, although one must draw some implications on his constitutional views since he appears to have considered the issue only briefly in *General Principles*, relying primarily on citations. Still, on the narrow constitutional question of removal, the majority in *Seila* could have used Cooley and his citations to bolster its opinion—apparently he relied on the appointments clause alone rather than the vesting or take care clause to identify the location of the president's power to remove PAS officers. In his *General Principles*, published in 1880, Cooley was silent on the supposed underlying powers housed in the vesting and take care clauses of Article II, focusing instead on the enumerated powers of the president—namely, the appointment power. He recognized the well-known principle that “the power to appoint includes the power to remove.” Here he cited the Supreme Court case *Ex Parte Hennen*⁶²¹—only briefly cited as an aside by the majority in *Seila*—in which Justice Smith Thompson in 1839 had affirmed in the Court's holding the exclusive power of the president alone, heads of departments, or the courts to remove appointed subordinates at pleasure, unless such tenure was otherwise limited by the statute. More

⁶²¹ *Ex Parte Matter of Hennen*, 38 U.S. 230 (1839)

importantly for the issue here, the Court also wrote that the “practical,” “legislative,” “settled,” and “well understood construction” of the Constitution indeed had confirmed that the president alone enjoyed the power to remove all officers who had been appointed by the president with senatorial concurrence. Although the Court in *Hennen* recognized the reasoning behind the Decision of 1789, which included considerations of the vesting and take care clauses, the appointment clause alone was emphasized in the *Hennen* opinion—nowhere did the Court in *Hennen* claim that the presidential removal power was housed in the vesting or take care clauses, but rather, the focus was the principle that the power to appoint included the power to remove, just as Cooley had cited in *General Principles*.

In considering the removal power from a constitutional perspective, it appears Cooley would have aligned the reasoning in *Myers* in terms of the appointments clause, wherein Justice Taft later wrote, “The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment.” This reflected the point made by Fisher Ames in the Congress of 1789⁶²²: the Senate was not the appointing power. In other words, the Senate could only check the power to appoint through a negative—it could not nominate candidates or otherwise initiate an appointment—and if indeed the president alone had the power to appoint, then he alone had the incidental power to remove PAS officers (unless otherwise provided for in the Constitution, of course). Standing alone, this was a fairly tenuous claim—indeed, nominees

⁶²² Ames, Fisher. June 18, 1789. “It is doubted whether the Senate do actually appoint or not. It is admitted that they may check and regulate the appointment by the President, but they can do nothing more; they are merely an advisory body, and do not secure any degree of responsibility, which is one great object of the present constitution. ... The President, I contend, has expressly the power of nominating and appointing, though he must obtain the consent of the Senate. He is the agent; the Senate may prevent his acting, but cannot act themselves.” Gales, Joseph. 1834. *Annals of the Congress of the United States. First Congress*. Vol. I. Washington: Gales and Seaton. p. 540. See also Thach, Charles. 1923. *The Creation of the Presidency*. The Johns Hopkins University Press. p. 137.

cannot assume their positions without senatorial consent—but the language of Article II arguably supported it,⁶²³ and it was part of the Decision of 1789.

Chief Justice Roberts and the rest of the majority in *Seila* turned primarily to the vesting and take care clauses, as well as the separation of powers principle, as the sources of presidential authority over removals, and they suffered for it. Kagan leveled a strong criticism against the majority in *Seila*, writing how the majority was extrapolating from “the ‘general constitutional language’ of Article II’s Vesting Clause an unrestricted removal power.” This is not to claim that Kagan’s argument in favor of the *Morrison* balancing standard was stronger—indeed, such balancing tests are notoriously subjective—but it was nonetheless a powerful point if one is examining the language of the vesting and take care clauses alone. One must deduce from general language and make some significant assumptions on the supposed nature of executive power to arrive at the majority’s conclusion: the president was vested with executive power, which included the power to control and supervise the executive branch, which necessarily included the power to remove, in order to take care the laws be faithfully executed.

The majority’s argument was not without merit, and indeed it enjoyed support dating to 1789, but reliance on the appointments clause alone, as understood by Ames, Thompson in *Hennen*, Cooley, and Taft, would have required fewer leaps in reasoning and would have rooted the decision in an enumerated power exclusively. Further, it would have resulted in a clearer and more categorical standard of determining the extent of presidential removal power by basing it on the mode of appointment alone—PAS or non-PAS—rather than on the more uncertain

⁶²³ Article II, §2: “[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ...” The president had the power to both nominate and appoint, by this language, while the Senate’s role was limited to advice and consent.

standards of the nature of executive power, or the rank, status, or “character of the officer,” or whether the officer in question unduly interfered with the president’s duty to take care the laws be faithfully executed. Unless otherwise provided for in the Constitution, if the president appointed an officer with the advice of the consent of the Senate, the president alone could remove him—end of story. Had this original standard been enforced in previous cases, the officers in *Myers*, *Humphrey’s*, and *Seila* would have been subject to unilateral presidential removal, while the court-appointed independent counsel in *Morrison* would have continued to enjoy the for-cause insulation required in the Ethics in Government Act.

Pinning Down Cooley on the Removal Power

It is important to recognize that in *General Principles*, Cooley reluctantly noted there had been a modification of the principle that the power to appoint included the power to remove. He cited the Tenure of Office Act of 1867 and *U.S. v. Avery*,⁶²⁴ a district court opinion handed down within six weeks of that act. Cooley wrote with some italicized skepticism, “*it seems*” the advice and consent of the Senate was required for removal of presidential appointees confirmed by the Senate, or at least Congress may pass a law requiring qualifications for their removal.⁶²⁵ This point of Cooley’s should be taken in context: the Tenure of Office Act and that district court opinion were handed down during the height of radical Republican fervor. Within twenty years the Act was tempered and repealed, and by 1926 finally ruled unconstitutional. In 1880, the Tenure of Office Act had yet to be struck down, and the purpose of Cooley’s book was simply to “present succinctly the general principles of constitutional law”⁶²⁶ for law students, not make

⁶²⁴ *United States ex rel Bigler v. Avery*, 1 Dedy 204 (1867)

⁶²⁵ Cooley, *General Principles*. p. 104

⁶²⁶ Cooley, *General Principles*. Preface.

constitutional arguments contrary to the most recent legislative and judicial constructions. The most he could do in his situation, one might speculate, was offer a plainly hesitant concession. This recognition of Congress's great assertion of power does not appear to equate to Cooley's approbation or agreement on its constitutionality.

He made this quite clear elsewhere. In 1877, he wrote without ambiguity, the "Tenure of Office Act ought to be repealed."⁶²⁷ Here he was considering the removal power from a political perspective, one should note, rather than from a constitutional standpoint. Regardless, at the time he was offering ten suggestions for how the newly elected President Hayes could fulfill the campaign pledges to reform the civil service and "return to the principles and practices of the founders of the Government. They neither expected nor desired from public officers any partisan services. ... They held that appointments to office were not to be made nor expected merely as rewards for partisan services, nor merely on the nomination of members of Congress as being entitled in any respect to the control of such appointments."⁶²⁸ Non-political offices filled by appointment should be bound by a "faithful discharge of duty" rather than senatorial preferences; the president needed unilateral removal power "to hold them to due accountability." The system under the Tenure of Office Act was "destructive of responsibility" for the president and added to the corrupting influence of politics in the administration. In *General Principles*, Cooley similarly pointed out that the "heads of departments do not act independently of the President ... they are executive agents, and any official act done by any one of them is, in contemplation of law, done by the President himself, and the responsibility is upon him."⁶²⁹ Cooley clearly recognized that

⁶²⁷ Cooley, "The New Federal Administration." p. 301

⁶²⁸ Cooley, quoting Hayes. "The New Federal Administration." p. 299

⁶²⁹ Cooley, *General Principles*. p. 101

without the power to remove, the president lacked the power to control the executive branch—a violation of the separation of powers principle. So it seems that for Cooley, the vesting and take care clauses and the separation of powers principle provided *support* for the conclusion that the president *should* have the authority to remove PAS officers. The constitutional authority itself, by comparison, to remove unilaterally all PAS officers, principal or inferior, was housed in the appointments clause alone.

Independent Agencies Briefly

In his *Seila* opinion, Justice Thomas wrote there was no place for “quasi” legislative or judicial powers in the tripartite system that separated the powers of government into distinct departments. He urged the Court to overturn *Humphrey’s*, deny the CFPB the power to issue subpoenas, and declare independent agencies unconstitutional. There is little doubt Cooley would have similarly abhorred CFPB because it violated the non-delegation doctrine and so the separation of powers maxim. As he reiterated the Madisonian points in *General Principles*, “[P]owers thus concentrated must of necessity be an arbitrary government,” and that to protect individual rights, “the powers of government must be classified according to their nature, and each class intrusted for exercise to a different department of government.”⁶³⁰ In terms of legislative power, as Cooley had emphasized in the *State Tax Cases*⁶³¹, legislators should indeed rely upon experts or even the people to help in the creation of new laws. But such discussions and considerations were not “legislative in nature,” as the owners of the seized land had argued. Rather, those who made the

⁶³⁰ Cooley, *General Principles*. p. 43

⁶³¹ *State Tax-Law Cases* 54 Mich. 350 (1884)

final decisions for rules affecting future actions were those exercising legislative power.⁶³² The director of the CFPB, as described at length in *Seila*, routinely made final legislative decisions, in addition to executive and judicial determinations.

Cooley recognized sometimes one of the three branches exercised powers that nominally belonged to other branches, but such decisions were made within those branches and in accordance with their constitutionally designated spheres. For example, the executive and judiciary “may respectively make rules which are in the nature of laws, for the regulation of its own course in the discharge of its duties,”⁶³³ but that did not equate to a sanction of an autonomous branch of government making final decisions outside legislative, executive, or judicial oversight. It appears Cooley’s thought was at least consistent with that of Thomas, who perhaps could have cited Cooley to reinforce his position.

Conclusion

Cooley was like some sort of arborist working in a petrified forest. As he saw it, like the old trees that had grown or died according to the laws of nature, human law flourished or died in accordance with the experiences and preferences of the Anglo-American people, always bound by the laws of natural justice. Those manmade laws that had conformed to those principles endured, and in American constitutional conventions, those laws that had been the most

⁶³² It is important to note that Cooley was the first chairman of the Interstate Commerce Commission (ICC), often considered the first independent regulatory agency. But before the Hepburn Act of 1906, the ICC lacked explicit final regulatory or adjudicatory power. It was only after the passage of the Act that the ICC gained the power to set maximum railroad rates. Cooley’s approach in his position was mixed—variously trying to expand and limit the ICC’s regulatory power—but he appears to have generally relied upon the rule of law, common law principles, legitimate administrative processes, and the separation of powers principle to restrain the agency and to emphasize “publicity and moral influence rather than legal coercion as head of the ICC.” See Postell, Joseph. 2017. *Bureaucracy in America: The Administrative State’s Challenge to Constitutional Government*. University of Missouri Press. p. 159-162

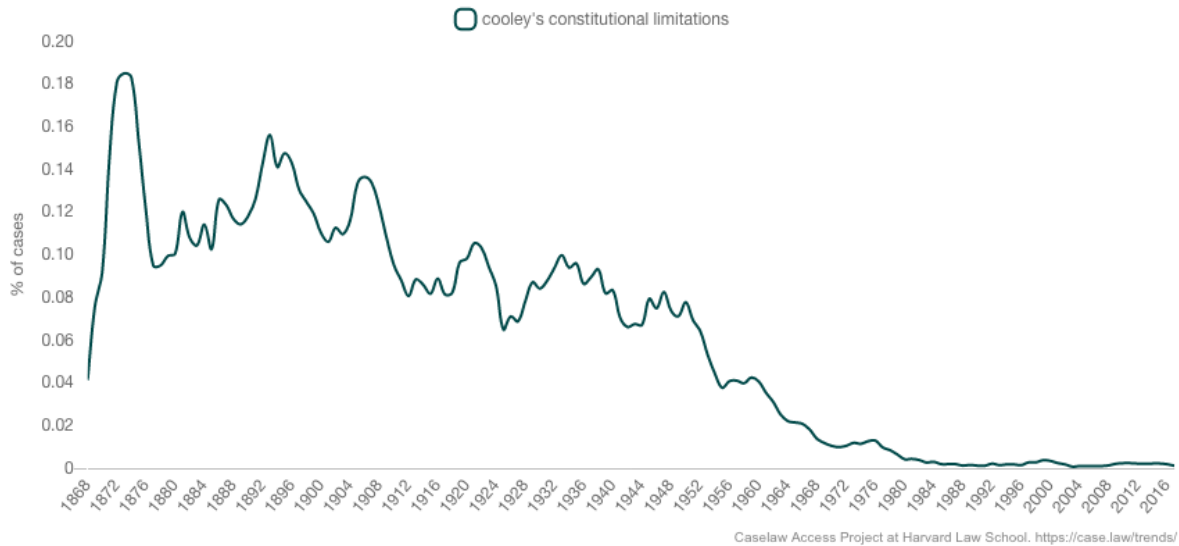
⁶³³ Cooley, *General Principles*. p. 44

successful, which had adhered most closely to natural law, experience, and the preferences of generations, which were most in agreement with the time-tested traditions of the people, those most towering of laws, stood as the greatest achievements of the forest and had crystallized into permanent, written constitutions. Cooley respected those constitutions because they had endured, and he cultivated the new preferences of the people that were sprouting all around him in keeping with those same rules. Cooley's principles remain relevant to modern constitutional law because we are still in that forest, however much the landscape has changed with the circumstances. Some trees, weeds, and brambles have been cut and cleared while others have sprung to great heights, but it is important to recognize *why* they have reached such prominence. It is because of the principles to which Cooley adhered, which he respected and honored because he saw them ingrained in the greatest laws of all, the American constitutions.

Appendix

Appendix A

This data suggests “Cooley’s *Constitutional Limitations*” saw a marked decline of references in state and federal cases during and immediately after scholars erroneously cast him as an ideologue or natural law jurist.



Source: Caselaw Access Project at Harvard Law School.

Appendix B

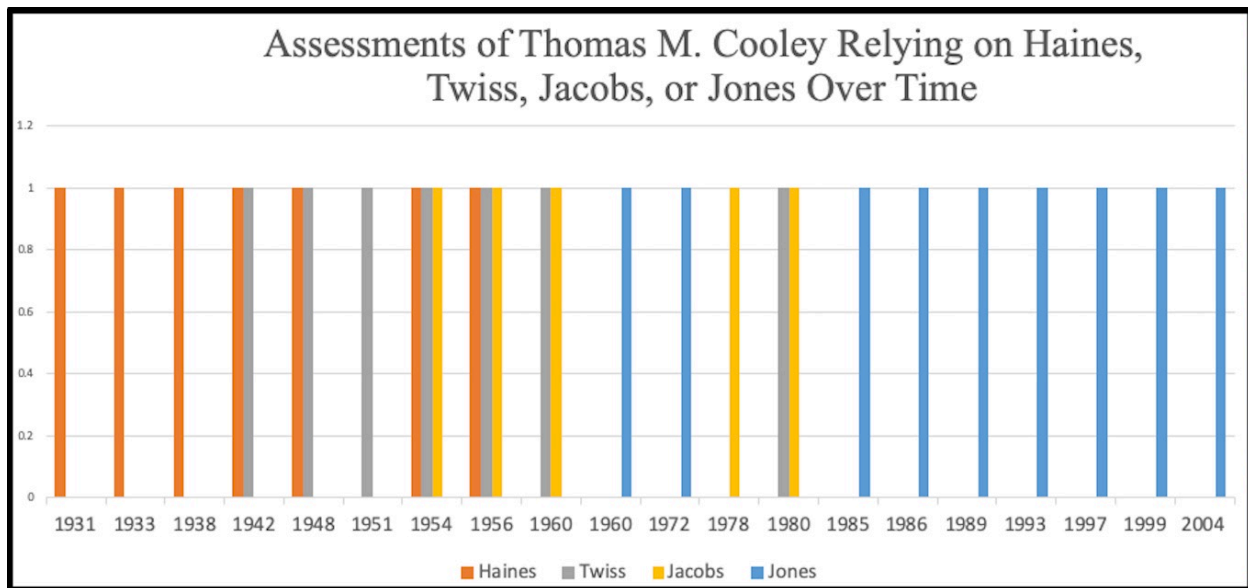
This chart suggests Cooley’s most famous work, *Constitutional Limitations*, has seen fewer citations in literature over time.



Source: Google Ngram Viewer

Appendix C: Deferrals to Charles Grove Haines and Alan Jones

This appendix demonstrates the extent to which scholars who wrote on Cooley after 1930 largely deferred to Charles Grove Haines,⁶³⁴ Benjamin Twiss,⁶³⁵ and Clyde Jacobs⁶³⁶ for their assessments. From 1960 until the present, Alan Jones has been recognized as the first to significantly revise the claim that Cooley was a higher law or *laissez-faire* constitutionalist.⁶³⁷ He claimed Cooley's Jacksonian politics ultimately guided his jurisprudence. In the past few years, a handful of scholars such as Brian Tamahana,⁶³⁸ Carl Herstein,⁶³⁹ and Robert Olender⁶⁴⁰ have cast Cooley as a legal realist in the image of Benjamin Cardozo or Oliver Wendell Holmes.



⁶³⁴ Haines, Charles Grove. 1930. *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with Special Reference to the Development of Certain Phases of American Constitutional Law*. Harvard Studies in Jurisprudence, Vol. IV. Cambridge, Mass: Harvard University Press.

⁶³⁵ Twiss, Benjamin Rollins, and Edward S. Corwin. 1942. *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court*. Princeton: Princeton University Press.

⁶³⁶ Jacobs, Clyde Edward, and University of California Press. 1954. *Law Writers and the Courts : The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon Upon American Constitutional Law*. Berkeley: University of California Press.

⁶³⁷ Jones, Alan R. 1987 [1960 dissertation]. *The Constitutional Conservatism of Thomas McIntyre Cooley : A Study in the History of Ideas*. American Legal and Constitutional History. New York: Garland.

⁶³⁸ Tamanaha, Brian Z. 2010. *Beyond the Formalist-Realist Divide : The Role of Politics in Judging*. Princeton, N.J.: Princeton University Press.

⁶³⁹ Herstein, Carl W. (2013). "Postmodern Conservatism: The Intellectual Origins of the Engler Court (Part I), 59 Wayne L. Rev. 781 (2013).

⁶⁴⁰ Olender, Robert Allan. 2014. "From Commonwealth to Constitutional Limitations : Thomas Cooley's Michigan, 1805-1886." Dissertation, University of Michigan Law School.

Author, Article or Book	Date of Publication	Relied on Haines (1930)	Relied on Twiss (1942)	Relied on Jacobs (1954)	Relied on Jones (1960)	Notes
Seligman, Edwin R. A, and Alvin Saunders Johnson. 1931. <i>Encyclopedia of the Social Sciences</i> , Seagle, William. "Cooley, Thomas McIntyre." Vol. 4. New York: Macmillan.	1931	p. 356-357				
Max Lerner, "The Supreme Court and American Capitalism," Yale Law Journal 42, no. 5	1933	p. 689				
Francis R. Aumann, "Some Problems of American Legal Development during the Period of Industrial Growth, 1865-1900," University of Cincinnati Law Review 12, no. 4	1938	p. 530				He did not cite Haines but echoed Haines's assessment that Cooley was a natural law jurist. p. 530
Twiss, Benjamin Rollins, and Edward S. Corwin. 1942. <i>Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court</i> . Princeton: Princeton University Press.	1942	p. 19				

Corwin, Edward S. 1948. <i>Liberty against Government: The Rise, Flowering and Decline of a Famous Juridical Concept</i> . Baton Rouge: Louisiana State Univ. Press.	1948	p. 148	p. 117, 138-139			The citation of Haines was not directly concerned with an assessment of Cooley, but nonetheless was in reference to a doctrine to which Cooley supposedly ascribed.
Paschal, Joel Francis. 1951. <i>Mr. Justice Sutherland : A Man against the State</i> . Princeton, N.J.: Princeton University Press.	1951	----- ----	p. 17			
Jacobs, Clyde Edward, and University of California Press. 1954. <i>Law Writers and the Courts : The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon Upon American Constitutional Law</i> . Berkeley: University of California Press.	1954	p. 22	p. 27, 35, 166			
Fine, Sidney. 1956. <i>Laissez Faire and the General-Welfare State: A Study of Conflict in American Thought, 1865-1901</i> . University of Michigan Publications. History and Political Science, V. 22. Ann Arbor: University of Michigan Press.	1956	p. 4-5, 128	p. 127, 141	p. 129-130		

Paul, Arnold M. 1960. <i>Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895</i> . Ithaca, N.Y: Published for the American Historical Association by Cornell University Press.	1960	----- ----	p. 4	p. 12		
Jones, Alan R. 1987 [1960 dissertation]. <i>The Constitutional Conservatism of Thomas McIntyre Cooley : A Study in the History of Ideas</i> . American Legal and Constitutional History. New York: Garland.	1960	----- ----	----- -----	----- -----		Jones directly countered the claims of Haines, Twiss, and Jacobs that Cooley was a higher-law or laissez-faire constitutionalist, and instead cast Cooley as a Jacksonian.
Paludan, Phillip S. 1972. "Law and the Failure of Reconstruction: The Case of Thomas Cooley." <i>Journal of the History of Ideas</i> 33 (4): 597-614.	1972	----- ----	----- -----	----- -----	p. 599-601	Paludan noted Twiss and Jacobs' assessment that Cooley played a role in corporate power, but he emphasized his agreement with Jones's assessment particularly.
Tribe, Laurence H. 1978. <i>American Constitutional Law</i> . University Textbook Series. Mineola, N.Y.: Foundation Press.	1978	----- ----	----- -----	p. 429 n. 15, 438 n. 4	----- -----	

Peebles, Thomas H. 1978. "A Call to High Debate : The Organic Constitution in Its Formative Era, 1890-1920." University of Colorado Law Review, Vol. 52, No. 1 (Fall 1980).	1980	----- ----	p. 69	p. 69	----- ----	Peebles noted that Cooley adhered to a strict interpretation of the Constitution, but he nonetheless relied on Twiss and Jacobs and included Cooley among the laissez-faire constitutionalists.
Les Benedict, Michael. 1985. "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism." <i>Law and History Review</i> 3 (2): 293–331.	1985	----- ----	----- -----	----- -----	p. 319	Les Benedict recognized Twiss and Jacobs's argument that Cooley was the foundation for laissez-faire constitutionalism , but he leaned in favor of Jones's assessment and linked Jacksonianism with that doctrine.
Williams, Joan C. (1986). "The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law." <i>1986 Wis. L. Rev.</i> 83 (1986)	1986	----- ----	----- -----	----- -----	p. 139 n. 292	Williams recognized the school of Haines, Twiss, and Jacobs, but she wrote that "Jones's interpretation of Cooley seems established in the historical literature."

Fishman, Donald A. 1989. "Thomas M. Cooley, Laissez Faire Constitutionalism, and the Formative Period of First Amendment Law." <i>Free Speech Yearbook</i> 27 (1): 33–47.	1989	----- ----	----- -----	----- -----	p. 35	Fishman noted Jacobs's assessment but favored Jones's interpretation of Cooley as a Jacksonian.
Gillman, Howard. 1993. <i>The Constitution Besieged : The Rise and Demise of Lochner Era Police Powers Jurisprudence</i> . Durham: Duke University Press.	1993	----- ----	----- -----	----- -----	p. 57	
Carrington, Paul D. 1997. "Law As 'the Common Thoughts of Men': The Law-Teaching and Judging of Thomas McIntyre Cooley." <i>Stanford Law Review</i> 49 (3)	1997	----- ----	----- -----	----- -----	p. 528 n. 249	Carrington thought that Jones's assessment more balanced than that of Haines, Jacobs, and Twiss, but he added that Cooley had much in common with early Progressives in addition to the Jacksonians.
Barron, David J. 1999. "The Promise of Cooley's City: Traces of Local Constitutionalism." <i>University of Pennsylvania Law Review</i> 147 (3)	1999	----- ----	----- -----	----- -----	p. 509-511	Barron recognized Haines, Twiss, and Jacobs, but he generally favored Jones's assessment of Cooley as a common law Jacksonian.

Ely, J. W. 2004. "Thomas Cooley, 'Public Use," and New Directions in Takings Jurisprudence." <i>Michigan State Dcl Law Review</i> 2004 (4): 845–58.	2004	----- ---	----- -----	----- -----	p. 849-850	Ely rejected Twiss and favored Jones as described in Gillman's <i>The Constitution Beseiged</i> .
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Bibliography

Cases

Barron v. Baltimore, 32 U.S. 243 (1833)
Bayard v. Singleton, 3 N.C. 42 (1787)
Bradwell v. Illinois (1873)
Brewster v. Kitchin [Kidgell], 1 Ld. Raym. 317; 1 Salk. 198; S. C. Carth. 438. (1697)
Calder v. Bull, 3 U.S. 386 (1798)
Cheaney v. Hooser, 48 Ky. 330 (1848)
Child Labor Tax Case, 259 U.S. 20 (1922)
Civil Rights Cases, 109 U.S. 3 (1883)
Collins v. Hall, 1 Del. Cas. 652 (1793)
Common Cause v. State, 455 A.2d 1 (Maine S.C. 1983)
Commonwealth v. Alger, 7 Cush. 84, 61 Mass. 53 (1851)
Commonwealth ex rel. O'Hara v. Smith, 4 Binn. 117 (1811)
Couch v. Jeffries, 4 Burr. 2460 (1769)
Dash v. Vankleek, 7 Johns 477 (1811)
Den ex dem. Trustees of University v. Foy, 5 N.C. 58 (1805)
Detroit v. Detroit & Howell Plank Road Co. 43 Mich. 140 (1880)
Doe ex dem. Gaines v. Buford, 1 Dana 499, 31 Ky. 481 (1833)
Dorman v. State, 34 Ala. 216 (1859)
Elliott's Ex'rs v. Lyell, 7 Va. 268 (1802)
Everson v. Board of Education, 330 U.S. 1 (1947)
Ex parte Milligan, 4 Wall. 2 (1867)
Ex Parte Matter of Hennen, 38 U.S. 230 (1839)
Fisher v. University of Texas, 579 U.S. ____ (2016)
Flast v. Cohen, 392 U.S. 83 (1968)
Fletcher v. Peck, 10 U.S. 87 (1810)
Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010)
Gilmore v. Shuter, 2 Mod. 310 (1677)
Goddin v. Crump, 35 Va. 120 (1837)
Humphrey's Executor v. United States, 295 U.S. 602 (1935)
In re Dorsey, 7 Port. 293 (1838)
In re Mayor, Aldermen & Commonality of New York, 11 Johns. 77 (1814)
John L. Sutherland v. The Governor 29 Mich. 320 (1874)
Jones v. City of Portland, 245 U.S. 217 (1917)
Jones v. Jones, 2 Tenn. 2 (1804)
Kamper v. Hawkings, 3 Va. 20 (1788)
Laing vs. McKee, 13 Mich. 124 (1865)
License Tax Cases, 72 U.S. 462 (1866)
Loan Ass'n v. Topeka, 87 U.S. 655 (1874)

Matthews v. Zane, 20 U.S. 164 (1822)
Menendez v. Progressive Express Ins. Co., 35 So. 3d 873 (2010)
Michigan v. Long, 463 U.S. 1032 (1983)
Miller v. N.Y. & Erie R.R. Co., 21 Barb. 513 (1856)
Mitchell v. Roberts, 2020 UT 34. No. 20170447 (2020)
Morrison v. Olson, 487 U.S. 654 (1988)
Myers v. United States, 272 U.S. 52 (1926)
National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012)
Ogden v. Blackledge. 6 U.S. 272 (1804)
Olcott v. Supervisors, 16 Wall. 678 (1873)
People ex rel. Bay City v. State Treasurer, 23 Mich. 499 (1871)
People v. Blodgett, 13 Mich. 127 (1865)
People ex rel. Detroit & H.R. Co. v. Township of Salem, 20 Mich. 452 (1870)
People ex rel. Ira C. Bristol et al. v. The Board of Supervisors of Ingham County 20 Mich. 95 (1870)
Pingry v. Washburn, 1 Aiken 264 (~1830)
Reagh v. Spann, 3 Stew. 100 (1830)
Seila Law LLC v. Consumer Financial Protection Bureau, 591 U. S. ____ (2020)
Sharpe v. Speir, 4 Hill. 76 (1843)
Shawn v. Bishop, 2 Del. Cas. 208 (1804)
Slaughterhouse Cases, 83 U.S. 36 (1873)
Soc’y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814)
Starr v. Fisher & Shockley, 1 Del. Cas. 611 (1818)
State, 2 N.C. 28 (1794)
State v. Allmond, 7 De. 612 (1858)
State v. Lowber, 2 Del. Cas. 557 (1820)
State Tax-Law Cases 54 Mich. 350 (1884)
Striker v. Kelly, 1 Lock. Rev. Cas. 442 (1799)
Sutton's Heirs v. Louisville, 35 Ky. 28 (1837)
Taylor v. Ypsilanti, 105 U.S. 60 (1882)
Terry v. Anderson, 95 U.S. 628 (1877)
The Case of the County Levy, 5 Call 139, 5 Va. 139 (1804)
Thomas v. LeLand, 24 Wend. 65 (1840)
Towne v. Eisner, 245 U.S. 418, 425 (1918)
Township of Pine Grove v. Talcott, 86 U.S. 666 (1873)
Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819)
Turner v. Turner's Ex'X, 8 Va. 234 (1792)
United States v. Butler, 297 U.S. 1 (1936)
United States v. Carolene Products Company, 304 U.S. 144 (1938)
United States ex rel Bigler v. Avery, 1 Deady 204 (1867)
United States v. Kahriger, 345 U.S. 22 (1953)
United States v. Perkins, 116 U.S. 483 (1886)
United States v. Reorganized SC&I Fabricators of Utah, Inc., 518 U.S. 213 (1996)

Vanhorne's Lessee v. Dorrance, 2 U.S. 304 (1795)
Wales v. Stetson, 2 Mass. 143 (1806)
Walker v. State, 2 Del. Cas. 437 (1818)
Waples v. Prettyman, 1 Del. Cas. 65 (1795)
Wayman v. Southard, 23 U.S. 1 (1825)
Weimer v. Bunbury, 30 Mich. 201, 214 (1874)
Wynehamer v. People 13 N.Y. 378 (1856)

Books, Articles, Speeches

Alschuler, Albert. 1996. "Rediscovering Blackstone." 145 *University of Pennsylvania Law Review* 1 (November 1996)

Aumann, Francis R. 1938. "Some Problems of American Legal Development During the Period of Industrial Growth, 1865-1900." 12 *U. Cinn. L. Rev.* 519 (1938)

Bacon, Matthew. 1807. *A New Abridgment of the Law*. Vol. VI. Sixth Edition. A. Strahan.

Barron, David J. 1999. "The Promise of Cooley's City: Traces of Local Constitutionalism." *University of Pennsylvania Law Review* 147 (3)

Black, Henry Campbell, and West Publishing Company. 1968. *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*. Rev. 4th edition. St. Paul, Minn: West Pub.

Blackstone, William; ed. Cooley, Thomas M. 1870. *Commentaries on the Laws of England*. Chicago, Ill.: Callaghan and Cockcroft.

Blackstone, William, and Thomas McIntyre Cooley. 1884. *Commentaries on the Laws of England: In Four Books* (3rd ed., rev.) Chicago: Callaghan.

Blackstone, William, and William Draper Lewis. 1902. *Commentaries on the Laws of England : In Four Books*. Philadelphia: R. Welsh.

Bracton, Henry. *Bracton on The Laws and Customs of England*.

Bradford, M.E. 1987. "The Best Constitution in Existence: The Influence of the British Example on the Framers of Our Fundamental Law." 27 *Brigham Young University Studies* 3 (Summer 1987).

Brennan, William. 1977. "State Constitutions and the Protection of Individual Rights," 90 *Harvard Law Review* 3 (January 1977).

Berger, Raoul. 1987. *Selected Writings on the Constitution*. “Insulation of Judicial Usurpation: A Comment on Lawrence Sager’s ‘Court-Stripping’ Polemic.” Cumberland, Va.: James River Press.

Berger, Raoul. 1987. *Selected Writings on the Constitution*. “‘Law of the Land’ Reconsidered.” Cumberland, Va.: James River Press.

Brockelbank, W.J. 1953. “Role of Due Process in American Constitutional Law.” 39 *Cornell Law Review* 4.

Broom, Herbert. 1845. *A Selection of Legal Maxims, Classified and Illustrated*. Philadelphia: T & J.W. Johnson, Law Booksellers, No. 5 Minor Street.

Caldwell, Lynton K. 1943. “The Jurisprudence of Thomas Jefferson.” *Indiana Law Journal* Vol. 18 (1943).

Carrington, Paul. 1997. “The Constitutional Law Scholarship of Thomas M. Cooley,” 41 *Am. J. Legal Hist.* 368 (1997).

Carrington, Paul D. 1997. “Law As ‘the Common Thoughts of Men’: The Law-Teaching and Judging of Thomas McIntyre Cooley.” *Stanford Law Review* 49 (3).

Carrington, P. D. 1998. “Law and Economics in the Creation of Federal Administrative Law: Thomas Cooley, Elder to the Republic.” *Iowa Law Review* 83 (2).

Chapman, Nathan S.; McConnell, Michael W. 2012. “Due Process As Separation of Powers.” 121 *Yale Law Journal* 1672 (2012)

Clark, G.J. 1895. *Life Sketches of Eminent Lawyers*. Kansas City, Mo., Lawyers’ International Publishing Col.

Coke, Edward. *Institutes of the Lawes of England*. 1642. See Sheppard, Steve. 2003. *The Selected Writings of Sir Edward Coke*. Liberty Fund.

Cooley, Thomas. 1857. *The Compiled Laws of The State of Michigan*. Vol. II. Hosmer & Kerr.

Cooley, Thomas M. 1863. “Address on the Dedication of the Law Lecture Hall to the Students in the Department of Law.” Ann Arbor, Michigan: Elihu R. Pond.

Cooley, Thomas McIntyre. 1868. *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*. Little, Brown & Co.

Cooley, Thomas M. 1871. "Of the Right to Waive a Tort and Sue in Assumpsit." *Albany Law Journal* 3.

Cooley, Thomas M. 1875. "The Guarantee of Order and Republican Government in the States." *International Review* 2.

Cooley, Thomas M. 1876. *A Treatise on the Law of Taxation: Including the Law of Local Assessments*. Chicago: Callaghan and Company.

Cooley, Thomas M. 1876. "Incidental Injuries from Exercise of Lawful Rights." *Southern Law Review* 2.

Cooley, Thomas M. 1876. "Extradition." *International Review* 3.

Cooley, Thomas M. 1876. "The Cases in Which the Master Is Liable for Injuries to Servants in His Employ." *Southern Law Review* 2.

Cooley, Thomas M. 1877. "New Aspects of the Right to Trial by Jury." 11 *American Law Review* 705.

Cooley, Thomas M. 1877. "The New Federal Administration." *International Law Review* 4.

Cooley, Thomas M. 1877. "Liability of Public Officers to Private Actions for Neglect of Official Duty." *Southern Law Review* 3.

Cooley, Thomas M. 1877. "Effect of a Change in the Law Upon Rights of Actions and Defences." *Southern Law Review* 3.

Cooley, Thomas M. 1878. "Principles That Should Govern in the Framing of Tax Laws." *Southern Law Review* 4.

Cooley, Thomas M. 1878. "Liability of Public Officers to Private Actions for Neglect of Official Duty." 3 *Southern Law Review* 531.

Cooley, Thomas M. 1878. "Changes in the Balance of Governmental Power: An Address to the Law Students of Michigan University." March 20, 1878. Ann Arbor: Douglas & Co.

Cooley, Thomas M., Hewitt, A.S. 1878. "The Method of Electing the President." *International Review* 5.

Cooley, Thomas M. 1878. "Limits to State Control of Private Business." *Princeton Review* 1.

Cooley, Thomas M. 1878. "The Lawyer's Duty to be Faithful to His Own Manhood. Closing Address to the Law Students of Michigan University. March 21, 1878. Ann Arbor: Douglas & Co.

Cooley, Thomas M. 1879. "The Surrender of Fugitives from Justice." *Princeton Review* 3.

Cooley, Thomas M. 1879. *A Treatise on the Law of Torts: Or the Wrongs Which Arise Independent of Contract*. Chicago: Callaghan and Company.

Cooley, Thomas M. 1880. *The General Principles of Constitutional Law in the United States of America*. Boston: Little, Brown, and Company.

Cooley, Thomas M. 1880. "Confinement of the Insane." *Southern Law Review* 6.

Cooley, Thomas M. 1881. "Title to Lands Under Fresh Water Lakes and Ponds." *Central Law Journal* 13.

Cooley, Thomas M. 1881. "The Limits to Legislative Power in the Passage of Curative Laws." *Central Law Journal* 12.

Cooley, Thomas M.; Trumble, L.; Butler, B.F.; Dwight, T.W. 1881. "Presidential Inability." *North American Review* 133.

Cooley, Thomas M. 1881. "The Recording Laws of the United States." *Annual Report of the American Bar Association* 4.

Cooley, Thomas M. 1881. "Remedies of Illegal Taxation." *American Law Register* 29.

Cooley, Thomas M. 1882. "School Boards: Their Duties and Responsibilities." A Paper Read Before the Michigan State Teachers' Association. Lansing, Mich.: W.S. George & Co., State Printers and Binders.

Cooley, Thomas M. 1883. "State Regulation of Corporate Profits." *North American Review* 137.

Cooley, Thomas M. 1883. "The Remedies for the Collection of Judgments Against Debtors Who Are Residents or Property Holders in Another State, or Within the British Dominions." *American Law Register* 31.

Cooley, Thomas. 1883. "The Abnegation of Self-Government." *Princeton Rev.* 12.

Cooley, Thomas M. 1883. "The Remedies for the Collection of Judgments Against Debtors Who Are Residents or Property Holders in Another State, or Within the British Dominions." *American Law Register* 31.

Cooley, Thomas M. 1884. "Labor and Capital Before the Law." *North American Review* 139.

Cooley, Thomas. 1884. "Popular and Legal Views of Traffic Pooling." *Railway Review*.

Cooley, Thomas M. 1885. *Michigan: A History of Governments*. American Commonwealths. Boston: Houghton, Mifflin.

Cooley, Thomas M. 1886. "Arbitration in Labor Disputes." 1 *Forum* 308.

Cooley, Thomas. 1886. "Codification." *American Law Review* XX (May-June 1886).

Cooley, Thomas M. 1886. "The Influence of Habits of Thought Upon Our Institutions." Second Annual Address Delivered Before the South Carolina Bar Association. December 2, 1886.

Cooley, Thomas M. 1887. "Acquisition of Louisiana." An Address Delivered Before the Indiana Historical Society. February 16, 1887. Bowen-Merrill Co.

Cooley, Thomas M. 1888. "The Uncertainty of the Law." 22 *American Law Review* 347.

Cooley, Thomas M. 1889. "Comparative Merits of Written and Prescriptive Constitutions." 2 *Harvard Law Review* 8.

Cooley, Thomas M. 1889. "The Interstate Commerce Act." Address at the Dinner of the Boston Merchant's Association. January 8, 1889.

Cooley, Thomas M. 1889. "The Place of the Federal Court in the American Constitutional System: A Lecture Delivered Before the Political Science Association of the University of Michigan." New York and London: G.P. Putnam's Sons.

Cooley, Thomas. 1889. "The Constitution of the Empire of Japan." Addressed to Students of Political Science in the Johns Hopkins University. April 17, 1889.

Cooley, Thomas M. 1892. "Sovereignty in the United States." 1 *Michigan Law Journal* 81.

Cooley, Thomas M. 1893. "The Power to Amend the Federal Constitution." 2 *Mich. Law Journal* 109.

Cooley, Thomas M. 1893. "The Administration of Justice in the United States of America in Civil Cases." 2 *Mich. Law Journal*. 341.

Cooley, Thomas M. 1894. "The Year in Its Constitutional Aspects: The Lawyer as a Teacher and Leader." *American Law Review* 641.

Cooley, Thomas M. 1894. "The Fundamentals of American Liberty." 3 *Michigan Law Journal* 149.

Cooley, Thomas M. 1894. "Address of the President." *Annual Report of the American Bar Association* 17.

Corwin, Edward. 1914. "The Basic Doctrine of American Constitutional Law." Vol. XII *Michigan Law Review* No. 4.

Corwin, Edward S. 1948. *Liberty Against Government: The Rise, Flowering and Decline of a Famous Juridical Concept*. Baton Rouge: Louisiana State Univ. Press.

Elliot, Jonathan; eds. James McClellan and M.E. Bradford. 1989. United States Constitutional Convention (1787). *Jonathan Elliot's Debates in the Several State Conventions on the Adoption of the Federal Constitution As Recommended by the General Convention at Philadelphia in 1787*. Cumberland, Va.: J. River Press.

Ely, J. W. 2004. "Thomas Cooley, 'Public Use,' and New Directions in Takings Jurisprudence." *Michigan State Dcl Law Review* 2004 (4).

Emperor Justinian I. *The Digest of Justinian*

Farrand, Max, ed. 1911. *The Records of the Federal Convention of 1787*. 3 Vols. New Haven: Yale University Press.

Fine, Sidney. 1956. *Laissez Faire and the General-Welfare State: A Study of Conflict in American Thought, 1865-1901*. University of Michigan Publications. History and Political Science, V. 22. Ann Arbor: University of Michigan Press.

Gillman, Howard. 1993. *The Constitution Besieged : The Rise and Demise of Lochner Era Police Powers Jurisprudence*. Durham: Duke University Press.

Grant, J. J. (1931). "Natural Law Background of Due Process." 31 *Columbia Law Review* 56 (1931).

Haines, Charles Grove. 1914. *The American Doctrine of Judicial Supremacy*. The Making of Modern Law. New York: Macmillan.

Haines, Charles Grove. 1919. "Efforts to Define Unfair Competition." 29 *Yale Law Journal* 1.

Haines, Charles Grove. 1924. "Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations of Legislatures," 3 *Texas Law Review* 1.

Haines, Charles Grove. 1930. *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with Special Reference to the Development of Certain Phases of American Constitutional Law*. Harvard Studies in Jurisprudence, Vol. IV. Cambridge, Mass: Harvard University Press.

Haughey, David O. "Statistical Study of the Cases Decided in the Michigan Supreme Court During the Time of Judge Cooley, 1865-1885." Michigan Law School, Ann Arbor, Michigan. August 19, 1947. See Bentley Historical Library, University of Michigan. Lewis G. Vander Velde Papers 1855-1975, 1933-1968. Call Number 86174 Aa 2 UAm. Box 5. §3, p. 6. (unpublished).

Haynes, Milton, ed. 1844. *South-Western Law Journal and Reporter*. Vol. I. "John Haywood." Nashville: Cameron & Fall.

Herstein, Carl W. (2013). "Postmodern Conservatism: The Intellectual Origins of the Engler Court (Part I), 59 *Wayne L. Rev.* 781 (2013).

Howard, A. E. Dick. 1968. *The Road from Runnymede: Magna Carta and Constitutionalism in America*. Virginia Legal Studies. Charlottesville: University of Virginia Press.

Jacobs, Clyde Edward, and University of California Press. 1954. *Law Writers and the Courts : The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon Upon American Constitutional Law*. Berkeley: University of California Press.

Jefferson, Thomas. "Letter to John Colvin." 20 Sept. 1810.

Jones, Alan R. 1987 [1960 dissertation]. *The Constitutional Conservatism of Thomas McIntyre Cooley : A Study in the History of Ideas*. American Legal and Constitutional History. New York: Garland.

Jones, Alan. 1967. "Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration." 53 *The Journal of American History* 4 (March 1967).

Katzenberger, George A. 1896. "A Brief Outline of the Life and Works of Judge Cooley." 5 *Michigan Law Journal* 12.

Kent, Charles A. Bentley Historical Library, University of Michigan. Law School University of Michigan publications 1859-2017. Call No. 9784 Bimu C61 2. Box 1. "Memorial Discourses: Address on Thomas McIntyre Cooley, by Charles A. Kent, A.M. 1899.

Kent, James. 1826. *Commentaries on American Law*. Four Volumes.

Kent, James. 1832. 2nd ed. *Commentaries on American Law*. Four Volumes.

Kirchner, Otto. *The Inlander*. 1898. "Thomas M. Cooley." Vol. 9 (1898) p. 54-58. *See full typescript article at Bentley Historical Library, University of Michigan. Lewis G. VanderVelde Papers 1855-1975, 1933-1968. Call No. 86174 Aa 2 UAm. Box 5.*

Knowlton, Jerome C. 1907. "Thomas McIntyre Cooley." *Michigan Law Review* 5 (5).

LaPiana, William P. (1992) "Jurisprudence and History and Truth." 23 *Rutgers L.J.* 519 (Spring 1992).

Lerner, Max. 1932. "The Supreme Court and American Capitalism." *Yale Law Journal* Vol. 42, (1932/33).

Les Benedict, Michael. 1985. "Laissez-Faire and Liberty: Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism." 3 *Law & History Review* 293 (1985).

Lewis, William Draper, ed. 1907. *Great American Lawyers: The Lives and Influence of Judges and Lawyers Who Have Acquired Permanent National Reputation, and Have Developed the Jurisprudence of the United States: A History of the Legal Profession in America*. "Thomas McIntyre Cooley," by Harry Burns Hutchins. Philadelphia: John C. Winston Company.

McClellan, James. 2000. *Liberty, Order, and Justice : An Introduction to the Constitutional Principles of American Government*. 3rd ed. Indianapolis: Liberty Fund.

McDowell, Gary L. 1982. *Equity and the Constitution : The Supreme Court, Equitable Relief, and Public Policy*. Chicago: University of Chicago Press.

McKechnie, William Sharp. 1914. *Magna Carta: A Commentary on the Great Charter of King John* 2nd ed. Glasgow: J. Maclehose and Sons.

Mott, Rodney. 1973 [1926 Reprint]. *Due Process of Law: A Historical and Analytical Treatise of the Principles and Methods Followed by Courts in the Application of the Concept of the "Law of the Land."* Da Capo Press.

Olender, Robert Allan. 2014. "From Commonwealth to Constitutional Limitations : Thomas Cooley's Michigan, 1805-1886." Dissertation, Producer not identified. University of Michigan Law School.

Paludan, Phillip S. 1972. "Law and the Failure of Reconstruction: The Case of Thomas Cooley." *Journal of the History of Ideas* 33 (4).

Paschal, Joel Francis. 1951. *Mr. Justice Sutherland : A Man against the State*. Princeton, N.J.: Princeton University Press.

Paul, Arnold M. 1960. *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895*. Ithaca, N.Y: Published for the American Historical Association by Cornell University Press.

Peebles, Thomas H. 1978. "A Call to High Debate : The Organic Constitution in Its Formative Era, 1890-1920." *University of Colorado Law Review*, Vol. 52, No. 1 (Fall 1980).

Postell, Joseph. 2017. *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government*. University of Missouri Press.

"Retroactive Legislation: A Primer for Congress." Congressional Research Service. August 15, 2019.

Robertson, Max A., ed. *The English Reports*. Vol. CXXX. Common Pleas VIII. Containing Bingham, Vols. 1 to 6. William Green. Edinburgh. 1912.

Rogers, Henry Wade. Bentley Historical Library, University of Michigan. Henry Wade Rogers papers 1873-1920. Call No. 852211 Aa 2.

Scott, Henry Wilson, and John James Ingalls. 1891. *Distinguished American Lawyers : With Their Struggles and Triumphs in the Forum*. New York: C.L. Webster.

Scurlock, John. 1953. *Retroactive Legislation Affecting Interests in Land*. University of Michigan Law School.

Seligman, Edwin R. A, and Alvin Saunders Johnson. 1931. *Encyclopedia of the Social Sciences*, Seagle, William. "Cooley, Thomas McIntyre." Vol. 4. New York: Macmillan.

Sheppard, Steve. 2003. *The Selected Writings of Sir Edward Coke*. Liberty Fund.

Siegel, Stephen. 1990. "Historicism in Late Nineteenth-Century Constitutional Thought." *Wisconsin Law Review*, Vol. 1990, No. 6.

Smead, Elmer. 1936. "Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power." 21 *Cornell Law Review* 2 (February 1936).

Smead, Elmer. 1936. "The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence." 20 *Minnesota Law Review* 7 (June 1936).

Smith, Bryant. 1927. "Retroactive Laws and Vested Rights." 5 *Tex. L. Rev.* 231 (1927).

Smith, E. Fitch. 1848. *Commentaries on Statute and Constitutional Law and Statutory and Constitutional Construction, Containing an Examination of Adjudged Cases on Constitutional Law Under the Constitution of the United States, and the Constitution of the Respective States Concerning Legislative Power, and Also the Consideration of the Rules of Law in the Construction of Statutes and Constitutional Provisions*. Albany: Gould, Banks & Gould; and New York: Banks, Gould & Co.

Story, Joseph, and Thomas McIntyre Cooley. 1873. *Commentaries on the Constitution of the United States*. 4th Ed. Boston: Little, Brown.

Tamanaha, Brian Z. 2010. *Beyond the Formalist-Realist Divide : The Role of Politics in Judging*. Princeton, N.J.: Princeton University Press.

Thach, Charles. 1923. *The Creation of the Presidency*. The Johns Hopkins University Press.

Tribe, Laurence H. 1978. *American Constitutional Law*. University Textbook Series. Mineola, N.Y.: Foundation Press.

Twiss, Benjamin Rollins, and Edward S. Corwin. 1942. *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court*. Princeton: Princeton University Press.

Usman, Jeffrey Omar. 2013. "Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions." *Nevada Law Journal* 14 (1).

Weeks, O. Douglas. 1925. "Some Political Ideas of Thomas McIntyre Cooley." *The Southwestern Political and Social Science Quarterly* 6 (1).

Williams, Joan C. 1986. "The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law." 1986 *Wis. L. Rev.* 83 (1986).