



## THOMAS COOPER, EARLY AMERICAN PUBLIC INTELLECTUAL

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I first heard about Thomas Cooper when I came across the case that bears his name, *United States v. Cooper*.<sup>1</sup> I wanted to teach my students about the infamous Sedition Act of 1798<sup>2</sup> and was looking for a case that best illustrated how it had been applied. *Cooper* proved to be a prime example—Thomas Cooper was prosecuted essentially for writing the following:

At that time [President Adams] had just entered into office. He was hardly in the infancy of political mistake. Even those who doubted his capacity thought well of his intentions. Nor were we yet saddled with the expense of a permanent navy, or threatened, under his auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent. in time of peace, while the unnecessary violence of official expressions might justly have provoked a war.

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<sup>1</sup> *United States v. Cooper*, 25 F. Cas. 631 (C.C.D. Pa. 1800).

<sup>2</sup> An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798) (expired 1801).

Mr. Adams had not yet . . . interfered, as president of the United States, to influence the decisions of a court of justice—a stretch of authority which the monarch of Great Britain would have shrunk from—an interference without precedent, against law and against mercy. This melancholy case of Jonathan Robbins, a native citizen of America, forcibly impressed by the British, and delivered up, with the advice of Mr. Adams, to the mock trial of a British court-martial, had not yet astonished the republican citizens of this free country; a case too little known, but of which the people ought to be fully apprised, before the election, and they shall be.<sup>3</sup>

This, Justice Chase concluded (and the jury ultimately agreed), was not only a “scandalous and malicious libel . . . against . . . the president,” but “false” as well.<sup>4</sup> The charge related to the nation’s credit was supposedly false because the late 1790s weren’t really a “time of peace.” The condemnation of the president’s conduct in the Jonathan Robbins matter was supposedly false because the president was required by treaty to hand Robbins over. And the “standing army” statement was supposedly false because (Justice Chase reasoned) the army couldn’t be “standing” given that, in accordance with the Constitution, its expenses could only be authorized for two years.<sup>5</sup>

Today, these disagreements between Cooper and his critics would be treated as matters of opinion, and Cooper’s statements could not be condemned as false. But the *Cooper* case illustrated how a law ostensibly aimed at punishing “malicious” falsehoods could end up punishing opinions as well. Cooper’s case remains the only non-Supreme Court opinion that I’ve included as a main case in my First Amendment textbook.<sup>6</sup>

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<sup>3</sup> *Cooper*, 25 F. Cas. at 631.

<sup>4</sup> *Id.* at 639.

<sup>5</sup> *Id.* at 640–42.

<sup>6</sup> See EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 94–98 (3d ed. 2008).

But I soon learned that Cooper was more than just a partisan polemicist—he was also an incisive commentator on free speech, religious freedom, and other matters. The essays that the *New York University Journal of Law & Liberty* is reprinting below help illustrate that; *On the Propriety and Expediency of Unlimited Enquiry*,<sup>7</sup> cowritten with Elizabeth Ryland Priestley, is an especially good example.

Cooper was also one of the leading public intellectuals of post-revolutionary America, a man with a remarkable breadth of interests and a talent for controversy. He was born in England in 1759, into a well-off family.<sup>8</sup> He studied at Oxford but didn't get a degree, likely because of a refusal to sign the Thirty-Nine Articles of the Church of England (an early sign of Cooper's religious heterodoxy).<sup>9</sup> He quickly became a supporter of democratic reform and a critic of ecclesiastical privilege.<sup>10</sup>

Cooper also supported the radical democratic reform experiment then taking in place in France (though not yet in its bloody phases).<sup>11</sup> In 1792, he traveled to France and publicly participated in Jacobin events as an emissary of the Manchester Constitution Society. At least once, he was introduced by Robespierre.<sup>12</sup> This soon drew the public notice of Sir Edmund Burke, with whom Cooper got into a heated public exchange.<sup>13</sup>

Democratic agitation was not a safe business in 1790s England. Dr. Joseph Priestley—the leading Unitarian clergyman, materialist

<sup>7</sup> *Infra* pp. 466–492.

<sup>8</sup> See MALONE, *supra* note \*, at 4.

<sup>9</sup> See *id.* at 5.

<sup>10</sup> See *id.* at 20–26.

<sup>11</sup> In THOMAS COOPER, *SOME INFORMATION RESPECTING AMERICA* 75–77 (London, J. Johnson 1794), Cooper condemned the revolution's illiberal turn:

I look for happiness . . . where I may talk folly and be forgiven; where I may differ from my neighbour in politics or religion with impunity; and where I may have time to correct erroneous opinions without the orthodox intervention of the halter or the guillotine. Such times may and will come in France, but I fear not before the present race shall die away.

<sup>12</sup> MALONE, *supra* note \*, at 35–36.

<sup>13</sup> See *id.* at 40–42; see also THOMAS COOPER, *A REPLY TO MR. BURKE'S INVECTIVE AGAINST MR. COOPER, AND MR. WATT, IN THE HOUSE OF COMMONS, ON THE 30TH OF APRIL, 1792* (Manchester, M. Falkner & Co. 1792).

philosopher, discoverer of oxygen, and a friend and mentor of Cooper's—had his house and church burned down in a 1791 riot, prompted by Priestley's support for the French Revolution.<sup>14</sup> Friends of Cooper's were tried for sedition or treason,<sup>15</sup> and Cooper later reported that the Attorney General likewise threatened him:

[C]ontinue if you please to publish your reply to Mr. Burke in an octavo form, so as to confine it probably to that class of readers who may consider it coolly: so soon as it is published cheaply for dissemination among the populace, it will be my duty to prosecute.<sup>16</sup>

So in 1793 and 1794, the Priestley and Cooper families moved to Pennsylvania.<sup>17</sup> "There is little fault," Cooper wrote,

to find with the government of America . . . . [W]e have no animosities about religion; it is a subject about which no questions are asked: we have few respecting political men

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<sup>14</sup> See ROBERT E. SCHOFIELD, *THE ENLIGHTENED JOSEPH PRIESTLEY* 263–89 (2004).

<sup>15</sup> See MALONE, *supra* note \*, at 43–72.

<sup>16</sup> THOMAS COOPER, *THE INSTITUTES OF JUSTINIAN: WITH NOTES* 630 (Philadelphia, P. Byrne 1812). By 1812, Cooper had become more conservative and did not much object to Scott's threat, which he said embodied "a distinction that I had no right to complain of." *Id.* Such prosecutions for public distribution of material that might "excit[e] to civil commotion," he opined, would constitute "defensive measure[s] on the part of government, certainly excusable, probably justifiable." *Id.*

<sup>17</sup> They were accompanied by some other Englishmen who shared Priestley's views, including Harry Toulmin, who became a federal judge, legal writer, and editor of the statutes of Kentucky, Mississippi, and Alabama. *E.g.*, HARRY TOULMIN & JAMES BLAIR, *A REVIEW OF THE CRIMINAL LAW OF THE COMMONWEALTH OF KENTUCKY* (Frankfort, W. Hunter 1804); HARRY TOULMIN, *THE AMERICAN ATTORNEY'S POCKET BOOK* (Philadelphia, Mathew Carey 1806); HARRY TOULMIN, *THE STATUTES OF THE MISSISSIPPI TERRITORY* (Natchez, Samuel Terrell 1807); HARRY TOULMIN, *A DIGEST OF THE LAWS OF THE STATE OF ALABAMA* (New York, Ginn & Curtis & Harper 1823). Harry Toulmin's great-grandson, Harry Aubrey Toulmin, Sr., *see* Family Tree – Descendants of Abraham Toulmin of Chard, <http://www.toulmin.family.btinternet.co.uk/AbrahamChardTree.htm> (last visited Feb. 25, 2009), later earned his place in history by being the patent lawyer on the Wright Brothers' airplane patent. *See* Flying Machine, U.S. Patent No. 821,393 (filed Mar. 23, 1903), *available at* <http://www.pat2pdf.org/patents/pat821393.pdf>.

or political measures: the present irritation of men's minds in Great Britain, and the discordant state of society on political accounts is not known there. The government is the government of the people, and for the people.<sup>18</sup>

But this happiness was not to last, and Cooper soon became a strident and prominent critic of the Adams administration, as well as a political ally of Thomas Jefferson's. (Jefferson came to be a good friend, admirer, and supporter of Cooper's in later life,<sup>19</sup> once asserting that "Cooper is acknowledged by every enlightened man who knows him, to be the greatest man in America, in the powers of mind, and in acquired information; and that, without a single exception."<sup>20</sup>)

Cooper's libel prosecution stemmed from his anti-administration efforts, but indirectly. In 1797, Priestley had written to the newly elected Adams, with whom Priestley was at the time friendly, urging Adams to appoint Cooper to a federal post as the American agent before a board of commissioners for resolving disputes between the U.S. and England.<sup>21</sup> In 1799, when Cooper had become editor of the *Northumberland Gazette*<sup>22</sup> and an opponent of the administration, Cooper's enemies tried to use the application against him, arguing that his not getting the job is what turned him against Adams.<sup>23</sup> Cooper in turn responded with the handbill that formed the basis of his prosecution under the Sedition Act. The phrase "hardly in the infancy of political mistake" referred to why Cooper thought well of Adams in 1797; the remainder explained why Cooper had changed his mind.

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<sup>18</sup> COOPER, SOME INFORMATION RESPECTING AMERICA, *supra* note 11, at 52-53.

<sup>19</sup> See, e.g., MALONE, *supra* note \*, at 89-90, 164-69, 196-98, 223-46, 260-78.

<sup>20</sup> Letter from Thomas Jefferson to Joseph C. Cabell (Mar. 1, 1819), in EARLY HISTORY OF THE UNIVERSITY OF VIRGINIA, AS CONTAINED IN THE LETTERS OF THOMAS JEFFERSON AND JOSEPH C. CABELL 167, 169 (Richmond, J.W. Randolph 1856).

<sup>21</sup> See THOMAS COOPER, AN ACCOUNT OF THE TRIAL OF THOMAS COOPER OF NORTHUMBERLAND 5-7 (Philadelphia, John Bioren 1800); MALONE, *supra* note \*, at 87.

<sup>22</sup> MALONE, *supra* note \*, at 91.

<sup>23</sup> See *id.* at 103-06.

Cooper's libel was published in late 1799, but the prosecution came only some months later, following Cooper's continuing attacks on the Federalists. In particular, in 1800, anti-administration editor William Duane criticized the Senate Federalists' drafting of a proposed electoral count bill, and the Senate sought to try Duane for contempt of Congress. Duane asked Cooper and Alexander J. Dallas (who is known today chiefly as the reporter for the Supreme Court's earliest decisions) to serve as his counsel, but they publicly declined.

Cooper's reply was characteristically harsh. It began with "I have every inclination to render service to you and to your cause, but I will not degrade myself by submitting to appear before the Senate with *their gag in my mouth*" (referring to the limitations that the Senate was planning to impose on the arguments that counsel could make).<sup>24</sup> And it ended with "Where rights are undefined, and power is unlimited—where the freedom of the press is actually attacked, under whatever intention of curbing its licentiousness, the melancholy period cannot be far distant when the citizen will be converted into a SUBJECT."<sup>25</sup> This attack on the Senate Federalists seems likely to have prompted Cooper's prosecution for the earlier handbill.<sup>26</sup>

Cooper's six-month Sedition Act prison term did not dampen his passions. Within a month of being released, Cooper proceeded to New York to pursue Alexander Hamilton,<sup>27</sup> who was then Secretary of Treasury but who had publicly broken with Adams in a scathing pamphlet labeled *Letter from Alexander Hamilton, Concerning the Public Conduct and Character of John Adams, Esq., President of the United States*.<sup>28</sup> Hamilton, Cooper reasoned, had libeled Adams

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<sup>24</sup> Thomas Cooper, *Mr. Cooper's Answer*, MERCANTILE ADVERTISER (N.Y.), Mar. 29, 1800, at 2.

<sup>25</sup> *Id.*

<sup>26</sup> See MALONE, *supra* note \*, at 112–18.

<sup>27</sup> See *id.* at 136–42.

<sup>28</sup> ALEXANDER HAMILTON, LETTER FROM ALEXANDER HAMILTON, CONCERNING THE PUBLIC CONDUCT AND CHARACTER OF JOHN ADAMS, ESQ., PRESIDENT OF THE UNITED STATES (New York, George F. Hopkins 1800). See, e.g., *id.* at 7:

at least as much as Cooper had and thus likewise merited prosecution under the Sedition Act. As Cooper wrote to Hamilton in asking for an admission that Hamilton had indeed written the anti-Adams pamphlet,

Under [the Sedition Act], passed through the influence of a party, of which you are (and I think justly) regarded as the head, I have suffered six months tedious imprisonment, and paid a fine of 400 dollars. I therefore have a right to retaliate: I have a right to try the experiment, whether *Republicanism* is to be the victim of a law, which *Aristocracy* can break through with impunity.— There have been many petty offenders in this respect among what is called the Federal party; but I have nothing to do with the Fenos, the Waynes and the journeymen of federalism. You are worth trying the experiment upon.— Your energy and your talents have rendered you a conspicuous object of praise and blame.<sup>29</sup>

Cooper's call for prosecution of Hamilton went nowhere legally, but it did attract a good deal of public attention.<sup>30</sup>

Cooper's suffering for the democratic cause understandably enhanced his reputation among the now-triumphant Democrats. He was quickly appointed to the important Pennsylvania state

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This scrutiny enhanced my esteem in the main for his [Adams's] moral qualifications, but lessened my respect for his intellectual endowments. I then adopted an opinion, which all my subsequent experience has confirmed, that he is a man of an imagination sublimated and eccentric; propitious neither to the regular display of sound judgment, nor to steady perseverance in a systematic plan of conduct; and I began to perceive what has been since too manifest, that to this defect are added the unfortunate foibles of a vanity without bounds, and a jealousy capable of discolored every object.

<sup>29</sup> NATIONAL INTELLIGENCER (Wash., D.C.), Nov. 21, 1800, at 3 (reprinting Cooper's letter, which Hamilton had passed along for newspaper publication), as reprinted in MALONE, *supra* note \*, at 141–42. Fenno and Wayne were pro-Federalist newspaper editors of the era. See MALONE, *supra* note \*, at 142 nn. 77–78.

<sup>30</sup> See, e.g., 10 ANN. CONG. 952–58 (1801) (speech of Harrison Gray Otis on the Sedition Act).

commission on the Luzerne land claims,<sup>31</sup> and in 1804 he was appointed the presiding judge of the third district of Pennsylvania.<sup>32</sup>

After being removed from the judgeship in 1811, chiefly as a result of internal Pennsylvania politics,<sup>33</sup> Cooper became a professor. He began by teaching chemistry at Carlisle College (now called Dickinson College) and the University of Pennsylvania, and then went to South Carolina College, now the University of South Carolina, where he served as president and also taught chemistry and economics. Throughout his academic and pre-academic career, Cooper was an influential scholar as well as a teacher, administrator, and public commentator: among other things, he was the author of the earliest American treatise on bankruptcy law (1800, written while Cooper was in prison for sedition),<sup>34</sup> the author of one of the earliest American treatises on the law of insanity (1819),<sup>35</sup> the editor of the earliest American edition of the *Institutes of Justinian* (1812),<sup>36</sup> the author of “[a] pioneer American work”<sup>37</sup> on economics

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<sup>31</sup> MALONE, *supra* note \*, at 150.

<sup>32</sup> *Id.* at 174.

<sup>33</sup> *See id.* at 206–08.

<sup>34</sup> THOMAS COOPER, *THE BANKRUPT LAW OF AMERICA, COMPARED WITH THE BANKRUPT LAW OF ENGLAND* (Philadelphia, J. Thompson 1801) (cited in over twenty Westlaw-accessible cases from 1802 to 1850).

<sup>35</sup> THOMAS COOPER, *TRACTS ON MEDICAL JURISPRUDENCE* (Philadelphia, James Webster 1819) (cited in over ten Westlaw-accessible cases from 1819 to 1850). Cooper was also one of the founding directors of the Lunatic Asylum of South Carolina. *See* MALONE, *supra* note \*, at 279.

<sup>36</sup> THOMAS COOPER, *INSTITUTES OF JUSTINIAN, WITH NOTES* (Philadelphia, P. Byrne 1812) (cited in over one hundred Westlaw-accessible cases from 1812 to 1900).

This was the first true American edition of the *Institutes* and was . . . frequently reprinted. It is this translation (which, in fact, is a crib from [George Harris’s 1756 translation]) that was found in virtually every American private and public law library of the period and was a frequently cited source for Roman legal rules. . . . If a lawyer or judge wanted to study a point of Roman law, he was inclined to do so in the most accessible form: the Harris/Cooper edition of the English translation of the *Institutes*.

M.H. Hoeflich, *Legal History and the History of the Book: Variations on a Theme*, 46 U. KAN. L. REV. 415, 424 (1998); *see also* R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649, 1655 (1992); M.H. Hoeflich, *Roman Law in American Legal Culture*, 66 TUL. L. REV. 1723, 1736 & n.32 (1992)



(1830),<sup>38</sup> the author of a considerable number of works on chemistry,<sup>39</sup> and the editor of the first five volumes of *The Statutes at Large of South Carolina* (1836–39).<sup>40</sup>

Jefferson had also arranged for Cooper's appointment at the new University of Virginia that Jefferson had founded, but Cooper had to resign before assuming the office.<sup>41</sup> The cause for that resignation, and his eventual resignation from South Carolina College, was Cooper's religious views, coupled with his outspokenness and pugnacity in expressing them.<sup>42</sup> Cooper was an outspoken materialist, and—while he believed in God—he did not believe in standard Christian precepts such as the immortality of the soul; he was also a sharp critic of the clergy, particularly Presbyterians.<sup>43</sup> Unorthodoxy of substance and harshness of tone are a dangerous combination, but one that was emblematic of Cooper's career and love for the intellectual and political fight.

Cooper's third major field of controversy (after democratic politics in the 1790s and religion throughout the latter decades of his life) involved states' rights and, unfortunately, slavery. From 1823 on, Cooper was a leading academic and public proponent both of states' rights and the possibility of secession; in 1827, he publicly urged South Carolinians to "calculate the value of the Union," and

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(labeling Cooper as "one of the most interesting and least known legal scholars of this period"); MALONE, *supra* note \*, at 223 & n.39 (discussing Jefferson's praise for the work, and the material additions in Cooper's work compared to the Harris translation on which he built).

<sup>37</sup> MALONE, *supra* note \*, at 405.

<sup>38</sup> THOMAS COOPER, LECTURES ON THE ELEMENTS OF POLITICAL ECONOMY (Columbia, Doyle E. Sweeny 1826).

<sup>39</sup> See, e.g., THOMAS COOPER, A PRACTICAL TREATISE ON DYEING, AND CALLICOE PRINTING (Philadelphia, Thomas Dobson 1815). In his early adulthood in England, Cooper was a partner in a calico printing firm. See MALONE, *supra* note \*, at 6.

<sup>40</sup> E.g., 1 THE STATUTES AT LARGE OF SOUTH CAROLINA (Thomas Cooper ed., Columbia, A.S. Johnston 1836); see MALONE, *supra* note \*, at 371–72. David J. McCord completed editorial duties on the fifth volume when Cooper fell too ill to continue the work. *Id.* at 372–73.

<sup>41</sup> See MALONE, *supra* note \*, at 227–45.

<sup>42</sup> See *id.* at 238–45, 350–63.

<sup>43</sup> See *id.* at 341–42.

to secede if the calculation came out against remaining.<sup>44</sup> And while much of his substantive disappointment with federal policies related to trade and the tariff,<sup>45</sup> he had also shifted from being an outspoken opponent of slavery early in his life<sup>46</sup> to becoming a defender of slavery in his late years.<sup>47</sup>

So Cooper was in general an important and fascinating figure throughout the early decades of America's existence—a major intellectual presence in many public debates, whether on the right side or the wrong. In this issue, the *Journal of Law & Liberty* is focusing on a particular period in Cooper's early career, 1799–1800, and a particular publication, Cooper's (and, in two instances, Elizabeth Ryland Priestley's) *Political Essays*. This period of Cooper's writing sheds especially valuable light on the debates of the era, especially the ferment over the Sedition Act and, more broadly, the then-emerging American constitutional order. The essays are a window on American political life as seen through the eyes of a man of exceptional intellectual ability and vigor. They fascinated me, and I hope they will likewise interest you.

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<sup>44</sup> See *id.* at 307–11.

<sup>45</sup> See *id.* at 308–10.

<sup>46</sup> See THOMAS COOPER, LETTERS ON THE SLAVE TRADE (Manchester, C. Wheeler 1787); COOPER, SOME INFORMATION RESPECTING AMERICA, *supra* note 11, at 3–4, 11, 218 (London, J. Johnson 1794).

<sup>47</sup> See, e.g., THOMAS COOPER, ON THE CONSTITUTION OF THE UNITED STATES, AND THE QUESTIONS THAT HAVE ARISEN UNDER IT 48–49 (1826).