

Law and Economics in the Creation of Federal Administrative Law: Thomas Cooley, Elder to the Republic

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Thomas McIntyre Cooley was sixty-three in 1887. He was then revered as a law teacher, widely admired as a judge, and famous as a legal scholar.¹ The esteem he enjoyed was exceeded by no person in American public life. When in 1886 he received his honorary doctorate from Harvard (as part of the celebration of the 250th anniversary of that institution),² he had completed all three careers that had brought him to that position of national esteem. He was, however, on the cusp of a fourth career that is the subject of this article.

COOLEY'S ADULT EDUCATION: CAPITAL V. LABOR

The Cooley embarking in 1887 on a career in administrative law was not the Cooley who moved from Adrian to Ann Arbor in 1858 to assume his new duties at the University of Michigan. Advanced in years, he had substantially modified the political views motivating his earlier careers.

Born and raised in upstate New York with meager formal education, he had come to Michigan in 1842 at the age of eighteen with a deep commitment to the radical Jacksonian politics dominating the rural region from which he came.³ He then regarded Jackson's bank veto message⁴ as a political text only slightly less sacred than the Declaration of Independence. Thus, he shared the widespread mistrust of government regulation of economic matters,⁵ not because he favored the aggregation of capital as

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1. Paul D. Carrington, *Law as "The Common Thoughts of Man": The Law Teaching and Judging of Thomas McIntyre Cooley*, 49 *Stan. L. Rev.* 495 (1997).

2. A Record of Commemoration, November 5 to November 9, 1886, On the Two Hundred Fiftieth Anniversary of Harvard College (Cambridge, Harvard University Press 1887).

3. For a comprehensive account, see Lester Harvey Rifkin, William Leggett, *Journalist-Philosopher of Agrarian Democracy in New York* (1951).

4. 2 A *Compilation of the Messages and Papers of the Presidents* 590 (J.D. Richardson ed., 1908).

5. The Jacksonian position on economic regulation was set forth at length in the three volumes of Theodore Sedgwick, *Public and Private Economy* (New York, Harper 1836-1839). Adam Smith's work, from which *laissez faire* economics drew expression, was likewise a

an indirect benefit to the working poor, for he opposed "the arrogance of wealth," but because, like most agrarians, he deemed it to be the mission of the government to protect from harm those who did the nation's work and raised the nation's children. He accepted the dictum of the Jacksonian equal rights doctrine—that farmers, laborers, mechanics, and shopkeepers and their families required for their own self-protection only laws assuring "Free Speech, Free Schools, Free Trade, and Free Labor."⁶ It was the Jacksonian faith that any more ambitious scheme of government regulation would almost surely be captured and used for the selfish advantage of those whom it purported to regulate.

Cooley had joined the Free Soil Party and then followed Lincoln into the Republican Party in 1860. He had secured election to his judicial office in 1865 as a Republican.⁷ But by 1880, he was repelled by the corruption and greed practiced by the party of Grant, Hayes and Blaine,⁸ and voted as a Mugwump Democrat in support of the presidency of Grover Cleveland. As a sitting judge, Cooley did not campaign for Cleveland, but Cleveland's campaign slogan, "a public office is a public trust," was an expression openly borrowed from Cooley.⁹ Cooley's unsteadiness as a Republican had contributed to his defeat in the election of 1885.

This drift away from the politics of his youth appears to have been caused, as ideological change so often is, more by Cooley's reactions to events than by any intellectual influence of others. But he had lived since 1858 in the academic community of Ann Arbor and had separated from his agrarian roots. Among those with whom he shared the nascent academic enterprise of the university in the 1860s were Andrew Dickson White¹⁰ and Charles Kendall Adams,¹¹ two political historians who would become eminent university presidents. White and Adams had been trained

reaction against the protectionist mercantilism practiced in 18th century England. Adam Smith, *An Inquiry into The Nature and Causes of the Wealth of Nations* (R.H. Campbell et al. eds., Liberty Classics 1981) (1776). Smith was himself no social Darwinist or eulogist for unrestrained predation by wealth. Jacob Viner, *Adam Smith*, in 14 *International Encyclopedia of the Social Sciences* 322, 327 (David L. Sills ed., 1968).

6. Alan R. Jones, *The Constitutional Conservatism of Thomas McIntyre Cooley: A Study in the History of Ideas* 47 (1987).

7. *Id.* at 207-91.

8. "Blaine, Blaine, James G. Blaine, continental liar from the state of Maine!" was a popular cry. See Mark D. Hirsch, *Election of 1884*, in 2 *History of American Presidential Elections 1789-1968*, at 1561 (Arthur M. Schlesinger ed., 1971). For a contemporaneous account of the Blaine-Cleveland campaign, see Frederick E. Goodrich, *The Life and Public Service of Grover Cleveland* 386-97 (New York, H. Hallett & Co. 1888).

9. T.M. Cooley, *Liability of Public Officers to Private Actions for Neglect of Official Duty*, 3 *So. L. Rev.* 531, 531 (1878).

10. His biography is Glenn C. Alschuler, *Andrew D. White—Educator, Historian, Diplomat* (1979). He remained a close, lifelong friend of Cooley. Jones, *supra* note 6, at 383.

11. This Adams founded the political science department at Michigan before following White to the presidency of Cornell. Anna Haddow, *Political Science in American Colleges and Universities, 1636-1900*, at 189-92, 205-08 (William Anderson ed., 1939). He concluded his career as the president of the University of Wisconsin.

in Germany, and shared the historical and cultural perspective on law and politics most explicitly advanced in this country by the antebellum scholar, Francis Lieber, a native of Germany.¹² Under their influence, Cooley also came to share the cultural relativism and pragmatism advocated by Lieber. Lieber was no Jacksonian, but he was a powerful advocate for some of the institutions favored by Jacksonians, notably the right to jury trial and the autonomy of local self-government.

In addition to being subjected to new intellectual influences, Cooley had by 1880 become increasingly concerned, and even alarmed, about industrial relations in the United States. While problems between capital and labor were not uncommon in earlier times, it was not until the 1870s that they attracted his concern. In 1873, a sharp depression had hit, and for the ensuing two decades and more, violent strikes were chronic. This turmoil provided the background from which federal administrative law emerged in 1887.

In 1875, it may be recalled, as much as a fifth of the nation's industrial workers were completely unemployed and without means, and many others were reduced to part-time employment. Textile workers and miners tried to strike, but their strikes were quickly broken, and their wages were cut.¹³ That year, the Pinkerton Company won a reputation for strike breaking by its private police; a tactic sometimes employed was to secure convictions of labor leaders on false evidence of violent misconduct.¹⁴ Miners thus deprived of leadership were dolefully singing, "we've been beaten, beaten all to smash."¹⁵

Railroad workers were also subjected to wage cuts. In 1877, there was an insurrection against the Baltimore & Ohio when its brakemen and firemen struck.¹⁶ They seized the depot at Martinsburg, West Virginia and

12. Lieber's most important works were Francis Lieber, *Legal and Political Hermeneutics* (William Hammond ed., 3d. ed. New York, F.H. Thomas & Co. 1880); Francis Lieber, *Civil Liberty and Self-Government* (Theodore Woolsey ed., De Capo Press 1972) (1852); and Francis Lieber, *Manual of Political Ethics* (Boston 1837). For a review, see Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 *J. Legal Educ.* 339 (1992). These works were revived in the late 1870s by distinguished editors. Paul D. Carrington, *William Gardiner Hammond and the Lieber Revival*, 16 *Cardozo L. Rev.* 2135, 2143 (1995). *Hermeneutics* was again revived in 1995 by the editors of the *Cardozo Law Review*. The article cited is part of a symposium that included the text of the 1875 edition of *Hermeneutics* prepared by William Gardiner Hammond of the University of Iowa. Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, with Remarks on Precedents and Authorities*, 16 *Cardozo L. Rev.* 1883 (1995).

13. 1 Philip S. Foner, *History of the Labor Movement in the United States: From Colonial Times to the Founding of the American Federation of Labor* 454-55 (1947).

14. See Frank Morn, *The Eye That Never Sleeps: A History of the Pinkerton National Detective Agency* 95 (1982) (noting that Pinkerton provided testimony and evidence that resulted in the hanging of many union members who had supposedly conspired to violence).

15. Harold W. Aurand, *Anthracite Coal Strike of 1875*, in *Labor Conflict in the United States: An Encyclopedia* 15, 15 (Ronald L. Filipelli ed., Garland Publishing 1990).

16. Gerard C. Eggert, *Railroad Strikes in 1877*, in *Labor Conflict in the United States: An Encyclopedia* 441, 442 (Ronald L. Filipelli ed., Garland Publishing 1990); see also Robert V.

stopped all trains. President Hayes dispatched troops. The leaders were arrested, but the insurrection spread, often with widespread public support, for there were many Americans who had reason to revile the managements of railroads. The Pennsylvania Railroad went out, and then the Erie. Some roads rescinded wage cuts, but the protest extended, soon reaching to California. When the militia was sent, they often fraternized with the strikers. But here and there were pitched battles between workers and police. Chicago exploded in violence; cavalry charged one crowd, killing twelve; soldiers who had been fighting Sioux on the frontier were brought to Chicago as reinforcements and scores more citizens were killed or wounded. A United States District Judge in Indianapolis declared that "society was disintegrating if it had not dissolved."¹⁷

In San Francisco, a meeting called to express support for railroad workers broke up in a race riot that stormed Chinatown and demolished Chinese laundries in the belief that the low wages of Chinese were causing low wages for others. The hoodlums were suppressed by a "pick-handle brigade"; one of the vigilante brigade's members was Denis Kearney, an Irish drayman who had acquired some wealth by uncertain means. After helping to suppress one mob, he decided to pursue a future at the head of another. He organized the Workingmen's Party in California and proposed to "wrest government from the hands of the rich and place it in the hands of the people."¹⁸

The disorders of 1877 predictably produced reactions. One was the advent of social Darwinism.¹⁹ In 1874, Herbert Spencer had published in England his *Study of Sociology* contending that wealth and poverty merely reflected the relative moral worth of individuals; his work was destined to sell well to prosperous Americans. Workers were said by his followers to deserve their poverty because they were lazy, thriftless, substance-abusing "folk who fell short in their adherence to middle-class Victorian sexual mores."²⁰ And if they did not deserve their fates, they were at best victims of a tragic destiny that none could prevent because it was biologically predetermined. Exponents of this view in America found support in the

Bruce, 1877: Year of Violence 74-76 (1959) (discussing the desperation felt by the workers of the B&O Railroad and explaining why Martinsburg, West Virginia became the outlet for this desperation).

17. Walter Nelles, *A Strike and Its Consequences—An Examination of the Receivership Precedent for the Labor Injunction*, 40 Yale L.J. 507, 522 (1931).

18. I Foner, *supra* note 13, at 490. See generally Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (1971) (describing in detail the clash between Chinese laborers and the white majority in California). Punished for breach of the peace, Kearney proclaimed himself "the voice of the people" and used his own hoodlums to abuse workers who failed to support him with enthusiasm. The Party succeeded in electing a mayor of Sacramento, but soon disintegrated amid allegations of racketeering. I Foner, *supra* note 13, at 490-93.

19. See generally Richard Hofstadter, *Social Darwinism in American Thought, 1860-1915* (Beacon Press 1992) (1944).

20. *Id.* at 11.

fatalism of two part-time economists, William Graham Sumner of Yale²¹ and Simon Newcomb of Johns Hopkins.²² Some took up residency among the founders of the academic discipline of economics emerging after 1870.²³

This truly "dismal science" evoked reaction among public lawyers and other members of the rising academic profession. Cooley, for one, recognized as legitimate the grievances of workers forced to compete with coolie labor, but as an old Jacksonian, he was also prone to blame the riots on the profligate subsidies given to western railroads, for these had called forth the invective of "sand lot orators," able to contrast what the government had done for bondholders with what it was allowing their representatives to do to laborers.²⁴ He explicitly rejected the Darwinist argument that low wages are the result of iron laws of political economy. It was not labor that needed awakening to the inevitability of economics, but capital that needed awakening to the moral duties accompanying citizenship in a republic.²⁵ He knew by 1879 the plight of the urban workers:

In the great cities arrogant wealth is here side by side with abject poverty; and here, honest industry wages its desperate warfare with want, perpetually doubtful of the result, and in many cases having the rewards of its hard labor doled out to it grudgingly as if it were a gratuity.²⁶

He regarded capitalists insisting on their legal rights to pay low wages and maintain dangerous or unhealthy working conditions as short-sighted pursuers of quick gain at the cost of long-term injury to self-interest as well as the public interest. "Peace," he said, could "never be based upon the triumph of capital over labor."²⁷

Cooley did not, however, oppose legislation to protect labor from capital, nor did he envision the Constitution as an impediment to legislative efforts reasonably designed to protect those too weak to bargain for a living wage.²⁸ Writing in 1884, he cautioned general readers that

21. His biography is Harris E. Starr, *William Graham Sumner* (1925).

22. Dorothy Ross, *The Origins of American Social Science* 110 (1991).

23. See W.W. Rostow, *Theorists of Economic Growth from David Hume to the Present with A Perspective on the Next Century* 153 & n.1 (1990) (explaining the post-1870 emergence of a new academic discipline brought about by nine historians of economic thought).

24. See Thomas Cooley, *Lecture IV, Johns Hopkins University* 40-41 (1878) (unpublished manuscript, on file in Box 7 of the Cooley Papers at the Bentley Library, University of Michigan).

25. See Thomas M. Cooley, *Labor and Capital Before the Law*, 139 *N. Am. Rev.* 503, 515 (1884) (suggesting ways that employers could and should improve the welfare of their workers).

26. Jones, *supra* note 6, at 219 n.33.

27. Cooley, *supra* note 24, at 512.

28. See Paul D. Carrington, *The Constitutional Law Scholarship of Thomas McIntyre Cooley*, — *Am. J. Legal Hist.* — (forthcoming 1998).

traditional constitutional protection of property from government could not be sustained:

[T]he benefit of this protection is reaped by those who have possessions, the Constitution itself may come to be regarded by considerable classes as an instrument whose office is to protect the rich in the advantages they have secured over the poor, and one that should be hated for that reason.²⁹

Searching for moral or religious constraints on the conduct of employers that would be more effective than legislation, Cooley came in the 1880s to admire the preaching of Washington Gladden, a Protestant minister whose Social Gospel movement was arrayed against the greed and materialism of industrial America.³⁰ That year, Cooley refused to address a large audience of Michigan capitalists whose anti-labor program he described as "absurd."³¹

The Knights of Labor were in the 1880s in the forefront of the struggle to reverse these allegedly predetermined effects on workers.³² At times, they proved so adept at using the boycott as an economic weapon that they were able to cause saloons to refuse beer to strikebreakers, and one worker in New Jersey lost his job at their behest because he lived with a brother who was deemed a strikebreaker.³³ In 1885, the Knights won an epic struggle over the Missouri Pacific Railroad, forcing the railroad to cancel wage cuts. This was followed by another victory in a Michigan lumber strike, and for a moment, the Knights surged in power and membership.³⁴

In 1886, the year of Cooley's canonization at Harvard, Chicago again erupted in labor violence. McCormick Harvester locked out 1400 workers. When they protested, police killed four. When thousands gathered in Haymarket Square to protest the killings, the police opened fire again.³⁵ Someone threw a bomb, killing a police officer. Eight labor organizers were tried for the bombing; they were convicted, not on any evidence that one of them had thrown the bomb, but on evidence that they had made inflammatory speeches inspiring the bomber. The jurors rendering the verdict had been specially selected by a bailiff designated by the

29. Cooley, *supra* note 24, at 514.

30. Jones, *supra* note 6, at 263. Gladden's book was *Applied Christianity: Moral Aspects of Social Questions* (Boston, Houghton Mifflin & Co. 1887). On the Social Gospel movement, see Charles H. Hopkins, *The Rise of the Social Gospel in American Protestantism, 1865-1915* (1940).

31. Jones, *supra* note 6, at 288.

32. The story of the Knights is told in Leon Fink, *Workingmen's Democracy: The Knights of Labor and American Politics* (1983).

33. 2 Philip Foner, *History of the Labor Movement in the United States: From the Founding of the American Federation of Labor to the Emergence of American Imperialism* 49 (1955).

34. *Id.* at 52-54.

35. See generally Paul Avrich, *The Haymarket Tragedy* (1984).

prosecutor; all of them were foremen in large factories. Judge Joseph E. Gary sentenced seven of the eight to hang.

Those in the labor movement protested vehemently, and they had support from many leaders of the bar. Leonard Swett, a former partner of Lincoln, signed the petition seeking review in the Supreme Court of the United States, but it was denied. Lyman Trumbull, a former United States Senator and political ally of Lincoln, and Stephen Gregory, later a president of the American Bar Association, joined in an unsuccessful effort to secure clemency. But there was widespread support for Judge Gary's action.³⁶ Four of the accused were hanged, and a fifth committed suicide in jail, if he was not killed by his jailers.

The Knights nevertheless continued their brief period of strength and influence. Among the principles advocated by the Knights was equal pay for equal work by women, and they deemed discrimination against Negroes "to be false to every principle" of their order.³⁷ They recruited black members even in the South where Knights' recruiters were threatened with lynching.³⁸ In 1886, while Chicago was in eruption, they boldly held a convention in Richmond, Virginia; many districts sent their black members to represent them.³⁹ Yet the Knights favored the exclusion of Chinese workers from the continent.⁴⁰

The Labor movement gained the support of some members of the academic profession. Among them were the emerging "new school" or "ethical" economists who opposed the "old school" of social Darwinists. The new school of economics was first led by Richard Ely, then at Johns Hopkins University, who in 1884 attacked the existing dogma in economics as English, hypothetical, inductive, and fatalistic. Ely proposed a new economics that would be German, realistic, deductive, and a service to suffering mankind.⁴¹

36. See, e.g., Anonymous, *Anarchy at an End: Lives, Trial and Convictions of the Chicago Eight* (Chicago, Gilbert S. Balwin 1886) (characterizing Judge Gary as generally able). For an account of political sentiments aroused by events in Chicago of that era, see Carl Smith, *Urban Disorder and the Shape of Belief: The Great Chicago Fire, the Haymarket Bomb, and the Model Town of Pullman* (1995). See also Bruce C. Nelson, *Beyond the Martyrs: A Social History of Chicago's Anarchists, 1870-1900* (1988) (focusing on the social history of Chicago's radical working class).

37. 1 Foner, *supra* note 13, at 510. Their journal editorialized in words prophetic of Martin Luther King, "the color of a candidate shall not debar from admission; rather let the coloring of his mind and heart be the test." *Id.* at 511 (quoting *Journal of United Labor*, August 15, 1880).

38. See generally Robert E. Weir, *Beyond Labor's Veil: The Culture of the Knights of Labor* (1996).

39. Melton Alonza McLaurin, *The Knights of Labor in the South* 131-148 (1978).

40. 2 Foner, *supra* note 33, at 58-59.

41. Richard T. Ely, *Past and Present of Political Economy*, in 2 *Johns Hopkins University Studies in History and Political Science* 143 (1884). For a brief account of this movement, its origins in Protestant theology, and its relationship to socialism, see Ross, *supra* note 22, at 98-122.

Among Ely's allies was Henry Carter Adams, then a young economist holding appointments at both Cornell and Michigan. While critical of Ely's professionalism,⁴² Adams joined the effort to transform economics into a reformist ideology.⁴³ They organized the American Economics Association in 1885. Among those invited to join was Washington Gladden, the leader of the Social Gospel movement. Among those not invited were Simon Newcomb and William Sumner.

Adams was at Michigan closely associated with Cooley. He was in the early '80s a Marxist-socialist, but he was also a pacifist who rejected confrontation and violence as the means to his social ends. His pacifism was shared by Cooley, who despite his anger at employers for their failure to perform their moral duties, was among those who approved the Haymarket convictions of defendants whom he presumed to be violent anarchists as well as bombers.⁴⁴

Henry Carter Adams was a strident supporter of the Knights. Indeed, his defense of the radical Knights of Labor marked him as so unreliable that he was in 1886 fired by Cornell,⁴⁵ then led by Cooley's friend and former colleague, Charles Kendall Adams. Despite his leftist leanings and his misadventure at Cornell, Henry Adams was tenured at Michigan, partly on account of Cooley's support.⁴⁶ The aged Cooley and young Adams became frequent dinner companions, and it seems likely that this relationship intensified Cooley's strong disapproval of the contemporary business morality favoring the reduction of costs by driving workers to the wall.

In 1886, Cooley disagreed with Adams in regard to the Knights, whom Cooley dismissed as demagogues willing to disturb the peace for their own advantage without producing benefits for their followers.⁴⁷ He published an article for general readers urgently recommending arbitration as the method for avoiding dangerous confrontations.⁴⁸ He also differed with Adams on the role of government, being less optimistic that the government could effectively diminish the suffering of the working poor.⁴⁹ As a Jacksonian, he continued to suspect that the rich or powerful would

42. Mary O. Furner, *Advocacy and Objectivity: A Crisis in the Professionalization of American Social Science, 1865-1905*, at 91 (1975).

43. *Id.* at 52-53.

44. Jones, *supra* note 6, at 290.

45. It was a half-time appointment; he was then teaching one semester each year at Cornell and one at Michigan.

46. For an account of Adams's career, see Furner, *supra* note 42, at 49-54, 70-79, 100-04, 128-42, 247-64. On Cooley's support of Adams, see Jones, *supra* note 6, at 286-87.

47. Jones, *supra* note 6, at 289-90.

48. Thomas M. Cooley, *Arbitration in Labor Disputes*, 1 *Forum* 310 (1886).

49. Among those who identified themselves with Lieber and who actively defended Ely in 1885 were Daniel Coit Gilman, the founding president of Johns Hopkins, Andrew Dickson White and Charles Kendall Adams, successive presidents of Cornell. On Ely's admiration for Cooley, see Jones, *supra* note 6, at 287 n.132.

subvert almost any state intervention that well-intentioned ethical economists might devise.

While Cooley shared many ideas with Henry Carter Adams and Washington Gladden, it was likely his faith in traditional democratic values that led him to change his mind about the role of law and government in economic matters. The agrarian world in which the dogma of Jefferson and Jackson had been framed, and in which Cooley matured, had given way to industrialization that greatly increased the opportunities for predation and diminished the ability of less resourceful citizens to protect themselves. The cataclysm foretold by Marx was increasingly visible on the horizon. That perception was an important stimulus to the Progressive politics beginning to germinate in Wisconsin, California, and New York in the last years of the century. Cooley was thus not only among the last Jacksonians, but also among the first Progressives.

THE RAILROAD CRISIS

While Cooley was expressing concern about the legal status of labor in America, he was also acquiring a professional interest in the nation's railroads on which so many workers were employed and which was destined to be the nation's first and premier regulated industry. In 1882, he became personally involved in railroad regulation,⁵⁰ and he increased his activity in that field after 1884, when he retired from the law school and turned his legal treatises over to other writers.

It is not easy today to comprehend the role that railroads played in the American economy, politics and culture in 1882. Robert Wiebe described the erosion of the "sovereignty" of "island communities"⁵¹ that occurred during Cooley's lifetime. Regionalization and then nationalization of markets caused by the roads deprived the small, familiar villages of their identities; local leaders were reduced in significance as their communities were made to seem provincial and even backward in the minds of their citizens. Thomas Haskell might have been describing Cooley and his generation when he observed that "individuals were deprived of the sense of boundless self-sufficiency characteristic of Jacksonian America and were encouraged to construe their own and other people's lives as a product of external circumstance."⁵² This was especially evident with respect to law and politics, for the communities that had given rise to

50. In that year, he wrote a letter to S.M. Collum, the chair of a Senate Committee on Interstate Commerce, declining to write on an issue troubling the Senator, but suggesting that "[s]omebody ought to write a paper on The Overlooked Moral Considerations Involved in the Railroad Problem." Letter from Thomas Cooley to S.M. Collum, Chair of Senate Committee on Interstate Commerce (Aug. 25, 1882) (on file in Box 7 of the Cooley Papers, Bentley Library, University of Michigan).

51. Robert S. Wiebe, *The Search for Order, 1877-1920*, at 44-45 (1967).

52. Thomas L. Haskell, *The Emergence of Professional Social Science* 37 (1977).

Jacksonian beliefs were impotent to regulate the influences or to limit the predations coming to them behind the iron horse.

In 1882, about a tenth of the nation's wealth was invested in railroads, but much of the other nine-tenths was at least partly attributable to what has been fairly described as a transportation revolution occasioned by the laying of rails.⁵³ At the time of Cooley's birth, goods or produce could be moved by wagon for about fifteen cents per ton-mile; water transport, where available, was a bit less than half the cost of surface transport, or still less if a steamboat had the benefit of a downstream run. By 1882, goods and produce were moved on rails for about a penny a ton-mile; wagons and steamboats had almost disappeared.⁵⁴

The availability and price of rail service were crucial to the welfare of virtually every business and every community.⁵⁵ In the early years, when the competition was horse-drawn, profits achieved monopolistic heights on almost every road. Gradually materializing was competition on longer carriages of goods that could be routed over alternate lines.⁵⁶ This competition could be ruinous, with rates falling in some places to the level of marginal costs, yielding no revenue with which to repay sometimes heavy indebtedness incurred in the building of the roads. On this account, some roads were doomed to fail.

A central and defining problem for railroads was that most of their costs were fixed capital costs, i.e., not variable with service delivered. In other words, most of the cost of moving a boxcar of grain from one point to another was incurred before the first boxcar was loaded. Not only were fixed costs high, but much of that represented an immovable investment permanently locked into whatever market conditions might develop at towns on its route. Moreover, the marginal cost of hauling the grain a longer rather than a shorter distance was very slight because there was little fuel expense incurred by adding more cars to a freight train. When it appeared that a load would otherwise be moved by a train on another road and therefore provide no revenue to a carrier, incentives were strong for each competitor to take whatever return it could achieve by cutting prices below the level needed to pay returns on the capital invested in incurring the fixed costs. Competition was especially severe for roads whose

53. See Albert Fishlow, *American Railroads and the Transformation of the Ante-Bellum Economy* 288-98 (1965) (describing the railroad's contribution to trade, transportation, and the expansion West); George Rogers Taylor, *The Transportation Revolution* 384-98 (1951) (discussing the effects of increased mass transportation on the nation's wealth and culture).

54. For a graphic presentation of this data, see Haskell, *supra* note 52, at 34. The Erie Canal stopped charging tolls in 1882. Edward C. Kirkland, *A History of Economic Life* (3d ed. 1951).

55. See Alfred Dupon Chandler, *The Railroads—The Nation's First Big Business* 25-40 (1965) (discussing the railroads' impact on agriculture, commerce, industry, and the economy in general).

56. It mattered little to most shippers whether their goods went from St. Louis to Chicago by way of St. Paul or Louisville, and the costs of providing services between those two points were about the same, whichever of many routes was taken.

competitors had become insolvent and were in receivership,⁵⁷ for the latter no longer had to pay a return on their fixed costs; such roads were therefore quite free to lower their rates to cover only their variable costs, a situation redolent of airline competition a century later.

Ruined railroads posed in turn a serious problem not only for their workers, but for farmers and other shippers when service was limited or discontinued. Some knowledgeable observers believed that the American railroad system was overbuilt; most recognized that there was what is now described as a market failure making competition inherently inefficient.⁵⁸ The roads were "either filthy rich or perpetually broke."⁵⁹ It was for such reasons that rails had been nationalized in most nations, including many not otherwise given to governmental ownership of enterprise.⁶⁰ Nationalization of the rails was advocated by the Populist Party that won support in western farm states in the 1890s.⁶¹ That idea, however, gained little support among the electorate in more settled regions.

The American railroads struggled to survive such feast-or-famine competition. One means of survival was differential pricing disfavoring shorter hauls where the marginal costs (of loading and unloading) were proportionally higher and where often a monopoly price could be charged. This practice enraged short haul shippers, many of whom were farmers. Another survival technique was the pooling of revenues, a form of cartel to reduce the vigor of price competition, but one that proved to be generally unstable because it depended on mutual trust between roads. Yet a third method of survival was merger of competitors.

Every freight pricing practice had secondary consequences for competition among shippers. Thus, the railroads' ability to ship grain long distances enlarged the farmer's market, but also brought in competing grain. New York merchants, like western farmers, favored a standard price per ton-mile because long-haul discounts enabled inland merchants to compete with them in ways previously impossible.⁶² Everywhere, shippers favored lower rates for themselves and higher rates for their competitors,

57. By 1895, one fourth of the nation's rail assets were in the hands of receivers. Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 *Yale L.J.* 1017, 1043 (1988); see also Charles Crowell, *Railway Receiverships in the United States: Their Origin and Development*, 7 *Yale Rev.* 319, 319 (1898) (noting that 21% of rail miles were in receivers' hands).

58. See, e.g., Charles Francis Adams, *The Railroad System, Chapters of Erie and Other Essays* 365-71 (New York, Henry Holt & Co. 1886) (examining the effects of competition and its concomitant business fluctuations on the rail system).

59. Hovenkamp, *supra* note 57, at 1044.

60. For early advocacy rate regulation, see Isaac F. Redfield, *Regulation of Interstate Traffic in Railways by Congress*, 27 *Am. L. Reg.* 11 (1874).

61. "From the prolific womb of governmental injustice," their 1892 platform stated, "we breed two great classes—tramps and millionaires." For a brief account of the Party, see Kirkland, *supra* note 54, at 432-36.

62. Lee Benson, *Merchants, Farmers, and Railroads: Railroad Regulation and New York Politics 1850-1887*, at 29-54 (1955).

and maintained relatively little interest in the absolute level of rates that could be passed on to consumers. There was no single solution attractive to all, no conception of fair pricing that could gain general assent.⁶³ Nor could there be agreement on the role of courts in any regulatory scheme: "[d]epending on whether the particular interest group perceived the agency as attuned to its concerns, the group either favored or opposed substantial judicial review, political independence of the commissioners and so forth."⁶⁴ Few public issues have aroused so widespread a demand for governmental intervention, or have allowed for so little agreement on what the substance of that intervention ought to be.

By 1880, the rates of most roads were regulated by the states, but only with respect to intrastate carriage of goods and passengers,⁶⁵ for the states were held constitutionally powerless to regulate interstate carriage.⁶⁶ At least some of this state regulation favored the interests of local users of roads and disadvantaged users in other states whose interests were of little concern to local regulators.⁶⁷

Cooley's first assignment as a railroad man was to serve (while still a judge) as one of the arbitrators to resolve disputes between roads and shippers over trunk line rate differentials to the major port cities of New York, Philadelphia, and Baltimore. His 1882 report touched on all these aspects of the railroad problem⁶⁸ and acknowledged that there was no rate structure that would be satisfactory to all the legitimate interests concerned. His balanced report was well-received by all of the many sides of the controversy.

In 1883, Cooley published an article reviewing the work of state railroad commissions as a response to abuses by wealthy owners "who are arrogant, overbearing, and reckless of the rights of others."⁶⁹ He agreed with Charles Francis Adams⁷⁰ that a regulatory commission should seek to

63. Edward A. Purcell, Jr., *Ideas and Interests: Businessmen and the Interstate Commerce Act*, 54 J. Am. Hist. 561, 561 (1967).

64. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189, 1207 (1986).

65. See Hovenkamp, *supra* note 57, at 1057-1062.

66. In 1886, the Supreme Court held that a state could regulate rates only if both terminal points were within the state. *Wabash St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 357 (1886) (qualifying an earlier more permissive holding in *Peik v. Chicago & N.W. Ry.*, 94 U.S. 164 (1877)); cf. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (holding that New York cannot grant monopolies that exclude out-of-state carriers).

67. See, e.g., *Smyth v. Ames*, 169 U.S. 466 (1898). In that case, Nebraska imposed unremunerative rates on local carriage. The roads had to cross Nebraska and could not refuse passengers or goods, and could remain in business only because the local traffic constituted but seven and a half percent of their business. *Id.* at 528-539.

68. Report of Messrs. Thurman, Washburne and Cooley, Constituting an Advisory Commission on Differential Rates by Railroads Between the West and the Seaboard (New York, Rusell Brothers, Printers 1882).

69. Jones, *supra* note 6, at 297 (quoting Railroad Commissions, Bullion (January 1883)).

70. Worthington Chaney Ford, *Charles Francis Adams*, in 1 Dictionary of American Biography 48 (Allen Johnson ed., 1928).

lead by moral suasion and publicity.⁷¹ In another article, he contended that rate regulation could be justified only in the absence of competition to restrain the abuse of monopoly power.⁷² He also explained to the public a constitutional obstacle faced by nineteenth century railroad regulation:

What is a fatal impediment to [the railroad's] control by law is, that the States and the nation have, in respect to it, a divided power; and while it is for the interest of the nation at large to encourage the competition which favors long hauls, it is for the interest of localities to make competition most active in short hauls. A State is therefore likely to favor legislation which compels proportional charges, or something near such charges, for all distances; but this, if it could be adopted and enforced, would preclude the great through lines of New York and Pennsylvania from competing at Chicago, St. Paul, and St. Louis in the grain-carrying trade of the Northwest, and would reduce such links as are wholly within a State, to the condition of mere local roads, compelled to make high charges or go into bankruptcy.⁷³

The next year, he wrote a technical piece explaining the business reasons for traffic pooling as a response to ruinous competition.⁷⁴

By 1885, the political pressure on Congress to regulate railroads was becoming irresistible. A committee of the Senate of the United States sought Cooley's advice. He urged caution, noting that the public had earlier been all too eager to favor railroads with unwarranted concessions, and might now be too eager to regulate them. He distinguished between those roads that were honorably managed to make them useful to both stockholders and the public, and others that were managed to the injury of both. He thought the most important objective of legislation should be to eradicate the practice of giving discriminatory rebates for the purpose of crushing competition, concluding with characteristic Jacksonian fervor:

It is a great public calamity when people in a free country are brought to believe that the tendency of public institutions is to make the strong stronger and the weak weaker.⁷⁵

When Cooley was defeated for re-election to the Supreme Court of Michigan in 1885, one of the opportunities presented to him was the presidency of a railroad at a salary many multiples of his combined former

71. See Kirkland, *supra* note 54, at 3-20 (discussing Adams's view that the only means by which a regulatory commission could avoid "corruption and stupidity" was to focus public opinion on its abuses).

72. Thomas M. Cooley, *State Regulation of Corporate Profits*, 137 N. Am. Rev. 205, 215 (1883).

73. *Id.*

74. T.M. Cooley, *Popular and Legal Views of Traffic Pooling*, Railway Rev. (Apr. 26, 1884), at 212.

75. Jones, *supra* note 6, at 300 (quoting T.M. Cooley's remarks in S. Rep. No. 46, at 13 (1886)).

salaries as a judge and as a professor.⁷⁶ A few years earlier, John Forrest Dillon had taken the eye-opening step of leaving the federal judiciary in Iowa to become a very highly paid General Counsel to the Union Pacific.⁷⁷ Cooley manifested no interest in such a move, although he would presumably have commanded an even higher price than Dillon.

In December, 1886, Cooley was appointed receiver for the Wabash Railway. In making this appointment, the United States Circuit Court discharged the receivers appointed earlier who had conducted the receivership for the benefit of the owner, the scion Jay Gould, to the disadvantage of bondholders. The court selected Cooley as a "symbol of integrity"⁷⁸ to manage the railroad to meet its indebtedness.

1887

By 1887, Cooley was burdened with substantial impediments of age. The preceding year, he had begun to suffer from chronic and sometimes acute depression.⁷⁹ The cause of his depression was never diagnosed. His illness might have been associated with organic deterioration, or long decades of overwork, or the sudden deprivation of his longstanding work commitments as teacher, judge and scholar, or his discomfort with the public events of the time, or his gradually failing health, or that of his wife of forty years, or more likely, a combination of some or all these.

One did not have to be afflicted with these burdens of aging to be depressed by the state of affairs in 1887. America was a glum place. The frontier was closing and with it the mythic opportunities it afforded to all having the desire and energy to exploit them. As noted, the advent of industrialization had brought new opportunities for the amassing of great wealth extracted from the labors of a new proletariat having no visible means of escaping grinding urban poverty,⁸⁰ while socioeconomic theorists were professing the inevitability of oppression in a Darwinist war of all against all.⁸¹

76. *Id.* at 252.

77. Dillon was born in 1831 in New York but grew up on the Iowa frontier. He had been an elected judge in Iowa and a law teacher at the University of Iowa when he was appointed to the federal bench in 1869. Like Cooley, he was a treatise writer. His major work was his *Treatise on The Law of Municipal Corporations* (Chicago, James Cockcroft & Co. 1872), but he was also well known for his *Removal of Causes from State Courts to Federal Courts* (St. Louis, G.I. Jones & Co. 1876). In 1879, he resigned from the bench to take the position with the Union Pacific, and also a faculty appointment at the Columbia University School of Law. For a brief account of his career, see *A History of the School of Law, Columbia University 84-85* (Julius Goebel ed., 1955). Dillon shares with Cooley and Tiedeman the distinction of being the object of attack by Clyde E. Jacobs, *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon upon American Constitutional Law* (1954).

78. Jones, *supra* note 6, at 303.

79. *Id.* at 291.

80. Wiebe, *supra* note 51, at 47.

81. See, e.g., William Graham Sumner, *What Social Classes Owe to Each Other* (1920);

Industrial pollution was becoming a menace to both rural and urban landscapes.⁸² The manufacture and sale of worthless medicines⁸³ was only one of many scams perpetrated on the public. And, as noted, many industrial workers and their families were exposed to horrifying work hazards or suffering cuts in wages needed by their employers to sustain high profit margins.⁸⁴ Harsh means were employed to break unions.

Politics was increasingly a game played by the wealthy and the cynical; for twenty years and more, the nation's politics and law had been given over to the greed and mendacity of some of its most aggressive and resourceful citizens. Corruption in government had reached epic levels awaiting the revelations of Lincoln Steffens and the muckrakers.⁸⁵ Public officials had begun to discover the rewards of mortgaging the future with public debt to pay for present enjoyments.⁸⁶

Random criminal violence was beginning to make its appearance in newly urbanized communities;⁸⁷ a President of the United States⁸⁸ and a mayor of Chicago⁸⁹ had recently been murdered by persons seemingly motivated by revenge for their failure to secure public employment.

Meanwhile, the efforts to reconstruct the former slave states had come to an end,⁹⁰ and the oppression of the former slaves and their descendants was becoming increasingly open and shameless.⁹¹

THE CHAIRMANSHIP

At such a troubled time, the aged and failing Cooley was called to shape and direct the effort of the federal government to respond to the social and economic crisis centered on the railroads. The Interstate Commerce Act was signed by President Cleveland on February 4, 1887;⁹²

William Graham Sumner, *Folkways: A Study of the Sociological Importance of Usages* (1906).

82. See Gifford Pinchot, *The Fight for Conservation* 3-11 (1910) (discussing the effect of coal emissions on community and forest areas).

83. See Paul Starr, *The Social Transformation of American Medicine* 49-59 (1982).

84. I Foner, *supra* note 13, at 48-64.

85. See generally Joseph Lincoln Steffens, *The Shame of the Cities* (1904) (demonstrating the effects of political greed and corruption in various American cities circa the late 1880s).

86. See, e.g., John M. Keating, *History of the City of Memphis and Shelby County, Tennessee* 32-33 (1888).

87. Blake McKelvey, *The Urbanization of America, 1860-1915*, at 92-94 (1967).

88. James A. Garfield (1831-1881); his biography is Alan Peskin, *Garfield: A Biography* (1978). For an account of his murder, see Charles E. Rosenberg, *The Trial of Assassin Guiteau: Psychiatry and Law in the Gilded Age* (1968).

89. For an account of the mayor's murder, see 3 Bessie Louise Pierce, *A History of Chicago 1871-1893*, at 378-79 (1957).

90. See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 580-82, 586 (1988) (describing the growing power of an increasingly conservative Republican Party in the late 1870s and the disappearance of the commitment to equal citizenship that characterized Reconstruction).

91. See *id.* at 588-601 (elaborating upon the success of Southern political campaigns that resulted in the repeal of numerous Reconstruction-era regulations).

92. 24 Stat. 379.

it was a major event in the political life of the country, for it was the federal government's first substantial step into the arena of business regulation.⁹³ It established the Interstate Commerce Commission (the Commission) and authorized that body to regulate interstate rail transport, but with limited powers.⁹⁴ The Commission was the first of the important federal regulatory agencies to be created, and it established a pattern for others:⁹⁵

It was not the product of a concerted reform movement. It did not reflect a coherent ideological approach to railroad regulation. And it was not one element in a more broadly perceived political agenda. Instead, [it] addressed a discrete set of immediately pressing problems in an equivocal fashion that reflected the difficult process of hammering out legislative compromise.⁹⁶

When it came to White House selection of the Commission's five members, there was a free-swinging imbroglio between diverse railroads (and their investors) and diverse users. What the President needed was someone, or five someones, who would apply the vague general policies established by Congress in "the coldest neutrality."⁹⁷ On advice from all sides, President Cleveland importuned Cooley to serve as founding chair.

93. The regulation of railroads was a major objective of Grange and Populist politics. Richard D. Stone, *The Interstate Commerce Commission and the Railroad Industry: A History of Regulatory Policy* 6 (1991). Early regulation was conducted by state agencies. *See, e.g.,* Benson, *supra* note 62, at 2. The creation of a national program of regulation was necessitated by a holding of the Supreme Court limiting the power of the states over interstate transportation. *See* *Wabash Ry. v. Illinois*, 118 U.S. 557, 575 (1886) (holding that Congress has exclusive regulatory control over "commerce among the states"). For a brief account of the early history of the Commission, see Frederick N. Judson, *The Law of Interstate Commerce and Its Federal Regulation* 49-54, 58-60 (1905).

94. The author of the definitive treatise on the Commission observed:

[T]he powers . . . conferred upon the Commission by the original legislation were found to be restricted in scope and feeble in effect . . .

Almost from the beginning the Commission encountered serious obstacles in the performance of its functions. Unwilling witnesses successfully took refuge in constitutional guaranties as a means of withholding essential testimony from the Commission. Moreover, at almost every step, the Commission was hindered by the open hostility of the railroads and the unsympathetic attitude of the courts. The carriers strove vigorously to discredit the Commission, and the courts, consciously or unconsciously, aided and abetted them in this purpose. The fact that the Commission was compelled to take the initiative for the enforcement of its orders, and that its rulings became binding only upon being judicially sustained by the court of last resort, not only left the carriers free to ignore the Commission's orders, but afforded ample opportunity to the courts to become the real arbiters of all contested issues.

1 I.L. Sharfman, *The Interstate Commerce Commission: A Study in Administrative Law and Procedure* 23-24 (1931).

95. *See* James M. Landis, *The Administrative Process* 10 (1938) (discussing generally the creation of the Interstate Commerce Commission).

96. Rabin, *supra* note 64, at 1207-1208.

97. *Interstate Commerce Comm'n v. Chicago, Rock Island, & Pac. Ry.*, 218 U.S. 88, 102 (1910).

Reluctant for reasons not only of his own health, but also that of his wife, Cooley nevertheless answered the call. The appointment was widely hailed as one establishing the integrity of the Commission,⁹⁸ with one observer exulting that "the most daring experiment in constitutional law has been entrusted to the first constitutional lawyer of the country."⁹⁹ At the first meeting of the Commission, Cooley was promptly elected to the chair. During the first three years, when Cooley's health remained adequate, the other commissioners regularly deferred to him on most matters.¹⁰⁰

Cooley was, of course, aware that the unsettled aims of the Commission, however the conflicts among them might be resolved, were impossible of attainment with the modest powers conferred on the agency. He had long conceded a need for public regulation of at least some kinds of businesses for the purposes of restraining predation. In his 1870 opinion in *People v. Salem*,¹⁰¹ the least cautious constitutional decision of his court, he had proscribed public subsidies for railroad construction, but acknowledged the public's need to confer on some private businesses such as railroads the power of eminent domain. He recognized that such rights when conferred must be accompanied by enforceable duties to the public. In this respect, as in others, he adhered to the dictum of Lieber that all rights carry duties.¹⁰²

Cooley was mindful that there are private stakes in public policies, and that the line between public and private interests is elusive.¹⁰³ The need to draw such a line was widely observed in 1872 when the Supreme Court of the United States decided *Munn v. Illinois*.¹⁰⁴ Illinois had enacted a scheme of rate regulation for grain elevators. The owner of an elevator protested, citing Cooley's famous treatise on *Constitutional Limitations*,¹⁰⁵ and arguing that such rate regulation denied him "equal rights," there being no satisfactory distinction between grain elevators and any other business. The Supreme Court upheld the state regulation, holding that businesses "affected with a public interest," such as grain

98. 2 Sharfman, *supra* note 94, at 459.

99. Henry A. Chaney, *The Supreme Court of Michigan*, 2 Green Bag 377, 391 (1890).

100. Jones, *supra* note 6, at 309, 316.

101. 20 Mich. 452 (1870).

102. 1 Manual of Political Ethics 386 (Theodore D. Woolsey ed., 2d ed. Boston, Freeman & Bolles 1875) (stating that rights without corresponding duties leads to absolutism); Francis Lieber, Address at Columbia Law School (Oct. 10, 1859), in 1 Miscellaneous Writings of Francis Lieber 369 (Daniel Coit Gilman ed., Philadelphia, J.B. Lippincott & Co. 1880).

103. Cooley was, however, far from accepting the later conclusion of Richard Sennett that there is no distinction to be drawn between the public and private self. See Richard Sennett, *The Fall of Public Man* (1977). For more recent and contemporary comment on the problems with the distinction, see Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L.Q. 8 (1927); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 71 (1988); Louis L. Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 212 (1937); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 643-647 (1985).

104. 94 U.S. 113 (1877).

105. *Id.* at 120.

elevators, might constitutionally be singled out for such controls. In 1878, Cooley published an article commenting on the decision.¹⁰⁶ While he did not question the result in *Munn*, he questioned the vacuous breadth of the term, "affected with a public interest," agreeing with the owner of the elevator that the public has some stake in the conduct of most if not all business.¹⁰⁷ But some enterprises did need to be regulated; thus, in the same article, he expressed agreement with a then recent Wisconsin decision holding that railroad rates might be regulated by the state without regard for provisions in the roads' corporate charters.¹⁰⁸ A few years later, he published another article for a general readership in which he explained that exceptionally high profits resulting from monopoly pricing could properly be taken into account in setting rates on public services facilitated by the power of eminent domain or by patent protection for new inventions.¹⁰⁹ Thus, in earlier years, Cooley had accommodated his Jacksonian politics to the concept of public utility regulation, but his approval of the idea was characteristically cautious.

Congressional diffidence about the wisdom of its dramatic step was manifested by its failure to confer a subpoena power on the Commission. On this account, the Commission lacked the ability to conduct an effective investigation of matters for which it had regulatory responsibility; it was substantially compelled to act on the basis of presentations of data made voluntarily by the roads.¹¹⁰

The Act was also pitifully ambivalent in prescribing the regulatory aims it directed the Commission to pursue. As we might expect, Congress was trying to respond to diverse and conflicting political pressures. Some roads sought regulation as protection against competition, while others saw benefits to themselves in remaining unregulated on the long hauls. Among those who wanted to be regulated, there was little agreement as to form or substance of the regulation that ought be applied. Many shippers also sought regulation as protection against the sometime monopoly power of the roads, but there were equally sharp conflicts of interest amongst shippers who were as concerned with the rates charged their competitors as with rates they were themselves required to pay. Trunk line passengers had interests that conflicted with those who rode on local trains. It was also recognized that consumers and workers had a stake in the regulatory issues, but even they were not united in their interests.

106. T.M. Cooley, *Limits to State Control of Private Business*, 1 Princeton Rev. 233 (1878).

107. For an endorsement of Cooley's view of *Munn*, see Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* 87 (1937).

108. *Attorney Gen. v. Chicago N.W. Ry.*, 35 Wis. 425 (1874).

109. Cooley, *supra* note 72.

110. This ability was soon supplied, but the Congressional authorization was challenged as unconstitutional. The statute was upheld in *Brown v. Walker*, 161 U.S. 591 (1896).

A REGULATORY PROGRAM ESTABLISHED

Cooley laid out a pattern of regulation based on the Act and resonating with Jacksonian notions of Equal Rights. The Commission did not at the outset undertake the task of setting long-haul rates, a task made Herculean by the complex economics of railroading and the constitutional division of authority between state and federal governments, and also by the random presence of unregulated non-rail competition on rivers and canals. However, the Commission established a requirement that rates be filed and the same for all shippers and passengers equally situated. And it entertained complaints by shippers that particular rates were excessive. In 1890, to the dismay of the roads, it ordered a reduction of rates on the carriage of grain in the midwest.¹¹¹

Although Cooley had in his 1883 article explained the economic benefits sometimes associated with long-haul "discrimination," his Commission, obedient to the aims of Congress,¹¹² proscribed the practice,¹¹³ even where the discrimination was a response to predatory pricing by a competitor.¹¹⁴ The Commission cracked down on rebates for large shippers,¹¹⁵ and on the issuance of free passes to preferred passengers,¹¹⁶ a group that often included judges and others engaged in law enforcement. It effectively proscribed discrimination against Negro passengers,¹¹⁷ allowing separation only where the accommodations were identical,¹¹⁸ a condition that could rarely be met. It also, in accordance

111. *In re Alleged Excessive Freight Rates and Charges on Food Products*, 4 I.C.C. 96 (1890).

112. Section 4 of the 1887 Act forbade railroads to "charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line." 24 Stat. 380 (1887).

113. *In re Southern Ry. & S.S. Ass'n*, 1 I.C.C. 278 (1887). The complaint was filed on April 5, the day the Act took effect, and was decided on June 15. See generally Ralph L. Dewey, *The Long and Short Haul Principle of Rate Regulation 65-73* (1934).

114. *In re Louisville & Nashville R.R.*, 1 I.C.C. 279 (1887). This decision was overruled in *Interstate Commerce Comm'n v. Alabama Midland Ry.*, 168 U.S. 144 (1897), holding that competitive pricing created dissimilar "circumstances and conditions." The latter decision resulted in an amendment of the statute making explicit that the result earlier reached by the Cooley commission was the national law. 2 Sharfman, *supra* note 94, at 443.

115. See, e.g., *Providence Coal Co. v. Providence & Worcester R.R.*, 1 I.C.C. 363, 366 (1887) (finding a promise of a discount deceptive where it was not connected to a purported condition of "quick dispatch").

116. Cooley spoke to this subject at Harvard in 1889; his remarks are reported in the *Railroad Gazette*, May 10, 1889.

117. In these decisions, the Commission relied on Section 3 of the Act that prohibited "any undue or unreasonable prejudice or disadvantage" to any passengers. E.g., *Councill v. Western & Atlantic R.R.*, 1 I.C.C. 638, 641 (1887). The Commission also relied in part on the Civil Rights Act of 1875, ch. 114, § 1-2, 18 Stat. 335.

118. See, e.g., *Heard v. Georgia R.R.*, 1 I.C.C. 719, 721 (1888) (holding that passengers paying the same fare are entitled to travel in the same character of car and to receive the same comforts and conveniences); *Councill*, 1 I.C.C. at 638 (discussing rights of men of different races to accommodations substantially equal to those of passenger's paying the same

with the Act, proscribed traffic pooling, again despite Cooley's personal opinion that the practice was sometimes necessitated by the diseconomies of competition. It even opposed the proposed repeal of the statutory restraint on pooling,¹¹⁹ despite the earnest entreaties of the roads that such pooling was necessary,¹²⁰ as Cooley had himself suggested in his writing in 1883.¹²¹

Although its policies disfavoring pooling and long-haul discrimination were injurious to the roads, the Commission acknowledged a responsibility to assure a reasonable return on investments made in building the roads, for disinvestment in them would disserve everyone. But the Commission was powerless to overcome the economic pressures driving the value of many local roads so low that they were cheaply acquired by the railroad monopolists such as Harriman, Hill, Morgan and Vanderbilt, who emerged in the early years of this century to build extended empires by acquiring and uniting failing roads.¹²²

Cooley's Commission sought,¹²³ but did not receive until 1920,¹²⁴ authority to regulate intrastate traffic.¹²⁵ Some of its policies were restrained by the courts.¹²⁶ Some were modified by Congress. Some were indifferently enforced by later commissions. And the Commission was later criticized both for failing to assure an adequate return to railroads¹²⁷ and

fare). As a result, black citizens sometimes traveled in desegregated Pullman cars where every other facet of their social lives were segregated by local Jim Crow laws and practices. The Commission did, however, weaken in its resolve to enforce this standard after Cooley's retirement in 1891. See generally Barbara Young Welke, "All the Women are White; All the Blacks Are Men," Or Are They: Law and Segregation on Common Carriers, 1855 to 1914, at 143-145 (Am. B. Found. Working Paper No. 9215, 1992). It is sometimes forgotten that *Plessy v. Ferguson*, 163 U.S. 537 (1896), involved the use of separate but equal railroad cars, not separate but unequal public schools. Whatever may be said of the opinion of the Court in that case, or of the uses to which it was put in the half century after its utterance, the decision on its facts merely approved a practice that was for its time a modest advance in the status of freemen and their descendants.

119. See 2 I.C.C. Ann. Rep. 19-30 (1888) (emphasizing the need for railroads to better their relationship with the public absent any protective pro-railroad legislation).

120. Arthur T. Hadley, *Railroad Business Under the Interstate Commerce Act*, 3 Q. J. of Econ. 170 (1889).

121. E.g., Cooley, *supra* note 72.

122. See generally Edward G. Campbell, *The Reorganization of the American Railroad System 1893-1900* (1938) (describing the consolidation of the railroads at the close of the 19th century).

123. See 3 I.C.C. Ann. Rep. 73-75 (1889) (arguing for the regulation of intrastate railway traffic because of its effects on interstate commerce).

124. Act of Feb. 28, 1920, Pub. L. No. 91-152, 41 Stat. 456.

125. For an argument for continuation of state regulation by one of Cooley's students, see Henry Wade Rogers, *The Constitution and the New Federalism*, 188 N. Am. Rev. 321 (1908).

126. The Commission experienced many defeats in the Supreme Court in the early years of the century. William Z. Ripley, *Railroads: Rates and Regulation* 463 (1912).

127. See Albro Martin, *Enterprise Denied* 153-54 (1972) (noting that the Interstate Commerce Commission was criticized for being unable to provide a rate structure that allows for efficient economic growth).

for failing adequately to protect shippers and consumers.¹²⁸ Sometimes, these criticisms were made almost in one breath.¹²⁹

The charge was also later made that the Commission had been captured by the railroads, an accusation that rested on the assumption that the only function of the Commission was to protect shippers and consumers from predation by the roads, an assumption further supposing that shippers and consumers had no stake in the economic health of their roads. Doubtless there were many advocates of national regulation of the railroads who hoped thereby to secure markedly lower rates on interstate consignments; perhaps, as Charles and Mary Beard assumed, some of them thought that the 1887 Act marked the capture of a stronghold of public enemies; if so, the Beards were right that such persons deluded themselves.¹³⁰ Herbert Hovenkamp has recently observed that such critics often lacked understanding of the economics of railroads and the difficulties presented by state-federal relations, matters "far better" understood by Cooley "than many of the historians who have written about it since."¹³¹ The circumstances precluded the possibility that "discrimination" in rates could be eliminated; inevitably remaining as victims would be those who were disfavored by whatever rates might be established. Virtually irresistible were the pressures on some roads to respond to some demands of some large shippers even though contrary to the Commission's policy.

Another objective of immediate concern to the Commission was safety in travel. By 1889, carnage on the roads was a national problem.¹³² In 1879, Cooley in his *Torts* treatise had explained and justified such common law principles as the fellow servant rule that operated to deny compensation to industrial workers injured in their employment.¹³³ But a decade later, he was no longer willing to rely on the benign motives of

128. See, e.g., Gabriel Kolko, *Railroads and Regulation: 1877-1916*, at 97 (1965) (quoting James A. Logan, the general solicitor of the Pennsylvania Railroad in 1901, for the proposition that greater power should be given to the I.C.C. in order to more effectively protect shippers and consumers). See also Charles A. Beard & Mary R. Beard, *The Rise of American Civilization* 566-568 (1928) (stating that much of the criticism levied on the I.C.C. was due to the fact that adverse court rulings had, in effect, stripped the I.C.C. of the power to fix rates for carrying passengers and freight); Harold W. Faulkner, *The Decline of Laissez-Faire 1897-1917*, at 187-191 (1962) (arguing that the I.C.C.'s inability to force witnesses to give material testimony and courts' unwillingness to accept the Commission's findings of fact severely handicapped the Commission in protecting shippers and consumers); Edward C. Kirkland, *A History of American Economic Life* 286-301 (1932).

129. E.g., Kirkland, *supra* note 128. Kirkland chastises the ICC for failing to prevent discrimination and other abuses, *see id.* at 187-91, for failure to prevent consolidation, *see id.* at 191-98, and for neglecting the interests of the carriers and for insisting on competition, *see id.* at 209.

130. Beard & Beard, *supra* note 128, at 566.

131. Hovenkamp, *supra* note 57, at 1025-26.

132. Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 *Am. B. Found. Res. J.* 351, 353 (1987).

133. Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs which are Independent of Contracts* 541-545 (Chicago, Callaghan 1879).

industrialists and the self-interest of workers to promote public safety. In that year, the Commission conducted a national conference on the problem,¹³⁴ initiating an impulse that led to enactment of the Federal Safety Appliance Act of 1893¹³⁵ requiring all roads to maintain equipment and thereby reasonably assuring the safety of workers and passengers.

In 1891, at the end of his career as chairman, Cooley recommended federal legislation to provide for the compensation of injured railway workers.¹³⁶ Cooley's 1891 recommendation was adopted in the Federal Employers' Liability Act of 1906.¹³⁷

AN ADMINISTRATIVE PROCESS CREATED

Cooley's major contribution as chairman of the Commission had less to do with the substance of railroad regulation or the rights of passengers, shippers, and workers than with the creation of an administrative style and process that would guide future national institutions. Three features of his Commission have been emulated, or at least held out as a model for emulation.

First, his Commission sought to resolve problems by mediation, avoiding wherever possible the use of the lash of its adjudicative power. It eschewed the power to make compensatory awards of damages as one likely to lead to constitutional problems related to the right to trial by jury, turn the Commission into a police or small claims court, and diminish its moral influence.¹³⁸ These positions reflected Cooley's view (shared by the Christian ethicist, Gladden) that the chief problem was one of business morality. During these years, Cooley traveled much, speaking to railroad men wherever they gathered, and always adjuring them to higher standards of conduct in their performance of duties to all shippers, passengers, and shareholders. He spoke, he said, "as a clergyman might."¹³⁹ In this respect, he honored the advice of Henry Carter Adams, now on his staff at the Commission, who urged that it was a duty of the government to set the standards for industrial morality.¹⁴⁰ The Commission's conduct also

134. 1 Sharfman, *supra* note 94, at 246.

135. 27 Stat. 531, 45 U.S.C. § 7 (1893), *repealed by* Pub. L. 103-273, § 7(b) (1994); revised, modified, and reenacted without substantive change in 49 U.S.C. § 20304.

136. 5 I.C.C. Ann. Rep 327 (1891).

137. Act of June 11, 1906, 34 Stat. 232 (1906).

138. 1 I.C.C. Ann. Rep. 27-28 (1887). Cooley wrote this report. He was concerned, among other things, with the right to jury trial under the Seventh Amendment and outlined the steps of such a proceeding before the Commission.

139. Jones, *supra* note 6, at 326. Cooley was supported in his moralizing by Charles Francis Adams, a Massachusetts lawyer, who endorsed "every word of indignant denunciation" uttered by the Chairman. *Id.*

140. See Henry Carter Adams, *Relation of the State to Industrial Action*, 1 Publications of the American Economic Association 465, 499-511 (1887) (describing government's role in securing the benefits of capitalism while at the same time guarding against the evils of a competitive society).

reflected Cooley's longstanding belief that the law could modify behavior only if it in fact nurtured and drew upon the moral sources of human conduct, an idea of German ancestry and voiced by Lieber, Andrew Dickson White, and Charles Kendall Adams.

Cooley's preaching was not without effect. Even later critics have acknowledged that the Commission was at first relatively effective in securing voluntary compliance with its policies by many roads.¹⁴¹ Reliance on moral suasion has since been a keystone of much of our national law, notably in the administration of labor law by the National Labor Relations Board¹⁴² and the Equal Employment Opportunity Commission.¹⁴³ In recent years, federal agencies, perhaps most notably the National Environmental Protection Agency, have made a regular practice of overtly mediating between regulated industries and public interest groups to secure regulatory standards acceptable to both groups. That practice is descended from those first employed by Cooley's Commission.

Second, Cooley developed the concept of a rulemaking process. His Commission was stunned by the opinion of the Supreme Court in *Chicago, Milwaukee and St. Paul Railway v. Minnesota*¹⁴⁴ holding that state ratemaking decisions are subject to de novo judicial review as rulings on questions of law.¹⁴⁵ This indicated that no weight would be given to the regulatory agency's decision when challenged by a railroad, each matter to be separately reconsidered anew by a court. The opinion of the Court, written by Justice Brewer, suggested that such review was required by the Due Process clause. Cooley, contending against this reading of the Constitution, argued that ratemaking decisions, like jury determinations of negligence, were too oriented to specific circumstances to admit of treatment as questions of law to be decided de novo by a traditional court.¹⁴⁶ Moreover, such intensive review conducted in diverse federal

141. *E.g.*, Faulkner, note 128, at 187.

142. The NLRB was created by the Labor Management Relations Act of 1947, §§ 201-204 (1947) (promoting a system by which employers and employees voluntarily settle disputes and maintain agreements on the grounds that it is in the best interests of the nation). Section 202(a) created the Federal Mediation and Conciliation Service. For a brief account, see Harry H. Wellington, *Labor and the Legal Process* 279-81 (1968).

143. *See* 29 U.S.C. § 626 (mandating that the EEOC encourage voluntary compliance through various means of institutional persuasion); *cf.* Increase Minority Participation by Affirmative Change Today of N.W. Florida, Inc. v. Firestone, 893 F.2d 1189 (11th Cir., 1990) (holding that plaintiff employee had standing to make a Title VII claim notwithstanding the fact that the claim was not part of the EEOC charge and despite the fact that the employee had not exhausted administrative remedies).

144. 134 U.S. 418 (1890).

145. *See id.* at 458 (holding that a state agency decision is "eminently a question for judicial investigation, requiring due process of law for its determination").

146. *See* 4 I.C.C. Ann. Rep. 15-20 (1890) (explaining that the regulatory agency is in a better position than the courts to examine the specific facts of each case). This was not a new position for Cooley. As a judge, he had contended that findings of fact by public officers with jurisdiction should be entitled to a presumption of accuracy. *Conrad v. Smith*, 32 Mich. 429, 437 (1875).

courts sitting in each federal district would severely impede the effort to maintain national consistency in the regulatory program. And it undermined the dignity of the Commission, making its proceeding a mere warm-up for the real proceeding to be conducted later in court.¹⁴⁷

In response to the threat of intensive judicial review, Cooley proposed a procedure to protect disputants that he described as "administrative due process of law."¹⁴⁸ He urged that Commission decisions resulting from such a process ought with respect to its findings of fact be as final as jury determinations, a recommendation that was finally adopted by Congress in 1906.¹⁴⁹ This concept of administrative due process was imparted to the Federal Trade Commission when it was established in 1914 and was to become a keystone to the administrative process emerging in the New Deal. In this, he was the forebear of James Landis,¹⁵⁰ an architect of New Deal government.¹⁵¹ The essential features of administrative due process are to afford affected parties notice of prospective agency action and an opportunity to be heard, basing the rulemaking action on the record of evidence submitted to it and on which interested parties might comment. The concept was embodied in the Administrative Procedure Act of 1946.¹⁵²

Third, Chairman Cooley's Commission set a standard for professional interpretation of a new law that was exceptional. Cooley's regulations and opinions were a model of clarity in providing guidance for regulated carriers. Judge Henry Friendly spoke of the Commission opinion in the short-haul matter:

[I]f Cooley had deliberately set out to write an opinion that would forever be a model for administrators, he could scarcely have done better. . . . [I]t is such an admirable illustration of what all commissions should do early in their careers, and then do again later on. . . . To get the full flavor of Judge Cooley's opinion, it ought to be read, in full, as against the vacuous and weasel-worded utterances characteristic of our day. The railroad lawyer who studied it in June of 1887 must have come away

147. This consideration moved the Court to limit review of ICC orders to the record made in the Commission. *Cincinnati, New Orleans & Tex. Pac. Ry. v. ICC*, 162 U.S. 184, 196 (1896).

148. He had earlier, as a judge, proclaimed that "[t]here is nothing that necessarily implies that due process of law must be judicial process." *Weimar v. Bunbury*, 30 Mich. 200, 210 (1874).

149. Hepburn Act, Act of June 29, 1906, 34 Stat. 584 (1906).

150. See generally Landis, *supra* note 95, at 89-122 (1936) (providing an overview and critique of the federal administrative process).

151. Landis was born in 1899 and was a young law professor at Harvard when he became a boy wonder of the New Deal. He served for a year at the Federal Trade Commission and then as organizing chairman of the Securities Exchange Commission, a position he left to return to Harvard as dean. He resigned as dean in 1946 and died in 1964. The work cited in n. 95 was a series of lectures given at Yale shortly after his return to Harvard. Donald A. Ritchie, *James McCauley Landis in 7 Dictionary of American Biography* 453 (John A. Garraty ed., 1965) (Supp. 1981).

152. 60 Stat. 237 (codified as amended at 5 U.S.C. § 551 (1946)).

feeling he had learned quite a lot; he had eaten meat, not gelatin.¹⁵³ The opinion did not settle every [Section 4] case for him, something that would have been manifestly impossible, but it told him pretty well how the land lay. Moreover, the Commission had provided the most effective possible answer to the fears, expressed in Congress, that the [Act] had endowed . . . [the Commission with arbitrary power greater than that of] the Czar of Russia¹⁵⁴

Judge Friendly's remarks record a widely shared reaction against the disposition of federal regulators to preserve their discretion by favoring deliberate indeterminacy in making rules to which they might later be held by reviewing courts.¹⁵⁵ By writing rules that spoke directly to the most prominent issues, Cooley had overcome this congenital weakness, but later commissioners in diverse agencies have not always been willing and able to follow his lead.¹⁵⁶

Cooley's approach was a self-limitation of administrative discretion making his administrative *law* indeed law in the conventional sense. It won the approval of Ernst Freund, the most thoughtful observer of administrative law in the early decades of this century.¹⁵⁷ But a different view was advanced by Landis¹⁵⁸ and his predecessors at Harvard, Bruce Wyman¹⁵⁹ and Felix Frankfurter,¹⁶⁰ all of whom argued in favor of broad administrative discretion in the exercise of economic regulation. Their view was reflected in New Deal practice, but was by mid-century in disfavor, as Judge Friendly's comment reflected. The weakness of New Deal administrative law was its "neglect of the possibility that a governing elite might be neither enlightened, nor apolitical, nor wisely selected."¹⁶¹ Frankfurter would recant his early rivalry with Freund¹⁶² and acclaim the latter for his

153. Judge Friendly was not the first to emphasize the clarity of Commissioner Cooley's regulatory utterances. For a series of illustrations, see Balthasar H. Meyer, *Judge Cooley and the Interstate Commerce Commission*, 6 ICC Practitioners' J. 137, 144-46 (1938).

154. Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* 29, 31 (1962).

155. See generally Morton J. Horwitz, *The Transformation of American Law 1870-1960*, at 213-46 (1992).

156. See Ernst Freund, *The Substitution of Rule for Discretion in Public Law*, 9 Am. Pol. Sci. Rev. 666 (1915) (recognizing both the problem and the solution previously recognized by Cooley).

157. See *id.*; see also Frank J. Goodnow, *The Principles of Administrative Law in the United States* 367-408 (1905).

158. See Landis, *supra* note 95, at 123-55.

159. See, e.g., Bruce Wyman, *The Principles of the Administrative Law Governing the Relations of Public Officers* (1903); see also William C. Chase, *The American Law School and the Rise of the Administrative State* 64-65 (1982) (describing Wyman's treatise and its effect on American administrative law).

160. See, e.g., Felix Frankfurter, *The Task of Administrative Law*, 75 U. Pa. L. Rev. 614 (1927) (describing the characteristics, contrary to those of Cooley's view, of a "modern view" of administrative adjudication).

161. Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967*, at 305-06 (1967).

162. See Harlan B. Phillips, *Felix Frankfurter Reminisces* 173 (1960) (praising Freund as

role in advocating the more realistic view of the possibilities of government. Freund's realism regarding the possibilities for wise administration had been anticipated by Cooley; indeed, the idealized vision of government advocated by Landis could never have been sold to a Jacksonian such as Cooley. Nor, for that matter, could it have attracted the support of Lieber or others from whom Freund's position was derived,¹⁶³ all of whom reckoned that law must be administered by persons with a reasonably full share of human failings.

What Cooley had done was more than groundwork for the New Deal.¹⁶⁴ His method was to conduct his agency according to moral conventions inhering in law, such as accessibility, comprehensibility, consistency, stability, and prospectivity. In aiming to meet these aspirational standards of law, Cooley's agency strove to obey the same "morality of law" later elegantly described by Lon Fuller.¹⁶⁵ Indeed, Fuller's morality was substantially derived from observing the conduct of virtuous public lawyers such as Cooley.¹⁶⁶

The Commission under Cooley was conducted in substantially full knowledge of the economics of the railroad industry. But it maintained a wholesome perspective on the utility of that knowledge. Given the limits of its powers, and even the limits of government to deal with the economic complexities of the industry, it recognized that the immediate and overriding objective was not economic, but moral. Absent moral integrity in the law and especially in its processes, any objective of economic regulation, however modest, would be unattainable for the reason that such regulation must, to be effective, secure the voluntary cooperation of most of those to whom it is applied. No law, Cooley perceived, could go far to correct behavior if it lacked the reinforcement of moral suasion.

A thought for contemporary scholars of law and economics is that economic analysis is incomplete if it fails to take account of the moral context, i.e., of the social and political culture from which any law, and thus any market, derives its being. It was a misfortune that many involved in the Law and Economics of the early Darwinists, in their fatalism, failed to undertake that disorderly and disconcerting synthesis. It may be that

"one of the most distinguished of all legal scholars in the whole history of the legal professorate").

163. Freund had been trained at Heidelberg and at Columbia by mentors who shared the general orientation of Francis Lieber. His mentor at Columbia was Frank Goodnow, author of *Comparative Administrative Law* (New York, G.P. Putnam's Sons 1893), a work descended from that of his Columbia antecedents, John William Burgess and Francis Lieber. On Goodnow's influence, see Ross, *supra* note 21, at 174-78.

164. Lewis G. Vander Velde, *Thomas McIntyre Cooley*, 15 *ICC Practitioners' J.* 858, 879 (1948).

165. See generally Lon L. Fuller, *The Morality of Law* (2d ed. 1969).

166. In addition to Cooley, both Freund and Frankfurter served as models for Fuller's conception of morality. See, e.g., Freund, *supra* note 156 (presenting Freund's beliefs as to discretion and its effect on public law); Frankfurter, *supra* note 160 (embodying Frankfurter's principled explication of the progress of administrative law).

some adherents of the Second Law and Economics movement emerging in the last third of the twentieth century have been no more sensitive than their predecessors to the interdependency of law, economics, and morals. Just as the nineteenth century Darwinists by their lack of moral restraint begot twentieth century Progressivism, so will twentieth century champions of a pitiless market economy beget a reaction.¹⁶⁷ And there is no assurance that the reaction will be shaped and controlled by men and women as prudent and humane as Thomas Cooley.

CONCLUSION AND EPILOGUE

In 1888, Cooley was afflicted with a severe and disabling case of pneumonia.¹⁶⁸ In 1889, he began to have frequent bouts with epilepsy.¹⁶⁹ In 1890, his wife died.¹⁷⁰ He was never thereafter capable of sustaining a work agenda, and there were times when he was not lucid.

In 1894, Cooley presented a presidential address to the American Bar Association which concluded with a stern sermon on the moral responsibility of the bar not only for political ethics, but also for the business ethics of their clients. He turned again to the incendiary relation of capital to labor that was still and again discomposing the republic. In that address, he expressed his hopes for law as an alternative to economic predation, chaos, and violence, and placed responsibility on the bar for the fulfillment of those hopes. He observed that arbitration of labor disputes, then the best hope for industrial peace, could not work without the cooperation of employers, nor could any other means of resolving conflicts between capital and labor. He addressed the bar as he had spoken to railroad men, "as a clergyman might." He called on lawyers, in the performance of their professional duties, to educate their industrial clients to the moral obligations of capital to the public and to their workers, and to secure enactment of laws reinforcing those moral duties. The profession ought, he concluded, "endeavor to have all laws which specifically affect the interests of laborers just and right, and see that they are administered so as to secure to all whose daily labor must give them and their families the means of support, the just rewards of their labor."¹⁷¹

It must have taken considerable will for the depressed Cooley to utter so optimistic a valedictory. Yet a Progressive age would soon materialize. Class war would be averted. Government and the profession would play a role in securing that benign result. While they would never solve the substantive economic problem of railroad regulation, lawyers would bring a nourishing if impermanent peace to the transportation industry, and to the

167. Cass Sunstein, among others, makes this point elegantly. *See generally*, Cass Sunstein, *Free Markets and Social Justice* (1997).

168. Jones, *supra* note 6, at 333.

169. *Id.*

170. *Id.* at 337.

171. *Address of the President*, 17 A.B.A. Rep. 181, 242 (1894).

American workplace as well. In particular, the career of Louis Brandeis would be a large fulfillment of the duty to which Cooley called the profession. Indeed, their would be a reprise to Cooley's 1894 valedictory in the utterances of Brandeis two decades later.¹⁷² In the achievements of Progressivism, Brandeis and others would employ Cooley's ideas and methods more than he could possibly have foreseen.

172. Louis D. Brandeis, *Business—A Profession* (1914); See especially his 1905 address to Harvard students. Louis D. Brandeis, *The Opportunity in the Law*, 39 *Am. L. Rev.* 555, 559 (1905) (criticizing the lawyers of great corporations for neglecting their obligation to protect the people). The relation between Brandeis and Cooley warrants further study and will be the subject of another paper.