LAW AND THE FAILURE OF RECONSTRUCTION: THE CASE OF THOMAS COOLEY

By Phillip S. Paludan

In the literature discussing the failure of Reconstruction to provide equal liberty for the freedmen the role of law and legal preconceptions occupies a minor place. That this should be the case in a time obsessed with law and order is notable, but the fact remains. Writers who have given the subject attention have concentrated on the congressional concern for constitutional limitations. They have properly suggested that respect for the separation of powers and a commitment to federalism produced conflict in Washington and ultimately crippled the ability of the national government to protect the freedmen, both before and after the so-called "redemption" of the South.[1]

In so far as the focus of this writing is the particular problems of the post-Appomattox era such an emphasis is proper. But a better understanding of the disunion crisis and the stuggle for equality demands a broader view. The legal compunctions of Reconstruction congressmen were not generated on the spot. They arose from prewar and wartime beliefs shared throughout northern society. When attention is extended beyond Congress to the legal and constitutional thought of the mid-nineteenth century new possibilities arise for understanding the Civil War era.

For example, why did the North fight for four years to sustain a legal abstraction called the Union? What accounts for the tenacious devotion to the Constitution displayed by both the President and Congress during the war? Although the fact that secession had occurred and war followed revealed the incapacity of the Constitution to resolve serious antagonisms, respect for the document remained firm almost everywhere. Lincoln threatened to veto a confiscation bill because it seemed to violate Article III, section 3. He refused to expand emancipation beyond war zones without a constitutional amendment. He

[1]W. R. Brock, *An American Crisis, Congress and Reconstruction, 1865–1867* (New York, 1963), 1–14, 250–73; Eric McKitrick, *Andrew Johnson and Reconstruction* (Chicago, 1960), 93–119; Harold M. Hyman, "Reconstruction and Political-Constitutional Institutions" and Alfred Kelly, "Comment," *New Frontiers of the American Reconstruction* (Urbana, 1966), 1–39, 40–58. Hyman's article does mention constitutional discussion outside Congress but focuses on wartime ideas, despite its title. I have discussed the thought of one legal author and its relation to Reconstruction in "John Norton Pomeroy, State Rights Nationalist," *American Journal of Legal History*, **12** (Oct. 1968), 275–93.

spent almost a third of his first inaugural address discussing constitutional questions.[2]

Congress and the nation mirrored this interest. Legislators debated extensively the constitutionality of every wartime measure, and outside Washington the debate continued. Over forty pamphlets appeared to argue the single question of whether the legislature or the executive might suspend the writ of habeas corpus. This constant legal wrangling provoked the influentual *Nation* to remark, "Nothing has been more remarkable during the war than the rapidity with which 'legal fictions' sprang up as the strife progressed. Generally the sword tears all the lawyer's fine spun webs to pieces . . . but our war has furnished an exception."[3]

The full question of the relationship between law and the disunion crisis cannot be given here the attention it deserves. But a brief look at the thought of one of the nineteenth century's most important jurisprudents may suggest the possibilities that arise from studying the legal mind of the Civil War era. In 1868, as the Fourteenth Amendment was being ratified, Thomas McIntyre Cooley published *Constitutional Limitations*. It was a propitious conjunction of circumstances. The amendment was an attempt to limit the ability of states to infringe upon the liberties of their citizens. Cooley's book was lucid and learned discussion of the restrictions imposed by the Constitution on the legislative powers of the states. Men who sought to determine how the amendment affected the exercise of state power in the post-Civil War world soon came to regard *Constitutional Limitations* as authoritative and indispensable. As the importance of the amendment expanded, so did Cooley's reputation. It became America's second constitution. Cooley became the most influential legal author of the late nineteenth and early twentieth centuries.[4]

Pervading the hundreds of cases, principles, and illustrations of

[2]*Collected Works of Abraham Lincoln*, ed. Roy P. Basler (New Brunswick, 1953), IV, 262–71; VI, 428–29; James G. Randall, *Constitutional Problems under Lincoln* (Urbana, 1951), 278–80.

[3]"Legal Fictions," *Nation*, 1 (Oct. 1865), 455–56; Sydney G. Fisher, "The Suspension of Habeas Corpus during the War of the Rebellion," *Political Science Quarterly*, 3 (Sept. 1888), 454–88.

[4]Sidney Fine, *Laissez Faire and the General Welfare State* (Ann Arbor, 1956), 128–29; Charles Edward Larsen, "Commentaries on the Constitution, 1865–1900" (Unpublished Ph.D. dissert., Columbia Univ., 1952), 146; Alan Jones, "Thomas M. Cooley and 'Laissez Faire Constitutionalism': A Reconsideration," *Journal of American History*, 53 (Mar. 1967), 759; Edward S. Corwin, *Liberty Against Government* (Baton Rouge, 1948), 116–18. A former student of Cooley, George Sutherland, sat as a justice of the United States Supreme Court from 1922–38 and promulgated his mentor's ideas while there. See Joel Francis Paschal, *Mr. Justice Sutherland* (Princeton, 1951), 16–20, 170–72.

Constitutional Limitations was fundamental Jacksonian faith in equality. "Equality of rights, privileges, and capacities," Cooley wrote, "unquestionably should be the aim of the law." Further, he emphasized that the word liberty had broad meaning; it was not confined to acting as a codeword to defend intrusions upon property rights. The word "embraces all our liberties, personal, civil, and political." Freedom of worship, of speech, "the right of self defense against unlawful violence," the right to attend the public schools, the equal right to buy and sell, all were included. Looking back in 1873 at the Civil War amendments Cooley saw a culmination of Jacksonian ambitions. "Freedom is no longer sectional or partial," he exulted. "There are no privileged classes." Apparently persons who needed protection for their liberties would now receive it.[5]

Corporate persons did. Black persons did not. With amazing swiftness lawyers and judges made the Fourteenth Amendment, intended to protect Negro freedmen, into corporate property. And they used Cooley's writings as their instrument. Again and again counsel turned to *Constitutional Limitations* to argue that their clients might not be deprived of liberty or property without due process of law. With equal frequency the bench cited the same book to agree with them and to strike down state regulative laws. The power of corporations increased as the century passed and national constitutional guarantees secured the environment of their growth.[6]

Meanwhile the position of the freedmen declined. The nationwide announcement of their access to equal liberty ceased to resound. Soon they became the prisoners of state laws, local custom, and private violence. Penned in by federalism they could only watch the progress of the corporate giants who had stolen their amendment from them. Although he intended neither industrial growth nor the Negroes' decline, Cooley's writings were an important vehicle in the accomplishment of both. His role in the first has been described. His importance in the second requires attention.[7]

Basic to the understanding of the legal and constitutional problems of Cooley and his era is a recognition that the men who struggled with them were products of Andrew Jackson's America. They had de-

[5]Thomas M. Cooley, *Constitutional Limitations* (Boston, 1890[6]), 393; Joseph Story, *Commentaries on the Constitution*, ed. Thomas Cooley (Boston, 1873), II, 689.

[6]Jones, "Cooley," *JAH*, 53 (1966), 751n; Fine, *Laissez Faire*, 128–29.

[7]Jones, "Cooley," 751–71; Clyde E. Jacobs, *Law Writers and the Courts* (Berkeley, 1954); Benjamin Twiss, *Lawyers and the Constitution* (Princeton, 1942). The most complete and thoughtful study of Cooley is Alan Jones, "The Constitutional Conservatism of Thomas McIntyre Cooley" (Unpublished Ph.D. dissert., Univ. of Michigan, 1960). I am very much indebted to this study and to Jones' other work on Cooley, although he slights the relationship between Cooley's thought and equal rights.

veloped their ideas about the uses of law and the limitations imposed by the Constitution in the years when Jackson sat in the White House and later when his spirit pervaded the nation. This is not to say that the legal thinkers of the pre-Civil War period were predominantly Jacksonians. In fact the majority of the legal profession probably opposed Jackson, recalling his attack on the Bank of the United States, and feared the egalitarian visions that his name provoked. They probably agreed with one of their number who in 1864 recalled Jackson as "a concentrated mob."[8]

Whatever the feelings of the legal establishment the Jacksonian view dominated the prewar era. The "monster bank" was destroyed. Whigs and Democrats vied with each other to wear the mantle of "party of the people" with Jackson's party dominating the nation's elections. So strong a hold did the Jacksonian spirit have on the popular mind that even Lincoln, Whig-Republican that he was, described the Civil War in Jacksonian terms:

> This is essentially a People's contest [he said]. On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all an unfettered start, and a fair chance in the race of life.[9]

Thomas Cooley spoke for the majority side. He supported the Jeffersonian-Jacksonian ideology. He read and listened eagerly to the apotheosis of this ideology, William Leggett. This was Leggett's theme:

> We hope to see the day . . . when the maxim of "Let us Alone" will be acknowledged to be better, infinitely better than all this political quackery of ignorant legislators, instigated by the grasping, monopolizing spirit of rapacious capitalists. The country, we trust, is destined to prove to mankind the truth of the saying that "The world is governed too much," and to prove it by her own successful experiment in throwing off the clogs and fetters with which craft and cunning have ever combined to bind the mass of men.[10]

It was an argument in support of greater freedom of foreign and domestic trade, favorable to equality in rights, liberties, and opportunities. Resting on an image of a strong, independent yeoman, it was an assertion of belief in the sort of government that Jefferson *talked* about—one whose duty was simply to keep men from injuring one another and otherwise, in Jefferson's words, to "leave them free to regulate their own pursuits of industry and improvements."[11]

[8]Sidney George Fisher, "A National Currency," *North American Review*, 99 (July 1964), 217.

[9]*Collected Works of Abraham Lincoln*, ed. R. P. Basler, XIV, 438.

[10]*The Political Writings of William Leggett*, selected by Theodore Sedgwick (New York, 1940), I, 104. Richard Hofstadter calls Leggett "The Spokesman of Jacksonian Democracy," *Political Science Quarterly*, 58 (Dec. 1943), 581–94.

These ideals were the bedrock of Cooley's thought. When antislavery sentiment led him to abandon his Democratic allegiance and to join in founding the Michigan Free Soil party he did not reject them. The party platform was of course antislavery but it was more basically Jacksonian. It opposed what one of its leaders called "anti-democratic social conditions." The movement reflected the general sentiment that freedom from all unrestrained power was the goal of true democrats.[12]

That such ideals sought support outside Jackson's party revealed an important phenomenon: a growing feeling that existing institutions had failed and that men would have to discover other paths to the realization of their dreams. Cooley's move from party regularity thus suggested more than a personal feeling that slavery was incompatable with his ideals. It revealed also a general feeling that society itself was sick, that his youthful optimism was unfounded, that there was more to liberty than unexamined egalitarian oratory. He showed a growing awareness of the possibilities for evil and failure in man and society. By the 1850's his favorite authors were no longer Emerson and Leggett, but Hawthorne and Dickens.[13]

As the prewar crisis intensified and sectional quarreling threatened to tear the nation apart his apprehension grew. Events in Kansas and the Dred Scott decision troubled him, and when the national administration endorsed proslavery actions in Kansas, Cooley joined the ranks of anti-Nebraska Democrats who would soon supply the new Republican party with such men as Salmon Chase, Lyman Trumbull, Benjamin Butler, Gideon Welles, Hannibal Hamlin, and Walt Whitman. In 1856 he officially joined the Republicans. This party seemed to him to be least equivocal in its devotion to equal liberty.

More important than his political affiliations, however, was the effect of the prewar societal crisis on his legal thought. Although his papers are scanty for this period, there is evidence of a growing interest in Blackstone and the common law. Cooley came to revere James MacKintosh, a noted apostle of conservative Edmund Burke. He became more and more interested in history and studied the relationship between common law and American liberty. The Michigan jurisprudent focused on the history of England which told him that principles of liberty were given by God to Anglo-Saxon nations who embodied

[11]Quoted in Marvin Meyers, *The Jacksonian Persuasion* (New York, 1957), 29.

[12]Jones, "Laissez Faire Constitutionalism," 753–54; Salmon P. Chase to Samuel Beaman quoted in Jones, "Constitutional Conservatism of Cooley," 54; William O. Lynch, "Anti-Slavery Tendencies of the Democratic Party in the Northwest, 1848–1850," *Mississippi Valley Historical Review*, 11 (Dec. 1924), 319–31.

[13]Jones, "Constitutional Conservatism," 109.

them in their customs and traditions. Common law was the structure of tradition and custom which preserved and promoted individual liberty; it was the perfection of natural reason and artificial reason. He accepted Matthew Hale's reverence for the common law "not as the product of some one man or society of men in any one age; but of the wisdom, council, experience, and observation of many ages of wise and knowing men." Even as the nation apparently fell apart Cooley came more and more to believe that an institutional framework, such as that provided by the common law, was imperative for liberty. With the nation secured in 1868 he would extol the common law, in spite of its faults, as "on the whole the . . . best foundation on which to erect an enduring structure of civil liberty which the world has ever known.[14]

Cooley modified his Jacksonianism, but he did not repudiate it. While he was sensitive to the need for law and a respect for history in a democratic society, he was equally sensitive to the need for liberty. He was concerned with maintaining an open society; one which, though restrained by respect for law and history, left open to every man an equal chance to exercise his talents and abilities. In contrast to more conservative legalists Cooley disliked the Dartmouth College decision. He deplored the support given by the Supreme Court to an ancient contract over the popular desire to permit the legislature to change established institutions for the people's benefit. "It is under the protection of [that] decision," he said, "that the most enormous and threatening powers in our country have been created."[15]

The common law which Cooley admired protected liberty first, then order, though it protected both most tenaciously. It was a common law that was suspicious of legislation, insistent about the equality of law, and always opposed to arbitrary power. Cooley's common law respected Jacksonian goals when it emphasized the idea that constitutional government was limited government, and that under just law all men's rights were equal. The law which Cooley admired was one which opened opportunity and formed a structure which protected liberty and property already won, but which also guaranteed the continued search and reward for enterprise. It was a law for liberal capitalism which opposed privilege. Its spirit: no one shall receive from the law special privileges; all shall have equal opportunities, no one shall be allowed to concentrate power to such an extent that liberty is impossible.[16]

This fusion of liberty and institutional structure was a common feature of the American political environment. Foreigners such as Thomas Carlyle might describe America as "the most favored of all

[14]*Ibid.*, 102–08; Cooley, *Constitutional Limitations* (Boston, 1872), iii, 23.

[15]Cooley, *Constitutional Limitations* (Boston, 1890), 335; Jones, "Laissez Faire Constitutionalism," 755.

[16]"Laissez Faire Constitutionalism," 757–58.

nations that have no government," but the phrase was a triumph of rhetoric over reality. Edmund Burke had warned British imperialists that Americans were extraordinarily sensitive where points of law and liberty were concerned. "[I]n no country in the world perhaps," he said, "is the law so general a study." Alexis de Tocqueville noted the same phenomenon with his observation that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Americans equated the Union with the Constitution; thus precipitating protracted constitutional arguments throughout the disunion crisis over whether the North or South respected the document more. In their local experience Americans were constantly concerned with the lineaments of liberty. They created governing institutions daily as they expanded their settlements across the continent.[17]

The protean Jacksonian world increased institutional concern, especially among the nation's lawyers. The result was twofold. On the one hand it generated advocacy of the restraining power of the law (certainly a tenable position). But on the other hand it encouraged the tendency to equate the preservation of existing institutions with the survival of liberty (a considerably more suspect claim which had its uses in creating strong Union sentiment, but which was ominous, as I hope to demonstrate, for the Negro).[18]

Cooley engaged in this more dubious process by insisting that the Jacksonian goal of equal liberty under law might only be achieved safely if men recognized liberty's deep historical and institutional foundations. Supporting his contention he hit upon the common law roots of American liberty. Doing this he joined a widespread effort of the legal profession in the prewar years, and he revealed the basic weakness in the era's legal thought: its fear of the exercise of governmental power in innovative ways.

Although American law was heavily dependent on the English common law, reliance on its restraining influence was unnecessarily conservative here. In England the restraining power of common law is

[17]Thomas Carlyle, "Horoscope," *Collected Works*, Sterling Edition (Boston, n.d.), XII, 356–57; Burke quoted in Clinton Rossiter, *The First American Revolution* (New York, 1956), 135; Alexis de Tocqueville, *Democracy in America* (New York, 1954), ed. Phillips Brooks, I, 290; Paul Nagel, *One Nation Indivisible, The Union in American Thought* (New York, 1964), 53–58; Daniel Boorstin, *The Americans, The National Experience* (New York, 1967), 50, 65–69, 72–79.

[18]On growth of concern for legal institutions: Perry Miller, *The Life of the Mind in America* (New York, 1965), 99ff. The most thoughtful criticism of Miller's work by Lawrence Friedman does not affect the generalization about the concern for these institutions. See "Head Against Heart: Perry Miller and the Legal Mind," *Yale Law Review*, 57 (1947–48), 1244–59.

kept from being too effective by the unitary form of parliamentary government. Parliament not only makes the laws, it is responsible for their execution, and is the ultimate arbiter of their constitutionality. Although the principles of common law can restrain, they cannot inhibit Parliament from exercising the nation's power to any extent necessary to respond to challenge. "Parliament," Blackstone insisted, "may do anything but make a man into a woman, or a woman into a man."

In the United States, born of a rebellion against that assertion, the national government is restrained considerably short of parliamentary power. Our constitutional troika already restrains the exercise of national power, and federalism further diminishes the power that remains. The addition of the restraining power of the common law was in fact redundant. It revealed starkly just how fearful of unrestrained power many jurisprudents were. It mirrored a devotion to institutional restraints which made most of them equate liberty with the negation of power.[19]

Such an attitude was an effective antislavery instrument. Slavery involved the ultimate assertion of both state and national power against individuals. It also seemed to threaten the institutional sinews of the nation by the way that it turned representative bodies into armed encampments, courts into political forums for dubious constitutional rhetoric, and presidents into advocates of territorial tyranny. It was easy for Jacksonians like Cooley to believe that the death of slavery would mean an end to arbitrary power and to envision a future in which free men boldly and successfully exercised their now unshackled talents.[20]

But of course the fallacy of such a view was its failure to recognize that the age of the free omnicompetent individual was in the past, not in the future. Even when applied to the white man it was an illusion. Society grew more complex every day, concentrations of economic power grew, fostered by freedom from the exercise of adequate governmental regulative power. Freedom there was and would be, but not freedom equally enjoyed. The myth of a society of equality ran bluntly into the fact of a society of unequal individuals. Equal freedom would ultimately require not the negation but the exercise of governmental power. That power would not be provided in ample portion to protect even white men until the first half of the twentieth century. Blacks

[19]On idea in law of liberty against government: Edward S. Corwin, *Liberty Against Government, The Rise, Flowering and Decline of a Famous Judicial Concept* (Baton Rouge, 1948).

[20]On slavery as a threat to northern liberties: Russell Nye, *Fettered Freedom: Civil Liberties and the Slavery Controversy, 1830–1860* (East Lansing, 1963).

would wait an additional half century before they could claim its benefits. When such power was available and combined with a willingness to use force to secure freedom, men not free might hope; without such willingness the hope was chimerical.

Cooley would never clearly understand the contradiction between equality and individualism. Neither would he recognize the extent to which an exercise of power might help resolve the conflict. He was too occupied with securing existing institutional arrangements to consider the possibility that they might be inadequate to the nation's future needs. In any event the Civil War effectively ended any possibility that he might seek new options. As an attack on the old order it made the salvation of that order the measure of victory. Coming as the culmination of a decade of doubt and disorder, it committed him all the more to the maintenance of the institutions he had come to equate with the survival of ordered liberty.

He was most anxious about the potential turmoil of wartime. He did not agree with abolitionists who insisted that the conflict offered an opportunity for revolution against all the institutions that protected slavery. He did not agree with these reformers that the great benefit of this conflict was that it opened minds for new ideas. Although certainly a great believer in democracy, Cooley's democratic faith was woven with doubt. He did not share the practically unalloyed joy of abolitionists and some reforming jurisprudents at the outpouring of popular support for any new measure which might save the country.[21]

Given a chance to talk at length about the meaning of the war, the Michigan lawyer spoke of the need for order in the midst of potential revolution. Addressing a crowd assembled to dedicate the new law building in Ann Arbor in the fall of 1863, he focused on the stable elements, the old institutions, for which the nation was fighting. He reminded his listeners of the Anglo-Saxon roots of American law. He emphasized the long national experience with local self-government. At a time when many were concerned with increasing nationalism, Cooley insisted on the traditional benefits of local self-government in the way that it "fitted men to larger responsibilities [and] made them conscious of the public purposes which government was to serve." No law that he ever taught, he insisted, would ever have "any tendency to strengthen the State at the expense of the nation, or to exalt the nation on the ruin of the state."

Recognizing that in wartime men might resort to what he termed

[21]Sidney G. Fisher, *The Trial of the Constitution* (Philadelphia, 1862), v-vi; Francis Lieber, *Miscellaneous Writings* (Philadelphia, 1880), II, 147; James M. McPherson, *The Struggle for Equality: Abolitionists and the Negro in the Civil War and Reconstruction* (Princeton, 1964), 65–66.

"desperate remedies" Cooley still sought to limit the occasions and justifications for their use. Echoing a widespread northern commitment to institutional stability, he insisted that in times of disorder it was "the part of wisdom to keep an eye to the old landmarks, and so to shape action that when the commotion is quelled there shall be apparent, not mere heaps of materials from which to build something new, but the same good old ship of state, with some progress toward justice and freedom." Great danger to those landmarks could result from yielding to "those temporary excitements which sometimes sweep over the people and from which no body of men can at all times be free." Only respect for established legal tradition would protect Americans from the dangers of such momentary passions.[22]

Further to secure the stability of the nation and society Cooley emphasized the crucial role that the legal profession was to play in guiding the nation through the war and in securing the results of the fighting. Echoing the urgings of lawyers and congressmen throughout the nation he insisted that the legal profession was uniquely qualified for such an important task. Untrained persons, he wrote, "would cut and hew blindly in their ignorance until the beautiful fabric which has required ages to build may be utterly defaced by vandal hands." But jurisprudents could promote change without loosing anarchy. "The lawyer is and should be conservative," he insisted. "However radical the change he may desire to make the lessons of our judicial history admonish him that they can only be safely brought about in the slow processes of time."[23]

A Jeffersonian who read Hawthorne, a Jacksonian who respected Blackstone and the common law, a devotee of individual freedom who feared the masses, Thomas Cooley encountered Reconstruction with ideas and assumptions which would severely limit uncompromising devotion to its legislation. Obstacles stood in the way of an unconditional commitment to human freedom. Innovations, he believed, required historical basis, and American history was singularly lacking in precedents for national power used in behalf of individual freedom. Distrusting power and revering liberty as he did, the Michigan lawyer was sure to feel discomfort where force was exercised to protect liberty. To Cooley, constitutional government was, by definition, government restrained. He was sure to suspect government action to guarantee liberty. When the Civil War ended, he was inclined to feel that the question of liberty and freedom for all men had been settled. He was not prepared to understand that it had only begun to be argued. He looked back at what had been preserved, too relieved to envision what had possibly been won.

[22]Quoted in Jones, "Constitutional Conservatism," 112–19.

[23]*Ibid.*, 117.

Writing additional chapters on the Civil War amendments for his 1873 edition of Joseph Story's *Commentaries on the Constitution*, Cooley reviewed the impact of the war. He rejoiced that the "dangerous excrescence of slavery" had been removed from the nation. Human bondage had not only been a moral wrong, it had threatened the permanence of the nation by a controversy made all the more bitter by the fact that each side had insisted that it alone defended the sacred Constitution. This violent and fearful antipathy had been the cause of war.

The war had killed slavery by releasing the force of pro-union sentiment against the institution. Prior to Sumter, concern for the integrity of the Union had restricted anti-slavery sentiment to a small group of radicals. But when the South dissolved the bonds of union, fears for union no longer restrained criticism or action. Emancipation ceased to be solely the dream of the revolutionary and became the necessity of the patriot. The Thirteenth Amendment, born of necessity, had removed slavery as "a disturbance and danger to the body politic."[24]

Cooley recognized the post-Appomattox fear of Congress that the conflict might somehow resume should leaders of the rebellion regain control of their states. He saw that Andrew Johnson's Reconstruction measures "did not sufficiently protect the government against the danger of States passing under disloyal control." Neither did executive action provide sufficient protection for freedmen or loyal southerners. Southern states had passed the so called "Black codes" which practically reduced the freedmen to peonage. He understood the fears behind these codes but deplored them. They would only "perpetuate the degredation of this [recently enslaved] people." He was, therefore, pleased that Congress had responded to these measures with the Civil Rights Act of 1866 which made the freedmen citizens. He was even more pleased when Congress ended doubt about the constitutionality of this act by initiating the Fourteenth Amendment. The subsequent ratification of this measure settled for all time, he thought, the vexing question of the status of the Negro in the United States.[25]

This was Cooley's history of the meaning of the war era. It conformed to his Jacksonian hopes and fears. As Huck Finn said of Mark Twain, "He told the truth, mostly." But what Cooley left out was in fact the crucial part, the spawning in the war era of new constitutional possibilities which would make Jacksonian goals realities for the freedmen. Hiding in the Michigan jurisprudent's apparent support for

[24]Story, *Commentaries*, Cooley's additions, II, 633–46.

[25]*Ibid.*, 649–54, 661–62.

egalitarian legislation were attitudes poorly designed to bring these measures to life.

To have impact the measures would have to be seen as the beginning of a new constitutional era—a promise by the national government that it would do what it had never done before—act in behalf of a citizen's personal liberty. Abolitionists and radicals, and even more advanced moderates, argued plausably that the power of the national government to free the slave implied a promise that such power would exist to secure that freedom should it be endangered. But to Cooley, the Fourteenth Amendment, the legitimizer of future federal action, was a promise kept, not a promise made. It was the end of a crusade, not its beginning.[26]

Cooley supported the amendment as a means to end doubts about the legal condition of the black man in America. The whole war crisis had been generated over this fundamental question. The time had come, he insisted, to cool this passion. The people wished to forget the war and to resolve its bloodstained uncertainties. They were turning their thoughts to new directions, but before they finally did so, they wished to tie together the loose ends of civil war. "The number was few indeed," he said, "who would have been disposed to deny citizenship to this portion of the people, or to object to a settlement of the question by express declaration of the Constitution."[27]

He spoke here for millions of war-weary Americans, but the ideas he expressed did not suggest to him an abandonment of equality as he understood it. He did not seek to achieve "normalcy" by knowingly sacrificing equal justice under law. He believed that the war, by purging the constitutional system of slavery, had secured that justice. With the Fourteenth Amendment securing to Negroes their citizenship rights, and the Fifteenth Amendment proscribing race or previous slavery as a condition of voting he insisted that no "particular or invidious distinction" could infringe upon the legal equality of Americans.[28]

Cooley did more than just write about equality, he showed his belief in it as a member of the Michigan Supreme Court. As example, an 1869 case raised the issue of educational discrimination against a Negro boy. In 1867 Michigan had amended her general school law to say that any resident of a school district might attend any school in the district so long as such attendance did not interfere with the system of grading schools according to the intellectual level of the students. The

[26]W. R. Brock, *An American Crisis: Congress and Reconstruction, 1865–1867* (New York, 1963), 250–54; Eric McKitrick, *Andrew Johnson and Reconstruction* (Chicago, 1960), 93–120.

[27]Story, 654.

[28]*Ibid.*, 656.

Detroit schools had, however, special legislation which allowed students to be segregated by race. When the youngster attempted to enroll in an all white school he was denied entrance. His parents insisted on his right to enroll and the case reached Cooley's bench. The judge ordered the school board of Detroit to admit the student, ruling that the state law overturned the city's special legislation, and meant that Negroes might not be excluded from white schools because of their race. In addition, Cooley observed that the young man had been deprived of advanced education, since the Negro schools in Detroit were only elementary schools. Although the judge was only enforcing a law, he intimated that even without the law the court would have taken the same position under the due process clause of the state constitution.[29]

This action and others like it on the bench showed that he meant it when he insisted in 1873 that the Fourteenth Amendment made it a "settled rule of constitutional law that color or race is no badge of inferiority and no test of capacity to participate in government." In addition he doubted "if any distinction whatever, either in right or privilege, which has color or race for its sole basis, can either be established in the law or enforced where it had previously been established." That question had been settled.[30]

But the only settlement that had in fact been made was a legal settlement, one to be defined in terms of existing legal limitations and structures. The amendment declared that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These were principles with which Cooley agreed. But the vital question was how these principles would secure *de facto* the equal justice promised *de jure*. How would they operate in relation to the federal system; would they change or preserve it?

As he described the actual working of the amendment it became clear that, despite sincere words of acceptance of its principles, Cooley would not allow them to be experienced as facts in the lives of the freedmen. Defying the intentions of Congress, ignoring expressed statements of law, rejecting the possibility that the war had altered the federal system, he offered an explanation which made the amendment simply rhetorical. Most importantly, his description was not *sui generis*; it rested securely on widely recognized and respected constitutional principles. Although Cooley falsified the intentions of the

[29]*People vs. Board of Education of Detroit*, 18 *Michigan* 400 (1869). *People vs. Dean*, 14 *Michigan* 406 (1866); Jones, "Cooley and the Michigan Supreme Court," 119; Cooley, *Constitutional Limitations* (Boston, 1878), 494.

[30]Story, 676.

framers of post-war changes, his argument was sufficiently plausible to gain the acceptance of war-weary people who sought an explanation that demanded little of them. There were many such.

The amendment, he said, had been passed to make more secure the guarantee of citizenship provided under the 1866 Civil Rights Act. It was passed to overturn the Dred Scott decision that blacks were not citizens. According to the bill and the amendment he noted, "The freedmen were to have the same right in every State and territory of the United States to make and enforce contracts; to sue, be parties and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and to be subject to the like punishments, pains and penalties and to none other, any statute, ordinance, regulation, or custom to the contrary notwithstanding." (This was a direct quotation from the bill.) Then came an immensely crucial qualifier. These rights, which the national legislature was establishing for the freedmen became, in his words "the privileges and immunities of citizens of the State."[31]

These last words are so important because Cooley believed that the phrase "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" did not refer to the rights of state citizens but only to those of national citizenship. "The difference," he stated, "is in high degree important . . . the privileges which pertain to citizenship under the general government are as different in their nature from those which belong to citizenship in a State as the functions of the one government are different from those of the other." The vital question then became what were the privileges and immunities which each government protected. On this definition would hang the extent of protection that could be claimed by the freedmen, in short, their access to equal justice rested on it.

Cooley's catalogue of federally protected rights was miniscule. He suggested that the 1823 definition of those rights provided by the Supreme Court in *Corfeld vs Coryell* was the only proper one. The following were exclusively federal rights: protection against wrongful action by foreign governments, use of passports, use of all navigable waters of the nation, use of post office facilities. "Such rights and privileges," Cooley magnanimously asserted, "the general government must allow and insure, and the several States must not abridge or obstruct; but the duty of protection to a citizen of a State in his privileges and immunities as such is not by this clause [of the Fourteenth

[31] *Ibid.*, 653-56.

Amendment] devolved upon the general government, but remains with the State itself, where it naturally and properly belongs."[32]

Had this view been isolated it would deserve only passing mention. But it was not isolated. It was the opinion adopted by the United States Supreme Court in April of 1873, the same year that Cooley offered his views. In the Slaughterhouse cases Justice Samuel Miller, for a 5—4 court, accepted that 1823 definition as the interpretation of the Fourteenth Amendment. It would be 1935 before the court would expand upon this list of federally protected privileges and immunities. Neither Cooley nor Miller provided reasons why the amendment should be so emasculated. Both were so firmly gripped by a commitment to the old federal Union that they seemed not to think that their assumptions required argument. Both simply made a fact out of a personal belief. Miller declared that it was not possible to believe that the framers had intended to change the nature of the Union. And Cooley simply asserted that the duty of protecting a citizen in the exercise of his fundamental rights remained with the state. Why? Because that was "where it naturally and properly belongs."[33]

An amendment that was intended by its authors to provide national protection for rights to life, liberty, and property had been transformed into an innocuous declaration of the permanence of the old federal Union. Although Cooley had insisted that the amendment constitutionalized the Civil Rights Act, when it came to describing the constitutional changes wrought by the amendment, he simply ignored what the act said. Its purpose was to end interference with citizenship rights of all kinds from whatever source they arose. Lawmakers recognized that state rights would have to be limited, and they limited them.[34]

The transformation of the amendment that Cooley made did not occur because of racism or because of a disbelief in the sovereignty of the national government. Cooley seems never to have displayed anti-Negro sentiment and he often displayed the contrary. He had vigorously supported the Union government during the war and had upheld the power of the national Congress over military Reconstruc-

[32] *Ibid.*, 657-59.

[33] *Ibid.*, 659; 16 *Wallace* 82.

[34] Analysis of the act reveals its intended impact on federalism. It declared that "any person [not just any state] who under color of any law, statute, ordinance, regulation or custom [the proscribed action need not be the passage of a state law] shall subject, or cause to be subjected, any inhabitant [not only citizens] of any State or Territory to the deprivation of any right secured or protected by this act" because of color or prior slavery, was deemed guilty of a misdemeanor and could be punished by a fine of $1000 and one year in jail, or both. Federal courts had exclusive jurisdiction over violations of this act. See *Statutes at Large* (1867), XIV, 27.

tion. He was much like Justice Miller in this regard. What led the Michigan jurisprudent to strip from the Fourteenth Amendment its intended potency was his passionate conviction that only abiding respect for constitutional traditions would provide the order necessary for the realization of his Jacksonian dreams of equal liberty. As his dreams envisioned an absence of excessive power, it is understandable that he rejected a view of the amendment so permissive of the exercise of federal power. He believed that the war had saved the old federal Union, not transformed it.[35]

The specific constitutional instrument whereby Cooley transformed the amendment from a call to action into a victory celebration was the venerable comity clause of the Constitution. Article IV Section 2 declares "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states." The common meaning of this clause was that a citizen of one state would not be discriminated against in another state. As example, Georgia might not pass a law which denied citizens of other states the access to Georgia courts which her own citizens possessed. If such a discriminatory law were passed the injured party might appeal to the federal courts for redress. But, for protection for exercising a right that he shared equally in law with other citizens, a citizen was dependent on the state. In short, unequal laws were appealable, unequal protection was not.

This clause was an obvious referent for the Fourteenth Amendment. The words privileges and immunities appeared in both; the Supreme Court had rendered decisions which illuminated, albeit none too clearly, the meaning of those words within the constitutional system. It was the comity clause that was the subject of the 1823 case of *Corfeld vs. Coryell* mentioned above. Clearly conservatives such as Cooley could argue that the amendment was limited in its meaning to what the federal system of the prewar years allowed.

This argument would have been untenable had the authors of the amendment insisted that they intended to give the phrase new meaning which would secure federal protection for important civil rights. Although this argument did appear occasionally in debates on the amendment it was not broadcast widely. It was not, because for thirty years those abolitionists who advanced the amendment had been insisting, despite court decisions to the contrary, that the comity clause already secured that protection. Thus the amendment, in the eyes of most of its proponents, was declaratory—it simply made a law out of a previously existing fact. It changed nothing. But this of course was Cooley's position too and those judges who studied the record for the true meaning of the amendment might conclude that both sides sought the same thing.[36]

What distinguished the two was their image of what the prewar constitutional world had been. And, in any argument where the weight of legal precedent mattered Cooley's opponents were on much weaker ground than he was. Guided by the belief that slavery must die because it violated the slaves' natural rights as human beings, abolitionists grabbed for arguments wherever they might find them to accomplish their goal. When they accepted the need to appease the pervasive constitutionalism of their fellow citizens they faced a difficult task. The Constitution had been written to secure the support of slaveowners; it did not yield antislavery arguments easily.

The comity clause was an especially weak reed. While it says that citizens of a state may claim its benefits, it does not confer them on non-citizens and, more importantly, it does not remove from the states the right to define who shall be citizens. The clause is not a grant of federal power to do anything; it is not even a prohibition of action by a state. It merely says that whatever a state decides to offer its citizens as benefits must be offered equally to citizens of other states. Further, the clause does not define what privileges and immunities are. For clarification of these points the decision of a court was required, and judges were unlikely to be moved deeply by arguments which rested basically on the sincere wish of abolitionists that the clause mean something that would advance their cause. Victory for the abolition view depended more on moral and humanitarian sentiment than on constitutional argument.[37]

But the war had generated a tremendous interest in legal and constitutional questions. Union troops had fought against what Lincoln called "the essence of anarchy" and for the rule of law. When victory for that viewpoint was assured, a society chastened by the consequences of excessive romanticism and individualism sought constitutional roots for its legislative efforts and as a foundation for reunion. Cooley, who had opposed slavery fundamentally because it endangered order, helped provide these roots by insisting on the continuity of past institutions with the war era's amendments.[38]

[35]Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862–1890* (Cambridge, 1939), 124-40.

[36]Howard J. Graham, "Our 'Declaratory' Fourteenth Amendment," *Everyman's Constitution* (Madison, 1968), 295–336; Jacobus ten Broek, *Equal under Law* (New York, 1965), 94–108.

[37]Jacobus ten Broek, 97–103.

[38]Kenneth M. Stampp, *And the War Came: The North and the Secession Crisis, 1860–1861* (Baton Rouge, 1950), 221–39; George M. Fredrickson, *The Inner Civil War, Northern Intellectuals and the Crisis of the Union* (New York, 1965), 183–98; Abraham Lincoln, *Collected Works*, IV, 268 (March 4, 1861).

The Fourteenth Amendment, he insisted, was simply a restatement of the comity clause which changed the federal system not at all. the only concession to change that he made was to admit that now the question of Negro citizenship was no longer in doubt as it had been before the war. Blacks might now claim the protection of the comity clause without question. But they would do so within an unchanged institutional framework. The provisions of the amendment, he wrote, "have not been agreed upon for the purpose of enlarging the sphere of powers of the general government, or of taking from the States of any of those just powers of government which in the original adoption of the Constitution were 'reserved to the States respectively.' The existing division of sovereignty is not disturbed by it."[39]

The imperative preliminary to the protection of equal justice for all men was a significant alteration in the "existing division of sovereignty." But to Cooley such a change was intolerable. Although deeply worried about the condition of prewar society he had not considered the possibility that the Jacksonian dream of equal men exercising their freedom equally in a world where government played an essentially negative role might itself be a cause of failure. He did not ascribe the trouble to either the dream or the constitutional system. Rather, he hit upon slavery as the problem—as the corruptor of venerable institutions good in themselves and of ideals unquestionably worthy. He hit upon slavery with the same pathetic eagerness as earlier Jacksonians had hit upon the Bank of the United States as the source of all evils.

Cooley recognized that the war had produced an expanded national power, but he believed that only the necessity of destroying the great corruptor, slavery, justified such power. He hoped that with slavery and its most blatant vestiges gone, the *status quo antebellum* that he had dreamed of might be achieved. He therefore argued eloquently that the legal innovations of war and reconstruction were only temporary expedients and that the true fruit of victory was a restored prewar constitutional system. Given the respect of most Americans for the recently won union and the long-standing love affair of practically all of them with the Constitution, his argument was convincing. The nation accepted the prewar union as the prize of battle and rejected for almost one hundred years the much greater prize that had potentially been won.

University of Kansas.

[39]Story, 683–84; Cooley, *Constitutional Limitations* (Boston, 1878), 631, 497–98