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Carrington, Cooley, Kennedy, Klare

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Duncan Kennedy's *A Critique of Adjudication: Fin de Siècle*¹ ("Critique") appears in this Article in a crowd. I begin by briefly discussing Paul Carrington’s book, *Stewards of Democracy*,² and proceed to examine at greater length some writing of Thomas Cooley.³ At this point the Kennedy book shows up, followed soon after by Karl Klare’s essay on the Wagner Act.⁴ This grouping assists appreciation of distinctive elements in Kennedy’s version of the idea of legitimation (the off-puttingly similar notions of the nineteenth-century conservative theorist Cooley are especially provocative). It also helps identification of work remaining to be done after Kennedy (here parts of Klare’s study serve as springboards).

I.

Paul Carrington begins *Stewards of Democracy* by proclaiming his belief in “democratic law.”⁵ “[I]n a world in which erratic absolutism and brutal chaos are the viable alternatives to self-government, a great deal depends on our ability to make government *by* the people work . . .”⁶ This is the job of the American lawyer: “to stabilize an otherwise fragile social order” while remaining “of the people, not over them.”⁷ The key to this project, Carrington argues, lies in lawyerly acknowledgement that “sound, useful legal ideas are generally conventional ones.”⁸

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¹ DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1997) [hereinafter CRITIQUE].

² PAUL CARRINGTON, STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION (1999) [hereinafter CARRINGTON, STEWARDS].

³ See infra Part III.


⁵ CARRINGTON, STEWARDS, supra note 2, at 1.

⁶ Id. at 6.

⁷ Id. at 1, 6.

⁸ Id. at 183.
Too often, however, judges become caught up in "heroic" conceptions of their office, and legal academics—often influential in defining the expectations of lawyers—assert the priority of "theoretical scholarship." "Rarely is recognition given in academic literature to the role of law as a confirmation of conventional morality and as a message of reassurance to the good citizens who do the Republic's work . . . ." Professor Carrington devotes much of his book to identifying and celebrating counterexamples; Louis Brandeis, Ernst Freund, Learned Hand, and Byron White figure prominently. For Carrington, though, Thomas Cooley is the lawyer whose work most obviously exemplifies "law as a public profession." Cooley—dean of the University of Michigan Law School, justice and chief justice of the Michigan Supreme Court, author of the celebrated treatise *Constitutional Limitations*, and first chair of the Interstate Commerce Commission—was "among the last Jacksonians, but also among the first Progressives." In all his efforts, Carrington contends, Cooley appreciated the concomitants of "a broadly representative legal profession," the obligation to be faithful to both "text" and "discernible contemporary mores." "[D]emocratic law must reflect the commonplace ideas of the people . . . ."

Paul Carrington finds one moment in particular in Thomas Cooley's long public life to be precisely illustrative. Harvard University, in the process of celebrating its 250th anniversary in 1886, awarded Cooley an honorary degree:

[Cooley] spoke briefly at a dinner in Hemenway Gymnasium, along with Justice Holmes . . . and Dean Langdell. With appropriate modesty, Cooley saluted the Harvard Law School . . . . But he spoke in terms unsettling to those present:

We fail to appreciate the dignity of our profession if we look for it either in profundity of learning or in forensic triumphs. Its reason for being must be found in the effective aid it renders to justice and in the sense that it gives of public security through its steady support of public order. These are commonplace, but the strength of law lies in its commonplace character;

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9 Justice Brennan is Carrington's example-in-chief. See id. at 147-51.
10 Id. at 191; see also id. at 185-92.
11 Id.
12 See id. at 121-29 (discussing Brandeis); id. at 131-36 (discussing Freund); id. at 137-43 (discussing Hand); id. at 193-203 (discussing White).
13 Id. at 100.
14 Id. at 56-57.
15 Id. at 33.
and it becomes feeble and untrustworthy when it expresses something different from the common thoughts of men.

That utterance stated a guiding premise of Cooley's career. . . . Nevertheless, its assertion at Harvard almost surely offended his host, Christopher Columbus Langdell . . . .

Cooley's remark also struck Justice Holmes with sufficient force that he was moved to respond . . . in 1902, four years after Cooley's death. On that occasion, Holmes called forth "the lightning of genius" to correct the failings of the "common thoughts of men."16

Holmes and Cooley embody Carrington's thesis:

Is the law an expression of the popular will and moral judgment, or is it an opportunity for a higher class of intellect to impose benign government on a passive people? . . . While Holmes deserves neither credit nor blame for the merit or demerit of the explosive messages of later professionals regarding themselves as geniuses of the law, he was in a sense the herald of twentieth-century lawyers and judges who would see themselves as agents of the politics and morality of a new ruling class.

Cooley, unlike Holmes, was genuinely modest in his intellectual pretensions. He believed and taught that a great mind cannot by its own exertions create new principles of morality or law. . . .

. . . [I]t is the reassurance law gives to conventional, responsible men and women, and the direction it gives to those who are confused or uncertain, that makes law so useful that it is universal among human societies.17

II.

There is an element of topsy-turvy here. Professor Carrington concedes that Holmes as a legal writer pursued an enterprise too complex to be readily reduced to "heraldry" on behalf of any single notion.18 In particular, Carrington acknowledges the democratic message of the famous dissents in the United States Supreme Court that Holmes wrote years after Cooley's speech, although he depicts democracy for Holmes as secondary, following from fatalistic skepticism or detached indifference.19 The Common

16 Id. at 9-10 (citation omitted).
17 Id. at 35, 37.
18 See id. at 35-45.
19 See id. at 40-41; see also Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).
Law, however, is not much in evidence in Stewards of Democracy, even though its publication date was just a few years in advance of Cooley’s visit to Harvard. The Holmes masterpiece, we might think, is distinctly democratic “lightning.” In addition to challenging Kant and Hegel, The Common Law starkly illuminated the anachronisms and inertias organizing much of the common law, repeatedly opened up traditional topics to contemporary “policy,” and revealed the overlapping agendas of judge-made common law and legislated statutes, entirely denying common law any claim to priority.

What of Thomas Cooley? Is his work simply that of a “worthy yeoman,” precisely and only “an expression of the Jacksonian tradition”? Or can we also glimpse the influence of a “theoretical scholarship”? In writing about Cooley, Paul

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21 Carrington judges The Common Law to be most notable for its “lofty style” and “Delphic expressions.” Carrington, supra note 20, at 525.
22 CARRINGTON, STEWARDS, supra note 2, at 23, 47.
23 Holmes, it appears, thought that Cooley and he were engaged in something like the same enterprise. Holmes wrote this letter to Cooley on September 22, 1882:

As you have introduced Mr. Waples’s Proceedings in Rem to the world I think I need not apologize for writing you a line in regard to it. It seems to me clear that he has made free use of an article of mine “Primitive Notions in Modern Law” 10 Am. Law Rev. 422 which was the foundation of Chapter 1 of my book on the Common Law without a word of acknowledgement. It is not merely that he takes for his starting point ideas which I have no reason to doubt were original with me and which I spent much time and labor in stating and proving but that the citations which I gathered from various sources occur in such wise as to earmark the indebtedness to my mind.

I am very glad that my work which is directed to the establishment of general principles only, should assist those who are engaged in making text books. But as my work is of a kind that is naturally known mainly to scholars, I think such assistance should be acknowledged. I write to you, whose name will secure the book a respectful treatment, to ask if there is any explanation to be made.

Oliver Wendell Holmes, Jr., Papers, Reel 30 (0203-0214) (1985). Cooley responded briefly on October 2: “Your letter rec’d & has been referred for consideration to Mr. Waples.” Id. Why didn’t Holmes write directly to Waples? Why, if he didn’t write to Waples, did he write to Cooley instead? Cooley, Holmes said, had “introduced Mr. Waples’s Proceedings in Rem to the world” and as a result he, Holmes, “need not apologize” for asking Cooley “if there is any explanation” for the evident plagiarism. Id. But wouldn’t Waples know better than Cooley (who in fact simply passed the Holmes letter on to Waples)? Did Holmes think that as endorser Cooley was warrantor of the originality of Waples? Perhaps it was not just that Cooley was famous. Waples, at least according to Holmes, belonged to the class of “those who are engaged in making text books.” Id. Holmes, of course, saw himself differently. How did Holmes see Cooley? Did his “name” impose upon Cooley an obligation to be familiar with Holmes’s work? If so, that “name” must have stood for more than “making text books.” Id. Cooley, as Holmes saw him, must have—like Holmes—belonged to the class of “scholars,” concerned
Carrington starts from, and elaborates upon, the work of historians who have emphasized the impact upon Cooley's thinking of Andrew Jackson supporters—especially the "Barnburners" of upstate New York, Cooley's home in his youth. However usual, there is something jarring about this juxtaposition of Jackson and Cooley. "Respectable opinion," it appears, was never "aghast" after reading Cooley—Jackson's message explaining his famous Bank veto, by contrast, struck Nicholas Biddle (to be sure, the head of the Bank of the United States) as the written equivalent "of a chained panther biting the bars of his cage, . . . a manifesto of anarchy—such as Marat or Robespierre might have issued." It is certainly true, as Carrington and others show, that elements of the Jacksonian political language survived the Civil War, and became a part of postbellum jurisprudence. "Equal protection," for example, was a phrase put to use in Jackson's veto message as well as in the Fourteenth Amendment. The extraordinary events subsumed in this passage of time, however, also obviously influenced interpretation of Jacksonian principles. In Cooley's work in particular, we will shortly see that democracy—centrally Jacksonian in Jackson's own time—figured as an equivocal and analytically marginal notion, and that judges—originally Jacksonian foils—occupied a central role, however conventional their language. Thomas Cooley emerges, I think, as a complicated, intellectually challenging conservative, both too subtle and too pointed to be anyone's "worthy yeoman." His jurisprudence also foreshadows Duncan Kennedy's.

On May 5, 1879, Cooley began a series of six lectures at Johns Hopkins University (arguably the very point of origin of organized "theoretical scholarship" in America) addressing the topic of

"with the establishment of general principles." Id. If so, Cooley should have "naturally known" Holmes's work and (presumably) spotted the Waples borrowing. Id. Thus the letter's implicit question: Why hadn't Cooley read Holmes?


27 The intensely felt conservative strain in Cooley's writing—his anxiety in the face of disorder—is perhaps most apparent in his responses to Reconstruction, in particular to passage of the Civil Rights Act of 1875. See Patrick O. Gudridge, Privileges and Permissions: The Civil Rights Act of 1875, 8 Law & Phil. 83 (1989); see also supra note 25.
“Evils in Local Government.” Cooley titled the first lecture “The Sentiment of Equality in American Politics.” “To usefully lead an age as statesman,” he observed:

[O]ne must be of it; must recognize its prevailing ideas and Sentiments, and take note of and respect such obstacles as these present to any great and sudden change. If the age is not yet prepared for his ideal, he will content himself with what is practical and attainable instead of forcing upon it something which could be better if voluntarily accepted.

This is, standing alone, very much in the Carrington vein. But Cooley’s lecture overall was a critique of the influence in politics of “Sentiments” in general and the “Sentiment of Equality in American Politics” in particular. “It is no doubt wise to take notice of prevailing sentiments, and utilize them in government so far as may be practicable, but reason and the teachings of experience must have the first place.”

“Sentiment,” Cooley believed, had especially led “reason captive” and into “folly” in functioning as the motive force behind recent extensions of the right to vote. He observed:

Suffrage ... is a birthright. The poor have the same right to it as the rich, the ignorant as the educated, and indeed there can be no distinction any where except as crime may be made to

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28 These lectures, well known to students of Cooley, can be found in handwritten form in box 7 of the Thomas M. Cooley Papers, Bentley Historical Library, University of Michigan [hereinafter Hopkins Lectures]. For Professor Carrington’s discussions, see Carrington, supra note 20, at 530-31, 535.

29 Hopkins Lectures, supra note 28. Cooley made his point at length:

The government must be suited to the age, to the people, and to the circumstances of the people; and when these are ignored, the punishment of folly must necessarily follow. A savage does not become a statesman by mere acceptance of the Christian religion, neither can an unlettered freedman become wise in matters of government by the mere force of a constitutional amendment. It may be political wisdom under some circumstances to trust either the one class or the other with privileges he does not as yet fully understand, but time has a mission to perform in educating him in the trust, and what shall come of the experiment before the training is completed must always be a subject of solicitude and anxiety.

Id. at 21-22. He was careful to note, however, that considerations of “policy” apart from sentiment might justify granting the right to vote to former slaves:

[P]articipation in suffrage is necessary for the protection of those who, by reason of the want of special means of influence which property confers would in various ways be at a disadvantage, and might be discriminated against by unequal laws and thereby wronged and oppressed. ... The circumstances of the country and of its politics made the appeal on this behalf irresistible, and an experiment conceded to only a choice between two great evils was entered upon.

Id. at 27-28. Cooley’s principal concern was instead immigrant voting. “The Sentiment that America was to be the asylum of the oppressed of all countries has been one which the nation from its birth has cultivated with care and assiduity.” Id. at 28.

30 Id. at 41.

31 Id.
forfeit it. To formulate this proposition a little differently, every man has a right to participate in the government of the State even though his participation would render government impracticable, and the good of the community must be subordinated to this right in the individual, whatever may be the consequences. *As this proposition is baseless in reason it is not surprising that it proves mischievous in practice.* It is as plainly the right of the State to exclude from suffrage all whose participation would preclude a successful government as it is of the citizen to participate in the blessings of government.\(^\text{32}\)

Cooley, at Johns Hopkins anyway, started from a notably restricted notion of democracy, believing:

> The fundamental purpose of any government is to give to the people who come under it the benefits of order by means of law. Every government therefore exists for the advantage of those who are governed, and any advantage to those who

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\(^{32}\) *Id.* at 40 (emphasis added). Cooley noted the emergence of a countersentiment, whose origins he carefully described without endorsing (he depicted himself as a partisan of “reason and the teachings of experience”). *Id.* at 41. He describes this countersentiment as follows:

Another sentiment bearing little resemblance to those already mentioned, begins to find expression somewhat vaguely in the wider current of American politics. We allude now to the feeling of distrust of and contempt for republican institutions, which is manifested in some quarters. This makes its appearance mainly among the following classes of voters:

1. Men of intelligence who desire good government, and who think they ought to have influence in proportion to their intelligence and integrity, but who find on the other hand that the parties intent on their own interests have more power.

2. . . .

3. Those who, in view of various circumstances, among which may be mentioned the unsettled condition of some portions of the Country since the war, the want of harmony between races now living intermingled and with equal political authority, and the rise of Communism in some sections, have come to believe that a greater exertion of discretionary executive authority is needed at times than is now permitted by strict construction of constitutional principles.

4. That class of persons in politics who are mere followers of party leaders in caucuses and conventions... and who being accustomed to autocratic rule in parties, come at length to regard it as proper, and to think of popular government by management.

With all these classes respect for the expression of popular sentiments in the accustomed legal modes diminishes, and with those who have property or who hope lawfully to acquire it, distrust of the ability of republic institutions to furnish property with adequate security increases. At length the faint foreshadowing of the “man on horseback” looming up in the near future becomes a familiar and not unpleasant object.

possess and wield its authority must be merely incidental and not the purpose for which they govern.\textsuperscript{33} These propositions did not determine the precise form of government.\textsuperscript{34} He continued:

Even the existence of great discontent, such as now exists in Russia, would not necessarily prove that the government should be displaced; for it may still seem probable that the existing authorities would better preserve order and give to the people protection of rights than those which would be likely to succeed them in the event of a revolution.\textsuperscript{35}

The perspective here proceeds from an angle plainly distinct from that of Jacksonian democracy. Popular sentiment, with respect to any particular matter, possessed no special status for Cooley. It was, therefore, either of benefit or harm to government depending upon the circumstances.\textsuperscript{36}

III.

It is mostly because of his work as a treatise writer that Thomas Cooley acquired fame. Paul Carrington concludes that Constitutional Limitations,\textsuperscript{37} the 1868 book that first brought Cooley national attention, succeeded because it "command[ed] the trust of its users as an accurate account of the law."\textsuperscript{38} Cooley's cardinal virtue was humility. "To write such work, authors must eschew novel thoughts and to that extent disavow not only academic status seeking but the more immediate satisfactions of self-expression."\textsuperscript{39} Cooley the treatise writer was of a piece with Cooley the judge—he was simply "describing the actual conduct of judges."\textsuperscript{40}

Indeed, Cooley himself similarly noted that he had "faithfully endeavored to give the law as it had been settled by the

\textsuperscript{33} Id. at 2.
\textsuperscript{34} Cooley was not impressed by strong notions of popular sovereignty:
The only theory recognized in our government is that... Civil Government has its origin in the agreement of the people.... In this Country, so far as concerns government under our existing constitutions, it has a basis of fact sufficient for practical purposes, though it may be and is generally true that a large portion of the people have never consented to the government in any form except as living under it implies assent.
\textsuperscript{35} Id. at 8.
\textsuperscript{36} See id. at 9-10.
\textsuperscript{37} THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (reprint 1999) (1868) [hereinafter COOLEY, CONSTITUTIONAL LIMITATIONS].
\textsuperscript{38} CARRINGTON, STEWARDS, supra note 2, at 184.
\textsuperscript{39} Id. (citation omitted).
\textsuperscript{40} Id. at 71; see also id. at 76-77.
authorities, rather than to present his own views.” He aimed to do no more than state “clearly and with reasonable conciseness . . . the principles to be deduced from the judicial decisions.” It is not clear how much weight we should give to claims of modesty from the author of a six-hundred-plus-page treatise, a work in this case mostly written in a tone of surpassing confidence, written by an author who had served as a judge for only three years and had taught for less than a decade. Regardless, Cooley’s modesty underscores this question: how do the “authorities” reach their “decisions”? There is no elaborate account of adjudication in Constitutional Limitations. In his last major treatise, however, the Law of Torts, published in 1880, Cooley began with an extended discussion of “The General Nature of Legal Wrongs,” embedding a theory of judging within a larger theory of law and society. As in his Johns Hopkins lecture, “The Sentiment of Equality in American Politics”—delivered at about the same time—Cooley treated public opinion as a problem to be managed, clearly not the expression of some Jacksonian general will.

Initially, Cooley called attention to the by-products of progress:

The increase in intelligence, and especially the new inventions and improvements which follow it, have a powerful tendency in the direction of creating new wants and desires, and of establishing people in new occupations, and as these increase, the interests, desires and passions of men must necessarily breed more frequent controversies. Moreover, every recognition by the law of a new right, is likely to raise questions of its adjustment to, and its harmony with, existing rights previously enjoyed by others; and in consequence thereof people in the honest assertion of their supposed rights are brought in conflict, and one or the other is found to be chargeable with legal wrong, though no purpose has existed to do otherwise than strictly to obey the law.

The legal system therefore comes under pressure:

Intellectual and material progress in various ways begets a complexity of business and social relations, and this adds perpetually to the difficulties of legal administration, and multiplies with no little rapidity the occasions for an

41 COOLEY, CONSTITUTIONAL LIMITATIONS, supra note 37, at iii.
42 Id. at iv.
43 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 1-22 (reprint 1993) (1880) [hereinafter COOLEY, LAW OF TORTS]. Professor Carrington notes this discussion briefly. See Carrington, supra note 20, at 497, 525.
44 COOLEY, LAW OF TORTS, supra note 43, at 1-2.
adjudication upon disputed or doubtful rights. And it renders
necessary an infinity of legislation in order to adjust and
harmonize the new conditions with what remains of the old.45

Frequent legal change seemed to Cooley to put at risk the
capacity of law to fix popular attitudes (Cooley writes here with
almost Orwellian elegance):

But where rights are defined and regulated by durable laws,
respect and obedience become habitual, and there is at length a
spontaneous conformity of action thereto which deprives the
numerous restraints of the law of all seeming hardship that
might have been felt originally. The restraints come to be
understood and appreciated in their true character as being
severally the representatives of rights secured and protected,
and the feeling they give is one of security rather than of
restiveness and oppression. The restraints and the liberty of the
people will progress together, so that the restraints will be most
numerous where rights are most fully recognized and most
perfectly protected; and if the laws are impartial, even peculiar
privileges which fall to the possession of the few will be
cheerfully acquiesced in by the many, because they will be
granted on a consideration of what is best for the whole
political society, so that though the few may receive the direct
benefit, all others will be supposed to receive incidental benefits
sufficient to justify the grant of such privileges.46

Common law, described by Cooley as “judicial legislation,”47
manages legal change in a way that minimizes any threat to the
appearance of “durable” order:

[R]ights have grown up under judicial regulation, and through
judicial definition, much more than under legislation properly
so designated. The code of to-day is therefore to be traced
rather in the spirit of judicial decisions than in the letter of the
statute. The process of growth has been something like the
following: Every principle declared by a court in giving
judgment is supposed to be a principle more or less general in
its application, and which is applied under the facts of the case,
because, in the opinion of the court, the facts bring the case

45 Id. at 2.
46 Id. at 10-11.
47 He explains further:
But in order that [the common law] may be continuously useful the progressive
changes must be great and numerous, so great and so numerous that it could
only be by the most enlarged intendment that the law of to-day could be
recognized as the common law of even the time of Lord Coke. In fact, its
principles now depend very largely on a species of judicial legislation which from
time to time, as new conditions were found to exist, has endeavored to fit and
conform the old law to them.

Id. at 11.
within the principle. The case is not the measure of the principle; it does not limit and confine it within the exact facts, but it furnishes an illustration of the principle, which, perhaps, might still have been applied, had some of the facts been different. Thus, one by one, important principles become recognized, through adjudications which illustrate them, and which constitute authoritative evidence of what the law is when other cases shall arise. But cases are seldom exactly alike in their facts; they are, on the contrary, infinite in their diversities; and as numerous controversies on differing facts are found to be within the reach of the same general principle, the principle seems to grow and expand, and does actually become more comprehensive, though so steadily and insensibly under legitimate judicial treatment that for the time the expansion passes unobserved. But new and peculiar cases must also arise from time to time, for which the courts must find the governing principle, and these may either be referred to some principle previously declared, or to some one which now, for the first time, there is occasion to apply. But a principle newly applied is not supposed to be a new principle; on the contrary, it is assumed that from time immemorial it has constituted a part of the common law of the land, and that it has only not been applied before, because no occasion has arisen for its application. This assumption is the very ground work and justification for its being applied at all; because the creation of new rules of law, by whatsoever authority, can be nothing else than legislation; and the principle now announced for the first time must always be so far in harmony with the great body of the law that it may naturally be taken and deemed to be a component part of it, as the decision assumes it to be. Thus a species of judicial legislation, proper and legitimate in itself, because it is absolutely essential to a systematic adjudication of rights, goes on regularly, and without interruption ....

Judicial legislation is thus, for Cooley, to be preferred to statutory change:

In this steady and almost imperceptible change must be found the chief advantages of a judicial development of the law over a statutory development; the one can work no great or sudden changes; the other can, and frequently does, make such as are not only violent, but premature. A large share of the value of any law consists in the habitual reception and the spontaneous obedience which the people are expected to give to it, and which they will give when they have become accustomed to and understand its obligation. The people then may be said to be their own policemen; they habitually restrain their actions

48 Id. at 12-13.
within the limits of the law, instead of waiting the compulsion of legal process. A violent change must break up, for the time being, this spontaneous observance, and some degree of embarrassment is always to be anticipated before that which is new and strange becomes habitually accepted, and its advantages appreciated, and before that which remains of the old is adjusted to it.49

If it is “principles” and not decisions as such that matter most in “judicial legislation,” we may wonder whether Cooley’s professed intention in his Constitutional Limitations to “state clearly . . . the principles to be deduced” was so humble after all. His Harvard mention of “the sense that [law and the legal profession] gives of public security” also acquires an added dimension—“commonplaces” now figure as a front for intricate governance. Thomas Cooley’s Law of Torts, like his Johns Hopkins lecture, is surprising work. The preoccupations and emphases are plainly not Paul Carrington’s. Cooley, in fact, seems to celebrate a process very much like that described in Duncan Kennedy’s Critique.

IV.

What should we make of that? It is not a question of anticipation. Some of Thomas Cooley’s ideas are just different enough, I think, to call attention to a difficulty in Duncan Kennedy’s use of the idea of legitimacy.

The adjudicatory mechanics that Critique describes, as one of its effects, a “reinforcement and reproduction of a particular attitude or ‘sense’ about the social world.”50

[T]he particular set of hierarchies that constitute our social arrangements look more natural, more necessary, and more just than they “really” are. . . . [A]lternative ways of understanding are rendered invisible or marginal or seemingly irrational by the practice of withdrawing a large part of the law-making function into a domain governed by the convention of legal correctness and the denial of ideological choice.51

Adjudication appears to be a background institution, one source of the framework or context “within which” foreground political struggles take place.52 Adjudicative results—for example, common law—therefore do not ordinarily look like “a major cause of

49 Id. at 15.
50 CRITIQUE, supra note 1, at 236.
51 Id.
52 Id. at 243.
inequality."53 "The legitimation hypothesis is that this limitation of the political imagination is good for the status quo."54

What is "the status quo"? Kennedy posits the existence of a "set of hierarchies that constitute our social arrangements."55 Cooley, however, is less sure of his surroundings, instead perceiving what Kennedy calls "flux."56 Social circumstances appear to Cooley to present recurring risks of disruption or disintegration. Law as well, in its own content, is at points incomplete or unjust; the case for revision is often clear enough that the question of means recurs. The argument for judicial change, as opposed to legislation, is that the relative invisibility of judicial action will do less to add to unrest, to the general sense of unsettlement. Cooley would probably have rewritten Kennedy's proposition that adjudication "reenforces the status quo,"57 to read "reinforces the status quo"; Cooley would have appreciated the implicit military and construction metaphors. He would not (I think) believe that this is the same thing (as it seems to be for Kennedy) as "reproduc[ing] the status quo."58

So what? If Cooley is right, adjudication, by filling the void, preempts legislation and the possibility of more radical, less ad hoc legal change. This is the same result that Kennedy's legitimacy produces.

I am not so sure. Kennedy seems to suppose that the results of adjudication are, in detail and in the aggregate, pretty much patternless.59 Judicial work approximately reproduces a status quo (allowing for moderate conservative and moderate liberal variations); there is not much to be learned from a close reading of judicial opinions themselves, either individually or in quantity. There is no reason to believe, for example, that organizing judicial opinions is a useful way to learn anything more than the rough outline of social preoccupations. Individual judges, Kennedy would perhaps agree, might exhibit flashes of insight. But most

53 Id.
54 Id. at 246.
55 Id. at 236.
56 Id.
57 Id. at 247.
58 Id.
59 He writes:
The liberal legalist investment in Reason sometimes pays off in knowledge that is useful beyond the project, that has as much 'truth value' for conservatives or radicals as for its liberal inventors. But the knowledge the liberal legalist project produces is not much help with these questions. We might define the project as a particular strategy for shoring up rightness, principle, and rights so that it will be unnecessary to answer them.

Id. at 130.
judicial work will mostly reflect the interaction of stylized elements ("bites" of various sorts), time constraints, and the like. There is no reason to suppose, therefore, that opinions disclose anything other than the techniques of writing opinions; just as the playing out of a game reveals nothing more than some of the implications of the game's rules. These conclusions hold within Kennedy's argument, however, only for readers who know something of the rules of the game. Uninformed readers believe that the opinions reveal esoteric insight into the structure of circumstances or society—hence the legitimating effect. Those who know how to read understand that what they read is just an allegory of writing; those who do not know how to read believe that what they read describes the world.  

Cooley seems to suppose that judicial opinions mostly pass unnoticed in the world at large. Indeed, they do their work within his politics precisely to the extent that this is so. Issues that would add to social conflict if politically prominent, or if subjects of legislation, never come to public attention because judges address them case by case. But this means, I think, that within Cooley's account, the content of judicial opinions does matter. He distinguishes cases in which judges simply reiterate what is already established from cases in which something new is needed either because there is no previous judicial analysis available or because previous work is now no good. Informed readers, at least in principle, should be able, as Cooley does himself, to distinguish between the two sorts of cases. 61 It becomes possible, therefore, to build up a map (or at least candidate maps) of interconnected problems—the potential subjects of the legislative action that Cooley means to preempt. What this means, I think, is that an ever present fragility is part of Cooley's project. Nothing in principle bars legislatures from map-making, from proposing large-scale changes exciting still further critique.

60 Kennedy need not assume that the public at large reads (and respects) judicial opinions. But he must suppose that participants in the legislative process (including the electoral process insofar as it frames legislative issues) do so. In this respect, his analysis parallels famous arguments of Henry Hart. See, e.g., Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 Colum. L. Rev. 489 (1954).

61 Cooley's discussion of the fellow servant rule provides an especially clear illustration. See COOLEY, LAW OF TORTS, supra note 43, at 541-45. Usual assumption of risk notions seems to have struck Cooley as not persuasive; he instead supplies a complex passenger safety rationale which, however persuasive, is notable for its considerable (although not total) independence of prevailing judicial rationalizations. On the usual perspective and its difficulties, see, for example, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 209-10 (1977); Gary T. Schwartz, Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation, 90 YALE L.J. 1717, 1769-70 (1981) (differentiating fellow servant rule and assumption of risk doctrine as such).
In his 1873 edition of Justice Joseph Story’s *Commentaries on the Constitution*, Cooley had already posed the question:

What is “the law of the land?” It cannot be the common law merely. Statute law is in the highest sense the law of the land; and the legislative department, created for the very purpose of declaring from time to time what shall be the law, possesses ample powers to make, modify, and repeal, as public policy or the public need shall demand. Such being the case, the question presents itself, whether any thing may be made the law of the land, or may become due process of law, which the legislature, under the proper forms, has seen fit to enact?\(^6\)

Here is his answer:

[L]ife, liberty, and property are placed under the protection of known and established principles, which cannot be dispensed with either generally or specially; either by courts or executive officers, or by legislators themselves. Different principles are applicable in different cases, and require different forms and proceedings: in some, they must be judicial; in others, the government may interfere directly and *ex parte*; but due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs.\(^6\)

But what if “the settled maxims of law” were themselves open to critique? He responds:

A party has no vested right in a rule of law which would give him an inequitable advantage over another; and such rule may therefore be repealed and the advantage thereby taken away.

... But it cannot be necessary to go more particularly, in this place, into an enumeration of the cases in which the legislature may change a rule of law in order to take away a remedy which, resting upon mere technical reasons, it might be unjust to insist upon; or to perfect a remedy which otherwise might have been defeated. The rules which determine the legislative power in such cases are broad rules of right and justice; and it is not often, when there is occasion to apply them,

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\(^6\) 2 *Joseph Story, Commentaries on the Constitution of the United States* § 1943 (4th ed. 1873) (notes and additions by Thomas M. Cooley) [hereinafter *Cooley’s Story*]. Cooley’s principal “additions” addressed—not surprisingly—the Thirteenth, Fourteenth, and Fifteenth Amendments. See id.; see also *Cooley, Constitutional Limitations*, supra note 37, at 353-54.

\(^6\) *Cooley’s Story*, supra note 62, § 1945 (emphases added). For a very similar formulation, see *Cooley, Constitutional Limitations*, supra note 37, at 355-56. In his edition of Story’s *Commentaries*, Cooley acknowledged that he was borrowing his own prior wording. “We have been unable to give a comprehensive definition which shall be more accurate.” *Cooley’s Story*, supra note 62, at 665 n.1.
that there can be difficulty in discerning plainly the line of constitutional limitation.\textsuperscript{64}

We may wonder how we are to distinguish “mere technical reasons” from “broad rules of right and justice” if “different principles are applicable in different cases, and require different forms and proceedings.” Cooley declares—confidently or prayerfully?—that “there can be no difficulty in discerning plainly the line.” We all remember, of course, what will follow: Justice Peckham in \textit{Lochner v. New York}\textsuperscript{65} obsessively worrying about the prospect of the police power becoming an illimitable “delusive name”;\textsuperscript{66} Holmes (also in \textit{Lochner}) chanting “[g]eneral propositions do not decide concrete cases”;\textsuperscript{67} Chief Justice Hughes, in \textit{West Coast Hotel v. Parrish},\textsuperscript{68} redrawing “the line,” observing that “[t]he Constitution does not speak of freedom of contract,” and that “the restraints of due process” plainly encompass “protection from unscrupulous and overreaching employers.”\textsuperscript{69}

The particular conception of legitimacy that Duncan Kennedy deploys trades heavily on a depiction of judges as alienated labor.\textsuperscript{70} It is as though “reasoned elaboration” is a factory product; as though Ford or Taylor had read Hart and Sacks. Judges faced with time constraints, dockets, and fellow judges to be persuaded assemble opinions from prefabricated parts in ways that conform to already established models allowing only limited opportunity for variation. It is not that the opinions must, in the abstract, be put together in this way—it is possible to imagine Hercules reconceiving a jurisprudence as a whole, seeking some “best” account of the law. This is just not what the work is ordinarily like. Paul Carrington, interestingly, reaches much the same conclusion:

Most opinions of a court are written defensively. They tend to disavow personal responsibility for the political consequences of the decisions they defend. One need not be a judge to recognize the prudence of attributing one’s unwelcome decisions to others, preferably some abstract other, such as “the

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64 \textit{COOLEY'S STORY}, supra note 62, §§ 1957-58. “[T]he term ‘vested rights’ is not used in any narrow or technical sense, as importing a power of legal control merely, but rather as implying a vested interest which it is equitable the government should recognize, and of which the individual cannot be deprived without injustice.” \textit{COOLEY, CONSTITUTIONAL LIMITATIONS}, supra note 37, at 358.

65 198 U.S. 45 (1905).

66 \textit{Id.} at 56.

67 \textit{Id.} at 76 (Holmes, J., dissenting).

68 300 U.S. 379 (1937).

69 \textit{Id.} at 391, 398.

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law” or “the rules” or “management.” Moreover, this style of disavowal serves to remind judges that they have professional duties to restrain their personal impulses, that indeed the law is not theirs to shape to their own desires. Carrington here seems to agree with Kennedy that judging is an example of Sartrean “denial,” “misrepresentation . . . of oneself as a machine . . . as factoid, or mechanical.” It seems to me, though, that judicial work as Kennedy in particular describes it is alienated labor even if judges acknowledge to themselves that the “experience of constraint by the text” is “a sometime thing, always unpredictably subject to dissolution by legal work.” Whatever “particular work strategy” individual judges adopt, the work is always one version or another of assembly—arrangement and rearrangement of parts, organization and reorganization of “rules” and “policies.” If this is their job, judges “as workers” can never regard the opinions that they produce as “theirs” in any deep sense. This means, of course, that judges, at least within Kennedy’s account, are often also alienated readers as well as writers. Opinions will appear to judges to be just assemblages, seams discernible—hasty or otherwise incomplete efforts. Should other readers view judicial work from this perspective? Kennedy describes “delegitimating critiques” as precisely adopting the point of view of the working judge in order to dissolve the “appearance of inevitability” by moving “legal rules” from “background” to “foreground.” The aim of this project, Kennedy says, is to show “that there are more ways to change the status quo than previously appeared.” But why doesn’t such effort, at least once past the momentary thrill of the gestalt shift, simply reproduce alienation, the sense of legal work as parts-assembly? If that is not supposed to be the result, if the point is to show the possibility of a politics other than busywork, something other than, or in addition to, parts-work must be discernible in judicial opinions. Cooley’s account suggests that readers may attempt to discover the issues or questions that, once interconnected, reveal the larger legislative projects that Cooley sees judges as (hopefully) obscuring. His own usage, however, is no longer especially helpful insofar as it relies on what are supposed to be irreducibly general gap-filling policies

71 CARRINGTON, STEWARDS, supra note 2, at 70 (emphasis added).
72 CRITIQUE, supra note 1, at 205.
73 Id.
74 Id. at 181.
75 Id. at 180.
76 Id. at 248.
77 Id.
or maxims aimed at supplanting so-called technical terms. This is a jurisprudence that parts-work replaced.

V.

So what is to be done? There are, I think, other options.

It is helpful, for present purposes, to reconsider a “foundational” example of delegitimation work (in its critical legal studies (“cls”) form): Karl Klare’s Judicial Deradicalization of the Wagner Act. Klare—famously—dramatized the larger theme of his article by pointing out the extent to which Chief Justice Hughes, in his opinion in NLRB v. Jones & Laughlin Steel Corp., manifested “adherence to traditional contractualist ideals,” merely “updating” and therefore “preserving the freedom of contract ideal.” This was and still is, we all know, simply brilliant. Jones & Laughlin is usually understood oppositely, as perhaps the exemplary illustration of New Deal constitutional and legal modernity. Klare engineered his reversal of ordinary expectations by repeatedly playing with assumptions about background and foreground—according priority to the more obscure Jones & Laughlin due process discussion rather than the well-known interstate commerce rhapsody, and, more importantly, reading the opinion as a description of labor law biases rather than constitutional law assumptions. Klare precisely put to use the sensitivity to the place of parts-work in adjudication that Duncan Kennedy expounds. Klare himself is clear on this (concluding his discussion of Phelps Dodge Corp. v. NLRB8 later in the article):

A microcosm of modern legal consciousness, Phelps Dodge contained a chaotic amalgam of conceptualism and realism, ruleboundedness and ad hoc balancing, deference to nonjudicial sources of law and unhesitating faith in the superiority of the judicial mind. This jurisprudential mélange transcended political lines and attitudes as to whether the proper judicial role is one of activism or restraint. I believe that all of modern legal consciousness partakes of this hodgepodge character. 82

Still, however correct Karl Klare is in characterizing Justice Frankfurter’s opinion in Phelps Dodge (I will return to this question shortly), there remains, for the reader of Jones & Laughlin, a sense of something missing. This sense, I think, finds its point of departure in passages that Klare finds no need to quote

78 Klare, supra note 4, at 265. For Kennedy’s characterization, see CRITIQUE, supra note 1, at 400 n.13.
79 301 U.S. 1 (1937).
80 Klare, supra note 4, at 298, 300 n.115.
81 313 U.S. 177 (1941).
82 Klare, supra note 4, at 334-35.
and that are in the middle of the paragraph in *Jones & Laughlin* that he uses to drive his own argument. This is the outline of the paragraph as a whole:

The Act does not . . . . It does not . . . . It does not . . . . The Act expressly provides . . . . The theory of the Act is . . . . As we said . . . . the cases of *Adair* . . . and *Coppage* . . . are inapplicable to legislation of this character. The Act does not interfere . . . . The employer may not . . . . and, on the other hand, the Board is not entitled . . . . The true purpose is the subject of investigation . . . . It would seem that . . . .

Klare quotes the first three sentences, does not quote the next three, quotes the seventh and eighth, and omits the ninth and tenth. Moderation in quotation is surely no vice. And it plainly is not the case that the omitted sentences contradict Klare's own contention. The organization of the paragraph as a whole, however, notably emphasizes multiplicity of point of view. There is the Act and the Supreme Court in its past decisions; there is the employer and the Board, neither depicted as decisive; there is the point of view of the *Jones & Laughlin* opinion itself: "It would seem that . . . ." Klare collapses this superstructure. We notice only what appear to be the biases of the *Jones & Laughlin* opinion itself. And, of course, they are the opinion's biases. But the artful arrangement of alternate perspectives, we know, is just as much the opinion's. Indeed, in the discussion of interstate commerce, Hughes proceeds similarly, albeit across a longer length:

Respondent says . . . . The argument rests upon the proposition that manufacturing in itself is not commerce . . . . The Government distinguishes these cases. The various parts of respondent's enterprise are described . . . . It is urged that these activities constitute a "stream" or "flow" of commerce . . . .

. . . .

Respondent contends that the instant case presents material distinctions . . . .

We do not find it necessary to determine . . . . The instances in which that metaphor has been used are but particular, and not exclusive, illustrations . . . . The question is necessarily one of degree . . . .

. . . .

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. In this sequence, propositions that might otherwise be presented as fundamental constitutional notions—indeed, treated as such

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83 *Jones & Laughlin*, 301 U.S. at 45-46.
84 See Klare, *supra* note 4, at 299.
85 *Jones & Laughlin*, 301 U.S. at 34-40.
before *Jones & Laughlin*—are recharacterized as arguments of parties. The artifice of one party’s “position” (the government’s) is further emphasized by calling attention to its metaphorical base; this sense of artifice in turn makes “apparent” the element of judgment and choice; “the fact” that the employees in the case “were engaged in production” can therefore be both acknowledged and treated as similarly (just like the metaphor) “not determinative.”

So what? Am I arguing only that Charles Evans Hughes deployed another kind of parts-work, originating in a familiar lawyerly awareness of point of view, that he must have been conscious of what he was doing, and that, therefore, perhaps like Thomas Cooley, he was a not quite so constrained activist? No. What is most distinctive about the *Jones & Laughlin* opinion, I think, is caught by the phrase, “[t]he theory of the Act,” in the paragraph that Karl Klare also puts to work. Hughes executes a gestalt shift of his own. *Jones & Laughlin* situates its readers, first and chiefly, within the Wagner Act:

*First. The scope of the Act.*

*Second. The unfair labor practices in question.*

*Third. The application of the Act to employees engaged in production.*

*Fourth. Effects of the unfair labor practice in respondent’s enterprise.*

*Fifth. The means which the Act employs.—Questions under the due process clause and other constitutional restrictions.*

Indeed, it is because the opinion first describes the statute and emphasizes how its provisions key its applicability to a finding, in particular cases, as to whether matters at issue are matters “affecting commerce,” that the opinion concludes that the constitutional issues are to be assessed within the context of “the instant case.” The facts about the scale of the *Jones & Laughlin* enterprise, as Chief Justice Hughes artfully assembles them, make the Commerce Clause question appear to be easy. The statute frames the constitutional question and thereby effectively resolves it.

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87 *Jones & Laughlin*, 301 U.S. at 29, 32, 34, 41, 43.

88 See id. at 25-28.
In the discussion of due process, perhaps similarly, the opinion repeatedly characterizes “traditional contractualist ideals” as statutory elements. Is the statute free to fix its own conception of contract, to focus contractual analysis just as it focused constitutional inquiry?\textsuperscript{89} We know, of course, that Chief Justice Hughes had already answered this question in the affirmative, just before Jones & Laughlin, in his opinion in West Coast Hotel v. Parrish.\textsuperscript{90} Indeed, he had made much the same point several years earlier in Home Building & Loan Ass'n v. Blaisdell.\textsuperscript{91} Common-law notions, just like constitutional notions, were subject to legislative specifications of emphasis.\textsuperscript{92} The important question becomes: what choice did the legislature make? This reformulation is, for Karl Klare’s immediate purposes, unnecessarily refined. His concern is the particular content of the choices that the Supreme Court attributed to the Wagner Act, and not whether the Court understood this content as first common law or first statutory. Sensitivity to the formal ordering of statutes and common law, however, ultimately fosters awareness of a jurisprudence, and therefore a politics, that Klare and Duncan Kennedy tend to obscure.

“There is no . . . general common law.”\textsuperscript{93} After reading Jones & Laughlin, I think, we can conceive of the possibility of a “theory of the Act” that would not only substitute its own emphases for usual conceptions of interstate commerce, but would also put in place its own versions of common-law concepts. Indeed, in cases decided during and just after the period that is the focus for Karl

\textsuperscript{89} Thus there were three possible approaches within the common law/legislation interplay. Common-law notions could be understood to constrain or even dictate statutory language—substantial legislative departures from common-law notions would be regarded as arbitrary. Statutes could be understood to be free to ignore or dispense with common-law vocabularies. Or third (this is the possibility that Kennedy’s argument itself highlights), common-law framings might be understood as unresolved, as themselves frequently and substantially varying; legislatures, therefore, might be understood to possess a considerable freedom of choice even in advance of reaching the question of whether statutes might entirely repudiate common law propositions.

\textsuperscript{90} 300 U.S. 379 (1937).

\textsuperscript{91} 290 U.S. 398 (1933).

\textsuperscript{92} Courts would acknowledge such specifications often in the 1940s. See, e.g., Hecht Co. v. Bowles, 321 U.S. 321, 328-30 (1944); Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943).

\textsuperscript{93} Erie Ry. Co. v. Tompkins, 304 U.S. 64, 78 (1938). It is not misleading, I think, to delete the word “federal.” It was, after all, the collapse of the notion of general common law, and the simultaneous recognition of the controversial political uses of general common law—of more or less the same body of law emerging everywhere—that created the environment within which the Erie rule seemed to make sense as a matter of sound judging, and within which the Swift v. Tyson rule seemed constitutionally to resemble nothing if not a judicial coup d’état. See generally Edward A. Purcell, Jr., Brandeis and the Progressive Constitution (2000).
Klare, the Supreme Court repeatedly debated the question of the place of common-law terms within federal statutes.94

*Phelps Dodge,*95 the last Wagner Act case that Karl Klare discusses, was one site of this controversy. Justice Frankfurter’s nominal majority opinion96 appears to Klare to be both “[a] microcosm of modern legal consciousness” and “a chaotic amalgam”97—a clear illustration (we might think) of what Duncan Kennedy leads us to expect. But both parts of the opinion that Klare persuasively criticizes98—the passages (1) requiring the NLRB to explain once more its reason for ordering reinstatement of workers now employed elsewhere, and (2) ordering the Board to enforce the mitigation doctrine full force—rest on the same ideas. First, the Wagner Act is not itself decisive. “Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition.”99 No particular resolution of the matters at hand, therefore, are “mechanically compelled by the Act.”100 Second, “[a] statute expressive of such large public policy... must be broadly phrased and necessarily carries with it the task of administrative application.”101 This “administrative process will be best vindicated by clarity in its exercise.”102 This meant for Justice

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94 The best known of these decisions also involved the Wagner Act. *NLRB v. Hearst Publications,* 322 U.S. 111 (1944), held that, even though the Act included no express definitions, the meaning of the statutory term was not to be judged in light of common law standards. Refusing, in strikingly Erie-like terms, to try to identify a “pervading general essence distilled from state law,” the *Hearst* opinion declared that “it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation.” *Id.* at 122, 127. To be sure, the *Hearst* opinion did not carry its own analysis to conclusion, “distilling” a statutory “essence” as it were. The “public right” notions according priority to the NLRB that are an important additional subject of Klare’s critique, already implicit in *Jones & Laughlin* in the depicted opposition of employer and Board, reappeared in *Hearst* in the form of a policy of judicial deference to agency statutory interpretation. *See Hearst,* 322 U.S. at 130-32. But the idea of “the theory of the Act” is plainly just as important in *Hearst* as NLRB priority. The Taft-Hartley Act followed in short order. A congressional shotgun blast fired at the NLRB—the statute included, inter alia, a specific repudiation of *Hearst*’s approach to the definition of employees, mandating a return to common-law conceptions. *See Allied Chem. Workers Local No. 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 165-68 (1971).

95 *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941).

96 The Supreme Court at the time consisted of eight justices. Justice Roberts did not sit for *Phelps Dodge.* *See id.* at 200. Justices Murphy, Black, and Douglas dissented. *See id.* at 200-08. Justice Stone and Chief Justice Hughes dissented in part. *See id.* at 208-12.

97 Klare, *supra* note 4, at 334.

98 *See id.* at 327-35.

99 *Phelps Dodge,* 313 U.S. at 185.

100 *Id.* at 198.

101 *Id.* at 194.

102 *Id.* at 197.
Frankfurter that the NLRB must “disclose the basis of its order” in terms “making workable the system of restricted judicial review.” 103 It also meant that the NLRB could not use “[s]implicity of administration” as a reason for not closely examining the capacity of workers to mitigate damages. 104 In reaching its “final judgment,” the Board’s process, like that of any “civilized legal system,” must “tak[e] fair account . . . of every socially desirable factor.” 105

Justice Frankfurter’s opinion in Phelps Dodge is a harbinger, specifically, of the postwar Administrative Procedure Act (already proposed in Congress) and, more generally, legal process jurisprudence. 106 It was not a reassertion of common-law order but rather reconceived law as a mechanism for maintaining order by shifting emphasis away from questions about the sources and stability of substantive legal norms to questions of institutional (prototypically judicial) requirements and ethics. But this rearrangement required, perhaps just as much as the older common-law regime, that statutes figure only peripherally. Frankfurter’s opinion proceeded accordingly. It is perhaps not surprising that the other Phelps Dodge opinions treated the Wagner Act terms as central. Justice Stone relied chiefly upon the wording of particular provisions that appeared to indicate that wrongly discharged workers who had obtained employment elsewhere, and wrongly hired job applicants, were not statutory “employees.” 107 Justice Murphy stressed the statutory responsibility of the NLRB to gauge and enforce “the policies of the Act.” 108 Linking institutional ethics with statutory substance, he wrote, “[i]t is not our function to read the Act as we think it should have been written, or to supplant a rule adopted by the Board with one which we believe is better.” 109

Karl Klare addresses the question of “the theory of the Act.” But it is not the Wagner Act itself that he reads mostly. Except for some references to “Findings and Policy” included in the first section of the Act, he looks to “labor law cases and literature.” 110 In this respect, at least, his approach parallels that of Justice

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103 Id. at 196-97. “From the record of the present case we cannot really tell why the Board ordered reinstatement of the strikers who obtained subsequent employment.” Id. (emphasis added).
104 Id. at 198; see also id. at 198-200.
105 Id. at 198.
107 See Phelps Dodge, 313 U.S. at 209-11 (Stone, J., dissenting in part).
108 Id. at 206 (Murphy, J., dissenting in part).
109 Id.
110 Klare, supra note 4, at 281.
Frankfurter. "The theory of the Act" looks like a marginalized third term, neither common-law concepts nor administrative procedure. To be sure, within the approach that Klare adopts and that Duncan Kennedy generalizes in *Critique*, this deemphasis is readily explained. Statutory interpretation is easily interpreted as just another form of adjudication—more ad hoc parts-work. In any case, the idea of "the theory of the Act," closely considered, does look odd. What does it mean for "the Act" to theorize? People theorize—say, judges, legislators (maybe), or academics—not documents. "The theory of the Act" is an anthropomorphism, figurative language not far different from "stream of commerce" rhetoric.

VI.

It may be a mistake, however, to reach this conclusion too quickly. Duncan Kennedy's depiction of the "chaotic amalgam" (Karl Klare's phrase) judicial opinions beget obtains at least some of its plausibility, we may suspect, from several presuppositions. It helps, for example, if judges routinely issue a very large number of opinions, addressing more or less similar legal questions. Kennedy's account also benefits if opinions are (relatively) easy to read, and free from (much in the way of) formal constraint. It becomes less difficult, and seems to be more revealing as well, to pick out the arrangement and rearrangements of standard elements ("bites" or parts work) that for Kennedy are characteristic of the substance of the opinions. *Critique* may trade, therefore, on aspects of our responses to judicial opinion-writing that are not so obviously part of the project of reading and writing legislation. Statutes are—vis-à-vis particular topics at least—relatively infrequent within given legislative jurisdictions (and it is almost always only with respect to particular topics and within a given jurisdiction that statutes are read). Statutes are—we ordinarily expect—difficult to read. This is in part a consequence of their length. It is even more so a result of their extreme stylization. It is plain that the content of statutes, whatever that may turn out to be, derives precisely from the arrangement,

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112 Notwithstanding a few celebrated attempts, and the well-known arguments of Roscoe Pound and James Landis, the idea that statutes would figure collectively as a new kind of—or new contribution to—common law did not take hold. See James Landis, Statutes and the Sources of Law, in HARVARD LEGAL ESSAYS (1934); Roscoe Pound, Common Law and Legislation, 21 HARV. L. REV. 383 (1908).
rearrangement, presence, absence, or other variation of more or less standard elements.

Statutes may be infrequent, lengthy, and both difficult and formulaic in style at least in part because their wording is canonical—always the point of departure, not just one version among many. It is surely also relevant that statutes require the approval of relatively large numbers of individuals before enactment. In the legislative process itself, statutory drafts may figure as representations—as registries and therefore organizers of (or at least departure points for) the politics of the moment. In the legislative process itself, statutory drafts may figure as representations—as registries and therefore organizers of (or at least departure points for) the politics of the moment.\textsuperscript{113} Statutes remain representative after passage as well. Their function, simultaneously jurisdictional and substantive, is the depiction of circumstances, in terms identifying both facts and norms, that authorize and inform executive or judicial acts. The mechanics and uses of statutes—this is my main point—conjoin form and content. "Every form of rule is the precipitate of a social conflict—it consolidates the distribution of power corresponding to its outcome."\textsuperscript{114} In the case of statutes, Elias's dictum becomes a provocative pun. "Rule" is both hegemony and writing.

Statutes matter because they are treated as governing models. The effect of judicial opinions, in contrast, is to an important degree independent of their exact wording—at least apart from their concluding orders. It is possible to wonder, therefore, whether in the course of reading statutes, in the course of identifying and interpreting legislative assemblies, we might glimpse something other than what (little, Kennedy argues) we gather from reading judicial opinions. Statutes, precisely because of the way they differ from opinions, might retain the potential of marking lines of conflict, of making explicit what is enforced, what is left unresolved or compromised, and what is taken for granted within a politics not necessarily the same as—perhaps writ larger than—the politics of adjudication. This hypothesis, we have seen, was Thomas Cooley's worry. It asserts the possibility that changing the first subject of critical attention—from judicial opinions to statutes—might open an inquiry falling outside the domain of Duncan Kennedy's dismissal.\textsuperscript{115} Adjudication would

\textsuperscript{113} See JEREMY WALDRON, LAW AND DISAGREEMENT 77-82 (1999).
\textsuperscript{115} There is another option. We might treat the proper norms—those that ought to inform legal instruments—as originating in the experience and efforts at resistance of persons who seem, in some systematic or structural way, to be exploited or otherwise badly treated. This is, of course, one point of departure for feminist legal writing and Critical Race Theory, as well as other similar projects. The same approach has also been put to use within a class-based framework. For an especially evocative illustration drawing on the Jones & Laughlin dispute, see Ken Casebeer, Aliquippa: The Company Town and
remain relevant, of course, but would now become secondary. Judicial responses to statutes might be understood as possessing an additional dimension, as sometimes treating statutes as changing terms of analysis and sometimes denying or minimizing any such statutory change. These responses might, in the aggregate, reveal no arresting pattern (Kennedy’s hypothesis). The opinions would remain, however, mineheads of a sort, sites for attempted extractions of possible statutory scale, more or less difficult efforts to describe concrete politics writ larger. Such attempts, like all tries at escape, may not succeed every time. They would, however, at the least challenge the claim of judges to title to their own opinions (and through their opinions the statutes the opinions expound). Jurisprudential direct action of this sort, in the end, seems the next best step after Duncan Kennedy’s *Critique*.

*Contested Power in The Construction of Law, 43 BUFF. L. REV. 617 (1995).* I do not mean to criticize this often powerful way of proceeding. It may sometimes, however, run the risk of putting aside the question of precisely how it is that legal materials considered relatively abstractly—understood as spectacle as a version of artistic production, ordinarily of a status quo—might be seized and reoriented, put to work—even if only intermittently and not often free from challenge—in service of some other production.