From Commonwealth to Constitutional Limitations: Thomas Cooley's Michigan, 1805-1886

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Professor William Novak, Chair
Professor Thomas Green
Professor Richard Primus
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Chapter I: Introduction

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

Oliver Wendell Holmes Jr.
*Towne v Eisner*, 245 U.S. 418, 425 (1918)

Feeling the oppression of a remote government, a group of farmers, tradesmen, merchants, doctors, and lawyers gathered through the summer to draft a constitutional blueprint for republican self-governance. Having had little voice in their distant government, and believing that it had ignored their welfare, these settlers boldly declared, “the time has arrived when our present political condition ought to cease, and the right of self-government be asserted.” The distant government responded with irritation, denying the settlers the right to self-government and insisting that agents of the distant government continue to rule. The year was 1835 and the place, Detroit, Michigan.¹

In response to what he perceived as the challenges associated with republican governance in the later portions of the nineteenth century, Michigan’s Thomas McIntyre Cooley penned his treatise concerning constitutional limitations on legislative power. In it, Cooley offered a vision of government where courts would check government power and would raise constitutional barriers against the impact of improper influences on legislators. As a student of history, Cooley grounded his beliefs and doctrines in experience, not philosophical reflections. Believing that “the fruits of speculative genius in government are of little value,” Cooley submitted that governing structures and law “must be the work of time and circumstances, must grow out of

¹ Preamble, *Constitution of Michigan, 1835*. 

actual needs, and have their excellencies tested in the practical wisdom of the people from whose aspirations and exigencies they have sprung.” Accordingly, law and governance must evolve along with political, social, and economic circumstances. This is not to suggest that Cooley advocated that constitutional structures yield to political shifts or popular passions. Rather, he proposed that constitutional language should be reinterpreted in order to hold fast to the core of American constitutional governance – republican, limited-governance. With republican limited-governance as their lodestar, courts were to search for new constitutional understandings to safeguard and advance that governance and, as part of that responsibility, to protect individual liberties and rights. To Cooley, courts were flexibly to employ and re-interpret constitutional language to further those core constitutional purposes. This allowed and demanded that courts reassess legislative powers in light of new circumstances. When a legislature had disused or misused powers, its authority over that issue would end, particularly when continuing the legislative practice would undermine republican governance or its associated promotion of individual liberties. Therefore, what was once constitutional could become unconstitutional as social, political, and economic forces dictated. Informing that decision, and Cooley’s theories, was the concern that powerful forces had, and could continue to undermine the legislative process in order to grant the wealthy improper privileges and the masses inappropriate succor. Because he believed that judges were cut of a finer cloth and not as subject to political forces as were legislators, Cooley charged the courts with the responsibility to dispassionately discern when legislation exceeded republican bounds. In doing so, the judiciary would both maintain constitutional governance and the rule of law, while pressing the natural advancement of the individual in American society. Through his advocacy of enhanced judicial review, Cooley

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tendered both the constitutional language and the means to protect against improper influences and majoritarian impulses . . . and judges across the nation cheered.

Situated in Michigan, this work explores how the state’s constitutional and governing challenges culminated in a Cooley-inspired jurisprudence where courts would systematically assert authority to limit legislative power. Beginning with state courts and migrating to the federal bench, Cooley’s advocacy soon captured the nation. Until Cooley, courts almost without exception had deferred to legislative power and largely had ignored, or treated on an ad hoc basis, limitations of legislative plenary powers. As they deferred, judicial roles were shrinking as statutory law supplanted the common law. With Cooley, courts began to reassert themselves to limit the perceived excesses of both majoritarian and private-interest protecting enactments, and did so armed with Cooley’s newly defined constitutional language and theories.

In analyzing his impact, most scholars have focused on Cooley’s elevation of individual rights as limits on legislative power. But that misses the larger dynamic. In his words, Cooley’s underlying goal was to protect against “diseases in the body politic,” and to preserve republican institutions. Individual rights protection was part of that effort, and would be the result of properly functioning republican institutions, but the underlying goal was to defend and maintain the constitutional principle of limited, republican governance. Cooley’s story, and this work, is the story of judicial review, the rule of law, and republican governance.

Cooley scholars place him at the forefront of rights-creating jurisprudence. In the shadow of the New Deal, Benjamin Twiss and Clyde Jacobs narrowly focused on contract and property rights, and attributed the rise of laissez-faire jurisprudence to Cooley. Alan Jacobs rehabilitated him, but mistakenly characterized Cooley as largely deferring to legislative prerogatives. Howard Gillman attributed a binary class-legislation test to Cooley; an effort that
was too neat and narrowing. Andrew McLaughlin perhaps best characterized Cooley’s contribution by suggesting that, over an extensive period, Cooley’s work was second to the *Federalist Papers* in importance. Because Cooley’s contributions transcend the limited, albeit important, role scholars have attributed to him, his legacy is of considerable historical and legal significance.

Events, and not philosophical musings, shaped Cooley’s constitutional beliefs. He was neither a constitutional philosopher nor one who culled meaning from dispassionate readings of constitutional texts. He did not glean constitutional meaning by searching for divinely inspired principles. Instead, he was a scholar molded by his experiences and driven to overcome the challenges society faced in response to activist state legislation. History shaped Cooley, but not in the way nostalgic recollections favor a return to simpler times. He was not a man looking backward to see the future. Instead, Cooley consciously considered historical developments as they applied to existing community needs to arrive at contemporary legal and constitutional understandings.\(^3\) Accordingly, his efforts to limit legislative power are best understood by a discussion of the environment in which he developed his ideas and an understanding of the world in which he lived. Hence, a bottom-up study of the changing nature of government and constitutional structures from Michigan’s territorial period through the beginnings of the Cooley revolution best captures the motivations and intentions of Cooley’s work. This study undertakes that task.

While located in Michigan this is not simply a local story. Michigan’s nineteenth-century experiences culminated in the Cooley-directed jurisprudence that courts across the nation captured as they sought to limit plenary legislative power. Michigan’s experiences were in some

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\(^3\) Although Cooley is often thought of as a law professor, jurist, and ICC Chairman, he was also an academic historian. In 1885, Cooley formally took on that role when he became a professor of history at the University of Michigan’s Literary College.
measure a microcosm of broader local and state efforts to employ government to address the oppressive forces of the day and to release social and market energies in order to advance general-welfare interests. Because other states had acted similarly, Cooley’s ideas to limit government power gained prompt purchase in courts across the nation.

While residents of other states engaged in similar activities, Michigan presents a unique study. It underwent a troubled territorial period, an early state constitutional period requiring government activism in commercial development, a second written constitutional period seeking to limit state legislative power, and the Cooley period where courts redefined constitutional language to limit legislative authority. In each period, this work studies a force that shaped constitutional understandings and governing structures. In order of treatment, those forces are political, economic, social, and philosophical. This work focuses on particular events during the studied periods. Other events, like banking challenges, the Civil War, and race relations also pressed against Michigan’s constitutional structures and probably influenced Cooley’s theories, but those forces remain outside the scope of this project. Based on the forces and events studied, it becomes clear that the doctrinal change – the Cooley revolution – proceeded from the earlier Michigan periods, and was a reaction to the challenges associated with the legislative activism from which Cooley believed Michigan, and the nation, suffered. In some measure, therefore, this work is a study of the road to Cooley.

**The First Constitutional Period – Political Forces and Change**

Michigan endured a lengthy territorial period from its designation as such in 1805 until Congress admitted it as a state in 1837. Since it set the governing structure for the territory, the Northwest Ordinance (the “Ordinance”) acted as a constitutional document for territorial Michigan, and this work addresses the governance under the Ordinance as Michigan’s first
constitutional period. The Ordinance provided that a federally appointed group of three judges and one governor would act as the earliest phase of government for the territory. In response to their appointment, those leaders answered to the national government, not the residents. In vying for power, Michigan’s governor and judges, for example, would gridlock government by engaging in a cycle where the courts nearly automatically would release prisoners that the governor’s administration had just arrested. With court contempt proceedings and gubernatorial proclamations demanding disobedience to court orders, Michigan’s governing structure virtually collapsed.

Resident reactions to the territory’s dysfunction moved from early calls to replace the offending officials to later rejections of the colonial nature of territorial governance under the Ordinance. Contrary to popular mythology, those calls were for more government, not less – but government subject to the direct control of Michigan’s residents. As part of their efforts for effective and involved governance, municipal governments actively regulated and encouraged economic and social development. They did so recognizing that many of those activities encumbered individual rights. Nevertheless, driven by majority goals to advance the general welfare, local legislatures consciously subordinated the individual to the collective. In doing so, they felt primarily constrained by a lack of resources and noted that future tax revenues would allow for greater government oversight and participation in general-welfare building.

To Michigan residents, the territorial period ended in 1835 when they unilaterally declared statehood, created and approved a constitution, and elected their state government officials. Unfortunately, the federal government did not agree. Congress refused to admit the state into the Union and President Jackson threatened to take action should the elected government interfere with his territorial appointments. Michigan now had two governors and a
legislature making laws of questionable effect. The constitutional structure of the Ordinance had broken under the pressures of local political forces.

**The Second Constitutional Period – Economic Forces and Change**

The 1835 constitution required the state government to encourage internal improvements. In response, Michigan’s leadership determined the state should build, own, and operate its major rail lines, and control and significantly invest in the state’s feeder lines. That determination was of singular importance in Michigan history and in shaping Cooley’s views concerning the dangers of legislative activism. In response to its leadership’s drive for economic progress, the state massively borrowed to finance its internal improvement projects. Envisioning rail service across the state’s inhabited peninsula, the legislature authorized multiple projects believing that it could mold economic development and provide revenue for future government spending. Those aspirations proved illusory as the Panic of 1837 along with bank fraud undermined an already problematic state investment.

Lurking political challenges contributed to the economic forces aligned against a successful state rail enterprise. Each legislator sought to maximize rail access for his constituents even when economic forces argued to the contrary. In response to popular passions, municipalities took up arms against the state militia and disgruntled citizens sabotaged rail equipment. Unable to raise taxes, the state soon defaulted on its obligations and, with respect to foreign creditors, repudiated its debts. Although the law favored the creditors, they lacked a legal forum where they successfully could bring their actions. Their complaints could only be voiced in the political sphere and then only to partial satisfaction.

The legislature not only ignored legal obligations under the common law, it consciously violated the state’s constitutional requirements. In 1846, it sold the state’s rail interests and
ceased involvement in transportation. While acknowledging that such action violated the constitution, leaders argued that economic forces prohibited compliance or that the divestment legislation modified constitutional requirements. Cooley, in his *Michigan, A History of Governments*, spent considerable ink detailing the era, and concluded that the state’s rail efforts left “nothing but the debris of our airy castles.” It did result in an effort that Cooley applauded. The government’s failures resulted in an 1850 constitution that limited state legislative power.

**The Third Constitutional Period – Social Forces and Change**

Largely as a response to the state’s debts, the embarrassments of defaults, and the increased taxation associated with the partial repayments, the citizens approved a new constitution in 1850. That constitution’s governing framework sought to avoid earlier state excesses by, among other things, curtailing legislative space. In part to accomplish that end, Michigan pioneered efforts constitutionally to separate its university from legislative oversight or control. Like other states in the wake of *Dartmouth College*, Michigan had created a state-owned university. Because of legislative intrusions, an 1840 Select Committee on the Condition of the University warned that the fluctuating politics of the legislature threatened the university’s survival. Armed with that report and a distaste for legislative activism, the framers of the 1850 constitution invested a voter-elected board of regents with complete control over the university. That board was to be independent of the legislature and was to control university funding from designated sources. Cooley later reflected that that the framers had taken the right course, as the “popular excitements and prejudices” that animated the legislature would prove dangerous to the university.

Notwithstanding the framers’ intention to vest exclusive authority in the regents, almost immediately after ratification the legislature passed a law seeking to direct the university’s
operations and instructions. Most of the law’s provisions were benign as they merely instructed the university to do as it already had done. One area differed. The law required that the university medical school employ a homeopathic professor. Homeopathic medicine was increasingly popular and the legislature enacted the law in response to public and homeopathic pressures. Ignoring the law, the regents refused to allow the legislature to direct hiring and instructional decisions. The state Supreme Court then refused to require university compliance. Nevertheless, the issue remained as homeopaths and allopaths squabbled, the American Medical Association threatened to decertify doctors associating with homeopaths, and the public demanded its university teach the homeopathic medicine it increasingly accepted.

Forces combined after the Civil War, while Cooley sat as the dean of the law school, to undermine the university’s constitutional independence. With the war’s conclusion, the student body increased dramatically while inflation required enhanced faculty compensation. By 1867, the university was unable to operate effectively on only the funds previously designated. Accordingly, it sought and received an appropriation, but the legislature pressed one condition: the medical school had to hire homeopathic faculty. The regents rejected the condition and sought a writ of mandamus to compel release of the funds without condition. The court declined. Soon university construction halted, the university retracted the promised raises, faculty resigned, and students, and ultimately the university president, left. Moreover, medical journals almost unanimously called for Michigan’s entire medical faculty to resign if the university hired homeopathic instructors. To follow the legislative demands, the university’s leadership exclaimed, would threaten the medical school’s and perhaps the university’s existence.

Before he left, the university president quietly negotiated with the legislature. In exchange for multiple appropriations, the regents would create a homeopathic college connected
to the medical school. This would not end the constitutional issue. Courts would ultimately rule that the legislature could not interfere in the educational decisions of the university. However, the legislature held the purse and, with it, could leverage changes in university policy as demanded by the state’s residents. The constitutional language and the convention debates establish that the drafters had intended otherwise.

Cooley enjoyed a nearly forty-year tenure at the university and his influence on, and involvement in, university affairs dramatically exceeded his role as law professor. Cooley’s writings did not significantly reference the homeopathic controversy, although he was involved in it, at least before his tenure on the bench. During that pre-judicial time, Cooley had served as counsel for the regents, as did his associate and future brother justice, John Campbell. Campbell had acted as the counsel to defend the university’s position during the earlier homeopathic litigation. While I have uncovered no specific Cooley advocacy for the university position, there are strong indications he agreed with Campbell and the regents. It is probable that the long crisis marked Cooley’s thinking and shaped his concerns about legislative overreaching.

The Fourth Constitutional Period – Philosophical Forces and Change

The 1850 constitution had prohibited state involvement in internal improvements. Despite that language, and fearing that economic advancement would bypass Michigan, the legislature authorized municipalities to pledge tax dollars to attract rail investment. Local legislatures could pledge funds to railroads subject to a vote of the taxpayers. That approval was almost always forthcoming, resulting in popularly approved but burdensome debt. This majoritarian tendency to employ government in what he deemed inappropriate fashion was the “disease in the body politic” that Cooley feared. Notwithstanding the expanding government and personal debts associated with those grants, in the antebellum period courts across the nation
uniformly upheld the constitutionality of those laws. In each case, the court deferred to the legislature’s judgment. When, during the war, one court invalidated its state’s law as violating taxpayers’ property rights, the U.S. Supreme Court limited the ruling on Commerce Clause grounds and castigated the state court for ignoring settled law.

All of this changed in response to Cooley’s 1868 publication of *Constitutional Limitations*. In that treatise, and the cases quickly following, Cooley argued that the legislature must use taxes to further a “public purpose,” which he defined as requiring a direct value exchange for projects within government’s historical sphere. Without that public purpose, the revenue collection would be “plunder,” not taxes, and therefore was unconstitutional. In *People v Township Board of Salem*, Cooley argued that grants to railroads did not fit the public purpose standard and were unconstitutional. Scholars suggest that *Salem* evidences Cooley’s property-rights position, but that is not how Cooley viewed his opinion. To him, *Salem* stood for the principle that government spending required a government purpose, which he believed did not include supporting privately owned businesses. The case, and his underlying philosophy, was about limiting government. “The fundamental maxims of a free government” required limited legislative power and a respect for advancing individual rights. While few jurisdictions overturned their rail appropriations, courts across the nation adopted Cooley’s public-purpose standard to limit other government spending. Soon courts would overturn grants to business, agriculture, public employees, students, the indigent, and the disabled.

By redefining constitutional terms, a newly energized judiciary acted to limit majoritarian legislation that it believed inappropriately encumbered individual rights. The impact was most keenly felt in the regulatory sphere. Cooley argued for a modified interpretation of “law of the land” and “due process” language to limit legislative power. Those clauses were linchpins for
the protection of limited government and the advancement of individual space. Using those clauses, Cooley advanced that courts should intervene when legislatures unduly deprived individuals of property or contract rights. Through the due process clauses, Cooley sought to require that legislators work within “settled maxims” of the common law. He incorporated those common-law standards into his constitutional understandings, and argued that rights protections and legislative limitations were constitutional memorializations of long-standing republican principles. Like the common law, constitutional understandings changed to protect those underlying limited-governance principles. By arguing that due process protections changed with social and economic changes, Cooley allowed for a continued reassessment of legislative space and a weakening of *stare decisis* principles.

While Cooley spoke the language of “rights,” it would be a mistake to focus on the protected rights rather than the legislative limits. Having been steeped in, and written about, Michigan history, Cooley understood the challenges of plenary legislative power, especially when the legislature employed that power to expand government’s scope. Rights were but one of the tools Cooley submitted as a limit on that power. Accordingly, those who focus only on the rights language miss the underlying philosophy of legislative limitations, judicial review, the rule of law, and republican government. Judicial review was to be the mechanism to assure and elevate republican governance. Because his arguments are much deeper than the protection of specific rights, which ebb and flow in acceptance, Cooley’s legacy continued (even as contract and property-rights arguments waned). Cooley’s jurisprudence addressed the tensions between republican limits and majoritarian rule; issues with which we continue to struggle.

Cooley’s work did not seek to set down binary rules of jurisprudence or to advance *laissez-faire* capitalism. Instead, he sought to articulate doctrines and traditions to reinsert courts
into republican governance in ways that were lost with the rise of statutory law. In a sense, he
reinterpreted a role for courts in a new age by advocating robust use of judicial review and
limited government in response to the negative consequences of plenary legislative power.
Cooley saw his advocacy not as a rejection of constitutional understandings, but an uncovering
of constitutional meaning for a time when, to his mind, republican governance was under siege.
To protect that republican governance and the rule of law, Cooley would capture and manipulate
threads of antebellum constitutional thought that, in reality, had almost only been employed in
dicta. Because that was his purpose and legacy, this work tells an institutional story of changing
government frameworks and rising judicial power.

This work offers a new way of thinking about Cooley and how he led a movement to
check legislative authority through an aggressive use of judicial review. Employing his
doctrines, courts would find new meanings in the word “tax” to imply constitutional restrictions
on the power to spend. They would uncover expanded meaning in the term “due process” and
employ it to limit legislative actions that heretofore had been almost universally accepted. Those
changes were not the stuff of revolutionary advancements of personal liberties or the reactionary
forces responsive to industrial power. Rather, they were part of an ongoing American effort to
adjust constitutional frameworks and understandings to address the forces of their time and
circumstance. In this work, Thomas McIntyre Cooley was the last piece of that continuing
effort. Based upon his experiences in Michigan and his understanding of the larger world, he
advocated an expanded judicial effort to limit activist legislatures. In doing so, he offered a new
constitutional framework to address his era’s needs and to strengthen representative governance.
Chapter II: The Drive for Self-Government 1805-1836

*State power and state laws were thus present at all times, touching the citizen for his advantage and direction in all his relations: by his fireside as much as in his business; . . . in nearly everything which had for him and those associated with him – whether in kinship or socially or in business – an every-day interest.*

Thomas M. Cooley

*Michigan, A History of Governments* 4

A Framework for Governance: The Northwest Ordinance

“Detroit is not under government . . . for this reason there were very few Europeans settled there.” So suggested North-American Governor General Guy Carleton during his 1774 testimony before the British Parliament. Without effective government, Carleton argued, the Detroit area would never enjoy meaningful population growth, trade, or safety.5 When instituted decades later, Detroit’s government would lay the foundation for the area’s expansive commercial and social growth. By 1837, when Congress admitted Michigan as a state, Michigan’s population and economy had increased tens-of-thousands-fold over its early days under the British flag. During that time, Michigan’s government played an integral and welcome, if at times frustrating, role in the social, political, and economic development of Territorial Michigan.

Pursuant to the Treaty of Paris of 1783, Britain legally ceded to the United States all of its territories between the Allegheny Mountains and the Mississippi River, south of the lands now comprising Canada. Those lands, which would be known as the Northwest Territories,

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5 "Debates of the House of Commons in the Year 1774 on the Bill for Making More Effectual Provision for the Government of the Province of Quebec. (Drawn up from the notes of the Henry Cavendish, Member for Lostwithiel),” (London: Ridgway), 142, 146.
eventually would be carved into the five and one-half states of Michigan, Illinois, Indiana, Ohio, Wisconsin, and the eastern portion of Minnesota. Under the Articles of Confederation, Congress enacted the Ordinance of 1787, which provided for the governance of the territory, and the standards by which each section of the territory would become a state. After the adoption of the United States Constitution, Congress reenacted the Northwest Ordinance on August 7, 1789 (hereinafter collectively referred to as the “Ordinance”). It did so under the broad powers Art. IV, §3 granted to Congress to “make all needful rules and regulations” concerning territories. In enacting the Ordinance, Congress envisioned a transitory status for each territory until populations had developed sufficiently for self-governance. Evidencing its paternalistic cast, Territorial Governor Arthur St. Clair noted, the “system” of government under the Ordinance “is temporary only, suited to your infant situation, and to continue no longer than that state of infancy shall last.”

Because the territories gradually would move from sparse to more sustainable populations, the Ordinance allowed for a three-phase progression toward self-governance. At the beginning of the territorial period, the Ordinance provided for one federally appointed governor and three federally appointed judges who also would act as legislators to “adopt” “such laws of the original states, criminal and civil, as may be necessary and best suited to the circumstances of the district.” In appointing the judges and governor as the legislature, in some measure Congress tabled the well-accepted belief that divided government shielded against despotism.

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7 An Act to provide for the Government of the Territory North-west of the river Ohio, 1 *Statutes at Large* 50 (1937).


9 Michigan defined “original” as all states in the union as of 1805, when it was created as a territory; not 1776 with the Declaration of Independence, or 1787 with the Ordinance, or 1789 with the Constitution. I have found no case law challenging that interpretation. The case law suggests Michigan’s interpretation was the accepted one.
Perhaps to overcome that challenge, Congress retained the right to veto territory legislation. To access that legislation, the Ordinance provided for a secretary who would transmit laws to Congress and who also would act as governor in the governor’s absence. As a further check against tyranny, the Ordinance required that the appointed officers reside in the territory and own substantial property therein. The governor’s term was for three years, the secretary’s for four, and the judges held office during good behavior.

When the territory had five-thousand free men, the inhabitants had the authority to elect representatives to a general assembly (also called a “house of representatives”) and the President would select a legislative council from a slate of candidates submitted by the representatives. Those two bodies would make up the territory legislature. The Ordinance required that voters own fifty acres of land, representatives two-hundred, and council members five-hundred. This property requirement was more stringent than that of any of the states save for North Carolina, which had a similar fifty-acre requirement for some voters. This legislature could alter the laws adopted by the previously appointed “legislature,” and make new laws as it saw fit. James Monroe defended a similar, earlier draft of the Ordinance as “in effect . . . a colonial government similar to that which prevail’d in these States previous to the revolution.” When the territory reached sixty-thousand free inhabitants, it would enter the third phase and become a state “on equal footing with the original states.” In a letter to Thomas Jefferson, James Madison explained that the fact that “admission to the union is guaranteed” eased the challenge that the territories

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10 Congress never acted to void a Michigan law and, after 1800, never voided the law of any of the Northwest Territory (or Louisiana-Missouri territories). Jack Ericson Eblen wrote, “Part of the explanation is that Congress had no procedure for the systematic review of territorial laws as they were received. Illinois officials, for example, may have avoided Congressional interference with their legislation just by deliberately failing to send any copies of district-stage laws to the federal government. But more important was the lapse of federal concern with the territories.” Jack Ericson Eblen, The First and Second United States Empires: Governors and Territorial Government, 1784-1912 (Pittsburgh: University of Pittsburgh Press, 1968). 102.


would initially be subject to colonial-type rule.\textsuperscript{13} At least that was the intention under the 1787 legislation.

While the Ordinance failed to achieve the higher-law status of modern written constitutions (a simple legislative majority could amend it), it does share space with modern constitutions in at least one important aspect: The Ordinance set forth the architecture within which government was to operate.\textsuperscript{14} In this respect, it carries a family relationship with the United States Constitution, the state constitutions, and those court decisions addressing the extent and limits of government power. And just as with those constitutional documents and decisions, the governing framework established in the Ordinance would suffer erosion, as political, social, and commercial changes would wash against its structural edifice. In turn, this would require legislative and judicial modifications to that “constitutioinal” edifice in order to align previous expectations with the new, changed realities.

In Michigan, this erosion of the Ordinance’s framework would occur most specifically in two areas. The first dealt with the Ordinance’s restrictions on legislative power. The Ordinance provided that territory legislators were to “adopt” the legislation of the original states. They were not to make law. Underlying that requirement stood a belief that state laws were wholly applicable to territory needs. That assumption would almost immediately come under attack, as the territory legislature (the governor and judges) required flexibility in order to address Michigan’s specific challenges. More corrosively, the Ordinance’s imposition of nationally


\textsuperscript{14} Onuf wrote, “undoubtedly, the Ordinance was intended to have constitutional effect, even though it was enacted as simple legislation by an enfeebled Congress looking forward to its own early demise.” Onuf, \textit{Statehood and Union: xviii, 69; Denis P. Duffey, “The Northwest Ordinance as a Constitutional Document,” Columbia Law Review 95, no. 4 (1995). The Ordinance also contained aspirational elements often found in constitutions. Among other things, it prohibited slavery, promoted education and religious tolerance, provided for jury trials, and prohibited \textit{ex post facto} laws.
controlled administrators met increasing hostility as those administrators failed to respond to local interests. Onuf argued that the Ordinance assumed a progression from colonial status to statehood, ending in “the automatic self-destruction of the temporary government it had called into being.” In Michigan, that progression was toilsome and contentious. That is the story of the Michigan Territory and the occupation of this chapter.

Many have furnished varying interpretations of the Ordinance, classifying it from a sacrosanct anti-slavery and rights-guaranteeing document to a governing structure conceived by greedy and corrupt hands. Although motivations are at issue, most historians view the Ordinance as a key element in early nation building. Its macro impact of ushering territories from wilderness to settlements to states largely has been applauded. But its mark on the individuals subject to its rule was not so clear. As Onuf noted, its “constitutional legacy – the history of its specific promises to settlers in the Northwest – was much more ambiguous.”

One cannot help but be struck by the similarity of political conditions faced by the territory’s residents and those complained of in the Declaration of Independence. For example, the Declaration protested that the crown had “forbidden his Governors to pass Laws of immediate and pressing Importance,” coerced the people to “relinquish the Rights of Representation in the Legislature,” made judges dependent on the distant government’s will, and imposed taxes without consent. All of those situations occurred in the Territories, but particularly in Michigan, which endured a lengthy territorial period. This is not to say that Michigan’s settlers suffered similar oppression endured by the original colonies, or that the

17 Onuf, Statehood and Union: xiv.
federal government treated the territory as a colonial subject. But, as discussed below, the parallels existed, and Michiganders increasingly objected to the policies of a distant government wherein they lacked representation.

Jack Eblen noted that the stages of self-government under the Ordinance mimicked those in the American colonial experience: The first stage, with governors and judges as the unelected legislature, was akin to the seventeenth-century period, characterized by a strong executive appointed by a distant power. The second phase, with its structure for growing representative government, mirrored the first two-thirds of the eighteenth century American experience, with a locally elected legislature and an appointed governor. And the last phase of state creation and self-government paralleled the American revolutionary and nation-building period of the later eighteenth century. Although, the structure may have been gleaned from the earlier colonial experience, one factor was different: Unlike their colonial forbearers, settlers under the Ordinance had been steeped in the self-governing environment of the revolutionary and early national period and now were required to move back to a pre-national era of disenfranchisement.

Under the Ordinance, settlers no longer elected their national leadership and lost influence over the appointment of federal judicial officials. In the early phases, they also relinquished control of their local governments, as now the President appointed the territorial leadership. The Ordinance’s “provision for temporary government authorized the (equally temporary) degradation of citizen to stateless subject, but the compact articles guaranteed that the process would reverse itself as the territory crossed successive population thresholds.” In this respect, the Ordinance traded an individual’s self-governing interest for future collective

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18 Eblen, The First and Second United States Empires: 42. Eblen argued that Jefferson, Monroe, and Nathan Dane were the forces behind the governing structure and rights focus of the Ordinance. Ibid., 18-34.
19 Onuf, Statehood and Union: 69-72.
benefits. A settler would forfeit his previously enjoyed political rights so that the national government could build a more stable economic and political future.\textsuperscript{20} 

The Confederation Congress surely was aware of, and troubled by, the similarity between the territory governance and British control over the American colonies. To address this concern, the Congress “in moving from the denunciation of one empire to the implementation of their own” legislated “guarantees of eventual partnership in the empire.”\textsuperscript{21} The key guarantee was that the territory would be admitted as a state on “an equal footing with the original states, in all respects whatever.” Doing so promised political parity to future generations but ignored those settlers residing in the territories before eventual statehood. While Congress may have considered colonial-like governance a practical necessity in the untamed western regions, the settlers there (with the exception of the pre-revolutionary French) had been raised with the ethos of government deriving its powers from the consent of the governed. In the short term, their consent was considered expendable, or at least shelved.

To compound matters, the settlers suffered the challenges of leadership ill-informed of the settlers’ needs. Federal appointees seldom hailed from Michigan and answered to a distant government for their decisions.\textsuperscript{22} As the territorial period lengthened, Michigan settlers increasingly recognized and bristled over their incapacity. In 1831, even after Michigan elected its legislature (but still dealt with an appointed governor and judges), a community of Michigan leaders would complain of the essentially colonial status under which they suffered. Reminding Congress that Michigan residents had come from republican states, they protested that, “The

\begin{footnotes}
\item[20] Foregoing current political rights in order to build the nation-state was not merely a question of political theory. Territory Governor St. Clair argued that the former citizens became “subjects” upon settling in the territories. \textsuperscript{21} Eblen, \textit{The First and Second United States Empires}: 28.
\item[22] Eblen argued that the governor had the powers of “an autocrat. During both the first and second stages of temporary government, he was legally responsible only to Congress – and, after 1789, to the President – from whom he received all his authority.” Additionally, the national government paid his salary and, in that way, he was even more insulated from the people than the colonial governors who relied on the colonial legislators for pay. Ibid., 49.
\end{footnotes}
mere fact of their having removed hither should not operate as disfranchisement of their privileges, or of depriving them, as citizens of the several states.”

This non-representative government architecture frustrated settler demands, resulting in growing anger over government dysfunction and non-responsiveness. The period would end as Michigan moved from governance under the Ordinance blueprint to one formed by the residents under the Michigan 1835 Constitution. Even that move was met with threats between residents and Washington, and bullets between Michigan’s militia and Ohio’s.

**Early Territorial Life: A Demand for Government**

Before Congress carved out a specific Michigan Territory, the inhabitants of the village of Detroit pressed for a degree of self-governance. Around 1800 nearly all the European-American inhabitants of the area now known as Michigan lived in Detroit. Previously, in turn, Native-Americans, the French, and the British, had controlled the Detroit area. Although Britain legally ceded the area in 1783, it retained physical control until 1796 when, pursuant to the Jay Treaty, it surrendered the area to the Americans. Being a military outpost, the area contained a fort and, below it, a town. Most of the inhabitants were of French ancestry and spoke French.

English and Scottish merchants, a few white Americans, some free blacks, and a small

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24 Although the Americans of the time would offer great deference to the French, others did not hold them in such high regard. British historian Esmond Wright referred to the French settlers in late 18th century Detroit as “the flotsam of France’s failure in the west.” Esmond Wright, *Fabric of Freedom, 1763-1800*, Making of America (New York: Hill and Wang, 1978). 3.

In 1856 historian John Ferris, wrote that the French settlers “were an extremely ignorant people and made most miserable cultivators of the soil . . . The Canadian French seemed to have no idea of any improvement in agriculture having been made by any body, since Noah had planted his vineyard at the foot of Mount Ararat.” Ferris wrote in a time when many Americans were rejecting European commercial and social practices as dangerously socialistic. Jacob Ferris, *The States and Territories of the Great West* (New York: Miller, Orton, and Mulligan, 1856). 173.
contingent of black and Indian slaves, made up the rest of the population. The Jay Treaty permitted the British to keep their slaves. The treaty also provided that French and British residents need not become American citizens nor pledge allegiance to the new government. 

The military presence in the town was not without its challenges, as conflicts between military needs and civilian rights occasioned strife. Military efforts to keep soldiers out of the taverns in 1798-99 fomented much excitement. John and Jane Dodemead’s home on Ste. Anne Street housed a tavern and, on the second floor, the town’s court. That soldiers frequented the tavern upset their fort commander, Major David Strong. Strong felt that soldier drunkenness had “been the cause of the desertions which have so frequently taken place” and placed the fault at the door of “those evil-minded persons who are constantly selling liquor to the men.” Strong’s demands that Dodemead stop serving his men fell on deaf ears. In an effort to impede his troops’ indulgences, he posted a military guard at the entrance to the Dodemead-owned home/tavern/court. Dodemead and the town’s judges objected to the guard and wrote to Governor St. Clair protesting the military’s interference with civilian issues and its obstruction of court activities. Despite Strong’s objection that the protest was “endeavoring to sour the minds


26 There is some evidence that Detroit residents and Indians traded in slaves after the Jay Treaty. Citing a “Veteran Detroiter’s Interesting Recollections,” General Friend Palmer’s Papers related: "Notwithstanding this wise provision [the Northwest Ordinance] our ancestors paid little attention to it, for whenever a spruce young negro was brought by the Indians he was sure to find a purchaser at a reasonable price. Most every prominent man in those days had a slave or two, especially merchants trading with the Indians. . . The master once attached to his "Sambo," a great price would have to be paid to buy him.” Friend Palmer, Early Days in Detroit (Detroit, Mich.: Hunt & June, 1906). 104.


of the people,”28 the protest met with success. St. Clair ordered the guard removed from the
house, and Strong removed from command.

It is not surprising that a tavern keeper served alcohol to soldiers, that they drank heartily,
or that the tavern keeper objected to military efforts to restrict that drinking. The twist to the
story is the judges’ protest on behalf of the tavern keeper. They argued that the guard was
disruptive of court proceedings. Since it is improbable that a guard positioned one floor below
the court would do other than quiet a rowdy crowd, the judges’ protest was not associated with
an unease over disruptions of court procedure. After all, one can only assume that drunken
soldiers would be more disruptive than sober ones. It is impossible to discern definitively the
judges’ motivations for siding with the tavern keeper. Those motivations might have been based
on friendship, a desire to support the court’s landlord, their personal distain for Strong, or an
impulse for republican governance and a concern over military interference. Whatever their
motivations, the judges sided with civilian authority over the military. This is not to suggest that
civilian authorities countenanced intemperate behavior. Shortly after civilian control took over,
the town’s Board of Trustees passed restrictive liquor ordinances in response to drunkenness,
idleness, and profanity.29 Dodemead was one of the members of that board.

The objections to Major Strong’s efforts should not be read as objections to government
controls. In 1798-99, the inhabitants of the town petitioned the territory’s “General Court” to

28 Letter from Major David Strong, dated January 23, 1799, published in Clarence Monroe Burton, History of
29 An Act dated 7, 1803, “Act of Incorporation and Journal of the Board of Trustees, 1802-1805.” (Detroit: Burton
Historical Collection, Detroit Public Library, 1922), 40-41. An uncertain balance characterized the relation between
civilian and military control. Rather than exercising authority over military areas, the town trustees requested
military compliance with civilian ordinances. For example, on July 20, 1803, the board notified the “Commanding
officer of the Garrison that the public Slaughter house is . . . a nuisance, and that he is requested to issue orders that
the Same be Kept Clean.” Ibid., 42. A few weeks later, the board issued fines to civilian violators of the fire
ordinances but requested that those under military control be furnished with the buckets and ladders necessary to
honor the ordinance. August 1, 1803, ibid., 43. Military control over civilians was unacceptable. However, the
civilians did not seek direct control over the military. Instead, they sought to advise and influence.
incorporate the town and invest it with “full power and Authority to make such, bye-laws and Statutes for the better Government of the Town.”30 The general court was the three-member Supreme Court of the territory that had the power to act upon such petitions. Unfortunately, the court traveled to Detroit only twice in six years and the governor never visited.31 Because the court rarely sat in Detroit, it did not get around to considering the petition before the United States Congress withdrew its authority in December 1799. In 1800, Congress divided the Northwest Territory into two parts: The Indiana Territory, which included current-Michigan’s western lower peninsula and its entire upper peninsula, and the Northwest Territory of Ohio, which included the Detroit area and much of eastern Michigan. On January 18, 1802, now Ohio Territory Governor St. Clair, signed legislation incorporating Detroit.32 St. Clair appointed five trustees to lead Detroit until elections could be held, one of whom was tavern owner Dodemead. After Ohio became a state in 1802, the eastern portion of Michigan, including Detroit, transferred to the Indiana Territory, a change not to the inhabitants’ liking.

The move from the Ohio Territory to the more distant Indiana Territory threatened further to marginalize the inhabited portions of Michigan. Accordingly, in March 1803, over three-hundred Detroit residents undertook a campaign for local territorial governance. Their first petition to Congress respectfully requested the creation of local territory governance to avoid the challenges associated with the “immense distance from the settlements upon the waters of the Lakes, to the established Seat of Government,” in Indiana. Local government would help resolve “[m]any important commercial questions,” in ways distant government could not.33

30 Ibid., vi-vii.
32 “Act of Incorporation and Journal of the Board of Trustees, 1802-1805,” 3-7.
Hearing no response, in September they reframed their plea, but still treaded gingerly so as not to offend their assigned leaders. “Your Petitioners are induced to make this request, under a full conviction of the absolute necessity of the measure, to the promotion of the happiness and prosperity of this Country; and to remove the many embarrassments under which it has long groaned, and not from any personal dislike to the Officers of the Indiana Government.”

Once again, Congress answered with silence. In frustration, Detroit residents again petitioned Congress, in October 1804, but this time with more vigor. Finding that their “Situation is too distressing to justify our Silence upon a subject of Such infinite Consequence to the Government, to ourselves and to our posterity,” the petitioners starkly set out the issue: A more local territorial government promised “the happiness, good order, and prosperity of the Citizens of this district.” A more distant one – like in Indiana – could not “but produce consequences of a Serious and alarming nature tending to all the horrors of outlawry, oppression, and anarchy.”

Once again, Congressional silence. It was time for others to plead the case. In an effort to appeal to party loyalty, in December 1804 the “Democratic Republicans” of Wayne County weighed in “for the first time.” Because the residents of Wayne County (wherein Detroit resided) had to “wander seven hundred miles, thro’ inhospitable deserts,” for the resolution of legal issues, the population appealed for local government to provide for the “regular and moderate exertion of authority blended with justice.”

These four petitions are telling. Contrary to popular culture’s view of rugged, frontier individualism, the people of Detroit advocated for more government structure and law, and did so in an increasingly irate fashion. And they did not stop until Congress granted their wishes.

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34 “Petition to Congress by Inhabitants of Detroit,” September 1, 1803, ibid., VII: 118.
35 “Memorial to Congress by Inhabitants of Detroit,” October 25, 1804, ibid., VII: 227.
36 “Petition to Congress by Democratic Republicans of Wayne County,” December 6, 1804, ibid., VII: 240-42.
To the citizens, the absence of government threatened commercial success, settlement progress and, ultimately, anarchy.

While waiting for the national government to respond to their calls for a more local territorial governance, the Detroit residents continued to forge their own framework for municipal governance. The Detroit Charter created by the distant territory government called for a governing assembly of five trustees. A popular vote of free-holders and renters paying at least forty dollars a year elected those trustees. At each election, the electors would vote on each law enacted by the trustees during the previous year. If not approved, the law would become void. The voters also determined the amounts government would spend, and directed how the tax assessor could set tax burdens.

Detroit’s incorporation statute (passed by the Territorial government) made clear government’s responsibility to enhance the general welfare. Detroit’s Board of Trustees was to “make, ordain & establish in writing Such laws and ordinances . . . as to them Shall Seem necessary and proper, for the health, Safety, cleanliness, Convenience and good government of Said Town.” The statute continued, stating that “it Shall [be] the further and particular duty” of the board “to make, adopt and establish regulations for Securing Said Town against injuries from fires, to cause the streets, lanes, and alleys of Said town, and the public Commons to be kept open & in repairs and free from every Kind of nuisances.” The board was responsible “to regulate markets, and if necessary, to appoint a clerk of the market, to regulate the assize of bread, both as to weight & price, and to prevent Swine and other animals from running at large.”

Voters had the right to reject those efforts toward “good Government and Well being,” but it is clear that the enabling legislation presumed a local governance actively involved in public safety
and commercial markets.\textsuperscript{37} By investing Detroit’s government with significant regulatory power over health, safety, general welfare, and economic affairs, the territorial government established that the board’s core purpose was community development.

Immediately upon incorporation, Detroit’s Board of Trustees embraced those obligations. Its first task was safety and, on February 23, 1802, the board took up the town’s most urgent safety concern – fire. The first ordinance regulated the quality and cleaning of chimneys, set standards for stoves and exhaust pipes, obligated each householder to keep barrels of water in areas where they would not freeze, to have dedicated ropes, levers, poles, and ladders to fight fires, and much more. Each shopkeeper had similar requirements. Additionally, the ordinance required each male to respond to all fire alarms to assist in dousing the flames. The ordinance at length set forth the inhabitants’ obligations, the penalties for breach, and the government investigation and enforcement mechanisms.\textsuperscript{38}

The board acted as both legislature and, at least in part, as judiciary. Nearly every board meeting addressed fines for those individuals violating the fire code, many of whom were town officials. For example, on March 24, 1802, the board fined four of its members and the Wayne County jail for fire-code violations. Included among those fined was John Dodemead who was a town trustee, the owner of the tavern housing the early courtroom, and the town treasurer assigned to collect the fines. The board assigned inspectors to engage in house-to-house searches to assure inhabitants honored the code but, apparently, their powers were inadequate. Frustrated over a lack of compliance, and recognizing the need to “obviate any objection or excuse” for non-compliance, the trustees tightened the fire ordinance to require the inspectors to

\textsuperscript{37} An Act to incorporate the Town of Detroit, Sec 5, "Act of Incorporation and Journal of the Board of Trustees, 1802-1805.” 4.

\textsuperscript{38} Ibid., 10.
Residents sought to excuse their non-performance, but nothing indicates that they objected to government searches of their private households and businesses. The record discloses no claims of Fourth Amendment rights against government searches.

The lack of litigation records is not in itself sufficient indication of public acceptance of the government’s right to enter homes to search for law evasion. That voters accepted those intrusions is evidenced better by the community’s failure to overturn the invasive regulations. The sparse records of the time do not even indicate that voters made an effort to do so. To the contrary, during times of crisis, they went a step further in subordinating their property and privacy interests to community needs. When bucket-brigade fire-retardation efforts were insufficient to quell a fire, the residents would form a battering squad to take up the effort.

“Taking up a green log as heavy as they could carry, they charged at the burning building at a brisk trot and dashing it against the wall with all their might sent the burning timbers down into the interior.” The squad continued until each wall collapsed – hopefully – into a controlled bonfire. The issue was not about the homeowners’ property rights. Burning buildings were pathogens to the community’s health. In that context, individual rights discussions were absent, or at least unpersuasive. The community faced danger and the response was collective.

One might expect that the board’s next ordinance would focus on safety. After all, Detroit was located in a hostile environment, with the British across the river, Native Americans outside the fort, disease a constant threat and its protecting government distantly located. But that was not the board’s next move. Instead, the trustees focused on market regulations. On February 26, 1802, the board passed an assize of bread, as required by the incorporation.

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39 Ibid., 16, 14, 20.
authorization act. The assize regulated the sizes of bread, and required that each baker stamp his initials on the bread for the purpose of identification and enforcement. The board would modify that statute in July, adding a required price for bread.\textsuperscript{41} Shortly thereafter, the board complied with another of the incorporating requirements – it created a “well regulated” public market. Through that legislation, the trustees required that nearly all foodstuffs be sold on Tuesdays and Friday at the geographically specified market area. The market would open at sunlight and close at 12 o’clock. Anyone selling outside the market was subject to a three-dollar fine.\textsuperscript{42} One year later, the board amended the ordinance to require that foodstuffs be merchantable, and imposed a significant fifty-dollar fine for non-compliance.\textsuperscript{43}

Soon the regulations increasingly took on efforts to enhance quiet enjoyment. The ordinances included horse and traffic regulations (no horse racing allowed in the streets), requirements that property owners provide footpaths, and that homeowners regularly sweep and remove offensive matter from the streets near their property.\textsuperscript{44} These efforts to keep the town clean were not merely advisory. On July 30, the trustees fined the “Widow Abbot, Robt. & James Abbott, Henry Hyman, James fraser, Widow Callahan, Robt Goure & Ths Nowlen” for failure to sweep in front of their premises.\textsuperscript{45} In May 1803, the board would declare “dung & filth” a “perfect nuisance” and would prohibit deposits of that waste “on the Commons or lanes” of the town. With its intentions well considered, the trustees granted the alternative “liberty to

\textsuperscript{41} February 26, 1802, "Act of Incorporation and Journal of the Board of Trustees, 1802-1805," 14, 24. The Board later repealed the price regulation for a time due to a scarcity of flour. Ibid., 28.
\textsuperscript{42} March 20, 1802, ibid., 15.
\textsuperscript{43} Such marketplace regulations went at least back to Medieval England where municipalities set the time and place for markets, adjudicated disputes, regulated the quality of goods and, at times, set prices. In London, for example, everyday save Sunday was market day and in the country, local governments would set more restrictive market times and days. Colonial Americans adopted this practice. As populations spread and commerce increased, government efforts to restrain market times and places increasingly would become problematic.
\textsuperscript{44} April 8, 1802, "Act of Incorporation and Journal of the Board of Trustees, 1802-1805," 18.
\textsuperscript{45} Ibid., 26. The Board later reconsidered the Widow Abbott’s fine, as her son proved the charges unfounded, September 4, 1802, ibid, 29.
carry & deposit the Same in the dock of the public market.” The river provided a natural sewer for the town and regulations suggested its use. Protecting the commons not just from filth but also from capture, the board imposed heavy fines and the possibility of incarceration for those attempting to enclose the town commons.46

Alcohol consumption was a significant challenge, and the board spent much time on liquor regulations and enforcement. From the first days of the town, residents applied for liquor licenses, often unsuccessfully. Even with the board’s stingy grants of licenses, in mid-1803 it took notice that “too great encouragement is given to drunkenness, idleness, and profanity on the Sabbath day.” Accordingly, the trustees banned “minors, apprentices, Servants or Negroes” from frequenting taverns in the later evenings or on or near the Sabbath. Other tavern regulations included a sliding scale of taxation, depending on the level of decorum exercised by patrons. Liquor regulations would increase in scope and complexity as government tried to balance the desire for drink with the desire for a safe environment and for containing public-assistance expenses associated with alcohol consumption.47 The goal was to build a safe, commercially vibrant community that was welcoming to settlement. The board continued to regulate, and act as a quasi-court to enforce those regulations. For example, in 1803, the board passed restrictions on swine and required that owners keep their female dog indoors during her

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46 May 19, 1803, ibid., 34; April 20, 1802, ibid., 22.
47 As discussed below, the territory government would soon dominate the regulatory regime. Among its first acts, the legislature (made up of the governor and judges) would require that taverns “shall provide and furnish suitable entertainments and accommodations for man and horse.” In placing that requirement on alcohol service, the legislature limited or eliminated alcohol sales in homes.

In the same act, the legislature required a license to operate a ferry, set out the duties of the person obtaining that license, and the prices that could be charged for ferry services. It also required a license to sell merchandise imported from other nations. An Act concerning ferries, tavern-keepers, and retailers of merchandise. Act XVII, August 29, 1805, Laws of the Territory of Michigan: Embracing All Laws Enacted by the Legislative Authority of the Territory, 4 vols., vol. 2, The Making of Modern Law: Primary Sources (Lansing1874). I: 42-43.

Given that the territory laws were taken from state laws, the extent and nature of the territory’s regulations suggest a broad regulatory (and commerce shaping) intention not just in Michigan but also in the existing states of the time.
Enforcing its nuisance regulations, the board issued numerous fines and ordered removal of offending agents.

Detroit was not unusual in its commitment to general-welfare legislation, including the regulation of markets, setting invasive safety measures, and subordinating individual property interests to the community. Such government economic involvement characterized early Michigan governance, as it did in the other areas of the nation. As Cooley noted of early America, local governance was “present at all times, touching the citizens for his advantage and direction in all his relations: by his fireside as much as in his business.”

The individual, market, and state were inextricably interwoven. Public and private, state and industry, and individual and market were not discrete, insulated units.

Government actions were not just about the “selves” that made up the resident community. It was about future – about the residents’ posterity. In reading their petitions and legislation, one is struck with the community’s concern for the welfare not only of its current residents, but also for future generations. In 1803, for example, a group of inhabitants petitioned a Congressional representative to assure that land sales of the commons be handled in a manner consistent with general population needs to address expected population growth. The petition asked that the national government use the proceeds of sales of the commons “in public improvements in the wharves, streets, etc., that it be appropriated to the purpose of schooling and education of youths etc.” Their interest was not lower taxes, or the price of the marketed parcels.

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50 R. Kent Newmyer reflected that almost all of Marshall’s early-American grand constitutional cases arose out of private, common-law disputes. However, the “line between public and private law in early national jurisprudence was plainly imprecise. So was the distinction between private entrepreneurial activity and public welfare, at least in the economically-grounded, common-law infused constitutional jurisprudence of the new chief justice.” R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001). 211.
Rather, it focused on the need to develop community to benefit “both the health and happiness of its citizens.”

With few residents, a mixed French, British, and American culture, and a subsistence existence, one may wonder why this sense of community. Simply put, individual survival was tied to community development. The town suffered the consequences of poor sanitation, crowded living conditions, and a geographic proximity to expansive swamplands. “In late summer, residents suffered from ‘bilious fevers’ typhoid epidemics, and ‘milk sickness,’ probably caused by lack of refrigeration, unpasteurized milk and contaminated water. Diphtheria, scarlet fever, measles, mumps, and smallpox were prevalent.” Its buildings were made of wood and most were huddled closely together within or near the walls of the fort. Either residents together addressed these conditions or they suffered significant consequences. It is not surprising, therefore, that early Detroit government had actively sought to address these conditions and did so without the halting voice of individual rights.

Changing Historical Understandings

It is significant that Detroit residents did not object to, or overrule their invasive government regulatory regime. By the standards of twenty-first century law, government entry into homes to assure compliance with fire-safety standards would be problematic. It was not so in the early nineteenth century, when Detroit government routinely entered private spaces for fire-related inspections, without the din of privacy-rights voices. And yet, the Fourth Amendment’s language against search and seizure is the same in both periods, having remained the same since its adoption in 1791. On paper, the “right” is the same. In practice, it is not. This is best understood by the changing nature of rights. While a library section unto itself, briefly,

claimed “rights” adjust as society elevates and contracts their importance as perceived needs change. Richard Primus, in *The American Language of Rights*, traced those changes and argued that Americans elevate interests into ‘rights’ in response to perceived needs and priorities of the time. He noted that the “practice of calling things ‘rights’ to claim priority and protection regardless of the kind of normative ground offered, and indeed regardless of whether any underlying norm is articulated, has been characteristic of rights discourse throughout American history.”53 Primus suggested three periods in American history predominated the shifts in rights claims as America struggled with new adversities: The founding, the Civil War, and the Cold War. Others suggest the Great Depression/New Deal era rather than the Cold War. This paper will suggest that the Jacksonian and Cooley periods together created a post-Civil War individualistic rights regime, with Jacksonian-era challenges elevating public perceptions and Cooley establishing legal standards. Others may suggest Ronald Reagan introduced a neo-liberal rights regime. Whichever period predominated, rights speech and law shifted to address the then current political, economic, social, and philosophical needs and beliefs.

Increasingly, historians and legal scholars have concluded that rights language employed in the colonial and early-American periods dealt more with communal rights than they did with private rights. Gordon Wood argued that American notions of rights evolved from the ongoing tension between the Crown’s claimed right to rule and the populations’ claimed liberty and property rights. In that context, British citizens did not consider their liberty and property rights “private,” as they had little notion of “public” and “private” spheres. “Even as late as the eve of the Revolution,” Woods submitted, “the modern distinction between public and private rights was still not clear.” He concluded that, “All of this meant that the colonists were able to use a

great deal of communal or ‘public’ control and management of what we would call ‘private rights.’”

Just as “private” rights did not forestall government activism when dangers like fire threatened, notions of private enterprise did not require, or even advocate for, hands-off government. Where today we would protest against a government marketplace (especially if it were exclusive) and a requirement that bread be sold at particular weights and prices, those government activities were common in the early nineteenth century. Yet the constitutional language employed to argue against such government activity is largely the same. This is because modern notions of private rights had not yet gelled in early America and therefore, had not attached themselves to constitutional language. Instead, society perceived a need for government involvement in commerce and social development and protests against that involvement were rare and largely unavailing. As William Novak noted, from the nation’s founding “commerce, trade, and economics like health and morals, [were] fundamentally public in nature, created, shaped, and regulated by the polity via a public law.” Where Novak dealt with governing entities in established states, his conclusions also apply to territory governments, at least Michigan’s. As Willis Dunbar noted of early Michigan, “There was no holding with the economic doctrine of laissez-faire, for several of the regulations were quite exacting.”

Novak and Dunbar’s argument can be taken a step further: Government not only regulated the market; it actively participated in the market. It helped to develop industry, it invested in private commerce, and it owned and/or directed internal improvements. As Oscar

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and Mary Handlin observed with respect to Massachusetts, government “would make its influence felt in every aspect of production, readily adjusting assistance to the needs of changing industrial, agricultural, commercial, and communications systems.”\textsuperscript{57} In addition to controlling society’s excesses, government fed the machinery of commerce to enhance the general welfare. At its core, the lines between government, industry, and society were deeply blurred. The interweaving of industry and governance required that individual interests either be subordinated to the public weal or, more fundamentally, that society concur that supporting the common welfare, by its nature, advanced individual interests. Kermit Hall characterized this philosophy as serving the “rights of the public.” He submitted, “This concept meant that the commonwealth, the public as a whole, had certain rights that had to be placed above private interest.”\textsuperscript{58} Even common-law rules that seemingly advance individual interests had their regulatory aspects. As Jonathan Hughes noted, “The rule of 	extit{caveat emptor} protected the seller from action by the buyer, but was never meant to sanction business fraud; in the colonial world direct non market controls buoyed up business probity.”\textsuperscript{59} Government priorities were group focused. With an overwhelming amount of evidence of early government involvement in industry, historians now largely agree that early-American government prioritized group needs over individual needs, and did so consistently with prevailing opinion.

That is not to say there were no dissenting voices. The Handlins pointed one out in 1819 Boston. At that time, the \textit{Boston Commercial Gazette} heavily critiqued claims of individual interest against government commercial activities. Holding to the prevailing opinion, the

\textsuperscript{57} Oscar Handlin and Mary Flug Handlin, \textit{Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861} (New York: New York University Press, 1947). 52. It is worth noting that the Handlin’s wrote this groundbreaking work as part of a New Deal inspired effort to assess the \textit{laissez-faire} characteristics of antebellum America. Their 1968 revisions sought to recognize and correct any information influenced by the time and funding of the project. This paper employs that revised study.


Gazette classified individualistic claims as “manifestly erroneous.” The Gazette was responding to claims that individuals should be “the judges of their interests, and consequently should be allowed to regulate them unobstructed.” Such arguments, the Gazette urged, were “subversive to the end and aim of all governments; and . . . utterly impracticable.”

This was more than thirty-five years after the Revolution, indicating that community-rights thoughts were not merely the momentary esprit of Revolutionary camaraderie. Impositions on what today would be personal rights were acceptable to, and desired by, the inhabitants of the city that led the call for independence and self-government. On the surface, there were concerns that selfish individual interests required moderation in the face of conflicting group needs. But the issue was not merely a decided preference for the group over the individual, as there was no such simple dichotomy. Instead, society embraced a symbiotic model where the individual was advanced through community and commercial development. Government acted believing that community development and safety facilitated an environment for individual self-creation.

Notwithstanding both the historical fact and logic of government involvement in early American society, popular belief has promoted an ideology of laissez faire, freewheeling individualism and weak, almost nonexistent, governance. This individualistic myth has long-standing roots. Writing in 1902, Guy Stevens Callender, a founder of American economic history, reflected that to the American public, “as to the rest of the world, America is the land of private enterprise par excellence; the place where ‘State interference’ has played the smallest part, and individual enterprise has been given the largest scope, in internal affairs; and it is commonly assumed that this was always so.” But, Callender noted, reality was much different. America was the one of the first “to extend the activity of the state into industry.” In doing so,

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60 “Public Interest”, Boston Commercial Gazette, September 23, 1819, quoted in Handlin and Handlin, Commonwealth: 52-3.
states would create over $200 million of debt purely for commercial development – amounting to government activity on a scale that dwarfed other nations. Rather than a laissez-faire approach, American states led the world in state-supported capitalism.61

While Callender as an economic historian analyzed government spending to show government involvement in economic affairs, early legal historians relied on court records. In doing so Edward S. Corwin helped popularize the notion that government was legally barred from too great an involvement in commercial affairs. To Corwin and his followers, law and constitutions were designed to protect private interests, and did so through a triumvirate of judicial review, due process, and vested rights.62 In setting vested-rights protection as a linchpin, Corwin’s analysis suggested that American constitutions necessarily elevated private rights, most specifically property rights, over conflicting societal interests. In support of that, he and his followers presented a sizeable lineup of judicial pronouncements touting the sanctity of property and the advantages of limited government. But court pronouncements and dicta are not precedents. Decisions are, and antebellum courts almost always found on the side of community interests over conflicting individual rights. In those relatively rare cases when they did not, the rulings were narrow and, most often, dealt with separation of powers issues – not limitations on government.

Corwin’s judicially focused historical world began to unravel as historians studied the interplay and relationships among society, economy, and government. Starting with the studies of Massachusetts and Pennsylvania, by Oscar and Mary Handlin and Louis Hartz, historians have increasingly accepted that economy, the individual, and government were not distinct

entities but, rather, aspects of an organic social whole, with each part influencing and responding to the other to facilitate general-welfare improvement. They found that rather than being a rigid protector of established interest, law was an accommodating tool of social development. In that context, Hall related, the “state existed to ensure that the ‘rights of the public’ took precedence over any individual or group interest.” To accomplish that, legislatures “enacted a veritable blizzard of economic regulations under the guise of enhancing the rights of the public.” To that, the Handlins would add that government financially supported economic development by subsidizing multiple trades. Massachusetts, for example, gave financial aid to its fisheries, agriculture, hemp, silk, twine, glass, cloth, breweries, and salt and sugar trades. It also enacted legal changes to assist commerce, modifying franchise, corporate and inspection laws, and provided attractive land grants to business. The goal was to “create favorable conditions for economic activity.” Hartz added, in respect to antebellum Pennsylvania, that government efforts were involved in “virtually every phase of business activity.” He voiced that government accomplished this by active participation in economic development, for example through a mixed corporate model, and by regulations to advance the general welfare. Rather than focusing on vested rights, as had Corwin, Hartz argued that government dealt with a “whole series” of rights “fathered by the Revolutionary doctrines which it became the duty of the state to secure.” Included in those were blacks’ right to freedom, debtors’ rights to legal modification,

64 Hall, The Magic Mirror: 94.
65 Handlin and Handlin, Commonwealth: 78-83.
66 The term “regulation” is oft used, but seldom defined. In this paper, I define the word broadly to incorporate the host of activities engaged in by government to advance general-welfare concerns. For purposes of this work, however, I distinguish government-spending activities from “police regulations.” I do this because most courts would address government power to spend under constitutional tax language and would employ due process language to consider police-power regulatory activities. The paper only lightly addresses the changes in common-law principles discussed by Morton Horwitz in The Transformation of American Law. Arguably, those changes fall under the regulatory umbrella as activities engaged in by government to advance general-welfare concerns.
children’s rights to education, and laborers’ rights to fair working conditions. These were the rights that government helped secure in order to enhance general and individual welfare.\(^6^7\) At the same time, the drive to advance commercial development animated even the highest court. Marshall and Story historian R. Kent Newmyer noted that “[n]early every one” of Marshall’s and the early Supreme Court’s decisions “facilitated market development.”\(^6^8\)

To this, Willard Hurst introduced an expanded perspective, studying government, social, economic, and legal dynamics in wilderness Wisconsin. In reviewing the pioneers and early settlers, Hurst found that government was not a top-down imposition. Rather it arose from settler efforts to enhance their interest, including in the commercial sphere. Instead of being an impediment, government was organic to an advancing social and economic society.\(^6^9\)

Novak and his followers have furthered the historical narrative by explaining that government involvement in trade and private lives was extensive and pervasive. Novak disclosed a world where, rather than acting upon each other, government, industry, and individuals acted almost as one to advance the general welfare. He urged, “Law and the state were not simply reflectors or instruments or facilitators of natural evolutions in the market or civil society. They were creative and generative forces.”\(^7^0\) As the Detroit experience bears out, government was not an overseer or laid atop society; it was a part of an organic whole. In that context, resources and not \textit{laisséz faire} attitudes were its limitations.

It seems too obvious to state, but it is important to note that government involvement, while pervasive, was not uniform as local conditions and needs demanded differing

\(^6^7\) Hartz, \textit{Economic Policy and Democratic Thought}: 289, 306.
\(^6^8\) Newmyer, \textit{John Marshall and the Heroic Age of the Supreme Court}: 317.
governmental responses. As Hartog noted in his study of New York City, “a public institution could define its goals only in response to the dictates of its varying constituencies.” Municipal leaders saw their role as “creating a stable context for private decision making. That such planning would necessarily interfere with private property interests and would involve a significant extension of public power was not of concern, for members of the city government believed that they were acting under the banner of popular sovereignty.” Although government responses differ from area to area, they also change temporally. Hall concluded that a number of government entities curtailed some regulatory activities, particularly wage and price regulations, as economies expanded and capital became more available. In that sense, government withdrew when it was no longer needed. Although the subject of a later chapter, Cooley would argue that once those regulations fell into disfavor, government constitutionally was barred from reclaiming that regulatory power. He offered, “whatever power may once have existed for [regulating prices] has been lost or taken away, and that business in general is protected against the interference of the state in such matters.” Whatever Cooley suggested for the post-Civil War era, in the antebellum period regulation and support of industry characterized state and local governance. Those activities were designed to advance commercial and social development and were widely accepted as norms of government.

The challenges faced at the founding were different from those during the opening of the west, just as the challenges were different with the advent of the steamship and those faced during the development of the railroads. Primus addressed that dynamic in his discussion of

72 Ibid., 154-56.
74 Thomas McIntyre Cooley, "Limits to State Control of Private Business," Princeton Review 1878 (1878): 43. Cooley wrote this article in the wake of Munn v Illinois.
changing rights speech. This dissertation will argue that Cooley’s arguments concerning new constitutional meanings in response to changing societal needs aligns with Primus’s finding that rights change through time. As oppressive forces and opportunities for advancement change, so too do our understandings of government and its role in facilitating individual self-creation. Ultimately, that is why Corwin and his followers missed the mark. Government and courts cannot hold to an immovable star when the heavens and earth are moving.

The Michigan Territory: The Ordinance in Action

Perhaps in response to the multiple petitions for local territory governance, on January 11, 1805, Congress carved the Territory of Michigan out of the Indiana Territory, effective on June 30 of that year. That act provided for “a government in all respects similar” to the Ordinance. Hence, the Michigan Territory would be led by a governor, a secretary, and three judges appointed by the President. Jefferson appointed William Hull governor, Stanley Griswold secretary, and Augustus Woodward and Fredrick Bates as judges. A third judge turned down the President’s appointment. Jefferson appointed his replacement, John Griffin, in late 1805. None of these individuals hailed from the Michigan Territory.

June 1805 would prove to be a pivotal month in the area’s history. On June 11, a fire destroyed all but two buildings in Detroit. Lore implicates “segar” sparks in baker John Henry’s stable for setting the town ablaze. The fire devastated the community. Detroit’s first mayor, Solomon Sibley would write to his wife, "we are without a single exception, unhoused ... in Short the Town of Detroit was . . . in the course of three hours reduced to ashes." Territory

\[75\] An Act to Divide the Indiana Territory into Two Separate Governments, 2 Stats. 309 (1805)


\[77\] Letter from Solomon Sibley to his wife, Sarah, June 12, 1805, in Solomon Sibley Papers, Burton Historical Collection, Detroit Public Library, quoted in Sherer, "Surviving in Frontier Detroit," 11.
Governor Hull arrived shortly after the fire. The first acts of his new government were relief efforts. Of course, the interests were humanitarian – all the homes were destroyed – but they were commercial too. From a national perspective, Detroit furnished an American commercial alternative to British interests. Britain was America’s main economic competitor and the young nation needed to maintain a commercial town in the area to prevent trade from moving to the nearby Canadian territories. Expressing that concern, a resident wrote: “The loss will prove a serious evil, not only to the individual sufferers, but to the interest of the U. States. Detroit was the only commercial Town belonging to our Govt. in this quarter and unless it can be rebuilt shortly the whole trade will centre in the towns in the british province opposite.”

Local government worked to address those needs it could, but as a territory, it had to wait for the distant central government to address long-range needs. This took time. A personal appeal to Congress by Hull and Woodward resulted in Congressional 1806 passage of “An Act to Provide for the Adjustment of Title of Land in the Town of Detroit and Territory of Michigan and for Other Purposes.” The act provided for the rebuilding of Detroit. It created a land board to lay out the town and to grant land to each person over seventeen and “not owing allegiance to any foreign power,” who owned land or inhabited a house during the fire. Tenants and mere occupiers would now become landowners.

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78 Cooley reflected, “obviously the first duty of the new officials was to do what should be in their power to give relief to the homeless and needy people. The rebuilding of the town must be aided, and the people must have lots to erect their habitations and business houses.” Cooley, *Michigan: A History of Governments*: 152.


81 2 *Stats.* 398. While a disaster, the complete destruction of the town allowed the government to plan the area according to future expanding needs. To Cooley, the fire “had removed the buildings as if by providential design; and the bare earth invited the suitable plan and was encumbered by no obstacles.” Cooley, *Michigan: A History of Governments*: 153.
The governor and judges sat as the land board. In September 1806, they started their work, including setting forth an elaborate urban plan for the town, with public squares and spaces, wide avenues, and an organized structure of streets and lanes. With Woodward leading, the board based the plan on Pierre Charles L’Enfant’s plan for Washington, D.C.\textsuperscript{82} The federal government had allocated significant additional land for the town’s expansion. At first, the board believed it should sell the best lots at auction, and assign other parcels to those suffering fire losses. Those receiving land “donations” (the land granted to those losing their buildings to the fire) believed they should get the prime lots. Gridlock threatened when Hull changed his position to accept that prior landholders should receive the prime land, while Woodward held to his position that prime land should be sold. At the same time, Hull would argue that residents should be allowed to re-inhabit their previous property. Unfortunately, doing so would undermine Woodward’s grand layout scheme.\textsuperscript{83} An irascible Woodward “resigned” from the board in protest, leaving the board without the required membership to continue. On November 10, Hull declared that: “no other course but a suspension of our duties under the law seems to present itself, however it may impede the progress of the city, whatever inconvenience it may produce to the inhabitants, or embarrassment to the government, it seems to be dictated by imperious necessity.”\textsuperscript{84} Hull’s declaration threatened to undermine Woodward before President Jefferson. In response, Woodward would eventually moderate his position, and the board would compromise. The board soon would continue its work, but the newfound tranquility would again

\textsuperscript{82} The plan also considered military needs. The Secretary of War instructed Hull to leave clear space between the fort and the river. As with the other city plans, this instruction required landholders to forfeit their parcels for other locations. The Secretary of War to Samuel Dyson [Commanding Officer - Detroit], August 5, 1805, \textit{The Territorial Papers of the United States}: X: 25.

\textsuperscript{83} Woodward had complained that “All the attachment of the inhabitants is to the old spot.” He continued, protesting that, “They value all the ground within the vicinity of the old town enormously rich, and all the rest as scarcely worth anything,” Frank B. Woodford, \textit{Mr. Jefferson's Disciple; A Life of Justice Woodward} (East Lansing: Michigan State, 1953). 39.

\textsuperscript{84} \textit{Governor and Judges Journal: Proceedings of the Land Board of Detroit}: 14.
retreat a few years later, when a Woodward/Hull conflict would again arrest governance. That
struggle also appeared intractable, as the parties seemed to have little interest in compromise and
the public carried insufficient force to require it.

In order to effect the new town plan, Congress necessarily destroyed previous titles to
land. It is not as if those titles were in doubt. The Jay Treaty had required that the United States
honor land rights existing under British rule. In part to accomplish that, in 1804, Congress
required Detroit area landowners to present their claims, whether they had acquired the land
through French, British, or American grants. Before June 1805, an appointed board of
commissioners had accepted or rejected significantly all those claims. Hence, at the time of the
fire, the government had recognized the property rights of many of the inhabitants in the Detroit
area. Yet the statute read that the government would grant land to “every person . . . not owning
or professing allegiance to any foreign power” who inhabited land at the time of the fire. So,
what happened to the property rights of those of age but with foreign allegiances? It appears that
the board attempted to soften the impact on those individuals by loosely defining “allegiance.”
This was particularly important as it applied to the French residents, as many carried significant
influence and wealth. Accordingly, the governor proposed two things: those persons “born in a
foreign country, but having resided in this country since the independence,” could petition for a
donation of land, and that the board would presume allegiance to the United States lacking
specific proof of allegiance to a foreign power.85 The burden had shifted, allowing the board to
apply the law according to needs, not to its strict letter. To this, petitioners responded either by

85 Hull Proclamation dated January 22, 1807, quoted in E. M. Sheldon and Earl W. De La Vergne, The Early History
proclaiming that they were American citizens or that they had never proclaimed allegiance to a foreign government.\textsuperscript{86}

The board’s records offer a glimpse of law in action in early Territorial Michigan. For example, on May 18, 1807, Jean Legard claimed that he was an American citizen, having taken an oath of allegiance to the United States in South Carolina. Unfortunately, Legard had also “signed a paper professing himself to be a British subject.” During the hearing, Legard claimed that he had done so in response to British threats to prevent his family from travelling to the United States should he not sign the British loyalty papers. In a split decision, the board accepted his United States allegiance and granted him a donation lot.\textsuperscript{87}

On December 18, 1808, the land board granted a donation to the wife of John Harvey (in whose stable the 1805 fire started). Harvey was born in England, traveled to the United States in 1792, and did not take an oath of allegiance to become a citizen until late September 1807, arguably to help obtain a land donation. An after-the-fire shift of allegiance could raise eyebrows so Harvey argued that he was active in municipal affairs, had served on the grand jury, and had “offered his house free of cost for the use of the court.”\textsuperscript{88} Harvey’s contributions moved the board and they were the focus of the proceedings. Probably in an effort to skirt the loyalty restrictions, the board granted the donation to his wife instead of Harvey. As it turned out, Harvey’s new allegiance claims may have been insincere. Harvey soon sold a portion of the granted land and, in short order, started to return to his home country, England. Mrs. Harvey put a stop to that plan when they reached New York. She refused to travel the ocean. They then turned around, and settled in Indiana.\textsuperscript{89} This is not to say that the board had been duped.

\textsuperscript{86} *Governor and Judges Journal: Proceedings of the Land Board of Detroit*: 164-65.
\textsuperscript{87} Ibid.
\textsuperscript{88} Ibid., 181. The board stated that the fire had started on his premises.
\textsuperscript{89} Ibid.
Instead, its interests were community development and not esoteric issues surrounding allegiance. Detroit’s leaders had advanced social and economic concerns over legal niceties. Detroit was a small, diverse community that could ill-afford alienating or displacing its foreign-born residents.

That government was reallocating property did not seem to trouble the residents, but when they deemed those allocations unfair, residents voiced their discontent. Their objections took several forms including challenges over the proofs necessary to establish claims, complaints over limitations on the size of replacement parcels, and the available uses of abutting property (such as claims for wood and/or grazing rights).\(^90\) Fairness was not the only grievance. The greatest dissatisfaction concerned the slow pace at which government acted. Five years after the fire, in 1810, a grand jury presented “that the poor of the territory are, and have been for the greatest part of the present year, unprovided for; and that the roads bridges and public high-ways, are almost impassable, with imminent danger to the lives of the good Citizens.” It also accused the territory government of a “wanton violation and breach” of its duty to replace the jail and courthouse lost in the fire.\(^91\) To the grand jury, government had failed because it had failed to act.

As mentioned, Detroit government had settled the real estate ownership issues before the fire. The fire did not destroy those interests: it destroyed buildings – the land survived. Accordingly, government could have done nothing with respect to specific property ownership, just as it would do today if fire destroyed a home or business. But Congress and the Detroit/Territory governments did act – and massively changed property interests. Government destroyed owners’ rights in distinct parcels and granted them rights in alternative parcels. It

\(^{90}\) See, for example, Petition to Congress by Inhabitants of the Territory, October 26, 1807, The Territorial Papers of the United States: X: 138.

created property rights by granting ownership to those who merely had inhabited a house, it gave
property to organizations that had neither owned nor rented property – such as churches,
nunneries, and religious schools, and it even granted and/or changed property rights to those who
did not fit within the text of the law. During the long process of reallocation, government
prohibited landowners from building on their (pre-fire) property. “The inhabitants who remained
were actually obliged to live the whole of 1806 in bark shanties, tents, or other shelter, and the
next year there were only nineteen deeds issued and less than half as many houses built.”

One might legitimately ask from whence the government derived the power to take
property and to change property interests. Thomas Cooley, the great advocate for limited
legislative power celebrated the fire as “providential” for allowing government to set up a
“suitable plan” for land use, but the Michigan Supreme Court in 1858 was not quite certain. In
People v Jones, the court would attempt to reconcile private property rights with the government
alteration of those rights. It did so facing the world where Detroit was a very different place
than fifty years before. Much of the city’s foundation now rested on the earlier reallocation of
property and any change would be extraordinarily disruptive. On the other hand, the court was
troubled by the prospect “that rights existed, both individual and public” that the land board had
destroyed. The court escaped that eventuality by creating a fiction – it assumed individual
consent. It found, 1) that land claimants voluntarily exchanged their property for the newly
granted real estate, and 2) that the governor and judges would not act in arbitrary and tyrannical
fashions in accepting and rejecting claims. The facts in the case were consistent with those

92 Ross and Catlin, Landmarks of Detroit: 278.
94 The court in Jones considered whether land upon which the defendant’s building trespassed was a public highway
when that building was constructed. If it was a public highway, then the court considered whether, in creating the
highway, the governor and judges, as the land board, had destroyed property interests without the owner’s consent.
Doing so without that consent, “would have been a gross abuse,” of government power. The court found that board
exercised “no such tyrannical expedient” in this case. People v Jones, 6 Mich. 176, 190 (1858).
95 Ibid.
assumptions, so the court avoided sacrificing justice in the case to the practicality of social and economic needs. In the end, crisis conditions eclipsed (at least later understood) limitations on government power.  

As a consequence of the fire, the territory governor and judges took control of Detroit’s government and the previous town trustees relinquished their posts. Not all were satisfied by this imposition of national control. As late-nineteenth-century Detroit historiographer Silas Farmer related, the rule of the governor and judges “designates a form of government unlike anything afforded by the history of any other place in the United States.” To him, the territory governance was both despotic and corrupt. “An irresponsible and uncontrolled autocracy fastened itself upon the people and for a long series of years this anomalous government, a strange compound of legality and assumption, held absolute sway over the lands and laws, the persons and properties of the town.” Residents accustomed to controlling their local government now complained that the territory government voided prior law and replaced it with newly promulgated statutes and the common law.

The governor and judges tightened their control of the area when, in September 1806, they passed an act incorporating Detroit as a city. Under that law, the governor appointed a mayor to a one-year term. That mayor had veto power over legislation of the popularly elected

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96 This chapter of property adjustments virtually closed on May 19, 1809, when the governor and judges reported to Congress that their job nearly was finished and the process of allocating donation lots was almost complete. "Report of the Governor and Judges of the Territory of Michigan Made in Obedience to an Act Entitled ’An act to provide for the adjsutment of titles of lands in the town of Detroit and territory of Michigan and for other purposes, June 6, 1809,’" (Washington, D.C.: A & G Way, Printers, 1809). The task, at least insofar as allocating the additionally granted land, continued albeit at a much slower pace. For example, on July 1, 1836, the judges and governor would grant a deed to the Detroit Young Men’s Society. See, Scott v Detroit Young Men’s Society’s Lessee, 1 Doug 119 (1843). That land transfer would illuminate another period where governance rules conflicted with the governed’ s needs.


city council and the council had no power to override that veto. With the short-termed mayor appointed by the governor and judges, and exercising a strict veto over the popularly elected council, democratic governance in Detroit effectively ended. In response to the autocratic nature of this new municipal governance, “the residents of Detroit refused to vote in the first elections under the statute,” and the first few appointed mayors promptly resigned, believing Detroit’s government powerless in relation to the territory governance. 99 This pretense of democratic governance would continue until February 24, 1809 when the judges and governor repealed the statute framing Detroit governance. 100 At that point, the governor and judges would take direct control of the city.

In response to the governor and judges’ high-handed treatment of the Detroiter’s, about 300 inhabitants (a sizeable percentage of the population) in 1807 signed a petition to President Jefferson, claiming that “the history of William Hull, and Augustus B. Woodward since they took upon themselves the Government of this Territory is a history of repeated injuries, abuses, and deceptions.” Central to their complaint was the “slow and novel mode” of adopting laws, and their failure to address the pressing needs of the territory. Included in that concern was the slow process of awarding land tracks in the wake of the fire, which “prevent[ed] those naked and houseless sufferers by the conflagration, from accommodating themselves with buildings.” They sought responsive governance and found it lacking. 101 Hull’s response demonstrated that his audience was the President and not the people over whom he ruled. Grousing that most signers knew nothing of the petition’s content, Hull protested that he had “perhaps done more than

99 Ross and Catlin, Landmarks of Detroit: 283.
100 There are no surviving records stating why the governor and judges repealed Detroit’s 1806 election law. Burton, History of Detroit: 70-71.
101 City council members introduced the Detroiter’s petition. In the introduction, they charged “that threatening and tyrannical measures have been resorted to by the governor and his few adherents to prevent citizens from signing the said petition.” The City Council of Detroit to the President, July 25, 1807, The Territorial Papers of the United States: X: 114-19.
candor itself would require, to preserve harmony and that it has been met only by base artifice and mean deception.”¹⁰² Neither the petition nor Hull’s response addressed the governmental structure that had given rise to, or at least encouraged, the residents’ protest. One might have expected the residents to object to the autocratic mechanisms of governance, particularly as the recently enfeebled city council seemingly had piloted the petition. Instead, the residents asked the President to remove Hull and Woodward, and replace them with “men of honest and upright principles.” Perhaps the council and residents were resigned to the Ordinance’s structure, or perhaps they accepted the structure but rejected its application. In either case, they did not seek to change the government blueprint. They only sought to change those responsible for affecting its aims.

Although controlled by the governor and judges, Detroit’s municipal government prior to the territory takeover in February 1809, had the task to regulate in support of the general welfare. The council was “to prevent and remove nuisances,” “to provide for the health of the city,” and “to establish and regulate markets.” Those powers included regulating transportation, building codes, weights and measures, fire codes, building materials, standards for weighing coal, hay, and wood, inspecting food, tobacco, and potash, and controlling the public wharfs.¹⁰³ Local government structure had changed, and would consistently change, but the goal of local government continued. It was to regulate and spend to enhance the general welfare.

All governmental power in Territorial Michigan ultimately devolved from the Ordinance’s blueprint. As such, the territorial government could adopt the laws of the states but could not make laws. The question soon became whether and how the territory government could parse state laws to adapt them to Michigan’s conditions. The judges advocated a loose

construction of the Ordinance to allow them to adopt portions of laws from various states, while Hull, to his regret, felt the Ordinance required a nearly word-for-word adoption of a state’s law. In a report to the President, Hull and Woodward bemoaned the problems a strict construction of the Ordinance’s “adopt” provision would cause and asked for relief from its restrictive language. They explained that even if Michigan had access to all state legislation from which to draw its laws, (which it did not, due to inadequate communications, reporting, and publishing of laws), many of those state laws did not fit Michigan’s needs. Claiming that, “a strict precedent will be searched for in vain,” Hall and Woodward argued that they would be hard pressed to handle even the simplest business of government, like regulating ferries, erecting public buildings, or establishing schools. Legislation needed to fit Michigan’s specific needs, and judicial interpretation had to fit the particularities of local conditions, not that of distant states.

The issue of territorial legislative power garnered serious discussion, and those discussions offer an insight into government and society’s response to legislation that was set down by colonial governance. Not accepting that the governor and judges as a legislature had any power beyond wholesale adoption of particular state statutes (they could not parse language), Detroit inhabitant John Gentle protested:

They parade the laws of the original states before them, on the table, and cull letters from the laws of Maryland, syllables from the laws of Virginia, words from the laws of New York, sentences from the laws of Pennsylvania, verses from the laws of Kentucky, and chapters from the laws of Connecticut –

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104 The debate over the proper construction of this requirement started within weeks of the Ordinance’s first application. See Blume, "Legislation on the American Frontier."
106 It is worth noting that the first example of local need expressed by Hull and Woodward dealt with government’s involvement with ferries – a significant transportation and communication vehicle of the day. As will be discussed, Michigan’s (and other states’) efforts to facilitate transportation and communication would command much of the state’s attention and test the constitutional edifices under which those efforts were made.
jumble the whole into such form as they conceive the most suitable to facilitate their schemes of peculation, and then call it a law.107

Gentle’s ire may have been animated by Woodward’s and the land board’s refusal to grant Gentle citizenship so that he might enjoy a land grant under the Detroit fire-relief legislation. Gentle was born in Scotland, immigrated to Montreal in 1783, and moved to Detroit in 1790. The land board had denied his application for a land donation, with Woodward voicing the board’s opinion. Feeling spurned by the Territory government, Gentle moved to Canada and fought on behalf of the British in the War of 1812.108

Despite his motivations, Gentle’s point was well taken. If the governor and judges could dissect and reconfigure statutory language as they saw fit, they were making law, not merely adopting it. The legislation may have fit the territory’s needs but the Ordinance forbad the territory’s appointed leadership from legislating. Congress believed this task should only be performed by democratically elected legislatures, which were found in the states. As an unelected legislature, the governor and judges lacked the legal authority and republican credentials to make law. Hence Gentle’s point: Legislatures are the people’s representatives and speak for them. The people did not select Michigan’s governor and judges and, accordingly, they lacked the democratic legitimacy with which to make law.

Under normal circumstances, courts would hear matters addressing the limitation on legislative power. But under the Ordinance, asking the Michigan judges to rule on their power as legislators would be a fool’s errand. The surviving court decisions disclose no effort to take on

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107 The Commonwealth, Pittsburgh Pennsylvania, September 16, 1807, cited in Transactions of the Supreme Court of the Territory of Michigan, 1805-1814: I: xxiii. Gentle published multiple articles accusing Hull and Woodward of corruption. Farmer, in his History of Detroit and Wayne County, wrote that in 1823, the court found Gentle guilty of libel although his accusations were most probably correct. Farmer explained that truth was not a defense to libel but that Gentle won in the court of popular opinion, as most citizens agreed with him. Farmer, History of Detroit and Wayne County and Early Michigan: 96.

108 As indicated above, apparently Gentle returned to American soil after the war. Governor and Judges Journal: Proceedings of the Land Board of Detroit: 168.
that task. The issue did arise in New York in a case concerning the enforceability of a promissory note to the Bank of Michigan, an entity created by the governor and judges. In incorporating the bank, they had taken portions of state laws and adopted them to Michigan’s particularities. The New York Supreme Court, recognizing that Michigan had no laws “which [were] a literal transcript from the laws of any State,” ruled that the Ordinance only required that territories retain the “substance” of a state’s law and convey the phraseology of that law “in all essential respects.”

At least one member of the affirming higher court had “serious objections” to that reading of the Ordinance. Nevertheless, he declined to vote to invalidate the Michigan law, stating that “we cannot shut our eyes upon the fact that [the law] has been in operation within the Territory nearly 14 years, without it having been annulled or disproved by Congress,” (which, as mentioned, the Ordinance allowed). The judge presumed that Congressional inaction constituted tacit approval of the statute. Of course, invalidating the actions of a bank in operation for 14 years would have resulted in serious financial upheaval, especially if the court applied its ruling beyond the four corners of the case. Other territories had similarly parsed language, so the upheaval may have affected other jurisdictions.

Only after Michigan became a state would the Michigan Supreme Court consider the issue. The court would offer that, “The governor and judges were, by the ordinance of 1787, invested with the authority to adopt laws of the original states, but were not clothed with legislative powers.” Having bowed to the statute’s language, the court then expanded. The governor and judges could “make such changes in the language [of state statutes] as their taste might suggest. The authority to adopt a law does not necessarily imply that precise words of that

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109 Bank of Michigan v Williams, 5 Wend. 480 (Sup. Ct. N.Y.) 486-87 (1830).
110 Bank of Michigan v Williams, 7 Wend. 539 (Court for the Correction of Errors N.Y.) 545 (1831).
law are to be adopted.” Hence, to the Michigan court, adopting laws meant adopting the spirit of a state’s (or multiple states’) legislation.

Well after all the Ordinance states, including Michigan, had moved from territory to state, the federal courts considered a territory’s right to modify state statutes through parsed language. In *Peck v Pease*, the circuit court determined that the Ordinance granted, “no legislative power [to the governor and judges] consequently they had no power to modify or alter the laws they adopted.” By that logic the governor and judges must adopt laws wholly, and any alteration would render the statute unlawful. The court, and an affirming Supreme Court, did not address whether the law, taken from Vermont, violated the “original state” provision. (Vermont became a state after the founding.) But these mid-century courts had the luxury of legal purity without a concern over the impact of invalidating a significant body of legislation. The ruling occurred well after the first-stage period and after subsequent legislatures adopted, modified, or rejected the law in question. In the end, the governors and judges had modified the state laws in probable violation of the Ordinance’s language but did so to address local needs. The courts demurred to that governing need at least for as long as general-welfare concerns dictated.

Under the Ordinance, the governor held expansive authority. Classifying that power as “staggering,” Eblen concluded that the governor, through the first two stages of territorial governance, held nearly unchecked powers, even in relation to the judges. Michigan’s situation was different, either because of the personalities involved, or because Eblen considered

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112 *Peck v Pease*, 19 F. Cas 81(1853); *Pease v Peck*, 59 U.S. 595(1856). The controversy concerned the statute of limitations on a debt issue. The Vermont law, from which the Michigan law was taken, exempted from the limitations “persons imprisoned, or beyond seas, without the United States.” The Michigan law provided “persons imprisoned or beyond seas or without the United States.” The missing commas and the insertion of “or” before the last condition changed the meaning of the Vermont law. This was the language submitted to Congress, and Congress did not object. Confusing the matter were archives that suggested, contrary to the statute books, that Michigan had adopted exactly the Vermont language.
statutory power, not on-the-ground activities that could undermine planned governance. An example of those dynamic limits on the governor’s power occurred starting in 1808, as the judges and the governor struggled over the control of Michigan law. The earliest of the statutes “enacted” to address Michigan’s needs were referred to as the Woodward Codes. Woodward was a brilliant but somewhat odd character, considered by many as caustic and unsuitable for leadership.\textsuperscript{114} His earlier threat to resign from the land board, and thereby halt progress on assigning land to fire victims, was an indication of his temperament. With time, he and Hull again became antagonistic rivals. Trouble was brewing in 1808 when Woodward determined to travel east. Before leaving to spend the winter in New York and Washington, Woodward, a bit ungraciously and certainly unwisely, publicly put forward a series of resolutions to the remaining judges and governor, many of which were deeply critical of Hull. He also urged that it would be “expedient to revise all the laws which have successively been in force in the Territory.”\textsuperscript{115} Woodward then left town and, more importantly, left the legislature without a balance of votes in his favor.

The governor and remaining judges appointed Hull to lead a committee to respond to Woodward’s departing “proposals,” including the accusations against Hull. The committee accepted a few of Woodward’s proposals, most notably that the legislature re-write the legal code.\textsuperscript{116} It then returned Woodward’s antagonistic attitude in kind, observing that the committee would be happy to consider the bulk of Woodward’s resolutions if they would “produce the least possible benefit.” It insisted that his proposals were “unfounded in principle or in truth,

\textsuperscript{114} Territory Secretary, and later Governor, William Woodbridge became so frustrated with Woodward’s eccentricities that he wrote “[o]ur chief Judge is a wild theorist, fitted principally for the ‘extraction of sunbeams from cucumbers.’” Chardavoyne, "The Northwest Ordinance and Michigan's Territorial Heritage," in, Finkelman and Hershock, \textit{The History of Michigan Law}, 23.
\textsuperscript{116} Ibid., XXII: 466-67.
irrelevant to the duties or powers of this legislature, calculated to destroy the energy of the government, to insult the patriotism of the people, excite insubordination in the militia, and to deprive families of those comforts which flow from the dearest of all connections.”

In other words, they heartily disagreed.

The governor and judges (without Woodward), then took action on Woodward’s proposal that the laws be re-codified, but did so in a manner Woodward would not sanction. They voided much of the Woodward Codes and introduced an interpretation of the Ordinance that would give the governor veto powers. They then significantly rewrote the laws. The replacement statutes are commonly referred to as the Witherell Codes. One of those acts changed the method of appealing from the district court to the Supreme Court. Shortly thereafter, the “legislature” passed an act declaring “that all acts or laws” passed before the Witherell Codes shall “cease to have any force or operation within this Territory.”

Woodward reacted with profound displeasure. With Woodward back, all legislating ceased. By October, the mechanics of justice jammed when Woodward and Justice Griffin, in their judicial capacity, joined in voiding the Witherell statutes. The Court invalidated the statutes in several cases, most notably in an appeal from James McGarvin against a judgment for James

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117 Ibid., XXII: 467.
118 Prior understandings were that the governor and the judges constituted the legislature. The new legislation had the governor act as an executive, approving or vetoing the legislation. The issue concerned the differing versions of the Ordinance, where the placement of a comma in the term “the Governor[,] and Judges, or a majority of them [made up the legislature]” would change the makeup of the legislature and the powers of the branches. A quorum was three of the four legislators, so when Woodward left, Hull and his associate, Judge Witherell, agreed on the laws. The Witherell Codes assumed an inserted comma, which then allowed the governor both to be on the legislature and have executive veto power. The Woodward Codes assumed no comma.

Earlier, in 1788-89, this issue had aroused conflict between St. Clair and the judges in 1788-89. St. Clair argued that he had veto power and, after a battle with the judges, declared that he would rule by proclamation, thereby circumventing the judges. Charles Thomson, the Secretary of the Confederation Congress communicated his agreement with St. Clair’s interpretation. Ultimately, the judges relented, in response to public needs. Eblen, The First and Second United States Empires: 98-104. See also, Blume, "Legislation on the American Frontier.,” especially letter from Woodward to Madison, 343-45.

119 Witherell was appointed to replace Bates, who had resigned in 1806 to become the secretary of the Louisiana Territory. Witherell assumed his duties in October 1808.
120 Laws of Territory of Michigan, I, February 24, 1809.
Wilson on a promissory note. In appealing his district court loss, McGarvin followed the procedure set forth in Witherell’s February 21, 1809 statute. Woodward, writing for the court, dismissed McGarvin’s appeal because his pleadings did not conform to the recently voided Woodward Code procedures.\textsuperscript{121} The record indicates that Witherell dissented. If he left an opinion, it does not survive.

A mêlée ensued. On October 19, 1809, an incensed Governor Hull quilled a proclamation in English and French challenging the court’s authority to void laws.\textsuperscript{122} He rejected that the court’s word was final. Accordingly he “require[d] on this more than extraordinary occasion all civil and military officials to be vigilant in enforcing the laws of the Territory and he urge[d] all good citizens to strictly and uniformly observe them.”\textsuperscript{123} The laws to be enforced were the voided Witherell Codes. Pursuant to the governor’s instructions, the magistrates then enforced those laws, and arrested inhabitants according to the Witherell Code’s procedures. The Supreme Court (the judges) responded, releasing those prisoners under writs of \textit{habeas corpus} because the Witherell Codes were invalid. The ruling affected other areas, as courts attempted to operate without accepted procedures and standards. Tensions heightened and invectives flew. Meanwhile, the public floundered between two different legal codes – one invalidated by the court, the other invalidated by the legislature.

The problem remained unresolved for some time. Perhaps frustrated with the gridlock, a party in the case of \textit{re Solomon Sibley and Christian Hoffman, Executors of the Last Will and Testament of George Hoffman}, asked the court to put in writing its reason for denying that party a writ of mandamus. In that, and in succeeding matters, Woodward would offer the reasons\textsuperscript{124}

\textsuperscript{121} Transactions of the Supreme Court of the Territory of Michigan. 1805-1814. I: 488-89.
\textsuperscript{122} Governor proclamations were means by which territory governors bypassed the legislature and sought to exercise nearly autocratic power. Eblen, \textit{The First and Second United States Empires}: 97-98.
\textsuperscript{123} Translated from French by Ivana Mrazova. Found in \textit{Transactions of the Supreme Court of the Territory of Michigan. 1805-1814}: II: 286-87.
behind invalidating the Witherell Codes. In the *Hoffman Estate* case, Woodward opined that the Witherell Codes violated the Ordinance because they were adopted and signed in violation of the Ordinance’s requirement that “the governor and judges, or a majority of them” shall adopt the laws of the states.\(^{124}\) To Woodward, a majority of a quorum of three must adopt and sign all new laws. Woodward further clarified why that was important in *In the Matter of Andre Colhoun*. In that case, the court released Andre Colhoun from prison pursuant to a writ of *habeas corpus*. The disagreement ultimately concerned the placement of a comma in the Ordinance. That placement affected the governor’s powers and the makeup of a quorum. Nevertheless, the court consisted of three judges and two of them disfavored the new laws. Since Calhoun had been arrested under the invalid Witherell Codes, he was released from imprisonment. In separate actions, the court also released prisoners Isaac Burnett, Jacob Smith, William Biggelow, John Connelly, and perhaps more.\(^{125}\) On July 23, 1810, Woodward sent a letter to Hull explaining why the new statute violated the Ordinance’s requirements. Never wasting an opportunity to give offense, Woodward attacked Hull, accusing him of engaging in a “storm of indignation” and classifying Hull’s October 1809 proclamation as “*calumnious* and *inflammatory*.”\(^{126}\)

The controversy went beyond statutory interpretation. It also concerned the respect required of the territory highest court’s pronouncements. Woodward argued that neither the executive nor the legislature had the power to reverse an erroneous or even corrupt court decision. The legislature could change the law, but it could not act retrospectively. Since “the \(^{124}\) Discussed *supra* at fn. 117.

\(^{125}\) *Transactions of the Supreme Court of the Territory of Michigan. 1805-1814.* I: 187-88, II: 430 *In the Matter of Jacob Smith* (case 228), *In the Matter of Isaac Burnett* (case 229), *In the Matter of William H. Biggelow* (Case B-6, Paper 4) *In the Matter of John Connelly* (Case B-8, Paper 5)

been impeached in the Supreme Court of the territory of Michigan,” the law was settled – the Witherell Codes were void, and Hull’s pronouncement that the rulings be ignored was improper. Not all agreed. Jacob Visger, the chief judge of the lower court, took great exception to Woodward’s voiding the Witherell Codes. So serious was his distress that “he would prefer death” before complying with the higher court’s order.\(^{127}\) Of course, Woodward believed that the enhanced court fees under the Witherell codes motivated the lower court judges siding with Hull.\(^{128}\) Witherell classified Woodward’s opinions overturning the laws as “the most extraordinary and unwarrantable stretch of power ever attempted to be exercised by the judiciary over a legislature and free government.”\(^{129}\)

While the governor and justices clashed, the population became increasingly frustrated, not just with the gridlock but also with what they perceived as corrupt governance. An 1809 grand jury commented that Hull abused his authority and acted in his self-interest. It chastised Hull for releasing John Whipple “illegally and without any colour of authority” from his court-imposed sanctions. The court had imposed those sanctions because Whipple called Woodward “a damn’d rascal.” Siding with the Woodward, the grand jury expressed “confident hope that the Supreme Court will carry into effect their own Judgments.” This same grand jury also accused Witherell of actions unbecoming a judge for introducing legislation to fund a road-surveying venture in which Witherell financially participated. Further, it declared an act of Congress “unnecessary, nugatory, and a nuisance” as well as “unconstitutional, and a gross violation and infringement of the unalienable rights of the Citizens of this Territory.” It then grieved that

\(^{127}\) *Transactions of the Supreme Court of the Territory of Michigan, 1805-1814:* II: 299.


members of the Supreme Court were often absent from their tasks. Both sides used the grand jury for their ends, with Woodward going so far as to badger grand jury members about their votes relating to his nemesis, Hull. The territory’s commercial center and capital city no longer had its own city government and the territory government was dysfunctional. Frustration abounded. As Michigan historian William Jenks noted, “virtual anarchy existed.”

The judges and governor would enact no legislation until September 1, 1810, having gone more than 16 months without agreement. On that day they passed An Act declaring any and all bills, acts, laws, enactments, or regulations whatever, heretofore existing, or supposed to exist, relating to the manner of authenticating the legislative acts of this government, to be null as to future operation. Jenks provided a nice history of the negotiations, describing the “general spirit of pugnacity manifest” at their meetings. In the end reason prevailed and a hybrid of the Woodward and Witherell Codes would pass. With that, this crisis passed.

In his Outlines of the Political History of Michigan, future Supreme Court Justice, and member of the Cooley Court, James Campbell would chasten Woodward for his disruptive judicial activism. Mocking his judicial forbearer, Campbell voiced, “His personal habits were slovenly, and his room was conspicuous for disorder.” If that were not enough to indict the man, Campbell continued, “His worst habit, however, was that sort of audacious impudence which, under the name of eccentricity, has sometimes characterized men of mark, and even made them

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131 Justice James Campbell’s unpublished book Judicial History of Michigan, related: “On September 22, 1810, the Grand Jury having made some presentments of persons not named in the Court record, the Chief Justice in spite of the law forbidding this disclosure of the action of those consulting, soon actually followed them and [illegible] each to answer whether he voted for the presentment. It is hard to conceive a more audacious violation of law.” James V. Campbell, "Judicial History of Michigan," in James V. Campbell Box (Detroit: Burton Historical Library, Detroit Public Libraries, 1886), 45-46.
to be imagined greater than if they had behaved themselves with more civility.”  All that being said, given today’s understanding of court authority, Woodward was correct. The court had determined laws in violation of the Ordinance’s requirements. It was then incumbent on Hull to challenge that opinion in federal court or, in the alternative, to honor it and press for new legislation.

The story of the gridlock over the Witherell Codes offers more than a whimsical look at government foolishness. As the residents of the territory recognized, dysfunctional governance encumbered commercial and social development. About a week after Hull’s proclamation calling for public dismissal of Supreme Court rulings, a citizen’s committee, with Woodward attending, petitioned Congress: “That it is expedient to alter the present form of government of this Territory, and to adopt a form of government by which two bodies, elected annually by the people should make the laws, instead of the executive and three judicial magistrates, appointed by the general government, adopting them.” The committee believed that a government institutionally subservient to the national government and relying on distant legislatures, could not be, and was not, responsive to the people. The residents had experienced a government that governed least, but, to their minds, had not governed best.

That call for change entered the nation’s capital as Washington increasingly focused on the challenges that would lead to the War of 1812. Accordingly, Congress did not respond to the Detroiter’s petition. That war was a disaster for Michigan. Governor Hull became General Hull, a task for which he was ill suited. Hull may have been the worst general of the war. Without a

135 James V. Campbell, Outlines of the Political History of Michigan (Detroit: Schober & Co., 1876), 250-53. Campbell was reputed to be a man of much culture and grace. But in his polished way, he was certainly more disruptive to the governmental balance than was Woodward. Campbell, in lockstep with his brother Justice Cooley, would invalidate previously well-accepted legislative efforts and forever change the balance between branches of government. That is a story for later chapters.

136 Quoted in Ross and Catlin, Landmarks of Detroit: 289. (Emphasis in original.)
shot being fired, he surrendered Detroit while holding a fortified position and enjoying an over three-to-one manpower advantage over British forces.\textsuperscript{137} With the surrender, American governance ended, only to return after the war. When returning to the city, government officials found the buildings torched by the British and the surrounding farms and their animals destroyed by Indians. Few crops were available, as the war interrupted plantings. Woodward wrote to Secretary of State James Monroe, “The desolation of this territory is beyond all conception. No kind of flour or meal is to be procured, and nothing for the subsistence of the cattle. No animals for slaughter, and more than half the population destitute of any for domestic or agricultural purposes.”\textsuperscript{138} The situation was desperate. “Food for humans and livestock was lacking, fences had been destroyed, clothing plundered and River Raisin inhabitants were eating boiled hay; there was little prospect for the future since seed grain was lacking.”\textsuperscript{139}

The national government soon responded. President Madison reported to Congress that “the inhabitants [of Michigan] were left in so destitute and distressed a condition as to require from public stores certain supplies essential to their subsistence.” He advised Congress that the War Department would request aid to support the Michiganders.\textsuperscript{140} The federal government authorized the governor to “issue to the indigent and distressed people of the Territory such relief

\textsuperscript{137} By October 26, 1812, the Secretary of War told Hull he would face court martial. Hull was charged with treason, cowardice, neglect of duty, and conduct unbecoming an officer. He was acquitted of the treason charge and convicted on the other three, and was sentenced to be shot. President Madison remitted the execution of his death sentence and Hull was forced to retire in Massachusetts. The Secretary of War to Governor Hull, October 26, 1812, The Territorial Papers of the United States: X: 415. Statement of charges against Brigadier General Hull, ibid., X: 420. Bald, Michigan in Four Centuries: 128-29. Irving Brant, “Madison and the War of 1812,” The Virginia Magazine of History and Biography 74, no. 1 (1966): 61.

At about the same time about 750 miles off Boston’s coast, Hull’s nephew, Isaac Hull, became a war hero as he captained the \textit{U.S.S. Constitution} in a naval victory over the British frigate \textit{H.M.S. Guerriere}. James MacGregor Burns, Vineyard of Liberty (New York: Alfred A. Knopf, 1982). 211.

\textsuperscript{138} Letter Dated March 5, 1815, from Judge Woodward to James Monroe, in Farmer, History of Detroit and Wayne County and Early Michigan: 287.


of provisions from the public stores as their necessities may require.” The letter approving the assistance cautioned, however, that “improper persons not receive relief.” While federal relief was slow, it was forthcoming. Detroit historian David Poremba suggested the aid included not only food, but also seeds and livestock. Congress also expressed an intention to compensate some war victims, passing legislation in 1816, 1817, and 1825. Those acts were limited and the required proofs were, at times, difficult. When that compensation proved inadequate or slow to materialize, Michigan leadership called for congressional assistance. As late as 1834, the Michigan Legislative Council sent a memorial to Congress, complaining that many had in vain sought relief under the statutes. “Justice and equity” required that Congress give “equable compensation” for wartime injuries.

The bitterness residents felt over slow or cumbersome government was part of a growing agitation. After the 1805 fire, residents complained not about their loss of democratic rights, but the government’s delay in responding to their needs. After the War of 1812, the complaint similarly was that government did not sufficiently address the injuries suffered. That complaint would continue in various forms and over various issues through the remainder of the territorial period. The residents’ discontent, therefore, was not about government action or presence – it

142 Poremba, Detroit, A Motor City History: 63.
143 An Act to Authorize the payment for property lost, captured, or destroyed by the enemy, while in the military service of the United States, and for other purposes. 1816, 3 Stats.: 261; An Act to amend the act "An Act to authorize the payment for property lost, captured, or destroyed by the enemy while in the military service of the United States," passed the nineteenth of April, one thousand eight hundred and sixteen, 1817, 3 ibid., 397; An Act further to amend the act authorizing payment for property lost, captured, or destroyed by the enemy, while in the military service of the United States, and for other purposes, 4 ibid., 123.
144 In 1826, Cass reflected on the slow pace of assistance promised by the national government for the devastation from the war. He voiced that, “It is deeply to be regretted, however, that justice is so tardily administered,” and that he “hoped the time is not remote, when public obligation will be felt and acknowledged.” Governor Mason would later reiterate that position in 1832. Cass, November 6, 1826; Mason, May 2, 1832, Messages of the Governors of Michigan, ed. George N. Fuller (Lansing: The Michigan Historical Commission, 1925). I: 30-31, 75.
was about government inaction and absence. In that context, it is a bit surprising that about sixty years later, courts would find prompt government responses to crises exceeded legislative power, for example when legislatures provided seed-aid to farmers and loans to businesses destroyed by fire. In that later period, constitutional interpretation of the blueprints of government, demanded a more restricted government framework, where courts acted to preclude government from offering the assistance that, in the earlier period, the people required and the government provided. That is the concern of later chapters. Before the courts would seek to limit government, Michiganders would demand greater government.

The Move toward Increased Democratization

Lewis Cass became Michigan’s governor in the aftermath of the war. William Woodbridge became the secretary (and Collector of Customs in Detroit), and Woodward, Griffin, and Witherell remained the judges. At the time, about eight hundred fifty people resided in Detroit, with the Michigan Territory housing less than five thousand. In 1816, the then territory laws were compiled and published as the Cass Codes. In addition to setting out the organs and powers of government, those laws regulated and spent to support the general welfare. The territory laws provided for schools, illegitimate children, internal police, and roads and bridges, as well as set rules of trespass and enclosures. They protected and regulated the poor, and set rules for the common and private areas of Detroit. They also regulated, among other things, ferries, taverns, and auctioneers.

All of those laws were adapted from state laws. Of course, laws on the books and law in action often diverge, and they did so in Michigan. Courts interpreted statutes in relation to Michigan conditions, and introduced English common and statutory law as they determined appropriate. Such “[f]reedom on the part of the court to adopt, adapt, or reject common law rules
and decisions (including British statutes) made it possible for the court to mould the non-statutory decisional law into a system suited to frontier conditions.”¹⁴⁶ That interpretive flexibility afforded another opportunity to shape pre-existing state law to fit territorial needs. In doing so, the judges were able to effectuate Woodward’s early claimed goals: to adjust state laws “in order to render it, in any respect, suited to the circumstances of the district.”¹⁴⁷

Under Cass’s leadership, in October 1815, Detroit recovered its home-rule authority from the governor and judges. The city’s new charter largely reenacting the government structure of the 1802 Charter. The voters would again approve or disapprove of legislation passed by the city’s Board of Trustees. There was no mayor. The electors also set the budget. Not insignificantly, the territory’s first newspaper, the Detroit Gazette would start publication in July 1817. Around the same time, steamboats began to travel the Great Lakes and Woodward laid the cornerstone of the University of Michigan in Detroit. The first bank was organized in 1818 and started operations on January 1, 1819. The national government sold more land to the public, allowing for population expansion. Burton, in his History of Detroit, reflected on the values land provided. “A turkey was worth one acre of land; two pigs equaled an acre; two geese equaled one acre, two bushels of potatoes equaled one acre; four bushels of turnips or two bushels of beets equaled one acre.”¹⁴⁸ Land was cheap and opportunities abundant. To be sure, Detroit was a small city. Its 1819 census showed 1,110 people lived in the city, exclusive of the fort; 1,040 were white – 596 men and 444 women – and 70 were “colored” – with no sex given.¹⁴⁹ Despite its small numbers, the population was moving toward self-governance and growth. So too, the Michigan Territory moved toward increased representative governance.

¹⁴⁷ Letter from Woodward to James Madison, May 16, 1806, in Transactions of the Supreme Court of the Territory of Michigan. 1805-1814: I: xxi. (Emphasis in original.)
¹⁴⁸ Burton, History of Detroit.73.
¹⁴⁹ Ibid.78-79
As noted, before the War of 1812, Detroiter had petitioned Congress for enhanced self-government. The war had interrupted that call, but it did not end it. The Detroit Gazette would take up the drive.\textsuperscript{150} In 1817, it advocated for more local, democratic governance with the goal of “encouraging immigration, inducing settlement, and developing the resources of the Territory.”\textsuperscript{151} The Detroit citizens’ address to President Monroe upon his 1817 visit similarly called for representative government: “But, accustomed to the exercise of their elective franchise, the American People will rarely select a country as their residence, in the government of which they have neither voice or participation – in the form of which they have neither will or control.” They then called for both representation and government activism, arguing that, “A law of Congress, empowering the citizens of our territory to enter upon the representative grade of government, contemplated by the ordinance of ’87, the establishment of permanent national roads, and an exposure of our valuable public lands in the market would be productive of immediate and beneficial results to our territory.”\textsuperscript{152} The residents had adopted the position articulated by Governor General Carleton in 1774, but with an important twist. Government alone was not sufficient for commercial and social development. In the United States, that government must be representative of the interest of the people it governed.

In 1818, Cass proposed that Michigan enter the next phase toward self-governance under the Ordinance, and called for an election to determine public support to move to an elected legislature. Entering that phase would have required residents to bear increased financial burdens for their governance. His proposal failed as many voters believed that a government

\textsuperscript{150} The Michigan Essay (aka., the Impartial Observer) arguably was the first paper, but it published only one issue on August 31, 1809.
\textsuperscript{151} Detroit Gazette, October 10, 1817, quoted in George N. Fuller, “Settlement of Michigan Territory,” The Mississippi Valley Historical Review 2, no. 1 (1915): 48.
\textsuperscript{152} “Arrival of the President,” Detroit Gazette, August 16, 1817, quoted in Katlin Cooper, “Frontier Nationalism: President Monroe Visits Detroit,” Brunsman, Border Crossings: The Detroit River Region in the War of 1812, 246.
largely paid for by the federal government was preferable to a legislature paid for by the territory’s inhabitants. Those voting against taking on the burdens of representative governance were thought to have come from French backgrounds where they had not been infused with American ideals of self-governance. The issue, however, may have gone beyond taxpayer frugality. Michigan residents no longer felt the press of distant governance as they had under the Hull/Judges regime. Cass governed according to Michigan’s needs and seemed unconcerned about courting Washington’s favor. With no kindling for change, voters were loathe to take on additional governance and financial responsibilities. But Michigan already was the slowest of all the territories in moving to the second stage of territory governance, having gone fourteen years since its creation as a separate territory in 1805. In some measure disregarding the vote, in 1819, Congress gave Michigan a non-voting seat in the House. Electors for that seat were white male residents who had paid a county or territorial tax.

Notwithstanding 1818 voter sentiment, the central government control inherent in the Ordinance would increasingly clash with rising calls for democracy and representative local governance. A paramount concern was the “vacillating policy” inherent in the laws created by the governor and judges system. Accordingly, a January 1820 Grand Jury Presentment declared that the “Grand Jurys are aware that nothing but a legislature constituted by the people, can be a  

155 An Act authorizing the election of a delegate from the Michigan territory to the Congress of the United States, and extending the right of suffrage to the Citizens of said territory, 3 Stats.: 482.
156 Some evidence of how the Ordinance’s federal appointment provisions resulted in the non-responsiveness to local concerns is found in Woodward’s response to the Detroit Gazette’s continuing attacks. Rather than responding in Detroit, Woodward responded in the eastern papers that Washington decision-makers read. Fuller, “Settlement of Michigan Territory,” 49, fn. 125.
radical cure for the evils complained of." In 1822, a committee of inhabitants petitioned Congress to separate the legislative from the judicial. In January 1823, they sent Congress a statement setting forth their concerns over the Territorial legislature’s actions. The statement complained of the secretive and almost despotic nature of law creation under the Ordinance. The committee urged that they had “no guarantee by the ordinance of 87” that the governor and judges could be responsive to the needs of the people. Given their “distant and ineffectual Responsibility,” the committee feared the abuses would not abate.  

These pleas were different from the petitions and grand jury reports of the first decade of the century. Whereas before, residents had complained of persons, they now complained of systems. Now, the form of government did not fit their needs. In response, Congress, in 1823 created a legislative council to assume the territory’s lawmaking authority. Michigan had taken nineteen years to get to this stage. This compares to a total of eleven years for Ohio (the first territory to move to statehood), five for Indiana, and three for Illinois and, under related laws, four for Tennessee, two for Mississippi, and eight for Louisiana. The President appointed its nine members of the council from a slate of eighteen popularly elected candidates. Through this act, Congress also separated Michigan’s legislative and judicial spheres, and changed the judges’ terms from the Ordinance’s “during good behavior” to four-year terms.

158 Report of a Committee of Inhabitants of Wayne Country, November, 1822, attached to Andrew G. Whitney, Austin Wing, and Ebenezer Reed to Hugh Nelson [Chairman of the House Judiciary Committee] January 9, 1923. Ibid., XI: 323. Of course, that position was not universally held as some residents expressed concern that the cost of governing a vast territory with few inhabitants would undermine future growth. See, Memorial to Congress by Inhabitants of Wayne County, January 2, 1823, ibid., XI: 320.  
159 An Act to amend the ordinance and acts of Congress for the government of the territory of Michigan, and for other purposes. 3 Stats.: 769 (1823).  
161 Congress had created territory judgeships, therefore, Congress could change the terms of office – a power Congress does not enjoy over Article III judges. This position, however, was not without challenge. On September 5, 1832, Michigan Justice James Doty relying on the Ordinance’s language, claimed that he was entitled “to have and to hold the said office,” “during good behavior” and that Congress could not change the law as it applied to him. "Judge Doty to the Secretary of State," September 5, 1832, The Territorial Papers of the United States: X: 521-22.
A distant federal hand still largely steered the territory’s governance, but now the legislature germinated in Michigan soil and was chosen from those elected by Michigan voters. Under the 1823 law, the President appointed the governor, secretary, and the judges, although the judges were no longer both lawgivers and deciders. In a further effort to cleanse the governance of its overly autocratic past, the President did not reappoint Woodward or Griffin, but he did reappoint Witherell. The legislative council first sat on June 7, 1824 and quickly reorganized the court system, limiting the Supreme Court largely to appellate issues. The justices sat on circuit courts but did so as appellate judges.

With population growth, in 1825 Congress increased the council to thirteen members and authorized the governor and council to divide the territory into townships. All township officials except for court personnel and sheriffs were popularly elected. Governor Cass went a step further by appointing those “unelected” officials according to the results of local advisory elections. Government was now institutionally more sympathetic to local concerns. This governance facilitated a “more mature and stable society [that] helped attract a wave of immigrants.” In response to that stability, Michigan’s population increased from twenty-eight thousand to over two-hundred thousand between 1830 and 1840. This is not to suggest that government alone facilitated that growth. The land was rich and the climate conducive to agriculture, and transportation mechanisms, particularly the Erie Canal, made Michigan more

Doty had been appointed as a fourth justice on the Supreme Court pursuant to 1823 legislation responding to the need for governance in the area now comprising Wisconsin (which was then part of the Michigan Territory). It appears that he did not contest his employment termination in the courts and he eventually became the Wisconsin Territory Governor. For a contemporaneous adjudication on the issue of whether a court employee holding office good conduct can be terminated by a later legislature see, *Hoke v Henderson*, 15 N.C. 20 (1833).

Monroe appointed Woodward to the Florida Territorial Court. He died a few years later, in 1827. Griffin moved to Philadelphia and soon married. Little is known past that point.


An Act in addition to an act, entitled “An act to amend the ordinance and acts of Congress for the government of the territory of Michigan,” and for other purposes. 4 Stats.: 80 (1825)

accessible to settlers. Nevertheless, government was instrumental in unlocking the area’s potential by addressing the security, capital scarcity, transportation, and environmental challenges that encumbered development.

Representative governance grew in Detroit as well. In 1824, Detroit adopted a city charter providing for a mayor and five council members. The council quickly took up its task of regulation in pursuit of general-welfare concerns. It ordered the marshal to examine the bread in the city’s bakeries “tomorrow morning” to assure that all bread matched the “weight last prescribed by the Common Council.” It passed a new assize of bread, appointed fire safety inspectors, and set fees and fines concerning the sale of foodstuffs. The detail of the council’s involvement in the market is notable. For example, on December 13, the council considered whether the “Clerk of the market [should] be directed to procure four convenient chains to fix and suspend four staples at the four corners of the market, of convenient length and strength, for the purpose of” weighing large quantities of provisions. That same day, it considered whether James Woodward could move his grocery shop and whether Edward White could trade as a baker. It then took up bills for regulating taverns, retailers of foreign merchandise, commission merchants, and ferries.

The council would soon take up regulations concerning the measuring of wood, and the “manner of using the sidewalks,” the transportation and storage of gun powder, and the rules on “shows, plays, games, theatrical and all other exhibitions.” The council considered and passed

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166 About a year and a half after the Canal opened, Charles Trowbridge wrote to Louis Cass: “The opening of navigation has brought us immense crowds of old fashioned immigrants with their wives and babies and wagons and spinning wheels, and a hundred dollars to buy an eighty acre lot for each of the boys. I have never seen more crowded boats. Yesterday our arrivals were eight steamboats, one ship, three large brigs and nineteen schooners. The day before, seven steamboats arrived.” Letter dated May 29, 1837, quoted in, Frank B. Woodford and Arthur M. Woodford, All Our Yesterdays; A Brief History of Detroit (Detroit: Wayne State University Press, 1969). 135.

167 October 24, November 2, December 8, December 13, 1824. Journal of the Common Council of the City of Detroit; from the Time of its First Organization. (Detroit 1824). 7-15. Note: The Journal offers a publication date according to the first records in contains – 1824. However, the materials extend through 1843.
ordinances controlling nuisances, prohibited swine and stud and wild horses from running at large, and regulated dogs. Finding it the duty of the city to improve the public grounds, the council provided for planting trees in the public yard. As new challenges arose, the council enacted new ordinances, or modified established ones. It routinely reconsidered the assizes of bread. It legislated against “the firing of rockets or other fireworks,” and it regulated the cleaning of fish. It also punished vendors of “unwholesome liquors and provisions,” modified its theatrical regulations, and it set fees of ferriage. In short, local government was both part, and a regulator of the relations of its population. As Cooley noted, government was involved in “all that infinite variety of rules and regulations known as laws of police, which are ever present and all about the citizen, his business and his property, prescribing limitations and setting bounds to the use and enjoyment even in respect to that which is unquestionably his own.” Local government regulation intertwined with the day-to-day in an effort to organize and control individuals, property, and commerce. That was the norm.

It is important to note that government activity was not just about regulation. City government also became involved in advancing commercial development. In March 1827, the council determined that the “erection of a steam mill is among the most important improvements projects in the City.” Being “apprehensive that it will not be effected by enterprise and individuals only,” it proposed to later consider whether community aid was appropriate. In reality, the question was not whether, but how government would help develop the mill. Council agreed that the city would “furnish such aid, either in a site for building, or in stock, or in both, as circumstances may render proper.” It explained that it was government’s role to further projects that would “contribute to the health and comfort of our citizens . . . give activity to

168 March 15, June 4, June 27, July 13, August 29, September 14, September 28, December 21, 1825 ibid., 15-25.
169 June 30, July 18, 1826, February 12, 1837, ibid., 34-47.
business and enhance the value of property . . . and to furnish employment.” The council believed this obligation extended not just to current residents but to future generations as well. By properly employing its limited resources, it could help build a community where “in a few years our population and wealth will enable us to meet any public demands which may be necessary.” This was government dedicated to advancing the public welfare by regulating behavior and spending to advance commercial development. It took this role not as an external marionette-master pulling strings. Instead, government was an integral part of the society and economy, working as an aid as much as a regulator. It keenly felt the responsibility to fill that role, as the city’s population was growing, having more than doubled in the five years between 1830 and 1834. Government was no night watchman. Rather, it fancied itself a social watchmaker, and acted accordingly.

Municipalities, like Detroit, were the government entities most involved in the regulation of the community and the support of commercial development. In large measure, this reflected the local nature of life. This does not mean, however, that the territory government did not regulate or support commercial development. It did so when local regulation or expenditures would prove insufficient. (The most telling example of this related to the support of internal-improvement, infrastructure programs, discussed in the next chapter.) Of course, the decision as to when to regulate at the territory level and when to defer, was left to the discretion of the

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territory legislature and governor. For example in 1827, Cass vetoed a bill to allow municipalities to regulate through licensing billiard tables, because billiards was “injurious to the habits and morals of the community.” To Cass, this form of gaming was beyond municipal discretion and such decisions should be territorial. On the same day, Cass vetoed legislation requiring state inspections of provisions, fish, and whiskey. He did so because he felt that local government should regulate such matters.\textsuperscript{174} It is hard to discern a difference between the regulation of snooker and scrod but, notably, the issue was not whether to regulate. It was who should do so.

James Willard Hurst helped usher in historian efforts to debunk the popular characterization of an early American governance premised on \textit{laissez-faire} principles. He argued that where “regulation or compulsion might promote the greater release of individual or group energies, we had no hesitancy in making affirmative use of the law.”\textsuperscript{175} Detroit proved no exception to Hurst’s perception and, as importantly, it consciously subordinated private to public interests when regulating. Detroit’s 1834 efforts to regulate liquor provide a telling example, particularly because those efforts were led by the then Territory Secretary (and Detroit Alderman-at-Large) Stevens Mason.\textsuperscript{176} (As governor, Mason would later lead Michigan’s efforts for infrastructure and commerce building efforts – a story for the next chapter.) At twenty-two years old, Mason, as secretary and city alderman, pushed city council to tighten Detroit’s liquor ordinances. Mason argued that, “the drinking of ardent spirits . . . leads to form intemperate habits and appetites, and . . . it causes a great portion of pauperism, crimes and wretchedness of the community; increases the number and violence of diseases, fills our prisons

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\footnote{174}{Cass, April 23, 1827, \textit{Messages of the Governors of Michigan}: 38-39.}
\footnote{175}{Hurst, \textit{Law and the Conditions of Freedom}: 7.}
\footnote{176}{Don Faber’s, \textit{The Boy Governor}, nicely discusses the life, character, politics, and accomplishments and failures of Stevens Mason. Don Faber, \textit{The Boy Governor: Stevens T. Mason and the Birth of Michigan Politics} (Ann Arbor: University of Michigan Press, 2012).}
\end{footnotes}
with convicts and malefactors; deprives man of reason and brings thousands to an untimely grave.” He recognized that his call to restrict alcohol sales ran against the philosophy of “let every man think for himself,” but rejected that in the face of overarching community interests. To Mason, good citizenship required individuals “to sacrifice present private interest to the public good.” In so arguing, Mason took on powerful economic and freedom interests. Detroit had one liquor-selling grocery store for every thirteen families in the city. Those stores existed because Detroiter consumed their products, and Mason proposed to limit those businesses.  

Council agreed and passed the restrictive law. The city would limit the individual discretion and economic interests of much of its population in order to advance collective needs.

The number and breadth of the regulations and the efforts to develop commerce tell only part of the story. Law-in-action was the daily business of municipal governance and Detroit’s Common Council routinely worked to shape its municipal world. Reviewing its activities on any number of days demonstrates that philosophy but, for the sake of brevity, I here list the council’s proceedings for only one day – May 9, 1832. On that day the mayor and four alderman considered, 1) a claim of A. M. Hurd for $34.71, 2) James Young’s application to keep a bakery at the corner of Randolph and Woodbridge, 3) James Fraser’s request to keep a grocery at Strykie and Taylor, 4) whether to request that the Secretary of War further open Cass Street, 5) a proposal to sell city lots from the former military reservation, 6) leasing the “public or steam mill wharf” but reserving a portion for a potential public market, 7) determining whether a public market would be closed if fees were not forthcoming, and 8) establishing a committee to set

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178 “An Ordinance to regulate victualing houses, ordinaries and groceries.” Mason was a member of the Detroit Young Men’s Temperance Society. Ross and Catlin, Landmarks of Detroit: 386.
market fees.\textsuperscript{179} Most importantly, this was not an unusual day – the record is replete with council deliberations that blended day-to-day commercial and social practicalities with legal enactments. No \textit{laissez-faire} sentiment arrested government efforts to enhance the general welfare. As Novak noted, “on the contrary, the fundamental social and economic relations of the nineteenth century – the market, the city and the countryside, the family, the laborer, the proprietor, the good neighbor, the good citizen – were formed and transformed in this period as the constant objects of governance and regulation.”\textsuperscript{180}

This is not to say that all Detroit residents agreed with the scope of government involvement in their lives, or that all council action met with universal applause. Concerns over local regulation of the central market increasingly percolated among the populous. In 1835, some protested not only the wisdom of the market ordinance, but common council’s power to regulate market hours. A letter to the editor of the \textit{Democratic Free Press} asked “what right the common council possesses” to limit market hours so that he and other laborers could not attend the market? He argued that council assumed powers “not delegated to them.” The editor of the newspaper agreed, stating, “We know not what right the common council possesses to pass such an ordinance.” Perhaps in response to public dissatisfaction over market availability, by 1837, the city had established three markets, one of which was on the first floor of City Hall. By advertising in its official Directory that the city markets “are kept in good order by the inspector of provisions, and well supplied with everything that can be desired at similar places,” the city suggested that trade was not restricted to city-owned markets, but city markets still thrived.

Further, government had not forsaken control where its leaders believed that government best enhanced welfare. In that same Directory, the city boasted that it had acquired the previously

\textsuperscript{179} \textit{Journal of the Common Council of the City of Detroit: from the Time of its First Organization}: 139.
\textsuperscript{180} Novak, \textit{The Peoples Welfare}: 236.
privately owned water-works company in order to “afford a more abundant supply, and to insure purer water.”

**Advancing to Statehood**

Cass’s drive to support local government had quelled many of the hostilities and problems associated with distant governance. Those concerns would re-emerge as Andrew Jackson’s spoils system would use Michigan government positions to reward his political supporters. With the exception of Cass, those beneficiaries resided outside the territory. As soon as the judges’ four-year terms ended, Jackson appointed judges from outside the territory. Similarly, when Cass left to become Jackson’s Secretary of War, Jackson appointed an outsider as governor. In response, resentment “was widespread and general; for the first time the Territory became keenly aware of the dependent character of its government.” A local paper claimed that Jackson’s appointments left “no identity of interest nor community of feeling which should inspire confidence.” The fervor over the loss of local control, however, did not immediately translate into action. An 1832 election on the statehood question garnered only

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The city would struggle to keep up with the population’s need for fresh, clean water and considered selling the waterworks to private industry, but investors were not interested in buying it. With numerous upgrades, the city’s water pumping capacity increased from around 120,000 gallons a day in 1837 to 100,000,000 gallons in about 1898. Ross and Catlin, *Landmarks of Detroit*: 446-50.

182 Consistently with his anti-favoritism beliefs, Cooley commented, “no general maxim of government was to be so powerful at Washington as the maxim that to the victors belong the spoils of office. This maxim of war, when war meant robbery and plunder, was now being adopted in the civil administration of the government, and was to vitalize all political life and be the chief spring of all political action and energy.” Cooley, *Michigan: A History of Governments*: 207.

Cooley likened the spoils system to creating privileged classes. In an 1886 speech before the South Carolina Bar Association, he warned, “In America, however, we have seen, with the rise of party, a vicious notion not unlike it take root and rapidly grow to fearful power. The party successful in the latest election has for the time been looked upon as constituting, in a certain sense, a privileged class, and entitled as such to seize upon public trusts and appropriate them as spoils of party warfare.” Thomas McIntyre. Cooley, *The Influence of Habits of Thought upon our Institutions* (Abbeville, S. C.1886). 2.

183 As Secretary of War, Cass would remove liquor as an army ration and would later become the first president of the Congressional Temperance Society.


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3007 total votes, with a small majority in favor of statehood. Residents remained reticent about bearing the cost of governing a large area with relatively few taxpayers. With that lack of enthusiasm, Congress failed to take up Michigan statehood and territory leaders dropped the issue for a short time.

From 1831 to 1836, the office of the governor changed hands in interesting fashions. Jackson appointed George Bryan Porter to serve as governor in 1831. Porter was from Pennsylvania and hailed from a political family. One brother would become Pennsylvania’s governor, and another the Secretary of War. Before his appointment, Porter served as a Democratic Representative in the Pennsylvania House. Porter was often absent from Michigan and, during those times, Stevens Mason was acting governor. Porter’s tenure as governor was shortened when, in 1834, he succumbed to cholera and died in office. Territory Secretary Mason again became acting governor. Mason’s earlier appointment to the secretary’s position created concerns in large measure because this Kentucky resident was nineteen years old at the time of his appointment and, hence, lacked both knowledge of Michigan and the experience typically beneficial for higher office. His appointment as governor at the age of 22 created even greater anxiety. A meeting of concerned Detroit citizens characterized his appointment as “in every point of view, so injudicious and objectionable as to make it improbable, if not impossible.” That he was a political appointee without grounding proved troubling. That he barely shaved proved infuriating.

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185 Detroit suffered from two major outbreaks in the 1830s. General Winfield Scott’s troops brought cholera to Michigan on July 4, 1832, when they landed in Detroit on their way to the Black Hawk War. Soon the troops travelled to Chicago where, like Detroit, death and panic followed. Buley, *The Old Northwest Pioneer Period, 1815-1840:* I: 251-52. In 1834, the disease returned, killing about 10% of Detroit’s population.

Mason soon won the residents’ support and would eventually become Michigan’s first elected governor. Before he could be elected, however, Jackson fired Mason for supporting Michigan’s territorial claims on land that is now part of Ohio.187 Ohioans could vote in national elections and its representatives could vote in Congress.188 Michigan’s could not, so political forces drove Mason out. In his place, the President named John Scott Horner of Virginia to the governor’s seat. (Jackson had first appointed Pennsylvanian Charles Shaler, but he declined the appointment.) Horner followed Jackson’s lead in offering a conciliatory position toward what Michigan residents considered an Ohio land grab.

It was their militancy over Ohio’s perceived arrogance that drove Michiganders’ desires for statehood. So intense were those feelings that Michigan tried to shorten the traditional route to statehood. Most territories seeking admission received Congressional enacting legislation at the beginning of the process of state formation. Congress did not respond to Michigan’s request for that legislation, so state advocates took the task upon themselves. In 1834, the Territorial Council enacted legislation calling for a census to determine if the territory had surpassed the 60,000 population required for statehood under the Ordinance. That census showed the territory held 87,273 people. In January 1835, the council called for an election of delegates to a constitutional convention, and on May 11, those delegates met in Detroit.

187 Secretary of State John Forsyth sent a letter to Mason stating that the President, “with regret [had come] to the conclusion that your zeal for what you deem the rights of Michigan has overcome that spirit of moderation and forbearance” required in the territory dispute. The Secretary of State to Acting Governor Mason, August 29, 1835, The Territorial Papers of the United States: XII: 970-71.

188 The nullification issue lurked in the background. Ohio Governor Robert Lucas claimed land for Ohio that Congress had granted Michigan in 1805 (and a federal survey confirmed this), and Jackson may not have wanted to engage in another conflict over state versus federal power. Having recently prevailed over South Carolina and Vice President John Calhoun’s nullification efforts, Jackson probably did not wish to split his Democratic Party by reopening the issue in the north.

A brief, but compelling account of the Toledo War, is in Buley, The Old Northwest Pioneer Period, 1815-1840: II: 192-203.
The delegates promptly set forth their goal in the preamble to the eventual constitution: “the time has arrived when our present political condition ought to cease, and the right of self-government be asserted.” The delegates were largely former residents of New York and New England. (The Erie Canal success would animate their governmental vision.) They represented a cross-section of residents, with delegates coming from rural and urban areas. They were tradesmen, timber men, farmers, merchants, educators, doctors, and lawyers. This group had little constitutional law or drafting experience and “were little concerned in the proposed constitution beyond the bill of rights and the suffrage provisions.” In the end, however, they left the legislature largely free from restraints, as “the delegates evinced no distrust of legislative assemblies.” The constitution went to the people for approval. Although few voted (7,658), this time the residents overwhelmingly approved the constitution (6,299 – yes, 1,359 – no).

The militancy that animated the drive to statehood also helped drive Horner from office. Almost immediately following his appointment, residents vocally expressed dissatisfaction with his Ohio position and proposed that Horner “return to the land of his nativity.” Mason was their man as he had “an open, fearless” policy against the marauding Ohioans. Distaste with Horner ran deep and soon a group of residents welcomed Horner to a local tavern by throwing rocks through the tavern’s windows. To avoid the projectiles, Horner slept on the floor of the tavern, as it afforded the safest location. Apparently unsympathetic with his guest’s plight, the tavern owner then charged Horner for the damage done to his building.

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189 Preamble, Constitution of Michigan, 1835.  
190 Dorr, Michigan Constitutional Conventions: 25, 29.  
191 A “large and respectable meeting” of citizens met with Horner early in his tenure and determined to “sustain the Executive” on the Ohio territory issue but warned “that a double faced policy with regard to our rights or our jurisdiction will be promptly resisted.” Proceedings of a Public Meeting, Undated in 1835, The Territorial Papers of the United States: XII: 985.  
192 The Toledo War was a passionate affair. Buley reflected, “Outrages were reported by both sides: houses broken open, citizens abducted, newspaper presses demolished.” It also had its comical element. Buley continued, “Even an Ohio flag was torn down and, according to Ohioans, tied to the horses’ tails at [Michigan Militia] General
Court Justice Campbell classified Horner as “rather more preemptory and assuming than the people were accustomed to find their public officers, and more dictatorial than they were disposed to submit to.” Accordingly, government officials granted him little respect. Horner stayed in Michigan until May 1836, when Jackson reassigned him to act as governor of Wisconsin.

While an interesting vignette, the episode casts light on the underlying settler drive to gain republican self-government under the Ordinance. In 1835, Horner wrote to Secretary of State John Forsyth to express relief over the settlement of the Ohio/Michigan border issue. Horner suggested Michigan’s concerns were part of “strenuous efforts to embarras [sic] the Administration . . . and also to drive from the Territory any Executive who designed to carry out the only salutary and tranquilizing measures the Government could prescribe.” His focus was on national priorities, applauding the “increasing popularity” of the national administration’s efforts. Horner wrote this letter on November 25. Interestingly, three weeks earlier, on November 3, Mason had sent a letter to the Secretary of State informing him that earlier that day he had “taken the oath of office as Governor of the State of Michigan.” Michigan had two governors.

Michigan voters had approved the state’s constitution in 1835. Acting as a state, Michigan then held elections under that constitution even though Congress had not yet accepted it into the Union or released it from its territorial status. Accordingly, Mason and Horner both were acting as governor, one popularly elected the other appointed, one claiming to govern a

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Stevens T. Mason to the Secretary of State, November 3, 1835, ibid., XII: 997.
state the other a territory. If one construed the Ordinance as a constitutional document, then Michigan should automatically have become a state equal to all other states. After all, the Ordinance provided that when a contemplated state “shall have sixty thousand free inhabitants therein” it would be admitted on “an equal footing with the original states, in all respects whatever.” Those accepting the election results, and Mason’s authority, believed that the Ordinance required that the nation accept Michigan as a state as soon as it had fulfilled the requirements of the Ordinance.197 Having achieved that, they would argue, Michigan was like all other states. Classifying this legal position as a collective political right, the elected state legislature offered that it had,

acquired rights, of which no human power could divest them, and in full and ample authority to form and establish for themselves, a Constitution; and having performed that act, they became a State, from that moment; and if a State, then the Territorial government must necessarily cease, and the people assume and exercise all the rights, privileges and immunities, that belong to the people of the older States.198

Believing Michigan had the full powers of a state, the Michigan Legislature passed laws dismantling the Ordinance’s structure and erecting a locally elected government blueprint, according to the terms of the new constitution. 199 Michigan had entered uncharted space, as Congress had almost automatically admitted the other states of the Northwest Territories. Not so with Michigan. Because Michigan and Ohio claimed common land, Congress refused to admit Michigan pending resolution of that dispute.

197 Mason and his supporters viewed Tennessee’s admission as precedent. Tennessee similarly had not received congressional enabling legislation before drafting its constitution and demanded admission. Congress voted for Tennessee’s admission.
198 Memorial to Congress by the State Legislature, November 9, 1835, The Territorial Papers of the United States: XII: 1004-05.
199 Dorr explained, “So sure were the delegates of the grounds upon which they were seeking admission that they authorized the people in the same election to choose a representative to Congress and to select a complete slate of state officers, and directed the officials so elected to proceed to organize the government of the proposed state.” Dorr, Michigan Constitutional Conventions: 33.
In Washington, national government actions evidenced a belief that congressional power, and not the Ordinance’s language, determined when and if a territory were admitted into the union. Accordingly, at the same time Michigan acted as a state, the national government treated it as a mere territory. An irate President Jackson warned that Michigan’s elected leadership should exercise caution when interfering with his appointed government. He had his Secretary of State write that the President would not interfere with the newly elected government “so long as such proceedings do not interfere with the due administration of the laws of the United States for the establishment and Government of that territory, and with the rightful exercise of the functions of the officers appointed under their authority.” In other words, if the elected government refrained from governing, all would be fine. To Jackson’s mind, territorial appointments ran the legitimate government “until it is terminated by Congress.” Federal law prevailed and any actions that undermined that law were invalid. Not surprisingly, Michigan’s pro-state leadership was deaf to Jackson’s counsel. The Territorial Council had disbanded, at least with respect to the territory now comprising Michigan. In what must have been perceived in Washington as a bold move, the state legislature severed from its jurisdiction the territory west of Lake Michigan. It also enacted laws not applicable to the severed territory – the area now constituting Wisconsin and part of Minnesota. All this was done ignoring governmental responsibilities and power under the Ordinance.

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200 The Acting Secretary of State to Acting Governor Horner, October 8, 1835, *The Territorial Papers of the United States*: XXII: 988.
202 Congress exercised that power, and largely validated Michigan’s actions, when it created the Wisconsin Territory in April 1836.
Michigan had organized a government, which appointed senators, elected representatives, passed laws, and adjudicated disputes. It elected a governor, lieutenant governor, and legislature, and set up a court system. It had acted much like a state before becoming one and did so, arguably, without legal authority. The leadership of the constitutional government knew that others disputed their authority. Accordingly, the state legislature and executive started slowly, hoping that Congress would soon admit Michigan into the Union. As time passed, the state government increasingly addressed the administrative and substantive needs of governance, but did so in a cautious fashion. It incorporated entities, set rules for elections, and organized towns. In doing so, territory and state government, at times, conflicted. Somewhat akin to the challenges presented when Woodward and Hull battled over the Witherell Codes, government became dysfunctional. Unlike that earlier challenge, between 1835-37 the leaders were not at loggerheads. Nevertheless, Michigan’s government inhabited a mesophase; neither admitted state nor functioning territory. That situation would only stabilize when Horner left for Wisconsin and, in January 1837, when Congress admitted Michigan into the Union. Politics had clarified the situations, but legal issues would remain.

The courts would consider whether laws passed by the “state” legislature were enforceable in the case of Scott v Detroit Young Men’s Society’s Lessee. In March 1836, (after the constitution but before admission) the state legislature (sitting under the constitution) incorporated the Detroit Young Men’s Society. Several months later, the territory judges (sitting under the Ordinance) granted land to the Society pursuant to their responsibility to allocate land

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204 Congress paired Michigan’s admission with Arkansas in order to maintain a slave/free balance. To assuage Michigan’s sensitivity over the loss of the Toledo strip, Congress granted Michigan its Upper Peninsula. Inclusion in the federal government’s program to share surplus revenue also motivated Michigan’s acceptance of federal conditions. The revenue sharing was for states but not for territories.
after the Detroit fire of 1805.\textsuperscript{205} When a dispute arose over the Society’s right to lease the land, the courts were presented with issues concerning 1) the legitimacy of laws enacted by a legislature that, without Congressional approval, had supplanted the territory council, and 2) the legitimacy of a body acting under the Ordinance where the existence of a “state” seemingly would dissolve territorial governance. The dispute raised issues of sovereignty, state creation, and congressional power. Perhaps more importantly, it threatened to unravel the multiple court, executive, and legislative decisions Michigan entered into over a fifteen-month period, which would then result in a significant disruption of numerous activities and lives.

Seemingly, the challenge could only be resolved if the courts found the state and territorial government could simultaneously rule, and that was the course it took. It found that the territorial government retained authority over issues concerning congressional legislation (here, land grants under the fire-relief statute), whereas state government held jurisdiction over state activities (here, incorporation statutes). After all, the court reasoned, “The change, from a territorial to a state government, was not, and from necessity could not be, instantaneous.”\textsuperscript{206}

Unsatisfied, the plaintiff then filed for a writ of error with the United States Supreme Court, claiming that the court held jurisdiction under the Judiciary Act. That act provided that the Supreme Court could exercise jurisdiction over actions of states. With a sleight-of-hand, the court dismissed the claim. If Michigan was defined as a state, then the state had authority to take the action it did. If it was a territory, as the court believed, then the Supreme Court had no jurisdiction under the Judiciary Act. In dicta, the court questioned whether a political entity could turn itself into a state through mere self-declaration – hence its belief that Michigan was a territory. The court was off the hook in either case. If a state – the act was appropriate; if it was

\textsuperscript{205} Campbell wrote that this was the last official act of the governor and judges of the territory. Campbell, \textit{Political History of Michigan}: 478-79.

\textsuperscript{206} \textit{Scott v Detroit Young Men's Society's Lessee}, 143.
a territory – no jurisdiction. Employing another jurisdiction-limiting tool, the court declined to hear the matter because the case presented problems that should “be discussed before the proper political tribunals.” The Court had ducked, and in doing so took the practical course of not invalidating about fifteen month’s worth of Michigan’s governance. It had also avoided addressing the relationships of states to the national government – an issue that could raise unsettling nullification issues.

Justice McLean, in dissent, was perhaps more intellectually honest but practically deficient. He reasoned that, “No act of the people of a Territory, without the sanction of Congress, can change the territorial into a state government.” That was exactly what Michigan had done. It had operated as a state in violation of the practice of awaiting Congressional approval. By exercising sovereignty outside the scope of national laws, pre-admission Michigan’s legislative acts were “repugnant to the constitution” and to the acts of Congress. Certainly, to McLean, and perhaps to the others, the Ordinance was a mere statute, and its automatic statehood provisions were not binding on later congresses.

The Court’s refusal to take jurisdiction and instead to leave the issue to the political process, in significant measure, was a recognition of the bind courts found themselves when governance rules and public needs clashed. A rejection of state legislative power would have forced the unraveling of the multiple acts and transactions upon which society now relied.

Further, a rejection of state legislative power would have required a declaration that Michigan

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207 Scott and Boland v Jones, Lessee of the Detroit Young Men’s Society, 46 U.S. 343, 378 (1847).
208 Ibid., 381. For further discussion of the legal and political controversy over Michigan’s status between October 1835 and January 1837, see Norton, A History of the Supreme Court of the State of Michigan, 1836-1857: 78-82, 101-11.

Unstated, but underlying this argument lurked the argument that the Ordinance was a mere statute, not holding constitutional status. Onuf argued that congressional unwillingness to admit Michigan until resolution of the Toledo dispute caused, “The constitutional complex” to “fall apart.” The Ordinance could, therefore, no longer stand as a constitution for new territory governments, and its prohibitions on slavery were trumped by Congressional power and the Constitution. To Onuf, “It was in this constitutional vacuum that the crisis of the union would unfold.” Onuf, Statehood and Union: 108.
citizens could not act to create democratic governance without the approval of a distant
government in which they had no voice and little power – perhaps not a legally based concern
but, nonetheless, real. Those residents, upset over the governance imposed under the Ordinance,
had forced out an appointed governor, enacted a constitution, elected a legislature, and sought
national government approval. The people had employed law to undermine the governmental
structure designed in the Ordinance. The Michigan Supreme Court’s finding of dual sovereignty
and the United States Supreme Court’s refusal accept jurisdiction amounted to tacit recognitions
that when structure clashes with need, structure will, or at least can, yield. Now Michigan had a
new structure, designed to accomplish needs as perceived in 1835. That structure too would be
forced to yield to changing circumstances.
Chapter III: Infrastructure and Economic Development 1837-1850

*Individual effort alone is not adequate to so great purposes; it is to man in his social capacity – to communities of men – to governments, to whom only the power and the high privilege is given of effecting them, and thus of ameliorating the condition and augmenting the happiness of men.*

Report of the Michigan Senate Committee on State Affairs, Relative to Donations of Land by Congress for Works of Internal Improvements
March 2, 1838

*From such [corrupting] influences, unsafe in a free government, dangerous to the purity of our institutions – destructive to civil liberty – a sale of our public works would set us free.*

Report of the Michigan Senate Finance Committee
January 23, 1846

The Drive for Internal Improvements

Michigan was still a territory when, in 1825, New York opened the largely state-financed Erie Canal, which transversed 350 miles from the Hudson River to Lake Erie. The Canal not only fulfilled the dream of cheap, effective transportation, it furnished a means to deliver the interior’s surplus crops to the population centers of the east. It also promised to aid immigration into the nation’s interior, as potential settlers could now travel to Michigan by water rather than by the relatively impassible roads of the day. As New York built the Canal, Michigan Territory Governor Lewis Cass hailed, “That great artificial river, which is about to unite the Lakes with the Ocean . . . has brought us almost in contact with the Atlantic border, and furnishes a communication with the commercial metropolis of the nation, with an economy,

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safety and facility which have almost annihilated the intervening distance.”

This early celebration of the Canal’s potential would open a chapter of government spending that would transform political and legal positions concerning government’s general-welfare responsibilities, individual-property rights, and majoritarian-democratic principles.

Cass’s dream was not unique, as the Canal opened vast commercial and social opportunities to the areas making up the Northwest Territories. In 1825, the United States was largely a seacoast-focused nation, with a developing but commercially limited interior. Effective internal improvements (the common phrase for nineteenth century efforts to build a transportation network) were required for commercial and social progress, particularly as the nation moved from its seaboard beginnings. Nineteenth-century British historian William Barrows noted that “grains, meats, hides, ores, coals, timber, and wool [had] practically been waiting for their opportunity in the great North American West a thousand years,” for the ability to effectively bring them to market. Canals, and soon rail, allowed for that opportunity by providing cheap and rapid transportation and by enhancing property values in an expansive swath of interior lands.

Prior to those transportation improvements, the early nineteenth-century landscape was characterized by vast territories and, at least in the non-seaboard portion of the nation, widely dispersed populations. Since roads were often little more than paths, commercial expansion hugged natural water routes. Efforts to trade outside those routes were lengthy and expensive.

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210 Cass, June 7, 1824 Messages of the Governors of Michigan: I: 15. The canal offered immediate hope to developing Michigan. In 1824, about 62,000 acres of Michigan land were in private hands. A year after the canal opened, in 1826, over 1,500,000 acres were sold. Faber, Boy Governor: 34.
211 On December 5, 1825, the Detroit Gazette cheered, “We can now go from Detroit to New York in five and a half days. Before the war, it took at least two months more.” Quoted in Woodford and Woodford, All Our Yesterdays: 133.
213 Employing language from the mid-twentieth century, R. Carlyle Buley, in his Pulitzer Prize winning The Old Northwest, remarked that until 1818, “the only road to Michigan led through the Blank Swamp of northwestern Ohio
Even within those routes, travel times were uncertain as currents and weather strongly affected voyages. Accordingly, internal trade primarily was regional.\textsuperscript{214} Canals and, more significantly, railroads would extinguish the natural barriers to economic growth, and open the west to population and commercial expansion. That expansion required government, as government could raise capital in ways the then-infant private markets could not. Rather than focusing on limiting government involvement in industry, as Hurst noted, early Americans “had no hesitancy in making affirmative use of law” to advance commercial opportunities. Hurst classified this affirmative use of law as a means to “enlarge men’s range of choices.”\textsuperscript{215} By employing its tax and spending powers, government shaped the commercial environment and released individual energies to conquer scarcity. It invested in developing infrastructure, allowing commerce to move from local to regional, and ultimately to national and international. With the Canal and its progeny, residents of the Northwest Territories now were but a week away from the population bases of the east. The transportation revolution would change those residents from self-sufficient pioneers into settlers fully integrated into the national economy.

The term “internal improvements” is telling. To the nineteenth century American, internal improvements were much larger than transportation developments. Internal improvements promised social, economic, and political progress. As Carter Goodrich noted, they were integral to “the exercise of pubic spirit.” The drive involved significantly more than individual prosperity. The promise of the improvements introduced a new responsibility for

\textsuperscript{214} Notably, the Canal also changed the flow of commercial traffic in the nation. Before its construction, western crops moved down the Mississippi, through New Orleans, and then to the population centers in the East. With the Canal, goods travelled in a more direct east/west fashion, helping to build New York as a major trading center. Callender, "The Early Transportation and Banking Enterprises of the States in Relation to the Growth of Corporations," 120-22.

\textsuperscript{215} Hurst, \textit{Law and the Conditions of Freedom}: 7, 43.
action. Goodrich continued, “To improve the country’s natural advantages by development in
transportation was, in the eyes of Washington and many others, a duty incumbent both on
governments and individual citizens.”\textsuperscript{216} Given the individualistic traditions upon which much
of our neo-liberal philosophy relies, it may seem surprising that nineteenth-century internal
improvements depended on government largess and direction (and, at times, control). Yet,
Americans turned to government to effect the political, economic, and social progress
transportation promised. They did so employing whatever model of government/industry
relations would best suit that end. Most of those efforts took place on the state and local levels.

Because rail was not limited to connecting water routes, it soon eclipsed canals as central
to the nation’s transportation fabric. To put rail’s importance in perspective, before the Erie
Canal, moving a barrel of flour from Buffalo to New York City would cost $10. With the Canal,
that cost had dropped to $2. With rail, it dropped to $0.35.\textsuperscript{217} Rail provided an additional benefit
not enjoyed by canals or other forms of overland transportation: it extended the selling season
through the winter months. Prior to rail, farmers could not ship late-harvested crops until spring,
reducing their value and increasing storage costs. Rail helped overcome the obstacles of space
and time by narrowing the gap between producer and consumer, but it only did so for those
connected to the transport network.\textsuperscript{218} It threatened to marginalize those not connected, and to
undercut those existing commercial centers that did not augment their infrastructure with rail
and/or canal development.\textsuperscript{219}

\textsuperscript{216} Carter Goodrich, \textit{Government Promotion of American Canals and Railroads, 1800-1890} (New York: Columbia
\textsuperscript{217} Barrows, \textit{The United States of Yesterday and of To-morrow}: 324-25.
\textsuperscript{218} See, David R. Meyer, "Midwestern Industrialization and the American Manufacturing Belt in the Nineteenth
moved from 15 cents per mile to about 2-3 cents with rail. See also, Kenneth E. Lewis, \textit{West to Far Michigan: Settling the
\textsuperscript{219} New York’s canal innovation supplanted Baltimore and Philadelphia’s earlier transportation-focused efforts.
Those formerly leading eastern seaboard’s commercial centers had pushed roads through the Appalachians and into
The benefits went far beyond transportation efficiencies. As Daniel Walker Howe noted,

If the railroads did not initiate the industrial revolution, they certainly speeded it up. They stimulated the mining, processing, and importing of iron and steel (and, after the eventual switch in fuel, coal). They created vast primary industries in the manufacture of rails, locomotives, and rolling stock. They encouraged the workforce to continue to leave agriculture and move into other occupations. They multiplied new jobs as engineers, firemen, brakemen, switchmen, conductors and roundhouse mechanics.

The impact was not merely economic. Howe submitted that rail changed the nation’s landscape. Because “public subsidies so often took the form of land grants, railroads became large-scale land speculators, promoting settlement along their routes and urban development at major railheads.” 220 Commerce moved from local to interstate, and mobility and communication exploded. If progress was a central idea of the nineteenth century, then railroads provided the path to that goal.

Along with opening a new world, the Erie Canal posed a dangerous temptation. While New York had anticipated paying for its canal though increased auction fees and salt taxes, as well as taxes on lands along the route, the state found that revenues from the Canal completely serviced the debt and, as a bonus, New York was able to suspend the state property tax in the later 1820s. 221 That realization gave rise to a general (but not universal) expectation that internal improvement projects could be self-funding. 222 As Larson noted, “it was hard to resist the

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222 Wallis and Weingast classify this as a form of “taxless finance.” They explain that when the government constructed and operated an enterprise, “it borrowed sufficient funds to cover both building the project and the interest charges in the early years of the project before revenues were expected to materialize. Of course, borrowing funds left taxpayers with a contingent liability. If ex post the project failed to generate sufficient revenues to cover the cost of the bonds, taxpayers had to pay the difference in proportion to their tax share.” John Wallis and Barry
conclusion throughout the rest of the country that wealth and power flowed to those who seized that kind of initiative." That possibility, along with optimism associated with growing populations, commerce, and wealth, and a recent history of federal budget surpluses, combined to promise a self-funding, fiscal nirvana.

To enjoy that progress, state and local governments aggressively embarked on internal improvement projects and, in doing so, exploded public debt. For example, Pennsylvania’s debt rose from $6.3 million in 1830 to $24.33 million in 1837 and Ohio moved $0.4 million in 1825 to $5.5 million in 1836. In all, aggregate state debt more than tripled from $60 million in 1835 to $183 million in 1839. (By way of comparison, total annual federal spending averaged a bit less than $27 million in the 1830s.) About sixty percent of that debt was for canals and railroads with about thirty percent for banks. (Northern states focused on internal improvement projects and Southern states focused on banks.) The debt was public, not private, because

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Larson, Internal Improvements: 106.


Even New York, with its successful Erie Canal project, was not immune from an overburdening debt obligation as a consequence of its infrastructure development projects. In 1842, the state suspended most of its canal projects and instituted a state property tax to pay off the debt and pay for future government services. David Montgomery, Citizen Worker: The Experience of Workers in the United States with Democracy and the Free Market during the Nineteenth Century (Cambridge: Cambridge University Press, 1993). 65.

Borrowing to support banks resulted from state efforts to replace the economic engine lost when Jackson vetoed renewal of the Second Bank’s charter. Wallis, Sylla, and Grinath, "Sovereign Default and Repudiation," 6.
government largely drove early rail and canal development. This was not odd, as before 1840 there was “no prejudice toward state activity of this nature.”

A Call for Government Aid

As in other states and territories, Michigan’s early leaders wanted to engage in infrastructure building. However, the territory suffered the disadvantage of a modest population base and meager government revenues. Even with the most cost effective transportation system, without people or commercial development, a rail project would not be self-funding. Without the promise of a self-funding system, and given its low tax base, Governor Cass sought federal financing to achieve Michigan’s development goals (and to keep up with its more advanced neighbors). Realizing that the national government had rejected requests to fund the Canal, Cass framed his argument in terms of national security. British North America remained a threat and, “In a state of war,” a Michigan rail system would preserve “the necessary intercourse between Lake Erie and the country upon the Upper Lakes . . . without incurring the danger of passing under the guns of a hostile shore for many miles.” Cass’s pitch failed, as the federal

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228 About sixty-eight percent of all canal investment between 1815 and 1860 came from public funds. Between 1828 and 1843, government invested about one-third of the rail capital and a total of more than twenty-five percent in the antebellum period. Hughes, The Governmental Habit Redux: 71-72.

229 Horace Secrist, An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States, Bulletin of the University of Wisconsin, no. 637 Economics and Political Science Series, v. 8, no. 1 (Madison, Wis.1914). 16-17. See also, Wallis, Sylla, and Grinath, "Sovereign Default and Repudiation," 4. In contradistinction, English rail and canal development was almost exclusively private and French government assistance was limited to government guarantees of returns on investments. Other nations were more involved in infrastructure development. Goodrich, Government Promotion of American Canals and Railroads, 1800-1890: 6-7.

230 Cass, May 12, 1830 Messages of the Governors of Michigan: I: 47-8. Cass’s national security plea may not have been cynical. The federal government had provided for military roads in the territory and it was not a great stretch to consider rail lines as an extension of those efforts. In 1837, the Michigan House Committee on Internal Improvements cited fears of a British war in justifying the need for the territory’s internal improvement projects. 1837, "Journal of the House of Representatives of the State of Michigan," (Detroit: John S. Bogg, 1837), 125. In 1838, the Michigan Senate’s Committee on State Affairs would warn that Michigan was “separated by a narrow river only, from the easily concentrated force of the most flourishing and powerful of the British dominions in America.” It then related how the territory’s isolation resulted in the terrible “destruction that overwhelmed” the territory during the War of 1812. Report of the Committee on State Affairs, Relative to Donations of Land by Congress for Works of Internal Improvement, "Documents Accompanying the Journal of the Senate," (Lansing
government was loath to support internal improvement projects. Within a few weeks after Cass’s request, Jackson would veto the Maysville Road bill as an unconstitutional extension of federal power. On policy grounds, he planned to use government surpluses to bring down the national debt, not to invest in infrastructure. Moreover, concerns over slavery lurked. As Virginia Congressman John Randolph warned in 1824, the government that could build highways could free slaves.  

Notwithstanding Cass’s failed pitch, local officials and citizens petitioned Congress in 1831 for assistance for a canal or railroad between Detroit and Chicago. Acting as chair for the citizen group, Detroit Mayor Marshal Chapin framed the project as a national concern, and not merely a Michigan Territory issue. The petition argued that transportation improvements would raise land values, “accelerating the sale of public lands,” owned by the federal government, and would “inure to the benefit of trade and manufactures of our Great Atlantic markets.” Accordingly, the group requested 1) a survey of the coasts of the Great Lakes, 2) a canal between each of those lakes, 3) the completion of a road between Detroit and Chicago, 4) improvements on the St. Joseph River, and 5) surveys for canal and rail development. This early request for government assistance is telling. Michigan’s population originated with residents of states determining to resettle in what, in the day, was the far west wilderness. Rather than reveling in their independence from government, the people of Michigan were petitioning government to actively support their commercial development.

1838), 440-43. No. 32, March 2, 1838. On the other hand, the Detroit garrison had been dismantled in 1826, partly because fears of war with Britain had receded. Campbell, Political History of Michigan: 510-11.  
231 41 "Annals of Congress," 1308. (January 30, 1824) Randolph warned, “If Congress possesses the power to do what is proposed by this bill, they may not only enact a sedition law – for there is precedent – but they may emancipate every slave in the United States.”  
The petitions are telling in another respect. Self-interest underlay each of the petitions, but the mechanism to address those interests was communal. No individual or gathering of individuals had the resources to build a road, canal, or railroad upon which they could take product to market. Only collective participation would accomplish that end, and that collection could either take the form of a business venture or a government program or both. Particularly in times of capital scarcity and underdeveloped corporate entities, government necessarily became involved in the answer. Even if a corporate entity could form, the probable return on early rail investments was so small or so far in the future that sustained private efforts were unlikely (as would later be the case in Michigan’s early private rail experience). So, even as the petitioners were motivated by individual interests, those interests required collective action. Government was to be the chosen and necessary vehicle for individual self-creation.

Michigan’s government was not by itself able to respond to its residents’ petitions. Accordingly, it too continued to press the national government for aid. Wishing a different answer than his predecessor received, Territory Governor George B. Porter changed the official approach. Porter proposed that federal land sales in Michigan fund the development of rail lines connecting the eastern seaboard with the Mississippi. Porter was candid. The goal was economic development. A railroad would boost land values, sales, and “numerous other advantages that would result as well to government and individuals.”

To the federal government the issue went beyond Michigan’s needs. It involved that government’s constitutional authority. Many (including President Jackson) believed that Congress’s spending power, as delineated in Art. I, § 8, prohibited spending to advance local infrastructure projects. Proponents of federal aid sought constitutional authority elsewhere.

Some sought to aid local infrastructure by exercising federal power under Art. IV, § 3 “to dispose

of...the territory or other property belonging to the United States.” Congress attempted to exercise that power in the 1833 Distribution Bill by earmarking proceeds from the sale of public lands to support “internal improvement and education projects.” Jackson vetoed the bill, arguing that Congressional involvement in local projects exceeded its constitutional authority. Jackson believed that the constitution required vigilant protections against federal incursions into state prerogatives. To Jackson, even disbursing federal funds to the states was fraught with danger, as state governments “would lose all their independence and dignity” at the trough of federal largess.\(^{234}\) Jackson’s position was consistent with his Maysville Road veto and the long-standing argument that the federal government could not, and should not, spend on local projects. To him, the national government enjoyed limited powers and Congress could only employ federal resources, – be it tax revenue or federal land – for national purposes and pursuant to Art. I, §8 limited powers.\(^{235}\)

That view of federal power limited but did not completely forestall early federal internal improvement efforts. If direct involvement raised constitutional and political barriers, indirect efforts seemed more palatable, and Congress increasingly found ways to employ them. In the early period of rail development, the federal government worked around the barriers in two ways. First, it provided surveying assistance to the states and territories, to the tune of about $75,000 (about $1.5 million today). That assistance demanded engineering knowledge as it applied to rail-required topography. The federal government justified that aid by referring to its authority under the navigable waters, post office, or war powers clauses.\(^{236}\) While that amount


\(^{236}\) See, for example, An Act to procure the necessary surveys, plans, and estimates, upon the subject of roads and Canals, wherein Congress authorized the President to make surveys “of national importance in a commercial or
may seem trivial, rail-engineering skills were sparse and in high demand. A snippet from the 103 page engineering report sent to the 1838 Michigan Internal Improvement Commissioners gives an indication of the type of expertise surveyors provided. The report suggested that, when choosing an appropriate rail route, the legislature and commission needed
to consider an increase of the rate of inclination on a mile of road, from twenty to forty feet per mile, equal to reducing the rate of curvature from two thousand to five hundred feet radius on a level grade, and a decrease of radius would be equal to an addition of one mile to the whole distance; the additional mile on an inclination of twenty feet grade, and either the increase of grade or decrease of radius, or increase of distance, would be equal to an extra expenditure in the cost of grading of twenty thousand dollars.\textsuperscript{237}

In the 1830s, such analysis was critically valuable. Federal expenditures may have been small but were significant.\textsuperscript{238} In providing that assistance, at least with respect to its efforts in Michigan, the federal government bypassed Article I §8, and supported internal improvements notwithstanding the concerns voiced by Jackson and those similarly inclined.

Congress also employed its power to regulate tariffs as a means to support internal improvements. Between 1830 and 1842, the federal government maintained low tariffs on British bar iron, the product used for iron rails. British manufacturers produced low cost, but low quality, iron. American rail developers preferred this iron because they were interested in initial costs and deferred concerns over maintenance.\textsuperscript{239} Congress implemented the low tariff in

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\textsuperscript{239} Peter Temin, \textit{Iron and Steel in Nineteenth-Century America}, An Economic Inquiry M.I.T. Monographs in Economics (Cambridge, Mass.: M.I.T. Press, 1964). 21-22. Temin relates the 1867 comments of Abram Hewitt, an owner of the Trenton Iron Company, that the British iron used in American railroads was “the vilest trash which could be dignified by the name of iron.” Contrary to Hewitt’s wishes, the railroads used that iron, as tariffs allowed, because American iron, while superior, was significantly more costly.
an effort to support rail development (and against the protest of Pennsylvania’s iron industry).  
This reduced the cost of rail by about $6 million during that period. While not a direct subsidy, that tax relief significantly contributed to the period’s drive for internal improvements. By keeping the tariffs low, Congress had employed its taxing power to accomplish ends it could not achieve employing its spending powers.

The limited federal involvement assisted, but did not drive Michigan’s efforts. The territorial, and later state, government would now take on the work, and would do so in an intensive fashion. A letter published in the Carrier, dated November 13, 1833, furnished among the first recorded calls for government rail ownership. The writer advocated building a 175-mile line from Detroit, in eastern Michigan, to Berrien County, in the west of the territory. He proposed, “there would be 10,000 farmers reached by such a road” who would each have a bounty of pork, wheat and other grains to transport, thereby enriching the territory. The government could sell land on each side of the tracks to pay for construction. In the end “the railroad would become the property of the territory and the tolls could be made very low.”

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242 While outside the scope of this project, it is interesting that in 1825 Congress authorized the Secretary of the Treasury to subscribe to 1500 shares of the Chesapeake and Delaware Canal Company. In a world challenging the constitutionality of federal involvement in infrastructure, it is unclear from wherest Congress gleaned its power to do this. 4 Stats. 124 (1825).
243 Letter Dated November 13, 1833, quoted in Burton, History of Detroit: 96. See also, Detroit Journal and Advertiser, November 20, 1833 and November 27, 1833. The articles suggested that federal land grants along proposed rail routes be sold to pay for construction and that ownership of the lines reside in the territory to keep tolls low.
Government was to support industry by building infrastructure and then operating the business at low cost to the consumers. The territory’s entire population at the time was around 32,000 so the author seemed to expect the rail development would facilitate a sizeable population increase. In addition to presuming dramatic population expansion, the plan promised a self-funding enterprise. Residents would pay nothing while enjoying substantial economic benefits.

Soon, petitions for government action intensified. While the arguments varied according to the interests of the listener and speaker, underlying under each petition sat a concern that rail not bypass Michigan. Should that happen, Michigan would remain commercially and politically disadvantaged. For example, a December 1833 petition to Congress noted the advantage of including Detroit in a proposed route connecting the eastern United States to Chicago and St. Louis. To accomplish that, the petitioners appealed for both direct and indirect aid. An “enlightened bounty of Congress in aid of important works of internal improvements,” along with land grants, would move the project forward.\textsuperscript{244} They couched much of the petition in terms of interstate commerce and mail delivery, but their interest went beyond mail delivery to St Louis. With a rail line came communication, commerce, population, influence, and a place in the nation. Without rail, progress would stop – or at least slow. The drive for widespread commercial development – and the fear of being left behind – drove this demand for robust government involvement.

Another request for rail assistance was more narrowly motivated. A group of residents located in the western agricultural region petitioned the government to help them find “an outlet to our abundant harvest.”\textsuperscript{245} They enjoyed fertile land and abundant crops, but produced inland

\textsuperscript{244} Petition to Congress by Citizens of the Territory, December 11, 1833, \textit{The Territorial Papers of the United States}: XII: 656.
\textsuperscript{245} Petition to Congress by Inhabitants of Calhoun Country, November 27, 1833, ibid., XII, 626. See also, Petition to Congress by the Inhabitants of the Territory, January 13, 1834, ibid., XII: 693.
from the lakes. Accordingly, they lacked a means to market, and government was the answer. The national government could own the rail, invest in the rail, or establish a private rail company. The means were secondary to the goal of facilitating transportation infrastructure. Similarly, in 1835, a group of petitioners argued that the federal government, as owners of nine-tenths of the territory’s lands, would profit from the income generated by higher land values associated with transportation access – and subtly argued that the government owed Michigan residents an obligation because of the amount of federal land in the territory. The petition recognized that although the route these settlers requested was longer, it would support the commercial and social interest of the territory as well as the military needs of the nation.246 In each of these petitions, and the several more reviewed, settlers commonly looked to government as the mechanism through which to develop commerce, increase land values, and incorporate Michigan residents into the larger nation.

**Parallel Private Efforts**

While ideas of self-funding and federal projects percolated, private parties attempted to develop rail enterprises. By the time Congress admitted Michigan as a state on January 26, 1837, the legislative council had chartered twenty-five railroad corporations, although only seven to nine actually had begun construction.247 Even as private, fledgling entities, these corporations carried significant burdens to benefit public interests. Most of the incorporation statutes required exclusively local stock ownership and capped the profits the corporations could enjoy. Excess profits would revert to the government. Typically, the charters provided that government

246 Petition to Congress by Inhabitants of the Territory, January 15, 1835, ibid., XII: 850.
247 Scholars count the numbers differently, depending on how they treat connected organizations. The bottom line, however, was that these rail efforts were ineffective not for want of vision but for want of capital and capability. Dunbar and May, *Michigan: a History of the Wolverine State*: 330-33. Dunbar reported that only one chartered rail company, the Erie and Kalamazoo, actually operated before 1837.
retained the right to purchase these railroads at a set formula over cost. Through such legislation, the government sought to employ corporations to encourage economic development while simultaneously attempting to minimize concerns over monopoly control of infrastructure. 248

The legislative council granted the first of those special-corporation rail charters to the Pontiac and Detroit Railway Company in 1830. This was also the first rail charter in the Northwest Territory.249 The owners never started construction and that charter lapsed.250 The legislature next chartered the Detroit and St. Joseph, which would run along the Huron River two miles west of Ann Arbor. It granted the railroad a strip of land and gave it eminent-domain privileges to condemn property.251 The rail investors held to a grand vision. They sought $1.5 million in capital for a line traversing the territory. Based upon federal surveys suggesting an appropriate route, they first solicited funds for the Detroit to Ann Arbor portion. At first blush, their efforts were successful, with Michigan inhabitants committing to nearly all the outstanding shares of stock. Unfortunately, few honored their commitments, and few dollars came in. The investors then solicited subscriptions from those residing along the proposed route. Those efforts proved insufficient. Ineffective in the private sphere, the investors turned to government. At first they requested federal financial assistance; a request the federal government declined.252 They soon turned to the city of Detroit. In 1836, the Detroit Common Council subscribed

249 Walter J. Hansen’s unpublished 1941 PhD dissertation nicely traces the history of early Michigan public support for rail development. I was unable to find any information on, or further works by, Hansen, but his dissertation provided significant assistance in uncovering source material on the events of Michigan’s early rail efforts. Walter Jacob Hansen, State Aid to Railroads in Michigan During the Early Statehood Period (Dissertation, University of Michigan, 1941).
250 In 1834, the legislature chartered a completely new Detroit and Pontiac Railroad Company, which did not share promoters.
251 1832 “Journal of the Legislative Council,” 190.
$10,000 to the effort. When that proved insufficient, the investors asked for and were granted another $40,000.

The territory legislative council intervened to address the insufficient capital challenges faced by the Detroit and St. Joseph, as well as that of the other embryonic lines. In 1835, the legislature amended several rail corporate charters to encourage those entities to enter banking. Some did so, but those efforts extended little benefit and, at times, created greater financial difficulties.¹²⁵³ Not reading those financial difficulties as a portent of rail’s economic instability, Michigan’s government would soon move to a more involved rail platform, and would do so believing the projects self funding.

The Threat of Corporate Power

In 1834, Michigan entertained the strong government rail-support of two governors. Porter, an enthusiastic advocate of agricultural development, could conceive no “subject more worthy” of the territory’s attention than building a railroad. He envisioned a system initially financed by the sale of public lands. Any “small expense” the government would incur would be reimbursed by increased land sales and “the numerous other advantages that would result as well to the government as to individuals.”¹²⁵⁴ To realize that ambition, government would build a railroad from Detroit to Lake Michigan. The land, and most of the funds, would come from the national government. Succumbing to cholera in July 1834, Porter was unable to effect his dream. Jackson then appointed his Territory Secretary, 22-year old Stevens Mason, as governor of the Michigan Territory.¹²⁵⁵ Almost immediately, Mason unleashed surveyors to map the landscape

¹²⁵³ Starting in 1837, the state began investigating improper banking activities by these rail lines. Hansen, *State Aid to Railroads*: 48-50.
¹²⁵⁵ Initially Jackson had nominated Mason’s father, John T. Mason, as Territory Secretary. James Witherell had been the secretary but Jackson filled the position as a political favor so Witherell was out. John Mason resigned the
for rail. Although authorized by the Secretary of War, to Mason the project’s object was the general prosperity of the territory. Mason called for subscriptions to defray non-subsidized survey expenses. In doing so, he invited business to participate in the infant stages of rail development. This view of the private sector soon would change. Within a year, Mason would display his disinclination to involve private corporations in internal improvement projects.

With his first annual address before the legislative council, Mason revealed that aversion to private involvement. To Mason, corporate power threatened democratic governance. Michigan would be better off relying on “individual effort and capital” to accomplish its commercial goals. For that reason, he “would with diffidence, but with a conviction of the importance of the subject,” call to the legislature’s “attention to the impolicy of granting acts of private incorporation.” Mason believed that private corporate charters had “been already carried to such an extent, that if persevered in, it cannot fail to fill our territory with an innumerable multitude of irresponsible companies.” He was speaking of special corporations – entities created by legislative acts that typically granted monopoly rights in exchange for services and restrictions deemed to be in the public interest. His concern was common in its day. Hendrik Hartog explained, “many American lawyers and legislators viewed corporations with distrust even as they relied on them as instrumentalities of public initiatives.” They were unavoidable,

position after about one year and Jackson then nominated his son in the father’s stead. Stevens Mason was nineteen when appointed secretary. Cooley commented, “The only reason ever advanced for this selection and the only one that could have existed, was that the father requested it.” Cooley, *Michigan: A History of Governments*: 208. Faber suggested that Jackson was favorably impressed with Stevens Mason and used young Mason’s appointment as an opportunity to rile his Whig opponents. Faber, *Boy Governor*: 17. As noted in Chapter II, Horner would replace Mason as acting governor in 1835. Mason then became an elected governor pursuant to the 1835 constitution.


“perhaps justifiable by the exigencies of the times but indefensible as a natural part of the political order.”

Mason’s address was a warning shot for actions that soon followed. On February 11, 1835, Mason began to execute his emerging vision of a state-controlled infrastructure system. The legislature had sent him a bill granting corporate status to the River Raisin Steam Boat Company and the St. Joseph and Chicago Steam Boat Company. This was not unusual because, as mentioned, since 1830 the territory had granted corporate charters for twenty-five railroads. Arguably, the governor would welcome the companies, as financiers had been shying away from investing in Michigan because its infrastructure projects were financial losers. Nevertheless, Mason vetoed the measure, vigorously objecting to the exclusive privileges taken by corporations:

> The creation of innumerable incorporated companies in the midst of society is a departure from the principles of republican government. Government is intended for the benefit of the many not the few, and where the people are the original of government, legislation should be adopted with a regard to their welfare. Acts of incorporation are aristocratic in their tendencies. They give exclusive privileges to a few, bestow partial benefits upon a favoured class, and [are] detrimental to the general interest of the public.

Mason continued his passionate objection by claiming corporations “if not checked, must soon entail upon the territory the curse of monied monopolies, which will ultimately impoverish and then control the wants of the great body of people.” The veto presaged his soon to be announced system of almost exclusively state-controlled infrastructure. Unlike many of its sister

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259 Mason biographer Don Faber argued that the legislature, not Mason, drove the state ownership, anti-corporate agenda. Faber, *Boy Governor*: 81. The evidence suggests otherwise. Mason believed that government better represented the people and could drive economic and social advancement without the scourge of corporate power. Mason led Michigan’s efforts and the legislature heartily followed.
262 Ibid., I: 141.
states, Michigan would shy away from involving corporations in its major internal improvement projects. In espousing that position, Mason would advance a classically republican critique of capitalism’s corrosive influences.

Corporations during this period were significantly different from those today. With a few exceptions, in the first half of the nineteenth century state legislatures specifically incorporated each of those entities. In Michigan, their creation required a two-thirds majority of the legislature. Special corporations enjoyed the new concept of limited liability and indefinite lives, unlike the other business entities of the time. They also received legislatively granted monopolies, where others could not compete in their fields or along their routes, and with respect to railroads, often also enjoyed eminent domain powers. Hall noted, “Antebellum legislatures embraced eminent domain because it was a means to protecting venturing capitalists who could achieve a public purpose through private profit.”

Harry Scheiber reported that government granted eminent-domain power to private transport companies “in every state.” While eminent domain grants and the other powers induced investors to risk significant capital, the grants themselves often were considered anti-democratic receipts of privilege that were aristocratic in nature. Because of their special treatment, popular opinion held corporations in low regard. Daniel Raymond, one of America’s first political economists, perhaps best reflected that opinion in 1823:

The very object then of the act of incorporation is to produce inequality, either in rights, or in the division of property. . . . Every money corporation, therefore, is prima facie, injurious to national wealth, and ought to be looked upon by those who have no money, with jealousy and suspicion. They are, and

264 Hall argued that grants of eminent-domain powers to private rail corporations were the extension of the Milldam Acts. In their effort to drive development, legislatures allowed canal and then rail companies to “take the land that promised the maximum return on invested capital.” Hall, The Magic Mirror: 100.
ought to be considered, as artificial engines of power, contrived by the rich, for the purpose of increasing their already too great ascendency, and calculated to destroy that natural equality among men, which no government ought to lend its power in destroying.\footnote{Daniel Raymond, \textit{The Elements of Political Economy}, vol. 2 (Baltimore: F. Lucas, Jun, and E. J. Coale, 1823). I: 119-21.} Those beliefs continued through much of the mid century. John D. Pierce, a father of Michigan’s educational system concluded:

The spirit of aggregated capital is aggressive. It has no limit, no bounds. Controlling the legislation of the world, it has been resistless in its sway. It never tires, it never sleeps. Soulless, heartless, remorseless, conscienceless, it presses onward, regardless of the dying or the dead. It produces nothing, but watches with an eagle-eye all the products of labor. It taxes all classes. It watches the wheat grower, the wool grower, the cotton grower, the laborer, the spinner and the washer-woman, and is never satisfied except with the lion’s portion. Robbing labor of its reward, it reduces to, and leaves the man and his family in, abject poverty; not satisfied, it takes his cot, and turns him, wife and children out.\footnote{Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan.1850, (Lansing: R.W. Ingals, 1850). 658-59.}

Hartz captured the era’s tenor. “An anti-charter philosophy emerged which became one of the most powerful, repetitious, and exaggerated themes in the popular literature.”\footnote{Hartz, \textit{Economic Policy and Democratic Thought}: 69.} Nevertheless, in a capital-poor nation at the beginning of its market-economy experiences, those special corporations presented the ability to accumulate capital to advance commerce.

To facilitate that in the rail sphere, the Michigan legislature at times granted those entities not only monopoly power, but extraordinary protections of corporate property. For example, the 1837 statute incorporating the Detroit & Shiawassee Railroad provided that anyone impairing the road’s property or impeding the work of the engineers was liable to the company for treble damages.\footnote{An Act to Incorporate the Detroit and Shiawasee Railroad Company, 1837, Act 111 "Acts of the Legislature of the State of Michigan." §§18, 19, 21, 27; "The Compiled Laws of the State of Michigan," (Lansing: Hosmer & Kerr, 1857). 1857. Vol II, §§ 5791, 5792.} Damages to an individual’s or unincorporated business’s property carried only ordinary damage remedies. By granting treble damages to railroads, the legislature not only
created extra-normal disincentives to lawbreakers, it granted a windfall to railroads in the event of damage to their property.

Because these corporations enjoyed special powers, the state sought public benefits from them, and imposed obligations to curtail their monopolistic tendencies. It would do so by retaining the power to set rates, providing for limited life spans, requiring personal liability of corporate officers, and by providing that the government could purchase the corporation after a set period. So important was this requirement that Territory Governor Porter repeatedly vetoed special incorporation statutes that failed to include the governmental purchase option. In 1832 he asked, “whether in all grants of this kind, there ought to be a proviso by which the Territory or county may, at any time, become entitled to” the corporation (in this case a bridge proposed to be built and operated over the St. Joseph River.)\(^{270}\) Those clauses were common in legislation creating private rail corporations,\(^{271}\) and not just in Michigan. Hurst noted that “[w]ith little question or exception, in the very act of providing franchises for private capital development, state constitution makers and legislators developed the practice of including in their grants the standard reservation of legislative authority to amend or repeal what they gave.” This reservation was not simply to maintain legislative prerogatives in the aftermath of *Dartmouth College*. As Hurst continued, the reservations allowed the states to “provide a framework within which many may venture, rather than a favored few, and it must take care that future release of creative energy is not barred by the rigidity of old concessions.”\(^{272}\) Embedded in Michigan’s grants sat a philosophy of governance. In order to release the residents’ commercial energies, government would retain the right to take over private infrastructure if that would enhance the

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general welfare. It was about public gain, not private, but more fundamentally, the state believed that it should participate in, and even dominate, its transportation industry.

The reservation of power over corporations evidences a concern that accumulated wealth could undermine American governance. Michigan Justice Charles Whipple took notice of that concern in *Green v Graves*, a case dealing with the constitutionality of banking entities created with less than the two-thirds majority required by the state constitution. He reflected, “The community were alarmed at the vast increase of corporations. They feared the power that such institutions were capable of wielding. The belief was entertained that this power had actually been wielded for bad purposes. It was argued that all corporations were, in a greater or less degree, monopolies, and hence the prejudices of the community were arrayed against them.”

In invalidating Michigan’s law allowing for the creation of bank corporations without the two-thirds vote, the Court cited Justice McLean of the U.S. Supreme Court in *Beaty v Knowler*: the “exercise of the corporate franchise is restrictive of individual rights.” Those opinions voiced the same concerns Mason had regarding corporations; corporations threatened individual rights and republican governance and were, therefore, to be employed only where necessary, and then with due caution.

Underlying much of this unease was a concern that private ends could overwhelm public goals. Many feared that the baser, selfish nature of man would eventually undercut American

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275 Hartz’s Pennsylvania study suggested an additional theory on government relations with special corporations. He submitted that banking and transportation decisions “often involved major questions of sectional adjustments and public policy which seemed to call for direct legislative judgment.” While other industries could operate under general incorporation statutes, Hartz suggested Pennsylvania’s governmental interest in banking and infrastructure were too profound to allow for unregulated competition. That is why, in Pennsylvania, general railroad incorporation statutes waited until the post-Civil War period. Hartz, *Economic Policy and Democratic Thought*: 41.
freedoms. To Mason, only the state, as the embodiment of the people, could guard against the dangers of individual self-interest. He warned, “there is yet an insidious and secret foe the American people should guard against.” That foe was the self-concerned individual. Mason predicted that the “imperceptible but all absorbing desire lurking in the heart of man to aggrandize self and promote private ends; which is too apt to forget country, and which, if indulged and encouraged, must prove the undoubted cause of a premature national degeneracy.”

Given those concerns, placing economic power in the hands of the democratically elected government seemed the answer. To Mason, doing so assured a continuation of American democratic principles, the protection of the sovereign people from themselves, and the development of the coveted rail system.

The Promise of Robust Governance

With a palpable fear of corporations and a trust in democratic governance, Michigan citizens began drafting the state’s first constitution. The lessons gleaned from the Erie Canal’s success were so strong that, in framing their constitution, they “took pains to impose upon the legislature the duty of following the example of New York.” Accordingly, Michigan’s first constitution obligated the state to facilitate internal improvements. To accomplish this, the constitution provided in Article XII, §3 that:

Internal improvements shall be encouraged by the government of this State: and it shall be the duty of the legislature, as soon as may be, to make provision by law for ascertaining the proper objects of improvement, in relation to roads, canals and navigable waters; and it shall also be their duty to provide by law

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for an equal, systematic, economical application of the funds which may be appropriated to these objects.\textsuperscript{278} The language was not merely empowering; it was demanding.\textsuperscript{279} The constitution placed on the legislature the affirmative obligation to act – and time was of the essence. The federal government’s continuing sales of land in the territory threatened to undermine the state’s ability to lay out appropriate routes. The territory’s delegate to Congress, John Biddle, fretted that those sales were often for “lands lying in the direction of the proposed railroad.” Accordingly, “the time has arrived, when a long cherished scheme of internal improvements may be commenced.”\textsuperscript{280}

It is worth briefly laying out the structure of Michigan’s early state government. The constitution provided for a strong governor with significant appointment powers. It called for a bicameral legislature. Elections were to be held annually for representatives and biannually for senators. The governor was to be elected every two years. The constitution called for an energized government that supported industry, agriculture, and education by providing that the “legislature shall encourage, by all suitable means, the promotion of intellectual, scientific and agricultural improvements.” It set specific educational funding sources and limited the legislature’s ability to divert funds from the educational mission. It called for libraries in each

\textsuperscript{278} Constitution of Michigan, 1835. Art. XII, § 3. The drafting records concerning this clause are sparse, with the only documentation disclosing minor grammatical changes during the convention. "Daily Journal of the Convention to Form a Constitution, Monday, May 11, 1835 - Friday, June 19, 1835," (Detroit 1835), 91. Unfortunately, we have few records of the debates over the clause because the original notes of the Convention Reporter were largely lost. Harold Dorr employed newspaper accounts, meeting notes, journals, and committee reports to recreate the proceedings. He concluded that the first Report of the Committee to Draft the Constitution proposed an internal improvement clause nearly identical to that ultimately adopted. Dorr, Michigan Constitutional Conventions: 479. It is interesting to note that Darius Comstock, a founder of the Erie and Kalamazoo Railroad headed the committee drafting this constitutional provision. Hansen, State Aid to Railroads: 25.

\textsuperscript{279} Cooley would argue that the language was not empowering. He wrote, “this section neither gave power to the legislature nor undertook to set bounds to power otherwise possessed.” In that respect, Cooley argued that the state legislature already had the power to build and operate commercial enterprises, and no such power need be delineated in the constitution. He did believe that the article “was indicative of prevailing thoughts and aspirations, and had no little influence upon subsequent state action.” It was, therefore, “a significant landmark in the history of the State.” Cooley, Michigan: A History of Governments: 280-81.

\textsuperscript{280} Memorial to Congress from John Biddle, January 14, 1835, Democratic Free Press, 3.
township and for the support of a state university.\textsuperscript{281} The framers had advanced an activist
government model, designed to facilitate societal development and welfare. Voters
overwhelmingly approved this constitution by a six-to-one margin. This is not surprising. As Hurst noted, governments of the time were “dominated by the virtue of overcoming scarcity,” and Michigan’s government planned to do so by aggressively educating its people and by building an infrastructure that would allow sales of the state’s bounty to an increasingly expanding nation.\textsuperscript{282}

Historians often associate government support of rail as the consequence of scarce private capital. For example, Goodrich suggested that in most of the nation, “popular desire for internal improvements was so strong and the inability of private business to raise sufficient funds for the major projects was so manifest that methods of mixed enterprise and public work” were strongly encouraged.\textsuperscript{283} At least insofar as Michigan was concerned, that correlation is incomplete. Michigan’s leadership visualized internal improvements as the very essence of government’s mission, even to the point of disdaining privately capitalized projects as at odds with democratic needs. Railroads in Michigan, as in other areas of the nation, were viewed as a means to a more democratic and egalitarian society. It was believed that, “There is no truer, more honest, unterrified democrat ‘than the railroad, for the moment steam entered, aristocracy was doomed and the final enfranchisement of society, from artificial distinctions, absolutely and effectively secured.’”\textsuperscript{284} This new transportation system offered Michigan residents not only routes to commercial markets, it promised to raze the walls of aristocracy.

\begin{footnotes}
\footnotetext[281]{Constitution of Michigan, 1835. Art. X, § 2.}
\footnotetext[282]{Hurst, Law and the Conditions of Freedom: 481.}
\footnotetext[284]{Samuel B Ruggles, Director of the New York & Harlem and the Erie railroads, quoted in Dorfman, "Economic Mind in American Civilization," cited in Hurst, Law and the Conditions of Freedom: 55.}
\end{footnotes}
With a history of failed private rail-enterprises and a concern over the threat successful corporations posed to governance, the state’s leadership proposed a state-focused rail system where Michigan would own its major lines and exercise significant control over its feeder lines. An 1838 Senate Committee on State Affairs report voiced that republican ideology. It started by suggesting that it was government’s role to supplement private capital, but then quickly shifted to a vision of robust democratic government. “[I]ndividual effort alone is not adequate to so great purposes; it is to man in his social capacity – to communities of men – to governments, to whom only the power and the high privilege is given of effecting them, and thus of ameliorating the condition and augmenting the happiness of men.” Rail was a community need – a public utility over which government must exercise control. The committee proposed that it was “the appropriate duty then, and the natural province of government, and it is therefore fit and proper that government should be armed with adequate power, so to control and, in just proportion, so to apply, all the wealth and latent resources of the country over which it obtains . . . those high purposes.”

Developing the infrastructure for community advancement was a core incident of governance, and doing so democratized state commerce.

Michigan was not an outlier. Nationally, the early nineteenth century calls for government economic activism responded to the anti-charter philosophy of the time. Those fears of corporate monopolies led to the widespread belief that, where expedient, the state should influence major infrastructure and banking enterprises as part of the nation’s concept of the community. This notion is contrary to popularly held beliefs regarding early American government and industry relations. As Hartz posited, the anti-corporate doctrine of the period “assumes a role which is in many respects the precise antithesis of that in which the ‘laissez-fire’

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interpretation has traditionally cast it.”\textsuperscript{286} And that responsibility went beyond internal improvements. In Michigan, Mason told the legislature that it was their responsibility to develop “a prudent and judicious system of legislation for the development” of agriculture and commerce.\textsuperscript{287} Anything less was an abdication of the responsibilities of democratic governance.

Mason called the legislature to action during the 1835-1837 period, when Michigan was neither fully a territory nor a state. As part of his advocacy for admission to the Union, Mason requested that the federal government “extend a liberal and fostering hand” to Michigan as it had with all the other newly admitted states. That assistance should include “large donations of land . . . for the purpose of effecting their systems of education and internal improvements.”\textsuperscript{288} As part of its submission for statehood, the Michigan legislature requested the federal government appropriate land for schools, state buildings, salt springs, and five-hundred thousand acres specifically for internal improvements. The proposal also requested that the state retain 5% of the proceeds generated from the sale of federal lands, 40% of which would be earmarked for internal improvements. Michigan proposed to embark on the internal improvement projects once Congress approved statehood. It believed it could do so in an equal, systematic, and economical way.

The fact that Michigan was not yet admitted only slowed implementation. After bemoaning that thus far Michigan’s “application remains without final action of congress,” Mason advised the legislature that, “among the first subjects which will naturally occupy your attention . . . will be that of internal improvements.” He proposed that government’s job was more than facilitating private initiatives. It was to drive that development through “liberal legislation” that “should embrace within its range” rail and canal development in “every section

\textsuperscript{286} Hartz, Economic Policy and Democratic Thought: 71-74, 80-81.
\textsuperscript{287} Mason, February 1, 1836, Messages of the Governors of Michigan: I: 169.
\textsuperscript{288} Ibid., I: 170.
of the state.” Along with his belief that government was actively to develop infrastructure, Mason pressed that there was little space for privately controlled infrastructure projects. Where private industry developed internal improvements, he proposed private projects “should never be beyond at least, the partial control of the state.” He proposed, “So important is [infrastructure] construction to the permanent interest and prosperity of the state, that I would recommend the passage of a law, authorizing a subscription in behalf of the state, to a large amount of the capital stock vested in the companies which have these roads in progress of completion.”

On July 12, 1836, Mason crystallized his message. Expressing the state’s obligation to advance the general welfare and his fear of monopoly power, Mason vetoed a bill to incorporate the St. Clair and Grand River Railroad Company. In an almost frenetic attack on private rail development, he argued that the state should construct and own the main railroads.

A grant of corporate powers to private companies for the construction of railroads through the unsettled and unsold lands of the state, struck me as a doubtful policy; the wants of the public could not absolutely demand the measure; and the time was not distant when the state could with greater security to the interest of the people, take the improvements into its own hands.

Accordingly, the state should predominate the railroad business. Private companies, with state stock ownership, could develop only feeder lines. Even then, corporate charters should severely restrict their latitude.

Mason explained why the state should be loath to employ the mixed corporate model that other governments had employed – private corporations were hostile to the people’s interests. Using what today would be considered startling language, Mason opined, “These profits from the lands of the company, must be taken from the pockets of the people, who are the actual

289 Mason, February 1, 1836, ibid.
290 Ibid.
291 Mason, July 12, 1836, ibid., I: 186.
settlers of the country. . . . [E]xperience teaches us, that the interest of all incorporated companies, are generally at war with the interest of the people.”

Mason’s stated concern was that the profits would go into private hands rather than state coffers. He believed that citizens needed protection from the high fares charged by monopoly railroads. Moreover, high freight costs would encumber commercial development and stifle population growth. Mason’s position was rooted in a belief that democratic government could better advance and protect the people’s interest than private industry. Underlying his thought was a belief in taxless finance. Government would develop infrastructure, offer low fares, avoid threat of accumulated wealth, and do so without taxation.

The goals did not stop there. Mason thought government ownership of rail would also fund government itself. His dream of state-owned businesses financing government extended to the legislature. In 1837, Michigan’s House Committee on Ways and Means recommended, “it would seem desirable to invest” future surplus revenue as well as the 5% proceeds Michigan enjoyed upon the sale of federal lands in the state, “in such a manner as to produce the greatest possible revenue.” As an investor in business, the state would be able to “greatly lessen, if not entirely relieve, the people from the burden of direct taxation.”

Government ownership of industry not only protected democracy, it promised the equivalent of a perpetual motion machine – one able to provide governance at no cost.

Ibid., I: 187. (Emphasis added).


Wallis, Sylla, and Grinath took issue with historical generalizations that states expected their internal improvement project would be self funding. Wallis, Sylla, and Grinath, “Sovereign Default and Repudiation,” 10-11. Whether they were generally correct, the evidence strongly suggests that Michigan’s leadership not only expected self-funding projects, but also that surplus profits would help fund government operations and thereby lower tax burdens.

Hartz argued, contrary to Wallis et al, that Pennsylvania intended to create “a positive profit-making state.” Mixed enterprises would allow for “a state in which taxes were abolished, poor houses obsolete, governmental
Mason also voiced an underlying belief that all who enjoyed the benefits of rail should pay for it, and only government could make that so. He took an expansive view, positing that benefits were societal, not just to those employing rail services. Rail’s benefits included improved property values, commercial development, and communications. With private ownership, those indirect but real beneficiaries would enjoy an economic free ride while only those directly employing rail services, most typically farmers, would pay for that development. Mason thought this unjust: “I would respectfully ask then, if even a direct tax, levied for the construction of the road, would not be more equal and less oppressive than this tax upon the settlers on the line of the contemplated railroad.” That tax on settlers was the transportation fees farmers paid. Public rail ownership allowed for equal enjoyment of, and equal burdens for, the blessings of prosperity. Four days later, the legislature joined Mason’s crusade. To set the legal framework for future internal-improvement legislation, on July 16, 1836, the Senate assigned the Committee on State Affairs “to inquire into the expediency of adopting such measures as will enable the state to assume and complete all the internal improvements within the state.”

The House soon weighed in. Such a system was, to the House Committee on Internal Improvements “the great lever which [was] opening the sealed up fountains of national wealth and civilization.” Through state control, Michigan could parry the efforts of competing states, like Ohio, to take away Michigan’s rightful commercial space. In the event a private corporation operated a rail line, the state must maintain controlling influence. Simple stock ownership was

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not enough to maintain control because of the ability of corporations to issue additional stock. Accordingly, legislation required that corporate charters must contain language restricting the share dilution.\footnote{Mason, February 1, 1836, \textit{Messages of the Governors of Michigan}. I: 188.} It also required that charters oblige private rail to operate in the public interest.\footnote{For example, in authorizing an early line – the Detroit and Maumee – to change its route, the 1837 legislature insisted that any change be “in such a manner as shall best comport with the public interest.” An Act to Amend an Act, entitled "An act to Incorporate the Detroit and Maumee Railroad Company," 1837 "Acts of the Legislature of the State of Michigan," Act 35, 53.} Both the executive and legislature still preferred direct state ownership, at least over the major rail lines, but where private lines could enhance the public interest they were welcome to do so, subject to continuing state control.\footnote{Milton Heath’s study of southern antebellum rail efforts suggested a similar, although not identical, argument. He reported that Georgia built its primary line but encouraged private industry to build secondary ones. “The procedure enabled the state to plan and direct over-all development of its railroad system with a maximum of private participation and a minimum of local interference.” The central line was to anchor and direct further development, with the goal of eventually privatizing the central line. Hence, Georgia’s rail ownership was to plant the seed for further internal improvement projects. Milton S. Heath, "North American Railroads: Public Railroad Construction and the Development of Private Enterprise in the South before 1861," \textit{The Journal of Economic History} 10 (1950): 49-50.} Up to this point, most state government action was anticipatory. Michigan had not been admitted into the Union and the legislature was reluctant to commence work before the state’s status was clear. As soon as that admission seemed imminent, Mason requested legislation creating state ownership of the major lines and state control over privately owned lines where they existed or might become necessary.\footnote{In 1919, the Michigan Public Utilities Commission studied the state’s history of rail support. It reported that the 1838 legislature loaned substantial funds and gave guarantees to the Detroit & Pontiac, the Palmyra & Jacksonburg, and the Allegan & Marshall railroad companies. These “were the first instances of public support directly to the many railroad projects then sought and promoted,” and “ultimately led to the State assuming control of all of them except the Detroit & Pontiac Railroad.” Michigan Public Utilities Commission, "Annual Report of the Michigan Public Utilities Commission for the Year Ending 1918," (Lansing, Mich.: Wynkoop Hallenbeck Crawford Co., 1919).} He would not approve private lines where they would compete with public lines. Most significantly, he sought to borrow five-million dollars to construct a state owned rail and canal system.\footnote{Mason, January 2, 1837, \textit{Messages of the Governors of Michigan}. I: 196-97.} The legislature seemed ready. The House
committee responsible for the bills framed future spending as an “investment” and “not an expenditure.”

Immediately after Congress accepted Michigan into the Union in late-January 1837, the legislature went to work. The Michigan House Committee on Internal Improvements reported that internal improvements would attract settlers, industry, and wealth. In rejecting the prior generation’s Jeffersonian ideals, the committee looked forward: “It has ceased to be a question, whether the calm and peaceable occupations of a pastoral and agricultural life, are more conducive to human happiness than the excitement and activity of commerce and manufactures.” Michigan’s “future prosperity” would be “inseparably interwoven with the progress of internal improvements,” and it would become the link between the Mississippi and the Atlantic. The choice was simple and obvious. The state could energetically build her infrastructure as “vast viaducts of wealth and prosperity” or stand by and watch as internal improvements “swell[ed] the power and abundance of her wiser neighbors.” Moreover, all of this could be achieved using the income from the rail lines, without any tax contributions. Rail would bring a 10% return and, with 5% bonds, would add $250,000 annually to government coffers. Personal taxes would then go down. Lest one think that government alone was caught up in this frenzy, the Detroit Advertiser suggested that the state raid the education fund for seed money to develop railroads.

304 Newspapers similarly were caught up in visualizing a great Detroit metropolis, anchored by her water and rail transportation systems. The (Detroit) Democratic Free Press applauded Canadian rail efforts near Toronto and Buffalo because they would help make Detroit “the great depot of the west.” With its transportation and soil advantages, the paper predicted “that this city is destined to become one of the most populous inland cities of this nation.” April 6 1836, Democratic Free Press, 2.

These opinions were not just the stuff of local advocates. In his 1856 study of the “Great West,” including Ohio, Indiana, Illinois, Missouri, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, and Michigan, Jacob Ferris noted: “Being so situated in the heart of the lake country, Michigan may participate very largely in the commerce of the whole interior and the continent. And that state possesses within itself the means of supporting the most extensive commercial enterprises.” Ferris, The States and Territories of the Great West: 186.
and canals. The infrastructure improvements, according to the article, would net between 10% and 20% annually.  

In one sense, the committee had diverged a bit from the governor. It proposed employing private corporations to help complete the infrastructure network. Its reasoning was practical: Michigan could not undertake all aspects of the project. Speaking almost regretfully, the committee submitted that an “attempt by the state to grasp the entire control of all such works, [would] of necessity impede the progress of the whole.” Accordingly, the committee suggested allowing private industry to construct and operate local feeder lines to the state’s major lines. This does not mean that the committee eagerly embraced private corporations. Had the state the wherewithal, government ownership was preferred. Maximizing state ownership not only would allow Michigan to fulfill its vision of becoming the throughway to the Mississippi, but it promised the panacea of low tax rates.

The legislature answered the call by authorizing the governor to borrow $5 million for the purpose of constructing a state owned and led internal improvement system. It pledged the state’s credit to buy the bond loans, and authorized the governor to contract on behalf of the state. It provided for a sinking fund, financed by the proceeds from the state’s rail and canal operations and dividends from bank stocks to pay off the interest and principal on the indebtedness. The committee reflected that the state’s internal improvement project was “an investment which will afford an ample profit; and that profit, instead of swelling the wealth of individuals and companies, will be equally divided among the whole mass of our population, by

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creating and maintaining public revenue, which in the process of time, will materially lesson the public burden.”  

The committee report, and the passage of the $5 million loan authorization, demonstrated that the legislature and Mason carried the same anti-corporate, pro-state ownership philosophy.

“It might be imagined,” Carter Adams commented, “from the proceedings of her early legislature, that the purpose for which [Michigan] sought the privileges of a state was to build canals, railroads, and turnpikes, and to improve rivers and harbors.” Whigs and Democrats, legislators and the governor all agreed: public ownership of the rails was optimal and, where that did not occur, strict public controls of private rail companies were required. As Robert Parks noted in his study of Michigan’s early rail experience: “the major difference between opponents [in the legislature] was not over the desirability of roads, but in their number [and] location.” Legislators resolved those differences by giving something to everybody. Mason had proposed a sizeable but limited rail and canal program. By the time all sectional interests were heard, the internal improvement project significantly exceeded the governor’s proposal. This project expansion met with nearly universal acclaim. As the Detroit Advertiser noted in 1842, “the system was the embodied wish of the people. It was their wish and met their undivided support. True some thought we were acting too rapidly, but still they acquiesced. The system was not the offspring of party but of the whole people.” At that moment, Michigan’s constitution, its

310 Parks, Democracy’s Railroads: 80.
311 Detroit Advertiser, April 30, 1842, quoted in Keith, “An Historical Sketch of Internal Improvements in Michigan, 1836-1846,” 15. Nearly universal acclamation was not the norm in other areas of the nation. Hartz reflected that the State of Pennsylvania eschewed large state involvement in rail development because of interstate rivalries over the placement of rail lines. Given the high cost of rail construction, the state could not respond to each municipality’s claimed needs. Hartz, Economic Policy and Democratic Thought: 87-8.
executive, legislature, and people aspired to the same end. The state would develop the internal improvement system.

**Troubled Implementation and Broken Promises**

At first, the project’s finances seemed promising. The state would enjoy $382,000 of federal assistance, when the state received funds in 1837 as part of the distribution of $28 million of national surplus funds. (Michigan’s share was so low because of its small population).312 Having witnessed the Canal’s success, the Michigan Legislature believed (or at least hoped) that the project would be self-funding, and taxation would never be required. Accordingly, they legislated that the revenues earned would service the debt. The Internal Improvement Act called for three trans-peninsula rail lines. The Southern rail line would extend from Monroe to New Buffalo, the Central line from Detroit to St. Joseph, and the Northern line from Port Huron through Grand Rapids to Lake Michigan. The legislation also financed three sizeable canal projects, loans to four private railroads, six river-improvement projects, and two salt facilities.

Knowing that it had granted monopoly rights to a number of private rail companies, the legislature also provided that the newly formed Board of Commissioners could buy those lines should the state lines “materially injure” the private lines’ rights.313 Michigan sought to undertake these expensive projects despite its small, economically undeveloped population of only 175,000 inhabitants and total assessed values of less than $43 million.314

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312 Taylor, *Transportation Revolution*: 358. These were the funds that Michigan’s House Committee on Ways and Means felt should be invested to create the best return and, if possible, to remove any need for direct taxation.


314 One of those canal projects, the Saginaw Canal, demonstrates the hopeful spirit of the age. Three quarters of that canal traversed Saginaw county. At the time, the county had only two villages, one of four-hundred people the other with twelve to fifteen families. Keith, "An Historical Sketch of Internal Improvements in Michigan, 1836-1846," 519.
Advancing the general welfare in this fashion assumed the state had or would develop the resources to implement its design. It also assumed it could build an effective system without the corrosive force of sectional influences. Those assumptions would quickly prove misguided. Sectional differences would soon arise and would eventually weigh heavily on public support for Michigan’s state-owned system.\(^{315}\) Notwithstanding that significant difficulty, finances would present the biggest challenge: by the time Michigan could start selling its internal-improvement bonds, the Panic of 1837 had set in, European investors had balked, and Michigan’s population growth had slowed. In the meantime, the legislature had set about spending the money, purchasing existing rail lines, and authorizing expenditures on newly planned lines. Justice Campbell later would characterize the young state’s efforts as “like an heir just emancipated, launching] into the most lavish display of her new freedom, and fancied opulence.”\(^{316}\) The constitution’s design for a robust governance would soon begin to fray.

Almost from the beginning, sales of the bonds proved difficult. Mason soon learned that the authorized 5% interest rate and the statute’s limited payment locations effectively thwarted efforts to sell the bonds. In response, the legislature raised the interest rate to 6% and allowed payment in Europe (but set the exchange rate at $4.44 to the Pound). As European financiers balked at those enhanced terms and Mason caught wind of proposed side dealings, Mason negotiated an agreement with Edward Biddle of the Morris Canal and Banking Company.\(^{317}\)

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\(^{315}\) Hansen, *State Aid to Railroads*: 68. State infrastructure projects often suffered the challenge of conflicting local interests. Wallis reported, “when, for example, New York contemplated the Erie canal, the primary opposition came from farmers along the Hudson and on Long Island who gained nothing from a canal benefiting upstate landowners. Because some of the tax liabilities for the canal were spread throughout the state, most counties expected to be worse off if the canal were built: they gained nothing and paid higher taxes.” Wallis, "Constitutions, Corporations, and Corruption," 212.

\(^{316}\) Campbell, *Political History of Michigan*: 483.

\(^{317}\) The cast of characters involved in the transactions were notable. Bankers Edward Biddle and his cousin Nicholas Biddle, author Washington Irving, former N.J. Governor Isaac Williamson, and former Senator Garrett Wall were all in some way involved with the banks. Mason put great stock in the group’s high standing, perhaps to the detriment of the state’s interests. Jenks, "Michigan's Five Million Dollar Loan," 582, 87. Doing so, however, was
company agreed to act as agent to sell the bonds for the state and to pay $250,000 upon
execution of the contract, $1,050,000 as Michigan required for construction, and quarterly
$250,000 installments starting in mid 1839. The agreement provided for a two and one-half
percent commission, meaning that Michigan would receive less than par value – a probable
violation of the legislation. Initially, Michigan would turn over bonds as they were sold. That
soon changed. Morris Bank and Mason would soon agree to involve the United States Bank of
Pennsylvania. (That bank was the successor to the non-renewed Bank of the United States.) The
terms largely were the same, with one exception: Michigan would turn over the remaining
$3,700,000 worth of bonds, and received no collateral in exchange.318 In doing so, the state
became dependent on both the banks’ continuing, solvency, integrity, and their ability to sell the
bonds for cash.

That reliance soon proved unfortunate. As a consequence of the Panic of 1837, the
nation and Michigan suffered from collapsing land prices, reduced tax revenues, multiple bank
failures, agricultural price declines, and currency collapses.319 “Bank notes became so valueless
that in grim humor some investors who but a little while before were supposedly rich used them
for wall paper.”320 In 1839, Alexander Trotter, of the London Stock Exchange, warned investors
that state internal improvement projects would not be able “to produce a revenue sufficient to

the normal course, as the underwriting banks were those used for similar bonds in sister states. Ratchford, *American
State Debts* 92-93.
318 McGrane and Jenks nicely set out the details of these transactions. Reginald Charles McGrane, *Foreign
Five Million Dollar Loan."
319 Hershock, *The Paradox of Progress* 1-11. John Moore reported that even in 1841, gross domestic product was
below that of 1831. Moreover, by mid 1837, “only six American banks continued to redeem bills for specie.” Over
500,000 Americans had lost their jobs and wholesale prices had dropped 29% between 1837 and 1842. Moore,
320 Fuller, "Settlement of Michigan Territory," 38.
keep them in repair and to pay the interest on the cost of their construction.”321 Despite Trotter’s warnings, some British banks continued to lend, in part based upon America’s history of repaying its national debt and in part based on a misunderstanding of the relationship between federal and state governments. A Baring Brothers’ circular issued during the depressed 1839 actually encouraged loans for American internal improvement projects. Believing that the states would “faithfully meet their engagements with their creditors,” Baring expressed “confidence [that] the resources and the national honor of the United States remain undiminished in this country, as well as the conviction that by such investments England employs her annual surplus of capital both safely and profitably, encourages her best customers, and binds more closely the ties of mutual interest between the two countries.”322 Several British banks were excited to lend capital to American states. The investments tendered high returns along with, many believed, little risk.

As British banks saw security in loans for state internal improvement projects, Michigan’s financial condition (and that of other states) continued to deteriorate. So serious was the crisis that Mason began to slide on his commitment to a self-financing system. While, in 1838, he had commented, “It will never answer to think of relying upon direct taxation for means to meet these obligations,” by the end of 1839, Mason grumbled, “It will require the most prudent and careful legislation, to prevent an ultimate appeal to direct taxation.”323 The challenge would transcend an ability to sell bonds or a shortfall on projected rail revenues. The banks would soon suffer financial distress and default on their obligations to pay the state. In

322 Quoted in, Callender, "The Early Transportation and Banking Enterprises of the States in Relation to the Growth of Corporations," 143-44, ftn.
response, Mason suggested that the legislature look for new sources of revenue, request aid from the federal government, and consider modifying the breadth of railroad programs.

The election season of 1839 introduced caustic criticism of Michigan’s rail efforts. The state’s Whig convention denounced the Democratic administration’s rail efforts, declaring that “the history of our state government, brief as it is, has been one of official stupidity, fraud, and corruption.” With politics in the air, the legislature looked for scapegoats. In 1839, the House formed a committee to investigate corruption in rail construction and payments. In what the committee classified as a “somewhat exciting investigation,” it uncovered numerous allegations of fraud and misdeeds. After finding that an early leader of the Central rail line squandered “two to three thousand dollars!!,” in a “profuse and profligate system of expenditure of the public funds”, the committee outed a real culprit, John Beech, a disbursing agent for the Central line. The committee accused the Central’s leadership of hiring a man “advertised as a public defaulter, or fugitive from justice from the state of New York,” who, in his three months on the job, used his skills to embezzle $8,405.14 (about $160,000 today). The committee also accused both acting commissioner Colonial James B. Hunt (the man who hired Beech) and General L. S. Humphries of “a desire to subserve his own interests” and “intending to deceive the board of internal improvements.” The committee’s tone suggested that political posturing tinted its report with an unfairly dark hue. Most claims of impropriety, when investigated, seemed unfounded. Nevertheless, when combined with the state’s financial difficulties, the committee’s allegations undermined public confidence in government control of rail.

324 Western Statesman, September 12, 1839, quoted in Hansen, State Aid to Railroads: 109.
326 In response to the committee’s accusations, Hunt acerbically noted that citizens “have been led to believe that the reports of legislative committees were entitled to the respect due to the representatives themselves; and that in the pure source from whence emanate our laws, there would not be mingled the bitter dregs of personal and political
It is worth stepping back a moment to reflect on why the leadership had been blind to the challenges associated with the massive internal improvement project. To inhabitants of 1830 and 1840s Michigan, rail progress opened new and exciting worlds. The completion of lines thrilled residents of newly served areas and opened possibilities heretofore only imagined. The opening of Detroit (and the lakes) to Ann Arbor is one such example. With construction of the line between Detroit and Ann Arbor significantly behind schedule in early 1839, tensions frayed and recriminations flared.\(^{327}\) Those feelings quickly evaporated when, in October, Ann Arbor received rail service. There was a “party feeling” associated with the completion of the line to Ann Arbor. “All was gaiety and delight.” Pageantry abounded and toasts to the state’s and communities’ success were the rule of the day. Cheering residents toasted to “The State of Michigan – Internal improvements necessary to the development of her abundant natural resources,” and to “Railroads and Canals – The business of months is now done in a day; if they do not lengthen our years, they enable us to live in the same time.” Taken by the celebration, one toast boosted, “Railroads and Steam Power – A Yankee’s notion of the Utile cum Dulce,” (the practical with the sweet).\(^{328}\) On the day before the rail line opened, it took farmers thirty-six hours to move their crops the thirty-eight miles to the Detroit market. With the opening, it now took two and one-half hours.\(^{329}\) These were exciting times of economic and social advance.

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\(^{327}\) Ibid., 802. Further, investigation on the claims against Humphrey revealed that rather than having embezzled, the state owed Humphrey monies for which he had not been reimbursed. Ibid., 802, 811. Of course, the committee rejected Hunt’s and Humphrey’s claims.\(^{327}\)

\(^{328}\) Frustrations over the pace of the line’s progress resulted in a House report castigating the project contractor and finding “that no satisfactory reason exists why the work was not completed within the time specified by the contract.” 1839 "Journal of the House of Representatives of the State of Michigan," 465-66. The legislature then passed a joint resolution, fining the contractor for further delays.\(^{328}\)

\(^{329}\) Western Emigrant, October 23, 1839, quoted in History of Washtenaw County, Michigan, (Chicago: C. C. Chapman, 1881). 341-43. See also, Frank Nelson Elliott, When the Railroad was King (Lansing: Michigan Dept. of State, Bureau of History, 1988). 1.\(^{329}\)

\(^{329}\) ________, When the Railroad was King: 1.
But not all were excited. Earlier that year, a farmer had set fire to a rail bridge, seemingly to protest the state’s failure to compensate him for livestock lost to oncoming locomotives. The destroyed bridge had delayed the connection between Detroit and Ann Arbor and an incensed lieutenant governor extended a $1,000 reward for the arrest of the culprit. Judge Cyrus Howard, having learned the name of the culprit, perhaps at a trial of an accessory, helped facilitate the arrest of Nelson Cochrane. The judge then sought the reward, only to be frustrated by the Senate Committee of the Judiciary. The committee, fearing the “charge of corruption” determined that “the dignity of the bench” would suffer if the state paid bounties rewarding “a judge of the conviction of a person who may be tried before him.”330 The story offers more than a peek into earlier judicial temperaments. It suggests a bubbling discontent associated with the introduction of industrialized risks into a pre-industrial world. There were few barriers between livestock’s historic grazing lands and the rail lines. As a result, livestock perished and farmers financially suffered. The state would pay for lost livestock (and endure claims that perhaps exceeded real losses) but, as rail increasingly became privately held, those private entities would be more reticent to pay for livestock losses. In response, violence would erupt between rail lines and farming communities. As those issues flared, society, government, and law would struggle to reconcile long-standing farming traditions with the dangers of industrialization. That struggle is discussed later in this work.

Ann Arbor’s celebration of rail access was also a celebration of government: Government had brought the rail, and all its benefits. Across the nation, state governments acted to advance rail development. To varying degrees, every state chartered rail entities with monopoly and other powers. Contrary to the laissez-faire myth, each of those states facilitated

and participated in the accumulation of capital to advance general-welfare interests. In addition, they became significant investors in those entities. These were not *de minimis* efforts. “In the years 1836-38 alone, states accrued more debts than they had over the previous fifty years.” Foreign banks provided much of that capital, with most of it employed for internal improvements.\textsuperscript{331}

Government contributions to internal improvements took various forms, with most adopting models different from Michigan’s pure ownership. In most cases, government assisted private corporations by granting eminent domain powers so that routes effectively could be laid, by offering land grants, tax exemptions, and banking privileges and, in many cases, by investing in those corporations.\textsuperscript{332} The rail corporations would then give stock in exchange for those government cash investments. The government as an investor presented interesting legal questions, as sovereign states have rights and responsibilities different from those of private corporations. To reconcile those challenges, investor-states would not be clothed as sovereign entities even though they might hold a majority interest in a corporation.\textsuperscript{333} At least under Michigan law, when the state outright owned and operated its railroads, those roads were akin to auxiliaries of government, functioning as government itself; but if the state was a mere investor,

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\textsuperscript{332} Morton Horwitz noted that courts modified eminent domain compensation to support development. For example, common law principles regarding ownership were abandoned, indirect damages to landowners were not compensated, and the probable increase in value of the remaining property from rail or canal development was deducted from the compensation. Horwitz concluded, “In an underdeveloped nation with little surplus capital, elimination or reduction of damage judgments created a new source of forced investment, as landowners whose property values were impaired without compensation in effect were compelled to underwrite a portion of economic development.” Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977). 67-71.
\textsuperscript{333} Marshall wrote in *Planters Bank of Georgia*, “it is a sound principle of law, that when a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen.” *Bank of United States v Planters' Bank of Georgia*, 22 U.S. 904, 907 (1824).
\end{footnotesize}
corporate-liability rules applied. More importantly than the legal rules, public expectations differed between state-owned and state-invested lines. Outright ownership lengthened the touch points for resident critique, and opened the legislature and executive to intensified pressures that would have been more muted under the government-as-investor model. Dissatisfaction over routes, construction timetables, and resource allocations would translate into a distaste for government itself. As importantly, an owner-state did not enjoy the same ability to walk away from a failed investment as it would with a more limited private investment. That state ownership carried a deeper, long-term commitment.

By mid-1839, Michigan was constructing a financially burdensome, government-owned rail system. Almost immediately, costs outstripped revenues, construction proved more expensive than expected and, as explained below, receipts on the bonds woefully missed expectations. Recriminations were rampant, as politicians sought to distance themselves from prior positions. In response to Whig arguments that Michigan’s internal improvement challenges were the “evil effect of bad legislation,” the Democratic Free Press reminded its readers that all had agreed to the system. The sole issue had been the details of the system, not its wisdom or scope. The newspaper’s point was well taken: during the debates over the legislation, Whigs had expressed concern over the placement of the rail lines, not the prudence of the projects. Rather than debating the enterprise itself, legislative logrolling presented the challenge. Legislators advanced projects to support purely local interests, and compromises tended to offer

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334 See pages __________, discussing State Attorney General ruling that required railroad to accept state script.
336 Detroit Free Press, March 31, 1838, 2.
something to all, including offering loans to private rail lines.\textsuperscript{338} The legislation had passed with only one dissenting vote.

The poisonous political atmosphere led to Mason’s decision not to again run for office. In his last address as governor, Mason reflected, “after months of warfare, between conflicting local interests, a conference between the two houses of the legislature, result[ed] in the unanimous adoption of the present system of internal improvements.” Rather than assigning responsibility to one party, he blamed “that false spirit of the age” where Michigan had “overtasked her energies and resources.”\textsuperscript{339} The Senate Committee on Finance disagreed: It was Mason’s fault. The committee insinuated that “matters, dark and mysterious” characterized Mason’s handling of the railroad loans and that private interests swayed his dealings. It then proposed a stinging resolution: “That we do hereby solemnly protest against the powers assumed, and the acts committed by our agent and declare them to have been, not merely unauthorized by law, and in violation of constitutional and legal provisions, but also of the obligations imposed by honor, and moral honesty.”\textsuperscript{340} Mason did not testify before the committee. The new Whig legislature had refused even to receive Mason’s final message before he left office. Mason shortly would leave the state. He died three years later at the age of 31 years.

**An Eroding Constitutional Mandate**

Soon the state was unable to meet its obligations to its contractors, and stopped work on all but the Southern and Central lines, two canals, and one river project. Even then, those non-rail projects would halt with the exhaustion of previously allocated funds. Next, the battle turned

\textsuperscript{338} Hansen, *State Aid to Railroads*: 70-73.  
\textsuperscript{340} 1841, "Journal of the Senate of the State of Michigan," 358. The full Senate did not adopt the resolution.
to apportioning resources between the Central and Southern. The projects were woefully underfunded and the economics demanded that only one line proceed at a time. However, the constitution demanded an “equal” application of state funds, resulting in a clash between constitutional mandates and economic realities. As the Committee on Internal Improvements noted in 1843, despite the “mandate of the constitution” and “the purest motives of patriotism and an ardent desire early to provide for every portion of the state . . . time and experience has conclusively proved to us that their anticipations were too sanguine, and the resources . . . too inadequate” to achieve government’s aspirations. 341 Just a few years before, the governor, the legislature, and the constitution promised railroads in every section of the state. Now, the government recognized that it did not have the resources to honor those commitments.

The state’s second governor, the Whig William Woodbridge entered office in 1840 facing enormous budgetary challenges. Before assuming office, Woodbridge approached advisors for their thoughts on the railroads. Woodbridge was considering shutting down or stopping expansion of some or all of the lines. H. B. Lathrop, an official of the Central Railroad agreed with Woodbridge, and proposed the best vehicle to financial stability required a focus on the his rail line. He asked if it was prudent to abandon or suspend the most lucrative of the state lines. “Shall over $1,000,000 be lost to the state when a further expenditure of $250,000 will put the works in such a state that they will pay interest on the whole sum in addition to the great convenience it would be not only to this county but to the two counties west of us?” 342 To Woodbridge’s request for advice from the state’s auditor general, E. P. Hastings responded that the state should focus on one line. He then addressed the mothballed remainder. “To the

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342 H. B. Lathrop, "Letter to William Woodbridge, dated December 12, 1839," in Woodbridge Collection, Burton Historical Collection, Detroit Public Library (Detroit).
question what shall be done with the works which it is proposed to abandon? I would suggest for the present a recommendation only to suspend their present construction.” Selling the other lines was ill advised. “The reasons for this must be apparent to everyone. . . . It might save the State from a present cost to sell the works to companies to be incorporated – but should the other works be completed, they would come into competition with the State works and materially effect the income of the State.”343

Woodbridge’s search for advice had uncovered two issues but, interestingly, neither advisor had challenged the state-ownership model. Both advisors suggested focusing the state’s efforts on particular lines. In that sense, practical economic considerations had overwhelmed the constitutional mandate of even construction to benefit all. Hasting’s advice suggested an additional concern – a shifting threat associated with corporations. In advocating a state-owned system, Mason and the legislature had voiced concerns that corporations would exercise their monopoly power to overcharge customers. To Hastings, that was no longer the problem. Instead, it was that those corporations would compete with the state’s monopoly and thereby diminish the government’s assets. Hasting’s approach was that the government must be protected from competition: a significant departure from some of the anti-monopoly reasoning of a few years earlier.

In 1840, rail problems provoked a governmental financial crisis. Rail expenses continued to exceed the underwriters’ bond payments, work slowed, and needed repairs were absent. In his first message to the legislature, Woodbridge observed, “This scheme, so bold in its conception, so splendid in its design, so captivating to a fervid imagination, but yet so disproportioned to our present local wants, and so utterly beyond our present means, must, I fear, as a whole at least, be

343 E. Hastings, “Letter to William Woodbridge, dated December 14, 1839,” in Woodbridge Collection, Burton Historical Collection, Detroit Public Library (Detroit).
given up.” One challenge was that the national government owned four-fifths of the land the rail line covered. As idle lands, they presented no freight possibilities; as national lands they furnished no tax income. Woodbridge proposed that the state limit its efforts to nearly finished projects whose costs of completion would be repaid through tolls. With respect to canals (and perhaps with a nod toward rail) he proposed that private industry might better complete the projects, “as the avidity of private gain leads to a more scrupulous and sharp sighted economy than is found ordinarily to flow from the colder dictates of public duty.”

The legislature responded with politics rather than solutions. It attacked the efforts of the former administration, and was unwilling to follow Woodbridge’s advice on privatizing canals. It prohibited new work contracts including repair efforts needed for existing operations, while allowing existing operations to continue notwithstanding the need to focus resources. The legislature expressed concerns that the rail projects suffered from inefficiencies and, perhaps, corruption. In response to those concerns, it now required monthly contractor reports, fines for delayed work, procedural impediments to fraud, and surety bonds to protect against impropriety. In that sense, the legislature addressed waste but not the core challenge of a vision that exceeded practical economics. Meanwhile, state residents continued to press for state internal improvement efforts affecting their municipalities, and government officials faced a choice between realistic spending and constituent satisfaction.

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345 Michigan, Legislative Acts, 1840, Joint Resolution #5.
347 For example, in 1840 the House received the following petitions: In support of the state purchase of the Detroit & Pontiac Railroad, from 295 inhabitants of Shiawassee and Genesee Counties, from 91 inhabitants of Saginaw Country, and from 300 inhabitants of Oakland County. It also receive a petition from the River Raisin & Lake Erie Railroads for the state to purchase it; “Sundry petitions” from the inhabitants of Calhoun County regard the completion of state lines to their area; Petitions from the Pontiac Railroad, the St Clair & Romeo Railroad, and the Monroe & Ypsilanti Railroad for financial and material assistance, and a request for financial assistance to create a Michigan silk industry. Several additional petitions protested the state’s operation of the railroad in their area on
the Morris Canal and Bank Company again defaulted on its quarterly principle and interest payments.

The state’s options were becoming increasingly limited. Taxation of the state’s few residents seemed untenable. Woodbridge bemoaned that the rail efforts resulted “in the exhaustion – alas, of our means; – in the prostration failure of our hopes; – in the humiliating failure of this undertaking!” Without the ability to spread the tax burden to the state’s largest landholder – the federal government – the rail program’s dream of lowering taxes and raising land values evaporated. It was replaced by a reality of looming default, state bankruptcy, or heavy taxation.

A year after he had taken office, Woodbridge formally declared the railroad projects to be a failure.

And in truth, the plan originally devised, was altogether disproportionate to our means; it was gigantic and visionary. I suppose it to be part of wisdom, in private life to do one thing first. It cannot be otherwise with states. It can never be either expedient or wise, to undertake more than can be fitly and within a reasonable time, accomplished. But with us in Michigan, we have many things begun, but nothing finished. We have nothing yet productive!

Woodbridge continued by suggesting that, had the project been undertaken in a systematic way, it would have been successful. He proposed to become more systematized by focusing on the Central route as the most likely to bring the return necessary to continue state internal-improvement efforts. Meanwhile, the legislature continued to struggle with the political challenges associated with limiting rail development to profitable ends. The Whigs and Democrats, the state’s residents, and newspapers agreed that the vast internal improvement

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efforts were unsustainable. The problem was that they each advocated a plan that would work to their favored benefit. Lost in the discussion was Article XII, §3’s constitutional requirement that the projects be “equal [and] systematic.” Financial realities had drowned out constitutional requirements.

In 1841, local interest clashed, almost violently, with state efforts to allocate resources to their best statewide advantage. The flare-up occurred in response to an internal improvement commissioner’s determination to divert rail iron from the Southern line to the Central. There should not have been a problem moving the iron from Monroe, Michigan to the Central as that iron was surplus and was rusting away. The commission believed that the use of the iron would increase the Central’s revenue by 20%, a much-needed infusion of cash, and would do nothing for the Southern. Indeed, under the legislature’s restrictions on new contracts, there was no planned (legal) use for the Monroe-located iron, except for its use to complete the Central line’s contracts.

John Van Fossen, a newly appointed internal improvement commissioner, gave the instructions for a removal crew to travel to Monroe to remove the iron (this was after several unanswered request to the Monroe authorities). That decision excited residents’ fears that the state would abandon their favored Southern line in favor of the Central. Monroe Mayor Dan Miller signed the handbills posted around the city warning of “evil disposed persons and depredators on public property, actuated by the devil and [the commissioner] are prowling about the streets preparing to steal the iron rail and spikes.” With the courthouse bell ringing its warning, the removal crew arrived in Monroe. There they faced a crowd ready to defeat their

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intentions. Outnumbered, the removal crew backed away and contacted the rail authorities, who called up the militia.

Having won the first round, Monroe’s residents planned their next steps, as troops gathered so that they might enter the city the next morning. Determined to forestall those efforts, residents gathered in the dark of night and loaded the iron onto freight cars for removal. After attempting to pull the car with horses and men, residents convinced a rail engineer to hook up a locomotive to move the heavily loaded car outside of town. After going about 4 miles, the residents dumped the iron into a nearby ditch and covered it with wood. The next morning, the removal crew and the militia searched in vain for the iron. They left town, their plans defeated. The city then employed its political power to discharge Commissioner Van Fossen, and to hire a commissioner more sympathetic to the Southern line.352

It might be worth here considering the challenges associated with state ownership of rail that would not be faced in private or mixed-ownership models of corporate governance. Corruption charges were rampant and each decision to invest in one location met with disapprobation in the other areas of the state. The results combined an unhappy citizenry with a government seeking to invest according to popular will rather than economic need.353 Almost immediately after approving a state rail project, the legislature had become involved in setting rates. In 1838, it reviewed how rates should differ between movements of tools for agricultural uses, versus rates for iron, slat, and roofing materials, versus stone and wood, versus liquor and

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353 Hansen, State Aid to Railroads: 90-98. Hansen relates how unhappiness resulted in vandalism including burning rail bridges and destroying railcars. 78-79
hides and more. In other words, public officials ill versed in the economics of profitable enterprise were making decisions based upon political and social needs.

Bleak state finances, the poor return on the bonds and slow, unprofitable rail development mixed to require hard decisions on future rail work. In a private corporate model, whether mixed or purely private, management would make asset allocation decisions according to expected returns on those investments. Public ownership, on the other hand, invited political involvement down to the smallest detail. A portion of the 1843 law regarding state rail expenditures demonstrates a difficulty of public ownership.

The board of commissioners of internal improvements are hereby authorized to purchase for the use of the state, a sufficient quantity of railroad iron and spike, to iron the central railroad to the village of Marshall, and the southern railroad to the village of Hillsdale; and the said board of commissioners are hereby authorized to pledge for the payment of said iron and spike the nett proceeds of the public works of this state.

If circumstances changed, the rail management would require further enactments to address the changing reality from a legislature that may not be sitting when time-sensitive decisions were required. More importantly, each decision the legislature made carried the flavor of local political interests.

One solution mentioned, but not yet widely supported, was to privatize the lines. To the contrary, leadership still believed state ownership preferable. Even as the financial picture dimmed, the state advertised that rail “Built by the State of Michigan” was safer than the alternatives. The government took “great care . . . in keeping this Road in good repair, thereby avoiding accidents similar to those occurring upon other roads almost daily, jeopardizing ‘life and limb.’” One might consider this the hyperbole of marketing were it undertaken by one

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354 Communication from the Commissioners of Internal Improvement, relative to Rates of Toll, March 2, 1838, "Documents Accompanying the Journal of the Senate," 454. No 34.
private company over another. But this is the state elevating its safety record over private industry largely owned by Michigan citizens. It was not the message of a government seeking to exit in favor of that private industry.\textsuperscript{356} With this notion of the state protecting the public interest, it is not surprising that Woodbridge’s solution to the debt crisis did not include the possible sale of the projects to private or mixed corporations. He was not alone. Even facing financial disasters, the members of the legislature believed support of industry was a government obligation. In suggesting bounties for the sheep and wool industry, the Senate Committee on Agriculture stated, “The encouragement of home industry by the fostering care of government, is a duty of the first magnitude; and more especially does it appear to your committee, that such obligation is imperative on the part of government situated as are the republican institutions of the United States.”\textsuperscript{357}

With the rail project a recognized financial failure, and the state unable to pay for contracted work, in January 1841 Senator Benjamin Witherell proposed legislation “to inquire whether it is not for the interest of the state . . . to lease, under proper restrictions, the railroads of the state.”\textsuperscript{358} It was not surprising that the Senate rejected his request, given the faith still held in the efficacy of government commercial enterprises. Senators viewed state government both as a facilitator of the people’s interest and as the people’s protector. Suspicion of corporations still haunted the citizenry. In 1842, the Michigan Supreme Court voiced that common sentiment. “A corporation is an artificial being, created by law with limited powers, and for specified purposes; and there is a tacit condition annexed to its charter, that it shall exercise its franchises in the manner and for the purposes, and in no other manner; and every abuse of its powers is a violation

\textsuperscript{356} Advertising billboard found in Elliott, \textit{When the Railroad was King}: 11, 33-35. (Emphasis in original.)
\textsuperscript{357} Report of the Committee on Agriculture, on the bill to encourage the keeping of sheep, &c, 1840 “Documents Accompanying the Journal of the Senate,” No 60: 537.
\textsuperscript{358} 1841 "Journal of the Senate of the State of Michigan," 95. Benjamin Witherell was the son of James Witherell, the author of the Witherell codes that contributed to the governmental gridlock in 1809-11.
of the law of its being, and a forfeiture of its franchises.\textsuperscript{359} Two years later, the court would offer, “The demand of us, and of all concerned in the administration of the law, the greatest vigilance in detecting, and punishing in the most exemplary manner, those who can and do wield so much power, when that power is so exerted as to be productive of evil instead of good.”\textsuperscript{360} American governance required a relative equality of voice, and concentrated wealth threatened to undermine that governing principle. Accordingly, Michigan simply could not trust private corporations with so urgent a program as its rail-transportation network, nor could it allow private hands to wield excessive influence over political, social, or economic issues. But, as government efforts failed, the anti-corporate position began to lose its grip. As Larson noted, the failure of public rail programs in the aftermath of the 1837 Panic, along with the ability of private lines to take advantage of opportunities, set the stage “for a marked shift in the popular conception of railroads, from public works (internal improvements) to private business ventures.”\textsuperscript{361} Soon that position would more effectively enter the Michigan discussion.

The notion of privatizing Michigan’s rail had not yet ripened, leaving Woodbridge to weigh his two options – raising taxes or declaring bankruptcy. “The sad alternatives then have presented themselves, of a course of heavy taxation to pay the semi-annual interest upon the public loan, on the one hand, or a decayed credit, a forfeited faith and a blackened reputation on the other.” Holding to the notion of state ownership, Woodbridge relied on hope. He again proposed completing the line most able to pay the interest, and suspending work on the other. Recognizing that focusing on one line violated the commitment made to benefit all citizens equally and, perhaps more importantly, threatened local interests, Woodbridge called upon the “intelligence and sound judgment and patriotism” of the citizens to accept the need for such

\textsuperscript{359} Attorney General v Oakland County Bank, Ewell Walkers Chancery Reports 95, 101 (1842).
\textsuperscript{360} People, ex rel Zephaniah Platt, Attorney General v Oakland County Bank, 1 Doug 282 (1844).
\textsuperscript{361} Larson, Internal Improvements: 234.
action. He thereupon proposed a tax increase to pay for the one line and he called on the federal government for assistance. The Whig Woodbridge asked Democratic Secretary of the Treasury Levi Woodbury for financial assistance. He premised his request on the increased value the transportation system brought to the national government’s large land holdings in Michigan. The record discloses no response.

As the federal government remained silent, the state legislature began to respond. It converted the Northern line into a wagon road (the Northern had never been pursued with vigor). Work would continue only on the Southern and Central lines. While that lacked the depth of action the governor suggested, the legislature did defeat numerous efforts to support local pet projects. To restrict the state’s liability, however, the legislature directed the Commissioners of Internal Improvement to make all contracts subject to payment by the Morris Canal Bank. If the supplier did not accept those terms, “the commissioners [were] hereby directed to make no contracts.” Public reaction to the contraction of the undertaking was mixed, with residents in underserved areas loudly objecting to potential tax liabilities for projects that now would bypass them.

The numbers surrounding the state’s predicament speak loudly of the impending financial crisis. The 1841 Report of the Board of Internal Improvements showed that Michigan had expended $669,000 on the Southern line and, in that year, had earned only $2,300. The annual debt for the line, at 6% was $40,150. As for the Central line, the board expressed confidence that it would soon bring more passengers and profit. Although the Central appeared to be the only

363 Pull language from Woodbridge letter to secretary of Treasury May 28, 1840. In Burton.
365 See, Detroit Advertiser, February 20, 1841
internal improvement project likely to show a suitable future return, that confidence may have been optimistic. The state had spent $1,065,000 on the Central and earnings in 1841 were $25,660. Interest alone would equal $63,800. The following year, the board again expressed confidence in the Central, calling it, “the only work from which the state can reasonably expect to derive a large revenue immediately.” By that time, it had spent $1,175,000, with an income of $72,100, an amount that would just cover interest, with no reserve for repairs, expansion, improvements, capital purchases, or servicing the principle that the state would owe. In 1843, the Committee on Internal Improvements recommended extension of the Central, with the expectation that when completed, it would bring a 7% return. Given the 6% notes, at first blush a 7% return seems advantageous. However, the Central was an element of an entire project and carried a return barely enough to pay interest on its capital. The total internal improvement principle amounted to $5,200,000, with an annual interest charge of $312,000.

With its profits from the Southern and Central consumed by the expenses and interest charges of the entire internal improvement debt, Michigan could not service its interest obligations. And, of course, improvements and repair costs threatened to increase as the rails, locomotives, and cars aged and technology improved. Looming in the background was Michigan’s distant but Substantial obligation to repay the principle.

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367 Report of the Committee on Internal Improvements, 1843 ibid., No 6, 28.
368 McGrane listed the interest at $375,000 on a debt of more than $6,000,000. McGrane, Foreign Bondholders and American State Debts: 154. A portion of that debt, however, came from other state borrowings for activities like the penitentiary, the University of Michigan, loans to private railroads, state script, and interest in arrears. Barry, January 4, 1842, Messages of the Governors of Michigan: I: 444.
369 Michigan’s situation was not unique. For example, from 1835-1839 Pennsylvania enjoyed an average $139,697 in annual internal improvement revenues while paying an average interest rate of $240,000. Ratchford, American State Debts: 97.
With his election to the United States Senate, Woodbridge entrusted this financial predicament to his lieutenant governor, James Wright Gordon. Gordon served from February 1841 until January 1842. On April 10, 1841, Gordon reported that the United States Bank had failed to pay its April installment. He warned of “disastrous effects” to the state and its citizens should a cure not be found. In July 1841, the state delayed making some interest payments, as it had run out of cash. The legislature issued state treasury notes (script) in an amount not exceeding the amounts due on the banks’ next four installment payments. (In an interesting twist, the Board of Internal Improvements later sought to deny passengers and shippers use of that script to pay for rail services. The Michigan Attorney General forced the board to accept it, as the legislation provided that paper was good for all state debts.)

On October 1, 1841, the second shoe dropped as the United States Bank completely defaulted, owing Michigan $1,087,500. It made no further payments. With both underwriting banks in default, Michigan had received only $2.6 million of the $5 million it now owed. (As noted below, the banks had pledged the notes as collateral for their credit.) Moreover, in 1842, a new $25/ton tariff on railroad iron increased the cost of construction. Congress had increased the tariff in response to protectionist complaints associated with depressed sales of domestic railroad iron. The Board of Internal Improvements classified the new tariff as “a serious obstacle” to

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making the lines financially viable. The drumbeat for change grew louder, as members of the legislature began to question the soundness of government ownership of industry.

When considering a proposal by State Senator Benjamin Witherell to lease the Central to private industry, a senate committee recognized that “It is a well established fact, that cannot be controverted, that a state government can never compete, (either with honor or profit,) with individual enterprise.” The committee claimed that,

The state must employ more, many more agents, with higher salaries, with more restricted powers, governed as it were by the square and rule, compelled to follow in the precise line of duty and action marked out by the law, never permitted to swerve therefrom, whatever may be the result, and, consequently, totally unable to conform to ever varying circumstances.

It then reflected on the beauty of self-interest that drives industry to curtail expenses; a drive missing in the public sphere. Accordingly, that committee recommended leasing the road to private enterprise, subject to state oversight and controls. Not all agreed, including the influential Senate Committee on Internal Improvements. After recognizing that “a slight glance at the downward progress, and present condition of our affairs, will satisfy the most superficial observer, that we live in evil times,” the committee recommended the state continue its course and press forward with the Central and Southern lines. With leasing and privatization not yet palatable or politically acceptable, the legislature adopted the Internal Improvement Committee’s recommendation. The state would continue to own the main lines and control the feeder lines. After all the efforts and all the special incorporations, only five railroads operated in Michigan

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372 Annual Report of the Board of Internal Improvements, dated December 15, 1843, 1844, "Documents Communicated to the Senate and House of Representatives." No. 5, 4. The tariffs were later reduced in 1846. Temin, Iron and Steel in Nineteenth-Century America, An Economic Inquiry 23-24.  
373 Report of the Committee on Internal Improvement, in regard to leasing the Central Railroad, 1842, "Documents Accompanying the Journal of the Senate," No. 6, 30.  
374 Report of the Committee on Internal Improvement, to whom was referred so much of the Governor’s message as relates to that subject, 1842, ibid., No 5, 24, 25.
and construction had stopped on all but the Central and Southern. As the clouds darkened over the state’s internal improvement project, bondholders looked to Michigan for full payment.

With this as their legacy, the Whigs lost the gubernatorial election to Democrat John Barry. Barry proposed that the nearly finished projects be completed if funds could be found. The state should abandon the rest. Barry’s motivation was primarily financial and not premised on a notion that government should avoid financing commercial development. He believed that government could only assist industry in minor ways, as major financial support required government beyond appropriate levels. He bemoaned the state’s inability to subsidize smaller projects. For example, the governor lamented “that our present financial difficulties” impeded the state’s ability to significantly financially support agriculture. Even with limited resources, the state should enact “some appropriate legislation . . . to put into the reach of the husbandman the improvements and discoveries made in his art by the researches of science.”

The legislature followed his lead by authorizing counties to require minor taxes in support of

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375 The roads were the Detroit & Pontiac, the Erie & Kalamazoo, the Palmyra & Jacksonburgh, the Central, and the Southern. Hansen reported that together they operated less than 180 miles of track. Hansen, *State Aid to Railroads*: 162.
376 Former Governor Gordon later lost an election to Congress. He died in 1853, falling off a balcony while serving as the American Counsel to Brazil.
377 Barry, January 4, 1842, *Messages of the Governors of Michigan*: I: 443. Barry noted that the approved internal improvement projects had expanded to “about five hundred and ninety-six miles of railroad, about two hundred and thirty-three miles of canal, and the improvement of five rivers. The estimated cost of these improvements, is $10,489,275.76, though probably their real costs, were they completed, would not be less than $15,000,000.00.” Ibid., I: 442.
378 Barry was known for his frugality and Cooley believed his fiscal conservatism laid “the foundations of a solid and permanent prosperity.” But citizens were not always as supportive. Cooley wrote that people would tell “by way of ridicule the story that [Barry] mowed the state house yard to sell the grass and put the money in the state treasury.” Cooley, *Michigan: A History of Governments*: 295-96. Campbell reflected that “His political views were somewhat extreme, and at times he became very obnoxious to his opponents on that ground; and many regarded his public economy as narrow and parsimonious.” On the other hand, Campbell reported that Barry “on more than one occasion manifested the most liberal views.” As examples, Barry assisted in the development of an insane asylum and supported the development of the University of Michigan. Campbell, *Political History of Michigan*: 515-16.
local agricultural societies.\textsuperscript{380} Government was the answer, but sadly lacked the resources fully to fulfill its mission.

**Pushing Legal Boundaries: Partial Repudiation**

Not opting for privatization, Barry put forward the pragmatic – a partial repudiation of the debt. The notes were in excess of $5 million but the state had received only about $2.6 million. Barry wished to protect the residents’ “rights and interests . . . against impositions and unjust extractions.” Accordingly, he proposed that the state pay the “just claims” against it, which he defined as those claims for which the state had received funds. If the banks had not forwarded funds on a particular bond, the state would not pay.\textsuperscript{381} The House soon followed, with legislators arguing that the limited repudiation honored the state’s legal and moral contract obligations. Still, they were reticent to enact mechanisms to fund payments, as that might require taxation. The legislators merely resolved that all “just demands” would be paid at “as early a date as possible.”\textsuperscript{382} On February 17, 1842, the senate followed, again with no mechanism for funding enacted.

The state had succumbed to what it perceived as the lesser of two evils: it chose partial repudiation over heavy taxation. In paying only according to the amount received from those first holding the instruments, the legislature disregarded whether a holder was *bona fide* without

\textsuperscript{380} An Act for the Encouragement of Agricultural Societies, 1844 “Acts of the Legislature of the State of Michigan.”, 23. The act was repealed and replaced in 1849. That act involved agriculture, manufacturers, and mechanical arts. It provided that the county supervisors were “required to levy a tax” between one-fifth and one-tenth a mill to support privately controlled societies encouraging commercial development. An Act for the encouragement of Agriculture, Manufactures and the Mechanic Arts, 1849 ibid., 97.
\textsuperscript{382} 1842 “Journal of the House of Representatives of the State of Michigan,” 163, 265. “Just demands” were defined to mean a demand on notes actually paid, as the governor had recommended.
notice.\textsuperscript{383} The only just demands were those upon which the state had been paid. Most of the repudiated \textit{bona fide} holders were British and had purchased the bonds as part of the lending programs promoted by banks like the Baring Brothers. The proceeds of those bonds were lost when the underwriting banks failed.

Publications in New York and London promptly denounced Michigan’s actions, with the \textit{New York American} protesting that “to borrow money and then refuse to acknowledge the debt is sheer robbery; and for that the laws of the State and the United States will furnish redress.” The state was denying liability rather than insolvency, and that was immoral.\textsuperscript{384} Whatever the morality underlying the state’s action, the \textit{New York American} incorrectly promised a legal remedy. As would soon become clear, injured bondholders held legal rights without legal remedies.

Unlike several other states, and despite constituent pressures, Michigan did not simply repudiate the loans. Instead, its leadership based their decision on arguable, albeit weak, legal grounds. The Morris Bank, as its agent, probably had breached its fiduciary obligations to the state. It and the United States Bank had improperly pledged the bonds as collateral in violation of their understanding with the state, and the bond agreements provided the payment would be from the revenues generated by the internal improvements. None of those arguments likely would hold legal water against \textit{bona fide} holders without notice, but they were colorable arguments. With the belief the state had been swindled (and perhaps because of political pressures), on April 27, 1842 Barry declared that the state would issue $2,342,960 of new bonds to replace the non-repudiated notes and would cancel $2,857,040 worth of bonds for which the


state had received no consideration. He also offered ownership of the railroads to bondholders in payment of their debt.\textsuperscript{385}

The issue was not one of debt evasion, as the alternative of heavy taxation probably was unworkable. An 1843 Congressional report on state debts classified Michigan as one of the states “most embarrassed with debt” and unable to raise taxes to service that debt. An increase in taxes would make land ownership “a burden rather than a blessing,” resulting in emigration from the state and a reduction in tax revenues.\textsuperscript{386} Hence, increased tax burdens would not help finance debt repayment. With a lack of practical alternatives, Michigan’s government suffered the moral indignity of default and repudiation. It had received about one-half of the expected funds for a project that was underfinanced from its inception. A dearth of rail profits had resulted in the state’s inability to pay even interest on its loan obligations and threatened the state’s ability to “keep in motion the wheels of government.”\textsuperscript{387}

As the state was buffeted by the challenge of poor investment returns, it suffered another blow to its rail hopes – the winter of 1843. Northern winters can challenge even the most advanced transportation systems. They particularly stressed early rail systems, and the winter of 1843 (starting in 1842) resulted in significant financial losses for Michigan’s rail. The winter that year was particularly harsh, culminating in a bitter March 1843. That month has been classified as “the most anomalous month in recorded history” with temperatures in the central

\begin{footnotesize}
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\item \textsuperscript{385} "National Intelligencer," May 21, 1842, quoted in ibid., 156.
\item \textsuperscript{386} William Cost Johnson, "Relief of the States - Public Lands, Rep No. 296," ed. 27th Congress House of Representatives, 3d Session (1843), 5. Senator Johnson proposed that the federal government assume the state debts. The Senate quickly rejected the idea. Sexton, \textit{Debtor Diplomacy}: 26-27.
\item Wallis argued that the ease of migration influenced policy decisions on payments of the debts. “A constant factor in the national debate about public land policy was migration from the east to the west, the desire of eastern states to keep people from moving (and lowering land prices), and the hunger for population in the west (to raise land prices).” He continued with an example that mimicked Michigan’s challenge. “In 1842 and 1843 Illinois politicians were unwilling to raise taxes to deal with their debt problem because, as then Governor Ford later wrote, ‘To pay immediately was out of the question. Heavy taxation then would have depopulated the country and the debt would never be paid.’” Wallis, "Constitutions, Corporations, and Corruption," 221.
\item \textsuperscript{387} Barry, January 4, 1842, \textit{Messages of the Governors of Michigan}: 448-49.
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and eastern United States “more than 25°F (14°C) below normal,” a situation not expected to return for thousands of years.\textsuperscript{388} The cold was so deep and long lasting in Michigan that lake navigation proved impossible for almost five months. Trains could not move during much of that time, as snow and ice blocked the roads. Michigan was isolated. In January through April 1843, rail receipts were down on the Central line about 43\% over the previous year’s period, yet expenses increased as time and dollars were spent to free the rails. Of course, the calendar drove interest expenses, and those obligations continued to mount. Spring came and, along with it, warmer weather that freed rail and water travel. Unfortunately, there was little freight backlog for the rail lines, as during the winter agricultural commodities went to market by either sleigh or rotted for lack of market access.\textsuperscript{389} To make things more critical, the partially completed rail lines were in need of upgrade and repair. Revenues were already insufficient to service the debt and, if improvements and line extensions lagged, the revenues would not increase as hoped.

Meanwhile, bondholders shuddered, and not just over Michigan’s plight. A number of other states had borrowed heavily and the prospects of their default and repudiation rumbled through the infant financial markets. Fearing the impending crisis, in 1840, the British Barring Brothers Bank urged Congress to guarantee the states’ debts. Congressional support was particularly important, as the Eleventh Amendment barred the banks from filing suit in federal courts against defaulting states.\textsuperscript{390} By 1842, the Florida Territory and the states of Mississippi, Arkansas, Indiana, Illinois, Maryland, Pennsylvania, and Louisiana joined Michigan in full or

\textsuperscript{390} Sexton, \textit{Debtor Diplomacy}: 26.
partial default,\textsuperscript{391} with other states teetering on the financial edge.\textsuperscript{392} Politics, anti-Semitism, and xenophobia led some politicians to advocate repudiation. Mississippi Governor Alexander McNutt attacked foreign creditors, in particular the Rothschilds. “The blood of Judas and Shylock flows” in their veins, he proclaimed, and warned of a Rothschild conspiracy to “mortgage our cotton fields and make serfs of our children.”\textsuperscript{393} Foreign capital had funded significant portions of the debt, and those foreign lenders and their political leaders did not understand the difference between state and national debt. Accordingly, state repudiation undermined national borrowing and standing, as well as the creditworthiness of all states.\textsuperscript{394}

In response to state defaults, threatened repudiations, and political hard-line positions, a member of the Rothschild family advocated ceasing loans in the United States. He declared “let us get rid of that blasted country . . . it is the most blasted & the most stinking country in the world.”\textsuperscript{395} British romantic poet, William Wordsworth’s, family had invested in Pennsylvania’s now threatened $36 million worth of bonds. In 1840, he scolded Pennsylvanian’s for betraying their commitments:

\begin{quote}
All who revere the memory of Penn  
Grieve for the land on whose wild woods his name  
Was fondly grafted with a virtuous aim,  
Renounced, abandoned by degenerate Men  
For state-dishonour black as ever came
\end{quote}

\textsuperscript{391} “Default” here means the state’s failure to make timely payments on its indebtedness.  
\textsuperscript{392} Grinath, Wallis, and Sylla, “Debt, Default, and Revenue Structure,” 1. Taylor related that by 1839, “the states had definitely exhausted their credit, and it had become apparent that the expected returns on their investments in banks [southern states had invested here] or internal improvements [northern states] would not materialize. Instead of receiving the major part of their income, as had been expected, from their investments in banks or internal improvements, the states were suddenly faced with the necessity of taxing their citizens in order to meet the interest on debts incurred in order to promote banking or public works projects.” Taylor, Transportaiton Revolution: 375.  
\textsuperscript{393} McNutt, quoted in A Member of the Boston Bar, An Account of the Origin of the Mississippi Doctrine of Repudiation (Boston, 1842), quoted in Sexton, Debtor Diplomacy: 27.  
\textsuperscript{394} Ratchford, American State Debts: 100-01. Wallis, Sylla, and Grinath, “Sovereign Default and Repudiation,” 1. This paper also addressed the various schools concerning the reasons for the borrowings and defaults.  
To upper air from Mammon's loathsome den.  

State defaults and the threat of repudiation promised relief to the states, but presented the specter of financial ruin to wealthy and ordinary investors alike. 

Even those the state promised to repay faced the prospect of financial difficulties. Although the state had acknowledged its debt to this group, it provided nothing but a vague promise of repayment. To protect the interests of those largely economically and politically elite bondholders, a series of American investors in Michigan’s bonds hired Charles Butler, a politically linked attorney, financier, and bond expert from New York, to represent their interests. His task was to turn the promise of future payment into a tangible reality. To accomplish that, Butler proceeded to Detroit, and did so in the difficult winter of 1843 that had shut down all but sleigh transportation in Michigan. 

Butler’s travails during his journey underscore both the seriousness of the creditors’ concerns and the need for enhanced rail facilities. After one false start, he travelled from New York to “Boston, about twenty-four hours’ journey, and thence going to Albany by rail. Beyond Albany it was rail to Rochester; then to Niagara by stage; then across the river on the ice, and so on by stage and cart through Canada to Detroit.” Butler traveled those last two-hundred miles in an open wagon. One night that wagon broke down at 2 am, forcing Butler to walk in the dark to a one-room log-house tavern. He then took a dirt cart into Detroit. With the dust of arduous

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397 Butler represented the Farmers Loan and Trust Company of New York, with bonds over $900,000 in face value and various New York banks with over $450,000 of those bonds. The state had received payment upon these bonds. Butler’s brother, Benjamin Franklin Butler, was the Attorney General under Jackson and Van Buren. His wife’s brother, William Butler Ogden, was the first mayor of Chicago, and the president of the Union Pacific Railroad. Ogden and Charles Butler were also direct blood relations. 

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travel on his shoulders, Butler began to plead the bondholders’ case to the governor and the legislature.\textsuperscript{398}

Butler faced a sympathetic but determined audience and, as he related in a letter to his wife, his coming “all the way from New York, through the mud, \textit{on purpose}” allowed him to say things that others could not “without being charged with treason.”\textsuperscript{399} To Butler’s mind, the “simple truth” was that “sound principles of democracy” required “\textit{payment of the public debt}.” Framing debt payment as a moral imperative, he urged that, “whereas a good citizen should be ready always to lay down his life in defence of his country against an invading foe, so he should always be ready to give up his property to preserve and defend the honor of his country and pay it debts.”\textsuperscript{400}

Butler’s arguments persuasively moved legislators away from the lingering temptation of complete repudiation and inspired the legislature to finance paying the just claims. The Report of the Joint Committee reviewing bond payments recommended that the state pay those bonds “for which we have received consideration.”\textsuperscript{401} The amount was $2,518,699, which included unpaid interest. The legislature determined which bonds were due and which were not. Further, the committee recommended that a future legislature consider raising taxes in the event rail revenues were insufficient to service the chosen bondholders. This almost created a stumbling block as some protested that only rail assets and revenues should be employed. Nevertheless, the legislature enacted a bill calling for taxes in the event of a revenue shortfall. The governor then threatened to veto the bill, objecting to the tax provisions. Recognizing that the lack of the tax provision could cripple his clients’ interests, Butler protested that the provision “was the only

\textsuperscript{398} Francis Hovey Stoddard, \textit{The Life and Letters of Charles Butler} (New York: C. Scribner’s Sons, 1903). 192-94.
\textsuperscript{399} Letter to wife, Eliza Butler, dated February 4, 1843, ibid., 196-97. (Emphasis in original.)
\textsuperscript{400} Letter to Aliza Butler, dated February 27, 1843, ibid., 199-200. (Emphasis in original.)
\textsuperscript{401} Report of the Joint Committee of the Senate and House of Representatives, on the Subject of the Five Million Loan Bonds, 1843, "Documents Communicated to the Senate and House of Representatives," No. 11, 417.
feature of the bill worth saving.”

So persuasive were Butler’s arguments (he drafted the legislation), that the legislation was referred to as the Butler Act and the committee posted his comments along with their report. The governor signed the act.

With the Butler Act signed, the issue moved to those bonds Michigan chose to repudiate. Future United States Supreme Court Justice Benjamin Curtis, at the secret behest of British bankers, argued there was no lawful basis upon which the state could distinguish between any bona fide purchasers. He protested that it was, “universally admitted, that, whenever a purchaser of property acquires a title from the seller, which he can transmit, although that title be tainted with fraud, if he sells to a bona fide purchaser, who parts with his money, or any other thing of value, on the faith of the property, such purchaser obtains a valid title, purged of the fraud.” Claiming that, “society could hardly get along without” such a rule, Curtis continued, “It would be monstrous to say, that, because property bought on credit has not be paid for, the holder cannot give good title to it.” He “entertained little doubt” that Michigan would treat all bondholders “in the same just and honorable” fashion, notwithstanding whether the state had received funds for the particular bond. The law was on Curtis’s side, at least insofar as one defines law as the rules written in statutes, treatises, and court opinions. However, the foreign


403 An Act to Liquidate the Public Debt, and To Provide for the Payment of Interest thereon, and for other Purposes, 1843, "Acts of the Legislature of the State of Michigan." No. 73, 150; For an in-depth legislative history, see Jenks, "Michigan's Five Million Dollar Loan," 600-12.

404 It is noteworthy that, along with its report the committee published a correspondence from then Pennsylvania Senator, and future President, James Buchanan. Buchanan had purchased $20,000 of the Michigan rail bonds (about $520,000 today) and he feared that “a large portion” of his assets were in jeopardy. If that were not enough, Buchanan had successfully urged friends similarly to invest. Facing personal economic difficulties, and a sullied reputation among friends, Buchanan exhorted the Michigan legislature (though a letter to Butler) to cure the default and pay the principle. Playing to their party allegiance, Buchanan urged that, “it is impossible that Democrats can ever become repudiators.” Letter from the Hon. James Buchanan, January 6, 1843, to Charles Butler, 1843 "Documents Communicated to the Senate and House of Representatives," 438.

405 Benjamin R Curtis, "Debts of the States," North American Review 58, no. 122 (1844): 156. Curtis wrote the article at the request of the Baring Brothers bank. Baring had secretly commissioned the article and provided the outlines of its argument. Sexton, Debtor Diplomacy: 43.
bondholders could not sue Michigan in federal court (the Eleventh Amendment precluded such suits), and state court remedies were unlikely. Under those circumstances, “law” provided inadequate shelter. Meanwhile, the public protested for repudiation, for fear of ruinous taxes, while bondholders clamored for payment, for fear of extensive losses.

Morality was a larger issue than legality, and Curtis believed that morality also required reduced government and smaller debt loads. Curtis would protest in the *Christian Review* that the “universal effort to carry a railroad or a canal to every town, and almost every man’s door was destructive to the nation’s wealth and, because of the risk of default, destructive to its moral center.” To Curtis, the nation was deeply in debt to the houses of Europe, but could not default for fear of driving Europeans “to beggary by the misfortune” and causing the credit of the United States to become “shivered to atoms.” He continued that “as men of integrity and honor and above all, as Christians,” taxpayers must practice self-denial and take on every burden in order to pay the debts.406 It mattered little that Europeans had few legal remedies. Prudence and Christian values required taxation, self-denial, and repayment, notwithstanding the belief that such repayment would cripple several states.

Despite the protests, the Michigan legislature specifically repudiated those primarily foreign bondholder notes in 1842 and 1843, and did so expressing indignation over the underwriting bank’s defaults on their obligations to the state. Debate continued and those advocating partial repudiation knew they stood on tenuous legal and moral grounds. In 1846, the legislature proposed to settle a portion of the European notes. The *London Times* admonished British bondholders to refrain. “It is hoped,” the *Times* declared, “that European creditors will

have firmness to refuse any terms short of their payment of their entire principle.” Ultimately, in 1859 the state paid a portion of the foreign debt and left the bondholders to look to the defaulting banks for the remainder. When finally forced to surrender their bonds for reduced compensation, George Peabody, the noted philanthropist and founder of the banking firm, George Peabody & Co, of London, voiced the frustration of those bondholders. We “do hereby Solemnly protest and declare that we” surrender our bonds at “such reduced rates . . . only because, under the laws of said state, we have no other means of obtaining any payment or satisfaction in part or in whole.” With legal rights but no legal remedies, Europeans had turned to the political sphere to press their rights. With their debts only partially honored, they left unsatisfied.

Notably, the courts were absent in resolving these matters. Given established legal doctrine, bondholders were in equal positions regardless of the underwriters’ payments to the state. Despite a legal right to payment, bondholders had no recourse to the federal courts, as the states could not be sued there, and Michigan state-court actions most likely would have proven futile. Bondholders turned to the political sphere, where legal rules merely influenced, but did not control, the outcome. Instead, pragmatic considerations controlled, with some bondholders

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409 Some would argue that legal rights exist only if associated remedies exist. Holmes, in his “The Path of the Law” article made that assertion when he declared that a right was little more than part of the process to a predictable outcome. He offered, “One of the many evil effects of the confusion between legal and moral ideas . . . is that theory is apt to get the cart before the horse, and to consider the right or duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterwards. . . . [A] legal duty so-called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right.” Oliver Wendell Jr. Holmes, “The Path of the Law,” Harv. L. Rev 10 (1897): 458. Whether by right without remedy, or merely unenforceable interest, courts were absent in resolving foreign bona-fide bondholder claims.
410 Notwithstanding their losses associated with the 1840s’ rail collapse, British bankers reentered the American rail bond market in the early fifties. In that era, “British investments in American railroad securities, especially bonds, increased rapidly so that by 1853, of the total American railroad bonds outstanding, 26 percent were foreign-owned.” Taylor, Transportation Revolution: 100.
satisfied and others less so. Those not fully compensated objected but ultimately accepted the partial payments.

**Federal Aid Efforts**

With all the challenges associated with government financial support of rail, internal improvements remained a central component of the drive for progress and general-welfare enhancements. To further those ends, Congress again attempted to assist several states, including Michigan, to overcome the financial burdens of their internal improvement projects. In 1841, Congress passed another distribution act, commonly referred to as the Preemption Act. That legislation sought to relieve the states’ burdens in several ways. First, it granted each of eight states 500,000 acres of federal land, which they could sell with the proceeds earmarked for internal improvements. (The act was called the Preemption Act because it gave existing squatters the right to buy 160 acres before the land went up for public sale.) Second, it provided the eight states with 10% of the sale price of federal land sold in their boundaries. It then paid all states a share of federal land sales according to population. Congress placed no restrictions on

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411 William English’s study of the state defaults argued that the historic methods nations use to recover sovereign debt were unavailable to Britain. The Constitution precluded litigation, U.S. military power protected against military force, the national economy and free trade between the states undermined economic sanctions, and national economic strength made a total embargo unworkable. English argued that most states repaid the debt as a means to maintain access to future capital. English, "Understanding the Costs of Sovereign Default: American State Debts in the 1840's."

Two challenges undermine English’s repayment argument. First, the states perceived they would not again borrow, as is reflected in the multiple constitutional prohibitions they would soon enact. Hence, his argument of maintaining access to capital is misapplied. Second, English failed to consider the moral concerns over default voiced by the leadership. Repayment was a moral imperative and failure to do so was a disgrace beyond concerns over later creditor reticence. That moral code provided the strongest argument against repudiation.


413 The funds went to all states, in some measure because Eastern states protested that the Act would threaten their labor supply by encouraging Western migration.
the use of those funds. President Tyler signed the law, believing the legislation would relieve a significant portion of the debts incurred by states attempting to develop commerce.\[414\]

The grant was controversial, even in the receiving states. Michigan’s Governor Barry complained that federal land in Michigan ought to, and did, belong to the state so it should receive all sale proceeds. He also argued that Congressional grants tended “to make the sovereign states pensioners” to federal largess. This was not unlike Jackson’s argument in vetoing the 1833 Distribution Bill, in which he believed that state receipts of federal funds would cause a loss of independence and dignity. Despite Barry’s concerns, the sums provided some relief. Accordingly, the legislature accepted the land and funds, and directed the governor to employ the land according to the congressionally mandated requirements.\[415\]

While those grants did not last long, they evidenced continued federal legislative determination to advance social and commercial goals in the face of constitutional impediments to the contrary. To be sure, the shared dollars were not earmarked. Earmarking those funds arguably would have run into the constitutional barriers that animated Jackson’s Maysville Road and 1833 Distribution Bill vetoes, as well as Madison’s 1817 veto of the Public Works Bill, and Monroe’s 1822 veto of the Cumberland Road Bill. Tyler took a different tack. In approving the legislation, he advanced that Article IV, §3 gave Congress unlimited power over the federal lands themselves and, therefore, the act was constitutionally secure, or at least defensible.\[416\]

While that position was not universally accepted, it opened the door to later legislative action.

\[414\] The involved states were Alabama, Arkansas, Illinois, Indiana, Louisiana, Mississippi, Ohio, and Michigan. An Act to Appropriate the Proceeds of the Sales of Public Lands, and to Grant Preemption Rights, 5 Stat 453 (Sept 4, 1841). David Currie related that Congressional Whigs had advocated that the national government assume the state internal-improvement debts but dropped that plan in favor of the indirect subsidies connected to federal land sales. Currie, "Constitution in Congress," 794, ftn. 67.

\[415\] Barry, January 4, 1842, Messages of the Governors of Michigan: 439-40.; An Act to Accept a Certain Grant of Land made by the United States to the State of Michigan, and to Authorize the Governor to Cause Same to be Located, 1842 , "Acts of the Legislature of the State of Michigan," No. 6, 8.

\[416\] For a nice discussion of the politics and law surrounding this, and other Congressional efforts, see ———, "Constitution in Congress."
Congress’s use of the public domain in the Preemption Act to advance rail development in some measure foreshadowed later legislative efforts to grant land and/or funds directly to the railroads. For the time being, however, Congressional action was constitutionally suspect. Believing the act unconstitutional, James Polk, the next President, killed future disbursements altogether.

**Building Toward a New Constitutional Model**

The Preemption Act, while helpful, “aided more in saving past investments than in future expenditures.” To newly elected Barry, fiscal responsibility required a different approach. He classified the state’s internal improvement projects the result of a “general delusion” and questioned both the wisdom of government ownership of rails and of its anti-business philosophy. With those concerns animating his policies, in his first annual address, Barry spoke of the limits inherent in republican governance. “The true aim, indeed, of a republican magistrate,” he argued, “is to refrain from the exercise of power not delegated; to abstain from all interference with the pursuits of the private citizen, and to give full scope to the inexhaustible energies of a free people.” Government was to set the framework to facilitate individual enterprise. He voiced that, “[t]he main design of a republican government is to protect the citizen in the enjoyment of his liberty and the property his own industry has acquired.” In the end, Barry argued, “the people will take care of themselves.”

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Campbell, while recognizing that the state’s finances during Barry’s term required thrift, warned, “when the resources of a State will permit liberal outlays for laudable purposes, parsimony may become reprehensible.” Writing in 1876, he added a counterpoint for his own era. “The recent experiences of municipal plundering and venality in various parts of the country, and the waste of public property to enable knaves to outshine their honest neighbors, have not indicated any serious danger that exactness in guarding the treasury is running to excess, or in need of discouragement.” ——, *Political History of Michigan*: 516-17.
As Barry advanced that vision, the Board of Internal Improvements continued to express optimism that time, improved economics, and line enhancements and extensions “will for the future, give an income that, it is believed, will relieve the state from the liabilities incurred for construction.” To the board, the answer to the economic challenge was to continue building, particularly on the Central line. If the state did that, rail receipts would pay the interest due in January 1846 (of course that interest was on the now lower, non-repudiated bonds). The requested construction required further financing and, while the board favored further development on the other multiple projects, it suggested waiting “until our resources are more ample.”

Neither the governor nor the legislature agreed, and no appropriation passed to expand the Central.

Instead, Michigan’s government moved to erecting constitutional barriers to curb future state financial support for internal improvements. Barry sought to change the government blueprint though a requirement that voters approve government borrowing. His proposal of a majority vote for government spending was short of his philosophical goal, however. To Barry, internal improvements were not “connected with the legitimate wants of government.”

One month later, a joint resolution of the legislature called for the Barry-proposed constitutional amendment to require voter approval of state borrowing or pledging the state’s credit. In doing so, the legislature and governor tendered an interesting flip to the logic of republican governance. The proposed amendment offered that government required the public’s steadying hand to retard overzealous legislative spending. The people would now check the

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421 Barry, “Our present embarrassments, and the means by which they have been brought upon the state, render it worthy of your consideration, whether it would not be expedient so to amend the constitution, as to require the consent of the people to all loans hereafter made by the state for works of internal improvements, or for any other purpose not connected with the legitimate wants of the government.” Barry, January 4, 1842, Messages of the Governors, I: 449.
passions of government – a notion at odds with theories of republican governance. In 1843, a joint resolution proposed sending the amendment to a vote of the people.\(^{422}\) The required two-thirds of the legislators agreed to the amendment, and the voters ratified it in November 1844.\(^{423}\)

By the time the amendment passed, the legislature had dramatically curtailed construction on the Southern line and cut the proposed length of the Central.\(^{424}\) Even with the cutbacks, by 1845 the rail interest charges were three times the highest tax level ever paid, and rail incomes increasingly were inadequate to pay those debts.\(^{425}\)

The state had invested in rail in accordance with the positive governance ideologies reflected in its founding constitution. That 1835 constitution had required the legislature to make provision for an “equal, systematic, economical application” of funds to support internal improvements. The constitution did not require state ownership or particular levels of involvement but, given the intentions and beliefs of the time, it assumed significant state participation. As that ideologically driven program proved too significant for state resources, the legislature became increasingly pragmatic. It trimmed active state participation in rail, and focused on particular lines in violation of constitutionally required equal building requirements. Constitutional and statutory law diverged, as aspirations of governance conflicted with pragmatic realities. The erosion of the constitutional requirement of equal support required a choice


\(^{423}\) Michigan Constitution (1835), Amendment II. The Amendment provided: “That the constitution of this state be so amended, that every law authorizing the borrowing of money or the issuing of state stocks, whereby a debt shall be created on the credit of the state, shall specify the object for which the money shall be appropriated; and that every such law shall embrace no more than one such object, which shall be submitted to the people at the next general election, and be approved by a majority of the votes cast for and against it at such election; that all money to be raised by the authority of such law be applied to the specific object stated in such law, and to no other purpose except the payment of such debt thereby created. This provision shall not extend or apply to any law to raise money for defraying the actual expenses of the legislature, the judicial and state officers, for suppressing insurrection, repelling invasion, or defending the state in time of war.”


\(^{425}\) Elliott, When the Railroad was King: 10.
between ignoring and changing the blueprint. Through the 1844 amendment, the state stepped in the direction of governmental restructuring but, as will be seen, did not go far enough to gain state fiscal order. Meanwhile, Barry’s beliefs of government’s appropriate sphere were gaining purchase. Those beliefs would further push against the 1835 Constitution’s activist blueprint and again require constitutional choices.

This is not to suggest that practical realities uniformly or completely supplanted aspirational goals to drive commerce through public spending. In the period between Barry’s proposed amendment and the ratification of that amendment, the legislature remained busy. A partial list of its spending tells the story. Between 1842 and 1844, inclusive, the legislature appropriated money from the defaulting internal improvement fund to support the state’s salt springs. It required the state-owned Central line to run on Sundays, thereby increasing operational costs. It provided for the purchase of iron and spikes to expand the Central and Southern lines and it paid expenses on the Clinton and Kalamazoo Canal. It required that public officials exercise responsibility over repairing the Detroit and Saginaw Railroad from “Detroit to John Davis’s tavern in the Town of Royal Oak.” It passed a joint resolution seeking expert guidance on building a branch of the Central Railroad to connect to the Detroit River. It authorized communities to tax to support agricultural societies and it allocated land to be used for the clearing of the Flint River or, in the alternative, to be used to improve a canal there. And in multiple acts, it provided for the building and maintenance of roads. In boxing parlance,

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426 An Act Making an Appropriation for the Improvement of the State Salt Springs, 1842, No. 10, 11; A Joint Resolution Relative to Running Cars on the Central Rail Road on the First Day of the Week, 1842, No 34, 170; An Act Making Appropriations on the Central and Southern Rail-roads for the Year of Our Lord One Thousand Eight Hundred and Forty-three, and for other Purposes, 1843, No. 25, 27; An Act to Provide for the Completion and Preservation of that Portion of the Clinton and Kalamazoo Canal between the Villages of Rochester and Frederick, No 32, 35; An Act to Authorized the Erection of a Toll Gate and for Keeping in Repair the Detroit and Saginaw Road, and for other Purposes, 1843, No. 77, 161; Joint Resolution Concerning the Construction of Lateral Branch of the Central Railroad, 1843, No. 14, 227; An Act to Improve the Navigation of the Flint River, 1844, No. 30, 28. “Acts of the Legislature of the State of Michigan.”

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state efforts were knocked down but not out. Lacking funds, the legislature curtailed state efforts but it did not abandon its aspirations of advancing public welfare through public spending and leadership.

Proposals to sell the roads and remove government from internal improvements initially fell short. While a bill to privatize the railroads cleared one house, the legislature was unable to gather the two-thirds vote to create a private rail corporation. Barry put forward a compromise, advocating that “associations of individuals” complete the state’s unfinished rail lines, and that the legislature could later buy those railroads back. This seeming caveat was in reality a restatement of the railroad incorporation acts already in place, for each of those acts provided that the state could purchase the corporation. Of course, given Barry’s belief that government space did not include rail ownership, the buyback proposal was likely politically, rather than philosophically, inspired.

The state’s debt challenge provided the crisis through which Barry communicated his new vision, but that vision of a separation between public and private spheres stood on its own philosophical legs. In his last formal speech to the legislature during the first of two Barry administrations, Barry elaborated on the limited-governance model he had urged at the beginning of his administration. “In extraordinary cases only,” he advised, “and when public good clearly demands it, should a state undertake the construction of public works, and then only when such works, from their magnitude, cannot well be undertaken by individuals.” Government was to act only when needs demanded and private vehicles were unavailing. The governor’s office had travelled far since Mason’s declaration ten years earlier that corporations were at “war with the interest of the people.”

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427 Barry, January 6, 1845, Messages of the Governors, I: 513.
428 Barry, January 6, 1845, Messages of the Governors, I: 516.
Barry’s thinking was part of a growing national trend. Larson suggested that by this time political thought had moved away from energized governance toward a reliance on the “natural laws” of the market. Larson wrote that, “Habitually distrustful of their representatives, tutored constantly on the dangers of big government and public power, and unable to perfect a system of democratic politics they truly believed in, Americans reached for the doctrine of liberal political economy to revise their own hopes for liberty and equality.”  

Economic historian John Joseph Wallis agreed, arguing that the debt associated with state internal improvement efforts led to widespread constitutional reforms that changed the nature of corporations and the nature of government-industry relations. That rebuilding of constitutional structures to remove states from active commercial involvement started in 1842, with Rhode Island’s constitutional restrictions on public borrowing. Soon states across the nation began to amend earlier constitutional encouragements of state commercial involvement.

### Divestment, Legislative Limits, and Corporate Ascendancy

Detroit-area newspapers soon advocated a sale of the railroads. Eastern financiers expressed interest in purchasing the Central Railroad, and hired Detroiter James Joy (the future president of the Central) to lobby that private management of railroads was the superior option. In that environment, Alpheus Felch was elected governor. Despite Barry’s frugality, Felch inherited a $4.1 million debt, and a minimally profitable, but increasingly antiquated rail system. His inaugural message set the tone that the state would soon follow: the state should sell

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432 Parks, *Democracy's Railroads*: 177.  
433 Ibid.
Felch stated, “The first [object of the sales] is to separate the government from a business which has usually been the subject of individual enterprise.”\footnote{Felch, “Inaugural Message,” \textit{Messages of the Governors of Michigan}. II: 26.} Felch’s history lesson was mistaken, as government everywhere had played a role in rail development. Nevertheless, his politics were increasingly accepted. Felch preferred that government not be involved in business when private industry could better manage the enterprise. Notwithstanding his privatization beliefs, Felch held to (or at least voiced) earlier beliefs that corporate ownership of rail remained vexing. He reflected, “The reluctance of many of our citizens to see these important works fall into the hands of corporate bodies, has occasioned some opposition to the proposed sale, and it must be admitted that this objection is not without weight.”\footnote{Felch, January 6, 1846, \textit{ibid.} II: 44-45.} Because corporations were entities with special rights, their unregulated existence violated the equality notions of democratic government. Even to Felch, failure to regulate would “violate one of the plainest principles of that form of government which seeks the independence and the equality of all who are subject to its laws.”\footnote{Felch, January 6, 1846, \textit{ibid.} II: 47.} Government needed to be present to control the perceived excesses of capitalism. Nevertheless, government ownership went too far. It occasioned partisan rancor, absorbed the legislature’s agenda, and was ineffective.

By 1846, the state’s rail finances were desperate. After all the effort, money, and time, only 279 miles of track were complete.\footnote{Felch, May 4, 1846, \textit{ibid.} II: 59.} Even that limited system was in poor shape. Maintenance suffered, the iron rails needed replacement, and bridges needed rebuilding. Interest payments were in arrears and the state owed $4.1 million. Despite predications to the contrary, the rail revenues “yielded no surplus to be applied in discharge of the interest” on even the bonds.

\footnote{Elliott, \textit{When the Railroad was King}: 43.}
accepted for payment.\textsuperscript{439} Growing interest obligations again threatened state bankruptcy.\textsuperscript{440} The alternative – taxation – was unpalatable. Servicing the debt though taxation would have required a 93\% tax increase.\textsuperscript{441} Yet, the alternative was “the disgrace and self-abasement of repudiation.”\textsuperscript{442}

The state owed $4,121,720.79 in principle and interests as of July 1845. Claiming that the Board of Internal Improvements had camouflaged the financial crisis, a minority report of the Senate Finance Committee expressed shock that all profits had been absorbed in operations, construction, and repairs. There was no surplus with which to pay creditors, leaving the government with a serious political challenge. From the beginning, it had reported that the state’s rail ventures were a success and that future profits would sustain and improve the lines. That was not the case and trouble loomed. Exasperated, a member of the committee protested,

\begin{quote}
there are no nett proceeds, and when in the revolution of one short year, they are officially informed that their roads, reported in good order at the commencement, have not only swallowed up the nett proceeds, but have become entirely inadequate for the transaction of business, and are in great measure useless and worthless to the state, unless speedily and entirely rebuilt, our citizens will most assuredly exercise their right of demanding an explanation.\textsuperscript{443}
\end{quote}

\textsuperscript{439} Felch, January 6, 1846, \textit{Messages of the Governors of Michigan}: II: 43. The Central and Southern generated revenue, but those funds were employed for construction and repairs. Felch recognized that the income would never be sufficient to retire the debt principal, and that major repairs soon threatened. Those repairs would require significant additional capital. Ibid., II: 45-47.

\textsuperscript{440} Seavoy, “Borrowed Laws to Speed Development,” 56.

\textsuperscript{441} Adams, \textit{Public Debts}: 323. Felch’s 1846 message to the legislature suggests that the required taxes would have been a bit less than Adams calculated. Felch spoke of a $52,621 increase on property taxes over and above the previous year’s $72,305 – a 73\% increase. Felch, January 6, 1846, \textit{Messages of the Governors of Michigan}: II: 42-43. Still, a sizeable tax increase.

\textsuperscript{442} Felch, January 6, 1846, \textit{Messages of the Governors of Michigan}: II: 43.

On this issue, the committee majority agreed: the roads were “in a dilapidated and almost ruined condition,” and any excess revenue would be swallowed by repairs and required improvements.\textsuperscript{444}

After speaking of the financial concerns, the Senate Finance Committee submitted that the “corruption, intrigue and deception” of “half starved political hacks” had run rampant in massive public enterprises like rail. The committee then urged the opposite view of political freedom that had animated Mason and the 1837 legislature. “From such [corrupting] influences, unsafe in a free government, dangerous to the purity of our institutions – destructive to civil liberty – a sale of our public works would set us free.” Government was corrupt, inefficient, and incompetent.\textsuperscript{445} Most importantly, it was out of money. As the committee noted in a connected report, “It has ceased to be a question of policy, and has become one of absolute necessity. The financial condition of the state present and prospective, leave us no option in the matter.” That financial challenge occasioned a reconsideration of corporate appeal and the place of free government.\textsuperscript{446} The committee was “satisfied that the best interest of the people in every point of view, political, social as well as pecuniary, demand an early and entire separation of the state from works and pursuits more legitimately belonging to individual, or corporate enterprise.”\textsuperscript{447}

\textsuperscript{444} Report of the Committee on Finance, Doc. 8, 1846 ibid., 17. Signed by William Fenton
\textsuperscript{445} Ibid., 20.
\textsuperscript{446} In 1883, Cooley reflected on the movement from government to private control of public services. “When a public need is thus discovered or felt, the first question often is, whether it shall be met by the Government directly, and at its own expense, or whether the franchise of providing for it shall be conferred upon individuals, with the privilege of making it a source of profit. The former is the method which apparently is most consistent with republican institutions, for it grants no favors, and does not complicate individual with governmental affairs. But in practice it is found subject to very serious objections. We know what some of these are, for they have been confronting us for many years, and subjecting us sometimes to disaster and disgrace. The cost leads to great debts, and these are commonly great calamities.” Cooley went on to explain that elected officials may lack the “business energy and capacity” to operate commercial enterprises. Thomas McIntyre Cooley, “State Regulation of Corporate Profits,” \textit{North American Review} 137(1883): 206-07.
\textsuperscript{447} The committee listed the multiple reasons for selling the rail lines. The committee focused on economics: the state had no money, the rail lines were not generating sufficient income to continue construction and pay the bonds,
It was time to privatize, perhaps because there was little alternative. In early 1846, the legislature authorized the sale of its best road – the Central, for about $2,000,000. It had spent $2,238,920 on that road.\(^{448}\) The newly formed corporation was private but, like the other special corporations of its day, the entity carried significant obligations and grants of power.\(^{449}\) The sale was accompanied by twenty-eight pages of legislatively required commitments, including construction requirements, rate structures, tax obligations, and corporate governance rules. The state even retained the right to repurchase the line after 1867.\(^{450}\) Shortly thereafter, the state sold the Southern line, for $500,000, under similar conditions.\(^{451}\) It had spent $1,125,591 on that line.

In short order, the legislature would abolish the office of Acting Commissioner of Internal Improvements. Before ending his tenure, the Acting Commissioner was to largely “dispose of all the personal property appertaining to the business of internal improvements.”\(^{452}\) Cooley quotes “one familiar with the whole history” as expressing the belief “nothing but the debris of our airy castles remained, and that only to plague our recollection.”\(^{453}\) Cooley neglected to

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\(^{448}\) McGrane, Foreign Bondholders and American State Debts: 165.
\(^{449}\) These grants and obligations were not unusual. In a fairly inconsequential act in 1843, the legislature gave a special corporation the right to build a bridge over the St. Joseph River near the village of Berrien. For the privilege of building and running that bridge, the company agreed to state-set tolls, (“For every person and horse ten cents; for every carriage drawn by one horse, ten cents; for every cart or wagon drawn by one yoke of oxen or span of horses, twenty cents, for every head of neat cattle, three cents,” and so on.) It also provided that if any passage was unreasonably delayed, the company would forfeit twenty-five dollars. An Act to Incorporate the Berrien Bridge Company, 1843, "Acts of the Legislature of the State of Michigan." No.52, 127. This was the common requirement associated with special incorporation. See, Robert Olender, "A Legacy of Limitation: Thomas Cooley, Public Purpose, and the General Welfare," Michigan Historical Review 33 (2007).
\(^{450}\) For example, after 1848, the railroad could charge passengers, and up to 100 pounds of luggage, only three cents a mile. Flour and grain freight charges could never exceed three quarters of the charges in January 1846. An Act to authorize the sale of the Central Rail Road, and to incorporate the Michigan Central Rail Road Company, 1846 "Acts of the Legislature of the State of Michigan.” Act 42: 37.
\(^{452}\) An Act to Abolish the Office of Acting Commissioner of Internal Improvements, and for Other Purposes, 1847, ibid. Act 76.
mention, however, that the sale of the roads and ceasing support of internal improvements probably violated the state constitution. (However, as discussed below, he would have responded that such actions were consistent with protecting the core constitutional principle of republican governance.) The 1844 amendment modified but did not eliminate the requirement of state support for internal improvements. But, in a very practical sense, public opinion and financial challenges either changed constitutional understandings or made them irrelevant. Article XII, §3’s requirement of state action was inconsistent with changed understandings and practical realities.

In 1849, Governor Epaphroditus Ransom suggested just that in his veto of legislation seeking to modify the payment schedule for the purchase of the Southern. He advanced that through their “singular unanimity” in favor of the sale, the public had demanded “an entire and lasting separation of the state from all schemes of internal improvement.” Believing that withdrawal had “its origin in the spontaneous movements of the people themselves,” Ransom suggested an almost constitutional barrier to further state rail support, notwithstanding the unamended constitutional language to the contrary. The legislature disagreed with Ransom’s approach and overrode his veto, thereby granting relief to the Southern. The difference from earlier action was that government now was subsidizing a private entity without seeking to control its activities.


454 The Confederate State’s experiences with railroads and constitutional principles are telling. Consistently with southern views of centralized power, the Confederate Constitution prohibited government from financially aiding private enterprise. However, railroads were central to its war efforts. With practical needs trumping constitutional prohibitions, the Confederate Congress authorized sizable loans to four private rail entities. Goodrich, Government Promotion of American Canals and Railroads, 1800-1890: 207.


Non-financial Public Assistance

With the exception of episodes like the payment extension, the state had discontinued its practice of direct financial support of rail, and moved away from involvement in internal improvement projects. Nevertheless, its efforts continued in a subtler and less public fashion. In its sale of the Central, the legislature bestowed state-like eminent domain powers to the private corporation. As in earlier special rail corporation statutes, the legislature granted that power not just over real estate but for “the obtaining of stone, sand, and gravel,” of entering private property “to fell and cut down timber” or to obtain “any articles whatsoever, which may be wanted in the construction or repair” of the line. The statute set forth the process required to value the property but, even on the sale of personal property, the unwillingness of the seller was not a barrier. These extensive powers were in many but not all acts of special rail incorporation. Moreover, the legislature passed, and the governor approved, taxes to support subsidies to agricultural, manufacturing, and mechanical arts societies.\footnote{An Act for the encouragement of Agriculture, Manufactures and the Mechanic Arts, 1849 ibid., 97. Later in that term, the legislature would incorporate the Michigan State Agricultural Society. Its responsibility was to gather and disseminate information that would be “most useful in promoting a greater and more general progress in practical agriculture.” It then provided a subsidy to that organization. An Act in aid of the Michigan State Agricultural Society, ibid., 240. As part of its efforts to advance commerce, in 1849 it also created the State Normal School, with the purpose of training men and women “to give instructions in the mechanic arts, and in the arts of husbandry and agricultural chemistry,” among other things. An Act to establish a State Normal School, ibid., 157.} Governors Barry and Felch had advocated a private/public wall. Their administrations, however, displayed a facility for ignoring that barrier when commercial needs dictated.

One might legitimately argue that rail development required corporate use of eminent domain powers. Railroads need efficient routes or they, and the public benefits they brought, would suffer. Nevertheless, grants of that power to private entities were akin to assigning public power, which is controlled by the democratic process, to private individuals, with little or no public control. Landholders would object to this private taking, and took their complaints to
court. In 1852, the Supreme Court would consider the propriety of those takings in *Swan v Williams*.\(^{458}\) That case would set Michigan’s early legal standard on the public versus private nature of corporations.

The case arose from powers granted early in Michigan’s rail history. In 1834, the territorial legislature incorporated the Detroit and Pontiac Railroad, granting the rail line the territory’s eminent domain power.\(^{459}\) Landholders objected, arguing that any taking under the legislation was for private, not public, benefit. The court disagreed, but did so by classifying corporations not by ownership, but by public benefit. In rejecting the landholders’ claim, the court declared that railroads “might with far more propriety be styled public than private corporations,” that they were “essentially the trustee of the government,” and “a mere agent, to which authority is delegated to work out the public interest.”\(^{460}\) In answer to the landholders’ complaint that the control and profits of the railroad were exclusively private, the court answered that “it is obvious, that the object which determines the character of a corporation is that designed by the legislature, rather than that sought by the company.”\(^{461}\) The public was the primary beneficiary of rail development and private industry’s gain was only secondary. The court essentially measured utility – with the public deriving most of the gain. Accordingly, the delegation of eminent domain power was valid. This should not surprise. Railroads required effective routes and society required railroads. Rather than foregoing the welfare-enhancing

\(^{458}\) *Swan v Williams*, 2 Mich. 427(1852).


\(^{460}\) The legislature had specifically incorporated the railroad and granted rights like eminent domain in exchange for public obligations.

\(^{461}\) *Swan v Williams*, 435. Emphasis in original. See also, Graves dissent in *People ex rel. The Detroit and Howell Railroad Co v Township Board of Salem*, 20 Mich. 452(1870).
activities of rail, society’s leaders, including its courts, shaped doctrine to make the private public. To grant public power to private entities, the courts reclassified those entities as public.

**Republican Government and Private Space**

In 1847, Felch proclaimed that the state should recognize a stronger barrier between private rights and government action. Direct government involvement in industry breeched that line in unacceptable, antidemocratic ways. Felch voiced his opinion on the “genius and design of a republic government.” “To avoid being governed too much, is one of the objects of a representative form of government, and to secure the good of community in this regard, all authority in matters not immediately connected with the public weal, and indispensable to the welfare of the body politic, should be withheld.” He then set forth his vision of a liberal republic. “It is among the encouraging signs of the present time, that the public mind is demanding a more definite limitation to the powers and duties of government, and a relinquishment of all unnecessary interferences with the free actions of the individual citizen.”

Felch had urged a vision very different than that which characterized the early State of Michigan or, for that matter, the nation during its first six decades. Rather than as an aid to individual enterprise, he viewed government as an impediment to personal freedom.

The challenge was in the interpretation of Felch’s vision: What constituted “unnecessary interferences,” and who should decide? Several months before his above-referenced defense of individual liberty, Felch signed legislation enhancing Detroit’s ability to regulate hours, wages, and working conditions of the city’s “porters, cartmen and draymen, owners and keepers of livery stables, hackney coaches, carts, dray and carriages of every description.”

apparently did not consider those restrictions improper, later courts would find otherwise. Felch’s and, I would argue, the nation’s wall between public and private was permeable. As was the case throughout American history, government did not withdraw from commerce and industry. Instead, it adjusted and tempered its philosophy with new understandings concerning the challenges of government involvement in business.

In the wake of its rail experience, Michigan was moving toward and demanding a structure of government that would exercise a lighter touch on commerce. State senator and future lieutenant governor William Fenton expressed that goal in a colorful, if somewhat peculiar fashion: “The wheels of government which should roll quietly on in an unimpeded track in their onward course towards civil, social and political improvements – will be clogged by the crash of locomotives, and the strife of aspirants for the loaves and fishes which fall from the tables of those in power.”

Mason had argued that private wealth could subvert republican governance by holding and exerting extensive power. His solution was government control of the state’s most important industry. The challenge, however, was that government faced institutional and political impediments to effective control of internal improvements. This led to public distrust of government as well as to a poorly constructed business. That failure and the associated distrust, threatened to subvert the political process and, accordingly, established that industry development was an inappropriate space for the state. Perhaps the practicalities of economic realities drove the changing political philosophies, but those realities animated deeper reflections about the role of government and the dangers of subverted republican governance.

This is not to suggest that all aligned on government’s role. Many legislators still believed that, but for the want of resources, government was the appropriate vehicle for internal improvement development and ownership. In 1848, the House Committee on Internal Improvement

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Improvements bemoaned the state’s inability to press forward with a trans-state canal that would have “become to our growing State, what the Erie Canal had proved to New York.” That inability did not descend from changed philosophies of government or the growth of private corporations. Instead, it came from a lack of funds. That lack, according to the committee, undermined commercial development and population growth. The committee reported that the legislature “would willingly listen to the cry for help, and cheerfully come to the rescue, did circumstances permit or reason approve the attempt.” The state’s financial condition prohibited construction, thereby undermining efforts to help inland farmers bring their products to market. The answer to the problem, the committee agreed, was government in the form of federal aid.\footnote{Report of the Committee on Internal Improvements, 1848, "Documents Accompanying the Journal of the House of Representatives," Report 10: 1-2.} It was not about private versus public spheres or the withdrawal of government. Rather, to the committee, the issue concerned which government could, and should, act.

Two months after voicing his bold reassessment of government, business, and freedom, Felch became a United States Senator. Epaphroditus Ransom, Felch’s successor, almost immediately displayed an antagonism to overactive governance. Declaring, “Excessive and hasty legislation are the most serious evils we have felt under our present system,” Ransom proposed to shorten the legislature’s term by two-thirds and to render legislation passed after a certain number of days in session automatically invalid.\footnote{Ransom, January 1, 1849 Messages of the Governors of Michigan: II: 128-29. See also, Ransom, January 3, 1847, ibid., II: 112. Ransom was the first governor inaugurated in Lansing, the state’s new capital.} He wanted smaller government, and rejected calls for loaning money or pledging credit to railroads. Ransom believed that the state had appropriately adopted a policy of liquidating and ending all involvement with the railroads and that the people had insisted that government severe all financial ties with rail.\footnote{Ibid., II: 139.} He rejected not just government-owned railroads, but railroads run by mixed corporations. Loans and

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\textsuperscript{466} Ransom, January 1, 1849 Messages of the Governors of Michigan: II: 128-29. See also, Ransom, January 3, 1847, ibid., II: 112. Ransom was the first governor inaugurated in Lansing, the state’s new capital.
\textsuperscript{467} Ibid., II: 139.
subscriptions had “almost universally proved disastrous,” and this was the case broadly across the nation. Ransom reasoned that if the projects for which the railroads requested state financial support were so important, private markets would provide the necessary capital.\footnote{Ibid.} If private markets found the project too speculative, then the state should not risk its capital.

The governor did not advocate complete abandonment of a state role in internal improvements. He supported construction of plank roads, with indirect government funding. Instead of direct capital insertions, government would offer land grants to private plank road companies that they could then sell to raise capital. The legislature passed a general plank-road incorporation statute, allowing corporate creation without specific approval by the legislature, and without corporate responsibilities to the state.

Michigan was not alone in its growing disquiet over government ownership of rail or in the mixed corporate model. Failing enterprises and rising public obligations strongly contributed to a shifting view of government and private spaces. Henry Carter Adams explained, “as the people had driven their representatives to enter upon internal improvements without caution, so, when taxes began to press, they censured them without justice, and disowned the policy.”\footnote{Adams, Public Debts: 339.} Larson noted that in the wake of the financial crisis, “American’s faith in government itself – never high – collapsed.” Perhaps nostalgic for what might have been, and despairing of the results, Larson wrote, “the founders’ hope of wielding power for the common good receded into memory: a distant possibility once (perhaps?) within the grasp of revolutionary statesmen, but unlikely (if not unimaginable) in the hands of their shortsighted, self-serving offspring.”\footnote{Larson, Internal Improvements: 226.}

Whether appropriate or not, public desire for and trust in government was shifting, both in Michigan and around the nation.
Corporate Success and Rising Individualism

In government’s place stood private corporations. As John Barry, reelected governor in 1849, advanced: “Associations of individuals with corporate powers, in many cases, possess advantages that materially aid in the prosecution of some legitimate enterprise, which, without such powers, could not be undertaken with prospect of success.” By 1855, a treatise on corporate law commented, “There is scarcely an individual of respectable character in our community, who is not a member of at least one private company or society which is incorporated.” By mid-century, the American population was moving toward an increasing dependence not only on the leadership of private economic development but also on the acceptability of corporations as an integral part of the economic landscape. Those corporations then, would provide the means to construct the infrastructure required by an advancing American economy. The state and society that had earlier viewed corporations as “at war with the interest of the people,” now viewed corporations as desirable, tax-paying contributors to the state.

In that shift, hero status soon replaced corporations’ earlier villainous image. As early as 1839, the English Civil Engineering Journal had been arguing that government simply was ill suited to control the rail industry. The journal proposed that only private control of rail created incentives for creativity and competitive advances, and public ownership stifled those traits. Picking up on that theme, the American Railroad Journal pronounced that “all the canals and railroads of this country would have been . . . better executed by private enterprise,” that “all such matters should be left” to private enterprise “which alone possesses the means, skill and integrity indispensable to success” and, finally, that “all we require in this country, to secure the

471 Barry, February 5, 1851, Messages of the Governors, II: 184.
construction of all really useful works is to be ‘let alone.’” It is not clear whether the American Railroad Journal’s distaste for government control extended to an aversion to government funding, eminent domain assistance, or land grants, or as Horwitz noted, common-law modifications to facilitate rail development. Certainly, railroads continued to take advantage of government largess and in that sense the term “private” requires a bold asterisk. Notwithstanding their demand for government favor, supporters of private industry continued to employ laissez-faire language. But, in truth, they fell far short of that standard.

Whether “purely private” or not, privately held corporations succeeded in furthering Michigan rail projects. The eastern investors who purchased the Southern and Central lines invested private funds in the lines’ upgrade and expansion. British interests financed the previous Northern line, and incorporated a faltering Detroit & Pontiac line into the system in order to include a Detroit terminus. The purchasers of the Central immediately began upgrading and expanding the rail system.

[O]ld oak and iron strap rails were torn up and replaced with new “T” rails made entirely of iron, roadbeds were surveyed and cleared, new track was laid, new engines and freight and passenger cars were ordered, and, after an active lobbying effort in Lansing [the new state capital], the legislature issued variances enabling the two lines to build farther southwest and eventually forge a rail link with the growing city of Chicago by 1852.


476 At first, Michigan investors purchased the Southern Railroad due to a legislative preference for native ownership. Lacking capital to achieve the required improvements, eastern money and management took over between 1847-49. Meints, *Michigan Railroads and Railroad Companies*: 5.

477 The State had abandoned the Northern line and had dedicated land to the Northern Wagon Road. On January 30, 1847, the legislature incorporated the Port Huron and Lake Michigan Rail Road Company and gave it all the State’s rights in the assets of the former line. "Acts of the Legislature of the State of Michigan." 1846-1847. Act 5. Part II: 5.

478 Hershock, "Blood on the Tracks," in Finkelman and Hershock, *The History of Michigan Law*, 41. The roads were not uniformly upgraded. In 1849, Ransom accused the Southern of “not actually advance[ing] a single dollar, for any purpose connected with the road, in the two years and upward they have had it in possession.” The company had not upgraded or extended the line. Ransom, March 13, 1849, *Messages of the Governors of Michigan*: II: 150.
The re-invigorated railroads spurred economic development, driving the growth of commercial farming.

Using the Michigan rail system as a metaphor for the benefits commerce and wealth could bring to the developing nation, Ralph Waldo Emerson exclaimed in his essay *Wealth* that,

A clever fellow was acquainted with the expansive force of steam; he also saw the wealth of wheat and grass rotting in Michigan. Then he cunningly screws on the steam pipe to the wheat crop. Puff now, O Steam! The steam puffs and expands as before but this time it is dragging all Michigan at its back to hungry New York and hungry England.

Emerson’s applause should not be taken as a comment on the benefits of private rail ownership as there are indications that he wrote early versions of the essay in 1844, and some suggest 1841, before the sale of the rail to private ownership. Instead, Emerson advanced wealth as a vehicle to move humanity to an elevated plane. He explained the “bread he eats is the first strength and animal spirits; it becomes, in higher laboratories, imagery and thought; and in still higher results, courage and endurance.” Emerson concluded the essay extolling the use of wealth to expand the moral and philosophical nature of man. “The true thrift is always to spend on the higher plane; to invest and invest, with keener avarice, that he may spend in spiritual creation and not in augmenting animal existence.” Accordingly, wealth for its own sake accomplished little. Its higher use was to advance the individual and his society spiritually, intellectually, democratically as well as materially.

In itself, Emerson’s views on wealth and society bear no special discussion in this paper. Most probably, they did not reflect the thinking of the time and those listening to Emerson’s lectures on wealth heard them to propound a material-seeking life rather than the spiritual

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message Emerson intended.⁴⁸⁰ Even with that as the individual goal however, Emerson would argue, capitalism creates social benefit without regard to, and in spite of, the intentions of the captains of industry. In his essay *Considerations by the Way*, Emerson recognized that the benefit of the western railroads,

> is inestimable, and vastly exceeding any intentional philanthropy on record. What is the benefit done by a good King Alfred, or by a Howard, or Pestalozzi, or Elizabeth Fry, or Florence Nightingale, or any lover, less or larger, compared with the involuntary blessing wrought on nations by the selfish capitalist who built the Illinois, Michigan and the network of the Mississippi Valley roads; which have evoked not only all the wealth of the soil, but the energy of millions of men.

Perhaps recognizing the irony of great gain through selfish motives, Emerson concluded with “a sentence of ancient wisdom that ‘God hangs the greatest weights on the smallest wires.’”⁴⁸¹

Musing, writing, and speaking on the new industrial society, during the 1840s and 1850s and publishing in 1860, Emerson tendered a vision of a society driven by individual capitalist impulses, but improved by the changes those impulses wrought. The individual was central, and government posed a risk to individual self-creation. He wrote:

> The only safe rule is found in the self-adjusting meter of demand and supply. Do not legislate. Meddle, and you snap the sinews with your sumptuary laws. Give no bounties, make equal laws, secure life and property, and you need not give alms. Open the doors of opportunity to talent and virtue and they will do themselves justice, and property will not be in bad hands. In a free and just Commonwealth, property rushes from the idle and imbecile to the industrious, brave and persevering. ⁴⁸²

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⁴⁸¹ “The Conduct of Life, Considerations by the Way” Emerson, Complete Works: VI: 244.

This acceptance of the value of the individual, working his self-gaining plan, would animate legal thought in the later portion of the nineteenth century. New constitutions and judicial doctrines would soon enshrine those ideas into a changing governmental framework.

Private industry was successful in completing Michigan’s rail lines where state ownership was not. The cause may have been economic – Michigan’s entry into rail development coincided with a dramatic economic downturn; it may have been political – states have multiple priorities and constituencies requiring non-economic decision-making; and it may have been managerial – states lack the singular profit-motive that drives private industry efficiencies. Whatever the cause of failure, selling the railroads to private industry changed the economic and legal atmosphere of the state.

**Corporate Growth and Public Dissatisfaction**

Rail brought more to Michigan residents than transportation, communication, and land value. It also brought dangers to livestock and the threat of ember-induced fires. The previous chapter touched on some of those injuries as free-grazing livestock fared poorly against oncoming rail cars. Resident dissatisfaction occasionally triggered a violent response. One such flair up in 1839 resulted in farmers burning bridges, derailing trains, and threatening physical violence. Largely, state government’s willingness to compensate farmers for their losses would mute the anger and calm those situations. That would change as the state exited the rail business. Private rail owners were not as charitable – offering only partial compensation. Private rail leaders claimed that farmers placed their infirm livestock on the tracks in order to win compensation while farmers claimed that the railroad destroyed prized stock, causing

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483 Hansen, *State Aid to Railroads*: 87. See also, page 127 *supra*.
484 Hershock discussed the tensions between the pre-industrial, open range traditions and the industrial age’s limited liability requirements of controlled risk. Hershock, “Blood on the Tracks,” in Finkelman and Hershock, *The History of Michigan Law*, 37-60. See also, Elliott, *When the Railroad was King*: 45-46.
grievous financial loss. Lawlessness resulted, with farmers destroying tracks, greasing inclines, and derailing engines. In one incident, arsonists struck and largely destroyed the Michigan Central’s new freight depot in Detroit. In 1850, an insurrection broke out with arson, undercover operatives, and conspirators. The antagonism included differing characterizations of private corporations with both sides claiming divine support. Whether or not God took sides, the transfer of rail from public to private entities had consequences beyond the economic. One celebrated event led to the controversial convictions of farmers for rioting and destroying rail property. Townsend Gidley, the 1851 Whig candidate for governor, pledged that he would pardon those convicted. State senator, Free Soil governor candidate, and future Michigan Supreme Court Justice I. P. Christiancy thought such a pardon would bring about “an evil day for Michigan.”

The underlying dispute concerned residents’ grazing privileges. Farmers claimed traditional open-range rights over the lands the lines travelled. If the railroads wished to limit grazing on their lines, the railroad should fence the land. John D. Pierce, the intellectual force behind Michigan’s innovative public school and university system, agreed: “No heathen altar ever smoked more continually with the blood of its victims” than did the roads of the Michigan Central. He continued, protesting that the rail lines “force their way through our farms, leaving our fields, meadows and pastures all open as commons, and yet we are the trespassers if our stock pass over the road from their high-mightiness, and liable to them for damages. The road must be fenced, in the meantime, something near the value of the property destroyed must be

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485 Letter from I.P. Christiancy to Thomas Cooley, October 23, 1851, box 6, Thomas M. Cooley Papers, Michigan Historical Collections, Bentley Historical Library, University of Michigan, Ann Arbor. At this time, Cooley was an associate editor of Watchtower, a radical Free Soiler, and a support of Christiancy’s candidacy. Jones, Constitutional Conservatism: 52. There is little more from the time to suggest Cooley’s thoughts concerning the upheavals over public versus private property rights.
paid.” On the other hand, rail owners thought their land private, and not a public common or highway. Accordingly, the cattle and horses grazing on the tracks were trespassers against which the railroad owed no duty. Traditions were changing rapidly; so rapidly in fact that by 1851, the Michigan Supreme Court would declare the idea that horses and cattle could graze on lands now owned by the railroad as “absurd – preposterous in the extreme.” Private industry owned the property surrounding the line and was entitled to protection from customs that had been a central understanding of the earlier agricultural world.  

Feelings of helplessness in the face of absentee owners fueled resident dissatisfaction.

With state ownership, residents held a voice. With absentee owners, they carried little sway.

Even as late as 1877, inhabitants complained about the futility of dealing with agents rather than owners of rail lines. The editor of the Osceola Outline expressed his community’s frustration with distant rail owners who, “having no interest whatever in the State’s welfare further than will put money in their pockets, the people somehow have got the idea that a nest of tarantulas in the shape of eastern capitalists have spun their iron webs across the country in all directions and then slipped back into their holes in the Eastern cities to lie in wait for the flies to come in.”

Popular response spanned from resignation to violence. Rail was changing their lives in wonderful but often frustrating ways.

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487 *Williams v Michigan Central*, 2 Mich. 259, 264 (1851). Adopting a contrary position, Cooley favorably cited Vermont’s *Thorpe v Rutland & Burlington RR*, (27 Vt. 149 (1854)) on this issue. That case addressed whether the legislature in 1849 could require that chartered rail corporations install fences along their lines and be held liable for livestock injured on those line. The court held that such a law did not violate the Contract Clause and that there was “no manner of doubt that the legislature may, if they deem the public good requires it, pass such a law.” Cooley continued, stating that fencing laws were a “reasonable provision for the protection of domestic animals,” and “as essential to the protection of persons being transported in railway carriages.” Thomas McIntyre Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union* (Boston: Little, Brown, 1868). 547-76, ft n 2, 579.
488 Quoted in Elliott, *When the Railroad was King*: 48.
A footnote to the rail story is the chronicle of Michigan’s entry into and withdrawal from the salt processing industry. As part of its petition for statehood, the drafting convention requested ownership of the territory’s salt springs. Congress awarded the state six salt springs along with attached lands. As mentioned, the Internal Improvements Act of 1837 provided for government development of a portion of the state’s salt resources, and starting in 1838, Michigan began developing those resources. After much legislation and numerous efforts to commercially extract and commercialize the salt, Governor Barry in 1844, threw up his hands, declaring that the “immediate prospect of manufacturing salt extensively and with a profit is by no means flattering.” Accordingly, he suggested, “that no further expenditures be made on the state owned and operated salt project.” The legislature soon passed a resolution requesting that Michigan’s congressional delegation seek federal approval for the sale of the lands granted upon the admission of the state into the Union.

Government efforts did not stop when ownership ended. After selling off the assets and getting out of the business, in 1859 the legislature decided to encourage the salt industry. It determined that the state should pay a 10 cents per bushel bounty for extracted salt, and to forego taxation on the associated manufacturing property. At first, the legislation called for a bounty of 10 cent per barrel (a larger unit of measure. There are 3 bushels to the barrel). A senator thought the bounty idea so outrageous that he suggested that the state pay by the smaller measure of a bushel. To his surprise, his sarcastically drawn proposal passed and was signed into law.

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5 Stats.: 59.
490 Parks, Democracy's Railroads: 145.
A few years later, in 1861, believing that the “appropriate encouragement [of salt manufacturing] is wise,” Governor Blair expressed concern that the bounty covered 100% of all manufacturing costs and was therefore excessive.\(^{494}\) In response, the legislature cut the bounty by two-thirds. The state then paid the salt companies according to the lower rate, even for the period between the first statute and the statute reducing the payment. Litigation ensued. In a one-sentence ruling, the court found that the East Saginaw Salt Manufacturing Company had a vested right in the higher bounty for the period before the legislative adjustment and that the state could not retroactively divest that right.\(^{495}\) The court discussed no constitutional concern over the legislature’s power to offer a bounty. In itself, the state salt efforts and the case concerning vested rights to state payments are not particularly novel. However, the issue would rise again when the Michigan courts would modify understandings of the constitutional blueprint. In that later period, courts would deem similar bounties beyond legislative power, and would declare unconstitutional previous traditional government activities.

Thomas Cooley led those redrafting efforts, and he was joined by his judicial brother, James Campbell. When authoring his *Outlines of the Political History of Michigan*, Campbell declared that these types of investments, in the form of “bounties and loans to encourage new branches of industry were not extravagant,” and were “probably well invested, even where the object did not succeed.” He discussed two of those investments, silk manufacturing, and private poor houses. The state had invested in silk raising and the associated mulberry tree development.\(^{496}\) (It was one of at least nine states that did so in the 1830s and 40s.)\(^{497}\) That


\(^{495}\) *East Saginaw Salt Manufacturing v State*, 9 Mich. 327 (1861)

\(^{496}\) In 1831, the Michigan Legislative Council petitioned Congress to assist in developing a silk industry. The council submitted, “In whatever country the culture & manufacture of silk has been successfully carried on, the general government has lent its fostering aid to the business, both in its commencement, and in its further progress.” It asked for “four townships of land” to be placed under the governor and council’s care, to be used for the
investment failed. The state also donated moneys to Reverend Martin Kundig to support his ministrations to cholera sufferers. With the funds, he “made a poor-house a charming place of resort for visitors.” Campbell did not object to those expenditures, in large measure because they provided seed money for the introduction of new industries and methods. His objection, at least as reflected in his Political History, concerned the pragmatic challenges associated only with extensive government investments. Massive railroad assistance was objectionable. Silkworm-raising grants, salt and sugar bounties, and indigent relief were not. But, as will be discussed in Chapter VI, the stated constitutional principles espoused by those advancing a negative governance model did not allow for pragmatic lines between effective experimentation and significant government involvement. However, a deeper consideration reveals that such experimentation may have been permissible, at least to Cooley.

Judicial Responses to Regulation and Government Spending.

Up until 1850, the Michigan Supreme Court’s record is largely silent about the legality of employing public resources to develop private industry and the nature and breadth of the constitution’s requirements concerning internal improvements. To some extent, that silence may have been the result of an incomplete historical record, as the court did not publish its opinions in the Territorial Papers of the United States: XI: 245-46. 

Although Campbell’s historical writing suggest that such government-aided experimentation is optimal, his constitutional writings sought to allow the opposite. Campbell would reject his own pragmatic approach when he argued that even small amounts of taxation to support a private enterprise violated constitutional law as, “the amount of property taken against [the taxpayer’s] will cannot make any difference in the principle.” People v Township of Salem, 495. The Michigan Supreme Court later would employ that language to reject Campbell’s non-judicially voiced, pragmatic approach, and did so in an industry for which Campbell argued government support was appropriate – agriculture. Michigan Sugar Co. v Auditor General, 142 Mich. 674, 681 (1900).
before 1843. The court’s probable position, however, can be gleaned from its later related holdings, which suggest that the court would have sustained legislative initiatives and rejected challenges to energetic governance and the reallocation of tax dollars to support private or public industry.

Most of the cases coming before the early Supreme Court were of minor legal significance and, in those cases of larger significance, the court conservatively followed the precedent of other jurisdictions. It is unlikely that the court would have taken issue with continued government support and regulation of industry, as that was the historic norm. There were some exceptions, however. At times, the court would eschew the mechanical application of law to fact in order to advance perceived community and commercial-development needs.

In facilitating community, the surviving court opinions suggest a court inclined to support regulations and to limit what it considered the corrosive influences of individual rights claims when those claims threatened to undermine the community. Some of the controversies concerned regulations born of the land-planning efforts associated with the 1805 fire. In response to the fire, the city drew up plans for roads, highways, and buildings. Over the years, it modified those plans but never abandoned the object to regulate the city’s design. In early 1844, William Carpenter constructed stairs adjoining his building on Woodward Avenue in Detroit. The city claimed those stairs infringed on the public highway and were a nuisance. Much of the Supreme Court’s review of the case concerned legal nuisance standards but the

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502 The city revised its planning ordinance in 1815, 1836, and in 1842, but each time it set forth space and content restriction of private property and the individual’s access to abutting public property. See, John W. Reps, "Planning in the Wilderness: Detroit, 1805-1830," The Town Planning Review 25, no. 4 (1955). for a more complete discussion about Detroit's earlier planning challenges.
court’s dicta in *People v Carpenter* opened a window into its interpretation of rights in mid-nineteenth century Michigan. Writing for the court, Chief Justice Charles Whipple submitted that both individuals and the community held rights with which government could not interfere. He then took a further step, arguing that the legislature was “to some extent the guardian of those rights,” and that it had an affirmative “duty to employ all the powers” to protect them. In this case, however, individual and community rights clashed. In response, Whipple argued government must protect the community against individual intrusions. It was government’s obligation to “remedy the mischiefs that have grown up under a course of legislation by which the rights of the public have been made subservient to the convenience or cupidity of individuals.”503 While individual rights were important, they should not defeat community rights. Accordingly, it was government’s affirmative obligation to protect the collective interest from the individual.504 The court’s fear that individual rights claims would eclipse collective needs was very similar to Mason’s 1838 concern that there was an “all absorbing desire lurking in the heart of man to aggrandize self and promote private ends; which is too apt to forget country, and which, if indulged and encouraged, must prove the undoubted cause of a premature national degeneracy.”505 Voicing thoughts that are foreign to today’s neo-liberal, individualistic philosophy, mid-nineteenth century leaders often held to notions of collective rights and needs, protected and fostered by government action.

Whipple applied his rights theory beyond public spaces. As mentioned in Chapter II, one of the first regulations promulgated by Detroit’s legislature involved the creation of a central market. The 1839 case of *Henretty v Detroit* addressed the city’s right to punish meat sellers that

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did not lease stalls from the market. Unfortunately, the majority opinion in the case is lost, but Whipple’s dissent survives. His dissent makes clear that the majority had affirmed Henretty’s conviction for violating the central market law. Whipple dissented, arguing that Henretty should not be liable for the violations because the ordinance was void for being unreasonable and in restraint of trade. He acknowledged the public’s health and convenience interests associated with the public market, but believed the regulation gave too much power to city government, created a monopoly, and divested choices from buyers. In sum, the central-market ordinance unreasonably “puts the whole community in the power of the few.” While his opinion focused on individual rights, Whipple’s logic was not about hampering an individual’s trade-related property or contract rights. Instead, it was about impeding consumer choice and convenience. Accordingly, the ordinance was “manifestly unreasonable and not for the common benefit: It being essential to the validity of a by law that it should be reasonable, and for the common benefit – not for the benefit of the few.” Whipple would force traders to operate in the market, but would not require they rent a stall from the city. It is hard to draw too great a conclusion here, as Whipple’s opinion was in dissent and we do not know the basis of the court’s argument. Notwithstanding that, it is interesting that Whipple would invalidate legislation based not on the encumbrances to the individual but rather on how those encumbrances undermined public rights. Simply put, democracy required that government provide equal access to all and that the best way to protect the public interest was for government to provide an open marketplace not restrained by monopolizing influences.

In speaking for the court a few years later, Whipple expanded on that philosophy in Godfroy v Brooks. In that case, the court rejected common-law dower standards that would have required a surviving spouse to maintain wooded land as she had received it. To the common

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506 Henretty v Detroit, 1839 WL 3475 (Mich), Blume Unrep. Op. 36 (1839). (Emphasis in original.)
law, clearing woodlands was “waste,” and that was something forbidden during a life estate. To the court, that rule made no sense in Michigan because, “Here the hand of industry has been at work leveling the forest and reclaiming the wilderness.” “By clearing the land of its surplus timber and converting it into a beautiful farm,” the surviving spouse enhanced the estate and helped drive commercial development. General welfare needs – society’s interest in advancing commerce – resulted in an elevation of the current owner’s rights over that of future owners. Public needs had changed the balance from the common-law standard that maintained the rights of future heirs to one where law supported current owners and immediate economic development. When established law encumbered commercial development, as it did here, the court adjusted its reading of that law.

To Whipple law should promote economic energy. The legislature could not exclude people from the market, time-honored waste and dower principles could not forestall economic development, and individuals could not stand in the way of community development. Underlying all three cases was a drive to enhance the public interest. Whipple either spent little ink on private rights or warned that those rights could not be used to defeat public needs. Development interests drove the court’s thinking and it changed the law to facilitate current use and community development. The focus was on group progress. And this was the drive of the courts, the legislature, and the executive. In short, it was a governing philosophy.

507 Godfrey v Brooks, quoted in Campbell, Administrator of Clark, 2 Doug. 141, 144 (1845). Original case missing but noted in Blume’s Unreported Opinions of the Michigan Supreme Court.
508 Horwitz argued that American modifications of common-law waste doctrines were part of judicial efforts to treat land as a commodity and to free it from social controls. By doing so, land could be employed for the nation’s economic development. Horwitz, The Transformation of American Law, 1780-1860: 54-58. Jedediah Purdy argued, “U.S. courts refashioned the English law of waste for several reasons: to promote efficient use of resources that the English law would have inhibited; to advance an idea of American landholding as a republican enterprise, free of feudal hierarchy; and because of a belief that the cultivation of wild land underlay the Anglo-American claim to North America.” Jedediah Purdy, The Meaning of Property: Freedom, Community, and Legal Imagination (New Haven: Yale University Press, 2010). 46.
Considerations of group needs predominated in early Michigan but they did not drown out considerations of individual rights, particularly when government threatened those rights employing criminal law. In two cases, again written by Whipple, the Supreme Court voided sections of Detroit’s ordinance for improperly restricting individual rights. Both cases, *Slaughter v People* and *Welch v Stowell*, dealt with Detroit’s efforts to suppress houses of ill fame.\(^{509}\) The only surviving record of *Slaughter* is its republication as a footnote in *Welch*. From it we learn that the Detroit Mayor’s Court convicted John Slaughter for keeping a house of ill fame in violation of a Detroit ordinance. Violation of that ordinance subjected the offender to fines or imprisonment. The city brought the matter by complaint, not by presentment to a grand jury. The court found that the action against John Slaughter was criminal in nature and required a constitutionally guaranteed grand jury process. Accordingly, it struck down Slaughter’s conviction on procedural grounds. However, its dicta went further, offering a glimpse perhaps of the increasing importance of individual liberties. In discussing the 1835 mindset of the framers of the Michigan constitution, Whipple offered, “In the most modern of the Constitutions of the states of the Union, there is a manifest inclination, not merely to enlarge but to guard with great strictness the liberty of the citizen.” In sympathy with that policy, Whipple declared that the Detroit ordinance was “repugnant to all notions which we have formed of the nature of institutions under which we live.” To Whipple and his brethren, procedural guarantees of individual rights and freedoms must be honored, and the courts were to actively protect those rights.

Whereas *Slaughter* dealt with the rights of the individual’s body, *Welch* dealt with the individual’s property. In that case, Whipple considered the limitation on the Detroit City Council’s power to “pull down or remove” the bawdy house itself. To further its efforts to limit

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\(^{509}\) *People v Slaughter*, 1842 WL 4554 (1842); *Welch v Stowell*, 2 Doug. 332 (1846).
red-light district challenges, the council provided that the city could destroy the involved property in addition to criminally prosecuting offending individuals. Their target was Elizabeth “Peggy” Welch, a “notorious character and an offense to the neighborhood in which she resided.” The court was uncomfortable with this “new and unusual remedy” of property destruction and, accordingly, sought to interpret narrowly the ordinance and the state’s empowering legislation. “We think the act of the legislature,” Whipple wrote, “should receive a more reasonable construction – a construction which will protect, as well the public against the evil complained of, as the rights of property, which should be held sacred.” One might double take at the court’s characterization of a bawdy house as “sacred” but there is more here than an unfortunate use of terms. The court’s language is emblematic of a growing attention to the rights of property. Because of the concern for private property rights, Detroit could fine and imprison those engaged in prostitution (subject to guaranteed procedural protections) but the house itself – the property – could not be destroyed, at least given the summary proceedings set forth in the statute. If the house were a nuisance threatening immediate and continuing harm (as with a house containing cholera, for example), the summary proceedings, and the property’s destruction, would be appropriate. Without that danger, the protection of individual property rights required more significant judicial process. Peggy Welch’s house of ill repute should remain untouched.

The tension between the government’s obligation to regulate in support of public welfare and the individual’s right to property again presented itself in 1863 in *Brady v Northwest Insurance*. In its effort to protect against fire, the Detroit City Council restricted the construction of wood buildings in certain areas of the city. As part of that restriction, it forbade the repair of

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“any wooden building partially destroyed by fire.” Samuel Brady, the owner of a warehouse affected by the ordinance, sought recovery on his insurance policy for the full value of his building after extensive fire damage. His insurer, Northwestern Insurance, sought to pay a lesser amount, based upon the cost of repairing the building to its previous state. To do so would require rebuilding a wood structure, in violation of the ordinance. The majority of the court considered the insurance contract in light of the regulation and determined that Northwestern must compensate Brady for the larger amount.

Justice Campbell disagreed. Campbell asserted the city had no power to require owners (or insurance carriers) of wood buildings to repair those buildings in forms safer than they were before the ordinance. The city could regulate the construction of future buildings but it could not do so with existing structures “without violating the rights of private property.” Campbell employed the underlying property-protecting principles of *Welch v Stowell* (the house of ill-repute case) and *Williams v Michigan Central* (cattle on the tracks) to support his legal position.\(^{511}\) To Campbell, those cases emphasized the importance of protecting property against intrusion – governmental or otherwise. Cooley, who would soon join Campbell on the Court, would cite *Brady*’s majority opinion as reflecting the state of the law, but he did so a bit sardonically. Cooley wrote, “The establishment of limits within the denser portions of cities and villages, within which buildings constructed of inflammable materials shall not be erected or repaired, may also, in some cases, be equivalent to a destruction of private property; but regulations for this purpose have been sustained notwithstanding this result.”\(^{512}\) Campbell’s opinion was contrary to the then legal standards although, perhaps, not against the coming wave of property-protecting jurisprudence.

\(^{511}\) *Brady v Northwestern Insurance*, 11 425(1863).
\(^{512}\) Cooley, *Constitutional Limitations*: 595.
It should not surprise that mid-nineteenth century Michigan law both argued for the protection of the public interest as against the individual and for the individual interest against the public. The Panic of 1837 undermined a faith in government. On the national side, President Martin Van Buren furnished no relief. Instead, he explained that the public could expect a “strict economy and frugality” and, in a statement that would be equally at home in the gilded age, he cautioned not “to substitute for republican simplicity and economical habits a sticky appetite for effeminate indulgence.”

While such a message might seem quite harsh to those Michigan inhabitants who lost dearly from a spate of bank defaults, collapsed farm prices, and a failed internal-improvements program, government intervention may not have seemed a panacea. The state had defaulted on loans and repudiated some principle obligations. By mid-century, political forces differed, with one group arguing for an expanded market economy while the other envisioned a more cooperative social structure. As Martin Hershock noted in his study of nineteenth century Michigan, Michiganders were frightened and began to strike out “at the potential threat of unbridled economic and social change. . . For some, the pace of change was too fast; for others it was not fast enough. Yet in the early 1850s, most state residents agreed that their freedom was imperiled.”

The political and economic climate was uncertain, and individuals in part looked to government as both the cause and the cure of their distress.

Perhaps because of its constitutional requirement to support industry or because of the Michigan’s system of state ownership, legal challenges to the use of an individual’s tax dollars to support infrastructure were not considered (or at least there is no record of such consideration) by the Michigan Supreme Court. Other state Supreme Courts, however, were beginning to hear complaints that the legislature could not mandate transfers from taxpayers to private

infrastructure companies. Early court decisions on this issue rejected those complaints. Such transfers were within the legislature’s mission to enhance the general welfare. Similarly, legislatures could extensively regulate, to the same end. After all, the decision as to what constituted support of the general welfare resided in the people’s representatives – the legislature. As government involvement in industry increased, and tax burdens and regulations threatened to proliferate, courts increasingly considered the “rights” of individuals to be free of such majority-approved burdens. That argument is the story of Chapter V. Before we turn to those issues, however, this work addresses how Michigan’s residents attempted to reign in legislative excesses while maintaining a faith in representative democracy. The challenges those efforts engendered would help pave the road to Cooley and its associated judicial activism.
Chapter IV: Refocusing and Shifting Governmental Responsibilities

“Constitutions and laws, usually placed as permanent landmarks on the civil estate, appear and disappear like species in the organic world. Even our constitutions of government prove the law of evolution.”

Francis Newton Thorpe, (1898)
“A Constitutional History of the American People,”
1898

In the summer of 1850, one hundred delegates from across Michigan travelled to Lansing, the new state capital, to draft an entirely new state constitution. This dedicated group travelled on paths more akin to Indian trails than to developed roads. Lansing was not yet a city (that happened in 1859), but was a town carved out of the wilderness. Three years before, the town – then called the “Village of Michigan,” – was a sparsely inhabited woodland. In 1847, lumbermen and construction workers started burning trees and brush to make way for the capitol. Visitors knew they were approaching the area when they saw the smoke from the fires during the day and the glow of the bonfires at night.515

The construction efforts were emblematic of the state’s drive for constitutional change. The 1849 House Select Committee recommending a constitutional convention did so in celebration of the state’s march to social progress. It listed the state’s goals as “a continual tendency to improvement in every land, to better systems of government; to better practice under those systems, to increase in physical well being, to more enlightenment in morals, more cultivation of intellect, to improved and therefore more beneficial social arrangement, effecting a more equitable distribution of labor, possession and enjoyment.”516 To the committee, government was to facilitate social and individual progress, and when that required that the

515 Birt Darling, City in the Forest; the Story of Lansing (New York: Stratford House, 1950), 32, 79.
system of government change, constitutional change was appropriate. Importantly, the committee did not perceive government as an impediment to individual progress. Instead, government and the individual shared a symbiotic relationship, whereby government was to release Hurst’s energy to facilitate individual and social advancement. It was all about progress.

The delegates represented a cross section of Michigan’s population. Almost half (48) were farmers, with the rest including lawyers, merchants, doctors, and millers. Only one was a native Michigander, with most originating from New York (43) and New England (38). By August 15, they had agreed upon a new constitution that diffused governmental power by stripping the state’s executive and legislature of much of their authority and placing that power with local government and directly elected special-purpose bodies. Some, including many who attended, argued that their proposed constitution limited government and curtailed tax burdens. This was an often-voiced intention. Despite that purpose, those characterizations missed the mark as the delegates shifted powers but did not diminish “government.” Their new constitutional blueprint curtailed some activity, expanded others, and repositioned much. In the end, it allowed for, and even facilitated, active government.

In its aftermath, local governments assumed activities previously directed by the state, and the state moved its focus from the economic to the social. As Francis Newton Thorpe noted, “The experience of fifteen years had proved that power might be safely exercised by the people in local government and it was now proposed to leave a large share of power in the counties and townships.” To accomplish that, the constitution was the first in the nation to require township governance. It required a township supervisor, highway commissioner, treasurer, school inspector, and constables. Even as the framers stripped the legislature of oversight and

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appointment powers, they granted many of those powers to directly elected officials. Instead of government withdrawing, it restructured, refocused, and reassessed areas of concern and responsibility. Even then, in practice, the legislature refused to yield reallocated powers and the people’s representatives would work around constitutional barriers to press the public’s agenda.

It would be a mistake to understate the delegates’ spirit for limiting government and government spending. Delegate William Norton MacLeod of Mackinac County captured the concerns over the needed government changes: “The inhibitions of the [1835] constitution were so scant, general and easy to be avoided that they served for no other purpose than as so many beacon-lights to warn of the quicksand and the shoals, without imposing a single restraint upon the free-roaming sea.”

The convention was a response to the challenges associated with majoritarian legislation, most significantly the state’s rail experiences. The delegates worked under the belief that the 1835 constitution had failed to check excessive public and legislative exuberance. The resulting debt and embarrassments were legacies against which the delegates sought to protect.

Even minor concerns over spending animated convention debates. The convention’s first dispute concerned hiring a doorkeeper to help clean the meeting room and the convention’s authority to buy stationery and pens. With the opening of the convention, Delegate Henry Fralick argued that he and his fellow delegates “had been elected here because taxes are too high,” and that the convention could only spend according to specific authority, which certainly

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518 Hershock pointed out that such attitudes were the norm and that participants from both the Whig and Democratic parties believed that the state “suffered from an excess and perhaps an abuse of legislation.” The Democrats, the majority party, felt strongly that the “enticements of a booming market, dangled like candy before the eyes of the infant state, had driven Michigan to enact a series of reckless and dangerous laws... bringing citizens and state “to the brink of economic, social, and political ruin” Hershock, The Paradox of Progress: 24, 16, 30. See also, Jones, Constitutional Conservatism: 43-45.
did not allow for custodial services or pens and paper.\textsuperscript{519} The delegates rejected his position on those minor expenditures, but did not reject his message.\textsuperscript{520} To control taxation and to forestall profligate spending, the delegates would draft a constitution that, among other things, would provide for biennial legislative sessions, protect against earmarks, forbid special corporations, dramatically reduce allowed state debt, and prohibit state internal improvement expenditures and pledges of the state’s credit. It constitutionally created township governance and separated control of the state university from the legislature and governor.\textsuperscript{521} The constitution removed much of the legislature’s power to spend to advance economic development. With its previous major focus diverted, the state legislature turned its sights on social concerns, and did so in ways that would challenge the state’s new constitutional structure.

This chapter focuses on one of the legislature’s social efforts – education. Particularly in the area of university education, Michigan pioneered state efforts. Cooley participated in the controversy over the implementation of the state’s higher education policy and participated in the struggle over legislative activism in a realm seeming carved from legislative control. The development of education policy thus was an important chapter in the development of Cooley’s legislative-limiting philosophy. By focusing on education, I do not mean to argue that other

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\textsuperscript{519} \textit{Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan.1850:} 3. Fralick was a merchant from Plymouth, Michigan. Fralick’s objections were not merely the stuff of nitpicks. In recommending the convention, the House Special Committee also expressed concern about the cost of a convention in the atmosphere where “no expenditure should be allowed, but such as necessity demands.” The committee noted “the only objection which seems possible to be raised to the call of a convention, is the expense attendant thereon.” Report of the Select Committee on the propriety of calling a convention to revise the constitution of this State, 1849 “Documents Accompanying the Journal of the House of Representatives,” Doc 13: 55.

\textsuperscript{520} The convention discussion reflected disparate views on governance, by party and by region, but in the end, most agreed that the state required restrictions on legislative power. As the Special Committee on Revisions to the constitution agreed, “it will be found that nearly all [of the problems facing the state government] have their origin in the undue exercise of legislative power.” Report of the Special Committee on the General Revision of the State Constitution, Doc 10, 1849, “Documents Accompanying the Journal of the Senate of the State of Michigan,” 48.

\textsuperscript{521} Hershock argued that the change to biennial sessions and single district representation were at the heart of the framers wish to avoid government by “demagogues, politicians, and lobbyist, men who disregarded the common weal and used their positions to benefit private interests.” Hershock, “To Shield a Bleeding Humanity: Conflict and Consensus in Mid-Nineteenth Century Michigan Political Culture,” 36-37.
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social concerns were unimportant or that they did not influence Cooley. To the contrary, areas such as temperance, capital punishment, and race relations were also important and deserve attention in future works, but only temperance is addressed in this work, and then only in limited measure. That discussion is in Chapter V.

The delegates at the 1850 convention believed that free public education advanced not only individual interests, but also provided a bedrock for democratic governance, economic development, and social peace. To the delegates, free education both advanced and was a symbol of equality, where the “barefoot urchin” and the “most fortunate heir” could stand as equals. State controlled university education would elevate those of applied merit (as opposed to inherited position) and promised to advance the entire state economically and socially. To do that, the new constitution sought to wrest control of the University of Michigan (“the University”), one of the nation’s first public universities, from the politics-infused state legislature, and place it under the control of a directly elected board of regents. Michigan was the first state to place constitutional authority over higher education in a board free from legislative control – essentially establishing the University as a fourth branch of government. As it would turn out, however, the legislature refused to leave the field, and tried to push its agenda against a resistant faculty and board of regents. The legislature was responding to public pressures, something against which the constitutional framework sought to protect. After years of struggle between the branches, the constitutional framework would buckle in response to legislative power and popular demands.

Limiting the Legislature – Michigan’s 1850 Constitution

James Bryce, in his *The American Commonwealth*, noted that American state constitutions, particularly in the mid-nineteenth century, did more than create governing frameworks. They pursued “topics into a minute detail hardly to be looked for in a fundamental document.”523 Constitutions took on this legislation-like characteristic in an effort to avoid the earlier challenges associated with government support of commerce, and internal improvements in particular. Michigan’s 1850 constitutional convention was part of this multi-state trend to restrict the perceived legislative overreaching of the 1830s and 40s. As Larson noted, even in New York, the state with the highly successful Erie Canal, the state began “sliding steadily away from its public works tradition toward a liberal separation of government power and private enterprise.”524 Hurst noted, “Soon repenting the broad authority given the legislative branch in our earliest state constitutions, substantial interests pressed successfully for limitations written into constitutional form.”525 An Ohio constitutional delegate encapsulated the feelings of the period: “I wish to see the State government brought back to its simple and appropriate functions, [leaving] railroad, canal, turnpike and other corporate associations, to get along upon their own credit without any connection or partnership with the State whatever.”526 Where earlier constitutional structures granted legislators broad discretion, in mid-century the “peoples of the

525 Hurst continued the sentence by adding “and supported the courts’ authority to enforce the superiority of constitution over statute.” Hurst, *Law and the Conditions of Freedom*: 24. In combining the constitutional framing changes with court restrictions, Hurst may have mischaracterized the events as contemporaneous. They were not. Until about 1870, court majorities largely rebuffed litigant arguments that constitutional language sheltered them from state legislative limits. In about 1870, the move toward separation of public and private spheres merged with minority court doctrines to mold new constitutional norms restricting legislative regulations and spending. This discussion is the providence of Chapters V and VI.
States have come to distrust their respective legislatures.” Hence mid-century framers across the states would not chance future legislative excess and decided “to narrow as far as they conveniently can (and sometimes farther) the sphere of the legislature.”

Michigan’s 1850 constitution would adopt the same narrowing focus as did that of its sister states. Michigan Justice Campbell (during whose tenure the 1850 Constitution applied) critiqued the constitution by offering “The most unpleasant features were a too great attention to details in grants and limitations of power, which have on some occasions endangered the public welfare for lack of discretionary authority in the Legislature.” Almost incongruently given his later legislative-limiting judicial philosophy, Campbell continued, “But a thing which struck many persons unpleasantly was the number of provisions which seem to indicate that it was supposed the people could not trust their agents and representatives.” The agents and representatives to whom he referred were the legislators and governor. It was not that the delegates rejected representative governance. To the contrary, they attempted to reframe it to avoid what they believed was self-interest, greed, and the challenges of more distant and unconnected legislators. In their efforts to facilitate representative governance, they increased the number of elected representatives, as judges, regents, and departmental leaders now were directly elected. So far had the convention’s direct-election philosophy been pushed that one delegate sarcastically moved that the constitution require direct election of university faculty.

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527 Bryce, *The American Commonwealth*: I: 427-28. Wallis quoted “Mr. Read” in the Indiana 1850 constitutional convention reflecting, “Look, sir, to the other States. State after State has called Conventions to reform their Constitutions. All around us Constitutional Conventions are in sessions, or just about to be in session. If there is a single cause more than any other, which has produced this general movement, it is the desire, on the part of the people, to cut themselves off from themselves and their representatives this power of creating public debt.” See also, Wallis, "Constitutions, Corporations, and Corruption," 235-36.


Limiting the Michigan legislatures’ authority decidedly flowed from the challenges associated with government rail ownership. Governor Ransom suggested that a quasi-constitutional limitation on legislative authority had occurred in 1846 with the privatization of the rail lines. In response to legislation that would, in effect, grant further credit to the privatized Southern railroad, Ransom protested that such acts were “entirely at war with the policy adopted in 1846, when our public works were sold, which received the undivided approval of the people.”530 The legislature, governor, and most importantly, “the people” had instituted a new governing policy. Ransom argued for limiting legislative authority to aid infrastructure, notwithstanding then applicable constitutional language requiring that the state develop internal improvements. To Ransom, circumstances and public acclaim had both supplanted constitutional requirements and placed implied limitations on legislative power. Whether he felt those forces changed the constitution itself, or were extra-constitutional limitations, is unclear. To Ransom, however, the experiences associated with the state’s rail failure resulted in a limitation on legislative power.

Ransom’s successor, John S. Barry, felt the same way about activist legislatures. A few months prior to the delegates’ 1850 journey to Lansing, Barry set the tone for the upcoming convention by chastising the legislature. “Excessive and unwise legislation has, perhaps more than any other cause, retarded the prosperity of the State; and protracted sessions of the legislature have caused a great and wasteful expenditure of public money.” Claiming a “progress made in the science of legislation,” Barry furnished his solution – constitutionally limiting legislative power. He then ended his address by telling the legislators that the state required “only a short sacrifice” of their time, as Michigan required little new legislation. Pass a

530 Ransom made these statements in his veto of legislation extending the time for the Southern Railroad to pay its obligations for purchasing the line from the state. Ransom, March 13, 1849, Messages of the Governors of Michigan: II: 152.
few pieces of legislation and go home. Barry was expressing what many felt: the legislature threatened state advancement. In Michigan’s short history, its professed governing philosophy had traveled from a desire “to meet any public demands which may be necessary”\(^{531}\) to a feeling that government hindered progress.

The formal change of constitutional structures had begun on March 12, 1849 with a legislative joint resolution supporting a vote to approve a constitutional convention. With the electorate’s overwhelming approval (33,193 yeas and 4,095 nays), the convention met in July 1850. Its records evidence an overwhelming distrust of the legislature and a commitment to avoid the perceived mistakes associated with government involvement in the economy (internal improvements, special corporate charters, and lending of credit, for example). According to Cooley, the 1848 European Revolutions also contributed to the distrust of the legislature.\(^{532}\) He offered that, “radicalism was in the air the world over, and discontent with existing institutions was rife in every civilized country.” He noted that, “everywhere the aspiration of the people was for greater liberty and more privileges to the individual and less power to the rulers.”\(^{533}\) In some measure, Cooley’s statement evidenced a belief that power was a zero-sum game: Grant power to the government and thereby take it from the people.

The infectious ideas about American state excesses and European revolutionary liberty animated Americans’ thoughts about their government. In response to historic domestic challenges and the seeping ideas of individualism, the Michigan drafters proposed, and the voters

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approved (by a margin of 26,736), among other things, biennial legislative sessions, limits on legislator pay, limits on bill introductions, prohibitions on special corporate creation, limits on state debt, prohibitions on state internal improvement participation and, as discussed below, revamping the state’s educational system.

A spirit of liberty and equality underlay much of the discussion and many of the provisions of the constitution. The goal in limiting the legislature was to expand and protect liberty and equal opportunity by averting short-sighted and self-serving legislation.534 The delegates were products of their time and, accordingly, they focused on the liberty and equality interests of adult white males. They failed to afford the same level of concern to African Americans and women (although they expanded married women’s property rights).535 That equality concern played a significant role in the state’s education efforts, particularly with respect to primary school education. As later chapters will address, those equality concerns would join with bubbling liberty and rights concerns to help forge judicial doctrines that sought to limit what the courts construed as legislative overreaching.

535 Michigan’s government began formally to address the issue of black equality in 1846 in response to a petition by a group of black men for the right to vote. Michigan’s Senate Judiciary Committee responded to their petition by justifying an exclusionary status quo: “Our government is formed by, and for the benefit of, and to be controlled by, the descendants of European nations, as contradistinguished from all other persons.” In a philosophical throwback to British virtual representation arguments, the senators promised legislators would protect disenfranchised residents. “The humane and liberal policy of our government at the same time, extends its protection to the persons and property of every human being within its limits, irrespective of color, descent, or national character.” Interestingly, the committee recognized that the petitioning black residents were “some of the most worthy and respectable citizens of this state,” thereby acknowledging a citizen status that Taney would later reject. Report of the Judiciary Committee on the Amendment of the Constitution, so as to extend the Elective Franchise, Senate Doc 12, 1846 “Joint Documents of the State of Michigan,” (Lansing: John A Kerr & Co.), 1-2.

Senator Austin Blair, Michigan’s governor from 1861-1865, submitted a minority report arguing that blacks should have the same right to vote as “[a]ny other conclusion is deemed to be directly at war with the very spirit of our republican institutions, based as they are upon a doctrine that a perfect equality of rights, both civil and political, is the birthright of every man of whatever name or color or nation.” Report of A. Blair from the Committee on the Judiciary, upon the subject of the extension of the right of suffrage to colored persons. House Doc #12, 1846 ibid., 1.

The reports evidence a difference over who is included and who is excluded, and that is significant. Nevertheless, both agreed: equality was a governing principle for Michigan governance.
The Rise of Public Education in Michigan

The previous chapter discussed early Michigan efforts to develop and support the state’s internal improvement system. As noted, at first the executive, legislature, and residents felt the transportation system was too important to be left to the hands of private industry. That experiment in government economic control did not pass the test of experience. Notwithstanding that failure, Michigan’s government pressed for government control of one other major sector, and did so with great success – education. Particularly with respect to higher education, Michigan was a national leader in providing education opportunities to its residents. Its successes were not a foregone conclusion. The private sector could provide, and had provided, effective common and higher education in other states. Moreover, Michigan’s politics and economic scarcity erected roadblocks to education advancement. Notwithstanding those early challenges, Michigan would develop a publicly funded and controlled education system, spanning from common school to university.\(^{536}\) Where the notion of public funding and control had died with respect to internal improvements, it thrived in the education sector, as legislators and constitutional framers toiled to advance the general welfare and equality interests of Michigan’s citizens.

Early Education Efforts

Modern general education significantly predated Michigan. As Lee Soltow and Edward Stevens noted in their The Rise of Literacy and the Common Schools in the United States,\(^{536}\) Burns classified the nation’s efforts to publically educate its youth as “an experiment in pure socialism.” Burns, Vineyard of Liberty: 501. Soltow and Stevens explained that the laissez faire education model did not fit society’s needs. Reformers, and with them government leaders, believed common school education could ameliorate the negative impact of rapidly changing demographic, economic, and social change. In essence, they saw the “common school as a means to the acquisition of basic literacy, and as the panacea for social ills.” Given those goals, a laissez faire system of individually financed and controlled education would not work. Lee Soltow, Edward Stevens, The Rise of Literacy and the Common School in the United States: A Socioeconomic Analysis to 1870 (Chicago: University of Chicago Press, 1981). 142.
religious concerns and the associated drives for social control drove early-modern education efforts. In the early American republic “as in Great Britain, the most notable examples” of the rise of literacy for social control “occurred as part of the sweeping missionary activities of evangelical Protestantism.” To those religiously motivated educators, literacy promoted respect for property rights, social stability, crime prevention, and moral development. In the 1820s, the Sunday school situs of instruction began to move to government-supported schools, open to all children in the community; and the central focus of education began to change from religion and morals to nation building, cultural integration, and advancing democratic and economic development.

Universities and common schools are connected. If students are not provided appropriate basic education, few will develop the intellectual basis upon which to address the substance of higher education. That does not mean, however, that public support for these two educational phases aligned, as the argument for public financing differs between common schools and universities. As one delegate at the 1850 convention described it, primary education concerned equality of all people while university education concerned elites. Both systems are addressed here, but particular focus is placed on the University, as Michigan was the leader in public university education. More importantly, the state’s efforts to develop the University exposed the challenges faced when majority will and constitutional structure collide.

In 1850, Michigan took a unique step in developing its educational system. It gave constitutional grounding and independence to its university. While its mechanism of constitutional separation was innovative, the idea that higher education should be separate from political forces was longstanding, going back to the ninth century. According to Lyman Glenny

537  ———, The Rise of Literacy and Common Schools: 11-16.
and Thomas Dalglisht, in most matters medieval universities were left to govern themselves. That space between the university and the governing powers – the church and the state – was a “social fact” premised on the nature of the university, but was not a structural separation. That de facto separation, however, often suffered as church and/or state pressured for control, particularly when they struggled against each other for governing control of their followers.\footnote{Lyman A. Glenny and Thomas K. Dalglisht, \textit{Public Universities, State Agencies, and the Law: Constitutional Autonomy in Decline} (Berkeley: Center for Research and Development in Higher Education, University of California, 1973), 9.}

Notwithstanding the social fact of separation, both the state and church provided support for the development and operation of universities, with great universities in such places as Bologna, Cambridge, Leyden, Oxford, Pavia, and Paris all receiving considerable government and/or church patronage.

During the American colonial period, religiously focused private interests most frequently created and ran the universities. The first, Harvard College, trained Congregationalist and Unitarian clergy as its earliest priorities. Despite its private nature, the college was dependent on public funds. From Harvard’s beginning in 1636, the Massachusetts legislature taxed residents to support the college. The first appropriation of £800 required a tax of one-half dollar on the 4000 Massachusetts inhabitants. The legislature also earmarked ferry incomes to provide funds to the college.\footnote{Wilfred B. Shaw, ed. \textit{The University of Michigan An Encyclopedic Survey}, 4 vols. (Ann Arbor: University of Michigan Press, 1942), I: 3. Most colonies had government supported religions, making clear distinctions between church and state anachronistic.

When the legislature then incorporated the Charles River Bridge Company, it compensated Harvard for future lost ferry-service income by requiring that the bridge company pay £200 annually to Harvard College. Ultimately, that corporate charter would become the focal point of \textit{Charles River Bridge v Warren Bridge}, 37 U.S. 420 (1837).}

Dartmouth College, the subject of John Marshall’s landmark opinion in \textit{Dartmouth College v Woodward}, also enjoyed extensive public support.\footnote{The jury at the trial found that state was a contributor to Dartmouth and, based upon that, New Hampshire’s counsel argued that the state could regulate the college. Marshall’s opinion did not specifically address the public support but instead focused on the nature of the corporate charter. \textit{Dartmouth College v Woodward}, 17 U.S. 518 (1819).} Despite
that support, Marshall expressed a concern that with further influence, politics could corrode the higher education mission of universities. He protested that the legislature had reorganized the university’s governance “in such a manner, as to convert a literary institution moulded according to the will of its founders . . . into a machine entirely subservient to the will of the government.”\(^5\)

With that decision, state efforts to democratize existing private universities ended. In response to that inability, states began to create public universities. In the wake of Dartmouth, the states soon created the Universities of North Carolina, Vermont, Indiana, Alabama, and Michigan. The University of Virginia was created the same year as Dartmouth.\(^5\)

Even as Marshall suggested that public control could undermine higher education, governments were pressing forward to support education on multiple levels. With its first efforts at national governance, the Confederation Congress advanced government support of education. The 1785 “Ordinance for ascertaining the mode of disposing of lands in the western country” set aside lot number 16 in every township in the Northwest Territories to support schools.\(^5\)

The Northwest Ordinance provided “Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged,” a phrase inscribed on a central building at the University.\(^5\) Ten days after

\(^5\) Ib. \(^\text{ibid.}, \text{p.653.}\) One could argue that Marshall pursued a Federalist/elitist position against state efforts to democratize university education. The New Hampshire legislature’s efforts to increase its influence over Dartmouth were part of a larger trend among the states. Feeling that private, secular colleges were aristocratic in nature and represented particular sects rather than the interest of the states’ populations, states attempted to reorganize and modify the private colleges. “It was argued that the colleges were the instrumentalities for moulding the future, that the kind of education given in them must ultimately influence the welfare of the State, and that higher education cannot be regarded as a private matter.” Ellwood Patterson Cubberley, Public Education in the United States: A Study and Interpretation of American Educational History (Boston: Houghton Mifflin Company, 1919), 206. Dartmouth College arose in response to those efforts to expand educational opportunities and curriculum to fit the needs of a wider population than the existing, closely controlled universities furnished.

\(^5\) Ib., Public Education in the United States: 206-07.

\(^5\) Lot 16 was one of thirty-six lots in each township. Lot 16 (like the others) was one square mile and, if all worked as legislated, the government would lease or sell the lot and place the proceeds in a perpetual fund to finance the educational target. The federal and state governments would use this system of financing for a number of years.

\(^5\) The phrase initially was carved into University Hall, a building no longer on the University campus. It is now on Angell Hall. University president, James Burrell Angell, for whom that building is named, said in his June 1887
passage of the Ordinance, Congress provided that lot 16 “be given perpetually for the purpose and maintenance of the public schools within the township.” Washington’s Farewell Address urged the people to promote “as an object of common importance, Institutions for the general diffusion of knowledge.” He then tied education to an enlightened electorate, required for democratic governance. Jefferson, in his Notes on the State of Virginia, sought “to provide an education adapted to the years, to the capacity, and to the condition of everyone, and directed to their freedom and happiness.” He proposed public education from grammar school to the university as a requirement of democratic governance.  

He later voiced, “If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be.”

To early leaders, education was both a requirement for and of American democratic governance.

Aspirations and achievement often diverge, and they did with respect to public education. On the collegiate level, interest group politics were the primary barrier. Strong church-focused organizations controlled higher education in the East. Unable to finance colleges in the South, churches worked to inhibit the development of secular state institutions. Governments in the areas of the Northwest Territories lacked the controls, sophistication, and funding to overcome church concerns over secular institutions of higher learning. “Thus, almost everywhere, active sectarian opposition proved for many years the most effective factor preventing any great degree

Shaw commented, “It is abundantly evident that the social and economic development of the new nation was not sufficiently advanced at first to make immediately effective the liberal program in education advanced by Jefferson and other leaders, although his ideas of a liberal curriculum and the state’s responsibility for an educational program, with opportunities open to all classes of society, had a profound effect and gradually modified and directed the whole trend of higher education.” Shaw, The University of Michigan An Encyclopedic Survey, I: 6-7.

of college and university support by the states.”

Even when government could support universities, throughout most of the Northwest Territories, religious interests pushed those universities to adopt a religious cast. Sectarian pressures certainly played a role in the muted beginnings of the University (and the constitutional decisions of 1850) but Michigan’s early focus on a state-controlled, secular university forestalled many of the denominational challenges that elsewhere undermined the government efforts. As it turned out, Michigan’s biggest encumbrance was funding. Educational plans exceeded financial means.

In 1817, the year the University claims as its founding, Woodward proposed and the governor and judges adopted, “An Act to establish the Catholepistemiad, or University of Michigania.” The act was impractically grand; calling for an educational system led by a university fed by public schools (those schools were referred to as “common schools”).

The system conceived of a centralized educational system directed by a few appointed officials that was to be paid for by a 15% tax increase. Another act in 1821 established the University of Michigan, supplanting the 1817 act. All of the judges and the governor signed the act, except for Woodward. He perhaps preferred the more aristocratic requirements of the Catholepistemiad act. An appointed board of trustees was to control the University. Government had few

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549 Dunbar noted that in Ohio the “development of higher education under state control . . . was hampered greatly by the consistent opposition of denominational colleges as well as the failure to concentrate available resources for the support of a single university” Similar problems challenged Indiana, Illinois, and Wisconsin. Willis Frederick Dunbar, “Public Versus Private Control of Higher Education in Michigan, 1817-1855,” Mississippi Valley Historical Review 22, no. 3 (1935). 385-87, 391.
550 Interestingly, Angell’s 1887 speech, arguing the University founding could go back to the 1787 Ordinance, was part of a semi-centennial event, which advertised the University’s founding as 1837. Today, the University marks its beginning with Woodward’s 1817 statute, in some measure to claim rights as the first public university.
551 Because the governor and judges could only “adopt” laws, the statute claimed to be based on the “States of Connecticut, Massachusetts, New Jersey, New York, Ohio, Pennsylvania and Virginia, as far as necessary and suitable to the circumstances of Michigan.” In short, however, it was based on Jefferson’s vision as set forth in his Notes on the State of Virginia.
resources, the territory had few people, and little was done to implement the statutes.\footnote{In 1818, the Classic Academy of Detroit opened under the University’s auspices. At its peak, the school had 183 students with tuition averaging $2.60 per quarter, adjusted by family income. It stayed open for nine years and later became a private academy. Buley, \textit{The Old Northwest Pioneer Period, 1815-1840}: II: 344-45, 66. Cooley explained that a university building was constructed but “A building and a high-sounding name could not make a university: there must be students competent to receive collegiate instruction, and as of yet there we no such students in the territory.” Cooley, \textit{Michigan: A History of Governments}: 311.} The “actions by the territorial government were, as a matter of fact, little more than stage settings for future educational developments in Michigan.”\footnote{For example, in 1826 Congress passed a measure that would “set apart and reserve from sale out of any of the public lands within the Territory of Michigan . . . a quantity of land not exceeding two entire townships for the use and support of a university.” 4 Stats.: 180.} But they, and a series of territory and national laws that granted lands to endow the University and common schools, led to the first, completely non-sectarian, state-educational system in the nation.\footnote{Cass, November 6, 1826, \textit{Messages of the Governors of Michigan}: I: 28.}

Recognizing that the “wealthy will provide for their own children,” Territory Governor Cass petitioned the legislature in 1826 to develop a publically supported common-school system that would serve “all who require instruction, and who have not the means of obtaining it.” To Cass, free governance required such public action.\footnote{An Act for the establishment of common schools, 1827 "Acts of the Legislative Council of the Territory of Michigan," II: 472.} In 1827, the legislative council responded. It provided that townships of a particular size should provide for common schools, teach certain subjects, and employ instructors of a determined quality and morality. The legislature authorized residents to vote for taxes to build and maintain schoolhouses. Parents of students were to provide wood (called a “fuel tax”) as their fee for attending, although inability to pay would not prohibit a child from attending. The act, however, provided only the structure and rules around education. Its last clause provided “nothing in this act contained shall be construed as to make it obligatory” for a township to construct and operate a school.\footnote{An Act for the establishment of common schools, 1827 "Acts of the Legislative Council of the Territory of Michigan," II: 472.} The law, like many of the time, was grand in design but short in practical application, and it is unclear whether any school was created under it.
A revised law was passed in 1829, but it was unsatisfactory – at least to Cass. Believing that the education law was “too complicated for practical operation,” Cass proposed statewide taxes to support common schools. To him, the “preservation of morals and religion,” and the “cultivation of the heart and intellect” required government action. He believed that informed public opinion and democratic governance relied on universal education.\textsuperscript{557} In 1833, the legislature replaced the 1829 law with a more modest common education requirement.\textsuperscript{558} Even then, public common schools developed slowly. In Detroit, the state’s then capital, the first fully public school was organized in 1838, and then in only one ward. Until 1841, the other wards refused to tax themselves to provide for schools. At that time, about two-thirds of Detroit’s school age children went without any formal education.\textsuperscript{559} Even then, the schools most often still charged tuition to families attending the schools. Buley explained that collecting financial tuition often was difficult. Accordingly, “Three or four raccoon skins, a calf, a barrel of whiskey, or a half-dozen well cured hams were, directly or indirectly, currency of the realm in the marts of Latin and moral philosophy as well as at the general store.”\textsuperscript{560}

In practical effect, Michigan started its long-lasting efforts to establish public education with its 1835 constitution. The state faced significant impediments to developing a coordinated education system. Michigan’s deep wilderness made an integrated, or even standard, public education system difficult. As John Pierce, one of the founders of Michigan’s education system,

\textsuperscript{557} Cass, May 12, 1830, \textit{Messages of the Governors of Michigan}: I: 51.
\textsuperscript{558} An act to regulate common schools, 1833 “Acts of the Legislative Council of the Territory of Michigan,” III: 1012.
\textsuperscript{559} Cubberley, \textit{Public Education in the United States}: 237-38. In this respect, Michigan’s early education efforts mimicked the other Ordinance-created governments. As Buley noted, “From the printed records – the messages of governors, speeches of legislators, proceedings of meetings, editorials and letters to the newspapers – it would appear that the pioneer’s faith in schooling, in education, was deep, sincere, and general. At times it appears even awe-inspiring in its implicitness and naïveté . . . Why then were both people and politicians so reluctant to provide schools, the means by which knowledge might be acquired?” Buley, \textit{The Old Northwest Pioneer Period, 1815-1840}: II: 329.
\textsuperscript{560} ———, \textit{The Old Northwest Pioneer Period, 1815-1840}: II: 341.
recalled, “We had no canals, no railroads; even the old slow coach was scarcely to be found. We had the lumber wagon and the Indian trail. We forded rivers, waded marshes, and when night came, if we found a shanty with a piece of old carpet for a door we turned in for the night, and all were satisfied.” Nevertheless, the thirst for education was palpable. Pierce continued, “But, notwithstanding all this, the people then here came mostly from the region of school-houses, and were anxious for schools.” And, he suggested, as these schools developed, Michigan became more attractive to settlers.  

Given the population’s drive for education, Pierce and Isaac Crary (the convention’s chairman of the committee on education, Michigan’s first representative to Congress, and founder of Michigan’s educational system with Pierce) proposed, and the drafters of the 1835 constitution accepted, an education system premised on the Prussian system – with a central authority coordinating educational policy from the primary levels through the university.  

To accomplish that, the constitution provided for a superintendent of public instruction (the first constitutionally created education leader in the nation), and instructed that the legislature shall promote “intellectual, scientific and agricultural improvements.” It provided for a “system of common schools,” funded by the revenue from the sale of federally granted lands. The

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Pierce became Michigan’s first Superintendent of Public Instruction and remains an underappreciated figure in the nation’s drive for universal public education. Pierce published his plans for public education two years before Horace Mann, and published the *Journal of Education* a year before Mann’s *Common School Journal*. In his work, Pierce pioneered the call for tuition-free, tax-supported education, minimum wages for teachers, teacher training, and compulsory education. Dunbar and May, *Michigan: a History of the Wolverine State*: 283.  

562 University President Henry Tappan spoke of the interrelationship of higher and common education under the Prussian system in his 1853 Commencement Address at the University. “After all, the great excellence of the educational system in Prussia consists in the thorough general education of the teachers of every description, and their particular adaptation to the department in which they are to serve. The Prussian system is to have good teachers, and hence it is a self-sustaining system. In all pervading spirit the University, the gymnasias, the normal schools, the schools for the mechanic arts, and for agriculture, and the primary schools, are all bound together.” Speech to Graduating Class of the University of Michigan, August, 10, 1853 "Detroit Free Press," 2. Found in Henry Philip Tappan Correspondence, Box 1, Folder 1, Bentley Historical Library, Ann Arbor, MI
University similarly was to be funded by interest on the proceeds from the sale of lands granted for the University’s support.\(^{563}\) That meant the funds would go to the one state university rather than be parsed among multiple institutions of higher learning. Further, by calling for a state-controlled system, the constitution infixed a secular direction on Michigan’s educational future. In consequence, instruction would move away from moral and biblical studies.\(^{564}\)

In establishing a state fund for common school education (the “Primary School Fund”),\(^{565}\) Michigan through its constitution and through the federal legislation admitting it into the union, had done something unique. Other state admission statutes provided that townships control the proceeds from the education-dedicated land in their borders. As a state, Michigan controlled those funds, which derived from a donation of over one million acres. This presented several distinct opportunities. First, centralized decision-making allowed for greater control on the sale of land, allowing Michigan to enjoy greater financial returns from those sales than did its sister states.\(^{566}\) Second, funds could be disbursed based on need. As noted by Francis Shearman, the superintendent of public instruction from 1849-54: “In taking the grant to the State, there was a higher principle of equity involved in relation to the whole people” than would have been the case if the funds had been distributed to townships in relation to the amounts received from land sales therein.\(^{567}\) Moreover, the system allowed for “a state school system rather than a series of

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\(^{563}\) Art X, Sec. 1-3, 5, *Constitution of Michigan, 1835*. The superintendent’s responsibilities over the University would include i) administering the University lands to be sold for the University Fund, ii) investing the University Fund, iii) apportioning the University Fund among the branches, iv) appointing an annual board of visitors to review University conditions, and v) submitting an annual report to the legislature.


\(^{565}\) By 1850, the state took the proceeds from the land sales and paid the Primary School fund an amount it would have enjoyed had the funds been invested. Dunbar and May, *Michigan: a History of the Wolverine State*: 281.

\(^{566}\) As a point of comparison, Kaestle noted that corruption associated with non-centralized control siphoned much of the proceeds from the granted lands in Ohio and Indiana. He concluded, because of the corruption and low land values, the Ordinance was more effective in developing a pro-education philosophy than funding educational growth. Carl F. Kaestle, "Public Education in the Old Northwest" "Necessary to Good Government and the Happiness of Mankind”, *Indiana Magazine of History* 84 (1988).

local systems of schools.” Those results were to prove important as Michigan could strive to provide equal educational opportunity to a disparate population.

In his first annual address as an elected governor, Mason in 1836, set the tone for the state’s future educational philosophy and, with time, efforts. Education was about democracy and equality. He urged, “Here the right of all are equal, and the people themselves are the primary source of all power,” and continued, “Public opinion directs the course which our government pursues; and, so long as the people are enlightened, that direction will never be misgiven.” Accordingly, Mason proposed development of a “uniform and liberal system of common schools . . . open to all classes, as the surest basis of public happiness and prosperity.” As with his efforts on internal improvements, the answer was a statewide, government directed program – and like the internal improvement projects, Mason believed that the young state had resources “ample for all our [education] purposes.”

With its admission in 1837, the legislature accelerated the state’s involvement in education. In March, it authorized the superintendent of public instruction to sell the land designated for schools and to allocate the proceeds to the townships to build and operate schools. The legislation set forth the roles and obligations of primary school officials and those of township officials. The Primary School Fund was apportioned based upon the number of students in each district (not the revenue received, as in other states). The legislature also authorized the University regents to begin construction of the University in Ann Arbor, and granted the University a $100,000 loan for that building. University operations were to be funded from the interest on the proceeds from the sale of the donated lands (the “University

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568 Cubberley, Public Education in the United States: 158.
Fund”), which would finance nearly all university functions until 1869. The legislature also enacted an organic law to create and operate the University. The constitution had left complete power in the legislature to create and operate the University, and the legislature pursued that effort. At its core, the legislation demonstrated the state’s interest in educational opportunity. Section 12 read, “The fee of admission to the university shall never exceed ten dollars; and it shall be open to all persons resident in this state, who may wish to avail themselves of its advantages, without charge of tuition.” The school largely was non-sectarian, as the legislature had forbidden any exclusion of administrators, faculty, or students on religious grounds. The act created a board of regents, with a chancellor who would be the board’s ex officio president. Those regents, nominated by the governor, would strive to build a first class university. However, the appointees largely were political and lacked the knowledge, or the focus, to achieve that objective.

The regents held their first meeting in 1837 and, envisioning multiple branches, they authorized eight university sites. (The University was the only body that could grant college degrees). Funding challenges eventually forced the closure of the branches save for the Ann Arbor facilities. The regents appointed Asa Gray as the University’s first faculty member. Lacking buildings or students, Gray left for Europe to collect books for the not yet built university library. After he had collected about 3,700 books, Gray returned to a destitute

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571 At this time, the legislature envisioned university branches in each state-senate district. Branches would soon open in Detroit, Monroe, Niles, Pontiac, Tecumseh, and White Pigeon. Most had departments for female education. 572 An Act to provide for the organization and government of the “University of Michigan.” Act 55, 183, Laws of Michigan: 102-06. 573 By the time the University actually began in 1837, Virginia, North Carolina, Georgia, Vermont, and New York each had state universities that were sectarian in nature. The exception was Alabama, whose university, established in 1831, was non-sectarian. Shaw, The University of Michigan An Encyclopedic Survey, I: 17. 574 Their number included the governor, the lieutenant governor, members of the Supreme Court, the chancellor of schools, politicians, and members of the scientific community. Shaw suggested that the political nature of the board of regents was a response to Dartmouth. Ibid., I: 12. States like Michigan, avoided private boards for fear of losing control over state university policy.
university and state. Soon, Governor Woodbridge proposed that Gray accept a one-year suspension of salary. Gray declined the offer and left for Harvard, having taught no classes.\footnote{Henry Munson Utley, Byron M Catcheon, \textit{Michigan as a Province, Territory, and State}, IV vols. (New York: Publishing Society of Michigan, 1906). III: 238.} In some measure, Gray was a casualty of a state that had financially overextended itself, particularly because of its internal improvement projects. But he was also a victim of a geographically distant and inattentive board of regents. Their priorities lay elsewhere.

In 1840, Woodbridge entered office and, in his first message to the legislature, warned of “the startling fact, that, from the period of its commencement, our expenditures for the ordinary operations of the government have far exceeded its fixed and ordinary income.”\footnote{Woodbridge, January 7, 1840. \textit{Messages of the Governors of Michigan}: I: 310.} In aligning expenditures with revenue, one-month later Woodbridge proposed to cut education expenses by, among other things, offering “that the salary of the Superintendent of Public Instruction should be greatly reduced,” and transferring the collection of the University and Primary School Funds to the state auditor general and the state treasurer.\footnote{Woodbridge, February 5, 1840, ibid., I: 332-33.} Like Gray, the superintendent of public instruction resigned. Whether motivated by the need for fiscal retrenchment or by the desire for political control over education, Woodbridge’s actions accomplished both goals. The governor now had effective control over education policy and spending.

Construction of the University continued and in 1841, the University opened its doors. It did so without much fanfare or enthusiasm. As Governor Barry (Woodbridge had become a U.S. Senator), declared “Well, we’ve got buildings . . . I don’t think they’re good for anything else, so we might as well declare the University open.”\footnote{Quoted in Kent Sagendorph, \textit{Michigan, The Story of the University} (New York: Dutton, 1948). 62.} Not surprisingly, a select committee of the legislature found government support for education lacking. Its report, especially concerning the University, set the foundation for later constitutional changes designed to free the University

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from political influences. That 1840 report’s conclusion, submitted before the first student attended class, was startling: Political interference undermined university development and threatened the very possibility of effective public higher education. Starting with the board of regents, they submitted:

A new board of trustees not knowing well what to do, generally begins by undoing and disorganizing all that has been done before. At first they dig up the seed a few times, to see that it is going to come up, and after it appears above the surface, they must pull it up to see that the roots are sound, and they pull it up again to see if there is sufficient root to support so vigorous branches, and then pull it up again to see why it looks so sickly and pining, and finally to see if they can discover what made it die.579

The committee suggested something more nefarious than an uninstructed board. It warned that those “many who would hope to profit from despoiling the University of its lands, and its funds,” posed a threat to public higher education. This could not be allowed as “the university is a trust too sacred to be made the foot-ball of party” and accordingly needed to “be cut loose from all connection with politics.”580 It then proposed that the University be run by a “permanent board of well known individuals [given] the entire responsibility” of running the University.581 The dissenting report accepted nearly all the conclusions save for the committee-recommended life tenure for regents. All agreed, politics and higher education poorly mix.

579 Report of the Select Committee on the Condition of the University, 1840 "Documents Accompanying the Journal of the House of Representatives," II: 472.
580 Among the challenges faced by the University was the legislative inclination to lower prices on the land sold to finance the University Fund. Initially, the legislature committed to a minimum $20/acre price. Nevertheless, it authorized sales for as low as $6.21 and, in 1841, lowered the “minimum” to $12. It made that $12 price retroactive, so that the state returned $35,651 to prior purchasers. Despite this legislative meddling, Michigan fared far better than her sister states, where prices paid were lower and corruption greater than in Michigan. Shaw, The University of Michigan An Encyclopedic Survey, 34.
581 Report of the Select Committee on the Condition of the University, 1840 "Documents Accompanying the Journal of the House of Representatives,” II: 474-75. (Emphasis in original.) In some measure, the committee report suggested empowering the regents in an effort to neuter the superintendent’s role. The regents, (who were politically appointed) had complained of the superintendent’s power over them, and argued that they, and not the superintendent, should be responsible for university affairs. ———, The University of Michigan An Encyclopedic Survey, 173.
As noted, most of the Northeast’s institutions of higher learning were founded by or in support of religious organizations. This was not the case in Michigan. As Pierce advocated in 1838, Michigan’s leaders designed the University “be such as to secure the confidence of the liberal minded of all denominations, and then it might be expected that they will give it countenance and support.” That support was not commonly forthcoming, as advocates of secular higher education protested that non-affiliation would undermine needed enthusiasm for the school. Not with the hoped-for applause, clergy responded with disdain to a secular university. Protesting that the governor had failed to appoint clergy to the board of regents, “the university was accused by church people of being ungodly.” In response, the University set up a faculty house for each of four denominations – Baptists, Episcopalian, Methodist, and Presbyterians – and frequently hired with an eye to distributing faculty seats to each denomination. In turn, each denomination would have a member sit for a one-year term as university chancellor. Inevitably, this effort to appease (and to avoid the domination by one sect) resulted in discontinuous leadership.

With challenges rising, the superintendent of public instruction convened a board of visitors to review the state of the University. Its 1847 report suggested changes in governance in order to reach the highest level of achievement (it used Yale as that benchmark). The committee urged that the government “must in no case allow political considerations to make merchandize of the interest of the University.” That its focus distilled to the financial is no surprise. In 1847, Michigan remained in its financial crisis. It had just sold the railroads, and with the battle over bond default and repudiation still ripe, the state was searching for revenue sources. With this in

mind, the committee warned against government invasion of the University Fund. “Let the hand
that for sinister purposes would lay hold of that or any other fund set apart to the education of
our youth, be palsied in the touch; let the tongue of him who would thus betray his trust and his
country, cleave to the roof of his mouth.” With the legislature responsible for the funds,
University education faced the risk of differing legislative priorities.

At about this time, the University faced an internally grown crisis that would pit student
calls for liberty against traditional faculty prerogatives. That crisis – commonly called the
“fraternity war” – began largely in consequence of faculty’s belief that its responsibility included
assuring student morals and values. With that mission in mind, one day in 1846 Andrew Ten
Brook, Professor of Morals and Intellectual Philosophy, covertly followed students living with
him into the woods surrounding Ann Arbor. (Some faculty members supplemented their income
by boarding students.) The students were sneaking away to a cabin hidden in those woods. Ten
Brook and others questioned the students about their activities. At first, the students refused to
disclose what they were doing but it soon came out that they belonged to fraternities that, to the
faculty’s mind, violated University Rule 20. That rule required faculty approval of all student
organizations. Faculty did not approve of fraternities as they believed that fraternities threatened

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584 Documents Accompanying the Annual Report of the Superintendent of Public Instruction, Report of the Board of
Visitors, 1848, as found in Journal of the Proceedings of the Board of Regents of the University of Michigan,

585 It is hard to gauge the extent of actual political interference in University governance in the later 1840s. An 1850
board of visitors report congratulated the state for avoiding political and religious influences that, in other states, had
created “a series of disasters and confusion, revolution and disorganization, rendering them sometimes a by-word.”
Shearman, System of Public Instruction and Primary School Law of Michigan: 188-89. Notwithstanding the actual
level of interference, the governor appointed and the legislature approved regental appointments and, as will be seen,
many perceived those regents as politically motivated.

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the University by employing “the despotic power of disorder and savagism” that could bring a plague of “debauchery, drunkenness, pugilism and dueling” to the University.  

The University demanded that the students withdraw from fraternity membership and activity, but without strong University leadership, (the chancellorship shifted every year), the faculty was unable to force compliance. Instead, it demanded that the fraternities admit no new members, thinking that by force of matriculation, the threat would subside in the coming four years. Upon learning that underclassmen continued to join these societies, the faculty on December 19, 1849 issued an ultimatum – either renounce fraternity membership or stay home after the Christmas break. The students regarded the ultimatum with some disfavor, a mood sensed by the faculty. As Ten Brook noted, “the occasion, it must be admitted was not marked by quiet and respectful attention.” Students noisily protested, setting outhouses and woodshops ablaze. The faculty responded by expelling those who failed to renounce membership. Soon students and their families expanded the conversation by publicly protesting that the University had violated their speech and assembly rights.

Faculty disagreed, believing that the University should be a sacred space for learning and that students, by their presence, had agreed to the school rules. Ten Brook argued that the students had been stirred up by “influences especially, coming from abroad” (these were the times of European revolution) and, in an aristocratic fashion, blamed increased student unrest on the expanded admission of students. A committee of regents agreed and argued “obedience on the part of students to the laws enacted by the Regents is as necessary to the existence of the

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586 Report of the Faculty, as part of the Report of the Committee appointed by the Board of Regents to Investigate the Recent Difficulties at the University, 1850 "Documents Accompanying the Journal of the House of Representatives," Doc. 6: 21-22.
589 Ibid., 191-92.
University as obedience to the laws enacted by the Legislature.” That committee expressed concern that an absence of strong supervision would allow students of “ripened intellect and loose morals” to influence the “minds of those of tender age.”590 Essentially, it argued that the University sat in *loco parentis* to attending students (a position later revisited in discussions over admitting female applicants).

Nevertheless, the faculty, or at least Ten Brook, understood that as more students entered the world of higher education, calls for individual freedom would increase.591 The students posited such an argument in their petitions to the legislature. Students had, they argued, natural rights to join together; rights that other universities respected through their unwillingness to enforce their similar anti-secret society rules. The solution to the University’s intransigence was structural change. A memorial drafted by students suggested that the regents, “and through them the faculty, be brought nearer to the people, and more immediately amenable to them.” The memorial continued, “Let some distinguished man be placed at the head of the institution as chancellor who can give it character and standing.”592 Ann Arbor State Senator William Finley proposed legislation for an independent, directly elected board of regents, but the bill failed to pass. With the legislature unwilling to act, the people, through their constitutional convention delegates did. Soon University governance would change along the lines suggested by the students.

Ultimately, the university reinstated the fraternities, although many of the expelled students never returned. Many of the faculty, like Ten Brook, held to their paternalistic and

590 Report of the Committee Appointed by the Board of Regents to Investigate the Recent Difficulties at the University, 1850 “Documents Accompanying the Journal of the Senate,” Doc 16: 6.
591 ———, *American State Universities*: 191-93. Ten Brook had penned his recollections over 25 years after the occurrences. His 1875 positions on student freedoms likely had evolved since the 1846-49 fraternity wars.
592 Memorial of H. Becker, E. L. Fuller, E. Thomson, Jas E. Platt and N.R. Ramsell, committee &c, in regard to the late difficulties in the University, 1850 “Documents Accompanying the Journal of the Senate,” Doc 28: 5.
authoritarian positions, while the students would continue to embrace the individualistic ideas that had animated their conflict with the faculty.\textsuperscript{593} As a postscript, three members of the faculty joined to force Ten Brook to resign, a capitulation Ten Brook later classified as “a great blunder and an act of injustice to the University.”\textsuperscript{594} Other faculty members would then force those three to resign. Ten Brook would later return to the University as its librarian and historian. The home from which he followed the students to the cabin eventually was leveled. In its place resides the Phi Delta Theta fraternity.

As the university students claimed liberty interests, those advocating common school development pressed equality principles. To some extent, the development of those common schools was the responsibility of the University, pursuant to the Prussian educational principles advanced by Pierce and Crary and propounded in the 1835 constitution.\textsuperscript{595} In that capacity, the University was to help establish the common schools.\textsuperscript{596} Much of the day’s discussion concerned the inability of the University to thrive without strong basic education. For example, the board of visitors commented, “In vain do you fill your Professors’ chairs with men of the highest eminence, if the youth who resort to them for instruction must be fed with milk instead of meat.”\textsuperscript{597}

\textsuperscript{593} Shaw, \textit{The University of Michigan An Encyclopedic Survey}, I: 37.
\textsuperscript{594} Ten Brook, \textit{American State Universities}: 208.
\textsuperscript{595} Cousin’s Report, which introduced the Prussian system into the United States, allowed those “struggling to reduce the rampant district system to some semblance of order, and who were trying to organize the thousands of little community school systems in each State into one state school system” to form some educational order. Cubberley, \textit{Public Education in the United States}: 273.
\textsuperscript{596} Ten Brook wrote that the belief was “higher education must, in the end, direct and control the lower, and it ought to do so; for while the latter employs itself mainly with simple facts in detail, the former teaches the principles or theories into which accumulated facts have been generalized.” Ten Brook, \textit{American State Universities}: 99.
\textsuperscript{597} Documents Accompanying the Annual Report of the Superintendent of Public Instruction, Report of the Board of Visitors, 1848 \textit{Journal of the Proceedings of the Board of Regents of the University of Michigan}: Doc. 5: 8.
The Drive for Free Common School Education

The central focus of common school education was how lower-level education facilitated the equity needs of democratic governance. This equity concern did not start in Michigan nor was it one of recent vintage. William Manning, a Massachusetts farmer, tavern keeper, and political author during the early years of the republic, captured the equality principles underlying public education. “Learning is of the greatest importance to the seport of a free government,” he wrote, “& to prevent this the few are always crying up the advantages of costly collages, national acadimyes & grammer schools, in ordir to make places for men to live without work, & so strengthen their party. But are always opposed to cheep schools & woman schools, the ondly or prinsaple means by which larning is spred amongue the Many.” To Manning, education was the right of every citizen, not just the affluent. Those same equity principles informed early Michigan education efforts. Not surprisingly those principles drove other governmental objectives as well. It is worth recalling Mason’s belief, and the legislature’s concurrence, that private capital could not be trusted with so important an effort as internal improvements. It was incumbent on government to provide transport services to all state residents and to assure that those services were affordable to all. Internal improvements, like education, would be a fundamental component of republican governance, driven by and for the interests of all citizens.

As Pierce noted, to advance that equity principle, early education efforts “not only contemplate[d] but attempt[ed] to provide for the extension of education to every individual in the republic.” He continued, “as the desire of improvement is universal, why not extend the

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598 Quoted in, Burns, Vineyard of Liberty: 502.
Blessings of education to every individual in every class? 599 But ambitions and achievements diverge, and did so with respect to early Michigan education. The new superintendent of public instruction, Franklin Sawyer, noted in his 1842 report to the legislature that public schools were not universally available across the state. 600 Only 1486 of 2300 districts (about 65%) had those schools. The reasons involved economic challenges. Michigan government’s contribution for the common schools was the Primary School Fund, an insufficient fund that Sawyer characterized as a “doubtful reed to lean upon.” 601 To make up the deficiencies, schools charged the parents of students according to the number of days they attended school. 602 This charge, called a “rate bill,” could present a challenge particularly to non-affluent families. In 1850, across the nation, these rate bills accounted for about twenty percent of public school funding. Given that economic burden and that school attendance was not required, the equalizing impact of education suffered as families failed to avail themselves of educational opportunities. 603 Nevertheless, the aspiration was strong, and as the 1850 constitutional debates will demonstrate, was widely accepted across the state.

Education and the 1850 Constitution

Education issues occupied notable space during the 1850 constitutional convention. During their deliberations, the delegates debated over common school education’s impact on equality, democracy, taxes, and personal and economic advances. The delegates agreed about

602 Utley, Michigan as a Province, Territory, and State: III: 244.
the need for free public education. E.S. Moore, a merchant from St. Joseph spoke eloquently not only of the equalizing possibilities of education, but also about education and democracy.

Where on earth is there such a practical demonstration of the doctrine that ‘all men are born free and equal,’ as in the school house under a free school system – where every barefooted urchin may have the same teacher, the same books, and sit on the same seat with the most fortunate heir in the town – may stand at the head of his class and take the precedence over all that wealth and rank can array against him, if only God has given him the better mind, or the more diligent disposition?

Moore continued, discussing how education promotes self-esteem and reflection. “It ennobles and encourages the poor boy, and fires him with such thoughts of the dignity of a human soul that tyrants can never after oppress him with impunity. It corrects, too, the thoughtlessness of the rich by the standard of mind, and teaches them to reckon rank by the Roman rule of merit.” Others weighed in, speaking about the advantages to society. “It is cheaper to provide schools than penitentiaries;” “the money spent on education will be saved by the less demand for penitentiaries, alms houses, and the expense of holding courts;” and “Education . . . has opened every avenue to industry; suppressed crime; and expanded the energy of all.”

It was important that all, especially the unwilling, be educated. As miller Joseph Williams urged: “Now, if we need and want a free school system at all, we want it most for those districts that would meet its requisitions with the greatest reluctance. The most backward, the most ignorant, the most indifferent, are the very portion of the population we wish to enlighten.” He then spoke in a way that would later become anathema to state policy, “The State wishes to stretch its paternal arm around them. It wishes to educate all, willing and

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604 For an economic discussion of nineteenth century thinking about moving to a purely public financed common school system, see ibid.
606 Speeches by John D. Pierce, farmer; J. Van Valkenburgh, farmer; D. C. Walker, lawyer, ibid. 264, 266, 552.
unwilling.” In the end, it was the state’s responsibility to provide free and public common school education, not only to advance the individual and the cause of equality, but to support commerce, safety, wealth, and general social development. The delegates agreed – the state’s youth must enjoy free public education.

Thomas Cooley did not participate in the convention but, as Cooley scholar Alan Jones noted, he followed and accepted the equal rights views flowing through much of the convention debate. Jones referenced Cooley’s speech in 1851 where he commented on the importance of public education:

The first and the most important of these [reforms] is the establishment of a system of education of all classes of all the people – of a system which does not say to the people, “you shall be furnished with the means of education if you have the wealth to purchase them” – but which says, “The interest, the safety, the glory of the state demands that she furnish the means of instruction to all, and especially that in her institutions of learning, the distinctions of wealth shall be broken down, and they shall thus become the schools of a true democracy.”

Jones gleaned from the above-stated equality argument that Cooley then held to principles requiring limited government that did not have the power to redistribute wealth. Here, he may have missed the mark. In some measure, public education by its nature demands wealth redistribution. It requires that a large pool of taxpayers pay regardless of their status as parents of schoolchildren. That requires not only a redistribution of wealth, but also a fairly robust government structure. As James McGregor Burns would not of public education, that was “pure

607 Ibid., 545. Williams was a member of the education committee and a miller from St Joseph. Carl F. Kaestle believed the issue was not that simple. He advanced that free school advocates often classified opponents as ignorant and requiring education’s lifting hand. He advanced that the issue was not merely taxes, but included the belief that education was the responsibility of family and church. He further voiced that opponents may have been motivated by a concern over central control over local affairs. Kaestle, "Public Education in the Old Northwest," 67-68.
608 Michigan Expositor, April 8, 1851, quoted in Jones, Constitutional Conservatism: 45-46.
609 Ibid., 47.
socialism.” Of course, “free” education meant that taxpayers must pay. That burden fell mainly on property owners. On this issue, delegate consensus ended as questions of educational equality clashed with property interests. Some, like farmer Nathan Pierce, from Calhoun County, argued for a statewide property tax, allowing government to provide equal funding and equal education across the state. He posited, “If there are one hundred children to be educated in Barry County, and if there are four times that number in Lenawee County, with no more means to be taxed, then I say that the country of Barry should contribute her part; and I think that a different course would be improper and unfair.”

D. C. Walker, a lawyer from Romeo agreed, suggesting that education was a statewide burden to which all should contribute. Otherwise, “It might be said that the man who had ten children should work ten times the highway tax as the man who has not children, He travels the road ten times as much. So with poor house; so with courts; so with prisons; for the wealthy, honest man, with no children, might say, I don’t intend to commit crime; I want no poor house; I have no trials in the courts; let them support them that may use them.” He believed education provided “a general benefit to the whole community,” and the whole community must pay based upon property ownership.

Others, particularly those representing large landholders in sparsely populated areas, did not wish to support lower contributing city dwellers. J.W. T. Orr, a farmer from Barry, represented a township of few residents but valuable property. He framed the issue as “rob[bing] the new and sparsely populated counties of this State of a portion of the money raised in such counties, for educational purposes, and giv[ing] it to the older and more densely settled portions

610 Burns, Vineyard of Liberty: 501.
612 Ibid., 552.
of the State.” Orr classified that transfer as “unjust and oppressive.” Others agreed, pressing local funding and completely local school systems. Just as with pauper relief and criminal prosecutions, J. G. Cornell, a physician from Jackson argued, schools should be locally financed and controlled. He was skeptical of the poor who were “universally in favor” of taking the property from the wealthy to benefit their schools.

If preferences can be gleaned from the number of words employed and speeches given, then delegates preferred a statewide tax with equal educational spending and opportunity for all students. But another issue intervened and forestalled adoption of specific constitutional language on common school funding and control. Underlying much of the debate, including on common schools, was the state legislature’s role in future governance. As Justice Campbell noted, the belief that “the people could not trust their agents and representatives” animated many of the 1850 constitution’s provisions. John Pierce applied that distrust to the common school debate: “We have so much distrust of future legislators that we cannot adopt a system that will be satisfactory” for how to pay for the schools. Despite that distrust, he then suggested that the constitution require free schools and leave the financing mechanism to future legislatures. Unable to agree on funding, the delegates did just that. They proposed, and the voters approved, that “The legislature shall, within five years from the adoption of this constitution, provide for and establish a system of common schools, whereby a school shall be kept without charge for tuition” The funding and control issues remained open.

613 Ibid., 545-46.
614 Ibid., 550.
Recognizing the leadership obligation to provide free education in five years, in his 1851 Annual Message, Barry called the legislature to action. Advocating education for all, Barry noted the challenges for the poor. “Though hitherto the charge of tuition has always been remitted to those not able to pay, yet, for a sentiment of delicacy or pride, the poor have not, in all cases, sent their children to school.” He then sought to shrug aside the biggest challenge -- taxation. Barry argued that a “complaint of taxation, for the purpose of education, has scarcely ever been made,” claiming “all residents know that education protected property.” His proposal – a statewide tax.\(^{618}\)

The legislature responded by providing that common schools would be financed through 1) income from the Primary School Fund (it held about $811,000 in 1852), 2) a two mill tax on the property in each township, and 3) an additional tax to raise one dollar per student, if approved by district voters.\(^{619}\) An 1852 law also provided for a rate bill to make up any deficiency and, in that sense, ignored the free-schooling intent of the constitution. In that respect, the 1852 law would require change in the next three years to honor the constitutional requirements.\(^{620}\) The state set the obligation, but the locality set policy. Equality interests for statewide equal education deferred to local property interests. Tax money collected in a district stayed in that district, so education eventually was provided for all, but not equally.\(^{621}\)

\(^{618}\) Barry, February 5, 1851, Messages of the Governors of Michigan: II: 188.

\(^{619}\) Michigan’s efforts were part of a larger trend. Kaestle wrote that, “in the 1840s, as in the East, legislation . . . created somewhat more active state supervision and made free schooling mandatory, ending tuition charges to parents.” It would be some time before Michigan would completely abandon the rate bill and, in that respect, Michigan lagged its sister states. Kaestle, “Public Education in the Old Northwest,” 66-67.

\(^{620}\) Shearman, System of Public Instruction and Primary School Law of Michigan: xiv. The legislature fell short of its five-year goal. As Dunbar noted “Not until 1869 did the legislature enact a law which made all public schools cost-free for pupils living in the district where the school was located.” He continued, “Even though not all schools were free, 75 percent of the children between the ages of four and eighteen attended the public schools in 1860.” Dunbar and May, Michigan: a History of the Wolverine State: 286. Sellers listed the number at 74 percent in 1850. Sellers, The Market Revolution: 369.

\(^{621}\) The supervisors were to apply the tax revenue to purchase books for a library and fund the school districts in the township where the taxes were collected. An Act to amend section one hundred and seven of chapter fifty-eight of
The debate over common school funding and control unveiled several mid-century tensions. At the same time many called for government activism to create equal educational opportunities, a rising chorus sought to define “equality” within narrower geographic bounds. Those providing the wealth wished to employ that wealth to advance local interests. To be sure, their tax payments were higher, as the property taxes required that large property holders pay more. The result of local use was that students in wealthy districts would enjoy greater resources – and by extension, educational opportunities – than students in the densely populated, less property-affluent areas. The debates also suggest an older-urban, newer-rural split, with the newer-rural areas protesting against taxes that benefit the older-urban areas. To the newer/rural residents, statewide educational equality interests were secondary to their liberty interest associated with private property. To those newer affluent residents, group needs should not overwhelm individual rights, and equality principles should not subordinate liberty interests. Localized school financing especially affected poorer rural areas. Those districts could afford only one-room schoolhouses, which limited educational opportunities in comparison with urban and/or affluent rural schools that enjoyed larger tax bases. It is not surprising that children in less populated and less affluent areas suffered the lack of common school education. Soltow and Stevens’ study found those two factors were significant indicators of literacy levels in mid nineteenth-century America.

Those delegates who wished to constitutionalize a statewide method of education funding and control were somewhat vindicated, although certainly disappointed, by the speed at which education would become “free.” Michigan lagged other states when, in 1869, it finally

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622 This problem festered until the early 20th century when new taxes would help fund rural student attendance at urban schools. Ultimately, rural districts would merge to expand the tax base and educational opportunities.

accomplished that end. It was not until 1871 that the state compelled school attendance. It was not until 1859, that the legislature authorized school districts to establish high schools. Financing for those schools came from taxes and, where insufficient, rate bills. In 1873, three Kalamazoo residents brought suit arguing that the district’s high school curriculum taught subjects not promoting the public’s benefit and, therefore, public funding was inappropriate. While there is some indication that the case was brought as a test case by those favoring publicly funded high school education, the named plaintiff, former U.S. Senator Charles Stuart, believed that government’s right to tax for education ended with primary school. To Stuart, primary school was all the preparation needed “to make a Congressman or President.” Those wishing more education for their children should pay for it themselves. To Stuart, this was a constitutional issue, as the legislature had no power to tax for non-public needs. Since high school education, in his view, was generally unnecessary, legislation concerning it was beyond the legislature’s reach.624

The Michigan Supreme Court disagreed. Cooley, writing for the court in *Stuart v School District*, concluded that providing high school education was a proper role for government and ruled in favor of the school district. Cooley’s opinion aligned with the public purpose standard he articulated in *Constitutional Limitations* (1868) and *Salem* (1870), discussed at length in Chapter VI. Rather than quickly accepting that educational policy was the province of the legislature, Cooley started his analysis by setting forth his philosophy on judicial oversight over legislation that employed tax dollars. Seeming to invite challenges to such legislation, he wrote, “It can never be unimportant to know that taxation, even for the most useful or indispensable purposes, is warranted by the strict letter of the law.” Those objecting to government spending

“may well be justified by his doubts in asking a legal investigation.” Consistently with his public purpose doctrine, Cooley focused on historic government spaces to determine whether taxes for high school spending were appropriate. Finding that Michigan had historically supported secondary education, he found the Kalamazoo School District’s spending constitutional. While Cooley did not specifically employ the term “public purpose,” its principles oozed in this opinion. Despite his close scrutiny of legislative space, Cooley’s opinion is marked as a pivotal point in the dramatic expansion of high school education in the later portion of the nineteenth century.

**Struggles over Constitutional Separation – The University**

Despite differences over funding, wealth transfers, and control, almost all agreed that publicly funded common schools advanced the state’s interest and that education should be available to all the state’s children. Delegates looked at the University differently. Whereas common schools sat on the “popular side” and advanced the democratic cause, higher education sat on the “aristocratic side” and was not for all. Even though the governance of the state university directly affected few, that governance captured much of the delegates’ attention. Ultimately, that discussion incorporated many of the ideas earlier noted and elevated University governance to a fourth, independent branch of government—at least constitutionally speaking. In accomplishing that, the delegates suggested, and the voters approved, creating a board of regents directly elected by the people and investing that board with control over operations and

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625 Stuart v School District, 30 Mich. 69, 71 (1874).
628 Article XIII, §8 of the 1850 Constitution provided “The board of regents shall have the general supervision of the university, and the direction and control of all the expenditures from the university interest fund.” Article XIII, §7 constituted the board of regents as a corporate body.
educational policy of the University. Doing so stripped the legislature’s legal authority over the school. Cooley reflected, “This was felt to be a most valuable and important change: it secured steadiness in plan and conservatism in management, and it placed the university beyond the dangers that might spring from popular excitements and prejudices, and from political overturns.”

This did not mean that the legislature remained remote. To the contrary, the legislature seemed institutionally incapable of withdrawing from directing higher education policies and actions. As it did so, constitutional conflict arose, resulting in a tense relationship over competing educational and social values. That conflict nearly crippled the University of Michigan and raised deeper concerns about the viability of state universities generally.

The 1840 Select Committee on the Condition of the University reported that “when legislatures have legislated directly for colleges, their measures have been as fluctuating as the changing materials of which the legislatures were composed.” That sentiment aligned with the convention’s general desire to restrict the legislature’s power and gave rise to the nation’s first constitutionally independent university. Late in the convention delegate J. H. Bagg, a physician from Detroit referred to legislative control over the University as the only remaining “blot and blemish, savoring federalism,” to be addressed in the new constitution. That blot could not “be permitted to reign.” The delegates agreed that political winds could not be allowed to affect the University but some questioned whether alternative forms of governance avoided those storms. If the legislature suffered from political inconsistency, they asked, did not the general population also suffer that malady? And if so, how is the popularly elected leadership of the University protected from the fluctuations of public sentiments?

There was no recorded discussion of granting regents life tenure as suggested by the 1840 select committee report. Instead, the delegates discussed two options. Robert McClelland, a member of the state house of representatives and a University regent (he was also elected governor in 1851) believed the status quo worked best. He criticized the efforts to marginalize the legislature and mocked the move to direct elections by moving “to make professors of the University elective by the people.” Bagg took exception, characterizing McClelland’s proposal as “like the embrace of the night-mare.” In response to McClelland’s underlying concern, Bagg and others proposed that regent elections take place at a less politically charged time than the general election. Accordingly, regent elections were to be held at the same time as the election of Supreme Court judges. Those elections were to be held every six years on the first Monday in April. By removing the election from the autumn political season, and by granting extended terms of office, the delegates hoped to shelter the regents and, with them, the University from shifting political winds.

Michigan was the first, but not the only state to seek to remove political interference from its public universities. Arizona, California, Georgia, Idaho, Minnesota, Nevada, and Oklahoma, at various times and to various degrees, have constitutionalized the governing boards of their universities. They did so, according to Elliot and Chambers, with the intent of avoiding “the fluctuating political fortunes of parties and individuals,” and overcoming the challenges of “short and crowded sessions usually only at biennial intervals.” The states’ constitutional framers concluded that legislatures could not “give the continuous study and whole-hearted devotion

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632 Ibid.
633 Ibid.
635 The elections were at the same time and in the same districts as circuit judges. In 1863, the regents were elected at large in the state, for eight-year terms. Two members were elected each two years.
which is requisite to the development of a wise educational policy for the state.”636 That was the case in 1850 Michigan. As delegate Charles Whipple, a Michigan Supreme Court justice submitted, “There is no gentleman, I suppose, in this Convention disposed to put [the University] within the grasp of either political party of the state, or to bring it under any improper influence.”637 With the goal of avoiding political influences, the delegates and voters constitutionally sheltered the University from the legislature. It was now up to the regents and legislature to honor those intentions.

The 1850 constitutional changes took place in a time of peril for the University. With the challenges presented by revolving-door chancellorships, state financial pressures to invade the University Fund, and the fraternity wars, students and faculty had started leaving. By 1852, enrollment had dropped about 30% from its 1848 high.638 As it turned out, the new constitution provided the path to avoid the earlier challenges and to facilitate University health. As part of the new constitution, the regents were to “elect a president of the university” who would “be the principle executive officer”639 Francis W. Shearman, the then superintendent of public instruction in 1852 wrote of the hope that change engendered.

That [the University] has not accomplished all that could be desired, is beyond question; but with future good management, by the exercise of prudence, wisdom, and discretion on the part of the Regents in the appointment of a president, and the re-organization of the department of literature, science and the arts, there is no reason why it should not be filled with students, and fulfill the objects of its high mission with the most abundant and satisfactory success.640

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637 Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan, 1850: 782. Whipple felt there were various means to that end but the core need was to separate the University from politics.

638 Literature Science and Arts enrollment had reached its high of 89 in 1848 but was down to 57 by 1852.


The University could now look to one man – the university president – as its policy focal point and as a director of university operations.

As the regents began their search, the legislature repealed the past acts concerning university governance and, in 1851, enacted legislation largely in line with existing university practice, including listing the schools the University should employ. Since the University already had the departments and plans the law required, no issue publicly was raised over the legislature’s right to command the academic areas the University would pursue. All that changed in 1855, when the legislature amended the 1851 act to provide “That there shall always be at least one Professor of Homoeopathy in the department of medicine.” Not satisfied to list that position within the list of schools in the 1851 act, the legislature placed the requirement as a modification of the language “granting” authority to the regents. It then went a step further to assure the regents understood its intentions. It repeated the requirement by stating, “so that the said section when amended shall read as follows: “The Regents shall have the power to enact ordinances, by-laws and regulations for the government of the University . . . Provided, That there shall always be at least one Professor of Homoeopathy in the department of medicine.”

The legislature said what it meant, and then repeated it so that all understood. The legislature required a homeopathic position as a condition of regent power. The regents paid no heed.

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Previously, the regents annually rotated the University leadership among the four major religious groups represented in the faculty.

641 As part of that law, the legislature provided in Section 5 “The regents shall have the power to enact ordinances, by-laws and regulations for the government of the university.” It continued in Section 8 that the university “shall consist of at least three departments: 1) A department of literature science and the arts, 2) A department of law, 3) A department of medicine.” The statute also provided that the regents may add departments as they saw fit and as funds allowed. An Act to provide for the Government of the State Univeristy and to repeal chapter fifty-seven of the Revised Statutes of eighteen hundred and forty six, Act 151, 1851 Laws of Michigan: 205.

642 An Act to amend an act entitled “An act to provide for the government of the State University and to repeal chapter fifty seven of the Revised Statutes of eighteen hundred and forty six” Act 100, 1855, ibid., 252.

Homeopathic medicine is based on the idea that the body has an ability to heal itself. Practicioners believe that a substance that causes symptoms of the disease in a healthy person can be given in small amounts to afflicted persons to help cure the illness. Practicioners tote a “like cures like” philosophy.
Even before the 1855 legislation, the issue had haunted the University, as homeopathic medicine had become increasing popular among the population and the legislators. Homeopathic medicine had curried favor during the cholera outbreaks of 1848 and 1852, as its treatments seemed more effective than those of allopathic (traditional) medicine. In response to that and homeopaths’ lobbying for inclusion in the state’s medical school, the legislature unsuccessfully had pressed for homeopathic instruction at the University. Those efforts were ineffective. Homeopathy was not popular with the medical faculty and they vocally expressed concerns over seating any faculty candidates in any departments who had any homeopathic sympathies. In 1849, the regents considered hiring Henry Tappan as a faculty member. (He later would become the University’s first president.) Tappan was a noted scholar, with five degrees, two of which were doctorates. He was considered among the finest intellects and innovative educators. Unfortunately, he had once visited a homeopathic physician and members of the new medical department pressured the school to forego offering him a position.

Homeopathic advocates understood that homeopathic instruction required dedicated faculty positions to teach the materials. Accordingly, starting in the 1840s they petitioned the legislature to add a homeopathic professor to the planned medical school. At first, those petitions resulted only in legislative advocacy, but no laws passed. Even the legislatively appointed regents were unresponsive. Allopathic physicians populated the medical school faculty and allopaths considered homeopaths as charlatans. Dr. Zina Pitcher, an outgoing regent, member of the medical faculty (and two times mayor of Detroit and future president of the

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644 Sagendorph, Michigan, The Story of the University: 79. In 1849, the University appointed faculty to the medical school and in the autumn of 1850, the school opened for instruction.
American Medical Association (AMA) composed his thoughts for the incoming regents. His comments instruct on the bitterness allopaths felt toward homeopaths:

[S]hall the accumulated results of three thousand years of experience be laid aside, because there has arisen in the world a sect which, by engrafting a medical dogma upon a spurious theology, have built up a system (so-called) and baptized it Homeopathy? Shall the High Priests of this spiritual school be specially commissioned by the Regents of the University of Michigan, to teach the grown up men of this age that the decillionth of a grain of sulphur will, if administered homeopathically, cure seven-tenths of their diseases, whilst in every mouthful of albuminous food they swallow, every hair upon their heads, and every drop of urine distilled from the kidneys, carries into or out of their system as much of that article as would make a body, if incorporated with the required amount of sugar, as large as the planet Saturn? 645

Many held the medical faculty in very high regard, and its vehemence in objecting to anything associated with homeopathy was taken very seriously.646 Accordingly, the regents again investigated Tappan’s homeopathic connection when, in 1852 they considered him for the first president of the University. A letter from H.N. Walker to a University faculty member (and later chair of the chemistry department) advised against rejecting Tappan on the homeopathic grounds. He warned of unintended consequences should Tappan be made a martyr of the homeopathic movement.647 Ultimately, the regents hired Tappan, but did so over the medical faculty’s objection (and because their first choice had turned the regents down). 648

Given the difficulties associated with hiring a person who had visited a homeopath, one can understand the challenges associated with the 1855 legislation requiring a homeopathic

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645 Zina Pritcher, A Memoir embracing an Epitome of the Transactions of the Regents of the University, with some reasons for the adoption of their more important measures, from 1837 to June 30, 1851 (Lansing: Ingals, Heges & Co., 1852). 14. Also found in 1851 “Joint Documents of the State of Michigan,” 325-26.
646 Shearman claimed “Although yet in its infancy, [the University medical school] has taken high rank in the medical world.” Shearman, System of Public Instruction and Primary School Law of Michigan: xii.
647 “Letter from H.N. Walker to S. H. Douglas, July 19, 1852.” (Tappan Papers, Box 1, Folder 1, Bentley Historical Library, University of Michigan)
648 University Chair of General Surgery, Hugh M Beebe, reported that Pitcher sent a letter under an alias to Tappan’s homeopathic physician seeking to trap him into characterizing Tappan as a homeopathic sympathizer. Because of that sympathy, the regents initially offered the presidency to Reverend William Adams, who declined to serve. The regents then selected Tappan rather than reopening the search. Shaw, The University of Michigan An Encyclopedic Survey, II: 1004.
position among the medical school faculty. The issue, however, went beyond a disinclination of faculty. The AMA placed extreme pressure on schools, treating homeopathic training as a contagion to scientific medicine. It resolved,

That any such unnatural union as the mingling of an exclusive system, such as homoeopathy, with scientific medicine in a school, setting aside all questions of its untruthfulness, cannot fail, by destruction of union and confidence, and the production of disunion and disorder, unsettling and distracting the mind of the learners, to so far impair the usefulness of teaching as to render every school adopting such a policy unworthy of the support of the profession.  

Following the legislature’s requirements, therefore, would sentence students and faculty to professional ostracism.

Forces were gathering on each side. On one side, the allopathic faculty, the medical student body threatened with professional irrelevance, those concerned about the medical school’s standing among its sister schools and, in a subtle but real way, Tappan, fought against accepting a homeopath on the faculty. Although having personally utilized a homeopath, Tappan certainly risked his standing among the University’s faculty if he capitulated to popular sentiments on this issue. On the other side stood a legislature that had prodded and legislated for homeopathic instruction and a growing public chorus for professional training in what was then a very popular form of medicine. (One cannot discount the ire of ignored legislators.)

Homeopathic advocates argued that the University was a public institution, giving the public not only an interest in its programs, but a right to help professionalize an area of medicine they felt important. Leading that effort were the Michigan Institute of Homeopathy (founded in 1847) and its successor, Homeopathic Medical Society of the State of Michigan (1870).


650 For a homeopath’s response to the medical facility, see “Homeopathy in the University,” Detroit Free Press, March 29, 1855, 2.
When the regents did not hire a professor of homeopathy as “required” by the legislation, Elijah Drake, a private citizen petitioned for a writ of mandamus to compel the regents to comply with the 1855 statute or to show cause for not doing so. Among other defenses, the regents responded that the court could not enforce the statute as the legislature lacked the constitutional power to compel university action. The court denied the petition but did so on procedural grounds. Even thought it ruled that the citizen had no standing to bring the action, the court declared that it “thought it would be proper” to respond to the regents’ constitutional claim. But it then waffled about, restating issues but never resolving them. At first, the court drifted toward supporting the regents’ claim to constitutional separation, acknowledging that the board was responsible for the fiscal, operational, and educational aspects of the University. It then hesitated and wrote with approval about the University’s efforts to determine whether it could add a homeopath to its medical faculty, as if doing so made the issue not yet ripe. Instead of ruling on the constitutionality, the court chose to applaud the regents’ good faith efforts even in light of “much uncertainty as to the constitutionality of the law.” Even that nod to the constitutional separation suffered when the court suggested it might employ its mandamus power if “it is made apparent that [the regents] seek to evade the law.” The regents had won the case, but given the court’s vacillation, the victory was narrow, and the core issues remaining unresolved.

The good faith investigation of the University went nowhere (even though top universities in Europe taught both allopathic and homeopathic medicine without challenge), and it placed no homeopathic physician on faculty. In the meantime, homeopathic medicine gained increasing popularity and public pressure on the University grew. In response, the AMA

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651 People ex rel. Drake v Regents of the University of Michigan, 4 Mich. 98, 103-05 (1856). In a later opinion, Regents v Auditor General, Christiancy would read the Drake opinion “as the intimation of a doubt of the constitutional power of the legislature to control the action of the regents” in placing a requirement for a homeopathic professor in the 1855 act. People ex rel. the Regents of the University v Auditor-Gener, 17 Mich. 161, 167 (1868).
intensified its efforts. In addition to its undertakings to block homeopathic education at the nation’s medical colleges, the AMA would now require that allopaths refuse any contact with homeopaths and their patients. Starting around 1855, branches of the AMA instituted policies threatening membership if physicians as much as consulted a homeopath or non-regular practitioners. The message was clear, including:

Have nothing at all to do with [quacks] professionally or socially, whatever be their name – whether followers of the more crude systems which have sprung up amongst ourselves, or dreamy stupid impostures of Europe. . . . Do not argue and debate with homeopathic patients; let them distinctly understand that you cannot alternate with a charlatan as their physician.652

So serious was the loathing for homeopaths that the AMA’s Vice President William Mussey demanded that Surgeon-General Joseph K. Barnes be censured for attending to Secretary of State William Seward after he had been stabbed three times as part of the Lincoln assassination plot. Barnes had worked with Seward’s personal physician – a homeopath – in his successful effort to save the Secretary’s life.653

Despite this effort to shun homeopathic physicians, public support for homeopathic medicine increased. Homeopaths rejected bloodletting, mercurial medicines, and other orthodox, but disfavored remedies. Homeopathic procedures and philosophies seemed more patient-centric and appealed to the clergy, women, and the press.654 Despite the protests of traditional doctors, the homeopathic movement gained legitimacy and power.

During this time, the University administration and regents did little if anything to modify the medical school faculty’s singular adherence to allopathic medicine. Tappan’s

653 Martin Kaufman, Homeopathy in America; The Rise and Fall of a Medical Heresy (Baltimore: Johns Hopkins Press, 1971). 86-87. Neither the AMA nor its Ohio branch censured Barnes, explaining that had the Surgeon General not acted, Seward would have died. Mussey believed that Seward should have been left to take his chances with his homeopath.
correspondence during the time reveals no clues of any University inclination to hire homeopaths. For reasons unrelated to the homeopathic challenge, the regents forced Tappan’s resignation in 1863 and named Erastus Otis Haven his successor. Notably, none of the multiple newspaper articles I reviewed concerning Tappan’s firing mentioned homeopathy or his failure to press its teaching. In Haven’s first formal report to the regents, he advanced only, “Our greatest immediate necessity is a new, enlarged building for the Department of Medicine.” Haven continued, advocating for a Hebrew and Oriental language professor, a professor of political economy, and the establishment of a gymnasium, but he did not mention a homeopathic appointment. From a University standpoint, the legislature’s homeopathic law was dead letter.

The issue largely sat dormant through much of the 1860s, with the legislature ineffectively prodding and the regents and University president focusing elsewhere. During those early years, the legislature lacked any real leverage with which to effectuate its homeopathic will. That would begin to change, as University needs began to outstrip University-controlled resources. Haven first publicly mentioned the challenge in his 1864 address, when he declared that the University could not reach its potential “without additional public aid, and also donations from the friends of education, such as have been received by Harvard, Yale, Princeton and other of our ablest Universities.” As he tendered this request for enhanced public support, Haven was careful to remind his listeners that, for the University to remain “strong and

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655 Tappan’s firing, in some measure, was the result of petty political forces. A new board of regents, brisling at Tappan’s aristocratic air, and resolved to exercise control of the University, forced Tappan out. Michigan historian Henry Utley colorfully characterized the firing as “the Robespierre of the regents had had his revenge on the “aristocrat” and the Lilliputians swarmed all over great Gulliver.” Utley, Michigan as a Province, Territory, and State: 254. The circumstances surrounding Tappan’s firing would provide and interesting case study on the impact of direct elections and class conflict on higher education.

656 Haven Notebook, "Erastus Haven Papers, Bentley Historical Library, University of Michigan ", (Ann Arbor, MI), 22.

657 Haven Notebook in, ibid.
permanent, [and] not torn by political factions,” it must remain independent. Suggested was a concern that legislative dollars often came with legislative demands.

In mentioning the need for funds without the insertion of political agendas, Haven was almost certainly referring to the homeopathic issue. In his address to the graduating medical class of 1864, he boasted, “It is the glory of your profession that it is exclusively and strictly scientific.” He continued, employing language that separated allopaths from other medical practitioners, particularly homeopaths. “The mysterious nature and origin of disease is investigated with observation, experimentation and analysis, in the fond hope that some remedy may be discovered, and the constant ambition [sic] is to alleviate the sick and lengthen the life of man.” Whether this was Haven’s core belief, or he adjusted his remarks to his audience, Haven had planted his flag with the allopaths. Unfortunately, the legislature envisioned a different future for the medical school, and it would soon have the capacity to press its case.

Prior to the Civil War, the University had lived within the means provided by the University Fund. Faculty salaries had been constant and inflation negligible. With the rapid

658 Ibid., 23. Haven did not wish to subject the University to political forces but was not above subjecting others to University forces. In February 1864, Ann Arbor’s City Council pledged $10,000 to support construction of an addition to the medical building. The Michigan Argus commented, “Individually we preferred that the amount be raised by private subscription rather than by tax, but as that was considered impracticable, if not impossible, we endorse fully the action of the meeting, and trust that no citizen will find fault with it.” The article continued, “We may hope, too, that it will tend to silence the clamor of a few uneasy spirits who have sought for half a score of years to procure the removal of the Medical College to Detroit, and the consequent disintegration and ruin of the University.” "Medical College - $10,000 Deal,” February 26, 1864, Michigan Argus. As the next chapter discusses, such municipal support, particularly with railroads, was common at this time.

659 Address of President Haven to the Graduating Class (1863), found in Haven’s Notebook, "Erastus Haven Papers, Bentley Historical Library, University of Michigan ". 31.

660 These beliefs continued for some time. In response to an 1873 request by Representative A.D. Gilmore concerning the reasons the regents would not accept homeopathic faculty, the regents reported that homeopathic education was at odds with the medical school’s teachings and, more importantly, would result in the ostracism of the faculty and students from the medical profession. Proceedings of the Board of Regents of the University of Michigan 1870-1876, (Ann Arbor: University of Michigan, 1915). 259-65.

661 Its other major source of income was fees charged to students from other states. The regents reported in 1867, “Thus while the students from other States contribute to the reputation and standing of the University, by lifting it from a sphere merely provincial to one that is national, they also add a very large item of material support.” Report of the Regents, as part of the Report of the Superintendent of Public Instruction, Report 5, 1867 “Joint Documents of the State of Michigan,” 158.
inflation associated with the war, as well as a large influx of students at its conclusion, fiscal embarrassment threatened. To avoid that, Haven and the regents in 1867 requested that the state help finance the University. Either it could do so with a block grant of $200,000 “or what would be better, grant a small annual income by tax.” The House unanimously tendered a vote of thanks to Haven for the report requesting assistance. It then promptly passed a one-twentieth mill property tax to support the University; but it did so with one caveat: “Provided, That the Regents of the University shall carry into effect the law which provides that there shall always be at least one professor of homeopathy in the department of medicine . . .” The law also required that the homeopath’s salary equal that of other faculty members and that “the State Treasurer shall not pay to the treasurer of the Board of Regents any part or all of the above tax until the Regents have carried into effect this provision.” In response, every member of the medical school faculty threatened to resign.

To the public, the battle was more than the struggle between a university and the legislature. It captured the discussion of the day, as to one side, the legislature threatened progress and the distinctiveness that the University brought to Michigan. An editorial in the *Detroit Free Press* submitted:

> Now every man knows that the two systems of medicine, if the one can be called a system, are as diametrically opposed as fire and water. It is unnecessary for us to express any opinion on the merits of the two, for it is admitted by all candid and fair men that both cannot be right – both cannot stand. So strong are the prejudices of regular bred physicians, that they will not even counsel or associate with homeopathists. The introduction, therefore, of such a professor, forced upon the University by law, is the equivalent to striking out the existence of the entire medical department, and to that extent destroying the University.

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662 By 1867, the University served about double the students it had before the war.
663 Petition of the Board of Regents of the University of Michigan, House Doc 1, 1867 "Documents Communicated to the Senate and House of Representatives," 8.
The paper then called on the regents to reject the aid and to support a constitutional convention that would provide “permanent relief” to the school. While in retrospect this may seem to be an interesting vignette, at the time it was anything but theatre. To the Free Press, the legislature threatened a cherished asset of the people and did so in violation of reason. Though many supported homeopathy, to others the legislature had become an intermeddling villain.

Haven would soon plead against such legislative conditions. Given the “unparalleled prosperity” and high esteem of the medical school and its graduates, he warned it would be “inexcusable and suicidal to admit any radical changes” into the medical school. His concern was that the homeopathic requirement was “of such a nature as to render it doubtful whether the University can consistently accept [the aid] – not withstanding its wants.” He appealed to the purposes of independent regents and the fear that an intervening legislature “will peril and perhaps destroy the prosperity of this State Institution.” He then suggested that the University would have “to decline most respectfully” to accept the funds given the conditions offered. 666

Haven did float an alternative, which the regents would soon consider. The University could create a separate homeopathic department, independent of the medical school. This proposal satisfied few, angered many, and failed to dampen rising passions. A regents’ letter to the legislature in 1873 explained the problem. No professor could teach with a homeopath “without absolute professional ostracism” and graduating medical students would not be admitted to practice medicine. 667 The legislature’s demands had placed the University in an untenable position. If it accepted the legislature’s conditions, the medical school would close. If it rejected them, the University would face financial ruin.

In an effort to avoid a maelstrom, the board of regents on the evening of March 25, 1868 attempted to compromise along the lines suggested by Haven. They accepted the aid offered by the legislature and, hoping to honor the legislation’s requirements, the board provided that a “Michigan School of Homeopathy” be “located at such place (suitable in the opinion of the Board of Regents) other than Ann Arbor.” They provided for two professors for that school and hired one, at a salary less than that that enjoyed by the medical faculty. They then requested that the state pay a portion of the tax revenues.

The state auditor general refused the University’s request for the millage funds, arguing that it had failed to meet the conditions of the legislation (a decision in which both the state treasurer and attorney concurred). The regents then sought a writ of mandamus to compel the auditor general’s payment. In essence, this mandamus request was cut of the same cloth as Drake’s 1856 demand that the University comply with the earlier homeopathic law. As before, the Supreme Court denied the writ request. However, in one important practical aspect, the cases differed. Here, the legislature offered funding, and the University needed those funds. In the earlier case, no funds were offered and none were needed.

In Regents v Auditor General, the justices published three separate opinions. (The fourth justice, Cooley, did not offer an opinion.) Two of the three agreed that the regents had not

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668 *Proceedings of the Board of Regents of the University of Michigan From 1834 to 1870.* (University of Michigan, 1870). 268. This idea may first have been floated by medical school Professor Alonzo Palmer who, in February 1867 wrote to Michigan Regent Edward Walker that a homeopathic school was appropriate given the nature of public schooling. He argued that the state had subsidized an allopathic school so it should subsidize a homeopathic one. That school should be located as far as possible from Ann Arbor. Palmer to Walker, Ann Arbor, February 20, 1867, Walker Papers, Bentley Historical Library, University of Michigan, quoted in Kaufman, *Homeopathy in America:* 94.

669 As noted earlier, in that case – *Drake v Regents* – the court put stock in the University’s claim of good faith investigation into adding a homeopathic position. In *Regents v Auditor General*, the court recognized that the University had never given great effort to comply with the earlier legislation. Christiancy wrote “But probably the regents would not claim to have been endeavoring in good faith to carry into effect this statute for the whole or any part of the eleven years [between the 1856 ruling and 1867]; believing their duty to the university required them to disregard the act.” *People ex rel. the Regents of the University v Auditor-General*, 167-68.

670 Ibid.
met the terms of the legislative condition and, therefore, the court could not issue the writ. To reach that conclusion, they needed to consider whether the legislature could place that condition on the regents. Unfortunately, the justices discussed the issue without sufficient briefing, as the University failed to argue that constitutional issue and, instead, relied on a claimed compliance with the statute. Notwithstanding that failure, each justice discussed whether the legislature could place restrictions on its funding, and thereby affect education policy. Christianity quickly declared that the legislature had given the regents a choice they could accept or reject, “thus avoiding all question of constitutional power.”671 Graves was more circumspect, mentioning that the regents had failed to argue the constitutional issue and, accordingly, the sole issue was whether the University had complied with the condition.672 Since the University did not comply, it deserved no writ. Campbell quickly disposed of the constitutional issue, finding that “of course” the legislature could place conditions on its funding. Unlike the other justices, he believed the University had complied but, lacking a majority on that issue, the court refused to issue the writ.

Campbell’s opinion is interesting in light of his advocacy on behalf of the University in the earlier 1856 case. In his legal brief in that case he argued that 1) adding a homeopathic position to the medical school would “utterly destroy the harmony and usefulness, and probably the existence of the medical college,” and 2) the constitution left no room for “legislative interference” in the University. He asked, “if their powers were to be left at the control of the legislature, and [the regents] to be its ministers merely, in carrying out legislative provisions, where was the propriety of saying anything about them in the constitution.”673 Yet, Campbell’s

671 Ibid., 168.
672 Ibid., 182-83.
673 Campbell also asked why the constitution framers would required direct elections and lengthy terms had the regents been made “mere puppets of the powers from whom they had just been freed.” Brief of Defendant, The
opinion in *Regents v Auditor General* suggested that the regents were ministers to carry out legislative directions, and that the University deserved the funds because it had complied with legislative demands. To be sure, Campbell acted in 1856 as an advocate, not as a judge, and he may have attempted to deflect the constitutional issue by holding that the University had complied with legislative demands. But his opinion makes no effort to discuss the constitutionality of the legislature’s purported control of higher education policy. Campbell had hidden behind contract principles to ignore, or perhaps to unravel, constitutional intentions.

Missing in all the discussions (although thought important by at least Graves) was the constitutional goal of an independent university. In changing the constitutional structure from a university dependent on the legislature to one acting as a separate branch of government, the 1850 constitutional delegates 1) wished to create a university separated from legislative political maneuvers, and 2) assumed the University Fund would finance the University. When it enjoyed sufficient funding, the University was able to implement policy in ways that differed from the political and social winds of the day. At that point the constitutional framework held. When the presumed funding source proved inadequate, the legislature inserted itself and the constitutional edifice began to buckle. The court chose not to tackle the issue or, as an alternative explanation, chose to address the events as contract issues. If the University required funds beyond the constitutional delegation, it would receive them subject to the legislature’s conditions. Unfortunately, as framed, the choice was to accept the homeopathic offer and thereby undermine University educational independence or reject the offer and threaten the University’s survival. This funding went to the heart of university control and existence.

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Regents of the University of Michigan, in People ex rel. Drake v Regents of the University of Michigan," (1856), 3, 6, 7-8, 9. In loose file of Michigan Supreme Court Reports and Briefs, for volumes 3 and 4 of the Supreme Court Reporter, University of Michigan Law Library.
Soon after the ruling, Haven expressed dissatisfaction with the legislature’s interference in hiring and educational issues. After calling on the legislature to reconsider, Haven in September 1867 suggested that the University might consider capitulating. He wrote, “I allow that the Regents ought to respect the will of the people and must in the end accept the aid tendered by the State on the conditions insisted upon.”\textsuperscript{674} They did not, and the state did not pay. By June 30, 1868, the Finance Committee of the Board of Regents declared the University “destitute” and recommended that all expenditures be “confined to matters absolutely necessary.”\textsuperscript{675}

With the University’s courtroom efforts to force payment frustrated, it was now the legislature’s turn to try to compel adherence. In January 1868, it filed for a writ of mandamus to compel the University’s compliance with the 1867 and 1855 homeopathic laws. It argued that the laws compelling a homeopathic faculty member were within the legislature’s constitutional prerogatives. To the legislature, the constitution merely gave the regents general powers of supervision over the University and such a grant did not strip legislative power. Instead, the regents were agents for the legislature, much the same as was the superintendent of public instruction. As proof, it argued that a legislature heavily populated by members of the 1850 convention passed the 1851 legislation setting forth regental responsibilities over the University. Significantly, the University had been acting under that law for eighteen years. The legislature argued that the regents had even professed to be following the 1855 law with their claimed “good faith” efforts to install a homoeopathic chair. Of course, the regents took exception to each point, raising the underlying issue – the framers’ intention to separate the University from the legislature and other political forces. Graves, writing for the court, declared that there was an

\textsuperscript{674} 1867 Proceedings of the Board of Regents of the University of Michigan From 1834 to 1870: 288.
\textsuperscript{675} Finance Committee Report, 1868 ibid., 305-06.
even split among the justices but declined to elaborate beyond that. Without a majority, this
mandamus petition too failed.676

While the legislators’ action was before the court, the winds of compromise began to
blow. In February 1869, the legislature amended the 1867 law to provide the University $15,000
per year with no conditions on the funds.677 That legislation followed an appeal by Haven on the
floor of the House and with members of both chambers. With grace, Haven declared that this
was “one of the noblest acts for higher education ever passed by the Legislature of an American
State.”678 (And with the funds, the University put steam heat into the law school.) He made this
statement before the Board of Regents on August 19, 1869, his last formal message to the board.
According to Michigan historian Kent Sagendorph, Haven had suddenly resigned, having tired of
the conflict surrounding the homeopathic issue.679

In a sense the legislature had capitulated, or at least wished to avoid the challenges of an
underfinanced university. However, the homeopathic issue did not go away. In 1871, the
regents issued a memorial in response to a house passed bill demanding a homeopathic
professor. It suggested that the regents or another board lead the construction of a homeopathic
school anywhere in the state save Ann Arbor. After receiving that memorial, the senate dropped
the bill. But passions remained over connecting it to the medical college. On June 26, the
regents reviewed two petitions – one from fifty-three representatives, the other from twelve
senators – requesting that the medical school hire a homeopathic professor. Regent Edward

676 People v Regents of University, 18 Mich. 469(1869).
677 An Act to amend an act entitled "An act to extend aid to the University of Michigan," Act 14, 1869 Laws of
678 Proceedings of the Board of Regents of the University of Michigan 1870-1876: 343-44.
679 Sagendorph, Michigan, The Story of the University: 119-20. The resignation may not have been as sudden as
Sagendorph suggested. Tappan, the University’s former president, wrote from Dunsink, Ireland on June 9, 1868,
“They seem to be in a good deal of trouble about Homeopathy at the Mich. Un. And it is reported that Haven is
about to resign and become a Methodist Bishop.” Henry Tappan, "Letter to Mr. Murphy, June 9, 1868 " (Henry
Tappen Papers, Box 1, Bentley Historical Library, University of Michigan).
Walker then proposed that the University open a homeopathic branch in Detroit. Several private citizens were willing to fund that endeavor and the regents approved that action.

Foregoing immediate hopes to attach homeopathic instruction with the University, in 1872 homeopaths opened the Detroit Homeopathic College. There is some evidence they did so with the regents’ blessing, and the regents had previously suggested this solution. Nevertheless, the tone in Ann Arbor remained harsh, as the student newspaper reported that the homeopaths threatened “to endanger the very existence of [the University’s] most flourishing department, by the introduction of elements so incongruous and irreconcilable.” In 1873, the legislature passed another statute requiring homeopathic faculty in the medical school. No funding accompanied the legislative command. The regents soon commented that the legislation would cost three thousand dollars to implement and that such funds were lacking. They did not acquiesce. The attorney general then petitioned for a writ of mandamus to compel compliance. Once again, the court could not arrive at a majority and, therefore, denied the

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680 Dr. E. R. Ellis, the secretary of the college, reported that the University regents had encouraged development of the college in Detroit, with the notion that it would one day be part of the University. Kaufman, Homeopathy in America: 99.

681 After the 1871 regent suggestion that a homeopathic school should be placed outside Ann Arbor and that the regents or some other body should administer that school, a student newspaper reported: “The regents by their action approve the efforts being made to establish such a school in Detroit, and, when ‘authorized to make it a part of the University by law, with proper provision for its support,’ promise to administer its affairs to the best of their ability.” 1871, ”The Chronicle, University of Michigan Student Newspaper,” III: 19-20.

682 “Homoeopathy Again,” 1871, ibid., III: 54. In a later article, the student authors displayed their disdain for the homeopaths. In describing a meeting of the homeopathic physicians concerning the appropriate location of a medical college, the student author wrote,

The writings of the homeopathic medical profession in reference to a place in the University are still very marked, and in some degree, quite absurd and amusing. . . . How momentous must be the scientific medical questions which agitate the profession to-day! They arraigned before their mighty sanhedrim the University board of regents, and with one comprehensive set of resolutions proved the guiltiness and prejudice of all.

Ibid., III: 67.

683 An Act to provide for the appointment of two professors of homeopathy in the department of medicine of the University of Michigan. Act 63, 1873 Laws of Michigan: I: 73.

684 Proceedings of the Board of Regents of the University of Michigan 1870-1876: 261.
petition. With the court leaving the field, the various interests sought resolution in the political and social arenas.

Perhaps in response to the deteriorating financial condition of its educational gem, the tone from the legislature began to moderate. Soon the legislature started to support the school in ways it previously had not. In 1873, it granted $25,000 for a university hall. This was an outright grant, with no conditions except that the funds be used for the designated purposes. Even with those earmarked funds, University finances were dire. The 1873 Regent Finance Committee warned that, “For the next three years . . . the University will barely keep running and out of debt, and it will be necessary to observe the most rigid economy in the disposition of funds.”

In March 1875, two non-medical faculty members – one in chemistry the other in anatomy – proposed to instruct homeopathic students to avoid forcing the medical school from compromising its position. Kaufman suggested that they did so in response to their fear that “the state might withdraw financial support. It was better to admit homeopaths, they argued, than to let their own intransigence destroy the school.” Soon the regents’ committee on the medical department would propose that the University establish a homeopathic school in Ann Arbor. It did so, not only in response to fears about general university funding, but also in response to a senate bill appropriating funds to create a homeopathic college in Ann Arbor as a part of the University. So why did the regents switch? Why accept legislative instructions to place a homeopathic department in Ann Arbor in the face of its long-standing argument that doing so

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685 People ex rel. Attorney General. v. Regents of the University of Michigan, 30 Mich. 473(1874). The opinion was short: “The very able argument in this case has not brought any member of the court to any different views from those heretofore sufficiently expressed, and we therefore make no order.”
686 An Act making appropriation for the completion of the new hall of the University of Michigan, and to pay deficit in the revenue of the university for the year ending June thirtieth, eighteen hundred and seventy-three, Act 7, 1873 Laws of Michigan: I: 6.
687 Proceedings of the Board of Regents of the University of Michigan 1870-1876: 260.
688 ———, Homeopathy in America: 100.
would destroy the medical school? The answer was money. As the committee would offer in its next report, the “naked facts” were that the University required significant funds to build or upgrade a hospital.\textsuperscript{689} Underlying their concern was the fiscal inability to advance the medical school and hospital without state aid. Accordingly, acting “in the interest of humanity,” the regents requested a $10,000 appropriation because the “cause of humanity imperatively demands” that they do so.\textsuperscript{690}

The legislature responded with a bill that “authorized” the regents to establish a homeopathic school in Ann Arbor.\textsuperscript{691} That language appealed to the regents. Rather than commanding their compliance, the suggestive law allowed the regents to maintain their claim to constitutional independence. The legislation promised a perpetual six-thousand dollars for the school and in doing so both paid for university expansion and created a cooperative atmosphere between the legislature and the regents. It also did not threaten all university funding for one desired project. Even though Abram Sager, a founder of the medical school and its first dean, resigned in protest, the University’s medical education system moved forward. Soon, homeopathic students would receive instruction in the University’s homeopathic medical college. Where curriculums allowed, homeopathic students would attend medical school classes.\textsuperscript{692} The legislature also responded favorably to the request for financing hospital construction and equipment. It furnished $8,000 for that end, if the City of Ann Arbor

\textsuperscript{689} The committee wrote that “An old brick building – formerly used as a dwelling-house – of limited capacity, poorly ventilated and utterly unfit for purpose, is the only provision we can afford for hospital facilities.” Proceedings of the Board of Regents of the University of Michigan 1870-1876: 414.

\textsuperscript{690} Reports of the committee on the Medical Department, 1875 ibid., 413-14.

\textsuperscript{691} An Act for the establishment of a homoeopathic medical department of the University of Michigan, Act 128, 1875 Laws of Michigan: 156.

\textsuperscript{692} The board resolutions implementing the new system also included a change of policy concerning diplomas. Previously, the school chairman signed the diplomas. Now diplomas across the university would “be signed only by the President and Secretary” of the University. This avoided the possible need to have the allopathic medical chairman involved in certifying students that had studied homeopathic medicine. Proceedings of the Board of Regents of the University of Michigan 1870-1876: 432-35.
contributed an additional $4,000. The regents did not stop there. They determined to establish a
dental school within the medical school and tied construction of a homeopathic lecture hall with
the dental school. The University also established a school of mines, something advocated by
Upper Peninsula members of the legislature. In a spurt of support, the 1875 legislature would
appropriate $5,000 to bring water to the University, grant $13,000 to wipe out University
indebtedness, appropriate $3,000 for two years for the dental school, appropriate $10,500 to
support the school of mines, grant $6,000 for the homeopathic school, and $8,000 for the
hospital. As part of some of its appropriations, the legislature required specific faculty
positions, something the regents steadfastly had rejected in the past. The University
administration applauded those appropriations, with University President James Burrill Angell
declaring the “Legislature at its last session treated us generously.”

   Angell tried to justify this seeming change in policy from regent control to legislative
direction or, perhaps, control. He suggested that a separate homeopathic school was acceptable,
whereas previous proposals that had the department as part of the medical school were not.

   Missing from his discussion were the early concerns over placing the school in Ann Arbor or
sharing faculty. In exchange for their capitulation, the regents received funding and an expanded
university curriculum. To receive that, at least in part, they gave up an unblemished claim to
constitutional independence. Angell seemed to acknowledge that new constitutional order when
he commented that, “The aid which the Legislature gave us last winter must be regarded as of

693 An Act to provide for a supply of water for the University of Michigan, Act 74, 1875; An Act to provide for
paying the outstanding interest-bearing warrants of the University of Michigan, Act 113, 1875; An Act to provide
for an appropriation to enable the board of regents to establish and maintain a dental school in connection with the
medical department of the State university, Act 186, 1875; An Act to organize a school of mines in the University of
Michigan, the establishment of additional professorships, and making appropriations for maintenance of the same,
Act 205, 1875; An Act making appropriations for the building of a hospital in connection with the University of
Michigan and for the equipment of the same with hospital stores and furniture, Act 207, 1875 Laws of Michigan.
694 President’s Report, October 15, 1875, Proceedings of the Board of Regents of the University of Michigan 1870-
1876: 465.
695 President’s Report, October 15, 1875, ibid., 468.
great importance, not only because it secures an immediate enlargement of the scope of our
work, but because it seems to promise yet larger help in the future.” He saw that aid as
foundational. “We trust that we are not over-sanguine when we say that we now start upon a
new era in the history and work of the University.” That change was significant. When
Angell first arrived as the University’s president, the school’s income was $76,700. By the time
he left office in 1909, it was $1,200,000.

The need for funds had changed University governance in ways not foreseen by the
framers of the 1850 constitution. The story of homeopathic medicine at the University did not
end with the 1875 compromise, nor did the issue of legislative overreaching into university
affairs. Former Medical School Dean Sager, who had resigned over the controversy, soon
became the leader of a group condemning the regents and the faculty, classifying the homeopaths
as the “arch-enemy of rational medicine.” A group of students also protested the taint they
would suffer from associating with homeopathic students. “Our alma mater,” they said, “must
be like Caesar’s wife, above suspicion.” A struggle within the various medical communities
ensued, with many allopaths believing that the medical faculty had violated their oaths and were
subjecting the students to quackery. They argued that the regents had allowed an
unconstitutional intrusion into the University’s prerogative. Tensions also arose between
allopathic and homeopathic faculties, culminating in a brawl and choking incident between the
dean of the homeopathic college and a faculty member of the allopaths. Soon, however,
passions cooled, at least for a time.

696 President’s Report, October 15, 1875, ibid., 470.
698 “Detroit Review of Medicine and Pharmacy” 10 (August 1875): 674-76, quoted in, Kaufman, Homeopathy in
Kaufman also mentions a medical student raid on a brothel, but it is not clear how that peccadillo involved the
homeopathic dispute. Ibid., 107.
The issue of legislative versus regental control of the University resurfaced outside the homeopathic crisis but, by coincidence, involved University hospital construction. Julius Weinberg, a subcontracting provider of stone and gravel suffered financial injury when, in the early 1890s, the contractor failed to pay him for work and materials on the University hospital. Weinberg sued the University and its officers, claiming that they failed to obtain the surety bond required by statute of government actors contracting on behalf of the state. The regents argued the University was not subject to that law due to its constitutional independence. The Michigan Supreme Court’s opinion shed little light, and introduced much confusion. Justice John McGrath’s opinion for the court stated that individuals and not the University were liable under the statute. He reasoned that state funding, together with the understandings of “most residents of Michigan” meant that University building projects were state building projects. Arguments of separation of the University from the state were “altogether too technical.” Justice Claudius B. Grant in his concurring opinion argued that the regents were not subject to legislative requirements. “Under the Constitution, the State cannot control the action of the Regents. It cannot add to or take away from its property without the consent of the Regents.” Grant submitted, however, “In making appropriations for its support, the Legislature may attach any conditions it may deem expedient and wise, and the Regents cannot receive the appropriation without complying with the conditions.” With the University now dependant on state financing, Grant’s dictum opened the University to expansive legislative involvement in university affairs.699

699 Weinberg v Regents of the University of Michigan, 97 Mich. 246 254 (1893). In 1908, in State Board of Agriculture v Auditor General the court limited its Weinberg statement. The case involved the Michigan Agricultural College (later Michigan State University), which inhabited the same constitutional space as the University. Its governing board was the state board of agriculture just as the University’s was the board of regents. The court wrote of Weinberg: “It did not mean that a condition could be imposed that would be an invasion of the constitutional rights and powers of the governing board of the college. It did not mean to say that, in order to avail itself of the money appropriated, the state board of agriculture must turn over to the legislature management and
Whether emboldened by the Weinberg dicta, or responding to public pressure or both, the legislature again waded into the homeopathic issue. In response to proposals to merge the two medical schools and local pressures to place the school in Detroit, in 1895, the legislature required that the University move its homeopathic college from Ann Arbor to Detroit. The regents declined to do so (even though that was their compromise position in 1867 and 1871). Thereafter, a private citizen petitioned for a writ of mandamus to compel University compliance with the statute. As with the 1856 Drake v Regents matter, the court questioned the petitioner’s standing to bring the action. Unlike that case, the University did not raise the standing issue, so the court in Sterling v Regents of University of Michigan, decided to consider the underlying issue – whether the University was bound to comply with legislation concerning university governance.

Where the court had previously avoided the issue of constitutional intent, this court, through Grant, clarified his dicta in Weinberg and directly addressed the issue. He noted that, “It is apparent to any reader of the debates . . . in regard to the constitutional provision for the University that they had in mind the idea of permanency of location, to place it beyond mere political influence, and to intrust it to those who should be directly responsible and amenable to the people.” He was “unable to find a single utterance” that advocated legislative involvement, (there were a few), and that the regents for 46 years had “declined obedience to any and every act of the legislature” with which they disagreed. The court took notice that the legislature probably never thought the University would require appropriations and that the framers never

control of the college, or any of its activities.” State Board of Agriculture v Auditor General, 226 Mich. 417, 425 (1924).

700 In their argument before the court, the regents argued that common instruction for the homeopathic and medical school students created efficiencies that the state would not enjoy with separate facilities. Accordingly, they argued, “great advantage arises to the University as a whole, and to the students in the various departments of the University, that all the branches of the University are located and maintained at the proper seat of the University, at Ann Arbor.” Certainly, the regents had changed their position since their 1855-74 arguments against a homeopathic school in Ann Arbor. Quoted in Sterling v Regents of University of Michigan, 110 Mich. 369 (1896).
intended to grant the legislature control over the University Fund. But, the issue of leveraging appropriations to control university policy remained. Court dicta suggested, “by no rule of construction can it be held that either [branch] can encroach upon or exercise the powers conferred upon the other.”\textsuperscript{701} Left open was the extent of legislative power to condition appropriations. More specifically, if the legislature had that power, it was undecided whether it could assume control over university policy in this new world where greater percentages of university revenue came from tax dollars.

Politics and practicalities ruled, with law setting a framing rather than deciding role. Financial needs played a heavy and pragmatic role. The revenue from the University Fund remained relatively stagnant as the needs of the University grew. The regents requested, and the legislature passed, increasing taxes to support the University so that by 1893, the one-twentieth mill had been increased to one-sixth mill (and in 1921 it became one-quarter mill). It may be that the legislature could premise an appropriation on university adherence to a particular policy, and that the University could refuse to comply. Even were the courts to rule a particular appropriation must be condition-free, legislatures could withhold future appropriations pending University acceptance of legislative desires. Accordingly, when the University struggled to survive without appropriated funding, the barricade of constitutional separation seemed poor solace.

Strict reliance on the framers’ intentions, even when as evident as here, was not enough. Social forces had pushed against the constitutional structure, with the Civil War both increasing the cost of and demand for education. The intended funding source, which had supported constitutional separation, no longer was relevant or effective. The framers’ assumed barriers against short-term political winds did not protect against economic realities created in the wake

\textsuperscript{701} Ibid., 374, 377, 379, 381.
of the Civil War. And, as feared, legislative thirsts to advance popular interests drove politically
inspired demands that would threaten the state’s educational plans. The result was crisis. In the
end, legislatures could not be expected to appropriate without conditions and the University
could not be expected to abandon its educational independence to a politically driven body. The
solution, however, was not found in the courts – which deals with one narrow subject at a time –
but in compromise. In that case, the constitution informed, it did not control.

Cooley’s Exposure

Cooley enjoyed a nearly forty-year history with the University, as a law professor, legal
advisor, and friend of University presidents. So strong was his attachment that Cooley declined
an 1880 Johns Hopkins University offer of a $5,000 salary to leave the University and teach
there. That salary amounted to more than Cooley’s combined judicial and University pay.
Although Cooley sat as law faculty during much of the controversy, he wrote little about the
homeopathic crisis. There are, however, a couple of indications of his support for an
independent University administration. In People ex rel. Leroy v Hurlbut, a case dealing with
state legislative power to appoint members of a municipal water board, Cooley associated state
control over local administrators to the “despotism” of European “monarch or commune.” After
drawing that stark comparison, he wrote of the 1850 constitution’s effort to “confide more power
to the people” by among other things providing for the election of regents of the university.702
His interest was avoiding legislative centralization; a challenge he certainly felt as a result of the
legislative demands that threatened university existence, or at least vitality.

Cooley also wrote with pride of Michigan’s education efforts and of the state’s status as a
model for newer states. “No commonwealth in the world makes provision more broad,

complete, or thorough for the general education of the people, and very few for that which is
equal.” He then applauded the use of public funds to accomplish educational aims. Given his
support for education, his belief that the University should be “beyond the dangers that might
spring from popular excitements and prejudice, and from political overturns,” and his advisory
role to the regents, one can safely surmise that the homeopathic crisis helped shape and
strengthen Cooley’s legislative-limiting philosophy. While there is no direct evidence of that,
any other result would surprise.

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Chapter V: Regulations, Spending, and a Search for Judicial Grounds to Limit Legislative Authority

The Courts often find themselves unable to set aside Acts of the Assembly on Constitutional grounds, which they would be glad to repeal if they had a constitutional veto.

Justice George Washington Woodward (1858)

Commonwealth ex rel. Thomas v Commissioners of Allegheny County

From their inception, state governments supported internal improvements and continued to do so even after their constitutions sought to restrict such support. Government support was so extensive throughout the 1830-1870 period that private rail companies received government financial assistance “so long as there was a mile of American railroad track to be laid.” That support increasingly came under attack as rising public debt and taxes caused legal and political reassessments of legislative largess. Despite that rising cacophony of complaints, legislators and the public continued to vote to publically support rail construction. Failing to convince the

704 32 Pa 218, 232 (1858).
706 The numbers are telling. Before 1840, no state constitution restricted state debt. As of 1857, nineteen of the then thirty-one states had limited legislative power to borrow. More would create constitutional barriers as new states entered the union. Even then, when no constitutional barriers existed, a series of states declined, for policy reasons, to borrow for commercial support. By 1861, only Delaware, Missouri, and Massachusetts sanctioned state aid to railroads. The change was forged by experience. Across the nation, excess construction, government debt, poor management, and economic challenges had resulted in widespread inabilities to finance state debt. Secrist summarized the challenges. “In the early period of the improvement crusade, public debts were looked upon as unreal because they represented only a small fraction of the wealth added to the country by the improvements themselves.” But as rail revenue failed to finance the debts, those “debits could no longer be ignored, for the time of a final reckoning in many cases was swiftly approaching.” Previous public acclaim turned to disdain and constitutions across the nation were changed to prohibit or severely limit state pledges of credit and massive public-improvement projects. Ratchford, American State Debts: 121. Goodrich, Government Promotion of American Canals and Railroads, 1800-1890: 231. Secrist, An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States: 13-31.

Michigan was no exception to the trend to limit state borrowing. Determined to go further than its 1844 Constitutional Amendment, the Special Senate Committee wrote that “More civil governments have decayed and perished as is seen on the page of history, in consequence of the creation of debts and government prodigality, its incident and natural concomitant, than from any other cause.” Report of the Special Committee on the General Revision of the State Constitution, Doc. 10, 1849 "Documents Accompanying the Journal of the Senate of the State of Michigan," 46-47. Hence, the 1850 constitutional restrictions.
majority about the challenges of public largess, disaffected taxpayers turned to the courts for relief. In the antebellum period, those efforts uniformly failed, as courts deferred to legislative discretion. At the same time, however, taxpayer and judicial discontent intensified with the courts and litigants developing legal doctrines that Cooley would employ to change judicial deference to judicial review and, with it, the acceptable to the prohibited.

Michigan’s experience during this period was much like that of other states. As elsewhere, the framers of Michigan’s 1850 constitution worked to change the nature of government’s relation to commerce. The Senate Special Committee on the General Revision of the State Constitution set the tone. It declared that the practice of loaning state credit or dollars “should be terminated and entirely prohibited by constitutional law.”

Gone were appetites for state-supported industrial and infrastructure development. As Cooley reflected, “Having all their bitter experience with internal improvements fresh in mind, when they formed a new Constitution, in 1850, the people resolved to put it out of the power of the legislature again to involve them in extravagant projects.” To accomplish those goals, the new constitution limited state debt, prohibited the state from pledging its credit, made state support of local or private projects more difficult, prohibited state ownership of corporate stock, and prohibited financial involvement in internal-improvements projects. It also prohibited the creation of

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707 The Committee’s position lacked consistency, as it suggested that the state continue development of the state’s salt springs and mineral deposits. They were “calculated to yield the state revenue.” Report of the Special Committee on the General Revision of the State Constitution, Doc 10, 1849 “Documents Accompanying the Journal of the Senate of the State of Michigan.” 48.
709 Goodrich noted that “over much of the country the difficult early years of the 1840’s did, in fact, mark an abrupt turning away from the policy of state action for internal improvements.” Accordingly, a number of states in this period amended their constitutions to prohibit or curtail state support of internal improvements. Goodrich, "Revulsion Against Internal Improvements," 148. Interestingly, and despite the article’s title, Goodrich’s point is that states did not turn away from internal improvements. Instead, they changed their methods of support.
special corporations, instead providing for the legislature to authorize general corporate entities that would owe no inherent duty to, and gain no favors from, the state.\textsuperscript{710}

With the state now constitutionally out of the internal improvement business, private corporations would respond to the public demand for rail services and development. However, this did not mean that government completely withdrew. Notwithstanding the drafters’ intent, several forces coalesced to bring government back into the picture – but this time it would be local government. Because municipalities required rail service to enhance their economic, social, and political relevance, railroads could leverage where they built in exchange for local financial support. In response, municipalities sought to shape rail routes through financial grants for building within their borders. Because their powers were limited, those municipalities required state legislative approval to tax for the funds needed to do that. All the state legislatures, including Michigan’s, responded by enacting “nearly 2200 special laws” between 1830 and 1889 to authorize government financial participation in local rail development.\textsuperscript{711} In the end, state legislatures were authorizing municipalities to grant aid to private corporations where the state itself was constitutionally barred from doing so.

As a general practice, taxpayers voted to approve the local rail grants and, by extension, the need for tax assessments to pay for them. Despite numerous challenges, during the antebellum period courts unanimously affirmed both the early subscription regime and the later municipal grants. Notwithstanding that unanimity, majorities and dissenters expressed concern

\textsuperscript{710} Cooley’s support for restrictions on legislative power to create special corporations became manifest in his comments on the 1853 legislative debates on a general rail incorporation bill. Cooley commented, “If public improvements are to be entrusted to individual enterprise, there is such manifest justice in having the whole field open, instead of bestowing legislative favors upon particular places and particular individuals, that this consideration alone ought to induce passage of a general law.”\textsuperscript{710} That bill was defeated and Cooley complained about the power of the Michigan Central, which had advocated against passage. “Watchtower,” January 25, 1853, quoted in Jones, \textit{Constitutional Conservatism}: 59.

over the propriety of such transfers of wealth. The dissenters linked their objections to vested rights, natural law, and republican-governance principles, as well as specific language in their states’ constitutions. At its core, the issue concerned government’s power to transfer, and thereby destroy, property interests. At the same time, residents increasingly complained about regulatory legislation that encumbered property and/or advanced governing power. There too, court decisions almost without exception deferred to legislative power. However, in both areas, court dicta suggested that there were limits on legislative power to tax, spend, and regulate. But dicta do not decide cases – holdings do. And, with only a few exceptions, court rulings affirmed legislative power . . . that is, until Thomas Cooley entered the picture. He enters in 1868, as discussed in Chapter VI. Before that entrance, however, this chapter focuses on pre-Cooley judicial concerns over legislative activism.

A Changing but Determined Support

Public desire and need for an enhanced transportation network did not end with the privatization of Michigan’s rail lines or with the erection of constitutional barriers. Notwithstanding that need, direct state subsidies, subscriptions, and other forms of aid took a decided rest in the mid 1840s, and rail development precipitously slowed as investors sought safer harbors for their capital. Following the sale of the Central and Southern lines, until 1855, the Michigan legislature only chartered seven new railroad companies, and those only created extensions or branches off existing lines. In a later assessment of Michigan rail development, the Michigan Public Utilities Commission in 1919 reported that, “During these years no active governmental financial support of railroads seems to have been given by the state, and evidently railroad enterprise was largely regarded as purely private enterprise.” That was true, at least with respect to direct financial support. However, government remained involved in other respects.
The federal and state governments granted extensive public domain lands to railroads, and that sort of aid “was a forerunner of the later policy of grants to corporations to accomplish the same purpose.” By 1863, those public domain grants largely ended. To fill the gap, local financial grant would become major facilitators of rail development. In 1863, Michigan’s legislature passed three acts to allow municipal aid, in 1864 twelve acts, and in 1865 eight acts. In 1869, the legislature passed a general authorization for municipalities to grant aid to rail, without specific approval from the state. Where the state had left the field of direct financial aid, it continued its efforts by allowing municipalities to enter the game. The goal was progress and railroads advanced industry, trade, and communication. Rail was a key to the future and government found new ways to prod their development when previous avenues of support were rendered unavailable.

This was a national phenomenon as multiple states granted municipalities the right to act when the state could not directly do so. The drive primarily was economic. Cities and towns recognized that rail access provided routes to market and, on the flipside, that lack of access threatened local decline. New York, for example, a state that had constitutionally prohibited state involvement in 1847, had authorized its municipalities to grant $30 million to railroads by 1879. Before New York’s constitutional prohibition of state support, those municipal grants amounted to a relatively meager $9 million. Whereas before government subscribed to corporate stock, now municipal aid typically took the form of grants to rail lines, paid upon

completion of construction milestones – a less risky strategy.\textsuperscript{715} Generally, municipalities floated bonds to finance that aid and paid for those bonds by increasing tax obligations. This created a considerable burden, as those obligations fell on landholders whose property values may (or may not) have increased, but who often lacked liquidity. Unfortunately, those “who had no cash simply mortgaged their farms” in order to pay the rail-created taxes. Accordingly, the move from state obligations to individual obligations made the financial transfer to the railroad seem more direct and the impact more immediate. The taxpayer was no longer cushioned from tax liability by the wider assemblage of residents associated with state obligations, or by the possibility of a state default on its bond obligations. In essence, local assessments moved the risk of bankruptcy from the state to the individual taxpayer. Despite this risk and the general requirement of a taxpayer vote, this form of municipal financing became so pervasive that it soon dwarfed previous state and federal financial assistance to rail.\textsuperscript{716}

In the early stages, these municipal grants were widely accepted by the taxpayers. Voters accepted that local rail advanced economic and social interests and facilitated population growth. As importantly, failure to promote local rail could economically devastate a municipality \textit{vis a vis} its participating neighbors.\textsuperscript{717} This is not to suggest that these forms of government transfers of wealth met with near universal acclaim. They did not, as many citizens expressed concern over government actions that encumbered property interests – most specifically by taxation and regulation. An article in the 1843 \textit{American Law Magazine} entitled “The Security of Private

\textsuperscript{715} Stock subscriptions at times resulted in state stock ownership in entities that did not complete the anticipated tasks. With grants, municipalities paid only upon completion of defined goals. The \textit{Michigan Argus} explained that the legislature’s “uniform policy has so far been to prohibit the placing of a single dollar raised by tax or on corporate bonds to the hands of a railroad company, until it has progressed with its work to such an extent as to make its completion certain. If a city becomes a stockholder this safeguard cannot be exacted, for its stock must share the fate of the company and of private stockholders.” \textit{Michigan Argus}, May 18 1866, 2.


\textsuperscript{717} Taylor classified rail access as the “chief weapons of warfare,” among municipalities for economic advantage. City leaders would mobilize resources to assure that railroads located in their jurisdictions, fueling the area’s economic relevance and vitality. Taylor, \textit{Transportation Revolution}: 97-99.
Property” protested that property was at such risk that it was “in need of every parchment barrier which has or can be thrown around it.” The problem was democracy. “In a republic, where the legislature . . . is annually elected, and where . . . the legislature . . . partakes . . . of the passions and impulses of the moment, it is important to inquire into the extent of the power possessed by the majority, to encroach upon the fruits of honest industry, or interfere with the proprietor in his free and undisturbed possession and enjoyment.” The author’s disquiet evinced a growing concern rising in some measure from the largest transfers of wealth of the day – rail subsidies.

The unanimity of court rulings accepting the wealth-transfer legislation was part of the general-welfare supporting paradigm of the early and mid-nineteenth century. Taney’s 1837 Charles River Bridge opinion well reflected that underlying general-welfare theme: “While the rights of private property are sacredly guarded, we must not forget that the community also have rights; and that the happiness and well-being of every citizen depends on their faithful preservation.” As discussed below, the cases considering rail subsidies argued that the legislature facilitated that happiness and well-being by transferring private property (tax revenue) to rail corporations. And those courts that questioned the efficacy of such transfers unanimously deferred to the legislature’s right to advance community interests even as individual rights suffered.

With temporary gaps when state direct finance slowed, from 1830 to the Civil War government infrastructure efforts accelerated as government pressed community interests. Even as Corwin maintained that courts were actively protecting property rights through a budding

718 “The Security of Private Property,” J Am. Law Magazine 318 (1843): 319-20. The author opened this argument by stressing his fear of majoritarian incursions into the private sphere. “In a republic, where the legislature for the most part is annually elected, and where of course legislation partakes in a great degree of the passions and impulses of the moment, it is important to inquire into the extent of the power possessed by the majority, to encroach upon the fruits of honest industry, or to interfere with the proprietor in his free and undisturbed possession and enjoyment.” Ibid.

substantive due process jurisprudence, he acknowledged the period’s overarching government activism. Corwin explained that, “with the revival of revolution abroad and the rise of transcendentalism at home, and last, but not least, the phenomenal success of the Erie Canal, the demand went forth for a large governmental programme: for the public construction of canals and railroads, for free schools, for laws regulating the professions, for anti-liquor legislation, for universal suffrage and for the abolition of slavery.”

Government was increasingly aggressive in pursuing efforts to develop commerce, communication, and social and moral programs.

As Michigan embarked on its early internal improvement projects, discussed in an earlier chapter, other states employed various mechanisms financially to drive their internal improvement goals. To understand court responses to those activities, it is worth briefly reflecting on those efforts to advance infrastructure development. Some measure of government involvement is in the dollars spent. Of the $137 million nationally spent on railroads before 1843, over a third was public money, much of it as stock purchases or direct subsidies. By 1861, that public aid exceeded $150 million. But public expenditures tell only a portion of the government-involvement story. State and federal land grants to the railroads equaled about 155 million acres, about 242,000 miles. By way of comparison, that area is larger than France, or more than double the combined area of Illinois and all the New England states. The goal was not just rail development, but also the economic energy that infrastructure development brings.

Economic historian George Rogers Taylor reflected that “in no other period of American history

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721 Sellers, The Market Revolution: 44.; Goodrich, "Local Government Planning of Internal Improvements," 429-30. Goodrich's study included only a portion of the states financing internal improvements and his estimates are likely conservative. Hughes, The Governmental Habit Redux: 71-76. Hughes states that "about 68 percent of all canal investment between 1815 and 1860 came from public sources," He notes that rail investment was substantially larger, especially when land grants to rail lines are considered.
722 Ripley, Railroads, Rates and Regulations: 35-6. Ripley asked, “Shall it ever be said, in the face of such evidence, that these common carriers are private concerns, to be administered solely in the interest of holders of their securities.” 37. Ripley was a professor of economics at Columbia, MIT, and Harvard. He also wrote on anthropological issues, including employing racial characteristics to explain behavior.
has the government been so active in financing and actually promoting, owning, and controlling banks and public works including turnpikes, bridges, canals, and railroads.” \(^{723}\) The reality was that American society employed government power to advance its economic and societal condition, and the courts stayed out of the way.

Virtually every state participated to varying degrees in supporting rail, and each did so as part of a general enthusiasm over the benefits rail would bring (or perhaps with a fear of the consequences of non-participation). \(^{724}\) Henry Carter Adams noted the mob-like frenzy, as governments entered into their rail development programs with “unbounded enthusiasm, and projected schemes absolutely absurd in their magnificence.” \(^{725}\) Quoting a *North American Review* article of the day, the Handlins related the general attitude regarding government obligations. “‘Many things’ it was acknowledged, ‘should no doubt be left to individual enterprise’ but transportation ‘may and ought to receive a salutary stimulus from well timed public encouragement.” \(^{726}\) With respect to internal improvements, there was no hard line between public and private. Internal improvements facilitated commerce, travel, and communication – core elements of government’s mission.

Having repeatedly lost in the political sphere, objectors ultimately took their case to the courts. They would claim that government had no power to take their property, in the form of taxes, and give that property to another private individual, namely corporations. In so arguing, taxpayers drew upon the high value Americans placed on the sanctity of their property and their distaste for taxation. The legal claims evolved over time, moving from early objections over tax fairness, municipal power, and government takings to later objections over individual property

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\(^{723}\) Taylor, *Transportation Revolution*: 383.


rights and an advocacy of a separation between public and private spheres. It is worth tracing that development, as evolving antebellum rights claims helped lay the foundation for later constitutional systems of thought.

**Judicial Deference but Percolating Dissatisfaction**

Early objectors to government business subsidies relied on takings law, claiming that government seized their property, in the form of taxes, without offsetting compensation. At first, courts responded as if takings clauses did apply, but answered that public benefit fulfilled the compensation requirement. Eventually the decisions would reject the applicability of takings clauses as curbs against government taxing and spending. Courts reasoned that takings related to a narrow, definable property interest as opposed to a broader tax concern. Moreover, taking remedies were monetary damages and employing that remedy would require that courts micromanage taxing and spending activities.

With takings clauses effectively unavailable, complainants challenged the government’s constitutional taxing authority. This strategy too was ineffective, as courts construed government power to tax as virtually unlimited. But a gap began to open as courts would address not only the means of taxation but also the ends of its use – spending. Their decisions eventually set forth two standards. The means of taxation needed to be applied fairly and the ends of taxation – expenditures – needed to pursue a public purpose. While both standards were important, the real battle would concern whether expenditures fit an appropriate public purpose. The answer in every antebellum case, whether cheerfully or begrudgingly given, was they did.

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727 See, for example, *Police Jury - Right Bank - for the use of New Orleans, O. & G. W. R. Co. v Succession of McDonogh*, 8 La.Ann. 341 360 (1853). In that case the court stated that the benefits returned to taxpayers lay in those things a taxpayer "enjoys in common with his fellow-citizens in the public welfare and public prosperity, to the advancement of which the money is to be applied."
After some early efforts to challenge directly the state’s taxing power, litigants focused on the public purpose requirement. That standard flowed from constitutional provisions and commonly accepted understandings requiring that legislatures act to advance the community’s general welfare and safety. The question soon became whether stock subscriptions, most notably in private railroad corporations, advanced that general welfare. That issue also raised the question of who decides whether an expenditure enhances the general welfare – the legislature or the courts. Ultimately, the issue concerned the nature of republican governance: When do minority or individual interests (or rights) trump majority will?

These were not esoteric, philosophical musings. By the 1840s and 50s, states and municipalities were widely and “freely mortgag[ing] their sovereign credit for pushing public works.” States were taxing to fund stock subscriptions and municipalities were doing so to support local rail projects. In response, disgruntled taxpayers looked to the courts for relief. And, contrary to the belief that courts were actively protecting property interests, in the antebellum period courts uniformly deferred to the legislatures’ judgment and affirmed wealth transfers from taxpayers to industry. Government support for internal improvements was the major form of wealth transfer in its day, and such transfers were far more substantial, widespread, and considered, than the few contrary and oft-celebrated cases that voiced – most often most often in dicta – other opinions.

Little legalistic discussion of government’s role in private industry occurred prior to the 1840s. The discussion concerned the wisdom of those policies, as “the legitimacy of the mix

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728 In essence, the issue was between the courts on one hand, and the legislature and the executive on the other. Unless the legislature overrode an executive veto, both branches had agreed on government support of private industry when passing the subscription legislation.
730 Cases like Calder, Hoke, and Wilkinson may dominate some scholastic work, but their rulings and dicta pale in comparison to the historical and legal significance of the cases dealing with antebellum government support of infrastructure projects.
corporation was pervasively taken for granted.” 731 The earliest cases to take up the issue considered public support of railroad’s precursors – turnpike roads and canals. In 1837, the Virginia Supreme Court in Goddin v Crump confirmed the constitutionality of Richmond’s subscription to the James River and Kanawha Company, a business incorporated to improve transportation on the Ohio River. 732 John Goddin, a Richmond resident and taxpayer, objected that his taxes increased $3.90 to help fund a private corporation. When he refused to pay the increased taxes, the tax collector took “Harry,” Goddin’s slave, to sell him to pay the tax deficiency. Goodin sought to enjoin the tax collector, and lost.

The case involved a number of issues, including municipal powers, expenditures outside of the city limits, and uneven tax burdens. 733 For our purposes, the importance of the case lay in the judges’ competing legal philosophies concerning municipal contributions to private entities, most specifically whether those contributions violated the property rights of non-approving taxpayers (when a majority of taxpayers had voted to the contrary). Acknowledging that taxes are collected to advance the public good, the court majority declared the legislature the best judge of the public good, and deferred. In this, as with almost all other municipal grants to railroads, the legislature required an approving taxpayer vote, which furthered the court’s belief about general-welfare advancement. The majority refused to enter what it considered legislative space, notwithstanding rights complaints. To the judges, popular will prevailed and courts had no power to veto legislative or popular efforts to advance the general welfare.

731 Hartz, Economic Policy and Democratic Thought: 104.
732 Goddin v Crump, 35 Va. 120(1837).
733 Cooley’s only Constitutional Limitations reference to the case concerned the right to leave tax and spending issues to the voters. Cooley, Constitutional Limitations: 119, fn 4.
Justice Francis T. Brooke disapproved with the court’s analysis, noting that the “great object [of civil government] is to protect the rights of the minority from the tyranny of the majority; a tyranny more inflexible and implacable than the tyranny of a single despot.” Searching for a constitutional principle upon which to hang his objection, Brooke mentioned takings, liberty, natural justice, moderation, and temperance. Those principles were to protect individuals from the loss of their property as a result of government involvement in the private sphere. Beyond the challenges associated with reliance on extra-constitutional limitations, Brooke’s reasoning suffered with his suggestion that rail development was a state (not local) issue, given the wider geography of benefits that rail engendered. Brooke did not discuss why a state tax was less intrusive on property rights, natural justice, temperance, or moderation than a local tax, but he did offer the germ of an argument that would later bloom. Brooke submitted that Richmond could only tax its inhabitants if there was “common interest” between the benefit to the taxpayer and the proposed expenditures. To grant funds to a private enterprise for a narrow purpose, Brooke suggested, would not support a “common interest.” The fact that “the inhabitants might derive some benefit remote in prospect, though the object was a public object” did not establish that the required common interest existed. He did little to expand upon this thought and it would require an energetic stretch to read him as proposing a test requiring direct benefits for taxes employed. However, his argument suggested a nexus between the tax and the benefit – or common interest – was required and, in the case of stock subscriptions, he believed that connection was missing.

734 Brooke was part of an influential Virginia family. His brother was Virginia’s governor, as was his grandfather. Brooke was married to George Washington’s niece.
735 *Goddin v Crump*, 151.
736 Ibid., 153.
The arguments voiced in Goddin continued in similar fashion for the next fifteen years. Court majorities would hold that the role of the legislature was to determine the appropriate use of taxes to support the general welfare and that courts were ill positioned to reconsider those determinations. As that was the uniform position, no antebellum supreme court overturned government subscriptions or grants to transportation companies. To be sure, courts recognized the risk of “onerous taxation” associated with legislative “indiscriminate prodigality,” in granting public funds to private corporations.\footnote{Cincinnati, Wilmington and Zanesville Railroad v Commissioners of Clinton County, 1 Ohio St 77, 80 (1852).} Despite this possibility, and the extent of the questionable investments made, courts declared that the ballot box, and not the courtroom, was the appropriate place to voice objections to excess taxation and profligate spending.

These courts were loath to step in where American government historically had “facilitated the social and business intercourse of its people.”\footnote{Ibid., 94.} Canal and rail support were mere extensions of that historic government/industry affiliation, and the courts agreed that legislatures were positioned to determine the appropriate means to facilitate trade and affect the will of the people. Indeed, they had the constitutional obligation to do so. As Chief Justice Chilton of the Alabama Supreme Court wrote, legislative power “extends to the employment of all those means and appliances ordinarily adopted, or which may be calculated, to develop the resources of the State, and add to the aggregate wealth and prosperity of the citizens.” Part of the legislature’s responsibility included, “providing outlets for commerce; opening up channels of intercommunication between different parts of the state; improving the social, moral and physical condition of the people by wholesome police regulations, and by a judicious system of public instruction as also for the protection, security and perpetuity of our government and institutions.” From this, the court concluded that the legislature had the “power to tax the owners
of real estate to aid in the construction of a railroad. Antebellum courts uniformly adopted this same position. The legislature had the power and the courts could not veto their decisions.

Where did Michigan courts stand during this period? The antebellum Michigan Supreme Court did not address the use of tax dollars to support privately held rail development, perhaps because for much of this period the state owned the major lines. Nonetheless, its views on the public’s interest in rail success were set forth in its 1852 decision in *Swan v Williams*. As discussed earlier, in that case, the court considered whether Michigan’s earlier territorial government lawfully granted eminent domain powers to the privately held Pontiac Railroad Company. In approving that grant of power, Chief Justice Martin classified railroads as a “public agent.” Unlike most other corporations, even fully private railroads were “public in nature,” with their private profit motive only “incidentally promoted.” It is not surprising that the court found as it did, as rail significantly contributed to Michigan industry and citizenry. James Wheeler’s study of economic changes in Michigan found that areas serviced by rail enjoyed a “sudden decline in transport costs” and that industry located along rail lines grew at a greater pace than those ill-served by rail. Given the court’s focus on the effect of the transactions, it is safe to surmise that, had the court directly addressed the issue, the antebellum Michigan court would have affirmed legislative power financially to support industry.

Majority deference to legislative power is not the same as agreeing with legislative judgment. As Pennsylvania Justice Woodward backhandedly noted in 1858, “the constitutional powers of the legislature are not necessarily as limited as its wisdom.” He bemoaned, but

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739 Stein v Mayor, Alderman of Mobile, 24 Ala. 591, 614 (1854).
741 Swan v Williams, 435.
accepted the limitation that, “The courts often find themselves unable to set aside Acts of
Assembly on constitutional grounds which they would be glad to repeal if they had a
constitutional veto.” The people spoke through their legislatures and, in the courts’ views, the
courts lacked the wisdom and power to overturn society’s will. In the end, in the antebellum
period, court majorities were unwilling to expand judicial oversight by shaping constitutional
language to fit their notions of appropriate governance. Accordingly, state courts unanimously
upheld legislative power to employ tax dollars to benefit private infrastructure programs, and
even the dissenters recognized that uniformity. Justice Lowrie, one of the dissenters in the
*Sharpless v Mayor of Philadelphia* (discussed below) later recognized that the “legislators and
courts have everywhere” supported public rail assistance. But as they did so, dissenters
pushed back and their objections began to seep into the majorities’ legal reasoning.

It is important to recall that state legislative power was considered unlimited unless
specifically limited by the constitution or, some would argue, accepted natural law limitations.
(In this sense, American state constitutions serve a very different role than does the United States
Constitution.) Accordingly, dissenters’ arguments for legislative limitations required a more
sophisticated and inventive analysis than did the majorities’. To stop what they considered the
economic and political ruin of the nation, the dissenters raised individual rights as a
counterbalance to legislative efforts to enhance the general welfare. That position increasingly
resonated, particularly as tax-supported projects failed to return expected financial results, tax
rates increased, and taxpayers suffered. To tax was to take property. Hence, the courts could
check the legislature and protect property by limiting the purposes to which those taxes were put.

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743 *Commonwealth ex rel. Thomas v Commissioners of Allegheny County*, 232.
744 *Cincinnati, Wilmington and Zanesville Railroad v Commissioners of Clinton County*, 97.
745 *Commonwealth ex rel. Thomas v Commissioners of Allegheny County*, 233-34.
– spending. In doing so, they relied on the underlying philosophy that government could not take from A and give to B. Taxes taken from A had to benefit A.

And so the dissents weighed in. Railroads were of great value, but public dollars, they argued, could not lawfully be used to promote private ends when the public benefit was merely incidental. With that notion of the proper place for taxation, Justice Spaulding in Ohio’s *Griffith v Commissioners of Crawford* bemoaned his court’s 1851 refusal to hear the case because he believed the court should declare all municipal subscriptions in violation of “the essential principles of liberty and free government . . . and of personal property rights.”746 Iowa’s Justice Kinney, in his dissent in *Dubuque Co v Dubuque and Pacific Railroad*, argued that taxes could only be “based upon public necessity, and proceeds upon the ground that it is essential to the public welfare and safety.” That court majority’s broad definition of general-welfare standards, he argued, ultimately would “invade and destroy the rights of the people.” The focus should be on the individual’s property rights, not the general welfare. “To allow a majority by their vote to tax a minority, to build railroads, is repugnant to every principle of civil liberty, and tends to despotism.” Kinney raised the scepter of socialism, fearing that “a bare majority of voters, destitute of property . . . [would] saddle a tax upon a minority, the only property holders.”747 In some measure, the dissenters’ thoughts aligned with those voiced by Thoreau in his objection to taxation to support religious societies. “I . . . do not wish to be regarded as a member of any incorporated society which I have not joined.”748 Taxpayers not wishing to invest in or grant gifts to private industry should not, and they argued could not, be forced to do so by those who

746 *Griffith et al v Commissioners of Crawford County*, 20 Ohio 609 621-22 (1851). Chief Justice Hitchcock took exception both to Spaulding’s discussion of substantive issues in a case denying jurisdiction and to the substance of that discussion. He advanced an extensive rebuttal, arguing that the court must defer to legislative judgments in the absence of clear constitutional language to the contrary.

747 *Dubuque County v Dubuque and Pacific Railroad* 4 Greene 1 8, 10 (1853).

so wished. Such government involvement in private affairs violated the dissenters’ freedom principles. Community efforts were oppressive to the individual.

Despite their disagreement over legislative and judicial power, both the majority and dissenting opinions evinced a shift in their approach to rights claims. Increasingly, they proclaimed individual rights, particularly property rights, as interests against which the governmental incursions must be weighed. While the shift was gradual and nuanced, courts increasingly considered rights as personal rather than as collective. As Justice Ranney, speaking for an 1852 court approving rail subscriptions in *Cincinnati, Wilmington, and Zanesville RR* declared, constitutions not only served to define and guide legislative power, “but extend their protections to the rights and interests of every individual citizen; who has at all times a right to invoke that protection when these rights and interests are invaded.” Invasion of those rights was “beyond the power of government.” The majorities began to profess these rights, but always ruled in favor of general-welfare efforts. And, until 1853, did so with little written analysis.

While the majorities deferred, and the dissenters promoted their version of a republican-governance model, taxpayers clamored as tax burdens heightened. Failing in the political sphere, those taxpayers increasingly voiced their objections in the courts and, as noted above, claimed property rights violations. In this context, the Pennsylvania’s Supreme Court in 1849 observed the increasing “fashion to impeach the action of the legislative bodies, as unconstitutional, when it happens not to accord with the party’s notion of propriety and abstract right.” In that case, *Dysart v M’Williams*, the Pennsylvania Supreme Court rejected the taxpayers’ governance model and concluded that even if a legislative act “seems to trespass upon our ideas of natural justice

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749 *Cincinnati, Wilmington and Zanesville Railroad v Commissioners of Clinton County*, 81.
750 *Commonwealth ex re Dysart v M’Williams*, 11 Pa. 61, 70 (1849).
and right,” courts could not overturn the legislation without specific constitutional violations. Since nothing in the Pennsylvania constitution prohibited subscriptions, taxing individuals to give the money to a rail corporation was a lawful exercise of state power. Indeed, the court argued that without government support of industry “a commercial community could scarcely exist.”

The Dysart ruling itself was typical in its day. Soon, however, the Pennsylvania Supreme Court would begin a shift from assumed deference to questioning whether legislative power extended to transfers of taxpayer wealth to private railroads. In 1853, the court began to question whether property and abstract rights should check legislative power and, if so, how courts should insert those issues into its deliberations. The court did so in a matter brought by William Sharpless, who claimed that Philadelphia’s plan to invest tax dollars in a private railroad violated his and his co-plaintiffs’ constitutionally protected property rights. In what the court classified as “beyond all comparison, the most important cause that has ever been” heard by that court, the court in Sharpless v Mayor of Philadelphia set out a new legal framework upon which future courts would consider government use of tax dollars to support private industry. It is important to note that it did so with facts and arguments that were substantively identical to those it, and other jurisdictions, had uniformly ruled insufficient to raise constitutional concerns.

The court’s characterization of the importance of the case was not hyperbole. Growing tax burdens associated with municipal support of private rail, and the increasing sophistication and resonance of individual-rights claims, coalesced to prod at least the beginning of

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751 Several years later, in 1858, the Court was asked to reconsider its approvals of legislative power to subscribe to private corporations. In a jab at legislative wisdom, Justice Woodward, speaking for the court in Commonwealth ex rel. Thomas v Commissioners of Allegheny County, wrote, “The Acts of Assembly on this subject have never been regarded as wise and wholesome legislation, by any member of the bench; but it must be remembered that a great deal of vicious legislation may be had within the boundaries of the constitution.”

752 In Dysart the court also warned that it was “the first importance” of government “to meet the necessities and to facilitate the commerce of the people.” Commonwealth ex re Dysart v M’Williams, 70-71.

753 Sharpless v Mayor of Philadelphia, 21 Pa. 147 158 (1853).
constitutional change. An author only referred to as “Cecil,” in the lead article of the 1853 *American Law Register*, (the precursor to the *University of Pennsylvania Law Review*) characterized the *Sharpless* issues as “nothing less than whether the legislature can confer on municipal authorities unlimited power over the property of every citizen.”\(^{754}\) His assertion that the case raised issues central to American democracy and individual liberty was well taken. At the risk of offering a “spoiler,” the court’s opinion in allowing the rail support, in conjunction with growing public dissatisfaction, would incite a public outcry for constitutional reform. Its holdings would reach beyond Pennsylvania as both the majority and dissenting opinions would provide a foundation for later constitutionally based restrictions on legislative power. Because *Sharpless* was pivotal, it deserves a close look.

**A Deeper Reflection on Rights: The *Sharpless* Decision**

Prior to the plaintiffs’ suit, Pennsylvania’s significant government/industry partnership “failed notably to evoke legalistic discussion of the proper place of government in economic life.”\(^{755}\) As mentioned, just four years before *Sharpless*, the Pennsylvania Supreme Court in *Dysart* had asserted that without government subsidies to rail “a commercial community could scarcely exist.”\(^{756}\) Pennsylvania had employed multiple mechanisms to support industrial growth but, as a state, had been reticent financially to support rail development. It had shied away from those investments in fear of the politics of intra-state rivalries and its failed history with other state-supported organizations. But the need for rail development weighed heavily, as New York’s Erie Canal threatened to marginalize Philadelphia’s shipping and commercial interests. In an effort to minimize its losses, while still avoiding the political challenges of state legislative

\(^{756}\) Commonwealth *ex re Dysart v M'Williams*, 71.
decision-making, the state legislature granted municipalities the authority to participate in rail development. 757

Immediately upon getting such approval, in April 1853 Philadelphia’s common council proposed to subscribe to 10,000 shares of the Hempfield Rail Road Company paid for by issuing bonds secured with the city’s credit. 758 The opponents of the subscription, “inspired now by a fervor that was religious in character,” 759 voiced their concerns in the political sphere, arguing that government could not justly take their tax dollars and give those funds to the railroad. An unmoved city council voted to subscribe four million dollars to the railroad. Thereupon, Sharpless and three other landholders turned to the courts, seeking to enjoin the subscription as an unconstitutional redistribution of wealth. To them, the government unlawfully was taking money from A, the taxpayers, and giving it to B, the railroad. With the court seriously considering this assertion, Hartz argued, “the constitutionality of the entire mixed enterprise tradition as it had evolved since the late eighteenth century was thus challenged for the first time.” 760

Business interests were vocal supporters of the subscription. They had been losing trade to New York because of the state-sponsored Erie Canal. To them, the rail investment would enhance the general business environment much as roads and canals did. On the other side sat taxpayers who frequently suffered the displacement, and the certainty of higher taxes, that new rail lines occasioned. 761 They argued that if businesses wanted the rail lines, businesses should

758 The proposed rail line was 300 miles or more from the city. It would act as a feeder line to the Pennsylvania Railroad, which went through Philadelphia.
759 Hartz, Economic Policy and Democratic Thought: 114.
760 Ibid., 117-18. (Emphasis in original.)
761 While railroads could increase the value of local lands, they also could present significant challenges to adjoining landholders. For example, at about this time in Detroit, residents on the east side of the city were in active revolt against the placement of nearby rails. Residents along the track suffered from spewing sparks and frightened livestock as a result of rails along their property. Frank and Arthur Woodford related, “One dark night a group of

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invest and risk their own capital. To Sharpless and his objecting fellow real estate owners, the issue was not merely one of self-interest. They claimed they were fighting European socialist principles, and berated government financial support of industry as the “popular despotism of Rousseau,” the “arbitrary tyranny vindicated by Hobbes,” and a form of Skidmorian socialism. Their cause was grounded in “Natural justice,” “public Liberty,” the “Magna Charta,” “private right,” and “the law of lands.”

To move the claim to the legal sphere, Sharpless had to pin those concerns to constitutional limitations on legislative power. Accordingly, his attorney, B. H. Brewster argued that the subscription violated taxpayer rights to acquire, possess, and protect property under Article IX of the Pennsylvania Constitution. In support of that argument, Brewster protested, “Men can no longer consider property their own if the majority can get authority from the legislature to tax, and mortgage without limitation.” Voicing a concern that increasingly would be heard, Brewster charged that the subscription was “practical agrarianism – this is the doctrine which men call socialism; it is that which Skidmore and other such, once propagated to the terror and discredit of the country when they published their immoral and dishonest social and political

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762 Hartz, *Economic Policy and Democratic Thought*: 118-19. It is not surprising that the argument employed socialist language. The failed 1848 European Revolutions caused Americans to distinguish their revolution from those of the Europeans. They believed that the American Revolution “did not endanger private property, and it kept government interference in people’s lives to a minimum.” The European revolutions, on the other hand, were radical in purpose. The 1848 Revolutions sparked an American distain for socialist ideas, with newspapers claiming that socialism would result in miscegenation, the rise of women’s and blacks’ rights, and the dissolution of private property. Timothy Mason Roberts, *Distant Revolutions: 1848 and the Challenge to American Exceptionalism* (Charlottesville: University of Virginia Press, 2009). 14, 42-62.

763 Article IX provides, in part, “That the great, and essential principles of liberty and free government may be recognized and unalterably established, we declare -

§1 All men are born equally free and independent and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property.”

§9 “nor can he be deprived of his life, liberty, or property unless by a judgment of his peers or the law of the land,” and

§10 “nor shall any man’s property be taken or applied to public use without the consent of his representatives and without just compensation.”
His argument offered more than political philosophy. Sharpless’ counsel argued that private capital, not public resources, appropriately determined and responded to economic need. In so arguing, the plaintiffs proposed to limit legislative power when the exercise of that power violated economic principles. Those principles constitutionally required a free-market, rather than a mixed-corporate, approach to economic development.

Counsel for the railroad had historical practice and court rulings on their side. They presented the long history of government support of industry and, along with counsel for the city, cited ninety-five Pennsylvania acts from 1796 to 1853 supporting municipal aid to internal improvements. Further, they argued that the state legislature was “entitled to exercise the whole power of the people, except when its limit is restricted by the express words of the Constitution.” In exercising their subscription power, the state and local legislature sought to advance the general welfare. They helped address the city’s legitimate commercial need to facilitate the movement of goods from the Midwest through Philadelphia to American and European population centers. One needs look no further than the Erie Canal to see the benefits of government/industry partnership. In essence, the mixed corporate model was an economic necessity. In a somewhat counterintuitive twist, taxpayers had argued for a version of laissez-faire economics while business had advocated for government involvement in, and ownership of, industry.

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765 In 1841, the defendant in Mayor and Aldermen of Mobile v Yuille similarly called for protection of private property according to developing free-market economic models. Yuille had been convicted selling underweight bread in violation of Alabama’s assize of bread. The court took notice of the property-lessening impact of the regulation but found, “The legislature having full power to pass such laws as deemed necessary for public good, their acts cannot be impeached on the ground, that they are unwise, or not in accordance with just and enlightened views of political economy, as understood at the present day.” 3 Ala. 137 (1841).
768 Hartz, Economic Policy and Democratic Thought: 117.
The majority, speaking through Chief Justice Jeremiah Black, rejected the plaintiffs’ efforts to limit Pennsylvania’s legislative authority. While acknowledging the thread of reasoning that natural law and vested rights limited legislative power, Black wrote that the court was “not aware that any State Court has ever held a law to be invalid except where it was clearly forbidden.” In tandem with the long line of cases following Iredell’s reasoning in Calder, Black stated that, the courts could invalidate an act “only when it violates the constitution clearly, palpably, plainly; and in such manner as to leave no doubt or hesitation in our minds.” Black was “thoroughly convinced that the words of the constitution furnish the only test to determine the validity of a statute.” Accordingly, philosophic arguments about government’s role were not sufficient grounds upon which to overturn statutes. Courts required specifically enumerated constitutional limitations.

Black then searched for constitutional language that might limit legislative grants to privately held businesses. Among other areas, he focused on the legislature’s taxing authority. Declaring that “a taking of private property for private use . . . is palpably unconstitutional,” Black observed that constitutional language, including the term “tax,” required interpretation. He wrote, “I do not mean to assert that every act which the legislature may choose to call a tax law is constitutional. The whole of a public burden cannot be thrown on a single individual, under the pretence of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the debts of the whole states.” After offering that equity principle, Black advanced that an improper use of taxing authority may be “an attempt to pronounce a judicial sentence, order or decree,” in violation of the separation of powers. In that sense, government-required private-to-private transfers were judicial in nature, and efforts by the legislature to enter the realm would exceed its authority. Accordingly, Black noted that a “taking

769 Sharpless v Mayor of Philadelphia, 162-64. (Emphasis in original.)
of private property for private use,” would be “palpably unconstitutional” and was specifically prohibited.\textsuperscript{770}

Black’s most lasting argument was that the ends – the spending of tax dollars – must be for the public good and not for a private benefit. Black reasoned that if the levy were for private benefit, the legislation “ceases to be taxation, and it becomes plunder.”\textsuperscript{771} In so arguing, Black attached to the constitutional power to tax the requirement of an appropriate spending component. That reasoning infixed the “public purpose doctrine” into American jurisprudence. The question then became, what was a public purpose and who got to decide?

With the legal standard set, the court in \textit{Sharpless} now addressed whether it would challenge the legislature’s determination that the tax and subscription were in the public interest. If it did so, the court would have to rule that the legislature’s efforts to advance commerce through the support of private corporations were, by their nature, unconstitutional transfers without public purpose (which the court equated with public benefit.) The court declined to do that. Instead, it accepted broad legislative discretion. “However clear [the court’s] convictions may be that the system is pernicious and dangerous,” Black argued, “we cannot put it down by usurping authority which does not belong to us.” Deference would be given, perhaps because the majority held to the common belief that rail subscriptions enhanced the general welfare.

Black indicated such when he suggested that the legislature was not just empowered, but was

\textsuperscript{770} Ibid., 167 – 68.

\textsuperscript{771} Ibid., 169. In \textit{Hallenbeck v Hann}, Nebraska Supreme Court Justice Crounse took issue with the plunder argument (so much so, he thought it originated in a disgruntled dissent). He wrote, “No doubt it was pronounced in something of that kind of humor which so frequently in discovered is dissenting opinions, and has served to give an air of spirit to most of the arguments delivered since on that side of the question. Counsel give it a prominent place in their brief. Judge Cooley quotes it. But I cannot believe it is put forward as argument. It has no legal signification, neither does it form any standard by which to try the validity of any law. Many of our people think it plunder to pay a tax to build a half-million-dollar penitentiary in which to confine a stage-coach full of prisoners. The resident of a city, who is taxed to pay for the improvements upon one street which draws business from and depreciates the value of his property and business on another, regards the tax as plunder. To the man with more property than children, a tax under a free-school system, to pay for the education of his neighbor’s children, seems plunder; while some are so averse to the payment of any levies in support of government as to regard all taxes as plunder.” \textit{Hallenbeck v Hann}, 2 Neb. 377, 407 (1873).
required to advance commerce. “To aid, encourage, and stimulate commerce, domestic and foreign, is a duty of the sovereign, as plain and universally recognized as any other.”

Black had advanced three positions regarding the “public purpose” requirement for constitutional taxation. First, he rejected a negative-governance, night-watchman model in favor of a government actively contributing to, and shaping economic development. Second, he submitted that government could employ and finance private actors to promote that economic development even though the public only indirectly benefited by the expenditure. Third, he maintained the practice of deferring to legislative judgment even though the results might be “pernicious and dangerous.” Given those standards, it was unlikely that courts would often overturn governmental financial support of industry. With this broad definition of public purpose, the court found the subscription lawful.

One cannot discount the gravity Black afforded practical realities. Aware that any other outcome would have upset the historic relation among government, business, and the general welfare, Black noted, “If the works erected by the Commonwealth for the promotion of her commerce, are not public improvements, then every law relating to them is void; every citizen may repudiate his share of the state debt, if he pleases, and defend his property by force against a collector of state taxes.” Given the breadth of government involvement in industry, the benefits that involvement could bring, and the consequences of court interference, the Sharpless majority granted expansive discretion to the legislature’s judgment. To do otherwise, Black

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772 Sharpless v Mayor of Philadelphia, 170. Justice Woodard would later write that all the members of the Sharpless court thought the investments unwise and potentially dangerous. Commonwealth ex rel. Thomas v Commissioners of Allegheny County, 232.
774 Sharpless v Mayor of Philadelphia, 169-70.169-70.
suggested, risked rebellion and chaos. The plaintiffs’ claims of right necessarily were subordinated to public purpose.

The *Sharpless* majority had walked to the edge of elevating personal rights over general-welfare concerns, but then halted. Why? Simply put, internal improvements were a major enterprise of mid-century America because society believed that they were required to advance the general welfare. As Justice Lowrie noted in his *Sharpless* dissent, states had a total of about $60 million invested or proposed in rail-supporting enterprises. That total was equal to one-half the assessed property value in the entire state of Pennsylvania.\(^{775}\) As significant as that was, Lowrie’s number was understated. Goodrich’s partial study of rail investments shows that by 1861 government had invested $150 million in private rail companies. Communities put so many dollars at risk, Goodrich noted, because rail access “was literally a matter of survival.”\(^ {776}\) William Sharpless’s challenge therefore threatened a deep, widespread, and largely accepted public undertaking.\(^ {777}\) It is no wonder that the court classified the case as the most important it had ever heard and that it ruled as it did.

While Black reflected the prevailing view, anti-subscription forces were gaining political traction. As an indication of the rapidity and depth of shifting public sentiment, at the 1838 Pennsylvania constitutional convention, the debt the state incurred to finance private business was considered a necessary and welcome investment in business and an effort to limit that debt to $30 million was defeated as “suicidal.” By the 1857 constitutional convention, perceptions had changed. That convention adopted a $750,000 cap on public debt, and did so with a

\(^{775}\) *Sharpless v Philadelphia, Lowrie dissent*, 2 Am. L. Reg. 27 (Penn. S. Ct.), 36 (1853).


\(^{777}\) Goodrich catalogued efforts to protect individuals from rail fraud and to allow taxpayers direct ownership of stock based upon taxes paid. For example, Alabama, Florida, Indiana, Iowa, Louisiana, Missouri, Tennessee and others provided that taxpayers receive stock in exchange for their taxes. However, Goodrich argued, municipal legislatures knew that direct economic returns were unlikely. The investments were to enhance business, ensure municipal survival, and to facilitate communications. Ibid. 428, 439.
population and economic base considerably larger than when it rejected the $30 million limit. By 1869, the Pennsylvania Supreme Court would publicly question whether it had appropriately applied the public purpose doctrine in *Sharpless*.

Legal historians give scant attention to the dissents in *Sharpless*, with Hartz mistakenly believing that that the dissenters wrote no opinions and Waldron dedicating only one paragraph to their writings. This is unfortunate. While Black carried the day by launching the public purpose doctrine, Justices Lowrie and Lewis, writing separately, carried the future by addressing the issues that would shape that doctrine.

In short, the dissents introduced a shift in the presumptions. Where Black’s opinion (and all previous opinions) focused first on the public’s need, Lowrie’s dissent focused first on individual rights – and it did so with an historical flourish. To Lowrie, property rights were the foundation for stable and free governance and, accordingly, required court protection. Lowrie sermonized, “it stands written in every age, in almost every year of the history of the Grecian and Italian cities, democratic, oligarchic, or monarchic . . . [a] disregard of individual rights, was more than anything else, the cause of their decay.” Juxtaposed against those ancient failed empires, Lowrie placed England whose “whole history . . . is one of continual protest against government invasion of private rights.” Ultimately professing a *laissez-faire* model, Lowrie railed against the 1853 oppression against which individual rights must stand – “socialism” –

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779 In *Hammett v Philadelphia*, Justice Sharswood wrote: “It has been seen that *[Sharpless]* recognizes that there are limits to the taxing power such as are here contended for; and the only doubt can be whether the rule was rightly applied.” *Hammett v Philadelphia*, 65 Pa. 146, 154 (1869).

780 Due to custom, the dissenting opinions were not included in the court reporters official reports. Their opinions are found in 2 Am. L. Reg. 27 (1853) and 2 Am. L. Reg. 85 (1853). Dissenting Justice Lewis’s biographer, Burton Alva Konkle, like Hartz, mistakenly believed the dissents did not exist. Burton Alva Konkle, *The Life of Chief Justice Ellis* (Philadelphia: Campion & Comp, 1907). 178.

781 Lowrie later related that earlier governments controlled all aspect of life and that property freedoms were unknown. To Lowrie, the people of Athens sacrificed Socrates “for his efforts in the cause of education and progress, and Plato received a hint that some hemlock of his master’s cup was left for him.” *Sharpless v Philadelphia*, Lowrie dissent, 38.
“the very worst form of government.” Accordingly, he promoted a system where government was to “protect individuals in the proper pursuit of their own lawful plans” but was not to otherwise shape economic decisions. Because individual rights and government power cannot coexist, Lowrie argued that several Pennsylvania constitutional provisions restricted legislative power to encumber property. Indeed, he argued, “all our American Constitutions” protect property against legislative overreaching.

Lewis’s dissent similarly wrestled with concerns over socialism and “Fourier establishment,” which he declared, “no man can constitutionally be compelled to embark.” His dissent called for the impossible, requiring the unanimous consent of the inhabitants paying taxes for the subscriptions. Despite the impossibility of that standard, this respected jurist and leader of the Democratic Party insisted the diminution of property rights through taxes to support private industry required specific consent. As had dissenting justices in earlier cases, he reasoned that objecting taxpayers could not be forced to participate in a corporate society where they had no rights. The necessary conclusion therefore was that government subscriptions and republican governance were fundamentally at odds. But to Lewis, it was not just about rights

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782 Ibid., 32, 39, 43.
783 Ibid., 42.
784 Ibid., 41. Lowrie, as both the chief justice and speaking for the court, expanded his thoughts in 1861 in Philadelphia Association for the Relief of Disabled Firemen v Wood, 39 Pa 73 (1861). In that case, the court overturned legislation requiring foreign insurance company donations to a private relief organization for injured fire fighters. Lowrie argued that the legislature could not demand one individual transfer his property to another. He also stated that even a tax on the insurance companies would be unconstitutional, as only those holding insurance would be forced to bear the expense – essentially employing an equity principle. And, employing his proclivity to wax historical, he argued that the support of the firefighters was tantamount to the monarchs of England supporting their favored public servants. Without mentioning public purpose, this case seemingly employs that doctrine.
785 Charles Fourier was a utopian socialist who advocated production for social benefit rather than personal profit. Interestingly, he was an advocate for sexual equality and coined the word “feministe” in 1837.
786 The Virginia Supreme court in Goddin v Crump rejected any call for unanimous consent to subscriptions, declaring that such a requirement would “annihilate the power” of government to act. Goddin v Crump, 154. See also, Police Jury - Right Bank - for the use of New Orleans, O. & G. W. R. Co. v Succession of McDonogh. “If each citizen can be permitted to complain that his tax has been increased, without his individual assent, and for a purpose which he individually disapproves, all government would be at an end.” 360.
787 This was an extension of the similar argument Justice Brook employed in Goddin, discussed on pages 271-73, supra.
protection: subscriptions were bad public policy. Perhaps enjoying the luxury of a dissenting podium, Lewis lectured about his fears of a bankrupt nation.

[W]hen credit shall be exhausted, and the day of payment shall come; when the bonds, (which are to be issued like other obligations of mere sureties without making any provision for payment,) shall come to maturity – when the railroad excitement shall subside and reason shall resume her dominion – when the exhilaration of profuse expenditure shall give place to the gloom to be produced by the grinding exactions of the tax gatherer, when the rich shall be impoverished, and the poor shall be cast into prison, – when all classes shall be involved in millions of debt beyond the means of payment – when individual industry and enterprise shall cease with the destruction of individual rights – when the freemen of this Commonwealth shall become the bondmen of corporations, I shall, if surviving, have the melancholy consolation of knowing that I have endeavored, to the extent of my feeble abilities, to avert these calamities from my fellow citizens, and to maintain their rights of property according to my understanding of the constitution. 788

In voicing his concern over the financial decay threatened by public subscriptions, Lewis revealed a driving concern. Growing public indebtedness and increased taxation were threatening economic, social, and political collapse. Taxes were imposed on landholders and, while their land values may have increased with rail, their ability to pay the increased taxes without selling or mortgaging that land did not, placing a number of taxpayers into economic distress and bankruptcy. To Lewis, those pragmatic burdens, as well as the continued violation of individual rights, required remedy. Government practices and court acquiescence needed to change. Courts had to step in to limit legislative largess, protect national solvency, and guard private property. Assuring private property and social welfare required court activism.

Black, Lowrie, and Lewis’ opinions were, in some measure, cut of the same dreary cloth. Laurie remarked on the staggering sums government had invested in private industry. Black noted that these investments typically failed (although he applauded government support of commercial development), and Lewis predicted these investments would launch “grinding

exactions of the tax gatherer.” A correlation between profligate government spending on the one hand and moral breakdown and economic ruin on the other ran through each opinion. But the justices differed on the court’s ability to act. Both Lowrie and Lewis in some measure advocated advancing individual rights as a means to prohibit government from leading society down an undesired path. In doing so, they pinned their arguments to constitutional property-protecting doctrines, including due process, eminent domain, and contract protection. Their objections, however, were not limited to constitutionally protected rights. To them, public subscriptions were beyond government authority in some measure because they were unwise.

**Emerging Property Protections**

Notwithstanding the dissenters’ protests, Black’s argument was grounded in the historical practices of local governance, state of law, and court precedents in the antebellum era. State and municipal governments had actively supported industrial development and had done so using their taxing authority. They did so in accord with majority community sentiment and, as Lowrie later noted, with unanimous court approval – or at least unanimous acquiescence. In his 1858 concurrence in *Commonwealth ex rel. Thomas v Commissioner of Allegheny Country*, Lowrie reflected that while he still believed public subscriptions unconstitutional, he recognized “that legislators and courts have everywhere expressed contrary views . . . [and] therefore I ought

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789 Hartz wrote, “The obvious evidence of decades was at hand to prove that the anti-subscription argument was incomparably a pièce d’occasion.” Hartz, *Economic Policy and Democratic Thought*: 123.

790 Perhaps getting ahead of ourselves, the aftermath of an 1869 Iowa court ruling against municipal subscriptions demonstrates the depth of public support. A Chicago Tribune story related that, following that invalidation of public subscription, the inhabitants of the subscribing town mobilized. “Schools were closed, business suspended, and everybody went to talking railroad; the band was out on the streets and, after a sharp canvass, it was found that $35,000 had been subscribed, and now the road is assured.” 42 ARJ (1869), 646, quoted in Goodrich, “Local Government Planning of Internal Improvements,” 444. The court had invalidated a municipal $32,000 subscription and the public rose up and gave $35,000. In this post *Constitutional Limitations* case, support for rail development assistance did not end, its means merely shifted.
to adhere to my own [opinions] with great modesty, if at all.”

In that same year, the New York high court declared railroad subscriptions to be in the public interest. Focusing on the benefit to society, rather than on the aggrieved taxpayer’s property or the nature of the receiving entity, the court voiced that railroads, “add to the value of property, promote trade, and contribute to the convenience of the inhabitants of any place.” Government support of railroads fell within the public purpose.

On the eve of the Civil War, the rulings were unanimous and courts considered the matter settled. As 1855 North Carolina Chief Justice Nash noted, “the power of the legislature to pass the Act [was] too strongly fortified, both by authority and reason, to be now doubted.” Legislatures had the power to employ tax dollars to subscribe to private corporations.

Michigan had no reported cases where the court considered the constitutionality of government support of rail. The court, however, did consider the constitutionality of other legislative efforts to tax and spend in support of the general welfare. In 1853, the Michigan

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791 Commonwealth ex rel. Thomas v Commissioners of Allegheny County. 233-34. In that same case, the majority opinion opined that such subscriptions, while constitutional, were of suspect wisdom.
792 Bank of Rome v Village of Rome. The court also commented, “That this kind of legislation may be injudicious, and even worse than that, is not denied, but considerations of that aspect of the question belongs not to the courts, but to the legislature and the constituents.” 42-3
793 For a list of the cases sustaining government power to contribute to rail, see Brief in Support of Petition for Writ of Mandamus, "Pleadings, People, on the relation of the Detroit and Howell Railroad Company v Township Board of the Township of Salem, 20 Michigan Supreme Court Records and Briefs," (1870), 8-37.
794 Taylor v. Commissioners of Newberne 55 N.C. 141, 142 (1855).
795 Maurice Dean’s study of judicially voided municipal bonds revealed 51 cases where courts invalidated municipal bonds as beyond legislative constitutional authority. None occurred prior to the Civil War and two occurred before Constitutional Limitation’s publication. Both of those were in Iowa - State ex rel Burlington and Missouri River Railroad v County of Wapello, 13 Iowa 388(1862), and Chamberlain v City of Burlington, 19 Iowa 395(1865). Courts had earlier invalidated bonds for other reasons, like lack of legislative authority or procedural defects, but not on constitutional grounds. Maurice B. Dean, Municipal Bonds Held Void: Including Issues Enjoined, Registration or Certification Denied, Issuance Not Compelled, Validation Refused and all Proceedings Determining Illegality (New York City: Moody's Magazine Book Dept., 1912).
796 When the Michigan Supreme Court addressed the issue in 1870, it noted “We are embarrassed by no decisions in this State, and are at liberty, therefore, to consider this question on principle; and when the legal principle which should govern a case stands out in bold relief, it is manifestly more in accord with a proper discharge of judicial duty that we should reach to it with directness, than that we should shut our eyes to the principle and blindly follow where others have blindly led.” People ex rel. The Detroit and Howell Railroad Co v Township Board of Salem, 493.
Supreme Court considered a Detroit landholder’s complaint that the city unconstitutionally assessed his property for road repairs. He argued that roads were a general benefit and the city could not specially tax him for a general good. In rejecting his claim, the court, through Justice Sanford Green, provided insight into the standards by which the legislature must exercise taxing authority. The state compensates a taxpayer for his taxes with “the security which the government affords to his person and property.” The court warned, “taxation, not based upon any idea of benefit to the person taxed, would be grossly unjust, tyrannical, and oppressive, and might be characterized as ‘public robbery.’” Nevertheless, this landholder owed the street repair taxes because the basis for assessment, while not perfect, was reasonable. The court noted that, “Every general law, however wisely and carefully perfected, will in its practical operation, work oppression and injustice to some. Equality, like perfection, when applied to man or his works is a relative term.”

The court, in an argument that may have resonated twenty years later, argued that taxpayers must be the primary beneficiaries of their tax dollars. Any other result was tyrannical.

At the same time, the Michigan court began to weigh the importance of individual rights in its adjudications. The spark for that philosophy, the court declared, was the 1850 constitutional change. Justice Wing in 1856 referred to this new philosophy: “It manifestly was the intention of the constitutional convention of 1851 [sic] to surround the rights of individuals with additional guards, and to place them upon as sound a basis as was consistent with the rights and necessities of the public.”

Nevertheless, in Swan v Williams, the court declared that “law of the land” provisions restricted executive power, not legislative or judicial.

797 Williams v Mayor of Detroit, 2 Mich. 560, 571-72 (1853). (Emphasis in original.)
798 People v Kimball, 3 Mich. 95, 97 (1856). The case concerned required eminent domain procedures under the 1850 constitution.
799 Swan v Williams, 432.
In the face of court acquiescence and/or silence, state legislatures across the country approved of municipal taxation in support of private rail ventures. Goodrich’s study indicates that the Michigan legislature adopted 28 of its total 30 special acts authorizing local rail aid in the period 1860-1873 and that from 1860-1865 it authorized the second most (next to Wisconsin) in the nation. Only two states would cease doing this before the 1860s – Pennsylvania, as a result of the constitutional amendment passed in the wake of Sharpless, and Iowa. Iowa also stopped because of constitutional change but, this time, not by the ballots of the legislators or the people. Iowa stopped by the votes of its Supreme Court justices.

The Iowa court had its chance to affect constitutional change when, in 1862, it reconsidered (although not acknowledging so) the contentious issue of public subscriptions. Before that time the Iowa courts, like those of the other states, had affirmed the legal legitimacy of legislative support of private industry. In *Dubuque Co v Dubuque and Pacific Railroad*, the Iowa Supreme Court in 1853, the same year as *Sharpless*, declared that the state constitution did not “make the slightest illusion” to prohibitions against state support of industry. So pervasive was the practice that by 1856 Iowa carried over $7 million of public debt in support of railroads. The government’s ability to pledge public credit changed with the court’s 1862 unanimous ruling in *State ex rel Burlington and Missouri River Railroad v County of Wapello*. In that case, the court considered the legality of Wapello County’s subscription of $100,000 to purchase stock in the Burlington and Missouri River Railroad. Refusing to rule narrowly on the issue of municipal authority, the court broadly assaulted the institution of government support of

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800 *Dubuque County v Dubuque and Pacific Railroad* 2. The lone dissenter Justice Kinney objected to the law, in part because railroad subscriptions did “not contribute in any way to support the government, nor is it a promotive of that welfare and security for which government is established.” He feared that those “destitute of property,” would “saddle a tax upon . . . the only property holders in the county.” This all would end in despotism. *Ibid.*, 10.

801 Taylor, *Transportation Revolution*: 94. Taylor reports that in 1858 Milwaukee, Wisconsin lent $1.6 million to two rail companies. In 1860, its population was only 45,246. It is not surprising, given the debt to population ratios, that Iowa and Wisconsin would lead the efforts to reconsider the constitutionality of rail donations, as is discussed below.
private industry, declaring such support unconstitutional. The court rejected the decisions of the “supreme tribunals of some fourteen or fifteen States” and the longstanding tradition of government support of industry. Instead, it claimed to decide the case, “upon principle, rather than authority.”

Instead of focusing on public welfare interests, as all other courts had, Justice Ralph Phillips Lowe, speaking for the court, focused on protecting “the great and fundamental reserved rights of the citizen,” from legislative overreaching, even when an approving vote of the taxed citizens accompanied that legislation. The rail subscription merely transferred wealth from one citizen to another.

To the court, the railroad had been incorporated under the state’s general incorporation law and, therefore, had no legal obligations to serve the public good. Its aim was “the making of pecuniary profit.” Accordingly, the subscription amounted to taking taxpayer private property and giving it to a private entity for private use. The court considered that a flagrant abuse of legislative authority. The court based its decision, and sought to distinguish its opinion from the contrary weight of authority, on the Iowa Bill of Rights provision, which declared, “this enumeration of rights shall not be construed to impair or deny others, retained by the people.”

That clause allowed the court to extrapolate its state’s taking clause to prohibit taking private property for private use. Lowe suggested that Justice Black in Sharpless similarly might have invalidated the Philadelphia subscription had Pennsylvania such a constitutional clause.

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802 The court explained away its recent Dubuque decision by stating members of the court “felt themselves so much committed and trampled by the previous decisions and subsequent legislative recognition, that they did not feel themselves at liberty, from public considerations” to rule against the public aid. State ex rel Burlington and Missouri River Railroad v County of Wapello, 395.

803 Arguably, the distinction between special and general corporations was important. In incorporating an entity, the legislature sets particular responsibilities into the corporate charter. No such responsibilities exist with general corporations. In that sense, one could distinguish a number of contrary precedents on notions of contract consideration, but courts did not avail themselves of that distinction. Instead, justices objecting to government support based their opinions on philosophic concerns about activist government.

804 State ex rel Burlington and Missouri River Railroad v County of Wapello., 399, 401, 423.
that vague constitutional language as its foundation, the court declared the bonds uncollectible, thereby protecting the people from “a step backward toward despotism.”

Many disagreed with the Iowa court, including the United States Supreme Court. In an unusual turn, that court rejected the State Supreme Court decision. After noting that Iowa’s opinion was contrary to those of courts in sixteen states, including an earlier Iowa opinion, the Supreme Court in Gelpcke v Dubuque dramatically limited the state opinion. Recognizing that it should defer to Iowa’s interpretations of its own constitution, Justice Noah Swayne, writing for the court, disdainfully characterized the Wapello reasoning as “in unenviable solitude and notoriety.” He then grandly proclaimed, “We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice.” The court then decided that Iowa must honor all outstanding bonds and agreements, or violate the Contract Clause of the United States Constitution. In some measure, the Court’s disquiet stemmed from the bondholders’ reliance on recent Iowa court opinions upholding legislative power. In that sense Gelpcke may have been an equitable decision protecting out-of-state investors against oscillating state-court positions. Not bullied by the federal Supreme Court, the Iowa Supreme Court held to its position. While the courts’ reliance on different constitutional provisions allows the holdings to be reconciled (the U.S. Supreme Court only limited the impact of the Iowa court’s ruling) the courts’ views of taxation to support private rail development were dramatically at odds.

The concerns voiced by the Iowa court, and the Pennsylvania voters who modified the state constitution to prohibit public aid to rail, were also voiced by residents across the nation. Nevertheless, the lure of local rail service, and the threat to a local economy should rail bypass

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805 Ibid., 423.
806 Gelpcke v Dubuque, 68 US 175, 205-07 (1864). Swayne continued, “The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union. Many of the cases in the other States are marked by the profoundest legal ability.” Ibid., 206.
807 The Iowa court affirmed Wapello in 1869 in Hanson v Vernon, discussed below.
its borders, continued as an effective call to action for local municipalities. Accordingly, in 1863 Michigan Governor Austin Blair received “a large number of petitions, memorials, and verbal applications” for legislation authorizing municipalities to pledge their credit in aid of local rail construction.” Blair saw value in many of those petitions but cautioned against nonremunatarive projects, as those would result in oppressive taxation. In response to that, and the fervor of the day, Michigan’s legislature authorized grants of at first 5% and later 10% of municipalities’ assessed property valuation to railroads, subject to an approving vote of the local taxpayers. In itself, Michigan was not unique, save for the actions of one small community and the writings of Thomas Cooley. With a case created by the tenacious Salem Township Board, Cooley would write an opinion that would open the floodgates of judicial review of legislatively authorized spending to advance the general welfare.

Regulatory Encumbrances and Judicial Deference

Before turning to the Cooley’s combustible writings on taxes and spending, it is important to review antebellum developments in the related regulatory sphere. Just as government efforts to support industry resulted in increased taxes, government efforts to regulate commercial and social activities resulted in burdens on residents’ use and enjoyment of property and their freedom to contract. Those efforts generated efforts to limit legislative regulatory – or police – powers. The legal history in large measure mimics that of legislative taxing and spending power, as the underlying question was the same; what is the scope of legislative power?

As mentioned, historians now agree that government regulated industry since colonial times. Those regulations started early. In 1641, the Massachusetts Bay Colony regulated against

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809 Purdy argued that liberty of contract was an extension of property-rights notions and that judicial arguments concerning due process protections of liberty of contract was derived “from the Due Process Clause’s protection of property rights.” Purdy, The Meaning of Property: 103.
“unwholesome” beer. It regulated tavern and inn hours, the size and weight of nails, and the prices charged for public transportation. Massachusetts was not alone; regulation during the colonial period was widespread. In populated areas, municipalities focused on health and safety concerns. Governments required chimney inspections and repairs. They required that buildings be made of brick or stone and that flammables be restricted. Regulations required that residents clean their streets and some cities, like New York, required residents to provide nighttime lighting. In regulating business, government focused on prices, inspections, labor and quality controls, and wharf rules. They regulated the price, size, and quality of breads, and bakers had to mark their names on each loaf to insure compliance. Some cities confined nuisances, like slaughterhouses, to particular areas of the town. The impact of the regulations did not mean residents were hamstrung. While “colonial society often placed the interest of the community above the economic rights of the individual,” regulations were by no means stringently enforced.

That loose enforcement was an attribute of small government and not a rejection of regulation.

As the population moved west, so did the regulatory mindset. An earlier chapter discusses regulation in Detroit. As a territory and continuing through the antebellum period, Michigan’s government regulated the manufacture and sale of wheat and rye flours, buckwheat, pork, lard, beef, fish, and butter. It set forth rules on packaging, the length of nails, and the correct placement of hoops on a barrel. It regulated leather production for shoes, the hours that ferries operated and the rates they could charge. It regulated the number and timing for mill


owner meetings and it determined the rates mills could charge.\textsuperscript{812} In sum, regulations were part of the American psyche of a well-ordered society.

State and local governments enacted most of those regulations. While the Federal Commerce and Contract Clauses somewhat limited their authority, states enjoyed “police powers” to advance the health, welfare, and safety of the public. By their nature, those regulations encumbered property. As Massachusetts Chief Justice Lemuel Shaw noted in \textit{Commonwealth v Alger} (1851):

\begin{quote}
We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoynment of their property, nor injurious to the rights of the community. All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare.\textsuperscript{813}
\end{quote}

To Shaw, there was no demarcation between public and private. Instead, liberties and rights were organically connected with the common good and general welfare. Government was a vehicle to social advancement, not a regulator or impediment. Every state accepted this interwoven relationship and both courts and the society embraced wide restrictions on property if those restrictions advanced the community’s health and welfare. All states and municipalities regulated in an effort to that end.

While society accepted regulation as part of its norms, property remained a potent liberty interest – it was a foundation of American liberty. Accordingly, protecting private property and the right to acquire it was a major emphasis of the Revolution and early American government. Arthur Lee, a revolutionary era diplomat to Spain, Prussia, and France, declared: “The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive

\textsuperscript{812} \textit{Laws of the Territory of Michigan}, (Boston: Boston Books, 1883).
\textsuperscript{813} \textit{Commonwealth v Alger}, 61 Mass. 53, 60-61 (1851).
them of their liberty."\(^{814}\) From the beginning, control of property was a bulwark against
government intrusion. It not only guaranteed citizens freedom, it was the means to self and
community improvement. James Ely, Jr. wrote, “historically, property ownership was viewed as
establishing the economic basis for freedom from governmental coercion and the enjoyment of
liberty.”\(^{815}\)

Notwithstanding that importance, early American government struck a balance on the
side of regulation over property interests. Gordon Wood reflected that, “the sacrifice of the
individual interest to the greater good of the whole formed the essence of republicanism.”\(^{816}\) The
Declaration of Rights in Vermont’s first state constitution declared, “private property ought to be
subservient to public uses, when necessity required it.”\(^{817}\) To be sure, early American
government balanced the individual’s right to enjoy property with the need to regulate in support
of the common welfare. Marc Kruman related that members of Pennsylvania state constitutional
convention discussed limiting the legislature’s taxing authority to require that “the purpose for
which any tax is to be raised ought to appear clearly . . . to be of more service to the community
than the money would be if not collected.”\(^{818}\) But that balance fell on the side of supporting the
common welfare. In the public economy of early America, Novak commented, “the buying and
selling of goods was intimately bound up with community identity and social order.” He
continued, noting that, “Nothing so important could be left to the invisible laws of a marketplace

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\(^{814}\) Quoted in, Ely, The Guardian of Every Other Right: 26.

\(^{815}\) Ibid., 3.

\(^{816}\) Gordon S. Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill: Published for the Institute of

\(^{817}\) Declaration of Rights, Article 2, "Constitution of the State of Vermont," (1777). This clause remains in the
Vermont Constitution.

\(^{818}\) Marc W. Kruman, Between Authority and Liberty: State Constitution Making in Revolutionary America (Chapel
Newton Thorpe, comp. and ed. The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of
the States, Territories, and Colonies Now or Heretofore Forming in the United States of America, (Washington,
D.C., 1909) 5: 3091.
or a public stricture that the buyer should beware.”

The legislature determined whether community needs exceeded individual interests and, when it did so, legislated accordingly.

While regulations might seem pervasive, they must be considered with an early-American mindset. Gautham Rao, in discussing antebellum acceptance of state compulsion to join posses, explained that citizens freely and willingly sacrificed their time and efforts in support of state law enforcement in pursuit of the common welfare. Citizens considered their uncompensated efforts as an attribute of good citizenship. Just as citizens embraced supporting the common welfare by their participation as law enforcement officers, so too did they accept limitations on their economic freedoms in pursuit of community benefit. In the first half of the century, most tradesmen did not consider it a burden to apply for a license to trade. At that time, in many locations, an individual had no “right” to engage in trade. Selling for profit was a privilege. As such, government could extend or not extend the privilege as it determined appropriate. Novak noted that in 1827 Maryland it was unlawful for anyone to set up shop

for the purpose of selling by wholesale or retail, or bartering any dry goods, groceries, spirituous or fermented liquor, imported dried fruit, glass, crockery, hardware, drugs or medicines, paints, printed books, stationery, saddlery, gold, silver or plated ware, jewelry, toys, wearing apparel, salted provisions, grain, meal, flour, timber, tobacco, cotton, leather, hides, lime, wrought or cast iron, copper or tin, or any other kind of goods, wares or merchandise, foreign or domestic, without first obtaining a license.

That the law was extended in 1832, and prohibited anyone from selling “with a view to profit” without a license. Soon other states, including Tennessee, Missouri, Pennsylvania, and

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California enacted similar licensing laws. As a privilege, states regulated traders to advance the common well-being.821

Accompanying their general agreement that government was to facilitate trade and legislate for the general welfare, Americans retained a fear of legislative overreaching. Kruman argued that state constitutional conventions, around revolutionary times, frequently considered and enacted limitations on legislative authority, in addition to the well-recognized restrictions on executive authority. He proposed that the declarations of rights and bill of rights attached to most state constitutions “infused . . . government with the idea of limitation.” Included in the stated rights was the oft-followed Virginia declaration that all man had “inherent rights” that government could not take away, including “the enjoyment of life and liberty, with the means of acquiring and possessing property.” Kruman submitted that these liberty rights against government intrusions applied to all aspects of governance, including the legislature.822

Even if the declarations and bills of rights intended limits on legislative prerogatives, most courts and litigants seemed unable to particularize the basis upon which courts could void overreaching legislation. Throughout the early nineteenth century, supporters of limited legislative power over property rights pinned their arguments on Justice Samuel Chase’s 1798 dicta in *Calder v Bull*. While that case concerned a legislative effort to require a rehearing of a judicial decree in a probate matter, it also involved serious issues of legislative power.

The opposing arguments in *Calder* presaged the property/general-welfare debates of the next century. Justice James Iredell’s dissent declared courts could employ only specifically

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821 Novak, "Public Economy," 14. As late as 1856, the Tennessee court affirmed that “the occupation or trade of wholesale grocers or merchants is a ‘privilege’.” *French v Baker*, 36 Tenn. 193(1856). Interestingly, that case arose because those required to hold a license, like wholesale grocers, were taxed to support rail development.

822 Kruman, *Between Liberty and Authority*, 35, 38, 40.
delineated constitutional limitations to check state legislative power.\textsuperscript{823} He wrote, “It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so.” Iredell also suggested that the \textit{Ex Post Facto} Clause does not restrict government regulations that affect property. Finding that “some of the most necessary and important acts of Legislation are, on the contrary, founded upon the principle, that private rights must yield to public exigencies,” Iredell argued that “without the possession of this power the operations of Government would often be obstructed, and society itself would be endangered.”\textsuperscript{824}

Chase took a different approach. Writing for the court, he claimed that courts required no specific constitutional provision to find legislation unconstitutional. “I cannot subscribe,” Chase wrote, “to the omnipotence of a State Legislature, or that it is absolute and without controul; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State.” He continued: “There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government is established.” As an example of such an extra constitutional limit on legislative prerogatives, Chase positions, “a law that takes property from A. and gives it to B. It is against all reason and justice, for a people to entrust a Legislature with SUCH powers and, therefore, it cannot be presumed that they have done it.”\textsuperscript{825} Chase premised his argument on seventeenth and eighteenth century theories of a “social compact” wherein government held its power in moral trust and forfeited

\textsuperscript{823} While called a dissent in the opinion, Justice Iredell concurred with the Court’s result but, because his reasoning differed, he classified the opinion as a dissent.
\textsuperscript{824} \textit{Calder v Bull}, 3 U.S. 386, 398, 400 (1798).
\textsuperscript{825} Ibid., 387-88.
that power when it violated that trust. Chase’s reasoning, while grounded on concerns over legislative overreaching, suggested that courts have the authority to overturn legislation if a court determines that the people could not have intended the legislature to act as it did. 826

Chase and Iredell’s dicta portended long-term controversy over the limits on legislative power. Iredell wrote of the need to legislate for the common welfare, and how such legislation necessarily encumbers property rights, but that doing so was an appropriate incident of democratic governance. Chase professed different beliefs. Freedom required individual property rights and legislative tinkering with those rights undercut that freedom. While state constitutions might not specifically prohibit legislative acts in violation of fundamental law, basic republican principles demanded those restrictions. Iredell’s position largely held sway through the middle portions of the nineteenth century as Chase’s concerns prowled in the background.

Chief Justice John Marshall would soon revisit the issue of non-enumerated limits on legislative authority in the 1810 case, Fletcher v Peck. In that case, the court considered the Georgia legislature’s effort to reverse the bribe-induced land sale of a previous legislature. Relying in part on the Contract Clause, the court unanimously declared unconstitutional the efforts to repeal the earlier legislature’s sale. In dicta, Marshall questioned, but never answered, whether there might be extra-constitutional limitations on legislative power. At first, he recognized that lacking specific constitutional restrictions, state legislative authority was

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826 At the time he wrote the Calder opinion, Chase was an ardent Federalist. He strongly supported limiting legislative power for fear that the mob would divest citizens of their property. In the 1804-05 impeachment proceedings against Chase, Congress accused him of “pervert[ing] his official right and duty to address the grand jury” by offering “an intemperate and inflammatory political harangue.” Chases grand jury charge warned that Maryland’s universal suffrage would “certainly and rapidly destroy all protection to property and all security to personal liberty; and our republican constitution will sink into a mobocracy, the worst of all possible governments.” Lance Banning, ”The Impeachment of Samuel Chase, 1804-1805,” Liberty Fund, http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=875&chapter=64008&layout=html&Itemid=27.
unlimited. He then floated a question that would resonate for many decades: “It may well be doubted whether the nature of society and government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.” He reflected that the legislature’s power to make property-affecting laws “where the constitution is silent, never has been, and perhaps never can be, defined strictly.”

Since the court determined that Georgia’s effort to rescind the land sale violated constitutional restrictions against ex post facto laws, impairments of contracts, and bills of attainder, it did not need to discuss further the extra-constitutional concerns. The question remained unanswered but, as with Calder, became dicta used by property-protecting advocates of legislative limitations.

*Calder* and *Fletcher* touched on, but did not address regulatory concerns. Because regulation was a state issue, state courts would be the primary forums in which American courts considered the nature and extent of limitations on legislatures. An early challenge to property-encumbering laws considered an 1826 Mobile, Alabama *assize of bread*. As in Detroit, that regulation required that bakers be licensed, that they use wholesome flour, that their bread be of a government-directed weight, and that it sell at a specified price. Moreover, Mobile required that bakers mark their initials and the price on each loaf. The city fined Yuille, a Mobile baker, twenty dollars and had his product condemned for being underweight. Yuille sued, claiming that the city did not have the right to regulate the sale of bread because those regulations interfered with his right to pursue a lawful trade. Since the right to trade was a property right, Yuille argued that the legislation unconstitutionally encumbered his property and that the regulations were void under the common law. The court found otherwise, stating that the restraints were appropriate “if such restraint be for the good of the inhabitants.” The regulation fit that goal, as

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827 *Fletcher v Peck*, 135-36.
society could not rely on the market to provide sufficient quantities or qualities of bread without government oversight.

By 1826, economists were beginning to challenge the wisdom of such encumbrances on trade and property and the court took notice of them. Nevertheless, the court deferred to the legislature’s judgment. “The legislature having full power to pass such laws as deemed necessary for public good, their acts cannot be impeached on the ground, that they are unwise, or not in accordance with just and enlightened views of political economy, as understood at the present day.” Given that deference, and finding that Yuille had a fair trial, the court affirmed the conviction.\footnote{Mayor and Aldermen of Mobile v Yuille, 3 Ala. 137(1841). Such statutes were not uncommon. Bread baking was considered an essential industry requiring special legislation. A bit over 60 years later, the Supreme Court in Lochner v New York would find otherwise.} Yuille was not unusual for its day: the courts routinely affirmed legislatures’ power to act in support of a well-ordered society.\footnote{Cooley was presumably speaking of Yuille when he argued that if the government had the right to set the price of bread, “there is nothing in this direction the legislature may not do.” Cooley believed states did not have that power, but recognized that it was employed by earlier legislatures. As noted below, Cooley advocated finding new meaning in constitutions to fit current needs. In doing so, he argued that constitutional interpretation required taking “notice of the steady growth of the free principles which have come from common-law rules and usages, and of their gradual expansion with the general advance in intelligence and independent thought and action among the people.” Cooley, “Limits to State Control of Private Business,” 251, 269.}

Notwithstanding that general acceptance, not all early attacks on property-divesting legislation were unsuccessful. One notable and representative case came out of North Carolina’s efforts to democratize its court personnel selection process. The matter started in 1807, when North Carolina appointed Lawson Henderson as a court clerk who was to hold his office during good behavior, a right that Henderson intended to retain. Twenty-five years later, in 1832, the North Carolina legislature enacted a law calling for elections of court clerks. John D. Hoke won that election and sought to take Henderson’s job. Henderson objected, claiming that he had a property right in the clerk’s position. He protested that the legislature was taking his property without due process of law, and the North Carolina Supreme Court agreed.
With the issue of slavery smoldering in the background, the court spoke out on the limits of legislative power. Chief Justice Thomas Ruffin, writing for the court in *Hoke v Henderson*, asserted that property was a linchpin of democratic society. “The great object of society” Ruffin declared, “is to enable men to appropriate among themselves the things which in their natural state, were common.” He claimed that laws were designed to protect that property from the wrongful acts of others, even if those acts were done on behalf of a majority of citizens as represented by the legislature. “In other words, public liberty requires that private property should be protected even from the government itself.”

He then looked for a constitutional hook upon which to hang his property-protecting beliefs and found it in several areas. The North Carolina constitution provided that the state could not deprive an individual of his property “but by the law of the land.” Since Henderson had a property right in his clerk position, the legislature could not transfer that right from him to another individual without a judicial hearing. Because there was no hearing to determine if Henderson had violated the good conduct provision of his tenure, the legislation was improper. In essence, Ruffin argued that the proposed taking was procedurally inadequate. By taking without a trial, the legislature violated separation of power principles. In an argument that would resonate in later decisions, the *Hoke* court found that the legislature improperly acted as a court by passing judgment on Henderson’s conduct in office. The court may have considered an interest wider than that of Lawson Henderson himself. On several occasions, the court likened Henderson’s loss of property rights to those slave owners would suffer were the legislature to enact laws limiting their rights. While the *Hoke* court argued procedural concerns, its unease

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830 *Hoke v Henderson*, 20, 21, 29-30., See also *Trustees of the University of North Carolina v Foy*, 5 N.C. 58 (1805) and *Allen v Peden*, 4 N. C. 442 (1816), for earlier North Carolina applications of law of the land provisions to invalidate legislation. In all three cases, the court ruled an act unconstitutional because the legislature affected property in ways legislatures could not – Taking a job, freeing a slave, and taking university property.
over slavery was manifest. The words spoke procedure but the focus was substantive. Two decades later Justice Taney voiced similar concerns in *Dred Scott*.

The oft-cited *Taylor v Porter & Ford* evidenced a judicial concern over government-compelled transfers of property between individuals. In that case, the court considered legislation that granted eminent domain powers to an individual to build a private access road over another individual’s land. Acknowledging that “private interests must yield to public necessity,” the court questioned whether government had the power to compel private-to-private transfers. Both searching for a grant of legislative power and a specific withholding of power, the 1843 court concluded that New York’s due process and law of the land clauses prohibited legislative property transfers without a judicial hearing. Because this was a naked transfer of property from one person to another with no public benefit, the court declared this enabling legislation invalid. 831

A series of challenges to property-affecting legislation also arose out of New York’s efforts to modify marriage rights and obligations. In 1848, New York passed legislation granting women ownership of the property they brought into a marriage or that they acquired during the marriage. Common-law principles held that property vested in the husband, “as governor of the family.” In seeking to protect the woman’s rights, the statute divested the husband of that property. Two cases concerning that law disclose the issues with which courts struggled when reviewing this legislatively demanded transfer of property from one individual to another.

Shortly after the statute’s enactment, Mary White sued her husband, the ne’er-do-well Lyman White, to divest him of his use and enjoyment of property bequeathed to her. Mr. White defended by challenging the constitutionality of the statute. In *White v White*, the court, through Justice Mason, ruled in the husband's favor. Since the legislation stripped property rights from

831 *Taylor v Porter & Ford*, 4 Hill 140 (NY), 143-45 (1843).
the husband without a judicial procedure, the law was invalid. The court reasoned that: “If the legislature can take the property of A. and transfer it to B., they can take A. himself and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be due process of law.”832 Few cite the case, perhaps because the court relied largely on natural law to define due process. Justice Mason argued for extra-constitutional limitations on the legislature and that courts were not required to rely on specific constitutional “negatives upon the legislative power.” To Mason, courts could invalidate legislation where the “exercise of [legislative] power is incompatible with the nature and object of all government, and is destructive of the great end and aim for which government is instituted, and is subversive of the fundamental principles upon which all free governments are organized.”833 It is easy to put too much emphasis on this lightly considered, infrequently cited case. Notwithstanding that caution, Mason seemed to be suggesting that natural law required that courts review legislation in light of the underlying purposes of (republican?) governance. Hence, if courts considered legislation inconsistent with governing structures, those laws were invalid, notwithstanding the absence of legislative-limiting constitutional language. To Mason and his brethren, the court was responsible to define the extent and nature of those extra-constitutional limitations. In the end, the Mason recognized that the court’s decision was anti-democratic and unpopular. The husband was a “man of idle habits,” was frequently intoxicated, and was an improvident scoundrel. The common-law was unfair and archaic. Nevertheless, natural law limited legislative prerogatives, and the legislature could not take property rights from husbands and give them to wives. The New York Court of Appeals, in Westervelt v Gregg ruled similarly, finding as Cooley noted that “rights once vested, . . . could not be divested by any subsequent

832 White v White, 5 Barbour (N.Y.) 474(1849).
833 Ibid.
change in the law.”834 In other words, laws that divested property rights were beyond the power of the legislature.

Those cases, and the several like them, are oft cited but too narrow to be representative of the nature of antebellum regulatory law. That is because in those cases the legislative action affected person-to-person transfers. The North Carolina law directly transferred Henderson’s property (good-behavior employment position) to Hoke, and New York’s laws, in one case, directly transferred land between adjoining landholders and, in another two, a husband’s property (acquired under common-law coverture rules) to their wives. While the courts’ expansive language eloquently spoke of natural law, due process, and law of the land, the practical consequences of the rulings were limited.835 When employed with respect to general regulatory legislation (or the largest transfers of wealth of the day – railroads), due process and other constitutional claims met significantly greater obstacles.

As Cooley noted, early nineteenth century government was “present at all times, touching the citizens for his advantage and direction in all his relations: by his fireside as much as in his business.”836 Up until 1845, most of that government was local and “took seriously the historical sensibility of the common law and the aspirations of an ordered commonwealth.”837 In that sense, early nineteenth-century government regulations largely harmonized with general sensibilities. That local harmony began to dissipate as state legislatures in the mid 1840s began to enact statewide alcohol regulations or outright prohibitions. “During the decade of 1846 to

834 Westervelt v Gregg, 12 N.Y. 202(1854); ———, Constitutional Limitations: 360.
835 Newmyer reflected, “What is striking about judicial references to natural law . . . was that they rarely, if ever stood alone in disposing of legal questions at issue but rather were harnessed to specific constitutional provisions . . . .” Newmyer, John Marshall and the Heroic Age of the Supreme Court.
1856 no fewer than sixteen states passed anti-liquor laws of a more or less drastic character.⁸³⁸

Those laws resulted in a flurry of litigation and what Novak characterized as the “earliest . . .
definitive statements of both substantive due process and the inalienable police power.”⁸³⁹ In
considering the propriety of the temperance legislation, courts would now address legislative power, particularly as it affected the individual rights of citizens.

**Temperance and Broadening Discontent**

As Detroit’s experiences attest, regulating alcohol was an incident of American
government from its earliest days. This stemmed not just from moral concerns, but also from
public health and safety concerns. Between “1790 and 1830 [Americans] drank more alcoholic
beverages per capita than ever before or since.” By 1830, “estimated annual consumption of
hard liquor [was] 9.5 gallons for every American over 14 – plus 30.3 gallons of hard cider and
other in toxicants to total 7.1 gallons of absolute alcohol.”⁸⁴⁰ That heavy consumption conflicted
with the magnified morality of the Second Great Awakening and with the health and safety
concerns associated with industrialization, family violence, and pauperism.⁸⁴¹ While some may
view the temperance movement as harking back to a purer era, it was quite the opposite. “The
organized temperance movement which emerged in the 1820s, marked by the formation of the
American Temperance Society in 1826, had its roots in the process of industrialization and
commercialization of agriculture; more important, the men and women who fashioned the

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⁸³⁸ Corwin, “The Doctrine of Due Process of Law Before the Civil War,” 466.
⁸⁴¹ In the preindustrial and early industrial age, employers would compensate employees in part with a liquor ration. It provided both calories and, to the beliefs of the time, stimulated work. With industrialization, employers would cease to provide liquor especially in risky professions where inebriation could result in serious injuries. Hartz, *Economic Policy and Democratic Thought*: 208.
temperance crusade sought to hasten the processes of social and economic change.” Ronald Walters and Eric Foner argued that the temperance advocates “had a sense of progress and the nation’s potential. As they saw it, prosperity, godliness, and political freedom were the fruits of sobriety. Poverty, damnation, and tyranny were the consequences of intemperance.”

An indication of the public’s engagement with temperance issues can be gleaned from theater attendance at plays featuring the challenges of drink. In the 1850s, along with *Uncle Tom’s Cabin*, plays promoting temperance “were crowd pleasers with the ability to draw a wider spectrum of the public than had ever before frequented the theatre.” During that time, wildly successful temperance plays moved across the country. According to Judith MacArthur’s study, the plot of one of those plays, *The Drunkard*, typified the temperance message. In it, 

Grasping lawyer Cribbs, the dastardly villain, schemes to have the poor but beautiful and virtuous Mary Wilson and her widowed mother evicted from their rose-covered cottage . . . The Noble young heir, Edward, weds Mary and chases off Cribbs, who revenges himself by luring Edward into an addiction to drink. Ruined and degraded, the hero flees to the miserable alleys of New York City, where his ragged and heartbroken but ever-devoted wife and child follow in search of him. Edward is about to take poison when he is saved by a reformed drunkard turned philanthropist who administers the pledge of sobriety. Cribbs’s last-minute attempt to abscend with Edward’s grandfather’s will is foiled, and the young family is reunited. The final scene is set in their picturesque cottage, where Edward plays “Home, Sweet Home” on the flute while the sun sets and the assembled villagers sing.

*The Drunkard* was one of several very popular plays used to display the evils of drink and the redemptive value of family and community, in a dry, sober environment.

To control alcohol consumption, municipalities and, increasingly, states would regulate the manufacture, sale, and consumption of alcohol. Along with political complaints that those

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laws were too onerous, dissenting residents began to petition courts for relief (most likely as part of the previously mentioned trend to claim constitutional rights violations). That occasioned a deeper judicial analysis of the limits of legislative power to regulate and the rights of private property. At first, efforts to judicially limit legislative power were unavailing. Early courts referenced natural law and vested rights as counterbalances to legislative authority. In *New York v Morris*, the 1835 New York Supreme Court considered the constitutionality of the Village of Ogdensburgh’s requirement that grocers have licenses to allow patrons to imbibe on their premises. Writing for the court, Justice Samuel Nelson began by recognizing that citizens had “vested rights” that were “sacred and inviolable, even against the plenitude of the Legislative Department.” After asserting that formidable standard, the court then questioned whether it had any authority to relieve parties from legislative overreaching. Claiming that it would be “indelicate and presumptuous” to assume that the legislature would ever overreach, Nelson softened his earlier promised protection of vested rights. “Vested rights are indefinite terms, and of extensive signification; not infrequently resorted to when no better argument exists.” The dictum suggested limits: the ruling found otherwise. After promising robust protection of property, the court fully retreated from its rhetoric. Nelson declared: “Government was instituted for the purpose of modifying and regulating these rights with a view to the general good; and under the Constitution, the mode by which it was thought this great object must be attained, was left to the wisdom and discretion of the people themselves, acting through the medium of their representatives.” The law was valid. General-welfare needs trumped property rights and the statute was constitutional.

The *Morris* court, however, may have been sending a signal. Because of the facts of the case, the court did not have to take the bold step of invalidating legislation on extra-

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constitutional grounds. The regulation at issue limited but did not substantially destroy property. That fact allowed the court to float a concern, without truly opening Pandora’s Box. The court was able warn against laws that violated “inherent or inalienable” rights, while still deferring to the legislature’s judgment.

A few years before *Morris*, the Massachusetts Supreme Court faced the same issue, but analyzed it quite differently. In *Commonwealth v Blackington*, the court faced a claim that a county’s failure to license a liquor establishment divested the previously licensed individual of his property interests. Oliver Blackington claimed that the loss of his license was a violation of his “unalienable rights.” Chief Justice Shaw was surprised by this rights argument as it had not been raised in the nearly sixty years of state and municipal liquor regulations. He responded by noting the expansive police powers “to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances” to advance the general welfare. Of course those laws had to be consistent with constitutional restraints. But the police power by its nature effected property interests, and to invalidate laws on that basis “would be a departure from the whole policy of the government, from the first settlement of the country.”

846 Notwithstanding constitutional provisions that signaled the importance of property, government regulations to advance the public’s health, safety, morals, and general welfare were both constitutionally acceptable and appropriate.

That same term, Shaw wrote the court’s opinion in *Commonwealth v Kimbell*. In that case, the petitioner argued that Massachusetts’s regulation of liquor violated Congress’ authority under the Commerce Clause. Shaw rejected that argument, again stating that government power necessarily included the authority to regulate “for the peace, safety, health, morals and general

846 *Commonwealth v Blackington*, 41 Mass. 352, 357 (1833).
welfare of the community.” That same issue regarding state power in the face of the Commerce Clause would arise before the United States Supreme Court in 1847 in a series of matters collectively called the License Cases. In a confusing and disjointed manner, six justices wrote opinions, with no court opinion issued. The question came down to whether federal space under the Commerce Clause was so complete as to leave no room for state regulations that, necessarily, affected interstate commerce. In addressing that issue, the justices reflected on the nature of state police powers and the historical role of alcohol regulations. Chief Justice Roger Taney’s oft-cited opinion found that states had the power to regulate, or prohibit altogether, ardent spirits and could do so even though interstate commerce might be affected. Justice John McLean “acknowledged [that the] police power of a State extends often to the destruction of property.” Hence, once the legislature found alcohol was an impediment to the public’s health or morals, it could regulate or destroy that property. Given the rather tepid regulations of the day, the law seemed clear. Government could regulate alcohol property – to the point of destroying it – in order to advance general-welfare interests.

Local licensing restrictions marked 1830 and 1840s efforts to limit alcohol sales and consumption. For each effort, however, enterprising businesses found a response. In his groundbreaking studies of early American liquor consumption and regulation, William Rorabaugh related stories of avoidance of those statutes. For example, to avoid Massachusetts’ 1838 regulations against the retail sales of spirits “an enterprising liquor dealer painted stripes on his pig and advertised that for 6¢ a person could see this decorated beast. The viewer also got a free glass of whiskey.” Rorabaugh explained that such easy avoidance led to the repeal of the

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847 Commonwealth v Kimball, 41 Mass. 359, 360 (1833).
848 Thurlow v Commonwealth of Massachusetts (License Cases), 46 U.S. 504, 577, 89 (1847). The License Cases in part grew out of the Massachusetts Kimball case.
statute, but also to new social and legal efforts to restrict that which many desired – alcohol. Those restrictions would move from local initiatives (one hundred Massachusetts towns were legally dry in 1845\textsuperscript{850}) to statewide mandates. With them, the courts would move from unanimous acceptance of the legislature’s right to regulate, to questions concerning the power to legislate the destruction of property.

Although the temperance movement had been very successful in reducing the nation’s alcohol consumption through local laws and social and moral persuasion (consumption had declined from 7.1 gallons of absolute alcohol to 1.85 by 1845\textsuperscript{851}), by 1850 temperance advocates pressed for statewide legal changes that would prohibit, or dramatically reduce, alcohol manufacture and sale.\textsuperscript{852} They first found success in Maine, driven by temperance advocate and Portland Mayor, Neal Dow.\textsuperscript{853} Believing that “the traffic in intoxicating drink tends more to degradation and impoverishment of the people than all other causes of evil combined,” Dow advocated, and won, legislative acceptance of the first state prohibition statute in the United States.\textsuperscript{854} In the next five years over a dozen states, including Michigan, would pass “Maine Laws” to restrict or prohibit alcohol consumption. Novak noted that these statutes “marked a stunning departure in the legal and legislative history of morals and liquor regulation.” He noted that with these laws, “Power and discretion were summarily taken out of the hands of communities and local officials and replaced with blanket state-wide legislative bans on a

\textsuperscript{850} Walters and Foner, American Reformers, 1815-1860: 138.
\textsuperscript{851} Sellers, The Market Revolution: 266.
\textsuperscript{852} Sean Wilentz related, “By 1850, alcohol had been virtually purged from northern middle-class homes where it had once been a mainstay.” The continued drive against alcohol in large measure was a response to anxieties about immigrants. Sean Wilentz, The Rise of American Democracy: Jefferson to Lincoln (New York: Norton, 2005). 680-81.
\textsuperscript{853} Dow campaigned for prohibition in the other states, was a nativist, abolitionist, Republican, and the colonel of a union regiment.
remarkably profitable activity . . . that previously enjoyed the sanction of law.”

Court challenges to those laws would occasion the first truly substantive due process cases. Courts would consider whether state legislatures had the authority to make unlawful that which had always been legal and to make criminals those who had been productive business people and community leaders and, in doing so, destroy significant property value and rights.

The 1852 Massachusetts legislature limited the manufacture, sale, and use of all intoxicating liquors. In Fisher v McGirr, the court through Chief Justice Shaw upheld the legislature’s right, under its police-power authority, to regulate liquor as a nuisance. Since banning nuisances was within the legislature’s authority, alcohol could be completely banned as an injurious and dangerous object. But there were limits. With the substance of the law in the legislature’s purview, Shaw looked to the summary procedures through which the law was enforced. He concluded that the procedures used to regulate must be consistent with due process guarantees. He asked,

whether the measures, directed and authorized by the statute in question, are so far inconsistent with the principles of justice, and the established maxims of jurisprudence, intended for the security of public and private rights, and so repugnant to the provisions of the Declaration of Rights and constitution of the Commonwealth, that it was not within the power of the legislature to give them the force of law, and that they must therefore be held unconstitutional and void.

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856 Shaw repeated what the courts had almost without exception ruled: “We have no doubt that it is competent for the legislature to declare the possession of certain articles of property, either absolutely, or when held in particular places, and under particular circumstances, to be unlawful, because they would be injurious, dangerous or noxious; and by due process of law, by proceeding in rem, to provide both for the abatement of the nuisance and the punishment of the offender, by the seizure and confiscation of the property, by the removal, sale, or destruction of the noxious articles.” Fisher v McGirr, 67 Mass 1, 27 (1854).
Using that due process standard, the court adjudged inadequate the statute’s delineated procedures. The properties’ value could be legislated away, but only if appropriate procedural guarantees protected against inappropriate takings and prosecution. The Massachusetts Supreme Court for the first time had invalidated a substantial portion of its state’s legislation.

In the end, the legislature cured the offensive provision and re-enacted the law. In that case, one can ask why Fisher is so important. Courts had almost without exception accepted summary actions to remove nuisances and had done so with procedures much like those invalidated in that case. As Novak pointed out, the situation in Fisher was different because those regulations were statewide and had rendered valueless (and, perhaps criminal) property that was previously well accepted. “It was a comprehensive statutory revocation of preexisting liberties, properties, and rights. It replaced local, discretionary liquor licensing with a formal, centralized, and uniform system of rules guiding the administrative and judicial conduct of law enforcement officials throughout the state.” While well taken, Novak may not have gone far enough. One might expect that summary proceedings would still be acceptable where a previously lawful product now faced uniform acceptance of its danger – like cyclamates, opium,

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857 Shaw wrote, “many of the precautions and safeguards for the security of persons and property, and the most valuable rights of the subject, so sedulously required and insisted on in the laws of all well ordered governments, and specially prescribed as the governing rule of the legislature in our Declaration of Rights, are overlooked and disregarded.”

858 Fisher v McGirr, 67 Mass 1, 28 (1854) There had been a number of cases suggesting that state due process clauses had a substantive component, beyond that suggested in Fisher v McGirr. Most often, those suggestions were dicta, with the court relying on other constitutional language for its holdings. In 1856, the United States Supreme Court held to a procedural definition of due process clauses in Murray v Hoboken Land and Improvement Company. There, the court considered whether a legislatively established adjudication procedure violated constitutional guarantees. The court acknowledged the vagueness of the due process guarantees, stating, “the constitution contains no description of these processes which it intended to follow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process.” The court reasoned that due process required that legal procedures must be consistent with other constitutionally guaranteed processes and with historic requirements as established by the common law. Most importantly, the court limited due process guarantees to process guarantees. It found that the legislature, executive, and the courts were bound to a fair and complete process when stripping an individual of life, liberty, or property. By implication, therefore, due process rights did not protect property. Instead, they guaranteed that judicial proceeding fairly applied the law, not that the law itself was fair. Due process was about process. Murry v Hoboken Land and Improvement Company, 59 U.S. 272, 276 (1856).

or virus-carrying poultry – even if those regulations were harsh and statewide. It appears that the court took notice of two additional factors. First, there was a strong undercurrent of dissatisfaction with prohibition laws and, second, the danger in *Fisher* was not immediate and, therefore, summary action was not needed. Recent immigrants and a sizeable portion of the native population accepted alcohol as a cultural norm and took umbrage at what seemed class-focused legislation. Further, unlike other nuisance cases, alcohol violations did not threaten immediate danger and accordingly did not require immediate remedy. Deeper due process proceedings had time to work, just as they did in *Welch v Stowell*, the Michigan case dealing with destruction of an alleged brothel. Whatever the distinction in *Fisher*, Shaw’s opinion offered an additional dynamic. It fenced in legislative discretion on enforcement of state laws. In doing so, it made enforcement of the prohibition law cumbersome and, for the values involved, expensive. Hence, while the substance of the law remained intact, the court had significantly muted its application.

While Massachusetts focused on procedure, a few other jurisdictions addressed more substantive concerns. To them, the issue was whether the legislature could strip citizens of their property value by legislating away the worth of heretofore valuable (and lawful) assets. A number of courts took up the issue, with most finding that state police powers allowed for property-destroying restrictions. In one of the earlier cases, the Illinois Supreme Court, with Justice Walter Scates speaking, waxed philosophical about the surrendering of natural rights upon entering the social state. In that social state, when “private right[s] become injurious, noxious or offensive to the public good, communities have a right to protection from it; and the private right becomes subordinate to the public right.” In response to the claim that the legislation both took property without compensation and impaired contract rights, Scates
answered, “No property has, in this instance, been entered upon or taken. None are benefited by the destruction, or rather the suspension, of the rights in question in any other way than citizens always are when one of their number is forbidden to continue a nuisance.” 860 The legislature had determined the property created a nuisance; it had legislated to remove the nuisance, and had been justified in doing so by the needs of the well-ordered society.

Only two courts disagreed with the weight of judicial decisions, with one arguing the legislature lacked the power and the other determined that the legislature could only act prospectively. 861 In 1855, the Indiana Supreme Court in *Beebe v Indiana* declared the state’s recently enacted prohibition on the manufacture and sale of alcohol unconstitutional. Focusing on limits to legislative power associated with “reserved natural rights,” Justice Samuel Perkins rejected the propriety of regulations to advance the general welfare and took particular exception to efforts to limit the consumption of alcohol. He suggested that courts use natural law to limit regulations advocated by “latitudinarians” who use “the general welfare doctrine” to enact such destructive legislation as the alien and sedition acts and national bank charters. The notion that government should advance the general welfare “has been fraught with oppression, and has not produced, permanently, promised results.” Accordingly, constitutions must be read to limit legislative prerogatives, and courts had the duty of “securing to the people safety from legislative aggression.” They should do so irrespective of specific constitutional limitations. To accomplish that, Perkins proclaimed, courts should employ clauses protecting inalienable rights.

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860 *Goddard v Jacksonville*, 15 Ill. 588 (1854).
861 Ernst Freund wrote in 1904: “The constitutionality of prohibition is firmly established. The one decision in which it was firmly denied [Beebe, discussed below] has since been ignored by the court which rendered it.” Later in his treatise, Freund explained that Maine Acts were regulations of trade, not private behavior – for to regulate private behavior generally was beyond the legislature’s police powers. He reflected, “A man may debauch himself in private and the state will not interfere, unless the debauchery creates a public nuisance or disturbs the public peace. . . . It is not the private appetite or home customs of the citizens that the state undertakes to manage, but the liquor traffic. . . . This is the ground of Prohibition.” Ernst Freund, *The Police Power, Public Policy and Constitutional Rights* (Chicago: Callaghan, 1904). 202-03, 483-84.
Those clauses established that citizens did not give up their natural property rights when entering society.

After setting out the governing philosophy, Perkins turned to the alcohol regulations at issue. Giving judicial notice to the fact that beer is no more hurtful than “the use of lemonade or ice cream,” the court honored its obligation to “secure [property] from the invasion of a despotic legislature” and ruled the liquor restriction unconstitutional.862 In the related *Herman v State*, Perkins continued the argument. To the court, the issue was personal freedom. “We lay down this proposition, then, as applicable to the present case; that the right of liberty and pursuing happiness secured by the constitution, embraces the right, in each compos mentis individual, of selecting what he will eat and drink, in short, his beverages . . . If the constitution does not secure this right to the people, it secures nothing of value.”863 The issue, therefore, was not about public needs and regulation of commerce. It was about regulating private behavior, which by its letter the statute did not do, but certainly was the intended result. By flipping the analysis from regulation of commerce to regulation of individuals, *Beebe* and *Herman* had challenged the long-standing practice and acceptance of legislation to advance general-welfare interest. To Perkins, freedom, as against majoritarian governance, was paramount. The Indiana Supreme Court had declared individual rights as paramount, whereas previous courts had declared group rights as such. In that way, the Indiana court challenged government’s right to legislate to advance the general welfare and replaced it with a new, individual-rights model. To accomplish

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862 The court also criticized the state’s use of European precedent and scholars in discussing limitations on legislative power. The court found such sources “dangerous, indeed utterly blind guides,” The court also argued that the state could not manufacture alcohol for medicinal purposes as that had always been in the private sphere. The opinion claimed that government “was organized” to protect such private enterprise against the monopolizing influence of the powerful. Hence, legislative power was limited to “undertakings of a public character.” *Beebe v Indiana*, 6 Ind. 501, 505-06, 16 (1855).

863 *Herman v State*, 8 Ind 545, 558 (1855).
that, Perkins positioned his court as an active government branch to check an active legislature.  

Very soon after Illinois and Indiana had ruled, the New York Court of Appeals in the groundbreaking case *Wynehamer v New York*, invalidated the retrospective aspects of New York’s 1855 act for “the prevention of intemperance, pauperism and crime.” Unlike most similar cases, the court directly took on the question whether the legislature has the power to destroy the value of property (liquor) consistently with the state constitution’s “due process” and “law of the land” clauses. With Justice George Comstock writing for the court, the court reasoned that liquor was entitled to the same property protections as “land, houses or chattels.” The state had the authority to regulate alcohol property under its police powers. But, the court argued, the legislation destroyed existing property and that the legislature could not do under the New York constitution. Perhaps following the logic of New York’s marriage property cases, Comstock wrote that property “cannot be pronounced worthless or pernicious, and so destroyed or deprived of its essential attributes.” In a statement signaling the shift to a more individual-rights focused jurisprudence, Comstock decried allowing “theories of public good and public necessity” to be used by “popular majorities” to take property from others. Regardless of democratic leanings, Comstock argued, “there are some absolute private rights beyond their reach, and among these the constitution places the right of property.”

Unlike *Beebe* and *Herman*, *Wynehamer* focused on constitutional language, but with a substantive spin. Comstock wrote, “the true interpretation of the ‘law of the land’ and ‘due

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864 Perkins repeated the concerns he articulated in *Beebe* regarding state manufacturing and the dangerous nature of foreign thought. He classified the Maine laws as the “law of Mohomet.” As he was criticizing the use of Islamic law, he celebrated the use of Christian doctrine. After writing of pro-alcohol biblical references to the vine and Solomon, Perkins wrote “It thus appears, if the inspired psalmist is entitled to credit, that man was made to laugh as well as weep, and that these stimulating beverages were created by the Almighty expressly to promote his social hilarity and enjoyment.” Ibid., 550-51, 61.

process of law’ is that where the rights are acquired by the citizen under the existing law, there is no power in any branch of government to take them away.” With that broad declaration, the *Wynehamer* decision invalidated a retroactive application of law – in essence, rejecting Iredell’s warning that “society itself would be endangered” were legislatures prohibited from restricting pre-existing property rights. Comstock wrote, “Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference, although a process and tribunal are appointed to execute the sentence.” What was lawful property yesterday cannot be made unlawful today. The court let the discussion rest on one question: “Does the statute under consideration simply regulate, or does it destroy an admitted species of property, in which millions of value are invested? As this question is answered, the act must stand or fall.” While remote or consequential diminution of property’s value was constitutionally appropriate, outright destruction was not. Such destruction “transcends the constitutional limits of the legislative power.” In ruling that destroying property value was by its nature a denial of due process, the *Wynehamer* court shifted the discussion from public welfare to private rights. And if the courts language were taken as literal, the existing private right would always win. *Wynehamer* had changed New York’s definition of “due process.” It was no longer just about process.

In New York’s *Morris* opinion, the court raised the issue of whether legislation that destroyed property rights was constitutional. In *White* and *Westervelt*, the court determined it was not, at least insofar as that legislation took property rights from a husband and gave it to his wife. With *Wynehamer*, New York had again overturned legislation because it had destroyed a

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866 *Calder v Bull*, 400.
867 *Wynehamer v New York*, 93, 400, 405-06.
property interest. But Wynehamer was more significant. In it, the court relied on the state’s due process clause, not on amorphous doctrines of natural law or vested rights.

Scholars consider Wynehamer as the first case to rule that courts could employ the due process clause to invalidate legislation that dispossessed significant property value. In redefining a constitutional provision to limit legislative authority, the court rejected natural law as grounds for limiting that authority. Comstock classified as dangerous other courts’ use of “natural rights” and “high authority” to restrict the legislatures, and believed that employing natural law as a limit on the legislature could imperil government. In doing so, he sought to deny any connection between due process and natural law. Almost certainly, Comstock was concerned about the abolitionist arguments that natural law abhorred slavery and that because it was a higher law, natural law superseded the legislatures’ rights to pass law in support of slavery.

Comstock’s fears were well founded. As mentioned, natural rights beliefs were endemic in the American psyche. Abolitionists repeatedly argued that those rights prohibited the enslavement of Africans. As, Howard Graham argued, abolitionists used the terms “due process” and “natural law” interchangeably in anti-slavery speeches: “For every black letter usage in the court there were perhaps hundreds of thousands in the press, red school house and on the stump.” He continued: “Zealots, reformers, and politicians – not jurists – blazed the paths of substantive due process.” The abolitionist argued that state legislatures could not promulgate slave laws because they lacked the power to pass legislation in violation of natural rights and due process guarantees. Among the audience of these 1840-1860 reformers sat those

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868 Ibid., 391-92.
of the Cooley generation. They would revolutionize due process in the later decades of the nineteenth century.

Over the next few years, all the states that considered the constitutionality of prohibition legislation rejected the Wynehamer arguments. One example is indicative of the whole. The Delaware Supreme Court in *State v Allmond* considered the constitutionality of a nearly complete prohibition on alcohol sales. The court, through Chief Justice Samuel Harrington, ruled that the legislature had nearly unfettered rights to regulate the use of property. Putting regulation in its historical context of general-welfare enhancement, Harrington wrote:

> The Legislature of this State has [regulated property] from the beginning, by prescribing the modes of acquiring and using, the transfer and disposition of property of all kinds; and the restriction or prohibition not merely of certain kinds of property, but of trades, professions and callings; thus regulating not only property itself but the personal industry and enterprise through which property is acquired. I refer to the statutes, among the first enacted for the conveyance of property; the statutes of wills; the intestate laws; all license laws; laws regulating physicians, surgeons, attornies, millers, ferries and fisheries; laws regulating the weight and price of breadstuff, and laws regulating inn-keepers and venders of liquor generally.

With regulation came the risks of unfair burdens. While recognizing that legislatures might be wrong or corrupt, the court maintained the importance of deference and refused to give the judiciary veto power over the legislature. “When [legislators] are supposed in any act of legislation unwisely, or improperly, to restrain what are assumed to be the rights of the people, it is for the people themselves to correct the evil through legislative repeal, and not by Judicial usurpation.”

A well-regulated society required limitations on property use, Harrington argued, because “the subjection of private property in the mode of its enjoyment to the public good, and its subordination to the general rights liable to be injured by its unrestricted use, is a principle lying at the foundations of government.” In stating what was then the prevailing social opinion,
Harrington continued that property encumbrances are “a condition of the social state; the price of its enjoyment, entering into the very structure of organized society; existing by necessity for its preservation.” Only after setting forth the historic goals and means of a well-regulated society did the court address Wynehamer. Almost scoffing, the court asserted that Wynehamer’s reasoning would require that the court overrule multiple precedents, gut the state’s ability to employ its police powers, and ignore well-settled practices. The court declined to do that, but called on the democratic process to remedy any legislative over-reaching.  

Michigan’s Temperance Experience

As discussed in Chapter II, alcohol regulation had been a project of Michigan governance from its earliest days. Believing that restrictions on access to ardent spirits would moderate the challenges of drunkenness, pauperism, crime, and family violence and abandonment, local and state government regulated the alcohol trade. Those efforts were to temper alcohol consumption (hence the term “temperance”) but not to prohibit consumption. In Michigan, as in the rest of that nation, most of those regulations concerned licensing alcohol sales. As morals shifted, and despite a significant drop in consumption, alcohol use took on an increasingly darker hue, with calls for prohibition rising. As in most of the northern states, religious forces associated with revivalism helped move Michigan to respond to calls for deeper governmental restrictions. The story of Augustus Littlejohn and his mid-1840s travels through Michigan, demonstrates the increasing fervor for an end to alcohol consumption. After his sermons on the evils of drink, Littlejohn would travel from town to town, putting “King Alcohol” on trial for its crimes against mankind. In one story,

870 State v Allmond, 7 Del. 612, 633, 634, 637-38, 645 (1858). The court also relied upon the Pennsylvania public purpose case, Sharpless v Mayor of Philadelphia, for its analysis and conclusion granting deference to legislative judgments, 640.
At the close of his lectures in Climax, King Alcohol was arraigned before a proper tribunal, and tried for his crimes. Littlejohn acting as counsel for the prosecution, some one for the defense. The charges of murder and other heinous crimes were brought against the old king, and clearly proven. He was found guilty, and sentenced to be burnt at the stake. The sentence was carried out. A spot was selected for the place of execution, and a pile of logs reared on it. The procession was formed at the church, led by Billy Harrison and Jonas Bailey as executioners, who walked to the music of the death march carrying between them the "old brown jug," filled with whisky, representing the condemned criminal. Reaching the place of execution, a stake was struck into the pile of logs, the criminal was bound to it, the death sentence was read, the pile fired, and King Alcohol was burned to death.871

This type of proselytizing occasioned a morality shift from an acceptance that “anyone, even clergymen, could take an occasional glass and still be considered an exemplar of temperance,” to one where the Regents of the University of Michigan could justify firing University President Tappan because he “is accused of having used wine as a beverage. Other Members of the Faculty merely used it as a tonic.”872 Because of that shift, popular opinion began to see regulation of alcohol as enabling, rather than regulating, a social evil.

This then was the alcohol debate during Michigan’s 1850 constitutional convention. Early in the convention, delegates received petitions to prohibit state alcohol licensing.873 Those petitions, as well as most of the debates, centered on state involvement through licensing rather than on calls for state prohibition of the alcohol trade. Some argued the state should not sanction the vice by licensing, some wanted to employ licenses to restrict sales, and a few suggested the

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873 For example, on June 17, the citizens of Pittsfield in Washtenaw County prayed for “the incorporation of an article in the revised constitution prohibiting the legalization of the traffic in ardent spirits as a beverage.” On June 20, seventy-one citizens of Calhoun county prayed that the constitution prohibit the “legislature from enacting any law authorizing the sale of ardent spirits as a beverage.” Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan.1850: 102, 59. Note: The quotations are directly from the Report of the proceedings but are not necessarily quotes from the petitions themselves.
state should prohibit alcohol altogether. For example, delegate J. Van Vakenburgh passionately argued, “the welfare of the community demands that something be done by us, to stay the tide of misery consequent upon this unhallowed traffic.” His answer was to “cut loose our State from this cruel traffic.” He provided the constitutional language: “The legislature shall have no power to grant licenses for the sale of ardent spirits or intoxicating drinks, except for mechanical or medicinal purposes.” His ultimate goal seemed to be limitations on the alcohol trade – he wished to “avert the progress of a destroyer who has strewn our land with the blood of the dead” – but his proposal (which largely is the text of the 1850 Constitution) promised no such solution: it only provided that the state could not license the alcohol sales. Because licensing was used not just for revenue but as a means of restricting trade, Van Vakenburgh’s proposal lifted all the state-government restrictions on the manufacture and sales of ardent spirits. Perhaps because of an inability to build consensus on alcohol policy, or because of a lay-convention’s equating licensing with approval, the delegates approved language that accomplished little and, contrary to their intent, allowed unrestricted alcohol manufacture and sale. It only forbad the legislature from passing “any act authorizing the grant of a license for the sale of ardent spirits or other intoxicating liquors.” The constitution did not speak to the legislature’s power to prohibit alcohol manufacture or sale. To some of the delegates, however, that silence meant that the legislature could completely prohibit the trade in alcoholic beverages.

Joseph H. Bagg, a physician and politician from Detroit, was one who believed that government should withdraw from licensing but should not prohibit alcohol sales. He believed that moral suasion should and effectively would cull alcoholic excesses. To him, the

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874 Valkenburgh, a farmer of Oakland County. Ibid., 183-85.
875 Bagg, ibid., 186. Bagg was the member of Detroit’s City Counsel who proposed and pushed through the destruction of Peggy Welch’s house of prostitution – an act the court later declared unconstitutional. See pages 188-89, supra.
876 Art. IV, §47, Constitution of the State of Michigan, 1850.
constitutional language supported those who “did not wish the State to give a moral tone to the traffic.” Perhaps prescient or insightful of the human condition, delegate Bagg warned of extending temperance efforts to state-coerced prohibition: “You may just as well attempt, in this Wolverine State, to stop the use of Java and Laguya coffee, of green and black tea – to stem the Falls of Niagara in a bark canoe – as to put a stop to the use of liquor.”\(^{877}\) Notwithstanding the warning, and the convention’s disinclination to legislative activism, as part of its move to address social issues, the legislature would soon turn its attention to the alcohol trade.

In 1851, the legislature abolished its earlier license system but required that sellers of intoxicating beverages hold bonds to insure payments for liquor related damages. The question whether that law ran afoul of the constitution soon was litigated. That occurred when, in 1852, Mrs. Langley sought damages for her alcohol-injured husband, Albert Langley. Mrs. Langley won her case against John Ergensinger for $68 plus costs of $4.16, for damages Ergensinger caused by selling liquor to her husband. Ergensinger appealed arguing the 1851 bond requirement (and the associated liability for alcohol-induced behavior), was constitutionally impermissible. Consistent with the tenor of the times, the law gave a married woman the power to recover damages she or her children suffered because of her husband’s alcohol purchases. Classifying those who sold liquor as “wrongdoers,” the Supreme Court determined that the legislature had expansive general-welfare powers. “It is the incident of every government, whether a state or a city, that they have the right to impose restrictions on natural rights when the exercise of them on a particular mode is found destructive of the morals of all who are subjected

to their influence.” With that broad power, legislatures could subordinate individual interests (or here, natural rights) in order to accomplish ends advancing morals and safety.

The 1851 statute only set liabilities; it did not restrict alcohol sales. Governor Robert McClelland continued that debate in 1853 by noting, “every good citizen is in favor of promoting the cause of temperance by all fair and legitimate means.” Perhaps unwilling to take a position on an issue that divided the state, he called on the legislature to consult public opinion and legislate according to the “condition of the State.” The legislature similarly was tentative. In response to continued public pressure in the wake of the Maine laws, the Michigan Legislature in February 1853 prohibited the manufacture and traffic of intoxicating liquor, but made the law subject to an approving vote of the people. After that affirmative vote, the Supreme Court considered two constitutional issues. First, it reviewed whether the legislature could outsource its legislative powers to a popular vote and second whether the legislature had the power to regulate away the value of alcohol related properties. The court, in People v Collins, overturned the law on the first grounds: The legislature could not delegate to the voters legislative power to enact laws. A number of justices wrote opinions. Justice Abner Pratt found that the delegation of legislative power to the people undermined representative governance and created “collective democracy, the most uncertain and dangerous of all governments.” Pratt, and his concurring brothers, feared a majoritarian juggernaut. To Pratt, the courts must assure representative governance and avoid majoritarian democracy. Justice Samuel Douglass agreed, arguing that the legislation could not constitutionally be submitted for a popular vote. His fear, too, was majoritarian democracy. Stating that governance would be “subjected to the dominion of the popular majority of the hour,” Douglass argued for the advantages and constitutional necessity of

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representative governance. It protected against “hasty and inconsiderate legislation.” The justices split over whether the legislature had the power to pass the alcohol prohibitions consistently with constitutional protections of property and prohibitions against state licensing.

Governor Andrew Parson responded to the court’s decision by acknowledging that “the people sincerely disagree” about the wisdom of temperance legislation, and also about “the power, of the Legislature to prohibit the manufacture and sale of spirituous liquors.” His comments on legislative powers may have been little more than casual, but those concerns resonated in Michigan (and national) legal circles. In the end, the legislature sided with those who believed its power expansive. Shortly, Michigan’s legislators would overwhelmingly approve a new statute to overcome the challenges to which the Collins court objected. Alcohol manufacture and sale were again illegal in Michigan.

In 1856, the Michigan Supreme Court, in People v Gallagher, considered the constitutionality of a state law prohibiting the sale and manufacture of liquor. The court, through Justice David Johnson reviewed Thomas Gallagher’s conviction for the illegal sale of alcohol.

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880 People v Collins, 3 Mich. 343, 368, 405-11, 17 (1854). (Emphasis in original.) Douglass looked at the majority as an unthinking mob. He feared “a majority whose opinion must be formed without legislative discussion or deliberation - - a majority responsible to no one, because it has no superior – impatient of restraint, because conscious of its strength, and apt to think itself infallible, and against whose restless will, thus exercised directly on matters of legislation, with an elective judiciary, all the restraints which the constitution has imposed upon the legislative power will, in the end, prove unavailing.”

881 Several of the justices felt that the legislature lacked the authority to pass the temperance legislation. Pratt argued against that expansive use of power.

“There can be no doubt that in consequence of indolence and want of physical exercise, the imprudent and reckless manner of dressing, and especially the feet, thousands of the American youth, and particularly females, have gone and are constantly going to premature graves. Neither can there be any doubt that these improvident and reckless habits are tending to reduce the American race in stature, strength, mind and health; and that, unless this lamentable course can be arrested, these pernicious habits must in time become a national calamity. Yet, who can help it? What can be done on the subject? Has the legislature the implied power under the constitution to prescribe exercise and dress or to inhibit the youth of the country from dressing as they please? Clearly not. Still, the legislature has as much power on this subject, as it has to inhibit the mere manufacture of spirits. But the legislature can do neither.” Ibid., 394.

In a case decided the same day, the court ruled the legislature had authority to enact prohibitory legislation. That case, People v Hawley, was decided 4 to 3, with Justice Copeland not participating, (he was ill during oral argument). Copeland was one of the four declaring the statute unconstitutional in Collins. In the end, Hawley, Collins, and the related People v Hoffman (3 Mich. 248), left uncertain the issue of legislative power to prohibit alcohol’s manufacture and sale. People v Hawley, 3 Mich. 330 (1854).
Gallagher’s counsel argued that natural law prohibited the legislature from enacting property-destroying legislation. It is worth noting the court’s language, as *Gallagher* reflected Michigan’s judicial position prior to Cooley’s ascension to the bench. In framing the dispute as a Chase/Iredell conflict, the court took pains to approve authorities holding that only express constitutional provisions limited legislative authority, and that judicial statements to the contrary were mere dicta. In a decision Andrew McLaughlin stated “admirably presented” the case for antebellum deference to legislation\(^{882}\), the *Gallagher* court noted, “It will be observed, as something peculiar, that in almost all [cases claiming extra-constitutional limitations] . . . the courts have upheld the particular legislative enactments under consideration.” Because of that, the court noted, it was “unable to find any case” where a court invalidated a statute on extra-constitutional grounds. Johnson continued by suggesting that courts grandly writing of natural rights did so only as warnings against future legislatures. He wrote,

> They seem to be impressed with the necessity of fortifying themselves in their conclusions, and that, although they were compelled to give force and effect to these acts, there might be such a perpetration of legislative wrong, conflicting with these natural rights, as to challenge the exercise of their judicial power; a power carefully kept in abeyance to meet any future contingency that might possibly happen.

Johnson then noted, “the language of” those cases “is subject to some well grounded criticism.”\(^{883}\)

After reviewing the state of the law, and criticizing those courts that espoused grand natural rights doctrines only to shrink from them in deciding the case, the court tackled a fundamental question of constitutional jurisprudence: The balance between majoritarian

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\(^{882}\) McLaughlin commented that courts routinely rejected natural law, vested rights, and inherent limit arguments as grounds for invalidating legislation. “The philosophy of the Revolution, a popular philosophy which was used to restrict tyrannical government, was not to be freely utilized to prevent the people from achieving their purposes. Who could better determine what was best for the people than the people themselves.” Andrew C. McLaughlin, *A Constitutional History of the United States* (New York: D. Appleton-Century, 1935). 460, fn 8.

\(^{883}\) *People v Gallagher*, 4 Mich. 244, 253 (1856).
governance and restrictions for personal space. The 1855 Michigan court would reject arguments that courts were actively to check majoritarian excess. Acknowledging, “it may be true that legislative bodies, acting from temporary impulses, without sufficient time for discussion and deliberation are more likely to be influenced by the highly excited condition of the public mind than courts of law,” the court steadfastly rejected judicial interference in the process. Although “great wrongs may undoubtedly be perpetrated by legislative power,” Johnson wrote, government required that that power be invested in the people’s representatives, not the courts.\textsuperscript{884} Cooley would look at things quite differently. Under his theories, majoritarianism posed a too severe a threat to republican governance, and therefore required judicially imposed limits. Where the \textit{Gallagher} court would look to the democratic process to check improper legislation, Cooley would look to the courts.

With its standard of review established, the \textit{Gallagher} court addressed legislative power to regulate and destroy alcohol property. In short order it rejected arguments that courts were to “compare the value of this [community] right with the injury which the exercise of it would inflict upon the public, and strike the balance.” That was the legislature’s role. Because of that, the court deferred to the legislature and, on a 7 to 1 vote, ruled the prohibition law constitutional.\textsuperscript{885}

Whether liquor was no different from lemonade or ice cream, as the \textit{Beebe} court had suggested, restrictions on its use resulted in a flurry of litigation and, with it, judicial reflection on the place of property in a well ordered society. That reflection affected other issues as well.

\textsuperscript{884} \textit{People v Gallagher}, 255-56.
\textsuperscript{885} Ibid., 258. Cooley would not take direct exception to the \textit{Gallagher} court and the other courts ruling the Maine laws constitutional. Instead, he would undermine their validity through questioning language. He wrote, “Perhaps 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 in the case of these [temperance] statutes.” Cooley, \textit{Constitutional Limitations}: 583.
Perhaps as a precursor to the *Slaughter-House* litigation, merchants began to question municipalities’ rights to regulate the location of markets within a city. Cities historically had set up zones of commerce, consistent with the early American belief that trade was a privilege and should be controlled and enhanced by government involvement. As part of that effort, Philadelphia’s city assembly in 1854 sought to purchase land for a city-operated market and to demolish an older central-market area. Several taxpayers and farmers protested and brought an action that would end up before the Pennsylvania Supreme Court in 1859, *Wartman v Philadelphia*. Chief Justice Jeremiah Black (who also authored the *Sharpless* opinion), speaking for the court, voiced the long-standing proposition that government should be intimately involved in trade, particularly in the creation and regulation of central markets. To do otherwise “would be an anomaly which at present has no existence among us.” Should the state fail to allow municipalities to control a central market, it would be an “act of mere tyranny.” Black went so far as to declare that Pennsylvania nearly required municipalities to regulate citywide trade and a central market. Failure to do so was an abdication of governing responsibility. Notwithstanding Pennsylvania’s philosophy, other jurisdictions were beginning to follow a different piper. While Pennsylvania embraced government involvement, Georgia found such involvement offensive. In the same year as *Wartman*, and considering nearly identical facts, the Georgia Supreme Court in *Bethune v Hughes* voiced near repugnance to central market regulations. James Bethune of Columbus, Georgia, took exception to his conviction for

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886 Black wrote, “The state might undoubtedly withhold from a town or a city the right to regulate its markets, but to do so would be an act of mere tyranny, and a gross violation of the principle universally conceded to be just, that every community, whether large or small, should be permitted to control, in their own way, all those things which concern nobody but themselves.” *Wartman V City of Philadelphia*, 33 Pa. 202, 209 (1859).

887 It is worth quoting the opinion at some length for a flavor of how far the court was willing to insert its policy beliefs into its constitutional decision-making. After suggesting that the legislature did not authorize the city to completely restrict trade, he addressed whether the legislature could do so, “And they will hesitate long before they will knowingly compel decent poor women and boys to attend at the market place, to mingle with the rabble that often assemble there in order to sell a few pounds of butter, or a few vegetables--before they will coerce poor men
serving products outside a legislatively established central market. In reviewing the case, one can imagine Chief Justice Joseph Lumpkin turning red as he proclaimed for the court that, “let anything and everything be done, rather than restrict commerce, rather than force and imprison tradespeople, to coerce them to submit to all kinds of discomfort and inconvenience, not to say loss, to gratify the selfishness, or avarice, or convenience of a favored few; to be taxed to support the pomp and parade of a few municipal lords.” Citing the increased irritation of the citizens over legislated restrictions, Lumpkin determined that the city had overstepped the authority granted to it by the state legislature and, therefore, the central-market statute was void and the conviction overturned. But Lumpkin had not finished. He now appealed for a “convention of the people,” that was “imperiously needed to impose additional restraints upon the powers of the Legislature.” Shouting “a Bill of Rights is demanded,” the justice proclaimed, “let the sovereign people convene, and say to the law-making power; thus far shalt thou go and no further.”

In passionate prose, Black of Pennsylvania and Lumpkin of Georgia expressed dramatically divergent views of government’s place in advancing a well-ordered society. Interestingly, in the industrial north, Black advocated active government. In the Deep South, Lumpkin claimed that “something should be done to arrest this evil.” In between, courts struggled to determine if there were limitations on the power of government to significantly alter or destroy property rights.

The United States Supreme Court weighed in, albeit tangentially and in a case seldom cited for its wisdom or precedential value. Chief Justice Roger Taney, in the 1857 *Dred Scott v*

who bring in poultry and eggs on their load of wood to wait for hours before they can return to their labors, remaining around the market exposed to the weather; or, indeed, before they will restrict any person, in this land of liberty, from selling his cotton, corn, wheat, beef, pork, chickens, or anything else, when he pleases, where he pleases, and to whomsoever he pleases.” He then urged that the legislature’s power in this area “is exceedingly questionable.” *Bethune v Hughes*, 28 Ga. 560, 562-63 (1859 ).

888 Ibid., 564-65.
Sanford decision gave passing reference to the Fifth Amendment’s Due Process Clause as limiting Congress’s right to deprive citizens of property. Speaking of enslaved persons as property, Taney wrote: “And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.”889 He did not elaborate on what the court intended nor did he discuss the Supreme Court’s only other reference to due process limitations on the legislature. That reference had appeared only a few years earlier in Murray v Hoboken Land and Improvement where the court had defined due process as requiring procedural guarantees.890 Unlike the few recent state cases that were arguing for a due-process limitation on legislation hostile to property rights, Taney had few liberty-based arguments to offer. Perhaps that is why his tendered due process argument lacked elaboration.891

Michigan Justice Johnson in Gallagher, in the regulatory sphere, and Pennsylvania Justice Lowery in Commonwealth ex re Thomas in the tax and spending sphere, recognized that antebellum courts almost without exception accepted legislative power extensively to legislate to advance general-welfare interests. To be sure, opposing voices, either in dissent or in majority dicta, rumbled as regulations and spending became more onerous. Their oft-mentioned natural and vested rights offered insecure grounds, as they were ill-defined and threatened unintended results. Without legal foundations to the contrary, the law settled on supporting legislative action unless specific constitutional language checked legislative power. Finding legislatures rarely exceeded those specific limitations, court rulings affirmed legislative actions and judicial review, while often discussed, rarely resulted in judicial activism. Then again, Cooley had not yet

889 *Dred Scott v Sanford*, 60 U.S. 393, 450 (1857)
890 See discussion of *Murray v Hoboken Land and Improvement*, ftn. 861, *supra*.
spoken. When he did, courts would hasten to assert newfound authority to check perceived
majoritarian excesses. That is the subject to which we now turn.
Chapter VI: Enter Cooley, Constitutional Limitations, and Activist Judicial Review

The most rigid institutions must, from year to year, yield something to [change]; the most inflexible Constitution, in the light of new and unexpected conditions, must present new phases and suggest new possibilities. Occasionally, no doubt, we shall modify the Constitution here and there by formal amendment, but if the general tendency of the political society shall be the development of a higher and better national life, the Constitution, the outer framework, cannot possibly remain altogether stationary.

Thomas M. Cooley
Address before the South Carolina Bar Association, 1886

A Judicial Shield

In 1870, Michigan’s municipal efforts to finance rail development came to a virtual halt when the Michigan Supreme Court, with Cooley writing, declared unconstitutional public financial aid to private rail corporations. Such aid, Cooley reasoned, undermined state governance and would ultimately result in unjust tax burdens on the weak “taxed to enhance the profits of the stronger.” Instead of narrowly tailoring his opinion, Cooley and his brethren chose to rule broadly, and did so understanding the opinion would shock the judicial community that had almost without exception ruled to the contrary. He did so in order to limit the legislature’s historic discretion over taxing and spending issues. Cooley advanced that courts were constitutionally responsible to bind legislative tax and spending powers to a court-defined “public purpose” boundary. Across the nation, courts adopted and expanded on Cooley’s reasoning. With those courts now reviewing spending purposes, individuals would be able more effectively to challenge majoritarian and special interest efforts to tax and spend for the general

893 People ex rel. The Detroit and Howell Railroad Co v Township Board of Salem, 487.
welfare. Issues that heretofore had been resolved in the political sphere would now enjoy a
rehearing in the judicial, and a measure of governing power would flow from the legislative to
the judiciary – and from the majority to the individual.

Cooley’s decision analyzed constitutional language that was unchanged from the state’s
and, indeed, nation’s founding. Yet, his interpretation fundamentally challenged, for the first
time, governing activities that similarly harked back to that founding. In doing so, Cooley
rejected historical judicial deference to legislative judgments and classified adherence to those
precedents as “blindly follow[ing] where others have blindly led.”894 Given that the
constitutional language upon which he relied had not changed, and that previous courts had
defined legislative power more broadly than he, one might ask how this great constitutional
scholar could justify narrowing legislative prerogatives and upending established and time-
honored constitutional meanings. As discussed below, Cooley embraced that task believing that
courts must refresh constitutional understandings to protect the core principle of American
constitutional structure – republican self-governance. Both the passions of the masses and the
power of the wealthy threatened to subvert the legislative process, and courts must diligently
exercise judicial review to assure that government adhered to the principles of republican
governance, the rule of law, and individual freedoms that were the foundations of American
constitutional government.

Cooley believed that laws and constitutional language were not the emanations of
Olympian ruminations. Instead, they reflected human efforts to address community-faced
challenges. As community needs changed, so too did the application of law in order to respond
to the law’s underlying purposes. For example, due process – originally an assurance of

894 Ibid., 493. Cooley used identical language in Constitutional Limitations, 493-94.
individual protections against executive action through legal proceedings – could change to incorporate protections against legislative actions that encumbered individual rights. Similarly, public spending to support community development could become constitutionally suspect when it advanced private interest and power to the detriment of that community. Although Cooley furnished citations for each of these propositions, he certainly recognized that he was ploughing new judicial ground and offering new constitutional interpretations. He did so relying on historical experience – not philosophic musings – and that experience informed his understanding and shaped his constitutional philosophy.

To Cooley, American state government was at its core not democratic but republican. Accordingly, he believed that state constitutions limited legislative power in order to check majoritarian impulses and support the rule of law over popular passions and the coercive influences of aggregated power. His experiences and understanding of Michigan’s governance taught him the necessity of doing just that. Cooley had witnessed the humbling results of majoritarian exuberance in building infrastructure; he saw industry exerting its influence over legislatures and voters to exact public largess in order to advance private gains; he sat as counsel for a university that, while constitutionally separate, had faced enormous pressures from a legislature intent on impressing its will; and he watched as the legislature criminalized previously legal alcohol sales and rendered lawful property contraband. With those disquieting experiences, Cooley developed a fear of unfettered democracy that would animate much of his legal thinking.

895 Cooley noted that the founders designed bicameral legislatures to check popular passions. “We have our two houses of the legislature; each operating as a restraint upon the other, and thus guarding the State against those temporary excitements which sometimes sweep over the people, and from which no single body of men can at all times hope to be free.” Thomas McIntyre Cooley, Address by Hon. Thomas M. Cooley and Poem by D. Bethune Duffield, esq., on the Dedication of the Law Lecture Hall of Michigan University (Ann Arbor: Elihu B. Pond, 1863). 7-8.
Since his early tenure at the University of Michigan Law School, Cooley wrote of the threat of majoritarian excesses and lauded the virtues of republican governance. In 1868, he published his most complete advocacy of those beliefs in the aptly named *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*. Most of the limits he addressed in the treatise already were well accepted, including separations of power, *ex post facto* laws, and Commerce and Contract Clause limitations. His impact however concerned two doctrines that, while not completely new, were modified and argued with a vibrancy and constitutional connectedness that emboldened courts across the nation to actively limit legislative plenary powers. Those doctrines advanced limits on spending powers associated with legislative taxing authority and limits on regulatory – or police powers – associated with “law of the land” and “due process” provisions. To check the legislature, courts would insert themselves in ways that they rarely had heretofore. They would now determine which expenditures and which regulations were appropriate and which were beyond legislative purview. A once seldom-used weapon, courts would now employ judicial review to strike down legislation they believed went beyond the scope of representative government. His ideas were combustible and in short order swept the nation. And, to a degree, Cooley would come to regret the fires he had lit.

**A Short Roadmap**

Historians now agree that early local and state American governments were characterized by heavy involvement in and support of commerce. Municipalities granted licenses permitting individuals to engage in trade. They set up zones where commerce was permitted, established price structures, and set working rules. Governments subsidized industrial development, developed transportation infrastructures, and became shareholders in private corporations. As
importantly, they reframed the common law to encourage business risk taking. The courts interpreted the Commerce Clause of the Constitution to ensure confidence in commercial transaction and to allow government to create and support monopolies in exchange for capital investments. While constitutional interpretations later loosened the hold of monopolies, local governments accelerated their efforts to develop industry. In short, the antebellum period was one characterized by a symbiosis between government and industry. The goal was progress and general-welfare improvement, not one of legislative limitation and exclusionary individualism.

This support and regulation of business required a legal and social system that favored calls for a well-regulated society against those advocating protecting unencumbered use of property. While early nineteenth-century governance tended to sacrifice property interests to general-welfare needs, calls to protect property advanced as industry developed. When government attempted to regulate industries like liquor, many grew wary of the effects those regulations would have on personal, property-based freedoms. Further, as government taxed to support economic development, many questioned government’s right to transfer the people’s wealth to industry. Despite a rising cacophony of concern, until Constitutional Limitations’ publication, courts set aside those property-protecting arguments in deference to legislatively supported efforts to regulate society, subsidize industry, and to overcome the burdens of scarce capital.

The Cooley-inspired revolution would involve two related but distinct governmental actions: Government promotion and support of industry and government regulation of commerce. The line between support and regulation is thin and, as Gabriel Kolko noted, regulation often was disguised as promotion.896 Early government support and regulation of

industry sprang from a belief that government must legislate to advance the common welfare. Government was to advance economic development while checking industry’s tendencies to monopolize and exert undue influence and control. Whereas regulation and support of industry were born of a common purpose, legislative and judicial treatment of those efforts differed. That difference was clarified by their constitutional treatment. In supporting industry, government used its taxing power to subsidize private industrial development. Litigation over those issues questioned whether the legislature has the power to take from A (the taxpayer) and give to B (the private business). In the case of regulation, the state sought to create a more orderly society by controlling social and economic excesses. In challenging regulations, litigants called upon the courts to determine if the regulation unduly burdened private-property interests. To challenge those regulations, litigants first employed eminent-domain principles and later due process and law of the land clauses. Law in those areas developed separately (although courts at times mingled the logic) and until Cooley (and perhaps after) the courts’ rulings did not fit within a consistent constitutional framework. While courts frequently confused the niceties, this work addresses tax and spending separately from regulatory restrictions.

Starting within months of Constitutional Limitation’s publication, courts began to modify previous standards of due process, taxation, and public purpose to press a more limited government model. Some courts pushed for an almost laissez-faire approach, giving rise to arguments that Cooley elevated the individual over the collective, and rights over order. Cooley’s approach was more subtle. He did not reject all regulation, all property encumbrances, or all class legislation. Instead, he sought to limit majoritarian impulses and undue influences by employing constitutional language or inferences to limit government – particularly, but not exclusively, the legislative branch. At times, individual rights were the principles limiting
government. Even so, those rights were not hard stops on government action. Rather, courts now were to insert individual rights into their review of the propriety of legislative action. With Cooley, courts began the shift from an almost *per se* acceptance of general-welfare regulation and spending, to questioning whether laws too significantly intruded in the increasingly protected private sphere. That trend evidenced a reshaping of American expectations of government and how the nation’s citizens could best be served in the rapidly industrializing world. At a minimum, it suggested a more earnest discussion of the place of government in a liberal democracy.

**Cooley, the Courts, and Constitutional Change**

Thomas McIntyre Cooley was born on January 6, 1824 as the tenth child of Thomas and Rachel (Hubbard) Cooley. Theirs was a farming family residing in Attica, New York, not far from the Erie Canal and within the Burned Over District of the Second Great Awakening. His parents raised him in a strong Jeffersonian and, later, Jacksonian household. Cooley rejected the revivalism of the Awakening in favor of what Cooley-scholar Alan Jones called, “moral individualism” and a faith that the mind “‘correctly cultivated’ could choose the right.” Shortly after reading law with a former Democratic Party congressman, in 1843 Cooley travelled west to settle in Chicago but, having run out of funds, settled in Adrian, Michigan. He embraced the Jacksonian faith in advocating for free speech, trade, labor, and schools. In 1848, he helped organize the Free Soil Party in Michigan, thereby alienating Democratic Party regulars. In tune with shifting party affiliations of the day, he edited Democratic newspapers, worked to support the Wilmot Proviso, and pushed progressive Democratic Party ideas. “His poems expressed democratic hopes and attacked war and slavery,” and “his editorials defended free trade and free
public schools as well as attacked monopolies and special incorporation laws." His public talks evinced distaste for the challenges associated with railroad, banking, and monopoly power, as well as advocacy for class legislation. Jones posited that Cooley, in the 1840s and 50s, supported constitutional limitations on legislative power as a means to avoid favoritism to acquisitive capitalists.

The legislature recognized Cooley’s intellect when it appointed him to compile the state’s statutes in 1857. His success there helped lead to his 1859 appointment as one of the first three law professors at the University of Michigan Law School. That appointment occasioned his move from Adrian to Ann Arbor. Because he was the only one moving to Ann Arbor, he became the law school’s dean. As a law professor, Cooley’s interests focused on legal change and the underlying purpose of law. “In all that he taught, Cooley emphasized the historical and cultural origins of law and the social and political aims it is shaped to serve.” In that respect his position was the antithesis of the later Harvard Dean Christopher Columbus Langdell, who taught that law was an internally consistent discipline, without regard to the environment in which it was developed or operated.

At the 1863 opening exercises at the University of Michigan, Cooley offered a hint of his constitutional philosophy and its reliance on an active judiciary. In speaking of the legal profession he commented, “While constitutional and other restraints could be thrown around the legislative power, there could be none upon the expounders of law save the learning and virtue of the profession to which they belonged.” The judiciary was to enforce those constitutional

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897 Jones, *Constitutional Conservatism*: 16-21, 47.
898 Ibid., 21-26; Jones, “Thomas M. Cooley and ‘Laissez-Faire Constitutionalism’: A Reconsideration,” 754-55. Gillman wrote: “As a Locofoco Democrat, Thomas Cooley consistently assails special favors to banks, railroads, and other privileged monopolies – he was a persistent critic of Marshall’s opinion in Dartmouth College – and at the center of his republican ideology was the idea of equal treatment before the law.” Gillman, *The Constitution Besieged*: 55.
899 Carrington, "Law as 'The Common Thoughts of Men': The Law-Teaching and Judging of Thomas McIntyre Cooley," 515-16.
limitations but, because of the structure of government, the judiciary was not itself subject to such limitations. Also telling was Cooley’s preference for slow change, as opposed to the rapid legal changes associated with legislative action. In espousing an affinity for the common law, Cooley urged, “The lawyer is and should be conservative. However radical the changes he may desire to make, the lessons of our judicial history admonish him that they can only be brought about in the slow processes of time.”

Wearing his academic hat, Cooley had made clear his preferences: The common law, slow change, and judicial checks on the legislature.

Cooley’s voice was amplified in 1864, when he was elected as a Republican to the State Supreme Court, a position he would hold for twenty years. During his court tenure, Cooley continued to sit as a faculty member of the law school and, in 1868 at the age of forty-four, published the first edition of *Constitutional Limitations*. He now sat as dean of his law school, a state Supreme Court justice, and as the author of the most read legal treatise of its time.

It is no coincidence that Cooley wrote *Constitutional Limitations* during the era of Michigan’s second massive public effort to support rail and during the debate and passage of the Fourteenth Amendment. To Cooley, constitutions limited the power of overzealous legislatures and courts were empowered and obligated to enforce those limitations. Accordingly, as his

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900 Cooley offered that the common law was “carefully elaborated and perfected through long centuries, at their firesides and in their ships, and only declared in Parliament and in the Courts. Its peculiar excellence is that it is forever adapted to the people, because it forever grows with the people, and expands to accommodate new circumstances and new and higher conditions of society.” Cooley, *1863 Address on Dedication of Law Hall*: 5-6, 11.

901 He was a legal scholar respected by both Democrats and Republicans. The Democratic leaning *Michigan Argus* voiced, “Nothing can be said against his private or public life and the Republican committee has made a fortunate selection.” *Michigan Argus*, September 24, 1864, 1.

In 1869, Democrats considered supporting the Republican Cooley as a result of the non-partisan nature of his decisions, most notably *People v Blodgett*, 13 Mich. 127 (1865) where Cooley argued that the constitution prohibited non-resident soldiers from voting. His decision injured Republican electoral efforts but enhanced Cooley’s reputation as an apolitical jurist.

902 Seven subsequent editions were published from 1871 to 1927. Jones explained that *Constitutional Limitations* grew out of Cooley’s law lectures. Jones reviews student notes from Cooley’s lectures and nicely ties them to Cooley’s understandings and theories on legislative limitations. Jones, *Constitutional Conservatism*: 125-29. Jones reviews student notes from Cooley’s lectures and nicely ties them to Cooley’s understandings and theories on legislative limitations.
preface to his first edition suggested, his treatise targeted a wider purpose than a restatement of
the law. It advocated that courts limit legislative overreaching. Speaking of himself in the third
person, Cooley wrote:

he will not attempt to deny – what will probably be sufficiently apparent – that
he has written in full sympathy with all those restraints which the caution of
the fathers has imposed upon the exercise of the powers of government, and
with greater faith in the checks and balances of our republican system, and in
correct conclusions by the general public sentiment, than in a judicious,
prudent, and just exercise of unbridled authority by any one man or body of
men, whether sitting as a legislature or as a court.  903

In the guise of a treatise on the current state of the law, Cooley was an admitted advocate. As his
later writings would reveal, Cooley’s greatest constitutional objective was the protection of
republican governance from the forces of excessive political power, whether emanating from the
wealthy few or the populist mass. He believed that specific constitutional language and implied
constitutional meanings protected against the forces subversive to republican governance. The
threats to republican governance changed as society changed. To address that, Cooley submitted
that courts should seek new constitutional understandings when considering current realities.
Those new understandings were informed by constitutional histories and judicial precedent, but
were controlled by the underlying constitutional purpose – republican governance. In that sense,
he advocated an almost common-law-like process of constitutional change. Constitutional
change was to be slow and deliberate; true to constitutional language (as newly understood), but
adjusting to changing realities.

It is difficult to give credence to Cooley’s protest that he “faithfully endeavored to state
the law as it has been settled by the authorities, rather than to present his own views.”  904 His
advocacy interest clearly trumped his restatement goals, as would soon become clear through his

903 Cooley, Constitutional Limitations: iv.
904 Ibid.
scholarly writings and opinions. Cooley published perhaps the clearest statement of his intentions ten years after first publishing *Constitutional Limitations*. In challenging the principle of *stare decisis*, Cooley commented, “that it is a very dangerous thing to make by a precedent an inroad upon one of the fundamental principles of liberty, because precedents tend to beget a habit of thought and action which leads insensibly in the direction in which they point.” Instead of using the collective wisdom of previous decisions, Cooley set forth his true standard of constitutional review. “Every doubtful precedent should therefore be carefully considered, and never accepted when it will not stand the test of settled rules of right.”

In rejecting precedent, Cooley necessarily relied on constitutional understandings that differed from his judicial forbearers. Two possibilities arise. Either previous courts had misinterpreted the constitution or changing needs required different (often, opposite) applications of constitutional standards. The difference between these possibilities is fundamental. The first argues for a static constitution, unmovable from original intents – but merely interpreted wrongly by a prior court. The second calls for a living constitution, where overarching intentions are honored but whose meanings shift to accommodate changing needs. Reading him on the face of his writings, Cooley did not pick one or the other – he picked both. This should not surprise, as Cooley rejected those who gleaned understandings from philosophic reflections on legal reasoning or notions of justice. Instead, he advocated reading constitutions with the light cast by historical understandings of law and experiences of governance. In doing so, he argued for adherence to constitutional language while advocating for a reconsideration of that language to respond to historical and current realities.

Attempts to pigeonhole Cooley, therefore, prove difficult (and why opposing counsel would often both cite Cooley to support their arguments), and explain why a scholarly search for

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905 ———, “Limits to State Control of Private Business,” 270.
a consistent Cooley may be quixotic. Cooley often mouthed adherence to a fixed constitution and deference to the legislature, but then found new meanings in the constitution to support his republican-governance agenda. As such, Cooley’s jurisprudence presents a rich, complex, and often conflicting account. In the end however, despite his sometime protests that constitutions did not change, Cooley believed that constitutional understandings did change, and that lines drawn between government and individuals changed as society developed. In other words, the constitutional edifice evolved with society. And, in response to Cooley’s advocacy, the courts stood in the center of that evolution.

Scholars Consider Cooley

Because of their focus on federal laws and courts, many historians miss a significant dynamic of the Cooley-inspired shift toward judicial activism. Cooley’s impact rose from state courts and only later was it picked up by the federal courts, including the United States Supreme Court. The revolution did not emanate from the reflections of doctrine-driven Supreme Court justices. Instead, Cooley’s doctrines gained purchase in state courts reviewing government efforts to address local economic, social, and political issues. Because he was steeped in those immediate challenges, Cooley was able to seize relatively obscure earlier legislative-limiting arguments, and frame them into a legal standard that would resonate with similarly situated courts. Cooley provided the constitutional arguments that allowed courts to address the pervasive concerns about governing power, economic change, and social displacement in the

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906 For example, University of Texas Law Professor Lucas Powe, Jr., cited only federal substantive due process cases when he wrote, “Fewer than ten cases decided between 1868 and 1890 touched upon substantive due process, and they have been analyzed in the extreme.” Lucas A. Powe Jr., "Rehearsal for Substantive Due Process: The Municipal Bond Cases," Tex. L. Rev 53(1975): 738. 438.

That view of constitutional law as cascading down from the federal bench ignored that regulatory law was very largely the province of state and local government. As Benjamin Wright noted in his forward to Hartz’s *Economic Policy and Democratic Thought*, “the national government intervened little in economic affairs before 1877 or 1890.” Therefore, one needs to look at state and local actions, not the federal government’s, to assess the nature of the prevailing governing model. Hartz, *Economic Policy and Democratic Thought*: viii-ix.
years following the Civil War. It was this grounding that allowed Cooley’s standards to
dominate American jurisprudence and governance for the next sixty years.

While most historians give passing tribute to Cooley as a participant in the shift from a
general-welfare approach to what they commonly classify as laissez-faire governance, few have
considered Cooley’s central role in introducing individual rights concerns into judicial
considerations of the limits of legislative and governing power. Though not focusing on Cooley
in his 1940 article, Andrew McLaughlin came closest to capturing Cooley’s importance to the
changing nineteenth-century dynamic. In characterizing Constitutional Limitations, McLaughlin
asserted, “it is doubtful if any other book in our history had an equal influence on the
development of constitutional law, with the exception, perhaps of The Federalists during the first
fifty years after its publication.”907 Phillip Paludan cast Cooley in a similar light, arguing,
Constitutional Limitations would become “America’s second constitution.”908 Cooley provided
the guidebook for a legal and social revolution wherein courts curbed legislative power and
granted individual rights and liberties – particularly property and contract – a central place in
judicial deliberations.

Scholars reviewing Cooley’s work and impact roughly fall into three camps: those who
claimed he advocated laissez-faire jurisprudence and governance, those who defined him as a
conservative, later-day Jacksonian, who feared legislative power when it encumbered personal
rights and liberties, and those who argued Cooley advocated a binary anti-class legislation

Paul Carrington classified Constitutional Limitations as "the most scholarly and certainly the most admired
American law book," and quoted a reviewer of the fifth edition as offering, "It is impossible to exaggerate its merits.
It is an ideal treatise, and not only a standard authority, but almost exclusively sovereign in its sphere. It is cited in
every argument and opinion on the subjects of which it treats, and not only is the book authoritative as a digest of
the law, but its author’s opinions are regarded as almost conclusive.” Paul D. Carrington, "Law as 'The Common
908 Paludan also “Cooley became the most influential legal author of the late nineteenth and early twentieth
centuries.” Phillip S. Paludan, "Law and the Failure of Reconstruction: The Case of Thomas Cooley," Journal of
the History of Ideas 33, no. 4 (1972): 598.
standard. All are grounded in fact and explain an aspect of Cooley’s thinking and his impact. None, however, explains the rich dynamic of this scholar who eschewed philosophical jurisprudence in favor of uncovering new constitutional meanings to respond to changing social and economic needs. Efforts to pigeonhole Cooley into a particular judicial philosophy fail, as Cooley believed law and constitutionalism must maintain flexibility in the face of changing needs. His beliefs were well considered, but adaptable, and in an effort to understand the man, scholars have mistakenly attempted to philosophically plant this experiential thinker.

Clyde Jacobs and Benjamin Twiss led the first school. Both wrote from a post-Great Depression perch and their works were influenced by the struggles between Cooley-inspired, limited-government models and the expansive government model of the New Deal.\textsuperscript{909} Both painted an almost conspiratorial picture, with Twiss arguing that Cooley “made up many of the principles out of his own head,” in order to advance monied interests.\textsuperscript{910} That central argument fails in two respects. Cooley adapted the arguments of antebellum dicta and dissenting opinions that argued for limits on legislative power. He did not “make up” his standards. Further, Cooley was not an advocate for monied interests. To the contrary, he feared that the wealthy class would co-opt representative governance and his standards were designed to mute their disproportionate influence on legislators.

Jacobs and Twiss’ works appear to be the result of gleaning Cooley’s intent and meaning from the limited perspective of his followers’ court opinions. Both works were written without significant analysis of Cooley’s experiences and the environment in which he wrote his works. Nevertheless, Jacobs and Twiss held sway over other members of the academy, who similarly

position Cooley as a laissez-faire advocate. Included in that group are Sidney Fine, Kermit Hall, Melvin Urofsky and, to an extent, Paul Kens.911 Their characterization of Cooley as a laissez-faire advocate captured Cooley’s concerns over majoritarian excesses (although his larger concern was legislative favoritism to capital). Those concerns held that majority passions would drive legislation that dispossessed individual property and undermined the rule of law. The statutory-law process allowed for such excesses. Because of that, Cooley preferred the results of the time-tempered reasoning associated with the common law to legislative enactments that were so often the results of passions, influences, and insufficient thought. However, contrary to the laissez-faire historians’ positions, Cooley neither espoused nor did other jurists accept a wholesale shift to laissez-faire governance. As Hurst has noted, “After seventy-five years of living from day to day amid the surge of an opening continent, we did not suddenly after 1870 become a nation of social philosophers.”912 Contrary to the laissez-faire school, Cooley was not part of an imagined conspiracy of capitalists intent on molding law to the advantage of the wealthy and powerful.

Alan Jones rejected the laissez faire explanation of Cooley in favor of arguments that Cooley advocated a conservative approach to constitutional thinking – the second of the three schools of thought on Cooley.913 Unlike most historians, Jones appropriately gives credit to Cooley’s doctrinal roots in Jeffersonian and Jacksonian political thought (although he over employs this. Cooley was a student of history, but he used that history to inform in opinions, not

912 Hurst, Law and the Conditions of Freedom: 107.
to control them.) Unfortunately, Jones seemed as concerned with restoring Cooley’s reputation as he was with addressing the intellectual underpinnings of Cooley’s thoughts or the uses to which those thoughts would be put. Almost apologizing for Cooley’s impact, Jones overstates Cooley’s proclaimed deference to the legislature. Jones’ argument concerning Cooley’s conservatism was based in some measure on Jones’ assessment that Cooley adhered to “a doctrine that history should be the interpreter of constitutional provisions.” While Cooley at times professed such a position, his doctrines responded more to current needs than historical interpretations. Cooley only held to an historical approach when it fit his desire for legislative limitations in light of current needs and his beliefs about evolving liberties (discussed below).

Cooley’s public purpose and due process doctrines, while found in earlier legal writings, almost never prevailed in the antebellum period. His admission that he would not be limited by precedent with which he took issue (even if it was overwhelming) in itself shows that a significant portion of Cooley’s principles were neither historically grounded nor conservatively deferential to legislative power. When he wished to limit the legislature, Cooley tipped his hat to *stare decisis*, historical uses of governing power, and deference to the legislatures, but then decided according to his governing principles. Cooley’s logic called for a judicial veto over the legislature; a logic that future courts employed with some vigor.

In focusing on Jeffersonian and Jacksonian ideologies, Jones’ work missed the more immediate and pressing historical influences on Cooley. Cooley’s thoughts were not merely philosophic or theoretical reflections on early-century politics. They were premised on beliefs in republican governance and property-protecting principles that increasingly held sway as America moved through the nineteenth century. Accordingly, any full understanding of the Cooley revolution requires an analysis of the legal, economic, and political firmament that molded and...
surrounded Cooley. *Constitutional Limitations* rose to the level of a nineteenth century
*Federalist Papers* because it resonated with judges and opinion makers steeped in the challenges
suffered during a period of legislative activism, not because he harked back to a more distant era.

Cooley made a conscious effort to look forward, not back, and warned his law students
about focusing on the past rather than looking to the future. In 1863, he urged, “instead of
opposing all change, and living as much as possible in the past” the students “must be awake to
the living present and hopeful of the future.” With his next breath, he challenged those who
clung to a foolish conservativism. “For better or worst must the world be ever changing; and he
who is forever looking backwards and hugging the past to his soul, will find himself insensibly
moving backwards until the darkness of the past is upon him.”

It was not that the past was
inconsequential: It informed understandings of the present, but did not suggest a conservative
rigidity. Cooley was not a mid-century Jacksonian advocating stagnant constitutionalism or the
resurgence of a bygone era.

Howard Gillman led the third school of thought – offering that Cooley’s concern over
class-legislation was the core of his constitutional thinking. Gillman distilled Cooley’s position
to, “liberty in the private economy and rights to property had to be protected not from
government interference but specifically from class interference attempts by special groups to
use public power to advance private interests.” Gillman’s focus was substantive due process
and the regulatory regime, but his point also applied to Cooley’s tax jurisprudence and his
associated public purpose doctrine. Gillman’s point is well taken, if a bit overbroad. Cooley
adhered to strong equality principles and those principles animated his reasoning. But

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915 Cooley, *1863 Address on Dedication of Law Hall*: 11.
regulations and government spending, by their nature, disparately affect individuals and classes (however defined), and Cooley recognized that the legislature may pass laws with disparate impacts. He wrote, “The power that legislates for the State at large must determine whether particular rules shall extend to the whole state and all its citizens or to a part of the State or a class of its citizens only.” Cooley continued, “The legislature may also deem it desirable to establish particular rules for the several occupations, and distinctions in the rights, obligations, and legal capacities of different classes of citizens only.”917 Indeed, in his contribution to the fourth edition of Story’s Commentaries on the Constitution of the United States, Cooley noted that due process clauses went far beyond issues of class legislation. Due process clauses, he argued, protected against “oppressive and tyrannical laws” even though they evenly fell upon all.918

Because of his concern with oppressive legislation, Cooley specifically rejected formulaic applications of due process principles. In an article discussing the application of due process provisions to state regulations, Cooley opined, “And what is due process of law can never be settled as an abstract question: it has a new phase with every new case, and judicial history shows that judges differ concerning it at the present day when particular cases arise.”919

Because Cooley cannot be narrowly confined to a formulaic approach, Gillman’s school’s efforts to squeeze Cooley into a class-legislation corral miss the mark. Cooley’s principles are too


Cooley, in quoting Tocqueville’s Democracy in America, recognized that by their nature, laws benefited or burdened particular classes. Cooley quoted Tocqueville to say, “Few laws can escape the searching analysis of the judicial power for any length of time, for there are few that are not prejudicial to some private interest or other.” ———, Constitutional Limitations: 44-45, fn 1.


919 Cooley, "Limits to State Control of Private Business," 237.
complex, or perhaps too undefined, to allow such categorization. Indeed, one might argue given his disinclination to employ abstract principles, that Cooley preferred the malleability of a common-law approach to developing due process understandings. He certainly avoided binaries, like “class legislation – invalid, general legislation – valid.” This is not to say that Cooley lacked a constitutional philosophy or that he reviewed each issue de novo. As discussed below, Cooley advocated adjusting constitutional applications to protect the core principle of constitutional governance – republican self-governance and the rule of law. As part of that belief, Cooley argued that courts should limit governmental space as society developed and individual rights expanded. Before addressing his theory of changing constitutional meanings, we move to the dispute that most significantly allowed Cooley to voice his philosophy from his judicial bench.

**A Common Occurrence and Seedbed for Change: The Detroit & Howell Railroad**

On February 4, 1864, the Michigan legislature passed Special Act 49, the cumbersomely labeled, *An Act to Authorize the Several Townships in the Counties of Livingston, Oakland, Washtenaw and Wayne to Pledge their Credit, and the County of Livingston to Raise by Tax or Borrow Money, to Aid in the Construction of a Railroad from Some Point Near the City of Detroit, to Howell, in the County of Livingston* (the Detroit & Howell Act). The act was not unusual. Of the seventy-one acts passed by the legislature during that session, twelve authorized municipal aid to railroads and one authorized aid for canal construction and improvements.²⁰ Each of those statutes took taxpayer wealth and redistributed it to private corporations in order to advance the legislature’s conception of the public welfare.

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²⁰ Moreover, multiple additional acts authorized municipal-funded bounties for military service.
During that period, the capital for local rail construction came from three sources, although the relative amounts differed with each project. Typically, most came from speculating investors. The second most significant contributions came from wealthy nearby landholders. The driving motivation for those subscribers was community development, with short-term direct financial return a problematic hope. Promoters heavily focused on wealthy local residents who would most benefit from the rail’s placement. The last source was public funding.

For example, the Detroit & Howell Act authorized the affected municipalities to pledge up to 5% of the assessed value of their communities’ real and personal property in aid of local rail construction. That public funding effort required the authorization of the legislature and then local taxpayer approval. Local approval was triggered by a written request signed by at least 30 taxpaying electors to the township supervisor. Upon receiving that request, the supervisor would hold a special election after a 10-day notice period. Municipalities would pay the pledged amount upon completion of agreed construction and, unlike subscription programs, would not receive stock in exchange.  

Michigan’s use of local taxes to supplement private ownership was part of a common national practice. Taxation was justified because the gains from rail development were general community benefits. Government and industry argued that without taxation to spread the financial burden, non-investing individuals would thrive by allowing investing neighbors to carry

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921 Goodrich noted that across the nation “individuals were often urged to buy stock not only for the dividends they would receive, but also for the satisfaction of bearing an honorable part of a great national work.” Particularly with short lines, it seemed altruism was the primary motivation for local investors. Of course, some sought more than altruistic goals – they sought financial gain. Goodrich related the surprise felt by some rail executives when shareholders sought dividends. To the executives, the investments were a means of public service, not capitalist interests. Goodrich, Government Promotion of American Canals and Railroads, 1800-1890: 3-4.


the financial burden. A purely private regime would allow non-investors to enjoy the benefits of enhanced property values while their generous neighbors carried the financial load.

Notwithstanding the possibility of sizeable tax increases, nationally this public financing mechanism’s “substantial victory margins testified to firm convictions that property values would increase, freight charges decrease, and that the investments would prove, at the least in the long run, to be profitable for the community.”924 But, as Cooley would mockingly note, “Nothing is so easy as to build railroads if it can be accomplished by dropping votes in a box.”925

Shortly after passage of the Detroit & Howell Act, advocates of the railroad began to campaign for financial support. Within a month of the law’s passage, the Livingston Democrat praised the proposed railroad as an economic boon to the area, particularly to the western farmers ill-served by rail. After presenting a lengthy economic analysis of future increases in property values and decreases in transportation costs, the writer stated that he was “morally sure that all the capital we invest in such an improvement would return to us the first year after the completion of the road.” This was not just his opinion. The Detroit Free Press republished the article, adding “[t]here can be no doubt it is desirable to build this road.”926 Several other papers would join in the applause.

While the marketing of the Detroit & Howell continued, unseen storm clouds appeared on the horizon. In 1864, the Michigan Republican Party nominated Cooley to serve on the state’s Supreme Court. His qualifications were well accepted. Even the Democratic leaning Michigan Argus believed that “the Republican Committee has made a fortunate selection.”927 Cooley’s opponents did not comment on or seem concerned about his conservative approach to

924 Elliott, When the Railroad was King: 28-29.
927 Michigan Argus, September 23 1864, 1.
law making or his noted advocacy for a restrained legislature. A year earlier, in opening
exercises at the University of Michigan, Cooley had proposed that judicial power “is perhaps
even greater” than the legislature’s because there were “numerous restraints” on the legislature
and no such structural restraints encumbered the courts. Perhaps advocating a common-law (and
court-focused) approach, Cooley offered that changes in government “can only be safely brought
about in the slow processes of time.” With slow change and restrained government his goal,
Cooley won the seat and began his tenure on the bench in 1865.

At the same time, Henry Crapo became Michigan’s governor. Crapo disapproved of
municipal support for rail and believed that aid violated the spirit of the 1850 constitutional
restrictions on state involvement in internal improvements. Accordingly, Crapo vetoed
legislation authorizing municipal aid and, in all likelihood, would have vetoed the Detroit &
Howell Act had he been governor when it passed. (In 1869, the legislature passed, and the
next governor, Henry P. Baldwin, signed a General Railroad Aid law authorizing municipal
support of rail without specific legislative approval.)

As Cooley donned his judicial robes, and Crapo argued against government debt,
advocates of the Detroit & Howell pressed their case. In 1865, the Livingston Democrat and
Detroit Free Press again advanced an economic analysis in favor of the project. The papers
compared land values and commercial development in unserved areas to those well served by
rail. That comparison demonstrated that, despite the cost, rail presented a significant boon to

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928 ________, 1863 Address on Dedication of Law Hall: 7, 10.
929 Crapo’s motivation did not seem to emanate from a belief that government should completely separate itself from
private industry. Instead, his concern was government debt. He sought bounties for the development of an oil
industry, so long as they did not become “burdensome” and sought to regulate the quality of refined salt to “promote
the interest of the manufacturers” as well as the public’s safety. He wished to use state power to “legislate so as not
to repel capital, and skill, and labor, from the State but to invite and encourage their introduction.” Crapo, January
4, 1865, Messages of the Governors of Michigan. II: 531. (Emphasis in original.)
landholders and industry. At first, that argument carried the day, as most communities supported the rail project.

The first signs of trouble arose when Detroit, the area’s largest community, began to balk. The railroad had started its Detroit efforts with a campaign for private subscriptions. A committee of the Board of Trade, appointed to solicit those subscriptions, reported in January 1866 that, despite “a very general willingness to acknowledge the importance of the enterprise” there existed not one private commitment. It seemed that private investments, while good for the city generally, were not advantageous to private investors. The committee’s requests “were met with a recital of past experiences in similar investments in rail road or plank road stocks,” all of which were negative. Targeted investors argued that, instead of appealing to the wealthy, the committee should solicit those who most benefit – the real estate owners along the proposed line.

Those responses raised a challenging issue. At least early on, most rail investors lost money on their investments, yet the railroads relied on those investments as significant sources of capital. With direct financial returns often absent, promoters would pitch that enhanced property values and the secondary benefit of transportation improvements justified local investments. Those efforts often proved successful. As Taylor noted the “merchants, small manufacturers, farmers, and professional men living along the proposed route of the new railroad . . . bought stock in the hope that land values would rise and general business prosperity result

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930 Reprinted from Livingston Democrat, "Detroit and Howell Railroads," Detroit Free Press, September 22 1865, 4. See also, Eugene Pringle's analysis of rail economic benefit in, "Northern Pacific Railroad Convention," Detroit Free Press, November 25, 1869. Pringle was a Michigan State Senator when he helped draw up statutes enabling local support for private rail enterprises. He was also a manger of rail lines.

931 “Failure to Obtain a Single Subscription in this City: Suggestions Worthy of Consideration by Our Captalist and Business Men," Detroit Free Press, January 12, 1866, 1.
from improved transportation, not for the most part because they sought safe or profitable investments for their small savings.\textsuperscript{932}

As the responses of Detroit’s wealthy demonstrated, pitches to those not along the lines were less attractive. Few anticipated that private investors in the Detroit & Howell would enjoy a direct financial return on their investments. The \textit{Detroit Free Press} acknowledged that,

\begin{quote}
Not one of these [private investors] will probably ever derive any direct return from their subscription as an investment, but in the increased prosperity of our city, in the additional population, in the enlarged sphere of business facilities, and in the opening up of an important section of our State, and making it tributary to Detroit, they will all indirectly reap a reward for their enterprise, to which, perhaps the only drawback will be the feeling that those who would be more benefited, and who refused to contribute, will derive also the benefit although they had not the public spirit to aid toward the result.\textsuperscript{933}
\end{quote}

Neighboring individuals and companies who refused to subscribe were those most benefited by the rail line’s development; they would bear no expense but garner all the benefits.

In October 1867, Detroit Mayor Merrill Mills asked the committee to submit a progress report on its efforts to gain local subscriptions. They were still $75,000 short of their $200,000 goal. Despite the “interests of Detroit [that] positively demand that the road” be built, the committee reported that among “many of our wealthy citizens who are most benefitted by such improvements, [hold an] entire indifference to the matter, and an unwillingness to contribute to its success in any manner.” Notwithstanding its financial shortfall, (and the arguably poor financial opportunity suggested by private hesitancy to invest) the committee recommended a tax

\textsuperscript{932} Taylor, \textit{Transportation Revolution}: 97. This is not to suggest that all railroads presented poor investment opportunities. Eastern financiers played a major role in longer-line rail development. As noted earlier, New York and Boston financial interests purchased the Central and Southern lines in 1846, and did so with the expectation of financial returns on the line itself. With time, railroad financing would increasingly rely on private funds, resulting, in part, in the speculative rail challenges of the 1860-1880 period, a subject much discussed but beyond the scope of this work.

\textsuperscript{933} “The Detroit and Howell Railroad,” \textit{Detroit Free Press}, November 28 1867, 2. This was not simply a Detroit & Howell problem. Milton Heath’s research on southern rail efforts revealed that, “private subscriptions were more frequently on the grounds of the public good than on the hope of dividends.” Local attachments proved stronger arguments than did problematic financial inducements. Heath, “North American Railroads,” 45.
assessment, and hence public contribution. They did limit their request to one percent of assessed property values.934

The mayor and committee had real concerns that the $75,000 shortfall would sink the project. So important was this rail line, that acting Detroit controller and town notable Alexander Hamilton Redfield remarked that if the committee could not obtain the remaining subscription commitments, “he would, rather than see the fair name of Detroit disgraced, depart from a good old Democratic principle, and put on the screws.”935 Redfield’s concerns went well beyond Detroit’s image. Failure fully to finance the line could result in moving the line’s terminus, and its economic benefits, to a different port city, quite possibly the still despised Toledo, Ohio.936 Toledo had excellent port facilities and some believed the Michigan Southern line suffered financially because the Erie and Kalamazoo line diverted southern traffic to Toledo.937 This could happen with the Detroit & Howell. Rail placements were flexible and rail promoters were known to move their lines when a community refused to subscribe. Frank Elliot related one such story when he reported that the “piratical promoter” of the Ann Arbor Railroad Company started building his rail line in an arch around the Forest Hills, Michigan community until it reversed its refusal to fund his rail line.938

935 Redfield had resigned his office in September after many years of public service, but stayed on awaiting the new appointee in January 1868, ibid. Prior to his tenure with the city, Redfield was the state's first postmaster, a state senator, and a regent of the University of Michigan. “Death of Col. A. H. Redfield,” Detroit Free Press, November 25 1869, 1.
936 Emotions over statehood and Toledo’s Ohio affiliation festered. In 1841, the Senate Committee on Internal Improvements minced no words in declaring its members’ distaste for Ohio. In debates over acquisitions of rail competing with a Toledo-based line, the committee reported it was its duty to avoid “the support of those who have so disingenuously and industriously striven to rob the state of a rich portion of its birthright.” Report of the committee on internal improvements in relation to the expenditure of appropriations upon the public works, Rpt 22, 1841 “Documents Accompanying the Journal of the Senate of the State of Michigan,” II: 32. That distaste remained evident in the drive for Detroit & Howell contributions.
938 Elliott, When the Railroad was King: 30. Rail executives often threatened to redirect lines around non-compliant communities. The 1878 Daily Jacksonville (Illinois) Journal noted that lines could easily “be diverted by the forecast and enterprise of men” away from their natural course in order to further the railroad’s quest for public
Being the terminus to the Great Lakes would especially benefit Detroit, as nearly all Michigan-related products coming from or moving to the east coast and Europe would move through that location. That benefit, however, required active promotion. As the Detroit Tribune related, cities like Chicago and Toledo grew because progressive men and government created an atmosphere for commercial growth. In admonishing Detroit to do likewise, the newspaper argued, “Let us make good our fair reputation, and remember that it is not location alone, but energy and farseeing wisdom anticipating the currents of trade and directing them to our profit, which shall at last determine the future importance of our city.”

Detroit needed the line not only in its own right but also to avoid strengthening its southern port-city competitors. If that required putting the screws to hesitant investors, so be it. Those efforts worked and, by November 27, the Detroit & Howell had obtained the private subscriptions needed.

Detroit then went to its taxpayers for additional support. The effort promised to be difficult, with one paper having classified it as “suicidal.” A July 1869 vote failed, according to the Free Press, for want of the railroad’s effort to convince voters of the depth and breadth of investor support. The paper maintained that taxpayers would assent, but only upon knowing that those most benefited – the commercial interests and nearby landholders – appropriately paid their share. “When this is done it will be time enough to talk about help from the citizens of capital support. Daily Jacksonville Journal, March 14, 1868, quoted in Goodrich, Government Promotion of American Canals and Railroads, 1800-1890: 259.

939 Detroit Tribune cited in Michigan Argus, March 5, 1869, 2. In November of that year, a convention for the Northern Pacific Railroad discussed, among other things, how to assure that an eastern terminus to the line be placed in Mackinac, Michigan. William Howard, (a former University of Michigan professor, United States Representative, chair of the Michigan Republican Party, and railroad land-commissioner) advanced doing whatever was necessary to locate the terminus there, including public subsidies. Even this federally supported rail program required local energy and financial support to accomplish community needs. "Northern Pacific Railroad Convention," 4.

On November 23, 1869, Detroit’s Common Council directed the city clerk to give notice of a second effort. This proposal sought a $300,000 loan, rather than a grant. If the railroad failed to pay the underlying bonds, taxpayers would be liable for $210,000. The clerk gave notice in early December for a January 10, 1870 election. This time the measure passed, but the celebration was muted. A now subdued *Detroit Free Press* cautioned that the vote could not be taken as an affirmation of “the principle of granting aid to railways by direct taxation.” Instead, the proposal passed because the Detroit & Howell was an “exceptional” project. Warning that public support could result in unwise rail construction, the newspaper cautioned against overbuilding, particularly in low population areas. The bloom was falling off the railroad rose.

As the Detroit efforts were moving forward, the railroad promoters continued to press for private investments and public grants along the rest of the line. There is some suggestion that powerful, entrenched rail interests made this difficult. In September 1869, the *Detroit Advertiser and Tribune* argued that the Detroit, Howell & Lansing were “not the creations of any great capitalist or railroad kings.” Instead, it reported, “They owe their existence to the determination of some of Michigan’s citizens of comparatively moderate means” and that the “work thus far done upon the line has been accomplished in the face of innumerable embarrassments, of which the organized resistance of powerful railroad corporations has not been the slightest.”

The reviewed record reveals no other statement concerning the forces against the Detroit & Howell,
and the *Detroit Advertiser’s* protests may have been mere advocacy. However, there is some evidence that established railroads begrudged the public support granted to newer lines. In an ironic twist, the Michigan Central Railroad reported in its 1870 Annual Report that a “multitude of projected roads, some meritorious, but probably the greater number of but little value” were being “stimulated . . . by aid from municipalities” as well as by easy money. The Michigan Central bemoaned this development, claiming that, “the want of merit is by no means the reason a railroad may not be constructed.”

Why would the government-created Michigan Central publish this in its annual report? Those new rail lines, including the Detroit & Howell, threatened to reduce ridership and freight, thereby undermining the Michigan Central’s profitability: certainly adequate cause for a campaign against those lines.

Salem, a small, affluent farming community about half way between Detroit and Howell, was (and is) a township along the Detroit & Howell line. In accordance with the Detroit & Howell Act, on May 23, 1866, thirty-one taxpaying voters submitted a written request to Township Supervisor Calvin Wheeler asking for a special meeting of electors to vote on their proposed 5% of assessed property-value grant to the railroad. The request provided that the aid only be given should the railroad locate four miles of track and a depot in the township. On June 21, the township posted a notice of a vote on an “unconditional donation” to be held on June 30, 1866. That notice was only nine days before the vote, not the statutorily required ten days. On June 30, the voters met in Township Clerk William Mead’s barn and, after some discussion, cast 257 votes on issuing a “conditional loan.” 78 ballots read “Against Aid for the

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946 The structure and information contained in the report suggest that it is the annual report, but the reviewed record contains no document title. “Michigan Central Railroad,” *American Railroad Journal*, July 23 1870, 817-19. It is a bit whimsical that the now private Michigan Central complained about public assistance to rail. That government-created rail was privatized significantly below asset value.

947 Exhibit A, Letter of Calvin Wheeler, May 23, 1866, to Township of Salem’s Response to Show Cause Order of the Michigan Supreme Court “Pleadings, People, on the relation of the Detroit and Howell Railroad Company v Township Board of the Township of Salem, 20 Michigan Supreme Court Records and Briefs.” Salem later challenged the taxpaying status of two of the signers. The court did not address that issue in its opinions.
Railroad in Salem Township”, 56 read “For Aid for the Railroad in Salem Township”, 42 read “The Loan – No,” and 81 read “The Loan – Yes.” The township supervisor tabulated the vote as 137 in favor and 120 against. Thereafter, Mead published two resolutions committing township aid to the rail line, payable upon timely completion of required construction.948

A committee of dissenters formed to continue the struggle against the grant. In answer to the legal complaints concerning the flawed notice, Washtenaw County Circuit Court Judge Edwin Lawrence issued a July 4, 1868, injunction prohibiting the township board from issuing the bonds. In March 1869, the Michigan Legislature responded by sweeping aside the election improprieties concerning aid to the Detroit & Howell.949 With this, legislatures had twice approved the project and the voters had approved it once.

After the legislature voted to validate the election, on April 30, 1869, the railroad petitioned the township supervisor to pay the promised funds. To the railroad’s displeasure, the township board’s membership recently had changed, with dissenters now in numerical control.950 The new board refused to pay, arguing the election was flawed because of the way the votes were cast and that the outcome was uncertain. Moreover, it claimed that the railroad had not completed its work and that the legislature could not legitimize the improper notice. The board also argued that public grants were unconstitutional. Not satisfied with the board’s explanation, the railroad applied to the Michigan Supreme Court for a writ of mandamus to compel Salem to pay its obligations.

948 The occurrences are discussed in the documents submitted to the Supreme Court at ibid. See also, Donald Riddering, The Railroad Comes to Salem, Historical monograph; no. 1 (Salem, Mich.: Salem Area Historical Society, 1988). 3-6.
949 The legislative validation also legitimized Osceola’s, Plymouth’s, and Green Oak’s flawed efforts to support rail lines. The legislation sailed through with a sizeable majority in both houses. The Michigan Argus took issue, asking whether the legislature could “give jurisdiction where there was not jurisdiction and make legal absolutely illegal acts.” Michigan Argus
950 Riddering, The Railroad Comes to Salem: 5.
As the proceedings moved forward, the railroad’s management threatened to slow or stop work on the rail line. After discussing the challenges it had faced with Detroit’s grant, company president T. T. Lyon, of Plymouth Michigan, complained because of “the refusal to deliver the bonds pledged by the Town of Saline [sic], the company was compelled to check and finally stop all work upon the line, for the reason that, during the pendency of the suit to compel such delivery, violating, as it does, the validity of all municipal aid, no use, by anticipation or otherwise, can be made of the aid pledged by towns.”\textsuperscript{951} The railroad recognized that Salem had parented a legal challenge that threatened a widely employed system of rail finance.\textsuperscript{952}

Reports differ over the amount in controversy. It was somewhere between $15,000 and $18,000, although its potential impact was significantly greater. In response to the railroad’s petition for a writ of mandamus, Salem would argue that the entire practice of government financial support of private industry violated taxpayers’ individual constitutional rights. As of November 30, 1869 (the end of the state’s fiscal year), Michigan municipalities had contributed $3,567,678 to private rail development.\textsuperscript{953} The Michigan Supreme Court would now seek arguments on whether any of those funds were lawfully collected and spent.

Newspapers pressed for a broad decision on public aid.\textsuperscript{954} Some, like the\textit{ Michigan Argus} proposed that the court should invalidate public aid “before the towns and cities of the

\textsuperscript{951} This was the report on the March meeting of the stockholders of the Detroit & Howell. Published in “Detroit Free Press.”, March 31, 1870, 1.
\textsuperscript{952} Notwithstanding its concern about the line’s future, the Detroit & Howell board also consolidated the line with the Howell & Lansing Railroad to create the Detroit, Howell, & Lansing. The published balance sheet listed at risk from the litigation, $200,000 from Detroit and $72,280 from the towns. Ibid.
\textsuperscript{953} “Aid to Railroads,” 2.
\textsuperscript{954} The constitutionality of public support for private railroads had become an often debated issued. To clarify its power, the legislature proposed an 1867 constitutional amendment to specifically state government had the power to financially support rail. That proposed amendment provided that the legislature could empower municipalities to pledge up to ten percent of their assessed valuation to aid railroads. Art V, Sec 28. "Journal of the Constitutional Convention of the State of Michigan, 1867," (Lansing: John A Kerr & Co., 1867), 853. The constitution also would have eliminated racial discrimination in voting, maintained alcohol prohibitions, and raised salaries of government officials. The voters defeated the constitution by a wide margin. Popular belief holds that the suffrage position undermined voter support, but some like Hershock and Finkelman argued that voter discontent with the alcohol, rail
State go to their bottom dollar on some wild goose railroad scheme.”  

Others counseled for continued public efforts. In February 1870, the *Ypsilanti Commercial Supplement* called on Salem residents to donate to yet another railroad and to drop the objections to the Detroit & Howell. It argued, “The fact is that Salem needs both roads. If we lived in the town we should say, Stop Litigation – do all we reasonably can for the Detroit & Howell road. It is going to be a good thing for Salem.”  

With the case, the issue would move from the political to the judicial sphere of government. Availing himself of that opportunity, Cooley would employ the legislative limiting arguments he published two years earlier in *Constitutional Limitations*, to fundamentally alter the balance between the judiciary and the legislature. In doing so, Cooley would give voice to individual rights claims that had heretofore only been given a cursory hearing. In time, courts would employ those rights claims to check and challenge what they construed as legislative activism.

**Precedents for a New Doctrine**

In *Constitutional Limitations*, Cooley suggested that each of his legislative limiting doctrines was grounded on both constitutional language and on court opinions. In many respects, he stood on solid ground. Constitutions imply and specifically require, for example, separations of power as well as territorial, Contract Clause, and ex post facto limitations on the legislature. In those respects, Cooley adhered to, and followed his jurisprudential forbearers. In support, and pay provisions led to the constitution’s defeat. Paul Finkelman, “The Promise of Equality and the Limits of Law,” Finkelman and Herschock, *The History of Michigan Law*, 193-95.

955 *Michigan Argus*, May 7, 1869, 2. Interestingly, in that paper’s next column, the *Michigan Argus* called for expediting efforts on the Toledo, Ann Arbor and Saginaw Railroad.

The next page of that paper also reported a not uncommon rail event. “A fatal accident took place at the depot Wednesday afternoon. As Fred Meyer, station baggage man, was coupling two freight cars, he was caught between the bumpers. When released he sat down upon a wheelbarrow by the side of the track, but almost instantly rose and fell forward, dead. No limbs were broken nor the body mangled but the breath was literally forced out of him. An inquest was to be held yesterday afternoon. He leaves a wife and five children.”

956 “Hurrah for Salem,” *Ypsilanti Commercial Supplement*, February 5, 1870. Files found in Salem Area Historical Society Archives.
two other areas, Cooley advanced doctrines that had little precedents upon which he could rely: the first advocated constitutional limitations on both the legislative powers to tax and spend and the second advanced scrutinizing regulatory laws that encumbered private interest or went beyond the courts’ understanding of appropriate governance.

Some disagree that Cooley broke with judicial precedent. Corwin and his followers list a number of cases where courts addressed limits on legislatures, and Cooley employed many of those decisions. Those cases, however, were slim reeds upon which Cooley (and the Corwinites) could base doctrines of legislative limitations. Most of those citations contained limits that were only suggested in dicta. Even then, most of the rulings to which those dicta attached affirmed legislative power. In the few cases where the court found no legislative authority, those courts often applied extra-constitutional limitations like natural law and vested rights. As importantly, with the exception of Wynehamer, those courts denying legislative power faced narrow issues of private-to-private transfers. And, even in Wynehamer, the court found that the legislature had the power to regulate prospectively but could not destroy already existing property interests. Even then, Wynehamer was an outlier – all states but one rejected its reasoning. So, the authority upon which Cooley could draw in relation to significant property-effecting regulations almost all line up against judicial restraints on legislative power. In the tax and spending arena, Cooley had one case out of dozens upon which to rely and the Supreme Court had mocked that court’s opinion.\footnote{See pages 293-96, \textit{supra}.} In sum, Cooley had few rulings upon which he could comfortably draw.\footnote{Walton Hamilton, “The Path of Due Process of Law,” \textit{Ethics} 48(1938): 271, refers to the body of pre-Civil War substantive due process as "casual and lack[ing] authority."}

As discussed in Chapter V, while court rulings significantly favored an expansive understanding of legislative power to spend and regulate, courts increasingly sought to limit activist legislative agendas. Cooley could rely on majority opinions in New York’s \textit{White v}
White and Holmes v. Holmes, he could parse Black’s language in Sharpless, and perhaps could rely on North Carolina’s Hoke v. Henderson decision. He could rely on the dicta of numerous majorities, while ignoring their legislative-power-affirming decisions. He could also look to Chase’s dicta in Calder, Story’s dicta in Wilkinson v. Leland, and the dissents of those arguing for constitutional or extra-constitutional limitations. Or, as he often did, he could look to holdings whose dicta spoke in grand language but where the holdings affirmed government power. Cooley drew much, and extrapolated expansively on cases challenging private-to-private transfers. In doing so, he mischaracterized the state of the law, and government’s ante-bellum relationship to citizens and commerce. Rather than Cooley’s world of limitations, as Hartog stated, “in ante-bellum America formal judicial deference to the legislature remained

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959 In White v White and Holmes v Holmes, the New York courts invalidated married women’s property-protection statutes. The courts found that the statutes improperly divested husbands of the property that the common law established they had acquired from their brides upon marriage. The courts relied on “natural rights,” “vested rights,” and the “fundamental principles upon which all free governments are organized.” Courts were to do their duty and ignore “the popular voice” demanding “onward progress of society” when that voice trampled on property interest. Hence the law could not be retroactive to property granted before the statute’s passage.

960 In Hoke, the 1833 North Carolina Supreme Court invalidated a statute that divested a court clerk of his position in violation of the state’s constitutional prohibition of taking property except by the “law of the land.” The Hoke decision was heavily infused with property rights language. Arguing, “public liberty requires that private property should be protected even from the government itself,” the court protected the job of a long-term clerk from legislative efforts to democratize the position. Hoke v Henderson, 21.

961 Chase wrote, “There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government is established.” Chase positioned, as an example of such an extra constitutional limit on legislative prerogatives; “a law that takes property from A. and gives it to B. It is against all reason and justice, for a people to entrust a Legislature with SUCH powers and, therefore, it cannot be presumed that they have done it.” Calder v Bull, 387-88.

962 Story wrote: “That government can scarcely be deemed to be free, where the rights of property are left solely dependent on the will of the legislative body, without any restraint. The fundamental maxims of a free government seem to require; that the rights of personal liberty and private property, should be held sacred.” Wilkinson v Leland, 27 U.S. 627, 655 (1829).

963 In 1874, Cooley reflected that dicta and decisions often differ. In Weimer v Bunbury, Cooley he, “There are, unquestionably, cases in which expressions have been used implying the necessity for a common-law trial before, in any instance, a men can be deprived of his property; but they will be found on investigation to be cases calling for no such sweeping statement. If any court has ever decided that judicial proceedings are of constitutional necessity in appropriating property under the power of taxation, the case has not been brought to our attention, and has been overlooked in our investigations.” Weimer v Bunbury, 30 Mich. 201, 212-13 (1874).
constitutional dogma.” Indeed, Hartog noted, “State constitutions in fact were never interpreted as restricting public initiative that happened incidentally to harm private property.”

The bottom line was that nearly every court had deferred to the legislative judgment, even when the result was transferring wealth from A to B. That does not mean, as some like Daniel Rogers argued, that late-nineteenth century courts engaged in a “wholesale construction of new property and entrepreneurial rights,” in order to advance a legislative-limiting regime. Instead, they relied on earlier pronouncements, and public understanding concerning the importance of property and property-related rights. In doing so, they corralled the rights-speech of earlier courts and ignored those courts’ legislative-affirming decisions. Because Cooley did not hold true to his stated goal of capturing settled law, he was able to advance his interest in writing in “full sympathy” with enforcing restraints upon the legislature. He did so by discounting “every doubtful precedent” as he defined them, and advancing positions that would stand his test of “settled rules of right.” He gave courts the constitutional peg for which they had so long searched. This made Cooley’s philosophy combustible and, along with his notions of enhanced judicial review, over the next sixty-five years that philosophy would allow courts to moderate, and at times hinder, community-welfare legislation.

**Targeted Constitutionalism**

Despite his willingness to cast aside precedents, Cooley was not intent on understanding or developing law in the vacuum of enlightened reason and philosophical reflection. He felt that doing so “would only be casting overboard the wisdom of experience, and giving ourselves to

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964 Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870.*, 222. Hartog mentioned that antebellum courts “lacked the tools necessary” to overturn property encumbering legislation. He then posits that the Fourteenth Amendment provided the impetus for later court action.


the winds of mere speculative abstractions.” Instead, he considered law in its historical context. When history reflected the folly of prior actions, or changed circumstances rendered precedents inapplicable, Cooley advocated legal change. That change was evolutionary. Cooley reflected “we ourselves with our families and friends and the whole social circle of which we are a part are and are to be an active and formative element in our legal and political institutions, which we believe to be perennial, but which are never precisely the same as they come to and are transmitted by us.”

Change was constant, and law and government necessarily adjusted to that change.

Cooley’s recognition of the need to change and to consider the constitution and law in new lights required a bit of legal conjuring. By popular understanding, a judge’s role was to apply established law to fact. The suggestion that courts adjusted laws – or constitutions – to changing circumstances was politically troubling. Perhaps wishing to avoid a political minefield, Cooley would often voice that constitutional meanings remained constant since their drafting. For example, his 1885 *Michigan, A History of Governments*, put forth the general proposition that written constitutions come “into existence with the understanding and purpose that its several paragraphs and provisions shall mean forever exactly what they mean when adopted.”

While he allowed for that customary thinking, he admitted to a more complex, realistic and, perhaps, common-law like approach. He offered that the theory of a set constitution could “only be true in the general sense.” Constitutions required interpretation and adjustment. This was because, “No instrument can be the same in meaning to-day and forever, and in all men’s minds. Its interpretation must take place in light of the facts which preceded and led to it; in the light of contemporaneous history, and of what was said by the actors and the ends they had in view.”

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967———, “Sources of Inspiration in Legal Pursuits,” 517, 22-23.
Hence, the key to constitutional interpretation was understanding and holding true to the document’s overarching intent. He believed that the constitution sought to achieve particular ends, and adherence to those ends was the obligation of legislatures and courts.

Because the ends were the paramount concern, constitutional language had to be read in light of changing needs and circumstances. Cooley urged, “as the people change, so does their written constitution change also: they see it in new lights and with different eyes; events may have given unexpected illumination to some of its provisions, and what they read one way before they read a very different way now.”969 To Cooley, this was not a ploy to replace disfavored interpretations with newly preferred doctrines. Change was a necessary condition of constitutional governance. In 1886, he submitted:

The most rigid institutions must, from year to year, yield something to [change]; the most inflexible Constitution, in the light of new and unexpected conditions, must present new phases and suggest new possibilities. Occasionally, no doubt, we shall modify the Constitution here and there by formal amendment, but if the general tendency of the political society shall be the development of a higher and better national life, the Constitution, the outer framework, cannot possibly remain altogether stationary.970

In that speech, Cooley was commenting on the national constitution, but his point directly extended to state constitutions. Needs change, meanings change, and constitutional edifices must similarly change or risk irrelevance or dangerous inflexibility. Despite his seeming acceptance of a changing constitution, in the same speech, Cooley voiced the opposite approach. Waxing poetic, he suggested that “When changes are voluntarily suffered to creep in by ways [other than amendment], we cultivate a habit of mind which saps the foundation of our institutions and sets us afloat upon a sea of uncertainty without definite landmarks, where the most reckless and pushing is likely to be most influential and the most presumptuous.”

969 Ibid., 346.
Nevertheless, he argued that constitutions must change to adapt to changing conditions. For example, in discussing federalism, Cooley stated, “the Federal Constitution though it is the same in words, is not, as a living and effective instrument, the same today as when it was made.” He continued, “Indeed, there has never been in the history of the world such a thing as a stationary constitution.” One might ask, therefore, if all constitutions changed, which forces and entities could change them?

One cannot strictly adhere to the language and original intent of a constitution and simultaneously redefine its meaning to address changed realities. Yet that is what Cooley suggested, at least at first blush. He reconciled those positions by focusing on the overarching goals of the constitution, which he defined as assuring republican governance. In that sense, his statement that “the outer framework cannot possibly remain stationary” is telling. The constitutional core remained solid but the mechanisms to protect that core – “the outer framework” – necessarily changed. This allowed for both constitutional consistency and change. Cooley warned, “What emergencies may require or demand cannot in advance be foreseen, but the general obligation to do whatever may be possible to preserve Republican intuitions in their integrity is plain, and if kept steadily in view will lead to safe results.” With that statement, Cooley disclosed the original intent to which he expected courts to hold true – republican self-governance. Since the oppressive forces to which government must respond would change, judicial review should hold the protection of republican governance as its constitutional lodestar,

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972 Cooley, The Influence of Habits of Thought upon our Institutions: 23. It is worth quoting at some length Cooley’s concern. He offered:

All Americans, it may be assumed, desire to render complete the success of their experiment in popular Government. To do this it is necessary to hold as closely as possible to the principles upon which it was founded and have attended its development. It is not sufficient to preserve forms if the substance escapes them, and it is plain that the substance of popular institutions is gone when the substantial power of the representative body has based to the hands of a few of its members, or possibly to some external managing body.
even if that required changes in specific constitutional understandings. In short, constitutional provisions must be read to affect the target of American government – republican self-governance and the rule of law.

This conformed to his historical understanding of governance. As he wrote in 1886, “Whatever the people, whatever their circumstances, whatever the nature of their institutions, the one law always present, always making itself felt and acknowledged in history, has been the law of change.”^{973} The change which was most evident to Cooley were his Michigan experiences of legislative missteps in a world that Jones described as “filled with political corruption, speculative prosperity, privilege seeking special interests and hustling mismanaged cities.”^{974} As those forces pressured government, Cooley witnessed little confidence in legislative resistance. That corrupt world was made all the more dangerous given an ill-considered legislature. In 1876 he wrote,

The average legislator, who can levy taxes, create and fill offices, and then abolish them, impose restrictions on trade, even to the extent of destroying it – if he shall please to do so – is slow to believe that there is any law of political economy operating among those over whom he is set as ruler, which he can not, or should not, compel to bend and conform to such enactments as the good of his constituents may demand, and as he may devise for their welfare.^{975}

Because ever more active legislatures were unable to resist corrupting influences, Cooley accepted the need for more vigilant judicial oversight. In that sense, he may not have been troubled by the weight of contrary precedent or by arguing that prior constitutional interpretations were no longer valid. Circumstances modify constitutional meaning, and

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^{973} Ibid., 4-5.
^{974} Jones, Constitutional Conservatism: 211.
constitutional interpretation must be targeted to limit forces undermining considered republican governance.\textsuperscript{976}

To Cooley, the best constitutions were written to adjust to the changing societies they governed. By having a “hold on the past, but which, with a foreseeing eye, prepares the way for appropriating the lessons of a progressive future,” Cooley offered that written constitutions can “harmonize the conservative and progressive principles.”\textsuperscript{977} This did not mean that constitutional meaning should change with a fluctuating majoritarian will. Cooley believed that American constitutional interpretation required a consideration of changing circumstances but not a bending to shifting political and social winds. That was accomplished through judicial review. American courts both maintained and adjusted constitutional meanings, not the legislature and not the public. It is important to note that Cooley was not arguing for stagnant governance. Instead, he sought to harmonize the conservative with the progressive, and would do so by empowering judiciaries to counterbalance legislative activism. The courts, Cooley believed, would effect his standard that “no maxim of statesmanship can be wiser than to make haste slowly.”\textsuperscript{978}

Cooley felt comfortable promoting judicial fencing of legislative activity in part because he believed those who would limit the legislators – the judges – were cut of richer cloth than

\textsuperscript{976} Cooley provided examples of how circumstances change constitutional meaning. He used the Civil War as one such example, where federal power increased in ways unanticipated by previous experience. “[A] rapid and very radical change was going on in respect to the view to be taken of the constitution; so that even when the letter remained unchanged, the change in spirit and practical expression made it almost a new instrument.” ———, \textit{Michigan: A History of Governments}: 354-55.

\textsuperscript{977} ———, “Comparative Merits of Written and Prescriptive Constitutions,” \textit{Harv. L. Rev} 2, no. 8 (1889): 350-52, 56-57. Cooley discussed two mechanisms to change government under his notion of conservative acceptance of progressive principles. The first was through amendment to the constitution. The other was by expansively defining the constitution beyond that assumed by the framers. For that second principle, he wrote of expanding federal powers under the commerce clause, an expansion required by rail, electric, and industrial developments. The need to mold constitutional understandings to new realities, Cooley argued, would result in a shift from state to federal power contrary to the expectations and wishes of the framers.

\textsuperscript{978} Ibid., 354.
were legislators. He said, “a higher degree of virtue is required to hold the scales of justice even in the courts than is expected of those who fill our legislative halls.” In part, that was because of their role as guardians of republican governance and protectors against majoritarian politics. Cooley offered that the courts were to check enactments responsive to “those temporary excitements which sometimes sweep over the people.” As the more reflective body, the courts were to “sit in judgment upon legislative action, and annul whatever is done in excess of rightful jurisdiction.” And who was to check the courts? Cooley advanced that “no similar restraints upon the judicial power are practicable. . . . [T]he judiciary must decide upon its own authority, and the judge must find within his own breast those restraints against hasty and unjust action which the legislator has in the constitution and the courts.” Underlying his confidence was a belief that judges were not subject to the pressures exerted by the wealthy or the masses in the same way as legislators were. Later in life, Cooley would come to understand that judges were subject to different pressures and judicial self-policing held its own challenges. With that realization, he would come to lament judicial tendencies to substitute their own judgments for that of the legislature.

Cooley understood that limits on legislative power “were incapable of being precisely indicated so to preclude mistake or controversy.” This was especially so given that those limits changed as society changed. Underlying that change was a “steady growth” of “free principles.” To Cooley, America was moving from a restrictive society to a freer one and, in doing so,
legislatures would lose their “obnoxious and despotic powers.” That withdrawal of legislative power effected “permanent modifications of the constitutional systems.” When the reasons for exercising a particular power were no longer valid, that “questionable” “power should be considered recalled when the necessity has ceased.” (Here, Cooley used employing tax dollars to aid mills as his example.) Ultimately, it was the judiciary’s role to determine when a power was “questionable” or when “necessity has ceased.” In this way, courts could assure the “gradual expansion” of free principles “with the general advance in intelligence and independent thought and action among the people.”  

Hence, a legislature once empowered to spend or regulate could lose that power through the forces of disuse, changed societal needs, or the elevation of free principles. This then was the force of history speaking. To Cooley, the common law and constitutional principles consistently were evolving to demand greater freedom and equal rights. Overzealous legislative regulation and commercial aid violated the expanding command for freedom, equality, and progress and should be judicially overruled.

A Call to Action: Constitutional Limitations

It may be that no book title better describes its author’s intent than A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union. Cooley set forth to interpret, or perhaps redesign, free government as requiring checks on the legislature and its advancement of majoritarian and special interests. Those checks came from several sources but did not necessarily require specific delineation in constitutional documents. Cooley believed that free government required legislative restraint and the constitution had “but a few positive restraints upon the legislative power contained in the

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981 Cooley wrote the article in the wake of Munn, presumably in an effort to narrow the Supreme Court’s “affected with the public interest” standard. Cooley’s article framed government power more narrowly than did Waite’s opinion.
instrument.” Hence, he needed either to find the restraints elsewhere or to draw inferences from the document. Included in those non-specific restraints were “the ancient limitations” that had always been on popular and monarchical governments – the common law. Further, limits “sprang from the very nature of free government.” Accordingly, for example, the legislature could not encroach on judicial or executive space, it could not change any court ruling by retrospectively defining statutory meaning, and it could not adjust marital or other vested property rights. The legislature’s efforts could only advance public gain as, “the legislature is to make laws for the public good, and not for the benefit of individuals. It has control of the public money, and should provide for disbursing them only for a public purpose.”

His concern that majorities or wealth interests might press to advance one group over another led to Cooley’s concern that liberties required judicial protection from improperly activist legislatures.

In *Constitutional Limitations* and his other writings, Cooley set forth several basic principles of American republican governance. Most basically, the sovereign people, through their constitutions, set forth the powers of governments, both national and state. Thereafter, both the leaders and those they governed must act within those limitations, even if immediate popular will is frustrated. In this sense, American legislatures were not like the British Parliament (wherein sovereignty resided) but were limited to exercising the grants of authority given by the sovereign people. In the case of the federal legislature, the sovereign people granted only those enumerated powers found in the federal constitution. State legislatures had no restraints to

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982 In *Flint & Fentonville v Woodhull*, the court decided that the determination whether a corporation honored its charter was an inherently judicial function, and legislation leaving that decision to the legislature was invalid. *Flint & Fentonville Plank-Road Co. v Woodhull*, 25 Mich. 99(1872).

983 ———, *Constitutional Limitations*: 88, 129. In a fashion emblematic of Cooley’s propensity to argue deference, but to adjudicate to the contrary, Cooley offered: “But what is the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except perhaps where its action is clearly evasive, and where, under pretense of lawful authority, it has assumed to exercise one that is unlawful.” Ibid., 129.
legislative powers save for those withheld by the people as enumerated in the constitutions. 

“Without constitutional limitations,” Cooley wrote, “the power [of state legislatures] to make laws would be absolute.” But state legislatures held no such powers as such a prospect was inimical to republican governance. In 1888, he wrote that legislative power “unless carefully restrained and limited, is quite likely to prove ‘a power to frame mischief by a law’” and accordingly constitutions “give special and careful attention to the necessary restraints.” To Cooley, “There is no legislative omnipotence in America, nor ever likely to be.” In creating government, the sovereign people protected themselves against legislative overreaching by retaining their rights under various constitutional clauses including the tax, due process, and law of the land provisions.

Cooley rejected the argument that natural law transcended constitutions or that courts could invalidate laws because they were unjust or oppressive. Instead, they could invalidate those improper laws only if it could “be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution.” However, Cooley allowed for significant judicial space by suggesting that in the event the constitution contained no specific limits, courts could find implied limitations. For example, even without a specific provision, it would be unconstitutional to pass a law requiring a person to give his property to another. Such a law would not fit within the power to tax because taxation, by definition requires “apportionment” and that the tax be for a “public purpose.” Legislation that went beyond that taxing authority was outside the constitutional grant to the legislature; and those limitations emanated from the common law and accepted precedent created by the courts. Cooley considered the common law to be the embodiment of reason as shaped by the wisdom of time and, connectedly, feared that

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Ibid., 174.


statutory law often suffered from the majoritarian passions of the moment. That disposition was laid bare in his 1887 speech before the Georgia Bar Association, where he voiced the proverb “With customs we do well, but statutes may undo us.”

So strong was his faith in the common law that Cooley urged, “constitutions are to be construed in light of the common law, and of the fact that its rules are still left in force.” This did not mean that constitutional provisions, or statutes, that claimed to depart from the common law were to be invalidated. In the event that happened, the drafters’ intent prevailed. Where the constitution or statute did not directly conflict with the common-law, the courts were to employ common-law principles to interpret language. To Cooley, this maxim of constitutional interpretation derived from the common law’s respect for those “maxims of freedom” that undergirded public and private affairs and the uses of property “from time immemorial.” He argued that constitutionally guaranteed rights in essence were reiterating common-law protections. In his 1887 speech before the Georgia Bar Association, Cooley also explained that the frameworks of American government were based on historical experience and that the “maxims of liberty” developed under the common law were “embodied in their constitutions as a protecting armor.” In his 1874 opinion in *Weimer v Bunbury*, Cooley elaborated on the connection.

The truth is the bill of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and secured against violation.

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987 Cooley wrote in 1875: “Customary law has its secret springs in the nature of man, but is moulded and shaped by time, place and circumstance of national development and growth; and even the most wise, must judge of its excellencies by the aid of observation rather than of introspection.” ———, “Sources of Inspiration in Legal Pursuits,” 517-18.
989 Ibid., 366.
990 *Weimer v Bunbury*, 214.
In *Constitutional Limitations*, he urged that the common law achieved two interrelated ends. It “protect[ed] the rights and privileges of the individual man,” and checked “arbitrary and uncontrolled authority.”

Cooley’s concern was that legislatures were subjected to “those temporary excitements which sometimes sweep over the people and from which no body of men can at all times be free.” In *Constitutional Limitations*, Cooley responded to that concern by offering the tools for lawyers and courts to limit that majoritarian activism. Although the courts could not invalidate legislation that violated the “spirit” of the constitution, “it does not follow, however, that in every case the courts . . . must be able to find in the constitution some specific inhibition which has been disrespected, or some express command which has been disobeyed.” While Cooley did not use the terms “penumbra” or “unwritten constitution” he certainly suggested that jurists look to the meaning of the document in its entirety. In doing so, they should refer to declarations of rights and due process clauses as protectors of republican governance and as limitations (both express and implied) on legislative power. Legislatures were required to operate within the constitutional guidelines or their legislation would be void.

Cooley’s last general principle was that the constitutions vest the judiciary with the responsibility to assure that the popular will, as reflected in legislative acts, was consistent with constitutional principles. In that sense, the court had authority and responsibility to “finally determine the question of constitutional law.” While courts should exercise this power “with

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991———, *Constitutional Limitations*: 60, 21-22.
992———, *1863 Address on Dedication of Law Hall*: 7-8.
reluctance and hesitation,” they must employ it to honor their judicial role. The court is a coequal branch that is neither superior to the executive or the legislature, nor subordinate.

It would be a mistake, to suggest Cooley disdained the legislature. He did not, and throughout *Constitutional Limitations*, his articles, speeches, and opinions, Cooley repeatedly affirmed the role of, and the required deference to, the legislature. For example, after questioning the Maine prohibition laws, Cooley ended his discussion: “A statute which can do this must be justified upon the highest reasons of public benefit; but, whether satisfactory or not, they rest exclusively in the legislative wisdom.” Cooley seemed of two minds. First, the legislature spoke for the people and its decisions required respect but, second, republican governance required judicially enforced limits on majoritarian impulses. His respect for (reasoned) popular will and his beliefs concerning the need to check that will to protect individual rights and republican governance resulted in a complex and dynamic approach to constitutional law. To Cooley, experience and changing public needs required an evolving legal and constitutional structure.

It makes sense to pause here to consider the context in which Cooley wrote *Constitutional Limitations*. Cooley wrote while the definition of “property” was undergoing dramatic change. Two cases with very similar facts demonstrate the changing nature of American property law. In 1843, the Pennsylvania Supreme Court in *Monongahela Navigation v Coons*, evinced the then prevailing notion that property was analogous to an iron bar – either it existed or it did not. In that case, the plaintiff sought compensation for damage he sustained as a result of a government-sponsored flooding of his land. The court expressed regret that it was unable to provide relief despite the wrong suffered by the landholder. It said that the court was

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994 Ibid., 160, 43-4.
995 Ibid., 584.
constrained to accept legislative determinations absent “constitutional restraints on legislative power.” The plaintiff still owned the land and, accordingly, no taking had occurred and no compensation was due. While suffering a loss, the court consoled, “the plaintiffs have at least the miserable good luck to know that they have companions in misfortune.” Because the court only reflected on the ownership aspect of property, it did not consider the diminished value of the land, or the forfeited gains that the owner might later enjoy from the use of the land.

By 1872, that notion of property rights had changed as the courts now recognized the intangible aspects of ownership. The United States Supreme Court in *Pumpelly v Green Bay Company* found that a taking occurred when plaintiff’s land was flooded because the water had “effectively destroyed or impaired [the land’s] usefulness.” Justice Miller wrote, “There may be such serious interruptions to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution.” Because the complainant lost considerable value, even though no physical taking had occurred, the court ruled that the uncompensated, publicly authorized, flooding violated due-process principles.

This contemporaneous shift is important, as Cooley advocated that individual rights, most specifically property rights, limited legislative latitude. They did so not merely because takings were specifically prohibited or because individual rights limited legislative space. To Cooley, republican governance, by its nature, respected property and government destruction of that

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996 *Monongahela Navigation v Coons*, 6 Watts & Serg 101, 115 (1843). The court ended its opinion offering “would that it were in our power to afford them more solid consolation!” The U.S. Supreme Court adhered to this doctrine in *Smith v Washington* when it denied compensation for damage done to private land in regrading roads. The Court argued, “Private interests must yield to public accommodation.” *Smith v Corp of Wash.*, 61 U.S. 135, 149 (1858).

997 Underlying this, and much of the milldam jurisprudence, was the notion that law should support development. Hall explained that to support commerce, “Legislatures reversed the common law rule that flooding the land of a neighbor created an injury and that the dam itself was a nuisance. Most acts granted to affected property owners a right to sue, but only for statutory damages (those damages specified in the statute). If a landowner adjacent to a mill incurred a loss greater than the statute covered, he had no basis upon which to seek additional damages.” Hall, *The Magic Mirror*: 100. See also, Horwitz, *The Transformation of American Law, 1780-1860*: 47-53.

998 *Pumpelly v Green Bay Company*, 80 U.S. 166, 181, 77 (1872).
property struck at the heart of time-honored principles. It follows, therefore, that as property notions expanded, legislative power contracted. In the temperance context, under the *Monongahela Navigation* standard, there was no taking because alcohol manufacturers retained ownership of their manufacturing property. Under *Pumpelly*, there probably was a grievous property loss, as value was greatly diminished: hence, Cooley’s warning that temperance legislation “must be justified” with the highest level of public benefit. With the move from the iron bar to the bundle of straw analogy came questions concerning property’s components and the allowable level of government interference with that property’s value. As the issues marinated, and courts explored the consequences of the changed property notion, individuals questioned whether new government regulations and taxes inappropriately took too many stalks from their property bundle. This would particularly be the case with respect to one’s ownership – or property – in one’s own labor.999

**Protecting Republican Governance**

In reflecting back ways in which courts employed Cooley’s due process standards, one might conclude that Cooley’s class legislation concerns primarily arose from a fear that the impoverished masses would legislate to deprive the affluent of their property. While that certainly was a concern, Cooley’s strongest concern over class legislation derived from his fear of the coercive influence of wealth – not poverty – on legislative judgments. He grounded his objection to class legislation on his Jacksonian-based egalitarian fears of corporate power and the propensity of that power to taint representative government. Within that context, Cooley understood class legislation largely to mean “legislation on behalf of already privileged

999 As Amy Dru Stanley noted, “labor was imagined as property” and, accordingly, “was imagined, too as a commodity.” *Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation* (Cambridge: Cambridge University Press, 1998). 9.
classes.”

His Michigan experiences and understandings grounded that concern. Cooley knew that the wealthy leveraged the political process to exact favors contrary to the general welfare. It was not just that the affluent enjoyed undue influence that granted them favors; that influence also kindled an opposition to governance. In his 1879 lectures at Johns Hopkins, Cooley disclosed his underlying fear: social upheaval. He warned, “poverty is never so much in danger of becoming the master as when capital unjustly manipulates the legislation of the Country.”

Jones pointed out that this concern was not anti-corporate. Rather, Cooley sought to assure an equal application of laws where the wealthy could not employ financially derived power to abuse the public interests. The law was to provide no special privilege, particularly if that law enhanced concentrated power that would subvert republican governance, liberty interests, or the general welfare.

Notwithstanding his focus on the coercive nature of wealth, Cooley did not limit his equality concerns to the machinations of the powerful. At times, Cooley took his equity principles, and his disinclination for one group to benefit at the cost of another, to an unusual extreme. That occurred in 1877, when the University of Michigan threatened to increase law school tuition to help pay for increased medical school expenses. In response, Cooley threatened to resign from the university, as the actions constituted an inappropriate tax on one group for the benefit of another, and “violate[d] the spirit of our Constitution and laws.”

Justice Campbell reported that Cooley was so incensed that he became physically ill over the issue. It seems that the university’s disparate treatment of students created significant anxiety; the taxing of one for

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1001 Jones, *Constitutional Conservatism*: 264-75.

the benefit of another, and treating similarly situated individuals differently, offended Cooley’s notions of fairness and propriety. That incident was a microcosm of the revolution Cooley had unleashed with *Constitutional Limitations*. That is not to say, however, that Cooley intended a class-based test or that his target was class legislation. Cooley’s goal was limiting the legislature and strengthening republican governance. Class legislation may have been a result of majoritarian excesses – and excess might be an incident of class legislation – but it was not, in itself, a mark of unconstitutionality. There was no such binary formula, and no line of demarcation between general and class legislation.

Continuing his argument that legislative limits spring from the nature of free governance, Cooley turned to limits respecting individual rights. He argued that those rights would limit legislative action even if constitutions had not specifically withheld power from the legislature. Arguing that the sovereign people had no legal need “to exact pledges for a due observance of individual rights from anyone,” Cooley wrote that they nevertheless did so because “the aggressive tendency of power is such” that the people “deemed it important to repeat the guaranty” in their constitutions. To Cooley’s understanding, those guarantees were in the “law of the land” and “due process” clauses. But, unlike the Magna Charta’s focus on the executive and courts (from which the law of the land language came) Cooley applied law of the land and due process principles to the legislature. He argued that due process guarantees protected individuals from unreasonable majoritarian incursions into private interests. Citing Daniel Webster in his argument before the Supreme Court in *Dartmouth College*, Cooley wrote of due process, “The meaning is, that every citizen shall hold his life, liberty, and immunities

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1003 Box 6 Cooley Papers Letter dated July 20, 1877, Edward C. Walker, a member of the University of Michigan governing board, writing to university president Angell, quoting Justice Campbell.
1004 Cooley stated that “due process of law” and “law of the land” clauses meant “the same in every case.” Cooley, *Constitutional Limitations*: 351-53.
under the protection of general rules which govern society.” Cautioning against legislative overreaching, he warned that, “everything which may pass under the form of an enactment is not the law of the land.”

While very few earlier courts had accepted Webster’s argument, Cooley did, and did so in a more significant sense than Webster had argued. Cooley expanded due process to direct that courts overturn laws that were “arbitrary” and of an “unusual nature,” especially as they applied to taking individual rights. Those rights, Cooley explained when writing the fourth edition of Story’s Commentaries, were contained in the words “life, liberty, and property.” Those were “representative terms, and are intended and must be understood to cover every right to which a member of the body politic is entitled under the law.” The individual’s body was assumed in the term life. Liberty included the pursuit of happiness, including the right to any legitimate employment, and incorporated “the negation of arbitrary power in every form which results in a deprivation of right.” For property, Cooley only cited Justice Story’s language in Wilkinson v Leland, proclaiming that government could not transfer property from A to B.

Cooley recognized that courts historically had associated due process guarantees with judicial proceedings associated with executive actions. He understood, however, that active legislatures could encumber individual interests generally, as executive actions could do so specifically. Hence, due process guarantees appropriately protected against improper government actions, from whatever source. His fourth edition of Story’s Commentaries, advanced that “due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for

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1005 Ibid., 353.
1006 Story, Commentaries: II: 668. Cooley quoted Mill’s language in On Liberty that advanced an individualistic notion of liberty: “The only freedom which deserves the name is that of pursuing our own good in our own way . . .” Ibid., II: 669, ft. 1, quoting the introduction of On Liberty.
the protection of individual rights as those maxims prescribe for the class of cases to which the
one being dealt belongs.” Cooley then cited Constitutional Limitations as authority for moving
due process from a right against executive to one against the legislative branch, and government
generally. ¹⁰⁰⁷

In Constitutional Limitations, he had extrapolated from the procedural protections
afforded to the individual a need to protect the community with more than procedural guarantees.
“While every man,” he wrote, “has a right to require that his own controversies shall be judged
by the same rules which settle those of his neighbors, the whole community is also entitled at all
times to demand the protection of the ancient principles which shield private rights against
arbitrary interference, even though such interference may be under a rule impartial in its
application.” In doing so, Cooley expanded the terms “due process” and “law of the land” to
create limitations that nearly all courts had rejected just a few years earlier, and he did so arguing
that the protection came not just from constitutional language but also as incidents of free
government. ¹⁰⁰⁸ Employing settled maxims of the common law and historic traditions, Cooley
molded a constitutional standard for rejecting “arbitrary” government action, and he did so by
defining constitutional language in ways that fit his limited-government ideals.

In applying that notion, Cooley advocated courts employ due process to protect against
legislative interference with property rights. To his mind, protecting property was tantamount to
protecting freedom. “Government can scarcely be deemed to be free, where the rights of
property are left solely dependent upon the will of a legislative body.” He continued, laying the
foundation for his activist court agenda. “The fundamental maxims of a free government seem
to require that the rights of personal liberty and private property should be held sacred.” In

¹⁰⁰⁷ He cited Constitutional Limitations and then stated “We have been unable to give a comprehensive definition
which shall be more accurate.” Ibid., II: 665. (Emphasis added).
¹⁰⁰⁸ Ibid., 355
constitutionalizing his standard, Cooley offered that the people, in granting authority to
government, did not authorize legislative encumbrances on private property. To Cooley, the
people would never grant, “a power so repugnant to the common principles of justice and civil
liberty” as would allow legislative authority over property rights. It was up to the courts
vigilantly to protect those rights. In a few sentences, Cooley had set the standard. Property is
the preeminent right and the courts should vigilantly protect that right from legislative
overreaching.

But legislation, by its nature, affects the individual and his/her property. So where may
the legislature act and where may it not? Cooley responded that legislatures had full power to
regulate pursuant to granted police powers. Cooley then cited Shaw’s language in
Commonwealth v Alger and Redfield’s in Thorpe v Rutland & Burlington R.R. Co. In Alger,
Shaw submitted “All property in this Commonwealth is . . . held subject to those general
regulations which are necessary to the common good and welfare.” In Thorpe, Redfield urged
that the regulations could secure “the general comfort, health, and prosperity of the States.” In citing these cases and this language, Cooley accepted that government power could do more
than merely assure that individuals enjoy their property so as not to injure others. Government,
within limits, could regulate to advance social interests. However, legislatures could not use
their police powers to deny “essential rights and privileges.”

Cooley furnished no demarcation line between regulations that sat inside or outside of the
legislative sphere. Instead, he relied on judicial discretion. Should government interfere with
property, the courts were to balance “those principles of civil liberty and constitutional deference

1009 Cooley, Constitutional Limitations: 165.
1010 Cooley reiterated this in Story, Commentaries: 671-72.
1011 Cooley, Constitutional Limitations: 573-74.
1012 Ibid., 577.
which have become established in our system of law, and not by any rules that pertain to forms of procedure merely.” No longer were courts limited to procedural review. Cooley, while voicing deference to legislative judgments and authority, argued for an energized judiciary to act as the protector of property. In essence, he inserted the judiciary into the political arena, granting it the power to determine whether the legislation was so objectionable or arbitrary that the court should intervene to protect individual rights and liberties. Because, in passing the law or regulation, the legislature had already determined the act to be reasonable, the court in essence exercised a veto power over the legislature. Unlike the one exercised by the executive, the judicial veto could only be overturned by a constitutional amendment or a change of court doctrine.

Just as government could not undermine an individual’s property rights through regulation, so too it could not take property in the form of taxes and redistribute it elsewhere. Cooley addressed that concern with his public purpose doctrine. Under that doctrine, any use of tax dollars not consistent with a “public purpose” was unconstitutional because “taxation having for its only legitimate object the raising of money for public purposes and the proper needs of government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized.” Taxation for any other purpose “would not be legislation;” expenditures not connected to a public purpose change the associated

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1013 Ibid., 355, 356.
1014 It would be a mistake to think that the tax standard was simply about diverting tax dollars from A and giving it to B. Cooley would have applied the standard to indirect taxes, where one can argue the “taking” is removed and perhaps voluntary. In addressing Congress’s power to impose tariffs, Cooley argued, “A tax on imports, therefore, the purpose of which is, not to raise a revenue, but to discourage and indirectly prohibit some particular import for the benefit of some home manufacture, may well be questioned as being merely colorable, and therefore not warranted by constitutional principles.” His point was not to handcuff legislative action, or even to allow for some support of home industries. Cooley would allow for tariffs that provided incidental protection to American industry, as the purpose of the legislation then would be to enhance “the prosperity of the people and welfare of the country.” He struggled with legislative patronage, which was the essence of protective tariffs. Legislatures constitutionally could not become the fiefdom of private interests. It was at that point, the courts must intervene. Thomas McIntyre Cooley, The General Principles of Constitutional Law in the United States of America (Boston: Little, Brown, and Company, 1880). 57.
assessments from taxes to “plunder.” Here again, Cooley professed deference by claiming that the legislature was “vested with a large discretion which cannot be controlled by the courts,” and that “the moment a court ventures to substitute its own judgment for that of the legislature . . . that moment enters upon a field where it is impossible to set limits to its authority.”

Cooley’s public purpose discussions in *Constitutional Limitations* suggested a general application of his public purpose doctrine – expenditures not for a public purpose were unconstitutional. In practice, Cooley applied that doctrine only when those expenditures were tied to a specific tax. In those cases, the challenged tax effected a transfer from the taxpayers nearly directly to the corporations and did not involve transfers from general revenue funds. One could, therefore, conclude that Cooley intended to apply his public purpose doctrine narrowly to near-direct A to B transfers. As explained below, it is unlikely that Cooley so narrowly construed his doctrine and, certainly, many of his followers adopted no such narrow an interpretation. Tax dollars necessarily could be spent only to advance a public purpose, or the legislation was invalid.

By inserting the courts into the tax and spending area by defining “taxes” to require spending on a “public purpose,” Cooley created his constitutional hook. Claiming precedent, he employed *Sharpless’s* requirement that taxes be spent in the public interest. However, he went much further. Whereas *Sharpless* looked to the impact of the expenditure, Cooley looked to the nature of the recipient. The issue was not whether the public enjoyed any benefit from the entity’s activities. Instead, it was whether there was a direct benefit to the taxpayers as the result of an exchange of value between the government and the subsidized industry. If there was not specific value exchanged, then the subsidy was a gift from the

\[^{1015}\] ________, *Constitutional Limitations*: 479, 487, 490.
\[^{1016}\] Ibid., 129, 167-68.
taxpayers. Since the legislature could not, under its taxing authority, take property from A and grant it to B, gifts were unconstitutional and “despotic.”\textsuperscript{1017} Cooley’s later writings would hone that message. Unless the entity performed specific services for the direct benefit of the taxpayers, legislative grants to those entities were unconstitutional, notwithstanding significant ancillary benefits.\textsuperscript{1018}

Cooley recognized that his position on municipal aid was in the distinct minority. In an effort to distinguish opposing law, he parsed language from some cases suggesting limits where, frankly, there seemed none. Quoting \textit{Talbot v Dent},\textsuperscript{1019} he advanced that municipalities could only provide aid when ‘the object to be accomplished is so obviously connected with the [municipality] and its interests as to conduce obviously and in a special manner to their propriety and advancement.’\textsuperscript{1020} But \textit{Talbot} affirmed legislative power to aid private rail corporations, as did the court in \textit{Hasbrouck v Milwaukee}, a case Cooley similarly employed to question public support for private rail.\textsuperscript{1020} Cooley then cited Theodore Sedgwick, intimating that he objected to taxpayer support of private internal improvement projects. Sedgwick’s challenge was altogether different. He believed that the responsibility for such support lay with the state, not the municipality, as the benefits were not limited to municipal boundaries.\textsuperscript{1021} Recognizing perhaps that he was being somewhat selective, Cooley mentioned that the recent cases had cast doubt on

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\textsuperscript{1017} Ibid., 490. \\
\textsuperscript{1018} See Olender, "A Legacy of Limitation: Thomas Cooley, Public Purpose, and the General Welfare," for a more complete analysis of how the principle of contract consideration formed the basis for Cooley's and later courts' thinking on public purpose. \\
\textsuperscript{1019} In \textit{Talbot v Dent} the Kentucky Supreme Court considered whether Talbot, as the tax collector, could seize two of Dent’s slaves for payment of a railroad-supporting tax. \textit{Talbot v Dent}. 48 Ky 526 (1849) \\
\textsuperscript{1020} The opening sentences of \textit{Hasbrouck} stated that municipal support for internal improvement projects “has always been sustained.” The court then took notice that municipally aided projects “have added vastly and almost immeasurably to the general business, the commercial prosperity, and the pecuniary resources of the inhabitants of the cities, towns, villages, and rural districts through which they pass and with which they are connected.” \textit{Hasbrouck v Milwaukee}, 13 Wis 374, 43-44 (1860). \\
\textsuperscript{1021} Sedgwick was not questioning the propriety of government aid to private rail industry. Sedgwick’s point was that a railroad “may benefit the locality, but it is not easy to see how it can be properly called a local object.” Theodore Sedgwick, \textit{A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law} (New York: J.S. Voorhies, 1857). 464.
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earlier judicial acceptance of legislative power in this area. He then cites Iowa’s Wapello decision – a case that would shortly be overruled. When speaking of government support of private industry, Cooley was certainly more concerned with writing “in full sympathy with all those restraints which the caution of the fathers has imposed upon the exercise of the powers of government,” than “to state the law as it has been settled by the authorities.” At least in this area, Cooley the advocate emerged while Cooley the legal repository withdrew.

Cooley wrote Constitutional Limitations as the nation considered the energetic governance created during the Civil War and reflected on the recent European upheavals. To Cooley, the power of large government and emerging European socialist philosophies threatened to undermine American limited government and, with it, individual property rights. Since their first days, American courts had expressed an eagerness to limit what they construed as ill-advised, property-encumbering legislation, but could find no grounds upon which to do so. With Constitutional Limitations, Cooley provided that hook. In the end, the first edition of Constitutional Limitations moved governance from a majoritarian to a republican model, and did so by addressing concerns that had troubled courts since the 1790s but had remained transient and indefinite until Cooley give them constitutional weight.

From Theory to Practice – Tax and Spending Limits

Cooley’s most immediate impact on American jurisprudence and thinking revolved around the use of tax dollars to support private industry. Before the ink had dried on Constitutional Limitations, Chief Justice John Dillon of the Iowa Supreme Court, in Hanson v Vernon, addressed the constitutionality of an Iowa statute authorizing municipal support of rail construction. As discussed earlier, the court met in the atmosphere of federal/state divergence over the meaning of Iowa’s constitution. Like the Pennsylvania Sharpless court, the Iowa court
recognized the importance of its decision, stating that “with possibly one exception, no question in the judicial history of the State has arisen which rivals the present in importance.” The court considered the split in earlier Iowa cases and sided with those that found that government financial support of rail unconstitutional and beyond the legislature’s taxing authority. Repeatedly citing *Constitutional Limitations*, the court found that: “the money demanded of the citizen is called a *tax*, it is not such, but is, in fact, a coercive contribution in favor of private railway corporations, and violative, not only of the general spirit of the Constitution as to the sacredness of private property, but of that specific provision which declares that *no man shall be deprived of his property without due process of law.*” Mimicking Cooley, Dillon explained that taxes were only to “raise money for public purposes.” Because the public did not own the railroad, a tax for the railroad’s benefit was not within the legislature’s authority.

Dillon looked at the recipient of government support as either public and “subject to the unlimited control of the legislature” or as private and not entitled to government largess. Railroads were private corporations. Dillon accepted Cooley’s public purpose standard, which required direct benefits in exchange for the subsidy (and thereby rejected *Sharpless* and the dominant line of cases). In flourishing style, he wrote: “This opening once made in the barriers which the Constitution has erected to protect private property, who is so wise as to foretell what troops of foes may not hereafter enter at the same breach?” To Dillon and the majority, the courts were vanguards to protect the citizens’ property against a rapacious legislature. In dissent, Justice Chester Cole cited the opinions of twenty-one state Supreme Courts that disagreed.1022 His opinion carried no weight with his brethren. The Cooley revolution had begun.

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1022 *Hanson v Vernon*, 27 Iowa 28, 33,45, 47, 52-53, 59, 81-82 (1869). (Emphasis in original.) In 1870 the court’s composition changed and, after passage of a law again authorizing state support for rail, the Iowa Supreme Court again changed direction and approved government subsidizes. *Stewart v Polk County*, 30 Iowa 9 (1870).
Soon Wisconsin joined in, first in *Curtis v Whipple* in 1869 and then in *Whiting v Sheboygan and Fond du Lac Railroad* in 1870. In *Curtis* the city sought to subsidize a private educational facility, but the court invalidated its efforts because the city retained no management rights over the school. Without that direct connection, the educational benefits to the city were too tangential to adhere to the public purpose standard.\footnote{Curtis v Whipple, 24 Wis. 350(1869).} While the Wisconsin court did not cite *Constitutional Limitations* in *Curtis*, it did in *Whiting*. That case was nearly identical to the one faced in Pennsylvania in *Sharpless* and in Iowa in *Hanson*. Citing *Constitutional Limitations* as authority, the court invalidated the public grant to a railroad almost solely because the railroad was privately held and motivated. The court took pains to distinguish its findings from earlier approved government expenditures by arguing that earlier cases addressed entities in part publicly owned.\footnote{Whiting v Sheboygan and Fond du Lac Railroad, 25 Wis. 167(1870).} To the Wisconsin and Iowa courts, public purpose turned on ownership, not public need or benefit – aligning with Cooley’s focus on the recipient of funds.

As Iowa and Wisconsin were hearing *Hanson, Curtis, and Whiting*, Cooley prepared to judicially elaborate on his public purpose doctrine. He had his chance in the matter involving Salem’s refusal to pay the Detroit & Howell Railroad for its work completed pursuant to the voters’ approval of rail-support bonds. Invoking his public-policy beliefs that government support for railroads were “diseases in the body politic” that needed to be “arrested by a decision of the State Supreme Court,”\footnote{Thomas M. Cooley, *Michigan, A History of Governments* (Boston: Houghton Mifflin Company, 1905), 292-93} Cooley sought to gain his brethren’s support in the Detroit & Howell mandamus matter. In a letter to Justice Benjamin Graves, Cooley justified sacrificing his
position and vote in one case before the court in order to win in the upcoming Detroit & Howell versus Salem dispute.

In the Detroit paving case I received an opinion from Judge Christiancy, in which, while waiving the question of proper construction of the city charter, he holds the assessment void on some grounds which seems to me entirely untenable. Under the circumstances I have deemed it polite in order to avoid an equal division of the court to yield on the main question of the construction of the charter & treat that as settled by the case of Woodbridge vs. Detroit. If we have got to face that question of railroad bonds we have no strength to fritter away on division on questions of less magnitude.1026

Cooley was looking to change the relationship between government and industry.1027 Interestingly, Cooley wrote this letter before any briefs had been filed or any arguments tendered in the case. He had been waiting to constitutionalize his theories and the “railroad bonds” case presented that opportunity.1028

The Detroit & Howell Railroad and the Board of Trustees of Salem would soon write their briefs and offer their arguments. Those pleadings furnished a litany of grounds upon which the justices could respond to the railroad’s petition for a writ of mandamus. Hiram J. Beakes, employing arguments from Constitutional Limitations, provided the key argument on Salem’s behalf. He wrote: “The Act of 1864 is not an exercise of ‘legislative power,’ and is therefore, void, whether it comes within any of the express prohibitions [in the constitution] or not. It is not a law, but an attempt to license an act of spoliation.” Beakes continued, “To compel A. to donate or loan his money to B. or to authorize a majority to compel the other citizens to donate

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1026 Thomas Cooley to the Honorable B. F. Graves, June 28, 1869, box 6, Thomas M. Cooley Papers, Michigan Historical Collections, Bentley Historical Library, University of Michigan, Ann Arbor.
1027 Cooley had indicated that desire in the 1869 East Saginaw Manufacturing case, a matter dealing with the legislature’s ability to cease tax abatements granted for salt manufacture. Writing about the “evil” of tax abatements, Cooley lamented, “The people of this State, at the present time are being pressed with arguments to demonstrate the necessity of railroad improvements, and the great and urgent importance of individuals and communities lending them their aid.”
1028 When later discussing the court’s consideration of the case, Cooley painted a very different picture. Referring to the court’s deliberations, Cooley wrote, “no legal controversy ever passed upon by the judicial tribunals of the state received a more patient or deliberative hearing or examination.” People on the relation of Bay City v State Treasurer, 23 Mich. 499, 502 (1871).
or loan their property to private corporations or individuals, is not legislation.” Drawing on Cooley’s underlying concern over the limits on legislative power, Beakes painted an arrestingly vivid picture: “It is an imperial edict or ukase, inconsistent with the idea of a limited government – and a fortiori inconsistent with the idea of legislative power in a government whose sovereignty is divided into independent departments, executive, legislative, and judicial.”

Ashley Pond, as counsel for the railroad, responded that the legislature had the power and wisdom to decide whether an act is for a public purpose – and courts historically had, and should, defer to those judgments. He then referred to the tradition of government financial support, citing the state’s salt bounty laws, agricultural societies, educational establishments, charitable grants, and government supported meetinghouse and church facilities. Pond had legal precedent and long-standing government practices on his side. Beakes had Cooley’s ear, mind, and heart, as Cooley believed that at least some of those government practices and precedent were either in error or had been delegitimized by experience. Cooley had hinted at his limitation philosophy in the 1863 University Law School Opening Exercises, developed them in Constitutional Limitations, and now would implement them in the Salem case.

Although the court could have decided the case on narrow grounds, Cooley embraced the opportunity judicially to implement his doctrines concerning limited government and the restrictions on legislative power. Much as he had professed in Constitutional Limitations, Cooley began by noting it was the legislature’s role to “subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people.” He

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1029 Brief of Respondant, Salem Township "Pleadings, People, on the relation of the Detroit and Howell Railroad Company v Township Board of the Township of Salem, 20 Michigan Supreme Court Records and Briefs," 20-22.
1031 Writing, “preferring as I do, to deal with the main and fundamental infirmity,” Cooley decided to address the overarching issue of majoritarian space. People ex rel. The Detroit and Howell Railroad Co v Township Board of Salem, 494.
then set out to limit that power. Granting almost judicial notice to the wisdom and sanctity of the
marketplace, Cooley pronounced, “a large portion of the most urgent needs of society are
relegated exclusively to the law of demand and supply.” He continued, intimating that the
market and not the government maximized the general welfare. “It is this in its natural
operation, and without the interference of the government, that gives us the proper proportion of
tillers of the soil, artisans, manufacturers, merchants and professional men, and that determines
when and where they shall give to society the benefit of their particular services.” Ignoring the
history of government practice, Cooley offered what reads as a very personal opinion about the
role of government. He denied government’s historical place in the market by claiming separate
spaces between public and private spheres. “However great the need in the direction of any
particular calling, the interference of the government is not tolerated, because, though it might be
supplying a public want, it is considered as invading the domain that belongs exclusively to
private inclination and enterprise.” In so arguing, Cooley assumed a wall between public and
private that never existed. He ignored Michigan government’s role in financially supporting
agriculture, silk, salt, sugar, mining, private education, banking, steam mills, religious
institutions, water pumping, public accommodations, and to some degree, internal
improvements. With respect to internal improvements, Cooley explained that Michigan’s policy
had changed, and that the entities involved were now private. His statement did not clarify
whether it was the shift in ownership that precluded state financial support of rail or a rising wall
between government and private spaces. Claiming that it was “no longer recognized as proper or
politic that the State should supply the means of locomotion,” the state privatized the business
and now was constitutionally prohibited from involvement.\(^{1032}\) However, his sentiment went
beyond the 1850 constitutional ban on state government financial support of industry. Cooley

\(^{1032}\) Ibid., 484-85.
believed that powers once enjoyed by government could be lost by disuse or changed circumstances, even in the absence of formal constitutional amendment. This was because constitutional language required reinterpretation in light of new realities and among those realities was the steady growth of rights. Accordingly, constitutional meanings, including the powers granted to government, changed even as constitutional language remained the same. New insights concerning the place of government and private industry drove constitutional understandings more than did the interpretations of earlier judicial eras. With *Salem*, those new realities occasioned a new understanding of the term “tax” in order to assure that public revenues were employed for a public purpose. What had once legitimately been government space was no longer.

Cooley offered equality principles as a core basis of his thinking, as discriminations in favor of one occupation “is an invasion of that equality of right and privilege which is a maxim in State government.” Speaking generally, Cooley offered that all must be treated the same or the state would subject itself to undue economic influences from the wealthy. Drawing upon his Jacksonian principles, Cooley offered: “When the State once enters upon the business of subsidies, we shall not fail to discover that strong and powerful interests are most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger.” By arguing that “equality of right and privilege” was a “maxim in State government,” Cooley suggested that the state could show no favorites. That language in *Salem* was significantly more restrictive than Cooley had offered in *Constitutional Limitations*. In *Constitutional Limitations* he had rejected the notion that all unequal legislation was unlawful. Instead, equality was an aspiration of republican governance. There he had written, “Equality of rights, privileges, and capacities unquestionably should be the aim of the law, and if special privileges

\[1033\] Ibid., 486-87.
are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government.”¹⁰³⁴ In discussing rail finance, Cooley in Salem exclaimed that favoring “farming or banking, merchandising or milling, printing or railroading is not legitimate legislation.”¹⁰³⁵

Cooley’s Salem opinion was long on aspirational law and short on precedent or firm maxims. His goal was to advance those limitations that are inherent in the notion of free government – a restricted, representative legislature with limited powers to undermine individual rights and liberties. Those principles, however, were not set forth in constitutional text and Cooley required constitutionally based limitations on legislative power. Here then, Cooley played the constitutional sleight of hand he offered in Constitutional Limitations. He suggested that the nature of representative governance itself assumed limitations on legislative power and that he would read constitutional limitations within that context. He offered that there were “certain limitations upon [legislative] power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words.” The legislature had no absolute authority over taxation and citizens should contest the exercise of legislative power whenever they believed their rights were invaded. In determining the propriety of the legislation, courts must consider the government’s obligation “to advance the present and prospective happiness and prosperity of the people.” In so arguing, he held true to his philosophy that constitutional meanings shift in order to hold to American states’ underlying representative-governance foundations. Hence, the multitude of

¹⁰³⁴ Cooley, Constitutional Limitations: 393.
¹⁰³⁵ People ex rel. The Detroit and Howell Railroad Co v Township Board of Salem, 486.
cases affirming the previous sixty-five years of government practice were mistaken only in the context of 1870 constitutional meanings.

In *Salem*, Cooley set forth to define constitutional language to limit legislative power and to respect individual rights. He did this by employing the constitution’s tax language. Here, as the court did in *Sharpless*, Cooley read into the word “taxes” a requirement that government collect moneys only for “public purposes.” Collections for any other purpose were not taxes but rather plunder (taking from A and giving to B), and plunder was unconstitutional. In doing so, Cooley captured the long-term property rights concerns and gave them constitutional grounding. But, while property rights were important, Cooley’s underlying focus was legislative power. Accordingly, in explaining his term “public purpose,” Cooley focused on government’s space. After explaining that public purpose (and the power to tax) “Has no relation to the urgency of the public need or to . . . the public benefit which is to follow,” Cooley set down his limited government objectives by leaning on an historical definition: Public purpose was “*a term of classification to distinguish the objects for which, according to settled usage are left to private inclination, interest or liberality.*”

Cooley’s “settled usage” dealt with more advancing republican notions than with historical practice. Accordingly, powers enjoyed in one era could be “recalled when the necessity has ceased” to use them. The burdens that Michigan and other states suffered in consequence of financing rail likely resulted in that “recall” of that governing power. The changing world of mid and late nineteenth century America, and in particular Michigan, had forced new understandings of what was “private” and what was “public.” By coupling a narrow definition of “public purpose” with constitutional “tax” language, Cooley sought to assure that

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1036 Ibid., 473-74.
1037 Ibid., 485. (Emphasis in original.)
1038 ———, "Limits to State Control of Private Business," 269-70.
which was truly public was addressed, while anything within private space was safe from public meddling.\footnote{Cooley acknowledged that government traditionally granted eminent domain powers to rail, but declared, “an object may be public in one sense and for one purpose, when in a general sense and for other purposes, it would be idle and misleading to apply the same term.” \textit{People ex rel. The Detroit and Howell Railroad Co v Township Board of Salem}, 478. Cooley further discussed the differing public purpose doctrines in 1877 in \textit{Ryerson v Brown}. He noted that “general and important public policy” needs justified eminent domain takings whereas taxation required a direct public purpose. “[T]he difference between a forced sale for reasonable compensation paid and a forced extraction without any pecuniary return, is amply sufficient to justify more liberal rules in the former case than the later.” Despite the looser eminent-domain standard, the court invalidated the state’s waterpower damming law as insufficiently in the public interest. Cooley suggested that since the law was unreasonable, the legislature must have passed it improperly to serve some local or individual interest. \textit{Ryerson v Brown}, 35 Mich. 333, 339, 335-36 (1877).} To Cooley, expanding that private space was part of the “steady growth” of “free principles.”\footnote{\textit{Limits to State Control of Private Business.} 269.}

Despite what some scholars characterized as Cooley’s pro-business grounding, Cooley was no advocate of corporate power, and in \textit{Salem} he was driven to deny corporations public largess. Student notes from Cooley’s lectures on corporations reveal a concern over the corrosive influence of rail corporations. One student’s notes read, “The source of danger is a few men having so much moneyed power. . . . They are able to exercise more influence over the state legislatures than both political parties.”\footnote{“Law Notebook of H. B. Swartz.” II, 243, quoted in Jones, \textit{Constitutional Conservatism}: 132.} In that sense, the concern over legislative activism was not so much with majoritarianism as corporate cronyism. That concern was manifest when Cooley wrote in \textit{Salem}, “When the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger.”\footnote{\textit{People ex rel. The Detroit and Howell Railroad Co v Township Board of Salem}, 487.}

His concern over disproportionate political power suggested a need to limit the legislature in order to limit the excesses attendant with corporate wealth. In this respect, individual rights were not the primary concern; the political system was.

Cooley’s concerns over corporate power were made manifest in later editions of \textit{Constitutional Limitations}. By his fourth edition, Cooley had added a critique of \textit{Dartmouth}
College. “It is under the protection of [that] decision . . . that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually have greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their existence.” He feared corporate power would undermine government by demanding, and receiving, “unwise, careless, or corrupt legislation.” Whereas he seemed to have great trust in the judiciary (as evidenced in his 1863 talk to incoming law students), he had little confidence in the legislature. It too easily succumbed to the power of money.

Cooley had accepted Sharpless’ public purpose language but had ruled quite differently. In a significant deviation from that earlier standard, (but aligning with the recent Iowa and Wisconsin cases) Cooley looked to the nature of the payee rather than the purpose of the payment to determine the validity of the transfer. Cooley found that payments to corporations without direct reciprocal benefits to taxpayers were mere gifts. Gifts, by their nature, were transfers from A to B. “No principle was older, and none seemed better understood or more inflexible, than that one man’s property could not be taken under the power of the government and transferred to another against the will of the owner.” In essence, Cooley required direct

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1044 Ibid, 479-480.

One could read Cooley’s statement as a narrow restriction on taxation specifically designed to transfer wealth directly from one individual to another. His language in the 1871 *Bay City v State Treasurer* matter suggests such a narrow interpretation. There Cooley characterized *Salem* as restricting government’s “exercising the power of taxation in aid of private corporations, or proposing to build railroads.” *People on the relation of Bay City v State Treasurer*, 23 Mich 499, 501 (1871). That narrow interpretation, however, would require a finding that taxing citizens of Salem to fund the railroad was unconstitutional whereas payments from Salem’s general funds would have been permissible. That interpretation is too narrow and ignores Cooley’s beliefs and discussion of the place of government and private industry, his fear of class legislation, and his reliance on historical experience – all of which were discussed in *Salem*.

Cooley’s later example of the withdrawal of governing power to subsidize mills establishes that his argument extended beyond direct transfers from A to B. In that example, Cooley displayed his concern over favoring one industry over others and his related fear of the corrupting influence of wealth. The challenge included the spending legislation, not simply the tax.
consideration, or value, from the corporation in exchange for the use of tax dollars on its behalf. The benefits private rail provided were indirect and could not form the basis of a public purpose.

At the end of his Salem opinion, Cooley recognized that states routinely supported industry and that the courts affirmed that support. Nevertheless, he argued that there was an ever-present undercurrent of dissatisfaction with the legislation. Accordingly, Cooley looked to the dissents as precedent for his groundbreaking limitations. “The best judgment of the legal profession, so far as I have been able to judge, has always been against the lawfulness of this species of railroad aid, and there has been a steady and persistent protest which no popular clamor could silence, against the decisions which support it.” Contrary to his claims in Constitutional Limitations that he sought to follow the established law, Cooley continued, “This protest has of late been growing stronger instead of fainter, and if the recent decisions alone are regarded, the authority is clearly with the protest.” Those recent cases, Hanson, Curtis, and Whiting, relied upon Constitutional Limitations as the basis for their decisions. As if in an Escher drawing, Cooley now relied upon those cases as precedent to support his Salem opinion and for the shift occasioned by Constitutional Limitations. In the end, Cooley accepted that he was breaking new ground by refusing to have the court “shut our eyes to the principle and

That concern was similarly voiced in his discussion of tariffs in his General Principles of Constitutional Law. There, Cooley objected to legislation that intended to indirectly transfer wealth through tariffs. He wrote, “A tax on imports, therefore, the purpose of which is, not to raise a revenue, but to discourage and indirectly prohibit some particular import for the benefit of some home manufacture, may well be questioned as being merely colorable, and therefore not warranted by constitutional principles.” Thomas McIntyre Cooley, The General Principles of Constitutional Law in the United States of America (Boston: Little, Brown, and Company, 1880). 57. See, Robert Olender, “A Legacy of Limitations: Thomas M Cooley, Public Purpose and the General Welfare,” 33 Michigan Historical Review 1 (2007), People ex rel. The Detroit and Howell Railroad Co v Township Board of Salem, 488-89.

It may be significant that Cooley twice moved his family in order to reap the promised benefits of incoming rail. In both cases, the promise exceeded the reward. In 1850, he moved to Coldwater, Michigan, hoping to enhance his legal practice as the Michigan Southern arrived. In 1853, he moved to Toledo to take advantage of the benefits of newly located rail. In both cases, he left frustrated over the lack of benefits, although his exit from Toledo may have also been connected to political losses he suffered.

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blindly follow where others have blindly led.”\textsuperscript{1047} The long-standing practice of government financial aid to railroads was now invalid, based on constitutional tax language that had been in place during the entirety of the government-support regime.\textsuperscript{1048}

Why did Cooley take what had previously been an argument in the political field and constitutionalize it in the legal realm? His 1885 \textit{Michigan, A History of Governments}, suggests that Cooley employed constitutional doctrine to achieve ends unattainable in the political sphere. Cooley wrote \textit{Constitutional Limitations, Salem}, and his other legislative-limiting writings in a time of great government expansion. In 1885, he reflected on the national government’s growing involvement in spheres Cooley believed should be private or within the states’ purview. After bemoaning how the Civil War had resulted in changed constitutional understandings that allowed the destruction of state banks, the federal imposition of authority during Reconstruction, and protective tariffs favoring industries, Cooley focused on government spending. He wrote of “liberal pensions,” creating a class of people who would exercise power at the expense of the state. He warned against the gifts of land and funds to railroads, and the expansion of federal postal operations. He warned against the “mighty army” of federal office holders, “an army greater in number than that which Wellington at Waterloo changed the history the world, greater than that which Mead won the decisive victory at Gettysburg.” Cooley’s challenge was that the constitution as written allowed for such “evils.” In his last sentence of this reflective book, Cooley concluded that “only time and the patient and persevering labors of the statesmen and patriots will suffice to eradicate,” those engrafted evils of government excesses.\textsuperscript{1049} It is not

\textsuperscript{1047} Cooley, \textit{Constitutional Limitations}: 493-94.
\textsuperscript{1048} After the Salem opinion, the legislature proposed a constitutional amendment to allow municipal aid to railroads. The effort failed but the vote suggests an interesting perspective on public/private enterprises. With a few exceptions, communities already served by rail, many of them with the support of local public funding, voted against further public aid. Unserved communities voted to amend the constitution and allow taxpayer support of rail development. Elliott, \textit{When the Railroad was King}: 32-33.
clear whether Cooley included courts in his call to statesmen and patriots. Whether he did or not, he expected that judges would labor to limit legislatures in an effort to assure republican governance and the associated respect for individual rights. In order to accomplish that, his work proposed that the judiciary find new constitutional meanings to address changing societal and governance needs. By doing so, the courts could protect the state and nation against the excesses of legislative power that had undermined Michigan and were undermining the nation.

The Response to Salem

It had been the practice in Michigan to grant support to rail, and Salem occasioned broad discussion. Public reaction was mixed with some applauding the court’s actions and some critiquing it. On July 27, 1870, Governor Baldwin called the legislature to extraordinary session to deal with the economic and legal challenges created by Salem. He maintained that bonds “for the larger part [were] held by persons of moderate or small means,” notably the aged, women and orphan children. While the court may have invalidated the law, he argued moral obligations compelled bond payment. To fulfill that requirement, Baldwin called for a constitutional amendment to allow municipal ratification of the bonds. The legislature passed that amendment but the voters did not.

In March 1871, Detroit’s mayor and common council petitioned the state treasurer to return the $300,000s of bonds the city had sent the state pursuant to the now unconstitutional law. The treasurer refused, claiming it would not release the bonds back until three years had passed. To defuse the situation, William Wesson, the president of the Detroit, Howell & Lansing, wrote in the Detroit Tribune that the railroad would not claim the bonds and, accordingly, the city faced no risk. Notwithstanding the loss of public financing, construction

continued. Wesson reported that the railroad was “engaged in rapidly constructing the road in accordance with the condition under which the bonds were voted.” Although the law now precluded government support of rail, the Detroit, Howell & Lansing continued to collect on the bonds that had been sold. As noted below, it could collect on those bonds pursuant to the United States Constitution’s Contract Clause as enforced by the federal courts. As the 1919 Michigan Railroad Commission Report noted, the Salem and Bay City opinions marked “the end of active campaigns for local municipal aid and donations to railroads, although for many years thereafter it is found that occasional public aids were given, sometimes under circumstances designed to evade the limitations of the law.”

Almost immediately after Cooley handed down the Salem opinion, fellow University of Michigan Law faculty member, Charles Kent, cautioned against the adoption of Cooley’s standard. Basing much of his critique on the principle that courts must uphold state legislation unless it violates a specific constitutional restriction, Kent accused Cooley of elevating his “unsupported philosophical theories as to the proper limits of government power against the popular will.” After noting the ahistorical nature of Cooley’s public purpose doctrine, Kent focused on the disruption that the doctrine and its associated judicial activism would cause. “If money cannot be raised by taxation in favor of private corporations, of course public property cannot be given to such corporations.” He continued, “All laws giving bounties to any particular industries, are void. All tariffs for the sake of protection come under the same head. All gifts by the state to churches or private schools are void. The homesteads given to actual settlers are still the property of the United States.” This academic colleague of Cooley continued, noting the revolutionary results that would logically extend from Cooley’s public purpose doctrine.

“Neither do we see how, consistently with this principle, it is possible to justify the exemption from taxation of churches, libraries, and private school property. The principle carried out fully would destroy a considerable portion of the legislation of almost every state in the Union, as well as a large share of that of the United States.” Kent was right; were one to extrapolate Cooley’s doctrine to a laissez-faire governance approach then, by and large, that would have happened. While some courts moved in that direction, more employed Cooley’s philosophy to limit but not totally restrict legislative activism, and mostly when the government or regulatory activity significantly encumbered individual rights or liberties.

Cooley advanced his arguments, writing in Bay City v State Treasurer that due process guarantees invalidated state support of rail development. “To take a man’s property from him under pretense of taxation, for a purpose for which taxation is not admissible, is not due process of law, but is an unlawful confiscation.” While Cooley attached the public purpose doctrine to due process, most other courts did not. They premised their invalidation of legislation on the implied definition of tax as requiring a public purpose.

Bay City was significant in one other respect. In it, Cooley used the state’s disastrous rail history as grounds for constitutionally prohibiting improvident legislation. Noting the state’s “bitter experience of the evils of” government internal improvements, Cooley argued, “a settled conviction fastened itself upon the minds of our people that works of internal improvement should be private enterprises.” Although the 1850 constitution only prohibited state aid, and all other jurisdictions had ruled that such state prohibitions did not preclude municipal aid, Cooley suggested otherwise. He would read the 1850 constitution not by its specific limits, but rather

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1054 People on the relation of Bay City v State Treasurer, 502. See also, Thomas v Port Huron, 27 Mich. 320(1873).
“from the public history of the times.”\textsuperscript{1055} Circumstances both before and after the constitution’s drafting influenced Cooley’s constitutional interpretation. The overarching constitutional goal drove the momentary interpretation of constitutional language.

With \textit{Constitutional Limitations} and \textit{Salem} as its foundation, a legislative-limiting, property-protecting undercurrent became prevalent. In nearly every state, courts increasingly protected property and invalidated state expenditures in support of the general welfare. At first, litigants focused on challenging business subsidies. For example, in 1872, the Maine Supreme Court in \textit{Allan v Inhabitants of Jay} invalidated legislation granting tax abatements and financial support to construct a sawmill and a grinding mill in the town. The court, fearing the tyranny of legislative majorities, protested that the state should not interfere in the market. Instead, investors should determine the best use of capital. “Those who by industry and economy have become capitalist are more likely to invest it well than those who, having gained none, have none to lose.” It then classified government support of industry “communism incipient, if not perfected.”\textsuperscript{1056} In 1873, the Massachusetts Supreme Court ruled that Boston could not issue bonds to assist downtown businesses to rebuild after a sizeable portion burned down, finding the benefit to the city “incidental.”\textsuperscript{1057}

While rapid, the move to limit legislatures was not uniform, especially in those cases considering rail subscriptions or donations. Because of the historic support given by government, courts struggled with invalidating those time-honored activities. Early on, the Kansas Supreme Court took exception to Cooley’s public purpose doctrine as defined in Iowa’s \textit{Hanson} and Michigan’s \textit{Salem} opinions. In an opinion almost mocking those recent cases, the court offered in \textit{Commissioners of Leavenworth County v Miller} (a rail-aid case) that historically

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\textsuperscript{1055} \textit{People on the relation of Bay City v State Treasurer}, 504-06.  \\
\textsuperscript{1056} \textit{Allan v Inhabitants of Jay}, 60 Me 124, 129, 133 (1872)  \\
\textsuperscript{1057} \textit{Lowell v Boston}, 111 Mass 454, 461 (1873).
\end{flushleft}
“The power of governments and governmental organizations to make donations, has been exercised ever since governments were instituted, and, we presume, always will be.” It then went on to list federal, state, and local donations to advance the general welfare or to reward individual behavior. In chastening the Hanson and Salem courts, the court offered the Wisconsin and Michigan courts were “forgetting of course that such donations as are everywhere admitted to be legal, are nearly always given to private corporations or to private individuals.” The court then suggested that Cooley and his followers wished to “startle the world” with “new truth,” but such action should await constitutional amendment, and not be subject to new constitutional constructions.\textsuperscript{1058}

Though the Kansas justices, and most other courts, did not accept Cooley’s doctrine as it applied to rail support, they took note in ways unusual for a distinctly minority position. In 1873, through the case of Harcourt v Good, Justice Moses B. Walker of the Texas Supreme Court weighed in. Recognizing that “the profound learning and ability of Judge Cooley” did “for a time shake the confidence both of the bench and bar in the correctness of the doctrine previously maintained with such unanimity,” Walker looked for a counter opinion to “restore the equilibrium of the judicial mind.” He found it in a federal circuit court opinion in Talcott v City of Pinegrove (discussed below). So pleased was he that standard government practices were constitutionally upheld by the federal court, that he asked his brethren on the court whether he could “have a copy of the [Talcott] opinion published in a forthcoming volume” of the court’s reports. He then listed the cases affirming legislative power financially to aid private industry and the courts’ obligation to defer to legislative judgments concerning that aid. Walker listed ninety-five rulings from twenty-four states, each finding government support of private industry

\textsuperscript{1058} Commissioners of Leavenworth Co. v Miller, 7 Kan. 479, 515-16 (1871). The court refused to distinguish itself from Hanson or Salem because Kansas employed subscriptions rather than Michigan and Wisconsin’s donations.
constitutorily permissible. It is footnoted below in its entirety.\textsuperscript{1059} After citing the authority contrary to Cooley, Walker dismissed \textit{Salem} as “very logical and profound reasoning upon a false premise.”\textsuperscript{1060}

\textsuperscript{1059} The following cases were listed in \textit{Harcourt v Good}, 39 Tex. 455, 472-75 (1873), to establish the weight of cases supporting government’s power to subsidize private industry.

“Alabama, 3 cases. --1854, Stein v. Mayor of Mobile, 24 Ala. 591; 1857, Mayor of Wetumpka v. Winter, 29 Ala. 651 (plank road case); 1860, Gibbons v. Mobile, etc. R. R. Co. 36 Ala. 410.


Delaware, 1 case. --1847, Rice v. Foster, 4 Harr. 479.

Florida, 1 case. --1852, Cotton v. County Commissioner of Leon, 6 Fla. 610.


Illinois, 10 cases. --1851, Ryder v. Alton, etc. R. R. Co. 13 Ill. 516; 1858, Prettyman v. Supervisors of Tazewell Co. 19 Ill. 406; 1859, Robertson v. City of Rockford et al. 21 Ill. 451; 1860, Johnson v. Stark Co. 24 Ill. 75; 1860, Perkins v. Lewis, 24 Ill. 208; 1861, Butler v. Dunham, 27 Ill. 474; 1862, Clarke v. Supervisors, etc. 27 Ill. 305; 1862, Piatt v. People, 29 Ill. 54; King v. Wilson, 3 Chic. L. N.; 1872, Chicago, etc. R. W. Co. v. Smith, decision just rendered in Supreme Court for northern division of Illinois, not yet reported.

Indiana, 5 cases. --1857, City of Aurora v. West, 9 Ind. 74; 1860, Evansville, etc. R. R. Co. v. Evansville, 15 Ind. 395; 1862, The Commissioners, etc. v. Bright, 18 Ind. 93; 1864, City of Aurora v. West, 22 Ind. 88; S. M. and B. R. R. v. Geiger, 34 Ind.

Iowa, 8 cases. --1853, Dubuque and Pacific R. R. Co. v. Dubuque, 4 Greene 1; 1854, State v. Bissell, 4 G. Greene, 328; 1857, Clapp v. Cedar Co. 5 Clarke (Iowa) 15; 1858, Ring v. Johnson Co. 6 Iowa 265; 1858, McMillen v. Boyles, 6 Iowa 304; 1858, McMillen v. Lee Co. 6 Iowa 391; 1859, Whitaker v. Johnson Co. 10 Iowa 161; Stewart v. Supervisors of Polk County, late case reported in pamphlet.

Kans. 1 case. --1871, County Commissioners v. Miller.

Kentucky, 4 cases. --1849, Talbot v. Dent, 9 B. Mon. 526; 1850, Justice, etc. v. Turnpike Co. 11 B. Mon. 143; [28] 1852, Slack et al. v. Maysville, etc. [474] R. R. Co. 13 B. Mon. 1; 1859, Maddox v. Graham, 2 Metc. 56.


Maine, 1 case. --1860, Augusta Bank v. Augusta, 49 Me. 507.

Mississippi, 1 case. --1861, Strickland v. Mississippi, etc. R. R. Co. cited as of 21 (or 27) Miss. 209, and as 1849.


North Carolina, 2 cases. --1855, Taylor v. Newberne (a navigation case), 2 Jones Eq. 141; 1858, Caldwell v. The Justices, etc. 4 Jones Eq. 323.

Ohio, 12 cases. --1852, Cincinnati, etc. R. R. Co. v. Commissioners, 1 Ohio St. 77; 1852, R. W. v. Township Treasurer of Christian Township, 1 Ohio St. 105; 1853, Cass v. Dillon, 2 Ohio St. 607; 1853, Thompson v. Kelly, 2 Ohio St. 647; 1857, State v. Van Horne, 7 Ohio St. 327; 1858, State v. Union Township, 8 Ohio St. 394; 1861, State, etc. v. Commissioners Hancock Co. 12 Ohio St. 596; 1863, Knox v. Nichols, 14 Ohio St. 260; 1863,
Classifying Cooley’s *Salem* opinion as exhibiting “a boldness which is really sublime,” Nebraska Justice Lorenzo Crunse warned in *Hallenbeck v Hann*, that Cooley’s uncovering unenumerated and novel limitations on legislative power was “most dangerous.” Cooley’s notion of “inherent” limits associated with free governments inappropriately allowed judges “to destroy legislation which does not square with their views.” Soon Iowa would reverse its earlier opinions and join those courts affirming legislative power to support private rail development. In *Stewart v Supervisors of Polk County*, the Iowa court would revisit its post-*Hanson*’s trail of cases in the wake of an 1870 effort of the legislature to “re-assert[] the power denied them.” Classifying *Hanson*’s language concerning legislative power to authorize public aid as “only dictum,” the court relied on the “overwhelming weight of authority” to affirm legislative power to aid rail development. By the end of the 1870’s, only Wisconsin and Michigan held public support of private rail unconstitutional.

\[\text{Only one of our own cases is referred to by Judge Emmons, but this is by no means the only time that the question has been before this court. San Antonio v. Jones, 28 Tex. 19; [31] San Antonio v. Lane, 32 Tex. 405; and San Antonio v. Gould, 34 Tex. 49, are all cases which uphold the power of municipal corporations, when properly authorized by the legislature, to loan their credit and subscribe to the capital stock of railroad corporations.}\\n
\[\text{Notably, there were no Michigan cases in the extensive list.}\\n
\[1060\] Ibid., 471-72, 77.\\n
\[1061\] *Hallenbeck v Hann*, 406.\\n
\[1062\] The court said that Hanson’s issue concerned the lack of state legislative approval of municipal actions. The dissent took great exception, quoting the language of Hanson and the seven subsequent Iowa cases to establish that the court specifically had ruled government financial support of private rail corporations unconstitutional. *Stewart v Board of Supervisors*, 30 Iowa 9, 11, 29, 31-37 (1870). (Emphasis in original.)
Federal Consideration of Cooley

Soon, federal courts would become involved in the fallout of Cooley’s invalidation of bond obligations, specifically in response to *Bay City v State Treasurer*. That was the matter where Cooley tied his public-purpose doctrine to due process guarantees. Circuit Court Judge Halmer H. Emmons scornfully attacked the *Salem* and *Bay City* decisions in 1872 in *Talcott v City of Pinegrove*, classifying Cooley’s opinions and positions as “a deliberate and conscientious disregard of the most learned, numerous and persuasive body of opinions ever before given upon any one subject in the whole history of our constitutional law.”

Painting Cooley as a legal scoundrel, Emmons declined to believe Cooley suffered from a mere misconception of the law. On a point-by-point basis, he attacked Cooley’s recast of law to fit his political philosophies. Cooley’s notion of a clear line between government and private entities (particularly in transport and communication) had no legal or historical basis and was contrary to established law in every jurisdiction, including Michigan. Emmons declared that Cooley’s position was “intentionally revolutionary in doctrine.” Perhaps referring to Cooley’s claim in *Constitutional Limitations* that he was merely restating the law, Emmons continued his attack, claiming that Cooley’s writing, “asserts independence of precedents, and expressly condemns the old conservative idea of stare decisis.”

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Interestingly, the Stewart court at length cited Michigan’s *s v Williams* (see footnotes 458 and 753, supra) to establish that railroads were public utilities and that the work of the corporation defines its public or private nature. Ibid., 22-23.

Emmons listed 90 cases from 25 states, “all sustaining the doctrines overlooked or overruled by the Supreme Court of Michigan.” Later in the opinion, Emmons declared of Cooley’s opinions: “it seems to us but a mockery of precedent - - a rejection of all the sources from which alone a lawyer can learn the law - - it is rendering worse than useless, all our libraries and professional diligence, which can only mislead by their teachings, if, in these conditions, a majority of a court will assume to say that it has no doubt whatever that all this practical action is a mistake and a blunder, and that all this judicial decision is ignorance and misapprehension.” *Talcott v Township of Pine Grove*, 2 F. Cas. 652, 658-59, 67-68 (1872).

Ibid., 657.
Before the United States Supreme Court could review *Talcott*, it addressed the 1869 Wisconsin Supreme Court decision in *Whiting v Sheboygan and Fond du Lac Railroad*, which invalidated legislation authorizing municipal support of private rail corporations. Once again, the Supreme Court would shrug aside a state court interpretation of its constitution and laws. Justice William Strong, for the majority, offered that the use of tax dollars for rail was a “matter of public concern.” Accordingly, the Supreme Court could set standards different from the state courts, as the issue was a question of “general law.” Strong continued, “The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State court can conclusively determine for us.” Rejecting ownership as the starting point in its public/private considerations, the court boldly asserted, “It is not seriously denied that a railroad, though constructed and owned by a private corporation, is a matter of public concern,” and reflected on the historical government responsibility to support highways, including rail. While the court accepted that “the taxing power of the State extends no further than to raise money for a public use,” and favorably cited *Constitutional Limitations* in doing so, it refused to go as far as Cooley had in *Salem*. Instead, the court specifically rejected Cooley’s ownership test for public purpose. “While, then, it might be true that ownership of property may sometimes bear upon the question whether the uses of property are public, it is not the test.”

With its review of Emmons’ *Talcott* opinion, the Supreme Court would consider a matter directly related to Cooley’s application of state tax and due process constitutional language as limitations on legislative power. Again, the Supreme Court failed to defer to state court judgments about its own laws. Instead, it critiqued Cooley’s logic and noted that the due process

1065 *Olcott v Supervisors*, 689-90, 695-96. As in *Gelpke*, the court was concerned about retroactively invalidating bonds issued at a time when the state courts had affirmed the legitimacy of municipal bonds for rail development.
language upon which Cooley relied involved criminal actors “confined to judicial proceedings.” It addressed Michigan’s (and the nation’s) historic public support of rail development and the fact that the constitution did not forbid municipalities from supporting rail until they were “judicially denied” from doing so in 1870. After setting forth the history of government activity in the transportation sphere, the court addressed the core issue – Cooley’s public purpose doctrine. On a basic level, the court agreed that taxes must be for a public purpose but then it looked to the public gain, rather than the nature of the entity receiving public funding. With that change of focus, the court stated, “the public character of such works cannot be doubted.” Poetically, the court mused, “Where [railroads] go they animate the sources of prosperity, and minister to the growth of cities and towns within the sphere of their influence.” Classifying the Bay City and Salem opinions as “not satisfactory” and in the distinct minority, the court employed the Contract Clause to compel payment of the bonds.¹⁰⁶⁶

All of the cases that rejected Salem’s reasoning as it applied to railroads did so by looking at the public benefits derived through rail transportation. In doing so, they viewed public purpose in a fundamentally different fashion than did Cooley. Cooley looked to both the nature of the receiving entity and whether the public benefit derived from the expenditure was direct or incidental. If the entity was private, and it provided no direct exchange of value, the expenditure unlawfully favored that recipient over others. Hence, he wrote, “the money, when raised, is to benefit a private corporation; to add to its funds to improve its property; and the benefit to the public is to be secondary or incidental,” then the grant is not a public purpose and the tax is unconstitutional.¹⁰⁶⁷ In considering one of the most important industries of the day – railroads – all jurisdictions save Michigan and Wisconsin maintained their historic deference to legislative

¹⁰⁶⁶ Township of Pine Grove v Talcott, 86 U.S. 666, 674-76 (1874).
¹⁰⁶⁷ People ex rel. The Detroit and Howell Railroad Co v Township Board of Salem, 477.
judgments concerning general-welfare spending. As Goodrich noted of the 1870s, “Whatever
genral views were held on the role of government intervention, the local authorities in many
parts of the country found no compelling doctrinal arguments to deter them from investing in the
railroads which they considered necessary for the development of their areas.”

Simply, community self interest muted theoretical arguments that would advance public/private
separation. In the area then predominating the economy – rail transportation – government was
the most useful (if some felt inappropriate) tool toward general-welfare advancement. And
courts demurred. However, that deference would not hold in other areas of government financial
aid.

A safe conclusion from the Supreme Court’s Talcott and Olcott opinions would be that
courts sought to protect bona fide note holders from judicial oscillation. Having purchased
public bonds under a legal regime allowing those bonds, courts could no more invalidate the
bonds by a challenge to constitutional standards than a legislature could through post-issuance
legislation. That interpretation would prove incorrect or at least no longer compelling with the
Court’s 1875 opinion in Loan Association v Topeka. With that case, the Supreme Court largely
embraced Cooley’s public purpose doctrine, at least in the non-rail sphere, when it invalidated a
law funding the relocation of an iron works company. Miller wrote,

To lay with one hand the power of government on the property of the citizen,
and with the other to bestow it upon favored individuals to aid private
enterprises, and build up private fortunes, is none the less robbery because it is
done under the forms of law and is called taxation. This is not legislation. It is
a decree under legislative forms.

Contrary to much of the logic of Talcott and Olcott, Miller offered that, “the right to contract
must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay
the debt, the contract itself is void for want of authority to make it.” With that, the Contract

Clause related argument failed, *bona-fide* holders lost their constitutional protection, and *Gelpcke* became ineffective.\(^{1069}\) Although lacking focus, Miller’s opinion advocated limited government and, by extension, the need to limit majority power. He argued that the “theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere.” Since “taxation is the most liable to abuse,” courts must review the purpose for which taxing power is employed.\(^{1070}\) In doing so, the Court expanded judicial power while contracting legislative power. Arguably, however, *Loan Association* was narrowly decided. Like *Salem*, it dealt with a specific tax designed to transfer funds from one individual to another.

Underlying much of the early post-*Salem* public-purpose decisions was a concern over rights but, in large measure, those rights were viewed in the context of republican governance concerns. In *Loan Association*, Miller wrote of free government and rights in the same breath:

> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.\(^{1071}\)

This *Loan Association* section cited three pages of *Constitutional Limitations*. The first dealt with limitations that “spring from the very nature of free government”; the second dealt with restriction on legislative incursions into the judicial sphere; the third dealt with taxation and the proper role of government. Each example involved individual rights, but none relied on rights as its exclusive basis for limiting legislative power. This is not to suggest that property rights were unimportant. They were a central focus of the court’s concern. Nevertheless, property rights

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\(^{1069}\) Notably, Miller dissented in *Gelpcke*.

\(^{1070}\) *Loan Association v Topeka*, 87 U.S. 655, 660-63 (1875).

\(^{1071}\) Ibid., 663.
were not the reason a legislature, for example, could not change marriage relations. That incapacity issued from inherent limits on republican-legislative power. Violations of property rights were an aspect of impermissible government action, not a cause; a reading of the cases suggests many courts construed commercially related legislative activism as constitutionally impermissible without reference to its property-intruding consequences. To Cooley and these courts, a dominant issue was limitations on legislative power notwithstanding rights impairment.

The constitutional basis of Loan Association was the legislative taxing authority. Almost ruefully, Miller acknowledged that most jurisdictions held that aid to private railroads fit a public purpose. He then addressed the doctrine as it applied to other areas of government assistance to private industry. At first blush, he did not go as far as Cooley in demanding direct, consideration-like benefits for grants to private industry. Instead, Miller listed a series of factors for courts to determine if legislative spending adhered to the public purpose requirement. Those focused on customary practice and actions required to support government operations. After that seemingly wide berth, however, the court began to narrow its standard. Custom was gleaned from court approvals rather than historical state activities. That allowed the court to frame its custom to disallow financial support of a bridge company. In declaring the legislation unconstitutional, Miller declared that such support was no different from governmental assistance to “the merchant, the mechanic, the innkeeper, the banker, the builder, [or] the steamboat operator.” But each of those industries historically had received government largess. This suggests one of three possibilities. Miller may have not known of the historic role of government in financially supporting industry – an unlikely prospect. He may have considered the volumes of cases supporting legislative power to spend as wrongly decided. Or, most likely,

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1072 Miller concluded his rail discussion by stating, “Of the disastrous consequences which have followed its recognition by the courts and which were predicted when it was first established there can be no doubt.” Ibid., 662.
he accepted a notion of constitutional change, the steady growth of “free principles,” and “recalled” power that Cooley advanced. What was previously acceptable became illegitimate when the necessity of government action ceased. Miller did not specifically embrace that idea, but new constitutional meanings underlie much of his argument.

The changed philosophy evidenced in Loan Association demonstrated an increasing judicial willingness to impose its governing vision over the legislative. In doing so, the court ruled that the historic practice of public support for rail development was constitutionally appropriate, whereas the historic practice of supporting bridge construction and operation was not. Whatever one’s belief concerning the wisdom of those policies, it is hard to find constitutional language that distinguishes legislative authority between the two. Instead, as Lucas Powe, Jr., argued, the cases “seem governed by no higher principle than the implementation of the Court’s perception of sound public policy.”

In at least one respect, the Cooley doctrines had permeated; courts would now review legislation to determine if spending fit the court’s notion of limited government and legislative power.

Although outwardly not adopting Cooley’s direct benefit test, Miller offered that courts should read Loan Association in light of two recent cases: Allen v Inhabitants of Jay and Lowell v Boston. Those cases “adjudicated by courts of the highest character” provided the judicial basis for judging what constituted a public purpose. (Miller could not cite Salem without overruling Talcott). If those cases proved the basis for understanding public purpose, then the Supreme Court adopted the Cooley standard, as both state courts had looked to the nature of the beneficiary of the funds to determine if the legislation was valid rather than the public benefit from their services.

1073 Powe Jr., “Rehearsal for Substantive Due Process,” 748.
1074 Loan Association v Topeka, 665.
In Allen, the Maine Supreme Court reviewed the constitutionality of a Jay Township loan to a steam sawmill to locate in the town. The residents approved a $10,000 loan in aid of the mill pursuant to authority granted by the Maine legislature. The court ruled that the legislature lacked the power to authorize that municipal action. While not specifically delineating the nature of its public-purpose test, the court’s reasoning suggests adherence to the Cooley direct benefit standard. As Cooley did, the court focused on the nature of the recipient and not the societal gain from the expenditure. In that sense, it had moved away from the Sharpless and Talcott standards to Cooley’s more stringent standard.

The Allen case is interesting in another respect. In it, the Maine court moved from the previous judicial concern with the power of accumulated wealth to a concern that the masses would strip the wealthy of property. The court suggested that because capitalists demonstrated greater wisdom, they were entitled to constitutional protections against majoritarian impulses. “Capital naturally seeks the best investment, or its owners do. Those who by industry and economy have become capitalist are more likely to invest it than those who, having gained nothing, have nothing to lose.” Immediately after offering that capitalists knew better where to invest than did legislators or the public, the court elevated successful capitalists in the eyes of the law. “The sagacity shown in the acquisition of capital is best fitted to control its disposition.” In dignifying the successful entrepreneur in this way, the court effectively claimed that these property owners should not be subject to the will of “an irresponsible majority.”

After celebrating the wisdom of the successful capitalist, the court revealed its concern. “It is communism incipient, if not perfected.” With that fear in mind, the court ruled that the

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1075 To some extent, the case should be viewed as evidencing distaste for public financing for a business move from one municipality to another. The court repeatedly questioned the wisdom of aiding a move from Livermore Falls, Maine to Jay, Maine. The towns are 1.77 miles away from each other.
1076 Allen v Inhabitants of Jay, 60 Me 124, 128-29, 42 (1872).
legislature lacked the power to promote private development with tax dollars. It employed the Cooley standard when it ruled that those actions necessarily offered only indirect benefits and were therefore unconstitutional. The court thereupon took the additional step of tying tax financing of private projects to violations of individual property rights. It proclaimed, “All security of private rights, all protection of private property is at an end, when one is compelled to raise money to loan at the will of others.”1077 With the court touting the wisdom of the capitalist, and fearing the rapacious majority, the court ruled the popular vote and state legislation unconstitutional. To this, Supreme Court Justice Miller tacitly agreed in Loan Association when he advanced the Maine court as “of the highest character.”1078

The second case Miller touted is interesting in light of the limits it employed. In 1873, the Massachusetts Supreme Court considered whether bonds issued to help rebuild Boston’s downtown in the aftermath of a devastating fire were within the legislature’s taxing authority. With Cooley in the background, the court voiced Massachusetts’ new standard: “The promotion of the interests of the individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not public object.” Sounding as Cooley had, the court offered, “It is the essential character of the direct object of the expenditure which must determine its validity.” Public funds must work, “to purposes and objects alone which the government was established to promote, to wit, public uses and public service.”1079 Ignored by the court was Massachusetts’ historic support for multiple facets of industry, agriculture, and social development.1080 The 1873 court held to this new

1077 Ibid.
1078 Loan Association v Topeka, 665.
1079 Lowell v Boston, 461-62.
1080 As the Handlins noted, from its earliest days, Massachusetts government financially supported commercial development. “Well-established colonial usage and post-revolutionary theory had exalted the notion of aid through an immediate outlay from the state treasury. Many considered the bounty the best technique and cheapest for society as a whole because it did not lead to a rise in prices or in cost of production, because it encouraged the
standard however “certain and great the resulting good to the public” the funds would be to rebuilding downtown Boston. That good was only an “incidental advantage to the public” and therefore constitutionally impermissible. Clearly, the Cooley standard prevailed.\textsuperscript{1081}

Underlying the referenced state court decisions, and that of \textit{Loan Association}, was the notion that courts must now intervene to check legislation that redistributed wealth. Whether \textit{Loan Association} be read as employing an amorphous standard of historic public benefit, or Cooley’s direct benefit standard, the United States Supreme Court in 1875 accepted limitations on historical legislative space, and did so by imposing limits on the legislature that all antebellum courts had rejected. Judicial activism would now seek to check what it considered majoritarian, legislative activism. In doing so, courts pressed against legislation that redistributed income. As an intrinsic offshoot, the public-purpose cases helped lay a foundation for the substantive due process jurisprudence that would soon follow. Powe correctly noted this when he argued that the “attitudes displayed in municipal bond cases were far more likely to assist the development of substantive due process than the dicta so often relied upon by commentators as demonstrating a convincing progression toward the ultimate concept.”\textsuperscript{1082}

\textbf{Sweeping the Nation}

\begin{itemize}
\item Introduction of new processes, gave enterprisers advantages in foreign as well as in domestic markets, and tended to reduce the export of specie.” Among those supported included agriculture, hemp production, sailcloth, duck and twine production, glass manufacture, cotton good trade, beer and alcohol processing, and salt and sugar works. When the legislature avoided these direct outlays, it did so not out of a philosophical concern over government versus private space, but out of a lack of finances. Handlin and Handlin, \textit{Commonwealth}: 78-80.\\textsuperscript{1081}

\item Justice Miller also cited \textit{Jenkins v Andover} (misnamed as \textit{Jenkins v Anderson}) for support of the Supreme Court’s public purpose decision. He stretched that opinion beyond its seeming intention. In \textit{Jenkins}, the Massachusetts court ruled that the state’s pubic school provisions precluded public financing of a quasi public school that was outside the complete control of the voters. In that case, there were specific constitutional prohibitions against the funding. \textit{Jenkins v Andover}, 103 Mass 94(1869).\textsuperscript{1082}

\item Powe Jr., "Rehearsal for Substantive Due Process," 755.
\end{itemize}
With *Constitutional Limitations* and *Salem* as their foundation, the legislative limiting and its associated property-protecting undercurrents became judicially dominant.\(^{1083}\) In nearly every state, courts became increasingly active in reviewing and limiting legislative efforts to advance general-welfare concerns. Those concerns transcended their support of private businesses. Any public funds given without consideration – or direct public benefit – were constitutionally suspect. With the legislature’s historical spending role now under assault, courts would employ Cooley’s public-purpose doctrine to test the propriety of aid to schools, public employees, cultural institutions, and private persons. It is worth reviewing several cases for a flavor of how courts responded, and then to consider how Cooley viewed judicial application of his public purpose doctrine.

In response to a request from the Maine legislature for a legal opinion on its power to enable “towns by gifts of money or loans or bonds, to assist individuals or corporations to establish or carry on manufacturing,” the Maine Supreme Court in 1871 in multiple opinions offered that such transfers were constitutionally barred. Employing taking, due process, law of the land, and public purpose language, the justices largely agreed that wealth transfers through taxation would destroy individual security and property rights. This was so whether the transfer was to a corporation or to a farmer or to a tradesman.\(^{1084}\) The court followed that opinion in 1872 with *Allen v Inhabitants of Jay*, mentioned above.

The Michigan Supreme Court ruled in 1889, in *John Clee v. William Sanders*, that the city of Fenton’s efforts to support a stave mill by donating funds to drain a marsh and to

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\(^{1083}\) Frequently, courts would not cite *Salem*, as most jurisdictions would not extend the public purpose test to rail aid (although their logic of looking at entities rather than benefit would suggest they should). Instead, they would quote cases employing its logic.

\(^{1084}\) *In re Opinion of the Justices, January 23, 1871*, 58 Me 590(1871). Maine’s constitution, like that of New Hampshire and Massachusetts, required the judges to give an opinion when asked by the executive or legislature “upon important questions of law and upon solemn occasions.” Art. VI, *Constitution of Maine, 1820.*
construct docks and harbors unconstitutionally appropriated public funds for a private purpose. The court rejected as obfuscation “too plain for discussion” the city’s argument that government assistance to drain marshes was an appropriate government activity. Similarly, in 1900 the court found in *Michigan Sugar v. Auditor General* that legislative efforts to facilitate sugar-beet manufacturing in Michigan were unconstitutional. The state legislature lacked the power “to authorize a tax for private purposes” and sugar refining was neither a legitimate “government end” nor a business “the State itself” could carry on. The court ruled that, even though the industry had taken action and expended funds in good-faith reliance on this legislation, Michigan Sugar could not be paid because the legislation was unconstitutional. The court declared that it could hold the sugar subsidy “void whether it comes within any of the express provisions of the Constitution or not,” but continued that the law violated the court’s definition of the takings clause and the tax provisions under the public purpose doctrine. Relying on *Salem*, the court asserted that to find otherwise would ultimately result in “strong and powerful interests” controlling legislation to the detriment of the weaker and unconnected. Cooley’s historical views had helped create an overarching constitutional principle—government assistance to industry threatened democratic governance and was unconstitutional unless there was a direct benefit to the taxpayers.

In 1875, the Kansas Supreme Court moved out of the purely commercial realm in *State ex re James Griffith v Osawkee Township*. In the wake of an 1874 severe drought and crop failure, Osawkee Township voters approved a $6,000 bond to provide loans to farmers, which James Griffith and William Armistead sought to enjoin. Recognizing government’s role in supporting the indigent, the court undertook to determine how much farmers must suffer before

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they could receive public aid. Not satisfied with both the legislature’s and citizens’ popular vote, and despite a judicial recognition that farmers suffered from dire conditions, the court determined that the farmers’ poverty was insufficiently deep to allow public support. “It is strictly speaking, the pauper, and not the poor man, who has a claim on public charity. It is not one who is in want merely, but one who being in want is unable to prevent or remove such want. There is an idea of helplessness as well as destitution.” In ruling the relief unconstitutional, the court inserted itself as the arbiter of the historic legislative decision over a community’s responsibility to mitigate suffering. The court went a step further, claiming review power over the legislature’s judgment over the best means of support. In response to the claim that a small amount of current relief would avoid significant future obligations, the court argued, “though this calamity is great and though by reason thereof it may seem wise to appropriate out of the public funds a little now to guard against the risk of future want, yet the principle is dangerous and unsound.” In a remarkable way, the court had removed the discretion from the legislature and the voting public to determine how to resolve a future problem. Instead, the court cautioned, “Let the doorways to taxation be opened, not merely to the relief of the present and actual distress, but in anticipation of and to guard against future want, and who can declare the result.” Because the efforts to avoid penurious want were indirect (seeds instead of food), the legislation was unconstitutional.1087

Concerns over class legislation seemed to permeate the decision. The court declared its distaste for legislation that “taxes the whole community to assist one class” – in this case, destitute farmers. That explanation is troublesome, as any beneficiaries of legislation not addressing the whole are by their nature a class. Provide schools, you benefit the class of

schoolchildren; help the truly destitute, you support the poor. Therefore, class was a method of distinction, not an underlying principle. That underlying principle was one of republican governance where a majority could not transfer to themselves the property of a minority. Steps in that direction proved troubling and, therefore, justified judicial intervention.

Soon Cooley’s public purpose doctrine moved to prohibiting other forms of government support. A few examples are illustrative. In 1898, a Missouri statute providing funding for need-based scholarships was challenged as an unconstitutional taking. Quoting Cooley’s *Constitutional Limitations* and a number of its progeny, the Missouri Supreme Court ruled the scholarship program unconstitutional. Citing *Salem*, the court found irrelevant the recognized benefit of education to the public welfare. Instead, the court considered the nature of the recipients – in this case private persons with no obligation to the state – and historic governmental obligations. Because the scholarship program had no historical roots, the court found the program beyond legislative authority. The state could support universities as a whole, but it could not target individuals for special aid. To do so smacked of “paternalism,” and paternalism was antagonistic to self-government and “pernicious in its tendencies.” The court further found that Missouri’s 1875 constitution was designed “to curb the power of those clothed with authority to legislate in behalf of favored classes.” The court claimed that use of tax dollars to support scholarships was not in “the character of our government.” In an almost Alice-in-Wonderland fashion, the court defined poor students as favored because the legislature had

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1088 While a critic of nearly all regulation, Jonathan Hughes recognized that nearly all legislation disproportionately affected the population on a class basis. “The country’s form of government not only lends itself to favoritist legislation, but depends upon it. A history of American government limited to those laws that sprang pure from the brains of the nation’s politicians with no special interest as their objects would be a very short history indeed.” Hughes, *The Governmental Habit Redux*.

1089 *State ex rel Garth v Switzer*, 143 Mo. 287, 323-24 (1898).
determined to support their education. Because they were now favored, state aid was unconstitutional.

Three more cases are worth noting, as they show how far Cooley’s public-purpose doctrine extended to limit government efforts to assist indigent people and to support the public welfare. The South Carolina Supreme Court in 1907 in Aetna Fire Insurance Co. v. Jones considered a statute that taxed insurance premiums to provide for injured firefighters and the widows of firefighters as well as, in some cases, to offer pensions to retired firefighters. The court found that the state lacked the authority to tax for these benefits. The payments were gifts and without consideration. While the legislation advanced a benevolent purpose, the court found that the constitutionally required “public purpose seems to be lacking.” The firefighters’ value to society was unquestioned, and the court acknowledged that such a program of taxation could help to create a professional firefighting force. However, those gains were tangential to the pensions and benefits and, therefore, unconstitutional.

In 1906, the Ohio Supreme Court in Auditor of Lucas County v. State nullified legislation designed to “provide relief for the worthy blind.” The court was reviewing a legislative grant to blind individuals who had no property or means of support. In finding an “inherent limitation” on the legislature’s power to tax for other than a public purpose, the court determined that the aid provided only incidental public benefit. Invalidating the legislation, the court ruled that it would not be “wise or constitutional to select out a class, having some particular physical infirmity, and then confer a bounty upon individuals of that class.” Relying on Constitutional Limitations and a line of cases relying on the public purpose doctrine, the court found that while supporting institutions for the blind was appropriate as a historically sanctioned form of aid to the poor,

1090 Aetna Fire Insurance Co. v Jones, 78 S.C. 445, 454 (1907). The court ruled “the act cannot be sustained on the ground that it is a police regulation, the important characteristic, publicity of purpose, being wanting.”
novel methods of support, like direct subsidies, were “without precedent” and unconstitutional.\footnote{1091} Because there was no direct benefit to taxpayers, and no historical precedent, aid to the indigent blind was unacceptable. In following Cooley, the Ohio court limited general-welfare legislation to existing programs, proscribing novel efforts as unconstitutional gifts to the needy.

By considering the nature of the recipient, Cooley’s public-purpose doctrine also blocked legislative efforts to provide effectively for the general welfare. In 1885 a group of Detroit residents organized the Detroit Museum of Art, pursuant to legislation encouraging the cultivation of art. Although the museum corporation was private, the museum’s obligations to the city were extensive. The corporation granted its real estate to Detroit and the city enjoyed minority representation on the corporation’s board of directors, whose express statutory object was to “open its building and art collection to the general public.”\footnote{1092} Nevertheless, in 1915 the Michigan Supreme Court in \textit{Detroit Museum of Art v. Engel} ruled that public efforts to promote art through a private corporation were unconstitutional. Basing its decision almost exclusively on the private nature of the corporation, the court revealed its purpose, to protect “the people against reckless and extravagant use of public funds.”\footnote{1093} Although admission to the museum was free, and the city’s common council declared the museum within the public interest, the court, fearing a lavish legislature, struck down the ordinance as beyond the constitutional

\footnote{1091} \textit{Auditor of Lucas Country v State}, 75 Ohio St. 114, 132-36 (1906). The court recognized the wisdom of the legislation when it stated that its object was to “enable many blind persons, aided by their own efforts or those of their friends, to support themselves, and thus to escape becoming a public charge.” However, because the grant lacked direct benefit to the taxpayer, the grant was unconstitutional.\footnote{1092} \textit{“An Act for the Formation of Corporations for the Cultivation of Art,”} in \textit{Public Acts of the Legislature of the State of Michigan Passed at the Regular Session} (Lansing: R. Smith, 1885).\footnote{1093} \textit{Detroit Museum of Art v Engle}, 187 Mich. 432, 442-43 (1915). Based upon a constitutional provision stating “No city or village shall have the power . . . to loan its credit, nor assess, levy or collect any tax or assessment for other than a public purpose (Art. 8, Sec. 25), the court employed Cooley’s definition of public purpose to invalidate Detroit’s efforts to support the arts. The court found, “It is of no importance how public the aims and purposes of the corporation may be, unless it takes on the form of a municipal agency.” In sum, the “public purpose within the meaning of the tax laws” required that the art museum be “managed and controlled by the public.”}
prerogatives of government. Seeing itself as the protector of the public purse, the Michigan Supreme Court stopped the city from legislating for what the court recognized as an obvious public interest. It furthered Cooley’s constitutional principle with a stated desire to protect against majority extravagance at taxpayer expense. Courts, in their efforts to protect property, now acted as shields against popularly supported social-welfare legislation.

Cooley’s public-purpose doctrine had been significantly born out of a concern that government support of industry resulted in “careless and corrupt” legislation on behalf of the wealthy. But Cooley’s principles had quickly mutated to include a good deal more, and indeed to undermine Cooley’s original focus on corporate power. Using the public-purpose doctrine, courts would routinely challenge legislative efforts to support the common good. These challenges increasingly had little to do with fears of undue corporate influence. Rather, courts sought to protect the wealthy from the “irresponsible majority.” The effect was to relieve corporations of tax burdens in support of the common welfare within the historical meaning of the “public purpose.”

Cooley had delivered the constitutional pretext the courts needed to protect property and to act as a super legislature where judges could determine level of need and acceptability of general-welfare legislation. Individual property, in the form of tax dollars, could not be given to another without a direct exchange of value. Justice Chase’s view in *Calder v Bull* had gained greater purchase, and his anti-majoritarian philosophy had gained judicial adherents. Courts had found a constitutional basis upon which to limit the legislatures’ right to take property from A

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1094 Ibid., 442.
and give it to B. They found that the people did not “entrust a Legislature with SUCH power,” and that the limitation was found in the constitutions. 1096

So, what did Cooley think of the application of his public purpose doctrine. He seemed torn, accepting some rulings as appropriately invalidating transfers of wealth to private purposes. Reviewing a number of cases quickly, he wrote in 1880, that some of the properly struck down laws included,

A tax levied to aid private parties or corporations to establish themselves in business as manufacturers; a tax the proceeds of which are to be loaned out to individuals who have suffered from a great fire; a tax to supply with provisions and seed such farmers as have lost their crops; a tax to build a dam which at discretion is to be devoted to private purposes; a tax to refund moneys to individuals which they have paid to relieve themselves from an impending military draft; and so on.

Because the public benefit for these expenditures were the same as the public would receive from any industry or individual efforts, each tax was unconstitutional. On the other hand, he seemed to disagree with cases that invalidated pay bounties and pensions. Accordingly, he suggested that cases invalidating widowers’ pensions, or compensated firefighters, were wrongly decided. Notwithstanding earlier language that broadly applied his public purpose doctrine to government transfers of wealth to private parties, in 1880 Cooley suggested that if the favored treatment was given with no associated direct tax (the funds come from general revenues), then the spending is constitutional, even if ill advised. “The remedies for such cases,” he offered, “can only be administered through the elections.” 1097 One explanation for this seeming shift may have been the broadened application his principles endured as courts substituted judicial judgment for that of the legislature. As discussed below, Cooley’s concern may not have been as

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1096  *Calder v Bull*, 3 U.S. 386, 387-388 (1798)
1097  Cooley, *The General Principles of Constitutional Law in the United States of America* 58-60. Cooley cites a number of cases where he agrees with the outcome, including *Loan Association v Topeka*, *Allen v Jay*, *Lowell v Boston*, and *State v Osawkee*. He does not cite those cases with which he takes issue.
much with the specific application of his standard as with the substitution of judicial judgment for that of the legislature. That concern would manifest itself with the substantive due process revolution he helped generate and to which we now turn.

**Inserting Private Rights to Limit Regulatory Power**

While Cooley’s impact in changing the public spending paradigm was considerable, his impact on government’s ability to regulate industry was perhaps more significant. Cooley wrote *Constitutional Limitations* as the states were ratifying the Fourteenth Amendment and his first edition only touches on the Amendment, but he did address it as the editor of the fourth edition of Joseph Story’s *Commentaries on the Constitution of the United States*. Cooley wrote of the Due Process and Equal Protection clauses that they “must have the same end as the others already existing” in state constitutions. In that sense, Cooley did not believe that the amendment changed the federal structure or that it modified state police powers. Instead, he felt the Fourteenth’s due process and equal protection language restated existing safeguards covered by state constitutions. To him, they offered a welcome repetition. Cooley noted that protections of individual rights “cannot be too frequently declared nor too many forms of words; nor is it possible to guard too vigilantly against encroachments of power, nor to watch with too lively a suspicion the propensity of persons in authority to break through the ‘cobweb chains of paper constitutions.’”

Given his limited-government focus, Cooley rejected the argument that the Fourteenth advanced an activist federal government or that it granted federal authority to regulate. Instead, it reiterated existing restrictions. Cooley would reflect that limited governance belief in a later

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letter to Christopher Tiedeman where he stated that he “cannot recognize any necessity of
twisting and turning Constitutional clauses away from their plain meaning in order to bring
doubtful power within the grant of the powers to the federal government.”

The Fourteenth Amendment did not authorize activist government. It was to support limited government – just
as the identical language did at the state level.

Others would similarly accept that the state and federal due process provisions restricted
legislative space. Jurists and scholars soon employed *Constitutional Limitations*’ principles to
define the Fourteenth Amendment as demanding restrictions on state police powers and the
governments’ rights to regulate. Employing that clause, corporate “counsel turned to
*Constitutional Limitations* to argue that their clients might not be deprived of liberty or property
without due process of law” . . . and “the bench cited the same book to agree with them to strike
down state regulative laws.”

Because state and local governments enacted the vast majority
of regulations, litigants argued that those laws violated state due process and law of the land
clauses. At the same time, they would raise Fourteenth Amendment challenges, allowing for
federal court review. Cooley’s argument that federal and state due process language must be
read consistently gained purchase. Due process was to limit government, primarily legislative,
excesses.

Referencing *Wynehamer*, Cooley employed his oft-quoted “Due process of law in each
particular case means, such an exertion of powers of government as settled maxims of law
sanction, and under such safeguards for the protection of individual rights as the maxims
prescribe for the class of cases to which the one in question belongs.” However, *Wynehamer* did

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1099 Cooley to Tiedeman, February 15, 1886, Thomas McIntyre Cooley Papers, Michigan Historical Collections,
Box 2, Cooley Correspondences. The “necessity of twisting and turning” language was first mentioned in a letter
from Tiedeman to Cooley, dated February, 10, 1886, where Tiedeman asked for Cooley’s comments on
Tiedemann’s police power theories.

1100 Paludan, "Law and the Failure of Reconstruction: The Case of Thomas Cooley," 599.
not offer a “settled maxim of law” – it was an outlier, with nearly all state higher courts rejecting its reasoning. And Cooley knew that, but consistently with his notion of modified constitutional meanings, Wynehamer held true to a deeper constitutional imperative – limited republican government. In proclaiming that such limits were a settled maxim of law, Cooley added a substantive perch to an accepted procedural podium. Consistently with his notion of a steady growth of free principles, Cooley believed that legislative regulatory power was at its weakest as legislative actions increasingly burdened private rights. When burdens on individual rights intensified, it was the duty of the court to consider whether the legislature had exceeded its authority. The courts were to assert judicial authority over rights encumbered by the legislature just as they had historically done so concerning rights encumbered by the executive. Hence his advocacy that,

While every man has a right to require that his own controversies shall be judged by the same rules which settle those of his neighbors, the whole community is also entitled at all times to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its application.\(^{1101}\)

To accomplish that, Cooley would read due process and law of the land clauses as shields against what he and other jurists considered the later-nineteenth century threats to republican governance, the rule of law, and individual rights. Those threats came from a legislature too pliable to monied interests and majoritarian will. That expansion of constitutional meaning and judicial space would ignite a governing tempest. Referencing Cooley and his associates’ impact, Twiss contended that they “contributed to a constitutional revolution paralleling the industrial revolution which was then taking place.”\(^{1102}\)

\(^{1101}\) Cooley, *Constitutional Limitations*: 165.

\(^{1102}\) Twiss, *Lawyers and the Constitution*, 22.
Much has been written about later nineteenth century judicial activism and this work will only touch the surface of those rulings. Notwithstanding that, it is worth highlighting some of those matters, especially as some led to a regretful Cooley. Cooley’s due process influence was first felt in the developing “liberty of contract” jurisprudence. Under this standard, individuals and corporations had a property right to contract without government interference.\textsuperscript{1103} The liberty of contract principle furthered the push towards a negative-governance, \textit{laissez-faire} governance by giving businesses and individuals the right to contract concerning their property interests – for example wages, hours, and collective-bargaining rights – without government interference. That constitutionalization began in earnest with Cooley, although earlier jurists had foreshadowed the ideas. For example, in 1859, Michigan Chief Justice George Martin, writing in \textit{Michigan Central Railroad v Hale}, ruled that individuals had the right to contract away rights even if deep public-policy interest weighed to the contrary. When considering the parties’ power to contract away common-carrier liability standards, the court ruled, “paramount considerations of public policy” allowed “every man the right to regulate his own affairs, in his own way, and to make such contracts respecting his property as he may regard to be advantageous.” Personal contract rights could now trump common-law standards. There was a limitation, however. The 1859 \textit{Hale} court stated that the legislature could “tie the hands” of the parties and prohibit such contracts.\textsuperscript{1104}

Of course, the legislature could only tie hands when it had the constitutional power to do so. Cooley’s due process standards would limit that legislative hand-tying authority, particularly

\textsuperscript{1103} Purdy addressed the nexus between property rights and liberty of contract when he wrote, “that the right to property, including ownership of one’s own labor, was not mainly a right to static enjoyment of what one already had. Rather, property rights were instruments for participation in a world of free exchange and self-improvement. Merely to protect existing property claims without setting in motion the churn of contractual exchange would obliterate the social purposes of property: mobility and opportunity.” Purdy also submitted that legal personhood required the power to transfer property, including labor. “[I]t was, in effect, the power to transfer the property one intrinsically held in oneself.” Purdy, \textit{The Meaning of Property}: 103.
\textsuperscript{1104} \textit{Michigan Central v Hale}, 6 Mich. 243, 262-63 (1859).
where legislation impacted individual liberties and rights. In one of his most frequently quoted
and most significant passages, he wrote, “The doubt might also arise whether a regulation made
for any one class of citizens, entirely arbitrary in its character, and restricting their rights,
privileges, or legal capacities in a manner before unknown to the law, could be sustained,
notwithstanding its generality.” He then framed the substantive due process revolution that
would soon follow:

if the legislature should undertake to provide that persons following some
specified lawful trade or employment should not have capacity to make
contracts, or to receive conveyances, or to build such houses as others were
allowed to erect, or in any other way to make such use of their property as was
permissible to others, it can scarcely be doubted that the act would transcend
the due bounds of legislative power, even if it did not come in conflict with
express constitutional provisions. The man or the class forbidden the
acquisition or enjoyment of property in the manner permitted to the community
at large would be deprived of liberty in particulars of primary importance to his
or their ‘pursuit of happiness.’

With the ahistorical “it can scarcely be doubted,” Cooley declared that property, liberty, and
pursuit of happiness interests limit legislative power. Before that declaration, courts almost
never found that such legislation had “transcend[ed] the due bounds of legislative power.” With
Cooley, the rules changed.

Cooley did allow that the states had police powers to regulate the health, safety, morals,
and general welfare of the community. The question was how far a legislature could go within
that context as, theoretically, all regulation would be under some definition of police powers.
After discussing the need to regulate dangerous activities, unsafe conditions, and nuisances,
Cooley in Constitutional Limitations turned to the subject that had so recently vexed legislatures
and courts – alcohol prohibitions. And he did so in irresolute fashion. While nineteen of twenty-
one state courts approved the legislatures’ severe restrictions on alcohol, Cooley at first focused

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1105 Cooley, Constitutional Limitations: 393. (Emphasis in original.)
on limiting such authority. He expressed concern over such legislative attempts, saying, “Perhaps 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.” Troubled over the value destruction of previously lawful property, Cooley offered, “The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in, and, by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value of the property on hand.” After bemoaning criminalizing behavior that was recently lawful and destroying previously valued property, Cooley set the standard of review: the legislation “must be justified upon the highest reasons of public benefit.” Having offered his standard, Cooley demurred by claiming that the validity of such laws rested “exclusively in the legislative wisdom.” Cooley never ruled on temperance legislation and his likely decision is subject to debate. He might have deferred to the legislature or might have sided with parties claiming the law unconstitutionally encumbered their property rights.

Whether he really would have deferred to the legislature or not, those courts following his lead frequently refused to do so. Instead, they exerted their independent judgment over the wisdom of property-destroying legislation, and that did not take long after Constitutional Limitation’s publication. In 1872, the Massachusetts Supreme Court, in affirming the right to regulate slaughterhouses, cautioned that it would step in if the legislature went too far in its regulations. Mimicking Cooley, the court offered: “The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or the protection against a threatened nuisance; and when it appears that such is not the real object and purpose of

1106 Ibid., 383-84.
the regulation, courts will interfere to protect the rights of the citizen.”107 The court started
down this path of questioning legislative motivation notwithstanding Massachusetts’s historic
practice of government regulation of tanneries and slaughterhouses.108

The next year, the Illinois Supreme Court relied on Constitutional Limitations as the basis
for overturning legislation that limited a cemetery’s use of its land for burial purposes. In Lake
View v Rose Hill Cemetery, the court considered whether the legislature had the constitutional
authority to impose restrictions on property uses that were authorized in the cemetery’s corporate
charter. Citing Cooley’s newly published work, the majority stated that it was unwilling “to
concede the existence of an indefinable power, superior to the constitution, that may be invoked
whenever the legislature may deem the public exigency may require it, by which a party may be
capriciously deprived of his property or its use, without compensation, whether such property
consists of franchises or tangible forms of property.” The court continued: “under the power to
regulate, the State cannot deprive the citizen of the lawful use of his property, if it does not
injuriously affect or damage others.” 109 In essence, the court found that police powers only
allow for correcting abuses and by extension could only be employed when an “overruling
necessity” or danger threatened. Invoking Cooley, the court subordinated concerns over the
general welfare to the nether regions, or at least to the complete discretion of the court.
Although the legislature could determine when and how to abate nuisances, without explanation,
the court found “there must necessarily be constitutional limits on that power.” Hence, it was up
to the courts to determine if the legislation improperly encumbered essential rights and

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107 Watertown v Mayo, 109 Mass. 315, 319 (1872)
108 For an in depth study of Massachusetts’s historic relation between government and commerce, see Handlin and
Handlin, Commonwealth: 204.
109 Lake View v Rose Hill Cemetery, 70 Ill 191, 197-98 (1873).
Without using the term “due process,” the Illinois court was the first post-
**Constitutional Limitations** court to declare a regulation unconstitutional because the legislature
encumbered property rights.

Although the court relied on Cooley, Cooley may not have gone as far as did the Illinois
court. In **Constitutional Limitations**, Cooley acknowledged that under legislative police powers
“churchyards which, found by the advance of urban population, to be detrimental to the public
health, or in danger of becoming so, are liable to be closed against further use for cemetery
purposes.” Cooley was advocating a more nuanced approach than that employed by the Illinois
court. He would balance the legislative judgment concerning the public’s health and safety
against the property and contract interests (or rights) of the individual. Hence, he approvingly
discussed cemetery restrictions along with flammable building and gunpowder laws, beach and
waterway restriction, and poisonous drug and dangerous animal limits. Legislatures would
not stop regulating despite rulings like *Rose Hill Cemetery*, but would do so within increasingly
unclear limits. The courts would not offer identifiable limits and Cooley suggested there could
be no firm boundary delineating public and private spaces. Rather, he believed that legislative
power waned as private interests advanced. And that balance changed as society developed, with
private space advancing over the public, particularly as economies advanced and history
disclosed the foibles of government intervention.

At about the same time that the Illinois court struck down the cemetery legislation, the
United States Supreme Court opened the due process floodgates with its rulings in the *Slaughter-
House Cases*. In 1869, the Louisiana legislature passed a law requiring New Orleans
slaughterhouses to locate in an area of the city owned and controlled by the Crescent City Live-

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1110 Ibid., 195.
1111 Cooley, *Constitutional Limitations*: 593-94.
Stock Landing and Slaughter-House Company. They could not continue operations outside that zone. A number of butchers and associations sued, in part claiming that the legislature did not have the constitutional authority to create a monopoly or dispossess them of their property. The case ultimately landed in the United States Supreme Court. The court now had occasion to issue its first ruling on the meaning of the Fourteenth Amendment.

The decision addressed a number of legal issues but, for the purposes of this paper, only those portions devoted to constitutional limitations on legislative power will be addressed. The majority opinion, written by Justice Samuel Miller, rejected the argument that due process rights restricted state property regulation. Noting that virtually all state constitutions and the Federal Fifth Amendment contained due process clauses nearly identical to the Fourteenth Amendment’s, Miller relied on precedent to limit due process to its historical procedural place. “It is sufficient to say that under no construction of that provision that we have ever seen, or in any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade . . . be held to be a deprivation of property within the meaning of this provision.” State police powers allowed for “all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state.”

While the court overstated the case when it claimed there was no authority for limiting state action under due process clauses, it certainly followed the vast weight of authority.

The dissent, however, saw the Fourteenth as more than a restatement of procedurally defined state due process provisions. In doing so, they would adopt many of the arguments of plaintiffs’ counsel. John Campbell, a former member of the court, who had resigned his seat when his home state of Alabama left the Union, argued that the newly enacted due process clause, along with the privilege and immunities and equal protection clauses, protected persons

\[1112\] *Slaughter-House Cases*, 83 U.S. 36, 80-81, 62 (1873).
from legislative interference with their property rights. In 1869, at the district court level, he proclaimed in oral argument,

On our part we assert that it is against the common right, that it is contrary to the common law, which gives to every man a property in his person and a right to employ that in every lawful trade. We say that those great inherent and natural rights which are proclaimed in all our constitutions and lie at the foundation of all our liberties, that they have had a constitutional sanction; that they are engrafted in the bills of rights in this State, and that they are written in the amendment of the Constitution.\(^{1113}\)

Thereafter, Campbell incorporated Cooley repeatedly in his arguments. In his briefs before the United States Supreme Court, Campbell premised most of his argument on the impropriety of government-created monopoly. Erroneously citing Cooley as support, he argued that all American legislatures only have as much authority as specifically delegated to them. Campbell then focused on the express and implied limitations found in the federal and Louisiana constitutions. Again quoting Constitutional Limitations, Campbell argued that constitutions should be interpreted to protect individual rights, including the right to property.\(^{1114}\) The dissenters in Slaughter-House listened intently.

Although never citing Constitutional Limitations, Justice Field’s dissent followed much of Cooley’s reasoning.\(^{1115}\) Like Cooley, he argued that state-created monopolies “encroach upon the liberty of citizens to acquire property and pursue happiness.” Picking up on Cooley’s class legislation argument, Field continued, stating that laws that limit avocations must burden “equally upon all others of the same age, sex and condition.”\(^{1116}\) Like Cooley, Field also incorporated common-law principles into his constitutional edifice. To him, the common law

\(^{1113}\) Campbell’s argument is reported verbatim in the Daily Picayune, June 27, 1869, 10, and was provided by Slaughterhouse historian, Ronald Labbe.


\(^{1115}\) Justice Field’s dissent is commonly considered the most compelling and complete of all the dissents in the case.

\(^{1116}\) Slaughter-House, 101, 110. Compare Cooley, Constitutional Limitations, 393.
prohibited government from granting monopolies and enacting unequal legislation, like the
Louisiana law. Field argued that the Fourteenth Amendment’s privileges and immunities
language gave constitutional effect to the common law and the inalienable rights of the
Declaration.

Field concluded his opinion by stressing the importance of protecting property and in
particular labor. In a frequently cited footnote quoting Adam Smith in his *Wealth of Nations*,
Field wrote:

‘The property which every man has in his own labor,’ says Adam Smith, ‘as it
is the original foundation of all other property, so it is the most sacred and
inviolate. The patrimony of the poor man lies in the strength and dexterity of
his own hands; and to hinder him from employing this strength and dexterity in
what manner he thinks proper, without injury to his neighbor, is a plain
violation of this most sacred property. It is a manifest encroachment upon the
just liberty both of the workman and of those who might be disposed to
employ him. As it hinders the one from working at what he thinks proper, so it
hinders the others from employing whom they think proper.’

Coming out of the Civil War, and fresh on the ending of slavery, Field and his dissenting
brethren focused on equality and labor freedoms. In doing so, they incorporated arguments
employed by Cooley including concerns over class legislation, excess regulation, and court
power. Whether Field premised his argument on *Constitutional Limitations* or independently
developed a similar line of reasoning, he pushed Cooley’s arguments forward as the due process
revolution developed. While Field focused on privileges and immunities, future courts would
blend Field’s words with Cooley’s due process arguments to limit legislative power to regulate.
With Cooley’s ideas now bolstered by the *Slaughterhouse* dissents, courts would accelerate their
efforts to limit legislatures, just as legislatures were accelerating their efforts to involve
government in the commercial sphere.

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1117 Ibid., 110.
Ronald Labbe and Jonathan Lurie in their work *The Slaughterhouse Cases* implied that Cooley supported the majority opinion, which rejected the use of due process as a check on legislative authority. Instead, they posited that Cooley would have approved of Louisiana’s legislation because its goal was consistent with public health and good order. Unfortunately, like Alan Jones, Labbe and Lurie rely on Cooley’s general statements rather than considering his deeper antipathy to active governance. Cooley demonstrated that, and his distaste for the *Slaughterhouse* majority opinion, when in 1878, he published “Limits to State Control of Private Business.” In that article, Cooley expressed his aversion to any connection between government and monopolies, wages, or prices and, in particular, the *Slaughterhouse* legislation.

In the troublous days immediately following the war, when the passions of the people were so inflamed on questions growing out of the civil conflict as to preclude any careful supervision of legislation by the general public, the Legislature of Louisiana granted to a corporate body the exclusive privilege for twenty-five years of slaughtering cattle in New Orleans and its immediate vicinity, limiting their charges it is true but making them sufficiently liberal.

Suggesting a litany of horrors, Cooley opined that, “If the legislature could lawfully create this monopoly, why not create a similar monopoly of warehousing?” “And if they did create one,” he continued, “what should prevent their fixing the rates as high as they have ever been fixed by individual warehousemen?” From there, Cooley turned to his targetedconstitutionalism argument: If historically, government endeavors failed or were no longer justified by circumstance, then the legislature’s power to engage in those activities was withdrawn. It was here he offered that a power to “assist in the establishment and support of mills” required in earlier days “should be considered recalled when the necessity has ceased.” Along with that recall, was a further recall of the power to regulate. Cooley offered, “When the power to aid mills by taxation is gone, such exceptional power to regulate as must have sprung from it should

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be considered recalled also.” Further, although earlier government regulated wages (Cooley incorrectly suggests this ended in the colonial period) those powers were “abandoned or recalled” by disuse. Cooley then offered that the due process clauses “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.” Accordingly, changed circumstances changed constitutional meanings. What was once within legislative purview was no longer. The question of whether a power was still constitutional, however, only arose when the legislature sought to employ that power. Therefore, Cooley’s argument about disuse of the power really meant something quite different. It meant that, notwithstanding the legislature’s belief to the contrary, the custodian of constitutional limits had decided that circumstances no longer allowed use of previously exerted powers. That custodian was the courts.

In basing his standard on the effectiveness of government programs and their impact on private spaces, Cooley advanced a fluid due process test. By doing so, he necessarily rejected doctrinaire laissez-faire and class-legislation approaches. The constitutionality of a government program, like Cooley’s proffered mills, was based on whether those projects made sense in relation to the burdens imposed at the time they were proposed. Given that fluid test, the mill taxes of the early nineteenth century would constitutionally become too burdensome later in the century as a result of expanded capital availability and/or the historical lessons of the government overspending. Social and economic changes demanded such modifications. The “steady growth of free principles” required an adjustment of legislative space through a “permanent modification of the constitutional system.” Price regulations, for example could be

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1119 Cooley, "Limits to State Control of Private Business," 269-70. It is not surprising that Cooley focused on mill aid rather than rail aid. Most jurisdictions had rejected his application of his public-purpose doctrine to rail development, but had accepted it as it applied to mill aid. In using the example of mill aid, however, Cooley recognized that his argument did not apply only to colonial use of legislative power. Government support of mill construction was commonplace in mid-nineteenth century America.
undertaken if government power could be “harmonized with the general principles of free government,” so they were not absolutely forbidden but, rather, were allowable at times and unconstitutional at others. While Cooley believed those regulations would rarely pass muster he noted that they might be acceptable according to the conditions of the time. In other words, legislative authority adjusted to circumstance. That fluidity required judicial balancing of the need to defer to the legislature’s judgment concerning general welfare needs, the historical effectiveness of government action, and the impact government activity had on individual interests. Accordingly, no set formula defined Cooley, as constitutional interpretation must change to assure the protection of limited, republican governance.

State courts moved more quickly to accept the Cooley standards than did the federal courts. Using the Slaughterhouse dissents and Constitutional Limitations as foundations, they began to reverse regulations where they found those acts unreasonable. Among the first was New York. Disregarding an 1884, New York City regulation prohibiting the manufacture of cigars in tenement houses, Peter Jacobs worked with tobacco in a four-floor tenement house that he shared with his wife and two children, and three other families. After being convicted for violating the ordinance, Jacobs sued, claiming that the statute deprived him of property in violation of due process. The court unanimously agreed with him in In the Matter of the Application of Peter Jacobs. In doing so, the court accepted an expansive definition of property and determined that restrictions on “the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation” were liberty interests protected by due process guarantees. Relying on Cooley, the court determined it was the judiciary’s place to review legislation to assure that it did

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1120 Ibid., 268-69.
1121 See, Jacobs, Law Writers and the Courts, 49-58.
not encumber property or liberty interests beyond the narrow bounds of the state’s police power.
The court’s language is telling, as it suggests an activist judiciary and a subordinate, or at least
tame, legislature.

Immediately after it had suggested the legislature had the authority to determine which
regulations would support health, welfare, safety, and general-welfare concerns, Justice Earl
offered, “the determination of the legislature is not final or conclusive. If it passes an act
ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or
interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it
really relates to and is convenient and appropriate to promote the public health.” Accordingly,
the court was not only to decide whether the legislature really intended to promote a policing
purpose but it was also to decide if the regulation effectively accomplished that end. It was to
balance the infringement against the gain. After asking, “What possible relation can
cigarmaking in any building have to the health of the general public?” the court declared the law
in violation of due process guarantees, unconstitutional, and void.1122

In Jacobs, a court for the first time grouped Cooley’s concerns over economic liberty,
class legislation, and restrictions on police power together to declare a law in violation with
substantive due process guarantees. That a New York court would lead is not surprising.
Cooley’s work had constitutionalized New York’s early property-protecting jurisprudence. The
concern expressed in White, Wynehamer, and Morris now had a constitutional doctrine on which
to grow.

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1122 In the Matter of the Application of Peter Jacobs, 98 N.Y. 98, 98, 100, 105-06, 108, 114 (1885). To be sure, the
court sought to protect the self-made man and/or self-employed entrepreneur from the burdens of employ or union-
member status. The law at issue in Jacobs, in part, was motivated by a desire to protect unionized factories from
small shop or home-based competition.
Soon the substantive due process revolution moved to Pennsylvania, a state that, in *Sharpless* and *Wartman*, had embraced government involvement in commerce or, at a minimum, had affirmed broad legislative powers. The controversy involved Pennsylvania’s steel industry. Steel and iron mill owners often paid mill workers according to the weight of the product they produced. Pennsylvania had legislated that a “ton” equaled 2000 pounds, but the mill owner, in the case of *Godcharles v Wigeman* (1886), had set work rules defining a ton as 2240 pounds. An employee claimed that the higher weight definition resulted in a loss of wages and litigation ensued. The Pennsylvania Supreme Court ruled in favor of the employer, finding that the state could not enforce weights and measure regulations in the face of contracts to the contrary. In an extremely short opinion, the court determined that the legislation was “utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are sui juris from making their own contracts.” Despite the employee’s concern he was being swindled, the court sought to protect his right to be free of legislative protection. “The Act is an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States.”\(^{1123}\) In an eight-sentence opinion, and without discussing any constitutional provision or the historic role of government in setting weights and measure standards, the Pennsylvania court ruled that those state laws could be disregarded by employers and employees.

Soon the West Virginia Supreme Court invalidated a statute requiring mine owners to pay their employees in United States currency. The court, in *State v Goodwill* (1889) based its decision on two Cooley inspired principles: First, the act constituted class legislation where “the

\(^{1123}\) *Godcharles v Wigeman*, 113 Pa 431, 437 (1886)
rights and privileges of certain specified employers are abridged while others of the same class are left free.” Second, the legislation violated the due process and privileges and immunities clauses by taking private property. Citing Justice Field’s dissent in *Slaughterhouse*, the court determined that requiring payment in currency violated contract rights and “the enjoyment or deprivation of these rights and privileges, constitutes the essential distinction between freedom and slavery; between liberty and oppression.” Accordingly, employees and employers had a constitutional right to set pay in any format they chose.\(^{1124}\) In a nearly identical 1893 Missouri case, *State v Loomis*, the court revealed its concern over pay legislation. After relying heavily on *Constitutional Limitations*, the court raised the specter of socialism. It declared the requirement that employees be paid in United States currency unlawful because it “introduce[d] a system of state paternalism which is at war with the fundamental principles of our government, and, as we have before said, are not due process of law.”\(^{1125}\)

In 1891, the Massachusetts Supreme Court in *Commonwealth v Perry* considered a state law that prohibited employers from withholding garment workers’ wages for imperfect weaving. Although the statute provided for alternative means to charge employees for unacceptable work, the court found that the parties could contract to avoid the state mandated procedures. The court declared the wage and process legislation unconstitutional because it constituted class legislation in violation of state constitutional property rights and contract guarantees. The case is of particular interest because of the dissent by Oliver Wendell Holmes, Jr. Holmes questioned the majority’s seeming willingness to bend the constitution to fit their economic model.

What words of the United States or State Constitution are relied on? . . . So far as has been pointed out to me, I do not see that it interferes with the right of acquiring, possessing, and protecting property any more than the laws against usury or gaming. In truth, I do not think that that clause of the Bill of Rights

\(^{1124}\) *State v Goodwill*, 33 W. Va. 179, 183 (1889).

\(^{1125}\) *State v Loomis*, 115 Mo. 307, 320 (1893)
has any application. It might be urged, perhaps, that the power to make reasonable laws impliedly prohibits the making of unreasonable ones, and that this law is unreasonable. If I assume that this construction of the Constitution is correct, and that, speaking as a political economist, I should agree in condemning the law, still I should not be willing or think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so.1126

Holmes was raising a concern he would later voice while on the United States Supreme Court; the constitution did not presume that the courts would void legislation with which they had substantive disagreement. Holmes’ dissent sobered neither the Massachusetts court nor, apparently, other courts. State courts would increasingly void legislation as violating due process guarantees, claiming that they constituted class legislation, inhibited the rights to contract, took property, or were in some way unjust.1127

For example, in response to an 1891 state act requiring the weekly payment of wages, the Illinois Supreme Court in 1893 elevated contract rights over state interest to assure payment to wage earners. The legislation addressed the practice of several industries, including coal mines, to withhold a portion of employee pay until corporate economic conditions improved. The Braceville Coal Company claimed that the law violated the state’s due process guarantees by depriving the company and its employees of their contract rights. Moreover, the company claimed that the act was improper class legislation and an interference with laissez-faire economic rights. In Braceville Coal v Illinois, the court sided with the corporation. As in previous cases, the court defined labor as property but it went a step further, perhaps stating what others had implied. The court declared, “the privilege of contracting is both a liberty and a property right.” Citing Constitutional Limitations at length, Justice Shope scolded the legislature over its class legislation and listed the industries to which the legislation did not apply. He then

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1126 Commonwealth v Perry, 115 Mass. 117, 124 (1891)
1127 See, Jacobs, Law Writers and the Courts, 64-97 and Fine, Laissez Faire and the General Welfare State, 127-164 for a more complete analysis.
offered, “The right to contract necessarily includes the right to fix the price at which labor will be performed and the mode and time of payment. Each is an essential element of the right to contract, and whosoever is restricted in either as the same is enjoyed by the community at large, is deprived of liberty and property.”1128 Liberty, contract rights, and property were fused and protected by due process principles. *Constitutional Limitations* had lit the intellectual fuse and undermined legislative prerogatives to act in support of the common welfare. Notions of negative governance and legislative limitations had trumped majority will.

The *Godcharles, Goodwill, Loomis*, and Braceville Coal decisions evidenced a move from a concern about the undue influence of the wealthy on the legislative process, to a concern that majoritarian impulses would undermine wealth. Public concerns over weights and measures, currency regulations, and pay guarantees melted in the face of individualistic notions of contract – even though those notions were contrary to long-standing public policies. In a relatively short time, state courts had applied Cooley’s reasoning to limit legislation in support of the general welfare. State courts embraced Cooley’s call to action and they sacrificed time-honored principles respecting *stare decisis* and deference to the legislature at the altar of property and contract rights. With Cooley’s declaration that “government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of the legislative body,” as their clarion call,1129 state courts elevated property rights and contract liberties to a preeminent position. In doing so, they almost certainly believed their rulings were consistent with “the general advance in intelligence and independent thought and action among the people” that

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1128 *Braceville Coal Company v Illinois*, 147 Ill. 66, 76 (1893).
Cooley spoke of as an historical force.\textsuperscript{1130} Those courts accepted Cooley’s notion that free principles could only expand if courts could shrink legislative prerogatives.

While most litigation arose in state courts, plaintiffs increasingly complained that regulations also violated federal due process guarantees. When they lost at the state level, litigants could then appeal to the federal courts. The U. S. Supreme Court’s frustration over those actions revealed itself in the 1878 case of \textit{Davidson v New Orleans}. In that case, the plaintiffs objected that a property assessment to drain swamps constituted a deprivation of property in violation of due process. Both parties cited Cooley to support their arguments concerning legislative power. Justice Miller, writing for the court, seemed perplexed by the sudden rush of litigation concerning due process rights. After stating that the “prohibition against depriving the citizen or subject of his life, liberty or property without due process of law, is not new in the constitutional history,” Miller declared “the docket of this court is crowded with cases in which we are asked to hold that the State courts and State legislatures have deprived their own citizens of life, liberty or property without due process of law.” He classified as a “strange misconception” the efforts of “every unsuccessful litigant” in state courts to challenge the merits of state legislation.

After scratching his judicial head, Miller wrote that the court was disinclined to set forth the specific scope of the federal due process guarantees. Instead, he suggested that the courts come to that definition gradually.\textsuperscript{1131} Justice Bradley concurred in the result, but was dissatisfied

\textsuperscript{1130} Cooley, “Limits to State Control of Private Business.”

\textsuperscript{1131} The court decided \textit{Davidson} too late for its inclusion in Cooley’s 1878 edition of \textit{Constitutional Limitations}. His 1883 edition cites the opinion without much comment, so it would require a stretch to conclude that Cooley embraced Miller’s gradual approach to substantive due process. However, some measure of Cooley endorsement can be gleaned from his citation of \textit{Davidson} for the proposition that, “Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.” Cooley then noted that \textit{Davidson} established that “taking property under the taxing power is [can be consistent with?] due process of law.” \textit{———}, \textit{A Treatise on the Constitutional Limitations Which Rest}
with the court’s hesitation to define due process. He declared that a law violated those constitutional principles if it were “arbitrary, oppressive, and unjust.” To him, courts were to sit in judgment over laws to assure they met the judges’ standard of fairness. The court was moving from a procedural definition to a substantive one.

The federal courts would accept Bradley’s principles, albeit a bit more slowly. As in Slaughterhouse, until the closing days of the nineteenth century, dissents drove the substantive due-process discussion. Three years after Slaughterhouse the court had the opportunity to consider whether due process limited legislative prerogatives. In Munn v Illinois, the court again approved regulation of trade, this time the regulation of rail and grain elevator rates. Counsel for both sides relied on Constitutional Limitations in their arguments and, consistent with Cooley’s underlying balance of public and private interests, Chief Justice Waite’s majority opinion held that grain elevators were a “business in which the whole public had a direct and positive interest,” and accordingly the regulations were appropriate. State legislatures could issue pricing regulations for those entities pursuant to their police powers. According to the majority, those powers included regulating for “the public good.” By noting a distinction between public and private corporations, the court may have been signaling that it would have ruled differently if the industry had operated in the private sphere. Once the elevator and rail industries were adjudged to be “public,” the majority rejected any notion of judicial oversight regarding the reasonableness of regulations. That oversight was left to the democratic process and the ballot box.

Upon the Legislative Power of the States of the American Union, 5th ed. (Boston: Little, Brown, 1883). 436, fn 2. The text language is the same between the first edition ( p. 356) and the fifth.

1133 Munn v Illinois, 94 U.S. 113, 125, 33 (1887).
Justice Fields again dissented, but this time with only one justice joining. He found, in part, that the regulations deprived the businesses of property in the form of potential profits in violation of due process. In doing so, Field acknowledged a widened consideration of “property.” Arguing, “All that is beneficial in property arises from its use and, the fruits of that use,” Field offered that the due process clause necessarily protected property beyond mere “deprivation of title and possession.” Field went as far as to argue for a nearly complete rejection of regulations that restrict property use. “If the legislature of a State, under pretense of providing for the public good, or for any other reason, can determine, against the consent of the owner, the uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special act for its confiscation or destruction.” Field relied on Pumpelly as support for including intangible interests as part of property. The property bundle of straw was expanding, and government power, under Field’s equation, was contracting.

Whereas previous courts had employed the term “police powers” to define government actions, specifically those of the legislature, Field treated the term as a limitation on legislative power. In employing the term, Field argued that police power was limited to advancing the “peace, good order, morals, and health of the community.” As in his Slaughterhouse dissent, Field did not include concerns over the general welfare in his calculation and derisively referred to the broad definition of police power as “an undefined and irresponsible element of government.” Accordingly, Field limited the legislative regulatory sphere essentially to sic utere tuo ut alenum non laedas (use your own property in such a manner as not to injure that of another), and price regulations had no place in that (and presumably, neither did general-welfare

1134 Ibid., 141-42.
regulations.) Field’s position, therefore, either rejected the mass of antebellum rulings that broadly construed legislative power or, as Cooley might have argued, found that changed circumstances demanded new constitutional meanings in order to protect core republican-governance principles.

It should not surprise that Cooley expressed concern over the *Munn* majority’s characterization that grain elevators were “affected with the public interest.” In his 1878 fourth edition of *Constitutional Limitations*, Cooley noted, much as he had in *Salem*, “The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices.” Recognizing that government historically had regulated some prices, Cooley offered that a business was affected with the public interest only if 1) it required a state license or franchise for the privilege of operating, 2) the state rendered business assistance to the entity, 3) the public granted public property or easements for the business’ use, or 4) the government granted exclusive privileges in exchange for business obligations to the public. Cooley suggested licenses only were limiting where they had been historically part of governance – like taverns, lotteries, and entertainment. The legislature enacted the grain elevator licensing requirement only as part of its challenged pricing limits, and that did not meet Cooley’s test. Although in portions of his fourth edition of *Constitutional Limitations* Cooley favorably cited *Munn*, in other portions he objected to the wide berth given in that case to legislative power to advance general-welfare interests. That being said, Cooley did

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1135 Ibid., 145-46. While it cannot be granted too much distinguishing weight, the *Munn* majority included a general welfare component (“prosperity of the State”) in its calculations.


1137 Cooley mentioned the statute’s license requirement in his introduction to his *Munn* discussion but commented that those licenses “are not important here.”
not adopt Field’s almost *per se* rejection of any pricing regulations or, extrapolating a bit, any
regulation not specifically tied to public safety health or morals.

*Munn* dealt with pricing regulations, something Cooley suggested was “commonly
supposed” to be “inconsistent with constitutional liberty.” What then of legislative power over
other regulations? Here Cooley added little in his fourth edition, despite the increasing struggle
over the issue. Almost identically with his first edition, Cooley offered that regulations
advancing public safety, health, and morals were well within the historic and constitutional
purview of legislatures. Market regulations were acceptable as they were “deemed important for
the public convenience and protection.”1138 As to the extent of legislative power to regulate for
the general welfare – Cooley offered nothing new. Instead, as in the first edition, he avoided the
issue by stating that his general list of appropriate regulations was “more than sufficient to
illustrate the pervading nature of this power, and we need not weary the reader with further
enumeration.”1139

Why the evasiveness and why the failure to elaborate on the specific limits assumed in
the due process clauses? It may have been that Cooley was satisfied deferring to the growing
body of judicial decisions on matter. It may have been that, as a chronicler of decisions, he was
leery of offering more than general statements of law. He may also have been loath to tacitly
critique his judicial brethren by offering differing standards than they were contemporaneously
pressing. While all of those reasons may have some validity, underlying much of Cooley’s
reticence was a notion that the due process restrictions of his day might become inappropriate or
insufficient for future courts. This “law of change” required that later courts retain the flexibility
to respond to threats to republican governance and, with it, to allow for the “steady growth” of

free principles. As Cooley noted in 1886, “What emergencies may require or demand cannot in advance be foreseen, but the general obligation to do whatever may be possible to preserve Republican intuitions in their integrity is plain, and if kept steadily in view will lead to safe results.”

As threats to republican institutions changed, so too did the limitations required by and allowed for under the due process banner. Accordingly, due process language could not stand as defined, unalterable barriers. Instead, due process clauses were flexible instruments to achieve Cooley’s target – republican governance.

**Briefly, an Aftermath**

Just as Miller suggested in *Davidson*, the federal courts would gradually consider the scope of due process. That effort would eventually elevate the minority position to the majority. In 1897, the United States Supreme Court fully embraced the substantive due process concept in *Allgeyer v Louisiana*. Using reasoning that mimicked *Constitutional Limitations*, the court combined the notions of liberty of contract, *laissez-faire* economics, and class legislation to arrive at its due process definition. Justice Rufus Peckham wrote for the court that due process “is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.” Peckham softened that powerful language, however, when he clarified late in the opinion that “it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the

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1140 Cooley, *The Influence of Habits of Thought upon our Institutions*: 23.
State.” In that sense, the court allowed some level of intrusion into individual rights. In essence, therefore, Peckham offered a balancing test, and the facts in *Allgeyer* argued for a balance on the side of individual contract rights. In the end, the court was on board, using due process as the sword with which to strike down undesired legislation.

Using due process guarantees contained in state constitutions, the Fifth Amendment and the Fourteenth Amendment, the courts turned Jacksonian principles on their head. The Jacksonian scourges of a free society – corporations – were now the liberty protectors of the new age. Ironically, Cooley considered those Jacksonian principles as central to his property-protecting beliefs. Now, however, Cooley and those who followed him considered limitations on corporate power as encumbrances on freedom and in violation of life, liberty, property, and due process.

As has been discussed, the Cooley inspired revolution propelled property to the preeminent liberty-protecting interest of late-nineteenth century America. *Laissez-faire* constitutionalism replaced the previous general-welfare paradigm and the individual’s interest became primary over that of groups. As part of that shift, Americans increasingly feared that European social doctrines would undermine American liberties. John F. Dillon, the former Chief Justice of the Iowa Supreme court, and one of the first champions of constitutional limitations on legislative power, reflected that concern in a January 1895 speech before the New York Bar Association. He related that property rights formed the very foundation of American society. He feared that the general-welfare legislation, unions, and various “communists, socialists, [and] anarchists” were engaging in “combined attacks” on America’s “social fabric” and “fundamental principles.” His strongest concern was the “socialistic” attacks on property through legislated taxation, and he classified “the States’ power of taxation” as “the most insidious, specious and

1141 *Allgeyer v Louisiana*, 165 U.S. 578, 589, 591 (1897).
therefore, dangerous” attacks on America. Dillon continued, protesting progressive income taxes that may be “designed as a forced contribution from the rich to benefit the poor and as a means of distributing the rich man’s property among the rest of the community." It should be recalled that Dillon was the first judicially to embrace Cooley’s *Constitutional Limitations* and its public purpose doctrines. Democracy seemed to offer grave threats, as the masses could divest the wealthy of their property. Missing in Dillon’s analysis was a concern that the wealthy would exert undue influence on legislatures to further their acquisitive aims. The concern that had most significantly animated Cooley seemed inconsequential to a Dillon concerned about protecting property from the ravenous masses.

Dillon was no malcontent nor was he alone in his concern. Respected attorneys and scholars were speaking and writing against government “paternalism” and the efforts to restrict individual free action. Sidney Fine, in *Laissez Faire and the General-Welfare*, provided numerous examples of the prevailing concerns. For example, John Randolph Tucker in a speech before the 1892 American Bar Association meeting warned that, “The evils which infest and menace our country will be crushed by the free and unbound and independent manhood of the American people, unhelped and unhindered by paternal care of their governments. This must be done or liberty will perish.” Others raised the alarm of paternal government, each expressing concerns that government legislation would undermine liberty and property rights. While their position did not rely specifically on Cooley, their ideas emerged from *Constitutional Limitations* and its resultant elevation of property interests and law – but, in a very significant way, they had ignored Cooley’s central point.

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1144 Ibid.
A Hint of Regret?

Cooley maintained that constitutional provisions should be interpreted in order to facilitate republican governance. At its core, the issue was not about individual rights. As Jones noted, Cooley’s “dominant concern was the republic, not property rights.” It was about protecting the governing structure from undue influences and inappropriate pressures. Rights were a part of that, but they were not immutable or unchanging forces. Rather, they expanded with the steady advance of free principles. Where Dillon and his intellectual brethren suggested firmer limits on activities encumbering property and contract, Cooley held to no such stringent standard.

So what did Cooley think about the developments in the due process and public purpose revolutions he had fathered? As mentioned, Cooley respected the legislative role and called for the courts to protect republican governance by assuring that legislatures did not inappropriately respond to undue pressures. In *Constitutional Limitations* and in a number of opinions, Cooley voiced the need for courts to defer to legislative judgments and to avoid replacing factual judgments of the court for those of the legislature. Yet his standards called for a strong court presence. He could do that because, at least early on, he believed judges were more contemplative and less subject to popular passions than were legislators. Because of that, courts did not require the oversight that the legislature did.

As courts became more active, and increasingly invalidated legislation, Cooley began to question his earlier thoughts. In 1884, he bemoaned Michigan’s and other courts’ recent tendency to usurp legislative power by improperly substituting judicial judgments for that of the legislature. In *State v Iron Cliffs Company*, a case considering the constitutionality of a statute

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dealing with the sale of tax-delinquent property, Cooley reminded his brethren that courts “have no supervisory power in respect of legislation,” and that the courts could not invalidate legislation “however unwise or impolitic” it might be. This admonition was necessary not only because court rulings offered the final word but because the courts had been overstepping their bounds. Cooley offered, “There is ground for the belief that sometimes statutes have been annulled by courts on objections that purported to be ground in the constitution, but which, if plainly stated, would resolve themselves into this: that the judges did not like the legislation.” Cooley then called on the courts to “assign reasons” that were “sound and substantial” when overturning legislation. 1146 Notwithstanding that call, in 1868 Cooley had invited such judicial activism when he urged judges to invalidate legislation in order to “shield private rights against arbitrary interference.” By doing so, he had helped open the door for courts to mold constitutional clauses – most particularly due process and tax – in ways earlier courts had been loath to adopt. By advocating a search for new constitutional meanings, Cooley invited the result he now feared.

The court in Iron Cliffs evenly split. The lower court then sided with Justices Campbell and Sherwood, who voted to invalidate the tax measure as contrary to due process guarantees. On appeal from that decision, Cooley continued his protest against what had become a regular practice of invalidating unfavorable legislation under due process clauses. Throwing up his judicial hands, Cooley offered, “Personally I have little care how this case shall be decided; but it seems to me that on the constitutional question the Court is drifting to this position: That those statutes are constitutional which suit us, and those are void which do not.” 1147 Ironically, Sherwood’s opinion claiming the law violated due process sounded much like Constitutional

1147 In re Wayne County Taxes, 54 Mich. 417, 446-47 (1885).
Limitations. He offered that fundamental (and natural) laws protected private property through due process clauses. Those protections existed in the common law and were made express in the written constitution.

The case was primarily procedural, as the court debated over the judicial process required concerning administrative findings. But the justices’ dispute concerned the legislature’s power to change property rights, with Cooley’s brethren arguing that as a constitutional right, property was protected against legislative encumbrance. Cooley had unleashed a judicial torrent – in some measure satisfying his legislative-limiting, republican governance objective. In some measure, they were overreaching. One wonders what Cooley thought of his earlier faith in judicial temperament and discretion.
Chapter VII: Historical Forces and Constitutional Change

*As our institutions expand the citizen will be subjected to new restraints for the protection of new rights which were either not clearly perceived before, or which have sprung from new conditions.*

Thomas M. Cooley
Sunday Chronicle, August 4, 1889

To Cooley, Michigan’s history provided essential lessons for the entire nation. Given its experiences under foreign flags, and then under various territorial and state governing structures, Cooley believed that his state was both a significant contributor to and was influenced by the “remarkable changes” that had “so greatly affected [the] constitutional questions and political habits of mind and tendencies of the American people.” To chronicle that contribution to national development, Cooley published his *Michigan, A History of Governments* while a member of the history department at the University of Michigan. In it, Cooley explored how Michigan’s social, economic, and political developments had driven changes in thinking about the place of government in the evolving American nation. While interesting in their own right, Cooley reflected that those changes altered constitutional understandings and governing structures. He wrote, “But as the people change, so does their written constitution change also: they see it in new lights and with different eyes; events may have given unexpected illumination to some of its provisions and what they read one way before they read a very different way now.”

If, as Cooley argued, constitutional interpretations could change with changing circumstances, then government actions that were valid earlier may be invalid later and,

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In the interview, Cooley continued, “A good constitution should be beyond the reach of temporary excitements and popular caprice or passion, but change in government is according to the order of nature, a good constitution should provide for safe growth and expansion.”

conversely, what was earlier forbidden could later be allowed. It is not enough, therefore, only to study the changing jurisprudential landscape. Instead, an understanding of changed constitutional principles requires an appreciation of the circumstances that drove courts to revise constitutional meanings and governing space. Only then can one appreciate why Cooley argued that early governments could financially support private mills but later governments could not.

There can be little doubt that Cooley was particularly knowledgeable about, and shaped by, Michigan’s history. His opinions evidence great respect for historical lessons, his articles spoke of historical events that shaped law and constitutional interpretations, and he was a member of the history faculty at the University of Michigan. He knew of and understood the struggles of Michigan’s pioneers and settlers, the harsh environment they inhabited, and challenges presented by the absence of a protecting government. He considered government planning and intervention providential in the wake of the 1805 fire, even as that intervention demanded changed property rights. While believing the early colonial-like government was necessary, Cooley noted that the Northwest Ordinance imposed a government “neither derived from the people governed nor responsible to them.” Particularly under the Hull and Woodward administration, that government was unresponsive to community needs. Instead, its leaders answered to distant rulers in the nation’s capital. Only when Cass became governor, and the people could elect at least some of their representatives, did Michigan accelerate its advancement to statehood and national relevance. Throughout his discussion of Territorial Michigan, Cooley focused on the need for governance responsible to the people. He bristled at the Jacksonian spoils system that undermined self-governance and he celebrated active governance that redesigned cities, relieved hunger, and educated the young. Those scholars who suggest Cooley advocated laissez-faire governance or a handcuffed legislature ignore his

\[1150\] Ibid., 146.
historical writings and understandings. By relying on the uses others later made of his doctrines, they miss that Cooley was neither an advocate for the wealthy nor an adversary of the common man. In an 1889 speech to the North Dakota Constitutional Convention, Cooley advocated for legislative power to meet “all evils” that could be reached by “proper legislation” under American constitutional governance.\footnote{"The Convention: Judge Cooley, Chairman of the Interstate Commerce Commission Addresses the Convention," \textit{Bismark Tribune}, July 18, 1889. (located in Thomas Cooley Papers, Scrapbooks, Box 8, Bentley Historical Library, University of Michigan, Ann Arbor). Cooley noted that speech in his diary. He wrote, “My talk to the Convention was of course altogether general: I only ventured upon one word of advice, namely, not to legislate too much. This was received with great apparent favor.” ———, "Personal Diary, July 17, 1889," in \textit{Thomas Cooley Papers} (Ann Arbor: Bentley Historical Library).} He was a forward thinking jurist, who advanced governance responsive to changed circumstances.

At the same time, Cooley was not a proponent of unchecked democratic governance. Michigan’s failed efforts to develop internal improvements and the associated fiscal embarrassments seared their way into his political and legal thinking. In his opinions and other writings, Cooley lamented the “debris of our airy castles” created when democratic impulses foolishly ignored economic realities. To Cooley, however, such failure did more than send a cautionary note to future generations. In his landmark \textit{Salem} opinion, Cooley suggested that such failures resulted in the withdrawal of legislative powers once enjoyed. In other words, experience demanded a changed constitutional structure. He drew that adjusted governing structure from new meanings found in constitutional text. To Cooley, it was “no longer recognized as proper or politic” that government should supply rail services. Instead, those services were “remitted to the care of private industry,” and could no longer be publically funded.\footnote{\textit{People ex rel. The Detroit and Howell Railroad Co v Township Board of Salem}, 485-86.} Significantly, the democratic process did not make that decision and, indeed, the legislature and voters repeatedly disagreed with those urging caution or withdrawing power; the state legislature had twice approved Salem’s grant, the people of Salem had once authorized it,
and communities across the state and nation had routinely authorized rail subsidies. In Michigan, only Cooley’s court majority and those losing in the political arena believed that it was “no longer recognized as proper or politic” to financially support private industry. Nevertheless, courts enjoy the final constitutional word (short of a formal amendment). Employing that power, Cooley imposed his notion of flexibly interpreting constitutional clauses to protect his constitutional target – limited republican governance. With Salem, he found new meaning implied in the constitution’s tax language and in Bay City, he judicially found new meaning in the due process language. In the end, previously misused power (perhaps along with chanced economic conditions) changed governing prerogatives. Governing space retreated as the forces of history pressed for expanded private space.

Cooley’s primary republican concern was that the wealthy and influential would drive legislation to enhance their position at the expense of the less powerful and that doing so undermined the ideals of republican governance. He witnessed firsthand as homeopathic special interests advanced the unauthorized expansion of legislative power to promote their own commercial interests. He sat as a legal advisor to the University as the legislature responded to those special interests (and those of the public generally) by shunning constitutional barriers in order to commandeer a sister branch’s constitutional space. Cooley believed that the framers had erected those barriers to assure a “steadiness in plan and conservatism in management, and place the university beyond the dangers that might spring from popular excitements and prejudices, and from political overturns.” Fiscal challenges suffered in the wake of the Civil War undermined the University’s ability to parry legislative efforts to exert control. In the end, the school’s administration capitulated, or at least compromised its independence, fearing that failure to do so risked the University’s continued vitality and perhaps existence. While Cooley’s beliefs

concerning homeopathic medicine are unknown, he certainly was concerned about the University’s struggles as it sought to maintain academic control in the face of powerful legislative impulses. The legislature was overstepping regardless of the wisdom of its policy preferences, and it was doing so in response to pressures that constitutional structures were intended to mute.

As the legislature began to flex its muscles *vis a vis* the University, Cooley witnessed another significant legislative effort to expand its reach. Multiple states, including Michigan, were enacting temperance legislation, which effectively rendered valueless property that had previously been of substantial value and commercial importance. In response to these “Maine laws,” state courts across the nation considered whether legislatures could divest citizens of their previously lawful property. Most significantly, the New York court found that such destruction of property violated that state’s due process clause. In so ruling, New York expanded due process protections beyond their previous focus on procedural guarantees. The court extended the clause to protect against legislative actions that significantly encumbered rights—most particularly, property rights.

Multiple jurisdictions, including Michigan, disagreed with the New York court, and continued their long-term expansive definition of legislative space. Even as they affirmed legislative power, several courts, and multiple dissenters, expressed concern that the legislature’s efforts so deeply to regulate were unwise and distressing. While declaring this was a political issue best left to the legislature and voters, many seemingly yearned for a constitutional peg upon which they could review significant rights-affecting legislation. To Cooley, the Maine laws presented yet another example of distressing legislative activism.
The 1850 Michigan Constitution stripped the state legislature of its power to finance rail, but it could not strip the state of its need for an expanded and effective transportation and communication network. In response to that need, the legislature once again searched for, and found, a way to respond to public and private pressures. In Michigan, as in other states, the legislature authorized municipalities to grant funds to private rail corporations where the state could not. The practice of supporting private internal improvement corporations was widespread. Since 1830, in one form or another, governments had been investing in rail and, since that time, disgruntled residents had sought judicial relief from the taxes associated with such government spending. At its core, their argument was that the legislature lacked the power to take their property, in the form of taxes, and give that property to other private parties. Unable to find clear and concise limits on such legislative action, all antebellum courts affirmed their legislature’s power financially to support private industry, particularly rail.

A reading of scholarly works suggests a different judicial dynamic. Perhaps in an effort to cull an inevitable timeline to later legislative limitations, scholars have sought to find significance in court dicta and the relative few that challenged legislative plenary power. When employing dicta, courts would denounce legislative overreaching but then affirm the legislature’s actions. In those few cases where they invalidated property transfers, the courts were either protecting court power – pursuant to separation principles – or responding to private, person-to-person transfers. Unlike the later Cooley-inspired rulings, those cases largely were not about government power. Rather, they were about which governing branch had jurisdiction. Notably, in the most significant wealth-transfer cases of the era – rail subsidies – courts uniformly affirmed legislative power. The bottom line is that prior to Cooley, courts deferred to legislative judgments concerning taxing, spending, and wealth transfers.
With one exception, those transfers remained valid until 1868 and the publication of Cooley’s, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*. In it, Cooley offered that state constitutions expressly or implicitly limited legislative power to tax, spend, and regulate. Through *Constitutional Limitations* and his further writings, speeches, and judicial opinions, Cooley unveiled his underlying premise that American constitutions were at their core, dedicated to the maintenance of republican, limited-government. In order to achieve that goal, courts were to search for new constitutional understandings and limit legislative activities when laws unduly encumbered advancing individual liberty interests. To be sure rights, particularly property rights, were always considered limitations on government overreaching. But, prior to Cooley, courts almost always deferred to legislative judgments, even when individual rights were encumbered. Cooley would encourage courts to protect and advance individual rights, largely in order to assure the promise of republican governance.

To Cooley, legislatures veered off their allowed constitutional course when, typically responding to undue pressures, they enacted unwise, uneven, or oppressive legislation. Unlike many who would follow his lead, Cooley believed that the wealthy elite most threatened legislative wisdom. Although a supporter of rail development, Cooley disapproved of the common practice of municipal financial support of private industry. To Cooley, those practices had been proven dangerous and subversive to republican governance and therefore were not valid exercises of legislative power. This was especially so as corporations influenced legislatures to coerce wealth transfers from objecting taxpayers to those corporate, private hands. As Cooley noted, once the state “enters upon the business of subsidies, we shall not fail to discover that strong and powerful interests are most likely to control legislation, and that the
weaker will be taxed to enhance the profits of the stronger.”

Because of a history of government failures, and because the wealthy were subverting the legislative process for their own ends, Cooley demanded that courts review those enactments to assure legislatures honored republican values and systems.

As an historian, Cooley believed that society’s need for government changed with social, economic, and political developments. Accordingly, republican values not only demanded legislation free from undue influences, but also required a respect for the natural growth of free principles. Because of that, a court response to the same question could be different in 1870 than it was in 1850. Hence, earlier acceptable public support of a mill would no longer be acceptable when the need or wisdom for doing so was absent. Governing power shifts with need, experience, and circumstance – and when the legislatures erred in their assessments, the courts were there to set them on the appropriate path.

Surely, Cooley knew that his doctrine invested considerable authority in the judiciary. At first, he seemed unconcerned. To him, courts were immune from the coercive influences of wealth and popular passions. Hence, judges could act as dispassionate referees, involving themselves in those cases where the legislature had ignored historical experience or had acted in ways that unduly encumbered free principles. When that happened, the courts were flexibly to seek new constitutional meanings to guard the core principles of republican governance.

Because of his respect for the legislature and belief that they were well suited to their constitutional role as problem solvers, and his faith in a well-trained and neutral judiciary, Cooley believed his theories would cautiously be employed. Unfortunately, he found that his judicial followers became activist in their efforts to limit the legislature. Instead of allowing progressive, considered legislation, a number of courts sought to enforce doctrinaire *laissez-faire*

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1154 *People ex rel. The Detroit and Howell Railroad Co v Township Board of Salem*, 486-87.
or anti-class legislation policies. In doing so, they undermined the very republican principles Cooley held dear. By suggesting the means to check legislative overreaching, Cooley had created the means to handcuff legitimate legislative action. Late in his judicial career, in 1884 and again in 1885, Cooley publically bemoaned that practice of substituting judicial views for those of the legislature. While his critiques were rare, Cooley understood that courts were undermining much of his intentions. In checking legislative power, Cooley had opened the door to enhanced judicial power that, unfortunately, lacked the dispassionate, agenda-free reflection he sought in limited, republican governance.
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