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THOMAS M. COOLEY JUDICIAL LECTURE

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Washington, D.C. • October 14, 2022

Between Two Foundings: Cooley's Constitutional Common Ground

The Honorable Don R. Willett & Aaron Gordon

THE THOMAS M. COOLEY JUDICIAL LECTURE

The Georgetown Center for the Constitution established the Thomas M. Cooley Judicial Lecture, in conjunction with the Thomas M. Cooley Book Prize, to recognize commitments to and the advancement of our understanding of the written Constitution.

These programs honor the renowned legal scholar and jurist Thomas McIntyre Cooley. Cooley was a long-standing chief justice of the Michigan Supreme Court and a professor — and eventually dean — at the University of Michigan Law School. He authored several highly influential books, including *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*.

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Between Two Foundings: Cooley's Constitutional Common Ground

The Honorable Don R. Willett

The Honorable Don R. Willett* ***& Aaron Gordon*****

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Thank you, Professor Barnett, for that too-generous introduction. Thanks also to the Georgetown Center for the Constitution, ably led by my beloved former law clerk, Alexa Gervasi, and to the Federalist Society for sponsoring this wonderful event. Professor McConnell, hearty congratulations on your well-deserved Cooley Book Prize. I remember editing, with trembling, a Michael McConnell law review article as a bright-eyed, know-nothing law student thirty-plus years ago. I was so awestruck—and I still am.

Speaking of awestruck, this breathtaking space is formally known as the Rotunda for the Charters of Freedom. And for a kid who grew up in a drafty doublewide trailer surrounded by cotton, this is high cotton. I'm honored to join you from Austin, Texas. It's not every day you get to fly from one nation's capital to another.

I'd like to begin by noting that this event's namesake—Thomas M. Cooley—was born in 1824. Now I chose law school because I was assured there would be no math. But for the math lovers among you, 1824 is 37 years *after* the constitutional convention met in Philadelphia—and 37 years *before* the first shots rang out at Fort Sumter. It is fitting, then, that Thomas Cooley's writings and jurisprudence reflected a dual commitment to the ideals of the Founding and to those of the Reconstruction. Like those who gathered to draft the original Constitution, Cooley championed the structural principles of separation of powers and federalism. And like the foremost constitutional thinkers of the Reconstruction, Cooley espoused something of a libertarian—and, in many ways, progressive—view of individual rights.[1]

This kind of dual commitment is uncommon these days. It often seems as if those who focus more on constitutional structure tend to focus less on constitutional rights, and vice versa.[2] For example, I recently co-authored a book

1 *See* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction xiii, xiv, 215–16, 288 (2008) (describing this trend in Reconstruction-era rhetoric and legal theory).

2 *See, e.g.,* Patrick M. Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights,* 36 Seton Hall L. Rev. 851, 881 (2006) ("Within the constitutional scheme, there has emerged an inverse relationship between the enforcement of substantive individual rights and that of structural provisions such as federalism and separation of powers. As the courts have abandoned the latter, they have had to intensify the former."); Michael B. Rappaport, *It's the O'Connor Court: A Brief Discussion of Some Critiques of the Rehnquist Court and Their Implications for Administrative Law,* 99 Nw. U.L. Rev. 369, 375 (2004) (noting emergence in recent decades of "the two-tiered approach of vigorous judicial review concerning individual rights, but deferential review of structural matters"); Laura E. Little, *Envy and Jealousy: A Study of Separation of Powers and Judicial Review,* 52 Hastings L.J. 47, 94–95 (2000) (describing some commentators' arguments that "federal courts should decline to adjudicate constitutional questions regarding federalism issues as well as the respective powers of Congress and the President" and that only "individual rights . . .

review of a book by someone who argued that "doctrines of federalism and the separation of powers both take . . . ideological cues from the Founding period," while "individual rights" were "first taken . . . seriously in the Reconstruction period," and that upholding structural doctrines serves the interests of "slavery and white supremacy."[3] This sentiment is hardly rare today. The sense one gets from much of modern legal discourse is that the Constitution's structural provisions and its guarantees of personal rights—its Founding-era ideas and Reconstruction-era ideas—are fundamentally at odds.

This evening I'll explore how the constitutional thought of Thomas Cooley reveals this choice to be a false one. Our Constitution is primarily the product of two different "Framing" events: one in the eighteenth century, another in the nineteenth century. And any holistic, historically faithful interpretation means taking seriously the ideas that animated *both* generations of framers. Cooley, born midway between these two foundings, embodied this interpretive aspiration. I also hope to highlight some lessons that can be gleaned from Cooley's work when it comes to originalism in the twenty-first century.

First, a little about the man himself. Thomas McIntyre Cooley, the eighth of 13 children,[4] was widely considered "the most respected lawyer in America."[5] He authored numerous scholarly works, starting with his iconic *Treatise on Constitutional Limitations*, which has been called "the most influential treatise ever published on American constitutional law."[6] Cooley was never nominated to the U.S. Supreme Court,[7] though the Court has cited his writing somewhere between 700 and 1000 times—a respectable consolation prize.[8] Upon Cooley's

structurally require the protection of the politically insulated judiciary").
The notion that the Constitution's structural provisions are tainted by an association with slavery is also a warmed-over chestnut in academia. *See, e.g.,* Michael C. Dorf, *Tainted Law,* 80 U. Cin. L. Rev. 923, 940–41 (2012); Jeffrey Schmitt, *Slavery and the History of Congress's Enumerated Powers,* 74 Ark. L. Rev. 641, 687 (2022); Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment,* 67 Law & Contemp. Probs. 175, 210 (2004).

3 Aziz Z. Huq, The Collapse of Constitutional Remedies 149, 150 (2021); *see also* Don R. Willett & Aaron Gordon, *Rights, Structure, and Remediation,* 131 Yale L.J. 2126 (2022).

4 Lewis G. Vander Velde, *Thomas McIntyre Cooley,* 15 I.C.C. Practitioners' J. 860, 860 (1948).

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

6 Edward S. Corwin, Liberty Against Government 116 (1948).

7 *See* Paul D. Carrington, *Law As "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley,* 49 Stan. L. Rev. 495, 496 (1997) ("Cooley's appointment was withheld, apparently because he was viewed by the barons of his Republican party as too independent."); Lewis G. Vander Velde, *Thomas McIntyre Cooley,* 15 I.C.C. Practitioners' J. 860, 864 (1948).

8 *See* Paul D. Carrington, *The Constitutional Law Scholarship of Thomas McIntyre Cooley,* 41 Am. J. Legal Hist. 368, 368 n.9 (1997). Indeed, in 1876, Cooley's former colleague on the Michigan

death in 1898, one legal publication lamented, "this country ha[d] probably lost its greatest exponent of Constitutional Law, a man whose opinions . . . have taken on . . . something in the nature of law itself."[9] It's fair to say, then, that Cooley's views on the Constitution are entitled to substantial weight.

So, what notions lie at the root of Cooley's thinking?

For one, as Cooley wrote in the preface of his treatise, he was "in full sympathy with all those restraints which the caution of the fathers has imposed upon the exercise of the powers of government."[10] Cooley believed that "the chief excellence of our system of government" is "its apportionment of powers."[11] That included the horizontal "distribution of . . . power[]" at the national level,[12] and the vertical separation of powers between federal and state governments. Cooley said this "division of sovereignty" was essential to preserving our liberties.[13] Cooley's reverence for the Framer's design was reflected in his approach to interpretation, which today we would call "originalism." Cooley wrote, "[t]he meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."[14]

That said, Cooley's respect for the original Framers never devolved into uncritical ancestor worship. They were Founders, not deities. Cooley acknowledged that the Constitution was far from perfect—in particular, its "toleration of the great evil of human slavery," which Cooley called "a blot upon [the] instru-

Supreme Court, Justice Isaac Christiancy, who was by then a U.S. Senator, wrote to Cooley, "'I know that among Senators here (all of whom know you by your work on *Constitutional Limitations*), your authority is placed higher than that of any man on the Bench of the Supreme Court.'" Lewis G. Vander Velde, *Thomas McIntyre Cooley,* 15 I.C.C. Practitioners' J. 860, 863 (1948).

9 *Judge Cooley Dead,* 6 The Law Student's Helper 358, 358 (1898).

10 Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union iv (1868).

11 2 Joseph Story, Commentaries on the Constitution of the United States § 1968, 685 n.1 (Thomas M. Cooley ed., 1873).

12 Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 151 (1880) (quoting Sill v. Vill. of Corning, 15 N.Y. 297, 303 (1857) (Brown, J., dissenting*)); see also id.* at 43 ("[T]he powers of government must be classified according to their nature" and "intrusted for exercise to . . . different department[s]."). This treatise, like *Constitutional Limitations,* was quite highly regarded by Cooley's contemporaries. One legal publication, reviewing *General Principles* several months after it was first published, wrote that "Judge Cooley carefully and accurately analyzes each provision contained in the Constitution ….The work will be equally useful to students of law . . . and to the profession, as a correct and impartial statement and interpretation of the organic law . . . , as established by judicial decisions." *Book Notes,* 14 Am. L. Rev. 514, 515 (1880).

13 2 Joseph Story, Commentaries on the Constitution of the United States § 1968 (Thomas M. Cooley ed., 1873).

14 Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 55 (1868).

ment."[15] Cooley was a staunch Unionist throughout the Civil War, and he celebrated adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments as "a necessary step in national progress."[16] Cooley acknowledged that the amendments would expand federal legislative and judicial power, but he believed they were needed in order to deny States the power to deny fundamental rights—a "power," he said, "which [no] free government should ever employ."[17] Still, the measured Cooley distanced himself from what he called the "extreme views" espoused by some after the Civil War who "contend[ed] that the nation" was the "source of all sovereignty."[18] As Cooley wrote in 1873, "It still remains true as before that the exercise of the local sovereignty is left with the States."[19]

Something else marked Cooley's approach to constitutional law: a baseline commitment to nonpartisanship: The Constitution, said Cooley, "can no longer be . . . the watchword of any political party."[20] He exhorted Americans to instead "preserve the constitution in its every phrase and every letter, with only such modification as was found essential for the uprooting of slavery."[21] This is not to say that Cooley considered the Constitution perfect after the Civil War amendments; on the contrary, he wrote this: "the Union as it was has given way to a new Union with some new and grand features, but also with some engrafted evils which only time and the patient and persevering labors of statesmen and patriots will suffice to eradicate."[22]

15 Thomas M. Cooley, Comparative Merits of Written and Prescriptive Constitutions 4 (1889).

16 *Id.* at 14 (1889*); see also* 2 Joseph Story, Commentaries on the Constitution of the United States § 1968, 685 n.1 (Thomas M. Cooley ed., 1873) ("The dangerous excrescence of slavery has been cut off, and these [new provisions] are but to heal the wound.").

17 Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 202, 199 (1880).

18 *Id.* at 34; *accor*d Thomas M. Cooley, Changes in the Balance of Governmental Power, Address Before Law Students of the University of Michigan 21–22 (1878) ("Unfortunately too, for a time after the war was over, it was deemed necessary to retain the States lately in rebellion under military control; so that the appearance presented to the unthinking mind was that of dependent provinces with derivative powers, rather than of Sovereign States with the inherent and general powers which the constitution left to the States").

19 2 Joseph Story, Commentaries on the Constitution of the United States § 1968 (Thomas M. Cooley ed., 1873).

20 Thomas M. Cooley, Michigan: A History of Governments 371 (1885).

21 *Id.*

22 *Id.*

With all that in mind, does Cooley deserve his present-day reputation as a "conservative?"[23] The answer is more nuanced than a simple "yes" or "no."

Cooley was arguably a "conservative" by today's standards when it came to separation of powers and federalism.[24] Consider the "anti-commandeering" doctrine, which prohibits the federal government from forcing states to enforce federal law.[25] In *Printz v. United States*, the Supreme Court held it was unconstitutional for Congress to require state and local officials to perform background checks on prospective gun buyers.[26] Cooley would've likely agreed. As he wrote in one of his treatises, "the state in the exercise of its functions [is] entitled to the same immunity from congressional interference that the nation is from that of the state."[27] "[I]f a grasping national Congress [were to] pass laws interfering with the right of local government," it would be the duty of "the courts [to] declare them void."[28]

23 *See, e.g.,* Paul D. Carrington, *Law As "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley,* 49 Stan. L. Rev. 495, 528 (1997) (Cooley "has been labeled as reactionary, an estimate based largely on the uses to which his scholarship was put by other judges making decisions years after Cooley's death") (citing examples); John P. Figura, *Against the Creation Myth of Textualism: Theories of Constitutional Interpretation in the Nineteenth Century,* 80 Miss. L.J. 587, 609–10 (2010) (noting "the common perception today that [Cooley] was a conservative.").

24 *See* Thomas B. Colby, *Originalism and Structural Argument*, 113 Nw. U.L. Rev. 1297, 1299–300 & n.18 (2019) (characterizing a strong emphasis on federalism and separation of powers as a "conservative" position); Linda Greenhouse, *Ideas and Trends: Divided They Stand; The High Court and the Triumph of Discord,* N.Y. Times (July 15, 2001), https://perma.cc/Q7N9-GRT2 ("There is a revolution in progress at the court, with Chief Justice William H. Rehnquist and Justices Scalia, Sandra Day O'Connor, Anthony M. Kennedy and Clarence Thomas challenging long-settled doctrines governing state-federal relations [and] the separation of powers"); Michael McCune, Note, *Double Security: Toward A Liberty-Based Approach to Constitutional Structure,* 82 U. Pitt. L. Rev. 881, 887 (2021) (same); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court,* 24 Const. Comment. 43, 51–52 (2007); Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication,* 90 Geo. Wash. L. Rev. 1088, 1091 n.5 (2022); David H. Gans, *Constitutional Blindspot: How The Roberts Court Is Betraying Our Democracy,* Constitutional Accountability Ctr. (July 1, 2019), https://www.theusconstitution.org/blog/constitutional-blindspot-how-the-roberts-court-is-betraying-our-democracy/ ("The Roberts Court's conservative majority treats federalism, separation of powers, and property rights as core constitutional values.").

25 Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018) (stating the constitutional rule that Congress lacks any enumerated "power to issue direct orders to the governments of the States").

26 521 U.S. 898 (1997).

27 Thomas M. Cooley, A Treatise on the Law of Taxation, Including the Law of Local Assessments 58 (1876). To the same effect was language in a judicial decision quoted approvingly by Cooley in *Constitutional Limitations:* "State governments . . . must not be subject to be encroached upon or controlled by Congress. This would be incompatible with their free existence." Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 483 n.2 (1868) (quoting Warren v. Paul, 22 Ind. 276, 279 (1864)).

28 Thomas M. Cooley, Address on the Dedication of the Law Lecture Hall of Michigan University 14 (Ann Arbor, The Law Class of the University of Michigan 1863); *accord* Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 144 (1880) ("The effectual checks []on the encroachment of federal upon state power must . . . be looked for . . . in a federal Supreme Court with competent power to restrain all departments . . . within the limits of

Cooley was similarly "conservative" when it came to Congress's power to regulate interstate commerce.[29] Cooley put it this way: "To constitute commerce between States, it is essential that it be not confined to one State exclusively …. The ordinary trade of a State, the local buying, selling, and exchange, … are of local interest exclusively, are left wholly to the regulation of state law."[30] I suspect Cooley would've let poor Roscoe Filburn keep his home-grown wheat.[31]

Cooley's views on separation of powers would also be labeled today as right-of-center. For example, he would likely favor revitalizing the Nondelegation Doctrine, which forbids Congress from delegating power so sweeping as to be "legislative" in nature. Since the mid-1930s, the Supreme Court has allowed such delegations of legislative power so long as Congress sets forth an "intelligible principle" to guide the exercise of that power—and principles as nebulous as "the public interest" have been held sufficient.[32] Cooley would not approve. He called it a "settled maxim[] in constitutional law"[33] that "legislative authority[] must be exercised by the legislature itself, and cannot be delegated … to another department."[34] In Cooley's view, Congress's inclusion of some vague "intelligible principle" alongside a sweeping statutory delegation of power would not cure the constitutional ill.[35]

their just authority, so far as their acts may become the subjects of judicial cognizance.").

29 U.S. Const. art. I, § 8, cl. 3.

30 Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 66 (1880).

31 *See* Wickard v. Filburn, 317 U.S. 111 (1942).

32 *See* Aaron Gordon, *Nondelegation*, 12 NYU J.L. & Liberty 718, 724 (2019) (quoting Nat'l Broad. Co. v. United States, 319 U.S. 190, 225 (1943)); *see also* Aaron Gordon, Nondelegation Misinformation: A Rebuttal to "Delegation at the Founding" and Its Progeny 1-12 (Apr. 23, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561062.

33 Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 116–17 (1868).

34 Thomas M. Cooley, A Treatise on the Law of Taxation, Including the Law of Local Assessments 48–49 (1876).

35 Cooley explained that a legislature cannot delegate to a "board the power to determine whether a tax should be laid for the current year, or at what rate, or upon what property." *Id.* at 50. While the legislature "need not prescribe all the details" surrounding collection of a tax, it must "prescribe the rule under which taxation may be laid"—that is, it must "prescribe[] . . . [a] rule . . . which, in its administration, works out the result." *Id.* To illustrate the point, Cooley favorably cited a pair of cases holding that lawmaking bodies with certain powers to tax were required to "vote a precise and definite sum as a tax on the inhabitants of the district," and could not "delegate to [other officials] a discretionary power as to the aggregate amount of tax to be collected." *Id.* at 49 n.1 (citing Robinson v. Dodge, 18 Johns. 351 (N.Y. Sup. Ct. 1820); Trumbull v. White, 5 Hill 46 (N.Y. Sup. Ct. 1843)). It is obvious from these cases' reasoning that a mere "intelligible principle" (i.e., delegating to administrators to the power to raise whatever sum they feel is in the "public interest") would have been insufficient.

Notwithstanding any of what I've said thus far, it would be a mistake to write Cooley off as a Gilded-Age reactionary.[36] Many of his views on civil liberties were progressive, even by modern standards.[37] For instance, take the proposition (espoused by Judge Robert Bork and Justice Antonin Scalia) that courts have no business enforcing any rights not set forth in the Constitution's text.[38] Cooley would've begged to differ.[39] Cooley believed that the Constitution protected an array of unenumerated rights, such as freedom to choose "the fashion of wearing [one's] hair."[40] Justice Scalia would be dismayed.

Or consider the question of whether the Constitution forbids public employers from discriminating based on politics in hiring low-level staff. Justice Scalia said the Constitution did not bar political discrimination.[41] Here too, Cooley felt differently. As he wrote, "a statute would not be constitutional which should proscribe a class or a party for opinion's sake," and Cooley gave as an example an antebellum Maryland law that barred abolitionists from employment in a municipal police department.[42]

The same goes for the Eighth Amendment's ban on "cruel and unusual" punishment. Justices Scalia and Thomas have argued that this clause doesn't forbid punishments that are disproportionate to the offense, but instead only those punishments that are *inherently* cruel.[43] Justice Scalia believed that the Eighth Amendment bars only those modes of punishment considered cruel in 1791

36 Some of Cooley's twentieth century detractors have unfairly done so. *See* Joseph Postell, *The Misunderstood Thomas Cooley: Regulation and Natural Rights from the Founding to the ICC*, 18 Geo. J.L. & Pub. Pol'y 75, 76–78 (2020) (citing writings of detractors).

37 *See* Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law,* 1986 Wis. L. Rev. 83, 140–41 (1986) (Cooley "advocated ideas still associated today with American liberals: equal rights, free speech, and hostility to privileged and powerful corporate interests.").

38 *See* Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting); *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary,* 100th Cong. 249 (1989) (statement of Robert H. Bork).

39 Cooley stridently rejected the notion that "courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed." Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 174 (1868).

40 Thomas M. Cooley, *Ho Ah Kow v. Matthew Nunan*, 27 Am. L. Reg. 676, 685 (1879). Cooley explained that there is "no authority in the state to punish as criminal . . . fashions" that "do[] not prejudice the community." *Id.; see also* Thomas M. Cooley, A Treatise on the Law of Torts: Or the Wrongs which Arise Independent of Contract 286 (1879) ("Neither can the State regulate [a person's] dress or his table, except so far as may be needful for the protection of morality and decency.").

41 *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 92 (1990) (Scalia, J., dissenting).

42 Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 390 & n.1 (1868).

43 *See* Harmelin v. Michigan, 501 U.S. 957, 985 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.); Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in judgment); *id.* at 32 (Thomas, J., concurring in judgment).

when the Amendment was adopted.[44] Cooley did not fully embrace either position. He wrote, although "[w]hat punishment is suited to a specified offence must in general be determined by the legislature," still a "punishment may be unlawful . . . possibly . . . because . . . it is so manifestly out of all proportion to the offence as to shock the moral sense with its barbarity, or because it is a punishment long disused for its cruelty until it has become 'unusual.'"[45]

Cooley was also progressively inclined when it came to the rights of criminal defendants. In discussing the right to counsel, he laid the foundation for recognition of an indigent defendant's right to a publicly funded attorney.[46] And not just any attorney; Cooley wrote that a defendant has a right to *minimally effective* counsel, not by "a feeble and heartless defence . . . . [marked by] inattention or haste."[47]

Cooley's treatise on *Constitutional Limitations* likewise articulated a liberal conception of free speech that foreshadowed the Warren Court's decision a century later in *Brandenburg v. Ohio*. That case held that expression advocating force or even unlawful conduct is protected by the First Amendment unless it involves "incitement to imminent lawless action."[48] Cooley had himself written that "it [is] not … in the power of the State . . . [to] make mere criticism of the constitution or . . . government a crime, however sharp, unreasonable, and intemperate it might be"—"except when [its] evident intent and purpose is to excite rebellion and civil war."[49]

Last but not least is substantive due process. As the Supreme Court has held, the Due Process Clause "forbids the government to infringe certain 'fundamental' liberty interests . . . , no matter what process is provided."[50] Justices Scalia and Thomas consider the doctrine constitutionally illegitimate.[51] I'm not sure Cooley would agree. In his view, the notion of "due process" concerns more than "rules . . . that pertain to forms of procedure."[52] Cooley wrote that "due process"

44 *See* Antonin Scalia, A Matter of Interpretation 145 (1997).

45 Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 296 (1880).

46 S*ee* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

47 Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 335–36 (1868).

48 Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam).

49 Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 429, 428 (1868).

50 Reno v. Flores, 507 U.S. 292, 302 (1993).

51 *See* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 24 (1997); Johnson v. United States, 576 U.S. 591, 608 (2015) (Thomas, J., concurring in judgment).

52 Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 356 (1868).

broadly encompasses all "those principles of civil liberty and constitutional defence which have become established in our system of law."[53]

Cooley's writings also bridge another divide in constitutional discourse—namely the divide *within* the "rights" category between economic liberty and other forms of liberty. For generations, federal courts have exalted the latter class of rights while marginalizing the former.[54] Cooley maintained no such distinction. Like most leading statesmen and jurists of the Reconstruction era,[55] Cooley denied that the Constitution gave government "unlimited power . . . to control and regulate private property and private business."[56] In his view, the guarantee of due process "protects the liberty of employment with the same jealous care with which [it] protects against unlawful confinement behind bolts and bars."[57] And yes, Cooley's conception of economic freedom, again consistent with the prevailing philosophy of the Reconstruction period, encompassed the much-maligned liberty of contract—dun dun duuun!—the bogeyman of constitutional law.[58] Nevertheless, Cooley always made clear that this freedom was subject to such police-power regulations as the legislature may establish to protect the community.[59]

53 *Id.*

54 *See* Don R. Willett & Aaron Gordon, *Rights, Structure, and Remediation,* 131 Yale L.J. 2126, 2157 (2022) ("[I]t is non-economic liberties that enjoy courts' most vigilant protection, while judicial scrutiny of economic and other regulatory measures is almost limitlessly deferential.").

55 *See id.* at 2142–45.

56 Thomas M. Cooley, *Limits to State Control of Private Business,* 1 Princeton Rev. 233, 239 (1878).

57 *Id.* at 270.

58 *See* Thomas M. Cooley, *Limits to State Control of Private Business,* 1 Princeton Rev. 233, 243 (1878) (No "general right to fix the price of commodities or to limit the charges for services can exist as a part of any system of free government."); Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 742 (4th ed. 1878) ("[A] general power in the State to regulate prices [i]s inconsistent with constitutional liberty."); Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 231, 232 (1880) ("The general rule is that every person sui juris has a right to choose his own employment, and to devote his labor to any calling, or at his option to hire it out in the service of others. . . . In general every person may make rules for the regulation of his own business, and may deal with whomsoever he pleases, and refuse to deal with others."); Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 278 (1879) ("[T]he constitution," in "provid[ing] that no person shall be deprived of lite, liberty, or property, except by due process of law," protects "the right to follow all lawful employments. . . . The following of the ordinary and necessary employments . . . cannot be made to depend upon the State's permission or license, except . . . that if the business offers temptations to exceptional abuses, it may be subjected to special and exceptional regulations, and among these may be the requirement of a license.").

59 2 Joseph Story, Commentaries on the Constitution of the United States § 1954 (Thomas M. Cooley ed., 1873). While Cooley maintained that no "general right to fix the price of commodities or to limit the charges for services can exist as a part of any system of free government," *Limits to State Control of Private Business,* 1 Princeton Rev. 233, 243 (1878), he "nevertheless . . . conceded that in some cases this might be done," A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 742

Okay, enough doctrine. My goal tonight is not a soup-to-nuts review of everything Cooley said about the Constitution. Nor do I mean to suggest that everything he said was right just because he said it. The point is simply that, in general, Cooley's understanding of the Constitution embodied a synthesis of Founding- and Reconstruction-era ideas.

Today, in contrast, it seems that those who take seriously constitutional protections for individual rights tend to consign the Constitution's structural provisions to an inferior rank, and vice versa. But why is that?

Instead of retreating to our respective partisan bunkers, perhaps we, like Cooley, can find some common ground at the intersection of Founding- and Reconstruction-era ideas. During the former period, structure dominated constitutional discourse. The original Constitution focused mainly on how power was divided—horizontally based on the type of power, and vertically based on the subject matter. Only a handful of rights were constitutionally guaranteed, and the most meaningful of these applied only to the federal government. Then came the Civil War. And through this bloody struggle, the Nation came to realize that simply dividing up power wasn't enough by itself to safeguard human freedom. A new generation of statesmen thus pushed for constitutional amendments that broadened rights guarantees by forbidding states and localities from violating them.

Note that neither of these goals is necessarily in tension with that of allocating power among various departments. True, as Cooley conceded, the Reconstruction Amendments' additions to the list of constitutional rights strengthened federal authority in some ways. More rights meant more grounds on which fed-

(4th ed. 1878). For example, Cooley explained, "the right to regulate charges . . . may be justified" as to businesses that are "essential to the business of the country, but of which the circumstances give to a few persons a virtual monopoly at each important commercial centre." Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 234, 235 (1880). Similarly, "if [a] business offers temptations to exceptional abuses, it may be subjected to special and exceptional regulations," like "the requirement of a license." Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 278 (1879). And government may "forbid[] . . . discriminat[ion] because of race, color, or previous condition" because "these regulations . . are in the interest of impartiality" and not "burdensome to the business in any sense." Thomas M. Cooley, *Limits to State Control of Private Business,* 1 Princeton Rev. 233, 255 (1878). These are merely examples; Cooley felt that it was "impossible to enumerate all the instances in which police power . . . may be exercised." Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 746 (4th ed. 1878).

eral courts could declare official action void and more wrongs for Congress to remedy through legislation. But we can enshrine more rights while maintaining the decentralized systems of federalism and separation of powers with respect to all other matters political.

This is not to say that federalism and individual liberty *never* butt heads. But neither does this mean that federalism and freedom are conflicting values. For example, it has been well-documented that in the early Republic, federalism was as much the enemy of slavery as its ally.[60] Pro-slavery forces argued strongly against state autonomy, preferring federal supremacy in order to thwart efforts to protect black Americans.[61]

A final point about constitutional common ground: studying Cooley's writings reminds us not only to take Reconstruction-era constitutional principles as seriously as Founding-era ones, but also to take *all* Reconstruction-era constitutional principles seriously—even those that are unfashionable with our twenty-first century political ideologies. Note especially how Cooley and his contemporaries treated constitutional guarantees of economic rights with the same dignity and seriousness as guarantees of non-economic rights. Economic liberty was a core component of the Reconstruction Framers' aspiration of "free soil, free labor, and free men"—to conquer slavery and its economic legacy.[62]

In closing (two words that usually generate thunderous applause), I'd like to highlight some lessons that modern proponents of originalism can take from Cooley's work. The first is more about how to brand originalism than about

60 Paul D. Moreno, *"So Long As Our System Shall Exist": Myth, History, and the New Federalism,* 14 Wm. & Mary Bill Rts. J. 711, 727 (2005); *accord* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review,* 51 Duke L.J. 75, 144 (2001) (cataloguing instances where "endorsement of federal supremacy . . . arguably had the effect of thwarting state efforts to protect black Americans"); Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution,* 36 Am. J. Leg. Hist. 466, 494 (1992) (By 1857, it was "clear that the federal courts would be the allies of the pro-slavery forces. Anti-slavery activists, by contrast, retained powerful influence in the organs of state government" and "maximize[d] the import of this influence by arguing strongly for state autonomy.").

61 Paul D. Moreno, *"So Long As Our System Shall Exist": Myth, History, and the New Federalism,* 14 Wm. & Mary Bill Rts. J. 711, 727 (2005); *accord* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L.J. 75, 144 (2001); Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution,* 36 Am. J. Leg. Hist. 466, 494 (1992).

62 *See* Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 Fordham L. Rev. 459, 468 (2001); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment,* 38 B.C.L. Rev. 1, 72 (1996).

how to practice it. Consider a common criticism leveled against originalism, as articulated by Justice Thurgood Marshall. In a 1987 speech marking the bicentennial of the Constitution, Justice Marshall announced he would celebrate it "as a living document."[63] He noted his disagreement with the "complacent belief that the vision of those who debated and compromised in Philadelphia yielded the 'more perfect Union' . . . we now enjoy."[64] Marshall's colleague, Justice William Brennan, likewise denounced originalism as "facile historicism" expounded by "[t]hose who would restrict claims of right to the values of 1789" and "turn a blind eye to social progress."[65]

These arguments reflect misconceptions about originalism. But originalists do little to dispel them when they deify our original Framers as not just inspired but infallible, while minimizing our Second Founding. It is undeniable that the commendable ideals of the Declaration collided with the condemnable deeds of those who adopted it. One-third of the signers of a document that proclaimed "all men are created equal" were slave owners. Even so, the Declaration's enduring ideals—that we are endowed by our Creator with certain inalienable rights—still lay the foundation for righting wrongs, including the "new birth of freedom" wrought by our Second Founding and the Civil War Amendments that belong at the center—at the very heart—of America's constitutional story.

Defenders of originalism should take a page from Cooley's playbook. He gave those who convened in Philadelphia their due as heroes—*imperfect* heroes, but heroes nonetheless. Cooley also acknowledged that the Constitution of his day reflected a blending of Founding- and Reconstruction-era ideas. In doing so, Cooley practiced originalism while simultaneously heeding the future warnings of those like Thurgood Marshall who cautioned Americans to "be careful, when focusing on the events which took place in Philadelphia . . . , not [to] overlook the momentous events which followed."[66] That is the lesson for us today: we must emphasize that originalism, properly practiced, not only does not compel, but in fact utterly rejects, what Justice Marshall derided as the "complacent belief[s] that the vision" of Philadelphia "yielded the 'more perfect Union' . . . we now enjoy."[67] The story of our Constitution may have begun in Philadelphia,

63 Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution,* 101 Harv. L. Rev. 5 (1987).

64 *Id.* at 1–2.

65 William J. Brennan Jr., *The Constitution of the United States: Contemporary Ratification,* 27 S. Tex. L. Rev. 433, 436 (1986).

66 Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution,* 101 Harv. L. Rev. 5 (1987).

67 *Id.* at 1–2.

but it did not end there, a point that Professor Barnett makes powerfully in his latest book, a tour de force blend of history and theory: *The Original Meaning of the Fourteenth Amendment*.[68]

My central theme tonight has been the idea of constitutional synthesis as reflected in the scholarship of Thomas Cooley. To wrap up, I'd like to underscore an even more transcendent fusion of seemingly conflicting ideas that characterized Cooley's philosophy: that of conservatism on the one hand and progress on the other. As Cooley saw it, "[i]n the life of nations conservatism and progress … go hand in hand; and the former, instead of opposing all change . . . must be awake to the living present, and hopeful of the future."[69]

This duality informed much of Cooley's thinking on the Constitution, which he called "the most conservative instrument of government known to the world."[70] Cooley said, "[p]rogress is assured through the conservative features of the constitution, in harmony with which the progressive spirit of the people acts and moves."[71] And that is what I've sought to show tonight by way of Cooley's writings: that one can, as he put it, acknowledge "the general excellency of the Constitution"[72] and the "cardinal rule" that its meaning was "fixed when it [was] adopted,"[73] while still remaining awake to the living present and hopeful of the future.

Thank you.

68 Randy E. Barnett & Evan Bernick, The Original Meaning of the Fourteenth Amendment (2021).

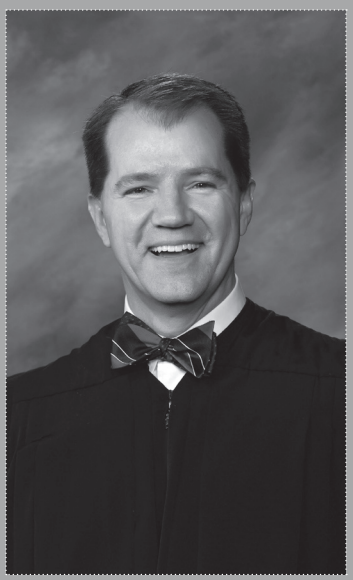
69 Thomas M. Cooley, Address on the Dedication of the Law Lecture Hall of Michigan University 11 (Ann Arbor, The Law Class of the University of Michigan 1863).

70 Thomas M. Cooley, Comparative Merits of Written and Prescriptive Constitutions 15 (1889).

71 *Id.*

72 Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 202 (1880).

73 Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 54, 55 (1868).



Don Willett serves on the United States Court of Appeals for the Fifth Circuit.

He has devoted his professional life to public service. Before joining the federal judiciary, Judge Willett served a dozen years on the Supreme Court of Texas. And before that, he was legal advisor to a Texas Attorney General, a Texas Governor, a U.S. Attorney General, and the President of the United States.

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