"God cannot alter the past but historians can."

So wrote Samuel Butler. Those of us who admire the work of Thomas McIntyre Cooley can only smile ruefully and assent to the wisdom of this comment. Although the former newspaper editor, city clerk, lawyer, Supreme Court Reporter, Michigan Supreme Court Justice, professor of law and political science, author, head of the Interstate Commerce Commission, and American Bar President is remembered in Michigan both with one law school that bears his name, and another that honors him with a distinguished professorship, his legacy on a national scale is both minor and tarnished. Despite more recent scholarship that has made some effort to restore what had been a towering reputation in American law during Cooley’s lifetime, the opprobrium of progressive era historians so undermined it that his achievements and contributions have been largely ignored.

It is the great irony of Cooley’s work that the reason that he was impugned by so many writers on law and legal history was that one of his great contributions to the law, his groundbreaking book known today as Constitutional Limitations, was perceived as creating the support for the key aspects of the United States Supreme Court’s decision in Lochner v New York. This case, the bête noire of the progressive legal movement, has been held up for 75 years as the embodiment of reactionary judicial activism in service of entrenched propertied interests and laissez-faire capitalism, and the origin of the illicit concept of “substantive due process.” While more recent scholarship has cast substantial doubt on the narrative about Lochner, nevertheless, the flaws and merits of that decision remain open for robust debate. What should be far less controversial, however, is Cooley’s role. He died seven years before Lochner was decided. At that point, Constitutional Limitations was in its 8th Edition. Cooley had ceased being the reviser of the text after the 5th Edition. Furthermore, the citation in question does not even provide clear support for the proposition for which it is cited. The notion that Cooley should best be remembered as the father of “laissez-faire constitutionalism” is a crude caricature. As Shakespeare had Brutus remark: “The evil that men do lives after them, the good is oft interred with their bones.” I come to praise Cooley not to bury him.
Born in 1824 in upstate New York, at nineteen, he had no college education but began the study of law in 1842 under New York lawyer and politician Theron Strong. A year later, at age 19, Cooley moved to Michigan and was admitted to the Bar in 1846. He married Mary Horton that year as well. Cooley’s initial efforts as a lawyer brought him no great distinction, but he was politically active. While he joined the Free Soil party in the 1850’s, he ran as a Democrat for district judge of common pleas [court] in Toledo in 1854, but lost the election. An opponent of slavery, it wasn’t long before he moved on to the new Republican party that was born in Jackson, Michigan, in 1854. He formed a law partnership in 1855 with future Republican Governor Charles Croswell. In 1857, he was appointed by Michigan’s Republican legislature to compile the State’s statutory law and, thereafter, to serve as the Reporter for the State Supreme Court, a post he retained until 1864. By 1859, his skills in organizing and documenting the law were such that the dynamic President of the University of Michigan, Henry Tappan, selected the 35 year old Cooley to be one of the first faculty members of the new Law Department at the school. It was an inspired choice.8

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

Cooley taught a wide array of courses. He published his first edition of A Treatise on the Law of Torts in 1879;9 like its author, it is much underappreciated. It was used as a textbook at the Columbia Law School when Benjamin N. Cardozo was a student there.10 Cardozo is celebrated for, among other things, his lectures that were published as a book entitled The Nature of the Judicial Process.11 That work is celebrated for articulating and candidly explaining that judges not only interpret the law, but in a meaningful sense, create law as well. One need only read past the first dozen pages in Cooley’s book on Torts for a very clear explanation of the process by which “a species of judicial legislation” occurs as courts successively interpret statutes. That Cooley’s comments may have had a significant, if unrecognized, influence on Cardozo hardly seems far fetched, but whether or not that is so, Cooley plainly prefigured the concept for which Cardozo is not unjustly celebrated.

Cooley’s time on the Michigan Supreme Court spanned twenty years, from 1865 until October of 1885, when he resigned after failing to win re-election. Cooley joined two of his colleagues from the Michigan Law Department on the Court, James V. Campbell and Isaac P. Christianny, both of whom had been elected in 1858, as well as Benjamin F. Graves, appointed by the Governor in 1857. Collectively, they became famous as “The Big Four” and have been considered Michigan’s greatest court.12

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

Notwithstanding his workload on the court, he published in 1880 a series of lectures under the heading “The General Principles of Constitutional Law in the United States of America”. The book is available as a reproduction (in the form of the 1889 3rd Edition which was co authored and revised by a fellow Michigan professor) and one can still benefit from reading it.

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

By 1886, *Constitutional Limitations* was in its 5th Edition and widely admired as the most authoritative and scholarly work on American law. Cooley’s stature among his contemporaries is exemplified by the fact that in that year Harvard invited Cooley to deliver the address to commemorate the school’s 250th anniversary. The now vastly more celebrated Oliver Wendell Holmes, who published his famous book *The Common Law* in 1881, and joined the Harvard Law faculty in 1882, was present only as an onlooker. In 1890, it was said of Cooley (in connection with a lecture compiled in a “Constitutional History of the United States as Seen in the Development of American Law: A Course of Lectures Before the Political Science Association of the University of Michigan”), “by common consent he has come to be considered the most eminent constitutional jurist of his generation, the successor of Mr. Justice Story as an expounder of the Constitution.”

After serving as the Receiver for the Wabash Railroad in 1886, Cooley was asked in 1897 to become the head of the Interstate Commerce Commission. Creating such an administrative body was a novel concept, and because it involved the railroads, it was of particular economic and symbolic importance given their central role in the movement of goods and raw materials throughout the country.

He was asked to deliver the first of what became the very famous Storrs lectures at Yale Law School in 1890, speaking about the Interstate Commerce Act.

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

ENDNOTES

6 See, for example, the discussion in Harold Hyman, “A More Perfect Union”, p. 352.
7 Julius Caesar, Act 3, Scene II.
13 *People ex rel Twitchell v Blodgett*, 13 Mich 127 (1865).
14 *People ex rel Detroit & Howell R. R. Co. v Twp. Bd. of Salem*, 20 Mich 452 (1870)
15 *People ex rel Leroy v Hurlbut*, 24 Mich 44 (1871).
16 *Stuart v School District No. 1 of Kalamazoo*, 30 Mich 69 (1874).
17 *People v Board of Education of Detroit*, 18 Mich 400 (1869).
18 46 Mich 341 (1881).