

# INTRODUCTION

In 1881, Oliver Wendell Holmes Jr., who was then serving on the highest court of Massachusetts, observed in his great book *The Common Law* that the “life of the law has not been logic; it has been experience.” He asserted that the “felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”<sup>1</sup> The essays in this volume on Michigan law underscore the wisdom of Holmes’s insights.

At the same time, they also suggest how we must expand on Holmes’s understanding of the forces that have led to legal development. Holmes wrote in New England some two centuries after settlement. He observed a mature industrial society expanding in the wake of the national and regional triumph of the Civil War. Nineteenth-century Michigan was a new place, just barely settled, and did not become a state until 1837. Michigan grew up along with an industrializing and expanding America. These facts alone make for a different kind of legal history. But the legal history of Michigan suggests that we must add at least two other categories to the forces shaping law: geography and the environment of a place and the people who settle and inhabit a place. In the Midwest, the environment profoundly affected economic growth, while the population grew dramatically through migration from other parts of the country and immigration from Europe and Canada. Three tiny midwestern settlements of the early nineteenth century—Chicago, Cleveland, and Detroit—had become three of the nation’s greatest cities by the end of the century.

In Michigan, access to abundant water (especially the Great Lakes), trees, and furbearing animals has helped shape the economy and the law. Forests and fish spurred development; rapacious timber cutting and commercial fishing led to laws mandating conservation and protection of natural resources. Similarly, the natural resources and transportation routes helped make Michigan a manufacturing powerhouse and led to the creation of the automobile industry, which, in turn, led to a vibrant union movement.

Legal change—both case law and legislation—developed along with industrialization, unionization, and urbanization. The downturn in the industrial economy—the emergence of the Rust Belt—has led, not surprisingly, to other legal developments.

Of greater consequence still is the source of the population. The “felt necessities of the time” were felt differently by people whose social, political, and ethnic origins were different. Thus, in the end, the history of Michigan law is the history of people transporting ideas and beliefs to a new region and applying them to the circumstances of that new place.

Although squarely in the heart of the Midwest, Michigan, as historian George May notes, “is perhaps the least typical of all of the original forty-eight states in the Union” and, in point of fact, differs in many pronounced ways from the rest of the states in the region.<sup>2</sup> Unlike its primary midwestern peers, Michigan, located on the nation’s northern frontier, developed without significant ties to the South. Rather, it was the influence of New England and upstate New York that most obviously shaped Michigan in the years after the United States took possession of the territory. Sometimes called the “Third New England” or the “Yankee West,” Michigan was profoundly influenced by transplanted Yankee culture. Sagacious, cunning, and rationally acquisitive, this Yankee spirit also was notable for its strident moralism, reform-mindedness, activism, devotion to public education, and, oftentimes, conservatism. Collectively, these values permeated Michigan society during its formative period. Perhaps nothing else makes this more evident than Michigan’s legal heritage, a heritage that undeniably reflects the legal environments of New York and New England. Indeed, much of Michigan’s legal code was lifted wholesale from the New England states or from New York State, whose central and western counties served as the second home for Yankee culture and as the primary staging point for emigration to Michigan.

This continuity of traditions and values, especially with regard to the law, manifested itself in innumerable ways in Michigan. Yankee settlers brought to the state an abolitionist ideology and a Puritan heritage that led to some of the most progressive civil rights law in the Midwest, to an early opposition to the death penalty, and to what John Quist calls, with some irony, “An Occasionally Dry State Surrounded by Water.” Thus, the most important aspect of Michigan’s geography may not have been its location between four great lakes but its proximity to New York and New England. As people from those states moved into Michigan, the state became a Yankee enclave on the western edge of American settlement.

A brief look at race relations in Michigan and other midwestern states further illustrates how the people of the state shaped the laws. Unlike the states of the lower Midwest, early Michigan did not have a population that was a mixture of southerners and Yankees. Early Ohio, Indiana, and Illinois were, in many ways, far more southern than northern. Settlers from Virginia, Kentucky, and Tennessee dominated those states in their early years. These southerners brought with them attitudes about slavery and race that led to repressive black codes and a persistence of bondage in Illinois.<sup>3</sup> By 1849, an influx of settlers from the free states had led to a repeal of the black laws in Ohio.<sup>4</sup> However, there was no similar population shift in Indiana or Illinois, and race discrimination remained an integral part of the law in those states until well after the Civil War.

When the Michigan Territory was separated from the lower Northwest, it inherited these black codes but effectively abandoned them before statehood. As a state, Michigan never tried to restrict black migration and, in 1838, eliminated the old territorial law that had established such limits. Thus, Michigan became a safe haven for free blacks and fugitive slaves escaping the more repressive laws of the South and the lower Midwest. In the antebellum period, Michigan was without question the most egalitarian state in the Midwest.<sup>5</sup> Although not as liberal as Massachusetts or New York in matters of race, it was far closer to those states than it was to its neighbors to the south. Like New York, Pennsylvania, and the New England states (but unlike Ohio, Indiana, and Illinois), Michigan allowed blacks to testify in court on the same basis as whites. When Ohio repealed its black code in 1849, the Buckeye State managed to catch up to where Michigan had been since 1838. In the 1850s, Michigan moved past Ohio again, when it allowed black men to vote in school board elections. As Roy Finkenbine demonstrates in his essay, Michigan was a leader in protecting the liberty of free blacks and fugitive slaves. Similarly, Paul Finkelman's essay on race after the Civil War shows that Michigan's legislature and courts provided strong protections for the civil rights of African Americans.

These attitudes toward race were not a function of mere geography or economics. Like the state's early abolition of the death penalty—Michigan was the first jurisdiction in the English-speaking world to do so—its early admission of women to law schools, its modern commitment to gender equality, and its sometime support for prohibition, the state's legal heritage on race reflected the people of the state. The persistent commitment to racial equality in Michigan—illustrated by the state's abortive foray into the world of cross-district bussing in the 1970s and its successful defense of

affirmative action in higher education in *Grutter v. Bollinger* in the twenty-first century—is also a reflection of how the law of the state grew out of the goals, attitudes, and beliefs of its people. This history is, of course, not entirely rosy. Unlike African Americans in Massachusetts or Vermont, for example, blacks in antebellum Michigan could not vote on the same basis as whites. Post–Civil War Michigan did not always live up to the promises of equality found in its own laws. Nevertheless, Michigan retained its progressive Yankee heritage in its legal culture, even as its implementation of these ideals proved incomplete.

Although its population and legal heritage differ from those of other midwestern states, Michigan’s legal culture is still very much midwestern. Situated in the center of the continent, the Midwest and its inhabitants have long been represented as the most American of all the nation’s regions and peoples. In this literal and figurative middle ground in the nation’s heartland, Americans from diverse regions, possessing varied traditions and distinct regional cultures, joined together to create a unique identity. Indeed, the Midwest stands as perhaps the most iconic of all American regions. From the mid-nineteenth century to the first third of the twentieth century, the region was the cradle of the American presidency, sending a spate of its sons to the White House. Twentieth-century American politicians and advertising executives adhered to the adage “If it plays in Peoria.” The sometimes ridiculed midwestern dialect has become the standard on the nation’s airwaves. Moreover, the region has retained its resonance in more recent times as a political bellwether and as the battleground upon which presidential aspirants are made or broken.

As already noted, Michigan’s legal heritage is both typically midwestern and, at the same time, distinctive. The state’s legislation and jurisprudence on race are examples of this. So, too, is the importance of its highest court in the nineteenth century. Although one might be hard-pressed to think of a great court in Ohio, Indiana, or Illinois, the Cooley Court of late nineteenth-century Michigan is very much in the tradition of the noted Shaw Court in Massachusetts. Similarly, Cooley is the natural heir to the jurisprudential tradition of Joseph Story, of Massachusetts, and James Kent, of New York.

Michigan’s law and its inherited legal culture were never stagnant and unchanging. Michigan (and the Cooley Court) also reflected the traditions of the dynamic jurisprudence of New England and New York. Michigan’s history illuminates a legal culture that was flexible and adaptable in the face of new conditions and circumstances. Frontier living, the expansion

of market capitalism, rapid industrialization on a grand scale, the diversification of the state's population, and a host of attendant social problems shattered and disrupted traditional life and sorely tested the host culture. Michigan's twentieth-century history set it further apart from its midwestern neighbors, as the state led the nation into the modern industrial age and became the center of America's most important industry. The dramatic expansion of the auto industry and the promise of relatively high wages in the aftermath of Henry Ford's fabled "five-dollar day" declaration made Michigan a magnet for native- and foreign-born migrants and immigrants alike. In spite of the furious pace of development and growth, however, the tradition of Yankee-influenced jurisprudence continued unabated. The state was among the first in the nation to embrace the concept of publicly funded legal counsel for criminal defendants, and it led the nation in the adoption of a modern rape law. Moreover, the state's unique water-bounded geography, abundant natural resources, and industrially blighted landscape compelled Michigan to become an innovator in environmental and conservation law.

More recently, Michigan has been the poster child for a postindustrial America. The auto industry, the heart and soul of the nation's manufacturing economy and the lifeblood of Michigan, was dealt a body blow by the 1973 oil embargo and foreign competition. Plant closures, layoffs, and an aggressive "Buy American" campaign failed to put the industry back on its feet. Anti-Asian resentment and hostility coursed through the state, rearing its head most famously in the 1982 murder of Vincent Chin by two unemployed auto workers. The collapse of the auto industry hit Detroit extremely hard. The city, once the nation's fourth largest with a population of roughly two million people, lost many of its residents to factory closures and white flight in the 1960s and 1970s. In the 1980s, it became the nation's largest city with a black majority—a great many of whom live mired in poverty. Today, the city is a tattered remnant of its glorious past, producing very few automobiles and losing population at an alarming rate. The future direction of Michigan law, like its history, may depend in large measure on the state's economic development.

Through it all, however, Michigan's Yankee heritage has stood up to the challenge and has served as a useful and flexible mechanism for dealing with change. Even as Michigan's legal culture adapted and evolved to meet changing circumstances, it remained true to its moral compass and the reforming spirit established by its originators. This powerful blend of judicious rationality and crusading fortitude propelled Michigan onto the

national legal stage and resulted in a number of innovative and precedent-setting laws. The essays included in this volume examine some of these laws and other issues that highlight the unique character and evolution of the law in Michigan from its territorial phase to the present time. *The History of Michigan Law* is not intended to be an all-encompassing work. Rather, it offers a collection of essays on a number of topics that are central to Michigan's legal past. The book not only will educate people about Michigan law but also will serve as an invitation to delve more deeply into the legal history of the state. The varied perspectives and approaches of the lawyers, historians, policymakers, and legal scholars who have contributed their talents to this collection add richness and texture to the work and facilitate the focused exploration of these discrete legal subjects. At the same time, the essays prompt a multifaceted consideration of common themes and a clear delineation of the persistence of Yankee influences, in all of their permutations, on Michigan's legal environment. Indeed, this common thread informs, to varying degrees, all of the volume's essays.

The book's opening essay, "The Northwest Ordinance and Michigan's Territorial Heritage" by David Chardavoyne, explores the origins and maturation of Michigan's foundational legal structures. Historians often have depicted Michigan's earliest legal phase in almost utopian terms as an era of exuberant idealism, moral certitude, and burgeoning democracy. Chardavoyne reminds readers of the contested nature of the contemporary legal environment and of the obvious limits of the dominant historical paradigm, particularly with regard to slavery in the region and the autocratic nature of territorial governance. Nevertheless, Chardavoyne affirms, in spite of these very real obstacles and restrictions, the Yankee spirit that permeated Michigan fostered innovation and progressiveness, attributes that manifested themselves in, among other things, the successful crusade by Michigan reformers to abolish capital punishment.

Martin Hershock's "Blood on the Tracks: Law, Railroad Accidents, the Economy, and the Michigan Frontier" also examines the Yankee influence on early Michigan law. This essay, however, pays particular attention to the tension between the settlers who favored development and those who retained the more conservative characteristics of Yankee culture, a tension embodied in the antebellum struggle of Michigan's pioneer farmers to preserve open-range grazing in the face of an expansive market capitalism symbolized by the railroad. Michigan's first American settlers, fresh from the booming Empire State, borrowed extensively from their previous home and Yankee traditions to create a legal system that encouraged commercial

development, highlighting Yankee acquisitiveness and entrepreneurship. But dogged independence, a commitment to the notion of community, and economic collapse brought forth a conservative desire to blunt and temper the power of the cash nexus and to preserve traditional self-provisioning farming. The resultant conflict, brought to a head by the expansion of the state's railroad network and the inadvertent slaughter of local livestock—a key component in subsistence agriculture—completely reordered Michigan's political climate and redefined the state's legal environment. The outcome of this conflict paved the way for the full-blown development of industrial capitalism in the state during the late nineteenth and early twentieth centuries.

Social reform and moral advocacy, trends long associated with Yankee culture, are highlighted in the essays by historians John Quist and Roy Finkenbine. In "An Occasionally Dry State Surrounded by Water," Quist outlines the social and legal crusade against alcohol in Michigan in the years before the Civil War. Because reformers continually shifted tactics between moral suasion and legal activism, Quist argues, the cyclical nature of the movement against alcohol in Michigan produced few tangible results in the 1830s and 1840s. In the following decade, however, aided by far-reaching social disruption and the enactment of the so-called Maine Law of 1852, supporters lobbied for and obtained prohibitory legislation designed to end "King Alcohol's" rule in the state. The victory, however, was a pyrrhic one, as Yankee moralism quickly gave way in the face of an increasingly diverse public and a hostile state judiciary controlled by the Democratic Party. These forces soon rendered the laws unenforceable.

Roy Finkenbine examines a strikingly similar disconnect between moral advocacy and reality in antebellum race relations in Michigan. A hotbed of antislavery fervor from its founding, Michigan remained in the forefront of the crusade against the peculiar institution and gave birth to the most successful antislavery political force in the nation's history, the Republican Party. In addition, many of the state's residents worked tirelessly to protect fugitive slaves who moved to Michigan or to assist those on their way to freedom in neighboring Canada. Michigan residents foiled efforts by slave catchers to return fugitives to bondage. Weak and relatively unenforced black laws in the territorial period—which were mostly repealed almost immediately after statehood—furthered the state's reputation as "a beacon of liberty" in the years before the Civil War. This reputation, Finkenbine hastens to add, although partially valid, is partially fabricated and masks a more complex reality: the state "was no racial utopia." Restrictive

laws, a lack of political rights and privileges, and rampant racism were an undisputed reality in the state. In the end, Finkenbine contends, although Michigan fares very favorably in comparison to many of the antebellum northern states, especially its midwestern peers, in regard to its racial climate, it did not fully live up to its mythic image of “a beacon of liberty” on the Great Lakes.

Thomas Cooley was one of the giants of American legal history and the most eminent of the state’s “Big Four” justices, a group that also included James V. Campbell, Isaac P. Christy, and Benjamin F. Graves. Cooley and his court are the subject of Paul Carrington’s “Deference to Democracy.” Steeped in “the equal rights doctrine embodied in the culture brought to Michigan from western New York,” Cooley sought to establish order and the predictability of the law in the face of social change. Although committed to the notion of “plain meaning” in the law, Cooley, as Carrington notes, did not shy away from judicial interpretation. On the contrary, mirroring the Jacksonian spirit and presaging twentieth-century liberalism, he embraced democratic politics as the “appropriate source of the moral values informing his judgments.” In nineteenth-century Michigan that meant, for all intents and purposes, Yankee values. This dedication to the vox populi culminated in a number of landmark cases promoting the Jacksonian ideals of equality (*People v. Board of Education of Detroit*), freedom of expression (*Atkinson v. Detroit Free Press*), and the existence of governmental power for public purposes (*People v. Salem*).

Commitment to democratic ideals and the general good, as Frank Ravitch demonstrates, has shaped Michigan’s four state constitutions (1835, 1850, 1908, and 1963). In his survey of the construction and subsequent evolution of Michigan’s constitutional framework, Ravitch focuses on the issues of legislative apportionment, the judiciary, and religion and religious freedom as written into the state constitutions. Through an analysis of these constitutions, he details the relationship between the people of Michigan and their government in response to changing social and economic circumstances and historical trends. In the judiciary, for instance, Michigan moved from a system in which most judges were appointed to one in which judges generally were elected. The apportionment debate, Ravitch contends, reflected a similar democratizing trend and shifted, in 1963, in important ways in response to civil rights concerns. Taken as a whole, Ravitch concludes, the constitution of the state of Michigan has broken important new ground while retaining its basic principles and remains “in many ways a cutting-edge document.”

Michigan has been a leader in the field of environmental and conservation law, as well. In his essay “Ruin and Recovery: Conservation and Environmental Law in Michigan,” Dave Dempsey, former director of the Michigan Environmental Council, graphically details the wanton destruction of Michigan’s rich natural resources. Timber, game, fish, land, and water, at various times in the state’s history, have been the targets of unregulated commercial exploitation. The result, Dempsey argues, was and continues to be an environment in peril. Urged forward by a conservation-minded and fiercely activist citizenry and resenting the rapid abandonment of the state by the lumber industry, Michigan’s legislature overcame intense lobbying and began, in the late nineteenth century, to adopt laws to protect and restore the state’s depleted resources. This environmental policy resulted in, among other things, the creation of the Michigan state forest system—one of the most extensive in the country. This sense of responsibility and stewardship, as Dempsey notes, inspired the modern environmental movement in the state and led to the passage, in 1969, of the Natural Resources and Environmental Protection Act, which authorized private citizens to bring suit to protect the environment. The tradition also has influenced contemporary efforts to curb urban sprawl and to safeguard Michigan’s invaluable water resources.

Ronald Bretz’s contribution, “170 Years of a Balancing Act: A Brief History of Criminal Justice in Michigan,” surveys some of the most important trends in the area of Michigan criminal law (substantive criminal law, punishment, juvenile offenders, the criminal court system, the right to counsel, the exclusionary rule, and the rights of crime victims). Bretz’s work once again reminds the reader of the Yankee imprint on Michigan law. The state’s first penal code, drawn primarily from the English common law as supplemented by the Northwest Ordinance, was adopted in 1846, at the height of Yankee influence, and still serves as the basis for the state’s criminal law. This substantive criminal law—in large part because of the poor definitions of the crimes codified—has been the subject of changing interpretations over time, including a marked conservative shift in the last quarter century. In the realm of punishment, Michigan was an early advocate of rehabilitation for criminals and constructed its first penitentiary in 1842. The state also was a pioneer in the use of a parole system and, early on, created a separate house of corrections for its juvenile offenders. Michigan is also notable as a leader in providing the right to counsel for those accused of crimes (an 1820 statute provided for counsel at public expense) and for being the first state in the nation to adopt voluntarily the

exclusionary rule in the wake of the U.S. Supreme Court's 1914 decision in *United States v. Weeks*.

Michigan's leading role in the post-Civil War civil rights story is recounted by Paul Finkelman in "The Promise of Equality and the Limits of Law." In clear distinction to its southern counterparts, some of its northern peers, and the late nineteenth-century federal judiciary, Michigan readily embraced the concept of legal equality among the races and enacted a number of sweeping measures intended to erase the color line. Furthermore, in the late nineteenth century, the Michigan Supreme Court vigorously denounced segregation and racism. Indeed, in few other areas does the state's Yankee heritage show more distinctly than in the realm of civil rights law. From antebellum guarantees of civil liberties for blacks to its postbellum efforts to ensure equality and racial fairness, Michigan legislators and judges succeeded in creating a race-blind legal code for the state by the beginning of the twentieth century. Although the enforcement of these laws never matched the aspirations written into them, Finkelman nonetheless demonstrates that "the repeated attempts by the legislature to create equality in the state . . . led to greater equality and greater opportunity for African Americans than they had in most other states" and thus stand as "a significant legacy."

Michigan long has been recognized as a labor stronghold. In "'Methods of Mysticism' and the Industrial Order," labor historian Elizabeth Faue examines the evolution of labor law in Michigan from 1868 to 1940. Although much attention has been given to federal labor law and its role in either constraining or aiding the American labor movement, Faue urges readers to remember that it was "local and state laws [that] were more important than federal ones in determining the outcome of strikes and the efficacy of protective labor laws." State laws, legal decisions (such as the 1898 *Beck v. Railway Teamsters* case), and local ordinances limiting political expression and criminalizing disorderly conduct, trespass, vagrancy, and property damage were among the methods employed by local businesses and employer associations to restrict and bar labor organization in the pre-New Deal era. By the 1930s, Faue writes, increasing emphasis on federal laws and executive orders shifted the balance between workers and employers and unions and businesses, opening new arenas and strategies for labor action and restoring a sense of equity in the realm of labor law.

In "The Michigan Women's Commission and the Struggle against Sex Discrimination in the 1970s," Liette Gidlow examines the issue of equity. Established in 1961 as a parallel to John F. Kennedy's Presidential Commission

on the Status of Women, the Michigan Women's Commission, housed within the state's Civil Rights Commission, was the first such state-level organization in the country. Over the next two decades, Gidlow shows, the commission evolved into a force for feminist legal reform and gender equity in Michigan law, thus ensuring that women were formally and consistently represented in state affairs. Although the commission met with mixed success in the areas of pay equity and abortion rights, it scored a tremendous victory in 1974 when it succeeded in convincing the state legislature to enact a new rape law. The new law modernized the definition of the crime, declaring it a crime of violence, not of passion, and revamped the legal process to be more sensitive to the victims of the crime. This law, Gidlow notes, initiated a national wave of reform culminating in the enactment of similar laws in every other state in the union.

The book's final essay, Byron D. Cooper's "Legal Education in Michigan," surveys the process of lawyer training in the state. At the time of statehood, access to the legal profession was limited by the apprenticeship system and formal rules that shut out both women and African Americans. Until 1949, Cooper notes, training for a legal career through an apprenticeship was permissible in Michigan. This system perpetuated the racial and sex bias of the bar because lawyers often were unwilling to accept clerks who were not like them—male and white. However, the devotion of Michigan's Yankee settlers to education quickly led to the creation of an alternative and more formalized system of academic and legal training—the university—a system that also became a tool for breaking down barriers to the profession. The state's first law school was established at the University of Michigan at its founding in 1817. Subsequently, five additional law schools (Detroit College of Law—now affiliated with Michigan State University, founded in 1891; the University of Detroit—now the University of Detroit Mercy, founded in 1912; Detroit City Law School—now a part of Wayne State University, founded in 1927; Thomas M. Cooley Law School, established in 1972; and Ave Maria School of Law, opened in 2000) were created throughout the state. Among the many notable accomplishments of the state's law schools, Cooper observes, was an early commitment to the principle of equality and equal access. The University of Michigan, the state's oldest law school, admitted its first African American student "apparently without comment" in 1868 and its first female law student two years later. The university's commitment to diversity in admissions has remained a strong one, resulting, in 2003, in the U.S. Supreme Court decision in *Grutter v. Bollinger*.

These essays contribute greatly to our understanding of the history of Michigan law and, taken as a whole, elucidate the many consistencies and changes in the evolution of the state's legal environment. These essays also attest to the power and persistence of Michigan's Yankee heritage and its imprint on every facet of state law, even as they also suggest how the Yankee heritage was changed and altered by the geography, history, and population of the Midwest. Most important, the stories in this volume demonstrate the powerful influence of law on Michigan's development and the importance of Michigan's legal developments to the nation as a whole. It is certain, if history is any indicator, that Michigan law will remain a vibrant and organic entity and that it will continue to shape and influence the legal landscape as it evolves and adapts to changing circumstances.

## Notes

1. Oliver Wendell Holmes Jr., *The Common Law* (Boston: Little, Brown, 1881), 3.
2. Willis F. Dunbar and George S. May, preface to *Michigan: A History of the Wolverine State*, 3d rev. ed. (Grand Rapids: William B. Eerdmans, 1995), x.
3. See Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, N.Y.: M. E. Sharpe, 2001), ch. 2 and 3.
4. Paul Finkelman, "Race, Slavery, and the Law in Antebellum Ohio," in *The History of Ohio Law*, ed. Michael Les Benedict and John F. Winkler (Athens: Ohio University Press, 2004), 2:748–81.
5. Wisconsin, which became a state in 1848, followed in Michigan's egalitarian footsteps, as did Minnesota, which achieved statehood in 1858.