The Misunderstood Thomas Cooley: Regulation and Natural Rights from the Founding to the ICC

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ABSTRACT

Although he was regarded by his contemporaries as the most influential legal author of the late 19th Century, Thomas Cooley is underappreciated and understudied today. His legacy is typically misunderstood, which likely contributes to his relative obscurity. He is often inaccurately referred to as an advocate of laissez-faire government. Cooley was a staunch defender of regulation based on the well-established, traditional understanding of the state police power. While he believed that there were limits on regulation, those limits were inherent in the police power itself. Courts should uphold these limits, Cooley argued, but should grant due deference to legislatures. Cooley's commitment to regulation as compatible with natural rights is indicated by his acceptance of the first chairmanship of the Interstate Commerce Commission. Because Congress carefully limited the powers of the Commission, Cooley could accept this responsibility, and his service as the first chair, while brief as a result of declining health, ensured that the Commission remained within constitutional limits.

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Given that he was, by many accounts, the most important legal thinker of his generation, Thomas McIntyre Cooley has received surprisingly little attention from historians, and most treatments of Cooley are unsympathetic. By all appearances, there is only a single book-length biography of Cooley, authored by historian Alan Jones.[1] A handful of law review articles on Cooley supplement this single book-length biography—hardly a legacy befitting a mind that so deeply influenced the legal thinking and development of his time.[2] Cooley was one of the first members of the faculty at the University of Michigan's Law Department and he also served on the Michigan Supreme Court for twenty years, from 1865 to 1885.[3] He was a prolific author, writing many legal treatises on subjects spanning from constitutional law to taxation.[4] Many of these works had a profound influence on the development of the law.[5] And yet he remains an obscure figure.

Those legal historians who do give attention to Cooley do so because they believe his influence on his time was mostly negative. In particular, scholars lament Cooley's most famous work, *Constitutional Limitations*, published just after the Civil War in 1868, for the profound influence it had on the development of "laissez-faire constitutionalism."[6] Various critics assert that *Constitutional Limitations* encouraged a judiciary all too willing to impose an ideology of

1. *See, e.g.*, ALAN H. JONES, THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY: A STUDY IN THE HISTORY OF IDEAS (1987).

2. *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 (1997); James W. Ely, Jr., *Thomas Cooley, "Public Use," and New Directions in Takings Jurisprudence*, 2004 MICH. ST. L. REV. 845 (2004); Carl W. Herstein, *Postmodern Conservatism: The Intellectual Origins of the Engler Court (Part I)*, 59 WAYNE L. REV. 781 (2013).

3. Carrington, *supra* note 2, at 496.

4. Cooley's works include A TREATISE ON THE LAW OF TAXATION (1876), A TREATISE ON THE LAW OF TORTS (1879), and THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA (1880).

5. As Carrington writes, by 1886 Cooley "was the most respected lawyer in America." Carrington, *supra* note 2, at 495; *see also* Philip S. Paludan, *Law and the Failure of Reconstruction: The Case of Thomas Cooley*, 33 J. HIST. IDEAS 597, 598 (1972) ("[*Constitutional Limitations*] became America's second constitution. Cooley became the most influential legal author of the late nineteenth and early twentieth centuries.").

6. *See* THOMAS M. COOLEY, A TREATISE UPON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

laissez-faire capitalism in the face of progressive state and national government policies. In a widely cited book, Sidney Fine wrote that

> It was in the courts that the idea of laissez faire won its greatest victory in the three and one-half decades after the Civil War. Here, the laissez-faire views of academic and popular theorists and of practical businessmen were translated from theory into practice. Bar and bench joined forces in making laissez faire an important element of constitutional doctrine and in establishing the courts as the ultimate censors of virtually all forms of social and economic legislation.[7]

"The work most responsible" for this development, Fine declared, "was Thomas M. Cooley's *Treatise on Constitutional Limitations*."[8] Fine noted that this book was probably the most frequently cited work by courts on constitutional law during the latter half of the nineteenth century.[9] In short, for those historians who note Cooley's influence in their writing, his chief legacy is his detrimental effect on American jurisprudence during the latter half of the nineteenth century. He played a central role in turning the courts into instruments for the imposition of laissez-faire ideology when conditions required a different approach.

This diagnosis of Cooley is best reflected in Benjamin Twiss's *Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court*, published in 1942.[10] Twiss wrote that, "Eighteen Sixty-Eight marks a turning point in American constitutional law. In that year laissez-faire capitalism was supplied with a legal ideology in Thomas M. Cooley's *Constitutional Limitations* almost as a direct counter to the appearance a year earlier of Karl Marx's *Das Kapital*."[11] This was true even though Cooley, in Twiss's view, "made up many of the principles out of his own head."[12] For decades, this charge against Cooley stuck, and was repeated by other scholarly commentators until it became consensus that Cooley offered the most prominent and radical defense of laissez-faire capitalism, a philosophy courts relied upon to strike down government regulation restricting the use of property. In *Regulating Business by Independent Commission*, for instance, Marver Bernstein asserted that "Cooley . . . regarded the judges as the spokesmen for the principle of the unfettered rights of property and as protectors of the *status quo* against the threat of popular power."[13] An entire era of legal history has been named after this contribution—the period of

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7. SIDNEY FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT: 1865–1901, at 126 (1964).

8. *Id*. at 142.

9. *Id*.

10. *See* BENJAMIN TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT (1942).

11. *Id*. at 18.

12. *Id*. at 33.

13. MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 32–33 (1955).

"laissez-faire constitutionalism"—and Cooley is said to have provided the chief intellectual inspiration for the period.[14]

These scholars are right about one thing: Cooley was probably the most important legal figure of the latter half of the nineteenth century. As Paul Carrington writes, by the end of his career Cooley was "the most respected lawyer in America and among the most widely respected persons in American public life."[15] His most famous treatise, *Constitutional Limitations*, published in 1868, was "the most scholarly and certainly the most admired American law book" by the end of the century.[16] Since his passing, however, Cooley's reputation has declined considerably, and he is now known simply as an intellectual founder of laissez-faire jurisprudence.

This is unfortunate because the representation of Cooley as a laissez-faire ideologue is fundamentally misleading, as this Article explains in Section II. But it also raises an important puzzle, for Cooley also served as the first chairperson of the Interstate Commerce Commission (ICC), which is widely regarded as the agency that launched the modern administrative state.[17] How could the great laissez-faire intellectual of the post-Civil War period become the chairman of the first modern regulatory agency? If the ICC is, as scholars often suggest, the national government's first major foray into national regulation, and the first step towards the modern administrative state, how could Cooley have accepted appointment as its first leader?

The predominant narrative about Cooley as a laissez-faire ideologue, in short, raises important questions about how to assess Cooley's career. Recently, some scholars have taken a more careful look at Cooley's writings and portrayed him not as a laissez-faire ideologue but as a Jacksonian Democrat committed to the doctrine of equal rights.[18] While certainly more accurate than the portrayal of Cooley as a doctrinaire laissez-faire capitalist, this portrayal nevertheless underemphasizes Cooley's agreement with the natural rights tradition of the American Founding. This natural rights tradition grounded Cooley's own understanding of

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14. *See, e.g.*, Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293 (1985); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970 (1975).

15. Carrington, *supra* note 2, at 495.

16. *Id*. at 496–97.

17. See *infra* note 97.

18. The work of Alan Jones, in particular, was influential in depicting Cooley along these lines. *See* Alan Jones, *Thomas M. Cooley and the Michigan Supreme Court: 1865–1885*, 10 AM. J. LEGAL HIST. 97 (1966); Alan Jones, *Thomas M. Cooley and the Interstate Commerce Commission: Continuity and Change in the Doctrine of Equal Rights*, 81 POL. SCI. Q. 602 (1966) [hereinafter Cooley ICC]; Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967) [hereinafter *Reconsideration*]; JONES, *supra* note 1. Subsequent scholars have followed Jones in portraying Cooley as a Jacksonian. *See* Carrington, *supra* note 2, at 507–18; Michael Les Benedict, *supra* note 14, at 319, 330–31; HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 55–60 (1993).

the extent of the police power and the distinction between legitimate and illegitimate governmental regulation.

This Article aims to provide a deeper explanation of Cooley's legal thought and career by showing its continuity with the natural rights principles and common-law tradition of the American Founding. In doing so, this Article addresses Cooley's views on the scope of regulation under the police power, thoroughly debunking the notion that Cooley was an advocate of laissez-faire. In addition, it examines Cooley's views on railroad regulation prior to, and during, his work with the Interstate Commerce Commission. While Jacksonian notions about government's limited role in subsidizing commercial development and corporate power certainly played a role in Cooley's thinking, those notions were perfectly compatible with common-law principles about regulation through charters and regulation of common carriers.[19] Cooley's own Jacksonian philosophy, in short, was perfectly compatible with the earlier tradition of the American Founding and its emphasis on natural rights.

Section I of this Article describes the natural rights foundation of the American Founding and its approach to regulation. It demonstrates that regulation was seen as perfectly compatible with natural rights to liberty and property and was frequently defended as necessary for both preserving and expanding these rights in pre-Civil War legal opinions. Section II connects Cooley's views on the appropriate role of regulation—contained in his famous work on *Constitutional Limitations* and in other places—with the earlier natural rights tradition. As Section II argues, Cooley's arguments on regulation mirrored those of the pre-Civil War thinkers and jurists.[20] Seeing this continuity allows us to understand Cooley not as a laissez-faire ideologue or simply a Jacksonian Democrat, but as an adherent of the pre-Jacksonian tradition. Section III takes up the curious and puzzling case of Cooley's leadership of the ICC. A Republican maverick appointed by a Democratic president, Cooley was respected as an impartial figure who could guide the Commission on a neutral path between shippers and railroads.[21] He earned this reputation in the years leading up to the creation of the ICC by being respectful of the limits on government authority over railroads, yet also critical of railroads' reliance on government subsidy and eminent domain. While Jacksonian influences certainly played a role in his skepticism about corporate power in general and railroad power in particular, Cooley's guidance of the Commission was also rooted in traditional notions of common-law regulation and the police power. Thus, where some scholars see discontinuity between Cooley's laissez-faire reputation and his populist leadership of the ICC, it is possible to understand these two phases of Cooley's career as compatible, as both

19. *See infra* notes 53–71 and accompanying text.

20. *See infra* notes 55–71 and accompanying text.

21. As Paul Carrington writes, at the time of Cooley's appointment he was viewed as "the one person in America sufficiently disinterested to be trusted by all sides, and thus to give the Commission a viable chance of useful service." Carrington, *supra* note 2, at 498.

were animated by respect for the legitimate purposes of government regulation and the constitutional limits on it.

I. REGULATION AND NATURAL RIGHTS IN THE ANTEBELLUM REPUBLIC

To understand Cooley's approach to regulation, which belies his reputation as a laissez-faire ideologue, it is important to compare Cooley's views on regulation to the antebellum legal tradition that dominated Cooley's upbringing and figured prominently in his writings after the Civil War. Although there is a widespread belief that the economy was essentially unregulated in antebellum America, historians have debunked this "myth of laissez-faire."[22] Regulation was a pervasive feature of American life before the Civil War.[23] Understanding the scope of regulation in early America, and how regulation was reconciled with Americans' belief in natural rights to liberty and property, is essential for understanding Cooley's own conception of the scope and rationale for regulation. This Article therefore begins with a brief explanation of the scope and rationale for regulation in antebellum America.[24]

A. The Scope of Regulation in the Antebellum Republic

Given Cooley's emphasis on the extent of the police power in his most famous work, it is most helpful to focus on state- and local-level regulation during the antebellum period. While the national government engaged in some regulatory activities prior to the Civil War, those activities were far more limited and were related to specified powers in a written constitution, rather than pursued under the general heading of the state-level police power.

Across a variety of states in the North, the South, and the newly established Western states, the police power was employed in remarkably similar fashion. Most states required inspections for goods to be sold in the open market. These requirements existed in states from all parts of the country, such as Massachusetts, Pennsylvania, Connecticut, Georgia, and Michigan.[25] These inspections governed matters such as the packing and dimensions of containers and the quality of the goods sold. Commodities such as beef, pork, fish, lumber, tobacco, salt, bar iron, and the like were subject to these inspection requirements.[26] State governments often paired these regulations with weights and

22. *See* WILLIAM NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 3–8 (1996).

23. *See* LAWRENCE FRIEDMAN, THE HISTORY OF AMERICAN LAW (3d ed. 2005) and NOVAK, *supra* note 22, *passim*.

24. Much of the following discussion is drawn from previously published articles. *See* Joseph Postell, *The Right Kind of Regulation: What the Founders Thought About Regulation*, *in* REDISCOVERING POLITICAL ECONOMY (Joseph Postell and Bradley C.S. Watson, eds.) 209–30 (2011); Postell, *Regulation During the American Founding: Achieving Liberalism and Republicanism*, 5 AM. POL. THOUGHT 80 (2016).

25. FRIEDMAN, *supra* note 23, at 183; NOVAK, *supra* note 22, at 15.

26. OSCAR HANDLIN & MARY HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861, at 64–68 (1947); LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776–1860, at 204–05 (1948).

measures laws that prevented fraud.[27] In addition, licenses were required for entry into various occupations, including lawyers and doctors, innkeepers and tavern owners, and auctioneers.[28] The common law of nuisance and trespass prevented certain environmental injuries such as factories that emitted foul smells or pigsties that affected other citizens' enjoyment of their property.[29]

A wide variety of regulations governing public businesses and common carriers supplemented these regulations governing trade in commodities, licensing of occupations, and prevention of environmental nuisances. During the antebellum period, states used special rather than general incorporation laws to charter corporate entities such as banks, transportation companies, insurance companies, water companies, and bridges. Regulatory requirements frequently accompanied the charters. In Vermont, the state legislature attached a six percent maximum interest rate on a charter granted to "The Farmer's Bank."[30] The Bank of Philadelphia had to pay a bonus of $135,000 to the state for its charter in 1803.[31] Many of these charters were granted to common carriers that had to follow regulatory requirements in exchange for the privilege of operating on public highways. Innkeepers, cartmen, ferrymen, and bridge companies were required to comply with various regulatory requirements to make their rates publicly visible, and as one historian explains, "to grant equality of access to members of the community seeking to use them."[32] Of course, antebellum America also featured many state regulations that arose out of moral considerations. From billiard and gaming halls to liquor sales to "idle shows,"[33] most states imposed regulatory limitations on behavior that would disturb the public morals or the public order.[34] Connecticut and Michigan, for instance, banned performances of for-profit puppet shows, rope or wire dancing, and other types of entertainment.[35] In addition, states and localities had broad authority to protect public health.[36] For example, state and local governments could control and limit the burial of the dead in cemeteries and could establish quarantine laws to prevent diseases from infiltrating cities. In *Vadine's Case* (1828), for instance, the Massachusetts Supreme Court upheld a Boston bylaw that prohibited anyone from removing "materials that might cause disease or discomfort" from dwellings without a license.[37]

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27. Handlin & Handlin, *supra* note 26, at 206.

28. FRIEDMAN, *supra* note 23, at 185; HANDLIN & HANDLIN, *supra* note 26, at 69–74; Hartz, *supra* note 26, at 206–07; WILLIAM E. NELSON, THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 123–24 (1975).

29. NELSON, *supra* note 28, at 121–22.

30. FRIEDMAN, *supra* note 23, at 151.

31. HARTZ, *supra* note 26, at 54–56.

32. Harry Scheiber, *Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America*, 107 YALE L.J. 823, 845 (1997).

33. FRIEDMAN, *supra* note 23, at 127.

34. Among many sources chronicling these morals regulations, see NOVAK, *supra* note 22, at 149–89.

35. *Id*. at 155, 256 n.54.

36. *Id*. 191–233.

37. *See* GILLMAN, *supra* note 18, at 51–53.

Antebellum regulations spanned inspections of goods to be sold, licensing of certain occupations, public health regulations (including environmental regulations), common carrier regulations, and regulations of corporations established through specific charters. While this description of antebellum regulation is not exhaustive, it is sufficient to demonstrate that, in the words of Lawrence Friedman, "[b]y reputation, the nineteenth century was the high noon of *laissez-faire* . . . But when we actually burrow into the past, what we find is much more complicated."[38] However, he argues "that nineteenth-century government was certainly in no way a leviathan. Even the bigger states had only a weak hold over the economy. Some programs probably only existed on paper. Many inspection laws, licensing laws, and laws about weights and measures were probably weakly enforced."[39] The existence of these regulations does not mean that there are no important differences between the nineteenth-century approach and that of the twentieth or twenty-first. Regulators were local and held accountable through elections, which helped ensure that regulation did not expand beyond what was useful to the community. In addition, minimal enforcement mechanisms existed in this pre-civil-service period.[40] Nevertheless, it is clear that the legitimacy of regulation became well established in antebellum America.

B. The Rationale for Regulation in the Antebellum Republic

On the surface, it might appear that the existence of regulation in early America is at odds with the basic philosophy of the American Founding, which emphasized certain inalienable rights, including the rights to liberty and property. Regulations that prevented people from burying their dead wherever they chose, or from setting up billiard halls and taverns, or from practicing medicine or auctioneering, might appear to be violations of these natural and inalienable rights. However, when the validity of these regulations was challenged during the early republic, judges and politicians argued that they were perfectly compatible with a government established to protect natural rights.

Some people affected by these regulations challenged their legitimacy on precisely these grounds in courts of law. In these cases, jurists had to determine whether regulation could be reconciled with natural rights. Judges had little difficulty drawing such conclusions. Legal historians who ably chronicle the extent of government regulation during the nineteenth century often simplistically conclude that private rights yielded to the public good and to practical necessity in early America. William Novak, for instance, argues that "nineteenth-century America . . . was predicated on the elemental assumption that public interest was superior to private interest."[41] Brian Balogh, another historian, similarly writes

38. FRIEDMAN, *supra* note 23, at 120.

39. *Id*. at 127.

40. *See* Joseph Postell, *Regulation, Administration, and the Rule of Law in the Early Republic*, *in* FREEDOM AND THE RULE OF LAW 41–70 (Anthony A. Peacock ed., 2010).

41. NOVAK, *supra* note 22, at 9.

that "[t]he commonwealth tradition stressed that the public good derived from placing the polity's interests ahead of the rights of individual citizens."[42] According to Balogh:

> The rights of citizens were not contracted for in a universal state of nature, as enlightenment thinkers had begun to argue. Rather, they were derived specifically from loyalty to the republic. The republic's safety and welfare, in turn, trumped individual rights when the two were in conflict.[43]

According to these arguments, the existence of regulation is evidence that, in practice, individual rights were subordinated to the public interest and the common good when the two came in conflict.[44]

This is *not* how judges and legal thinkers in the antebellum period understood regulation. In their view, regulation was perfectly compatible with a regime founded on the basis of individual rights, and in many cases, regulation was necessary to preserve or even expand natural rights.[45] When two churches challenged an 1823 New York City bylaw forbidding the burial of the dead in a specific portion of the city, the New York Supreme Court responded by affirming that "no property has, in this instance, been entered upon or taken."[46] Instead, the regulation merely reflected the legitimate "power so to order the use of private property . . . to prevent its proving pernicious to the citizens generally."[47] Several years later, the Massachusetts Supreme Judicial Court *overturned* a burial regulation requiring a license before bringing a dead body into the town for burial. The court sided with the undertaker of the Catholic Church in Boston, holding that the regulation was not necessary for the public health. The court justified its decision as follows:

> [T]he law will not allow the right of private property to be invaded under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation . . . It is a clear and direct infringement of the right of property, without any compensating advantages, and not a police regulation made in good faith for the preservation of health.[48]

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42. BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA 24 (2009).

43. *Id*. at 30.

44. For further discussion on how this dispute relates to the scholarly debate over the "liberal" and "republican" interpretations of the American Founding, see Postell, *Regulation During the American Founding*, *supra* note 24.

45. *See generally* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003). I originally came across many of the cases discussed here thanks to Claeys's research, and I am grateful to him for help formulating the arguments in this section.

46. Presbyterian Church v. City of New York, 5 Cow. 538, 542 (N.Y. Sup. Ct. 1826).

47. Coates v. City of New York, 7 Cow. 585, 606 (N.Y. Sup. Ct. 1827).

48. Austin v. Murray, 33 Mass. 121, 125 (1834).

Although the outcomes of the cases were different—in some cases, the regulations were upheld, while in others, they were overturned—each of these cases rested on the same principle: that regulations to protect the public health did not take away property rights but actually ordered their use so that the rights of all could be enjoyed.

The underlying rationale for regulation, in these decisions and others, was that regulations protected and expanded natural liberty and property rights rather than sacrifice them to the public interest. The New York Supreme Court, defending traffic regulations in New York Harbor, explained in *Vanderbilt v. Adams* (1827) that "the power exercised in this case is essentially necessary for the purpose of protecting the rights of all concerned." Therefore, the regulation was "not, in the legitimate sense of the term, a violation of any right."[49] Instead, the court explained, "It is for the better protection and enjoyment of that absolute dominion which the individual claims."[50] In the view of these judges and many others throughout the antebellum period, legitimate regulations better secured, and even expanded, the rights of all by preventing the injurious use of these rights by individuals.

Far from advocating a laissez-faire policy with regard to the use of liberty and property rights, political and legal thinkers justified regulations as compatible with and necessary for the enjoyment of these rights. Thomas Cooley was well aware of this established regime of natural rights regulation and defended it in his best-known treatise.[51] In the very work that has induced historians to heap scorn upon Cooley, Cooley endorsed the regulatory framework discussed in this section.[52]

II. COOLEY AND THE NATURAL RIGHTS REGULATORY FRAMEWORK

As many of his biographers and scholarly commentators have noted, Cooley grew up around Jacksonian Democracy and was himself a "Locofoco" Democrat until he switched to the new Republican Party just prior to the Civil War due to his opposition to slavery.[53] Central to Jacksonian Democracy was hostility to government interventions and actions that threatened to promote the interests of a particular class of people over another. In particular, Jacksonians reviled policies allowing wealthy, powerful, and organized interests to use government to promote their own interests. Jacksonians were especially suspicious of government charters, licenses, and monopolies. They attacked licensing requirements for medicine and law which were widely implemented and defended during the Founding period.[54]

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49. Vanderbilt v. Adams, 7 Cow. 349, 351 (N.Y. Sup. Ct. 1827).
50. *Id*. at 351–52.
51. COOLEY, *supra* note 6, at 572–96.
52. *Id*. at 584–85.
53. *See supra* note 18.
54. *See* Carrington, *supra* note 2, at 510.

One might therefore expect to see in Cooley a more hostile posture towards the police power and government regulation than one finds in the early American tradition. However, Cooley's treatment of the police power was remarkably similar to that of the earlier tradition, even on the questions of monopolies and licensing. If, after reading the various scholarly assessments of Cooley's influence on the doctrine of laissez-faire in the late nineteenth century, one expects to encounter the arguments of a laissez-faire thinker in his *Constitutional Limitations*, one will be highly surprised by his chapters on the scope and legitimacy of regulation.

A. The Police Power and the Power to Regulate

While Chapter 11 from *Constitutional Limitations* titled "Of the Protection to Property by the 'Law of the Land'" made Cooley famous (or infamous) in the eyes of historians, Cooley's description of the police power in Chapter 16 makes clear that he accepted the wide variety of regulations that existed in Antebellum America.[55]

Like the antebellum jurists, Cooley defined the police power as a power to preserve rights, rather than infringe upon them. He wrote:

> The police of a State embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offenses 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 uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.[56]

The purpose of the police power, in other words, is to ensure that citizens are able to enjoy their rights more fully by preventing injuries by one citizen upon the rights of another. Police power regulations prevent conflicts of rights, in Cooley's words, and ensure that everyone enjoys their rights "consistent with a like enjoyment of rights by others."[57] Cooley quoted Justice Lemuel Shaw's famous definition of the police power in *Commonwealth v. Alger*, that "[r]ights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious."[58]

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55. Fine, for instance, writes that Cooley's work was "most responsible for the transformation of due process of law from a procedural into a substantive guarantee," and that "[o]f chief significance to constitutional development was Cooley's chapter 'Of the Protection to Property by 'the Law of the Land.'" FINE, *supra* note 7, at 142. Curiously, Fine acknowledged Cooley's work on the police power, and even in a footnote granted that "Cooley was not unwilling to permit a fairly wide exercise of the police power." *Id*. at 152 n.65. Nevertheless, in the main text of his work, Fine consistently asserted that Cooley believed "that the police power should be construed in a narrow rather than in a broad sense and that private rights should be placed before the claims of society." *Id*. at 151.

56. COOLEY, *supra* note 6, at 572.

57. *Id*. 6, at 572.

58. COOLEY, *supra* note 6, at 573; Commonwealth v. Alger, 61 Mass. 53 (1851).

After laying out a definition of the police power founded upon the principle of rights protection, Cooley proceeded to justify various aspects of the police power as consistent with this definition. He defended the various state governments' authority over liquor licensing in the face of constitutional challenges. He argued that liquor regulations that "assume to regulate only, and to prohibit sales by other persons than those who should be licensed by the public authorities, have not suggested any serious question of constitutional power."[59] Instead, he maintained that "[t]hey are but the ordinary police regulations, such as the State may make in respect to all classes of trade or employment."[60] They are "established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances," he wrote.[61] Cooley acknowledged that "there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes."[62] However, he maintained the legitimacy of such policies "rest[s] exclusively in the legislative wisdom," and is not a matter for courts to address.[63]

Cooley also discussed the other areas in which police regulations were well-established. "Among these, quarantine regulations and health laws of every description will readily suggest themselves," he wrote.[64] His assessment of these regulations was clear: "These regulations have generally passed unchallenged. The right to pass inspection laws, and to levy duties so far as may be necessary to render them effectual, is also undoubted, and is expressly recognized by the Constitution."[65] Beyond these inspection regulations, Cooley defended those which "regulate the times and manner of transacting business with a view to facilitate trade, secure order, and prevent confusion."[66] Thus, Cooley defended the constitutional legitimacy not only of liquor regulations but also of quarantine and health laws, inspection laws, and other regulations of trade.

Cooley's defense of regulation did not stop here; he proceeded to defend the regulations at issue in *Vanderbilt v. Adams*, discussed above.[67] According to Cooley, the law authorizing traffic regulations in New York Harbor in this case was "sustained as a regulation prescribing the manner of exercising individual rights employed in commerce."[68] In a footnote, Cooley cited the court's opinion upholding the regulation as "stat[ing] very clearly the principle on which police

59. COOLEY, *supra* note 6, at 518.
60. *Id.*
61. *Id.* at 583.
62. *Id.*
63. *Id.* at 584.
64. *Id.*
65. *Id.* at 584–85. Cooley cited the provision of Article I, section 10, that states "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws."
66. COOLEY, *supra* note 6, at 585.
67. *See* Vanderbilt v. Adams, 7 Cow. 349, 351 (N.Y. Sup. Ct. 1827).
68. COOLEY, *supra* note 6, at 585.

regulations, in such cases, are sustainable."[69] Cooley quoted the court's statement, from the opinion in *Vanderbilt*, that "the power exercised in this case is essentially necessary for the purpose of protecting the rights of all concerned. It is not, in the legitimate sense of the term, a violation of any right, but the exercise of a power indispensably necessary, where an extensive commerce is carried on."[70] The legitimate ground of regulation for Cooley was the same as that of the antebellum jurists upon which he relied in his chapter on the police power. Regulation was legitimate when it protected and promoted the rights of all, and this justified a wide variety of regulatory activity under the police power.

In practice, Cooley was willing to support a broad use of the police power to protect and expand the enjoyment of the rights of all. As he summarized:

> It would be quite impossible to enumerate all the instance in which police power is or may be exercised, because the various cases in which the exercise of 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.[71]

This statement hardly makes Cooley sound like an advocate of laissez-faire, but it does illustrate his emphasis on the protection of individual rights as the basis for the police power. In this sense, Cooley was following the natural-rights tradition in grounding the police power in the individual natural rights possessed by all citizens.

B. The Limits of Regulation

As indicated, at times Cooley's acceptance of the power to regulate seemed to admit an extremely wide range for regulation. In 1878, for instance, ten years after publishing the first edition of *Constitutional Limitations*, he wrote that:

> [E]very item of personal property, real or personal, every kind of business, every moment of the living person where he may come in contact with others, the conduct of the living and the disposal of the dead, are all brought within the control of regulations established by the state, or by customs which the state adopts, and which thus become its regulations.[72]

However, Cooley noted the almost universal acceptance of the notion that the regulatory power of the state is limited by some principle: "while this is asserted in very positive terms, it is affirmed with equal positiveness, that there ought to

69. *Id*. at 585 n.1.
70. *Id*. at 585 (quoting *Vanderbilt*, 7 Cow. at 351).
71. *Id*. at 594.
72. Thomas M. Cooley, *Limits to State Control of Private Business*, 1 PRINCETON REV. 233, 239 (1878).

be and are some limits to the right to establish such regulations."[73] "What the limits are and how they are to be found, is the question," he concluded.[74] It was generally agreed that the power to regulate was robust but not unlimited, and Cooley sought to identify the contours of those limits.

Cooley's conclusion in both *Constitutional Limitations* and his article ten years later was that the police power itself provided its own limitations. If a regulation was related to the ends for which the police power is instituted, then it was legitimate, but if it only pretended to advance those aims, then it could not be justified. Cooley cited several antebellum cases for this proposition, including part of the opinion in *Vanderbilt v. Adams* in which the court said that the harbor regulations:

> would not be upheld, if exerted beyond what may be considered a necessary police regulation. The line between what would be a clear invasion of right on the one hand, and regulations not lessening the value of the right, and calculated for the benefit of all, must be distinctly marked.[75]

In that case, Cooley noted, the court asserted the power to invalidate regulations that did not serve the purposes of the police power.

And, Cooley explained, antebellum judges sometimes *did* invalidate regulations that pretended to promote these ends but were not closely related to public health or safety. In *Austin v. Murray*, discussed above,[76] the Massachusetts Supreme Judicial Court invalidated a burial regulation that was not actually necessary or useful for promoting public health. Cooley took note of this case in another chapter of *Constitutional Limitations*, explaining that:

> [I]f [a by-law] assumes to be a police regulation, but deprives a party of the use of his property without regard to the public good, under the pretense of the preservation of health, when it is manifest that such is not the object and purpose of the regulation, it will be set aside as a clear and direct infringement of the right of property without any compensating advantages.[77]

Cooley cited other cases in support of this judicial duty to invalidate pretended police power regulations that actually invaded the right to property, including a Michigan case in which a Detroit regulation banning slaughterhouses altogether was held void.[78]

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73. *Id*.
74. *Id*. at 240.
75. COOLEY, *supra* note 6, at 585 (quoting *Vanderbilt*, 7 Cow. at 351).
76. See *supra* text accompanying note 48.
77. COOLEY, *supra* note 6, at 203.
78. *Id*. at at 204 n. 2. The case was Wreford v. People, 14 Mich. 41 (1865). Cooley cited a handful of other cases from multiple states during the same period in this footnote.

Judges would therefore have an important, but limited role in ensuring that regulations fit within the proper boundaries of the police power. Cooley argued that courts had to refrain from second-guessing the wisdom of regulation under the guise of evaluating whether it truly promoted the public benefit. When he addressed the right of town selectmen to license the casks in which gin is sold and the right of municipalities to license the sale of liquor, Cooley noted the highly invasive nature of these powers: "there is no instance in which the power of the legislature to make such regulations . . . appears in a more striking light than in the case of these statutes."[79] Still, Cooley defended such laws, arguing that they "must be justified upon the highest reasons of public benefit; but, whether satisfactory or not, they rest exclusively in the legislative wisdom."[80]

In spite of this, Cooley reserved a role for courts in striking down regulations that were not meant to advance the proper ends of the police power. Cooley discussed the power of states to regulate corporations in their charters and even to amend existing charters as a form of regulation, and he defended the practice with certain limits:

> the regulations must have reference to the comfort, safety, or welfare of society. . . . In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise. . . . The maxim, *Sic utere tuo ut alienum non laedas* ["Use your own property in such a manner as not to injure that of another"], is that which lies at the foundation of the power; and to whatever enactment affecting the management and business of private corporations it cannot fairly be applied, the power itself will not extend.[81]

This would presumably require some judicial discretion in determining in specific cases which side of the line a regulation falls on—whether it genuinely promoted the ends of the police power or merely pretended to do so. As Cooley wrote elsewhere in *Constitutional Limitations*:

> Municipal by-laws must also be reasonable. Whenever they appear not to be so, the court must, as a matter of law, declare them void. To render them reasonable, they should tend in some degree to the accomplishment of the objects for which the [municipal] corporation was created and its powers conferred.[82]

In support of this judicial responsibility to declare illegitimate regulations unlawful, Cooley cited numerous cases and examples, including an exorbitant licensing fee for selling liquor that was held invalid "as being in its nature prohibitory."[83]

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79. COOLEY, *supra* note 6, at 583.
80. *Id*. at 584.
81. *Id*. at at 576–77.
82. *Id*. at 200–01.
83. *Id*. at 201. Cooley cited Ex Parte Burnett, 30 Ala. 461 (1857) and Craig v. Burnett, 32 Ala. 728 (1858).

Returning to this question in the wake of *Munn v. Illinois*, Cooley attempted to outline several principles to guide inquiries into whether a regulation was legitimate or beyond the proper scope of the police power. Admitting that "[t]he rules by which these limits may be determined are, from the nature of the case, incapable of being precisely indicated," Cooley nevertheless suggested that "the following ought to be unquestioned":

> 1. Whatever in modern times has generally been looked upon as being outside the sphere of legislation, should be regarded as finally eliminated from state authority. . . . The gradual transition from despotism to freedom has been mainly accomplished by the dropping out one by one of obnoxious and despotic powers. . . . 2. Wherever an extreme power has been supported by special and exceptional reasons, it should be regarded as gone when the reasons have ceased to exist. . . . 3. A questionable power, long disused, should be considered abandoned or recalled. Under this head may be instanced the power to fix the price of labor.[84]

Much of the basis for these limitations came from historical practice or the existence of special circumstances. Cooley's first and third principles—that whatever "in modern times" is thought to be beyond the scope of governmental power should be eliminated and that the disuse of a questionable power should be considered recalled by the people—are determined by historical practice. The second principle—that "extreme" powers supported by appeals to "exceptional" circumstances should cease when the circumstances pass away—resembles something like the prerogative power, or the power to act beyond law due to necessity. These limits would in practice be quite robust. Cooley noted that these principles would foreclose many regulatory powers once used under the British common law. Nevertheless, they hardly placed shackles on regulation or strictly limited the states' police powers.

C. Cooley and the Era of "Laissez-Faire Constitutionalism"

Throughout his career, in both *Constitutional Limitations* and in articles published decades later, Cooley accepted the need for expansive regulation under the police power. While Cooley searched for limits on the power of the government to regulate liberty and property and accepted a judicial role in imposing those limits, neither he nor the Founding-era tradition that he followed was laissez-faire in orientation. To the extent that Cooley's views influenced the jurisprudence of the so-called "*Lochner*" era, they were not a laissez-faire innovation but a continuation of the earlier approach to evaluating the reasonableness of regulatory action under the police power.

As indicated earlier, scholars have criticized Cooley for inventing a judicial power to limit the legislative power of states by adding a substantive component

84. Cooley, *supra* note 72, at 269–70.

to the guarantee of due process.[85] Even Alan Jones, a relatively sympathetic biographer, granted that "Cooley did not fully realize the degree to which a doctrine of implied limitations left an opening for judges to impose their own views on constitutional questions."[86] Indeed, Cooley emphatically endorsed the notion of substantive due process not only in *Constitutional Limitations*, but also in his 1878 article on the limits of government power: "The American constitutions, in providing that no man shall be deprived of life, liberty, or property without due process of law, should be understood as protecting the liberty of employment with the same jealous care with which they protect against unlawful confinement behind bolts and bars."[87] But in light of the historical evidence upon which Cooley relied in making these claims, Cooley can hardly be accused of inventing this idea of substantive due process out of thin air. Instead, Cooley relied heavily on historical precedent and tradition to support the idea that government's police powers were limited by their purposes and that police power cannot be used to infringe on liberty and property rights.

Cooley's endorsement of the states' regulatory powers, as well as his historical justification for judicially-imposed limits on those powers, points to a much different understanding of both Cooley and of the period of law that he influenced so deeply. A careful examination of Cooley and his era indicates that neither can be accurately called laissez-faire in orientation. As explained in this Section, Cooley believed that constitutionalism required limits on regulation and that the judiciary would play a role in enforcing those limits. But as he examined the legal tradition and precedents of the early nineteenth century, he saw ample precedent in favor of these judicially enforced limits, especially given that Cooley advocated some deference to legislative determinations of what the police power required. As Jones explains, Cooley's chapter on substantive due process has been misinterpreted:

> [Cooley's] most creative effort was his clear assignment of responsibility for protection of property from arbitrary legislative action to the "due process of law" clause of state constitutions. He devoted a chapter [in *Constitutional Limitations*] to this problem, and this is the chapter commentators have fastened on to the neglect of the rest of the treatise in their interpretation of Cooley as an apologist for laissez-faire capitalism.
>
> The chapter has no such sinister meaning because Cooley had no special concern for the protection of property rights. He certainly believed in the rights of private property, but he never considered them absolute or even paramount.[88]

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85. In a particularly scathing passage, Sidney Fine noted Cooley's "rather free translation of the due-process clause as a limiting factor on governmental action," but that "he favored no such liberal interpretation of the Constitution as a basis for positive action on the part of the state." He accused Cooley of intellectual inconsistency: "Cooley was apparently willing to stretch the meaning of the Constitution if it meant a restriction on the powers of government but not if its result would be an extension of governmental authority." FINE, *supra* note 7, at 142.

86. *Reconsideration*, *supra* note 18, at 760.

87. Cooley, *supra* note 72, at 270.

88. *Reconsideration*, *supra* note 18, at 760.

What Cooley was really doing in grounding the limits of the police power in notions of due process, Jones argues, was "provid[ing] an authoritative definition by which judges could find a written constitutional limitation to various types of legislative action."[89] This approach to constitutional limitation would actually discipline the courts by preventing them from going outside of the written constitution in inquiring into the reasonableness of regulations:

> "By looking to history he meant to deprive judges of the right to define due process on the basis of reason or natural justice. As he said elsewhere in his treatise (and in his judicial opinions), judges should not run a race of opinions upon points of right, reason, and expediency with the law-making power."[90]

Cooley consistently argued that while judges had to enforce the limits on the states' regulatory powers, they should exercise restraint in doing so, only invalidating regulations that clearly went beyond what the police power authorized.[91] This leads Jones to conclude that "the treatise was not intended to bring American judges to the aid of developing laissez-faire capitalism. Contrary to the accepted notion that Cooley meant to raise the courts to a superior position in order to protect property rights, it must be repeated that what is especially noteworthy is his insistence upon the principle of judicial self-restraint."[92] Reading Cooley's chapter on the police power in *Constitutional Limitations*, as well as his writings after that treatise was published, makes clear that Cooley supported a robust role for government regulation under the police power and a legitimate but moderate judicial role in enforcing the limits of the police power in order to protect rights to liberty and property. In carrying out this moderate role, Cooley emphasized tradition, history, and precedent as anchors to ensure that judges would not be reading their own personal preferences or ideological views into the fundamental law.

Many of the misinterpretations of Cooley also extend to the period of "laissez-faire constitutionalism" that Cooley allegedly influenced so deeply. Although the term implies a libertarian judiciary creating libertarian policies from the bench, the limits on states' regulatory powers after the Civil War were as moderate as they were during the antebellum period. As David Mayer has written, "laissez-faire constitutionalism is truly a misnomer. Judicial protection of liberty of contract never involved doctrinal application of libertarian or laissez-faire principles."[93] "Rather than consistently protecting liberty through a true laissez-faire constitutionalism," he continues, "judicial protection of liberty of contract in the early twentieth century adhered to traditional principles of nineteenth-century

89. *Id*. at at 761.
90. *Id*. at 761 (internal citation omitted).
91. See *supra* text accompanying notes 79–80.
92. *Reconsideration*, *supra* note 18, at 762.
93. David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the* Lochner *Era*, 36 HASTINGS CONST. L. Q. 217, 224 (2009).

constitutional law, including a traditional understanding of the scope of state police power."[94] Neither Cooley nor the judiciary, in other words, promoted the economic theory of laissez-faire as the basis of American constitutionalism or of public policy. Rather, while Cooley and the judiciary emphasized the limits on regulation that are derived from American constitutionalism, they also defended extensive regulation as compatible with the constitutional order.

Equating the enforcement of limits on regulation with laissez-faire, in the words of Cooley's chief biographer, "risks explaining away the concrete complexities of history. Thus Cooley has been explained away."[95] Rather than equating Cooley with the era of "laissez-faire constitutionalism," scholars would be better served by understanding Cooley on his own terms—with reference to his own words. Examining Cooley's arguments on their own, he appears not as an apologist for laissez-faire capitalism, but as a defender of regulation as well as the limits that must be placed on regulation in the name of freedom. Compared to the natural rights arguments of antebellum Americans, Cooley's position appears remarkably similar, suggesting that he was actually an advocate for the common law tradition that prevailed in America from the time of its founding to the end of the nineteenth century.[96]

III. COOLEY AND THE INTERSTATE COMMERCE COMMISSION

But what about Cooley's last great act of public service—his service as the first chair of the Interstate Commerce Commission? Scholars almost universally understand the 1887 creation of the ICC to be the origin of the modern administrative state.[97] If the establishment of the ICC was indeed the beginning of the administrative state, Cooley's willingness to become its first chairperson raises puzzling questions about his consistency or how his understanding of constitutionalism informed his approach to railroad regulation. This is a puzzle few Cooley scholars have addressed, and has never been explained satisfactorily.

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94. *Id*. at 227.

95. *Reconsideration*, *supra* note 18, at 752.

96. As evidence for the proposition that Cooley cannot simply be reduced to an ideological influence in the development of laissez-faire capitalism, Jones notes that "many lawyers of the late nineteenth century saw in Cooley's treatise principles which not only protected property rights but also supported a strong police power," and that Cooley was often cited by lawyers supportive of government regulation, not just by those opposed. *Id*. at 766.

97. A full citation of the places where this claim is made would produce an article-length footnote, but see, for instance, DAVID ROSENBLOOM & ROSEMARY O'LEARY, PUBLIC ADMINISTRATION AND LAW 2:22 (2d ed. 1996); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 19 (1990). Alan Jones, Cooley's biographer, makes the same claim, that "the centennial of the Constitution . . . marked the beginning of an administrative state that would try to regulate the economic growth of modern corporate America in the public interest." Alan Jones, *Republicanism, Railroads, and Nineteenth-Century Midwestern Constitutionalism*, *in* LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL 260 (Ellen Frankel Paul & Howard Dickman, eds., 1989). Robert Rabin's assessment is common: "when Congress established the Interstate Commerce Commission, it inaugurated a new epoch in responsibilities of the federal government. . . . The modern age of administrative government had begun." Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STANFORD L. REV. 1189 (1986).

Those who have grappled with this question have argued that Cooley's views were a complicated blend of Jacksonian populism, acquired in his youth as a Jacksonian Democrat, and a later conservatism that he developed after the Civil War.[98] This has led Cooley's chief biographer to conclude that "Cooley's mood was both conservative and reformist."[99] His was

> an authentically conservative progressivism, an attitude insufficiently recognized in Cooley and in others of his generation. A tradition of thought is reflected here which was important in the age of Jackson and again in the age of Wilson – periods when many looked backward for their values, particularly the value of 'equal rights,'but forward in their application of these values to the problems of a changing society.[100]

While this assessment is mostly accurate, it also suggests that Cooley's leadership of the ICC was the result of a mixed, and even somewhat contradictory, understanding of law and constitutionalism. In this view, Cooley represented a strange blend of clinging to the ideas of the past, while also wanting government's role to change in light of new circumstances. It leaves the reader wondering whether Cooley had a coherent set of principles in the first place.

This Section makes the case for Cooley's consistency by drawing the connection between his pre-ICC understanding of the role of government and his work with the ICC itself. Cooley's views of railroad regulation prior to the creation of the ICC indicated that, at the time he was writing *Constitutional Limitations*, he was also in favor of regulating railroads as a result of their status as common carriers and the support they received from the government. His views about these matters were consistent, both before and after the creation of the ICC. Moreover, the ICC itself was hardly emblematic of the kind of administrative state that would emerge in the twentieth century. Congress constrained the Commission's powers in important ways, and the principles of American constitutionalism were the foundation of those constraints. While Cooley's record at the ICC was mixed, in many cases he respected the limits on the ICC's powers and sought to keep the Commission within constitutional boundaries.

A. Cooley's Views on Railroads Prior to the ICC

Cooley was suspicious of railroad and corporate power long before he wrote *Constitutional Limitations*, and long before he took the position as Chair of the ICC. Cooley grew up in upstate New York in a family that was deeply committed to Jacksonian Democracy.[101] His father was an active Democrat and his uncle a

98. *See* Cooley ICC, *supra* note 18, at 603–05; *Reconsideration*, *supra* note 18, at 752, 757–58, 766–67. His arguments are reproduced in his book-length biography of Cooley: *see* JONES *supra* note 1.

99. *Reconsideration*, *supra* note 18, at 770.

100. *Reconsideration*, *supra* note 18, at 771.

101. *Reconsideration*, *supra* note 18, at 753.

Democratic candidate for Congress.[102] Cooley's moving to Michigan in the middle of the 1840s solidified these Jacksonian roots.[103] His writings and political activism during the 1840s suggested the deep influence of Jacksonian writers such as William Leggett.[104] He served as associate editor of a Jacksonian newspaper in Adrian, Michigan and became active in politics during the 1840s and 1850s, helping to organize the Free Soil Party as an offshoot of the Democratic Party.[105] In 1851 he gave an address in which he "assailed railroad, banking, and other monopolies and deplored legislation for classes."[106] These early, formative experiences in Cooley's life have led some of his commentators to suggest that Cooley was ultimately committed to a doctrine of "equal rights for all, special privileges for none," in line with the prevailing Democratic philosophy of the time.[107] According to Howard Gillman, "[a]s a Locofoco Democrat, Thomas Cooley consistently assailed special favors to banks, railroads, and other privileged monopolies . . . and at the center of his republican ideology was the idea of equal treatment before the law."[108]

Cooley especially detested public subsidies for railroads in the form of charters, subsidies, and the delegation of the power of public domain to railroads.[109] He consistently condemned the *Dartmouth College* case in which Chief Justice John Marshall declared that state governments could not alter the terms of charters.[110] In Cooley's view, this meant that once a state government granted a charter, it could not be altered by state legislatures, weakening the accountability of corporations to the governments which authorized them and eroding the regulatory controls that states traditionally exercised over business through charters.[111] This development exacerbated the problem of monopoly power by putting corporations above the regulatory power of the state.[112]

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102. *Id*.

103. *Id*.

104. *Id*.

105. Paludan, *supra* note 5, at 601.

106. *Reconsideration*, *supra* note 18, at 754.

107. This is a consistent theme in Alan Jones's assessments of Cooley, and also in Howard Gillman's treatment of Cooley and others in THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE. *See* GILLMAN, *supra* note 18.

108. *Id*. at 55.

109. The literature on this aspect of nineteenth-century law is vast, but two preeminent sources are J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956) and Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSP. IN AM. HIST. 327 (1971).

110. Tr. of Dartmouth C. v. Woodward, 4 Wheat. 518, 638 (U.S. 1819).

111. As Jones explains, Cooley added a footnote to the second edition of *Constitutional Limitations* lamenting the decision: "It is under protection of the decision in *Dartmouth College* that the most enormous and threatening powers have been created; some of the great and wealthy corporations having greater influence in the country at large, and upon the legislation of the country, than the states to which they owe their corporate existence." Jones, *supra* note 97, at 254 (citing THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 353 (2d ed. 1871)).

112. See the discussion of Cooley's views on this question in GILLMAN, *supra* note 18, at 57–59.

Cooley's attitude about government subsidy of railroads culminated in his most famous judicial opinion, *People v. Salem*, decided by the Michigan Supreme Court in 1870. In that case, the court declared local aid to railroads invalid as a violation of the maxim that taxation must serve a public purpose.[113] The town of Salem pledged its credit in support of the construction of the Detroit and Howell Railroad, but Cooley refused to enforce the law as a violation of the principle that "[t]he State can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws."[114]

Anticipating Cooley's argument, the railroads claimed that the construction of a railroad is a public purpose: "A railroad, however, it is said is a public highway, and as such its construction is a public purpose, which may be accompanied through the instrumentality of the sovereign power of eminent domain."[115] In response, Cooley advanced an argument that foreshadowed his approach to railroads as the first chair of the ICC. He admitted that "a railroad in the hands of a private corporation is often spoken of as a public highway" for the sake of satisfying the requirements of eminent domain, but that did not mean that government *subsidy* of railroads qualified as a public purpose.[116] "An object may be *public* in one sense, and for one purpose . . . and for other purposes, it would be idle and misleading to apply the same term."[117] Railroads constituted public entities because they operate on public highways, but nevertheless also counted as private businesses that cannot rely on strictly public tax subsidies. Cooley was suggesting that railroads were affected with a public interest for the sake of regulation, just as innkeepers, ferrymen, and other occupations were, even if they should be made exempt from public subsidy. As he explained,

> I have said that railroads are often spoken of as a species of public highway. They are such in the sense that they accommodate the public travel, and that they are regulated by law with a view to preclude partiality in their accommodations. . . . [B]ut 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. These owners carry on for their own benefit a business which has indeed its public aspect . . . and its establishment is consequently in a certain sense a public purpose. But it is not such a purpose in any other or different sense than would be the opening of a hotel, the establishment of a line of stages, or the putting in operation of a grist mill; each of which, may under proper circumstances

113. People v. Salem, 20 Mich. 452, 484-85 (1870). One of Cooley's chief legacies, outside of the regulatory realm, is his assertion that taxation must be only for public purposes. Cooley asserted this principle in *Constitutional Limitations* but more systematically in a later work, A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS (1876).

114. *Salem*, 20 Mich. at 486–87.

115. *Id.* at 477.

116. *Id.*

117. *Id.* at 477–78.

> be regarded as a local necessity, in which the local public may take an interest. . . .[118]

Cooley was signaling that railroads were subject to the same kind of regulation that the government had traditionally extended over ferries, innkeepers, and other public occupations that operated as common carriers. In this sense, railroads represented public entities subject to government regulation, but nevertheless remained private property that could not benefit from state subsidies.[119]

People v. Salem reflected Cooley's concern about the power of railroads and other special interests to use government support to pursue their narrow interests. The case was widely criticized when it was decided.[120] Just four years later, the U.S. Supreme Court essentially repudiated Cooley's argument when it decided *Township of Pine Grove v. Talcott*.[121] There, the Court noted that "[s]imilar laws" to the law invalidated in *Salem* "have been passed in twenty-one states. In all of them but two, it is believed their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of reason and authority."[122] Scholars have typically criticized the *Salem* opinion as resting on a flimsy textual basis, as Cooley relied upon the state constitution's due process clause, rather than a specific provision prohibiting railroad subsidies.[123] This assessment is too harsh given the significance of the railroad subsidy question in the rejection of the proposed Michigan state constitution in 1867, three years before *Salem* was decided.[124] A dispute arose between the state legislature and the governor of Michigan over the constitutionality of railroad subsidy legislation, resulting in several successful vetoes by the governor prior to 1867.[125] The proposed revisions to the Michigan Constitution would have authorized any city or township to allocate railroad subsidies, but the revisions were ultimately rejected by voters.[126] While there was no express prohibition of railroad subsidy in the Michigan

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118. *Id*. at 478–79.

119. Curiously, then, Cooley's analysis is precisely the opposite of the prevailing twenty-first century understanding. Cooley argued that private property can be "public" for the purposes of eminent domain, but cannot otherwise be proper objects of public subsidy. Today, tax subsidies to otherwise-private businesses are typically upheld, while the use of eminent domain to subsidize such businesses is far more controversial. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005) and the numerous state responses to the *Kelo* decision, chronicled in Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2012).

120. Alan Jones remarks that the decision was "the great news of the summer." JONES, *supra* note 1, at 181 n.41.

121. Pine Grove Tp. v. Talcott, 86 U.S. 666, 676 (1874).

122. *Id*. at 677.

123. *See, e.g*., David M. Gold, *Redfield, Railroads, and the Roots of "Laissez-Faire Constitutionalism,"* 27 AM. J. L. HIST. 254, 262 (1983) ("The second problem with Cooley's opinion was that it rested on no specific constitutional provision—an omission for which he was severely criticized in a dissenting opinion and in the pages of the *American Law Register*.").

124. I am grateful to Carl W. Herstein for this insight.

125. *See* JONES, *supra* note 1, at 174.

126. PAUL FINKLEMAN & MARTIN HERSHOCK, THE HISTORY OF MICHIGAN LAW 194–95 (2006).

Constitution, the attempt to include such a power by positive amendment had failed just three years prior to *Salem*.

At any rate, Cooley's concern about this problem of special interest influence through government charter and subsidy increased during the 1870s and 1880s—the years following the *Salem* decision. In 1882, Cooley served on an Advisory Commission on Differential Rates, for which he drafted a report that "demanded that railroads as public agencies subserve public duties."[127] At the same time, he expressed sympathy for the practice of "pooling," in which carriers merged to pool revenues and freights, working together to keep prices at a level that would allow them to make a profit.[128] During the period in the 1880s leading up to Cooley's appointment as ICC chair, his views were generally moderate. While he did not denounce the railroads, neither did he suggest that the government could play no role in governing their activities.

Cooley's support for railroad regulation, combined with his understanding of the constitutional limitations on government regulation, made him a natural choice for the ICC, as neither railroads nor shippers agitating for government supervision could call him unfriendly to their interests.[129] Cooley felt comfortable accepting the job partly because the ICC was not (as many scholars have maintained) emblematic of the power of modern regulatory agencies.[130] Rather, the ICC's authority was carefully limited so that it would remain within the limitations on power established in the U.S. Constitution.

B. The Limited Interstate Commerce Commission

The ICC was born out of a compromise between two very different proposals for railroad regulation.[131] The first, more radical approach was advanced by John Reagan, a Democrat from Texas who led the populist forces in the House of Representatives. The Reagan approach avoided empowering a regulatory commission by simply outlawing certain railroad practices, such as pooling and rate discrimination, and authorizing courts to enforce the law.[132] Senator Shelby Cullom, an Illinois Republican, introduced alternative legislation taking a competing approach. Cullom's legislation proposed to establish a regulatory commission to enforce more open-ended standards of legality, such as the prohibition of "unjust and unreasonable" rates.[133]

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127. Cooley ICC, *supra* note 18, at 609.

128. *See* Cooley, *Popular and Legal Views of Traffic Pooling*, RY. REV. (1884), cited in Cooley ICC, *supra* note 18, at 609.

129. *See* Carrington, *supra* note 2, at 498.

130. *See* Joseph Postell, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 153–58 (2017).

131. The creation of the ICC involves a complex story and scholars disagree on some of the particulars. The discussion in this subsection is based upon a fuller account provided in BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT. *See id.* at 146–53.

132. *Id.* at 147–49.

133. *Id.* at 149–50.

The congressional debate over the passage of the Interstate Commerce Act centered on these two proposals. The resulting legislation creating the ICC was a compromise bill that created a commission but limited its powers, leaving much of the law's administration to the courts.[134] Section 9 of the Act affirmed that the law did not disturb the right to bring common-law suits to enforce prohibitions on rate discrimination, and Section 16 clarified that the ICC had no enforcement power to back its decisions.[135] While the law required that all rates be "reasonable and just," it did not allow the ICC to determine prospectively which rates were just and reasonable.[136] In other words, it did not authorize the ICC to set railroad rates in advance. The ICC could merely declare, in response to complaints, that specific rates were unlawful. Once such a decision was reached, the independent courts would enforce the decision. The ICC had the power to gather data and conduct investigations, and it could require railroads to file annual reports. Shippers could file complaints about injurious railroad practices, and the ICC could issue cease and desist orders in response to those complaints, but the courts still had to enforce these orders by injunction, and courts reviewed both the ICC's factual and legal conclusions with little to no deference.[137]

Many scholars have noted the weakness of the Interstate Commerce Commission when it was first created.[138] But this weakness also would have potentially made the appointment more appealing to someone like Thomas Cooley. Cooley told a reporter in 1887 that an "able and conservative" commission could "give the law a just and beneficial operation," suggesting that whoever chaired the commission would have to proceed cautiously.[139]

C. Cooley's Engagement with Railroad Policy and Appointment as ICC Chair

Perhaps due to this distinguished yet moderate record in dealing with railroad issues, Cooley "was importuned by [President Grover] Cleveland to chair the Commission" upon its creation.[140] As the first chairperson of the Commission, Cooley would, in the words of his biographer, give "dignity and distinction to the inception of federal regulatory action."[141] For his part, Cooley told a media outlet during the debates over the Interstate Commerce Act that a railroad commission "would neither be unphilosophical nor out of accord with the general spirit of our institutions," depending on the extent of its powers.[142]

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134. *See* Interstate Commerce Act of 1887, ch. 104, §§ 11–12, 24 Stat. 383.

135. *Id.* § 9, 24 Stat. at 382; §16, 24 Stat. at 384–85.

136. *Id.* § 1, 24 Stat. at 379; *see* ICC v. Cincinnati, New Orleans and Tex. Pac. Ry. Co., 167 U.S. 479, 494 (1897).

137. ICC v. Ala. Midland Ry. Co., 168 U.S. 144 (1897); Tex. & Pac. Ry. Co. v. ICC, 162 U.S. 197 (1896).

138. Two good, brief accounts of the initial weakness of the ICC are MARC ALLEN EISNER, REGULATORY POLITICS IN TRANSITION 49–55 (2d ed. 2000) and STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 148–60 (1982).

139. "Cooley ICC", *supra* note 18, at 612–13.

140. Carrington, *supra* note 2, at 498.

141. Cooley ICC, *supra* note 18, at 602.

142. See Cooley's letter to Congress during the debates over the Interstate Commerce Act, in I REPORT OF THE SENATE SELECT COMMITTEE ON INTERSTATE COMMERCE 12 (1885).

The difficulty in evaluating Cooley's contributions to the ICC is one reason why his appointment has flummoxed so many of his scholarly commentators. He acted aggressively in some cases, yet he consistently disclaimed the notion that the Commission was pressing beyond the outer limits of its powers. In *People v. Salem* he specifically endorsed the requirement that common carriers on public highways serve everyone equally, and he vigorously enforced this requirement in cases of discrimination against blacks who were given unequal accommodations.[143] At the same time, he also acted cautiously. In his diary he reacted to newspaper reports that "the railroad magnates are trembling" in the face of the ICC as "sheer bosh."[144] "The law is working as it has been all the while . . . working a quiet reform and not a destructive revolution," he wrote.[145] He seemed to believe that "moral influence" rather than "coercive power," as he wrote to his wife, would make the Commission most effective in the long run.[146]

One area in which Cooley pressed the powers of the ICC to their limits—or beyond them—related to the Commission's authority to intervene in railroad labor disputes. The Interstate Commerce Act gave the Commission no power to investigate or adjudicate labor disputes involving railroads, yet Cooley attempted to persuade his fellow commissioners to intervene in a Burlington Railroad strike which affected all railroad traffic in Chicago.[147] Cooley pressed the Commission to take action during the month of April 1888, but he became ill with pneumonia and even fell unconscious during a Commission hearing on the matter.[148] He missed the only scheduled vote on the question of intervening, and the Commission remained on the sidelines.

In other areas more closely related to the provisions of the Interstate Commerce Act, Cooley also insisted upon a broader reading of the Commission's powers. The Act contained an anti-pooling provision that forbade the common practice of railroads to conspire to raise rates above where the market would have set them in order to maintain profits.[149] The Commission could order that unreasonably high rates be reduced in order to protect the interests of competing shippers. In the immediate aftermath of the law's passage, railroad rates dropped—particularly in the western part of the country—and in September of 1888 railroads asked the Commission to *increase* unreasonably low rates that competition emerging from the anti-pooling provision had driven downward. Although the statute read as justifying both the lowering and raising of unreasonable rates, Cooley responded by asserting that the Commission could only adjust unreasonably

143. *See* Cooley ICC, *supra* note 18, at 614.
144. *Id*. (quoting the entry of Oct. 26, 1887).
145. *Id*. (quoting the entry of Oct. 26, 1887).
146. Letter from Thomas Cooley to Mary Cooley (Oct. 21, 1888), *in* Cooley ICC, *supra* note 18, at 615.
147. Diary Entry of March 9, 1888, cited in Cooley ICC, *supra* note 18, at 616.
148. *See* Cooley ICC, *supra* note 18, at 617.
149. Interstate Commerce Act of 1887, *supra* note 134, §5, 24 Stat. 380.

high rates affecting shippers.[150] In his words, the term "just and reasonable" was "employed to establish a maximum limitation for the protection of the public, not a minimum limitation for the protection of reckless carriers against their own action."[151] Cooley's interpretation of the Commission's power over rates and the prohibition on pooling have led some commentators to conclude that he abandoned his earlier partiality between railroads and the public, and eventually became much more suspicious of railroad managers while chair of the ICC.[152]

Two of Cooley's other important actions suggest that he became increasingly aggressive as the chair of the ICC. In the first, Cooley addressed the question of whether due process had to be judicial process, or whether administrative procedures could, in certain cases, satisfy due process requirements. Could the Commission hold hearings to find facts, or does due process require that only courts may do so? Cooley insisted that administrative agencies, when rendering findings of fact, could satisfy the requirements of due process. As long as the ICC was only applying the law to its facts, it could act without violating due process.[153] This issue raised questions that had been litigated periodically in the nineteenth century, particularly in the leading case of *Murray's Lessee*.[154] When Cooley insisted upon preserving administrative process in this instance, he was aware that administrative bodies throughout the nineteenth century had made findings of fact without violating the Due Process Clause of the Constitution, so he stood on relatively firm historical ground.

Furthermore, as Paul Carrington has noted, Cooley sought to compensate for the shift to administrative process by increasing the rigor of ICC procedures for factual determinations, even exceeding what was required by law.[155] Carrington explains that "Cooley's major contribution as chairman" was "the creation of an administrative style and process that would guide future national institutions."[156] Thus, Cooley worked to limit administrative discretion even as he pressed for the legitimacy of the administrative process.

Finally, Cooley pushed the boundaries of the Commission's power to prohibit long- and short-haul discrimination (in which railroads would charge high rates for short hauls where less competition existed, but lower rates for short hauls contained within long haul routes) by asserting an implied power to positively and prospectively set just and reasonable rates.[157] In July of 1890, for example, the Commission reduced grain rates on all railroads in the Midwest.[158] Eventually,

150. Cooley ICC, *supra* note 18, at 618–19.

151. In re Chi., St. Paul, & Kan. City Ry. Co., 2 I.C.C.R. (1888), at 260 (quoted in Cooley ICC, *supra* note 18, at 619).

152. This is Jones's conclusion. *See* Cooley ICC, *supra* note 18, at 619–21.

153. Cooley ICC, *supra* note 18, at 625–26; Postell, *supra* note 130, at 159–60.

154. Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272 (1856).

155. Paul Carrington, *Law and Economics in the Creation of Federal Administrative Law: Thomas Cooley, Elder to the Republic*, 83 IOWA L. REV. 363, 384–85 (1998).

156. Carrington, *supra* note 2, at 384.

157. Cooley ICC, *supra* note 18, at 613–14.

158. *Id*. at 624.

Cooley's assertion of this power would be rejected by the Supreme Court in the *Maximum Rate Case*, in which the Court declared that "the grant of such a power is never to be implied. The power itself is so vast and comprehensive . . . that no just rule of construction would tolerate a grant of such power by mere implication."[159] Cooley's assertion of power and the Supreme Court's subsequent push-back indicate that, at least with regard to a few issues, Cooley was willing to aggressively push the boundaries of administrative power.

In the final analysis, however, Cooley's leadership of the ICC cannot easily be explained as simply the product of a conversion from laissez-faire ideologue to progressive champion. This is often how scholars describe it. Stephen Skowronek, for instance, writes that Cooley's appointment "certainly did not presage a radical or anticourt commission. Yet, Cooley's career and his thinking took a turn in the 1880s . . . The father of laissez-faire constitutionalism now attacked the equation of due process with judge-made law."[160] It is probably more accurate to conclude that while Cooley sometimes pushed the powers of the ICC to their outer limits, he also took the limits on the Commission's power seriously at many points, choosing to rely on moral rather than coercive authority and on a cautious approach to exerting any coercive powers the ICC actually wielded. On several questions, Cooley's constitutional scruples led him to limit the powers of his own office. He limited the ICC's discretion in applying the long- and short-haul prohibition, refused, on constitutional grounds, to award damages to complainants who received a favorable decision by the ICC, and focused more on moral persuasion rather than coercion.[161]

In fact, Cooley's biographer, Alan Jones, regards Cooley's caution as a reason for the ICC's initial failure:

> [I]mpartiality and a quiet and careful conservatism did not have a decisive impact on the American railroad problem. Cooley's attitudes were partly responsible, for well-meaning and democratic as they were, they reflected the basic ambiguities of the American doctrine of equal rights. Given the condition of national economic problems in the eighteen-eighties it was not enough to act quietly, to respect property rights and public interests with equal energy.[162]

Adding to the difficulty of judging Cooley's legacy at the ICC is the fact that poor health cut his service short. Pneumonia affected his attempt to intervene in a railroad strike in 1888, and by 1889 Cooley was suffering from seizures.[163] He

159. ICC v. Cincinnati, New Orleans and Tex. Pac. Ry. Co., 167 U.S. 479, 494–95 (1897).

160. SKOWRONEK, *supra* note 138, at 153.

161. See *supra* note 146 and accompanying text; Carrington, *supra* note 2, at 374–75 ("[Cooley] agreed with Charles Francis Adams that a regulatory commission should seek to lead by moral suasion and publicity.").

162. Cooley ICC, *supra* note 18, at 616.

163. Cooley ICC, *supra* note 18, at 623.

was forced to resign his position due to health issues in 1891.[164] Prior to his resignation, Cooley was invited to give the first Storrs lectures at Yale Law School, which he gave in 1890-1891.[165] The subject of those lectures was the Interstate Commerce Act. However, these lectures were never published, and a subsequent attempt to locate the transcripts of his speeches in his papers was unsuccessful.[166] Cooley's legacy to the Commission, like the ICC itself, would remain an ambiguous mixture of constitutional restraint and innovation.

CONCLUSION

Though his ultimate legacy is difficult to summarize, a careful consideration of Thomas Cooley's distinguished career should definitively disprove the notion that he was ideologically committed to laissez-faire, and should reveal that references to Cooley as "the father of laissez-faire constitutionalism" do justice neither to Cooley's legal thought nor to the period that he influenced.[167] Cooley was a defender of regulation who appealed to the earlier antebellum legal tradition to show that natural rights and regulation were compatible. He defended a broad notion of the police power—one that prevailed in that earlier period. He also sought to reconcile railroad regulation, and ultimately his work on the ICC, with principles of law that were well-established. While it is difficult to determine whether his leadership of the ICC as a whole reflected the constitutional limits he so thoroughly chronicled in his greatest work, it is clear that Cooley's cautiousness restrained the Commission to some extent, and perhaps allowed it to serve a useful role in dealing with the problems of the time.

In 1890, in the midst of declining health, Cooley was invited to give a lecture at the University of Michigan, where he had served on the faculty for many years. During his introduction, one of his contemporaries praised him effusively:

> [B]y 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. The profession is always ready to listen with interest to whatever he has to say concerning the Constitution and the laws.[168]

The comparison of Cooley to Justice Story may be shocking to modern readers who have become accustomed to reading about Cooley's laissez-faire ideology and association with ideas that are out of fashion. However, an honest assessment of Cooley's career lends credence to this contemporary assessment of his vast and salutary influence on American law and constitutionalism.

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164. *Id*. at 626–27.

165. ELIZABETH FORGEUS, THE HISTORY OF THE STORRS LECTURESHIP IN THE YALE LAW SCHOOL (1940).

166. *Id*.

167. SKOWRONEK, *supra* note 138, at 153.

168. THOMAS M. COOLEY, CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW 14 (1890).