BOOK REVIEW


Reviewed by Eugene D. Genovese 2

Unpretentiously but surely, Morton J. Horwitz in The Transformation of American Law has integrated economics, ideology, and institutional change in a manner that establishes him as a premier American historian while enhancing his reputation as a foremost student of the development of American law and the legal profession. Transcending the work of J. Willard Hurst, Lawrence Friedman, and their school,3 Horwitz lifts the discussion of American legal history out of the economic determinist quicksand into which their admirable efforts inadvertently have been leading. At his best, he gives due weight to the interplay of ideology and economics and, albeit too abstractly, to the decisive role of politics in shaping both. Unfortunately, Horwitz is not always at his best, and, as a result of his puzzling lack of attention to the specifics of the political history of the period, he introduces ambiguities that threaten to hurl him back into the economic determinism he is combatting.

Horwitz offers a convincing argument. The economic transformation of an agrarian-capitalist society into an industrial one posed hard problems for the law in general and its inherited doctrine of property rights in particular. The common law as molded during the eighteenth century proved inadequate to the demands for the realization of developmental possibilities and gave way not only to substantive legal changes, but to an increasingly activist role for the judiciary. In effect, the judges intervened to promote a presumably more rapid economic development at the expense of both time-honored judicial views and practices, and the interests of large sections of the people. This judicial intervention promoted development in order to redistribute wealth in favor of the strongest bourgeois interests and to accelerate capital accumulation.4 To bolster this thesis, Horwitz

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1 Professor of Law, Harvard University.
2 Professor of History, University of Rochester.
3 See, e.g., J. Hurst, Law and Social Order in the United States (1977); L. Friedman, Contract Law in America (1965).
4 For an excellent account of the place of The Transformation of American Law in the literature, see Foner, Get A Lawyer!, N.Y. Rev. Books, April 14, 1977, at 37, which, among other virtues, outlines some essential defects of Horwitz's work. My one criticism of Foner concerns his insistence on treating the economic process
brilliantly examines the increasing institutional autonomy of the legal profession, changes in the doctrine of eminent domain, the purging of traditional concern with equity and "just price" from contract doctrine, the decline in the power of juries relative to judges, and the shift from the protection of small property to that of consolidated wealth. With admiration for the book's many virtues, I shall proceed directly to selective criticism.

I.

Horwitz convincingly explains the rise of the legal profession between 1790 and 1820 as largely the result of "the forging of an alliance between legal and commercial interests" (p. 140). He carefully traces the decline of both the mercantile community's distrust of the legal system and its reliance on its own resources for settling disputes. "During this same period," he writes, "the Bar first becomes active in overthrowing eighteenth century anti-commercial legal doctrines" (p. 140). And as the Bar adjusted to the power of the mercantile interests, it expanded its own claims to autonomy and primacy in dispute settlement. The merchants, facing diminution of their power to resort to extralegal adjudication, accepted the claims of a Bar no longer perceived as hostile. Horwitz describes the outcome as an "accommodation by which merchants were induced to submit to formal legal regulation in return for a major transformation of substantive legal rules governing commercial disputes. . . . Law is no longer merely an agency for resolving disputes; it is an active, dynamic means of social control and change" (pp. 154–55).

Horwitz also considers the impact of emerging economic groups on the development of legal doctrine. These new economic groups—an industrial sector—did not simply generate new views of the law; those forces themselves received considerable support from judges bent upon reshaping the law to promote development (p. 4). He cites Palmer v. Mulligan and Platt v. Johnson as contributing to "the entirely novel view that an explicit consideration of the relative efficiencies of conflicting property uses should be the paramount test of what constitutes legally

Horwitz describes as one of "primitive accumulation." This indirect reference to Karl Marx's great contribution to economic history, see K. Marx, Capital pt. VIII (1967), assumes that primitive accumulation should be seen as a recurrent historical process. This view does violence to Marx's emphasis on the creation of a world market. The problem may strike readers, especially non-Marxists, as theological quibbling, but it has major consequences for our understanding of the rise of a hegemonic bourgeois world-view.

6 15 Johns. 213 (N.Y. 1818).
justifiable injury” (pp. 37–38). Horwitz refers more than once to the courts’ attempts to justify decisions favorable to development on grounds of public interest. He writes of the bitter contention over water rights:

A rule of priority [in time] had monopolistic consequences: a reasonableness doctrine based on a notion of proportional use resulted in competitive development. A contest between the two was inevitable. When the doctrinal confusion began to clear up in the second quarter of the nineteenth century, virtually all courts rejected prior appropriation, because, in the prescient language of the New York Supreme Court, it meant that “the public, whose advantage is always to be regarded, would be deprived of the benefit which always attends competition and rivalry.” (P. 43.)

Surveying legal developments of this period, Horwitz perceives a general reformulation of common law doctrine “to create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development” (p. 100). He raises the important issue of the spurned alternative—subsidy through reduced taxation rather than through the legal system—and perceptively notes the “nonpolitical,” and therefore more easily accepted, appearance of reliance on the courts. At this point he offers one of his most suggestive political insights by noting “a dramatic upsurge of explicit laissez-faire ideology” and a simultaneous “dramatic increase in state taxation during the 1840s” (p. 101); although this ideology was in ascendance, some elements within the rising commercial class saw advantages in the government investment made possible by state tax revenues. As a result of the ideological shift, state judges began to restrict the scope of redistributive doctrines such as eminent domain, formerly so encouraging to economic development but now a fetter on capital accumulation. Thus, the courts guided the economy along a path conducive to economic growth—not necessarily more rapid growth, for Horwitz notes that the path may have been strewn with overinvestment in technology, but a growth disproportionally paid for by “the weakest and least organized groups in American society” (p. 101).

While illuminating, Horwitz’s analysis blurs the internal changes within the merchant class, not to mention those within the emerging industrial class, and consequently leaves only a hazy impression of the political and ideological struggles so essential in shaping the law itself. Too shrewd and knowledgable to slip into conspiracy theories, he leaves largely unexamined the prob-

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7 The quotation is from Palmer v. Mulligan, 3 Cal. R. 307, 314 (N.Y. Sup. Ct. 1805).
lem of how assent to this legal transformation was achieved, contenting himself with vague references to social protests and political struggles (pp. xvi, 101). By failing to scrutinize the political ramifications of the doctrinal changes in the law, Horwitz mystifies the triumph of the judicial interventionist view.

These limitations expose Horwitz to a variety of charges. James H. Kettner sternly questions Horwitz's alleged attempt to infer "both motives and real effects from patterns embedded in legal decisions." Kettner attributes to Horwitz the projection of "monolithic" pro- and anti-commercial groups; by challenging this assumption, Kettner calls into question the conclusion that the judges should be seen as more or less conscious partisans in a social struggle — as agents of growing inequality. Horwitz probably intends merely to present a starting point for an analysis of the complex interaction of economic interest and ideology and of its effect on the shaping of the social psychology of members of the legal profession. But he does introduce a strong dose of ambiguity into his discussion of the relationship between material interests and ideas, and thus implicitly attributes a determining role to economics in the shaping of ideology and, ultimately, legal decisionmaking.

Mark Tushnet, in his pioneering essay, *A Marxist Interpretation of American Law*, criticizes Horwitz for assuming what he must prove empirically — that those legal changes which served the interests of the strongest capitalist groups did in fact accelerate economic growth. More fundamentally, Tushnet properly concentrates his telling criticism at Horwitz's implicit economic determinism, arguing it is not enough for Horwitz to suggest that the ideology of the legal profession contributed autonomously to judicial outcomes. While paying attention to the influence of political thought, Horwitz seems to consider the vital features of legal ideology as an outgrowth of guild interests. In contrast, Tushnet raises the more significant question of the impact of larger ideological influences in the molding of the legal profession — the question of the profession's tendency to identify with more traditional and conservative views of the proper relationship between the claims of freedom and order, change and continuity.

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9 Id. at 391.
10 Tushnet, *A Marxist Interpretation of American Law*, forthcoming in the Spring 1978 issue of *Marxist Perspectives: A Journal of History and Culture*. Horwitz, as his remarks on the possibilities of overinvestment in technology show, has his own doubts, but Tushnet is correct in attributing to him a general assumption of acceleration of growth.
11 On this general problem, see MAX WEBER ON LAW IN ECONOMY AND SOCIETY.
In associating myself with Tushnet’s critique, I can only point to an implicit irony. Tushnet, by noting Horwitz’s overemphasis on guild interests, attributes to him a tendency toward mechanistic materialism; Kettner, by criticizing Horwitz for characterizing the historical situation as a two-dimensional conflict between commercial and anticommercial groups, in effect attributes to him a tendency toward subjective idealism. These apparently mutually exclusive criticisms in fact constitute a piece. Mechanistic materialism in the analysis of historical process invariably slides into subjective idealism, for it ultimately rests on the subjective response of individuals and groups to their perceived economic interests. Horwitz is too sophisticated to embrace the logical outcome of such a view, but I fear that he has nonetheless walked into a reductionist trap, much as Charles Beard and others have done. Horwitz’s introduction of guild interests itself represents a special case of the economic determinism their interjection supposedly checks.

II.

Horwitz’s examination of nineteenth-century American legal ideology leads him to miss some of the intellectual gyrations of the bourgeois ideologues whom he so cogently criticizes. In his conclusion, “The Rise of Legal Formalism,” Horwitz makes two penetrating observations: that “the special power of the legal profession in American society has always been grounded in some theory of the distinctively objective and autonomous nature of the law”; and, following Perry Miller, that ante bellum legal theory had boldly advanced an equation of law and science while in fact merely systematizing and classifying in order to avoid coherent content and method and to separate “politics from law, subjectivity from objectivity, and laymen’s reasoning from professional reasoning” (p. 257). This combination of pretense and genuine concern to root the law in “science” produced some extraordinary results which expose the reigning ideological biases and raise complex questions about the influence of the law on economic theory. Horwitz analyzes these problems with great in-

12 For a fuller discussion of this relationship, see E.D. Genovese, Materialism and Idealism in the History of Negro Slavery in the Americas, in In Red and Black 23 (1971), and Genovese, Charles Beard and the Economic Interpretation of History, in Charles Beard: An Observance of the Centennial of His Birth 25 (M. Swanson ed. 1976).

13 See, e.g., C. Beard, An Economic Interpretation of the Constitution of the United States (1913).

sight but loses an important dimension. Horwitz notes that G.C. Verplanck and others mounted a formidable assault on traditional legal doctrines which were based on an objective theory of commodity value and permitted judicial scrutiny of contracts for substantive fairness. He plausibly concludes that the demand for attention to "economic science"—i.e., to a subjective theory of value in which individual desires define an object's worth—brought the law into line with the interests of the most advanced sections of the capitalist class and simultaneously strengthened "existing social and economic inequalities" (p. 183).

These are important observations. Unfortunately, Horwitz leaves the impression that legal theory and practice merely caught up with a prevalent economic theory he himself regards as suspect. Yet, further on he suggestively writes that "a subjective theory of contract served its historical function of destroying all remnants of an objective theory of value" (p. 201). In fact, economic theory had not scientifically settled the issue of value in favor of a subjectivism that equated value with price formation in a competitive market. Indeed, Verplanck's views, published in 1817, had broken sharply with Ricardian orthodoxy. The "economic science" to which Verplanck appealed may have represented, as Schumpeter later argued, a majority view, but his position had to confront powerful opposition among the followers of Ricardo, the era's most prestigious economist. Adam Smith had left a messy legacy—three theories of value: a labor-quantity theory, a labor-disutility theory, and a cost theory. Ricardo built upon the first, and his influence remained enormous throughout the first half of the nineteenth century. During this time labor theories of value provided the terrain for rough ideological struggle among bourgeois economists quite apart from the more formidable challenge mounted by Marx.

When, therefore, Horwitz speaks of the legal community's view having been settled in favor of the "commercial interests," he means much more than that the law simply was swinging into line with the emerging economic rationale of the world market. The victory of economic subjectivism at law enormously strengthened its supporters within the economics profession itself. The ideological struggle within the legal profession may well have had as great an impact upon economic thought as vice versa—economic thought appealing to the newly prevailing subjectivism of legal doctrine as if all opposition had been swept from the field,

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17 J. Schumpeter, supra note 15, at 601.
and legal thought increasingly resting its pretensions to science upon an economic reality perceived as a pure market mechanism, but in fact partly a result of that very legal intervention sanctioned by the economic theory to which it now was appealing in the name of scientific objectivity. Horwitz does not pursue all the implications of his extraordinary discussion of this problem in "The Triumph of Contract," leaving us instead with such undeveloped insights as: "Where things have no 'intrinsic value,' there can be no substantive measure of exploitation and the parties are, by definition equal. Modern contract law was thus born staunchly proclaiming that all men are equal because all measures of inequality are illusory" (p. 161). It is regrettable that he leaves matters there, for he thereby forfeits the chance to support his general case by exposing the appeal to economic "science" for the ideological swindle it was and has remained.

III.

From beginning to end, Horwitz focuses on class forces but reads them as discrete economic interest groups. Presumably, he is describing a struggle within the bourgeoisie and only secondarily between the bourgeoisie as a whole and other classes. His emphasis on direct economic interests makes good sense up to a point and provides the richest analysis to date of the contending viewpoints on economic growth and the attendant responsibilities of the legal profession. But he obscures the ideological content and social consequences of the underlying consensus on the morality and efficacy of property itself.

Historically, private property has meant bourgeois property. The seigneurial (or "feudal") mode of production recognized diverse claims to property. As the Russian serfs put it, "I belong to my lord, but the land belongs to me." This formulation, which makes no sense in a bourgeois social order, admirably expressed a social order in which several social classes, bound together antagonistically, had discrete rights and duties attendant upon multiple claims to the same piece of property. The early advance of capitalism may, therefore, be measured by the doctrinal advance of "absolute" property, most notably in land.

Private property, however, never could realize itself in social

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18 Tushnet, by confronting this problem, points beyond Horwitz's formulation and avoids the reductionist trap. See note 10 supra. But he would no doubt be the first to acknowledge his debt to Horwitz's accomplishment in beginning to characterize the groups participating in these political battles.

10 Presented in slightly different form in J. Blum, Lord and Peasant in Russia from the Ninth to the Nineteenth Century 469 (1961).

policy as absolute. The beautiful harmony of the marketplace, so
dear to the hearts of classical liberals and their Chicago School
heirs, always demanded some qualifications. Even Adam Smith
had to face this necessity and his closest continental counterpart,
François Quesnay, proposed a “legal despotism” to guarantee the
proper workings of the market. 21 For the most committed bour-
geois theorists the state has had to guarantee law, order, and na-
tional defense, and to curb such monopolistic tendencies as —
alas, not a trace of satire surfaces in their discussion — the tend-
ency of labor unions to distort “natural” wage levels. For the
less committed, the social costs of that ostensibly wonderful In-
visible Hand have always appeared too high. Thus, all classical
liberal theorists have had to agree that property should be rendered
a good deal less “absolute” than they would like — that society
must place limits upon property rights in the interests, if not of
social justice, then of social order.

Horwitz, primarily concerned with the place of bench and bar
in the dynamics of economic development, draws attention to
another difficulty in sustaining the doctrine of absolute property.
Referring to the mill act cases, 22 he credits Lemuel Shaw with
having forced the courts to see that the doctrine of absolute
dominion represented an insuperable obstacle to development,
and with having contributed to the tendency “to regard property
as an instrumental value in the service of the paramount goal of
promoting economic growth” (p. 50).

The struggle Horwitz sees between pro- and anti-commercial
groups proceeded, therefore, within a class consensus on the
nature of bourgeois property rights in general, but no consensus
at all on the specific claims of discrete individuals and groups.
By focusing on the interests and power of these individuals and
groups, Horwitz illuminates much of the specific historical record.
But by bypassing the nature and historical formation of the basic
consensus regarding property, he cannot readily explain either
the feeble resistance to changes that might have been expected
to strike dissidents as outrages, or the surprising resistance within
sections of the legal profession to the steady adaptation of the law
to the needs of a growing economy.

Tushnet suggests that the important question concerns less
the adaptation of the law than its slow and painful progress. 23 In
other words, Horwitz does not, and probably could not, demon-
strate that the resistance within bench and bar to the prodevelop-
ment doctrinal changes stemmed primarily from guild interests

21 See E. Fox-Genovese, The Origins of Physiocracy (1976); E. Fox-
Genovese, The Physiocratic Theory of Property (draft on file with the author).
23 Tushnet, supra note 10.
complicated by professional scruples. Instead, the focus should be on the extent to which various interest groups did violence to traditional ideas of the proper relationship among the claims of freedom, property rights, and social safety. The perceptions of economic and guild interests operated within a larger ideological framework — itself by no means free of ambiguity and logical and political contradictions — uniting the propertied classes in a general defense of bourgeois property rights but leaving room for a variety of viewpoints and passions on the proper balance among contending claims.

The dispute regarding the appropriate place of property in American law and the desirability of prodevelopmental legal doctrines cannot be reduced to theoretical abstractions, and these are sensibly dismissed by Horwitz. The dispute can be understood only with a recognition of the decisive role of politics in shaping its outcome. Astonishingly, Horwitz falls almost entirely silent about political struggles, although his argument would lose its bearing if not read with an eye to the political terrain.

During the Jacksonian era, for example, differing interests battled about American economic policy, and historians have attached widely different interpretations to the conflict. Peter Temin has made a strong case against those who either praise or blame the Administration and institutional forces for the performance of the national economy; the market, he argues, essentially determined its direction.\textsuperscript{24} Temin does not, however, meet Bray Hammond's challenge to look beyond the growth rate and criticize the social quality of that performance.\textsuperscript{25} Horwitz looks at the social effects of Jacksonian economic changes, but he does so primarily as a criticism of capitalist development per se, in terms suggesting inevitability. While many liberal historians have followed Joseph A. Schumpeter\textsuperscript{26} in thinking that the Jacksonian expansion of bank credit and the money supply accelerated economic growth, Hammond suggested that the economy might well have grown faster under the restraints imposed by the Second Bank of the United States, which promised to reduce the peaks and troughs of the business cycle.\textsuperscript{27}

All historical counterfactuals limp, and Hammond's stumbles badly. We are entitled to skepticism about the possibilities of a much better economic performance than that registered. In the end, Hammond rested his case on social and moral grounds: the drastic reduction by the Jacksonians of institutional restraints on the economy encouraged gross irresponsibility in business and

\textsuperscript{24} P. TEMIN, THE JACKSONIAN ECONOMY (1969).
\textsuperscript{25} B. HAMMOND, BANKS AND POLITICS IN AMERICA (1957).
\textsuperscript{26} J. SCHUMPETER, BUSINESS CYCLES ch. VII (1939).
\textsuperscript{27} B. HAMMOND, supra note 25, at 323–25.
government and led to injustices well beyond those presumably unavoidable in a growing economy. And while Hammond’s Whiggism permitted him to dismiss the Jacksonians as demagogues, scoundrels, and even fools, Horwitz, hardly a Whig, has no such recourse. Hammond’s thesis reminds us that the bourgeoisie has taken many roads to power and that human beings, not abstract economic forces, have determined the specifics through hard-fought political battles. Unfortunately, it is these battles that Horwitz’s analysis tends to neglect.

Horwitz never faces the most puzzling feature of his implicit political history— the triumph of the “commercial interests” during a period of democratic political ascendancy. He offers no clue to the relationship between that ascendancy and the apparently undemocratic curtailment of the power of juries relative to judges or the judicial usurpation of legislative functions. It might be suggested that the “democratic” movements of the period studied by Horwitz did not, in fact, present a real progressive option. And, no doubt, the Jeffersonian and Jacksonian movements had their share of hypocrites and adventurers. But surely they displayed a deeper egalitarian and democratic commitment than their Federalist and Whig rivals. Horwitz demonstrates that Jeffersonians and Jacksonians fell prey to illusions about the efficacy of the market, but they hardly did so mindlessly. They were more willing to accept the inequality and privilege Horwitz justifiably indict because, from their perspective, these liabilities represented the overhead cost of equality itself, since they made a uniquely American identification of freedom, democracy, and equality. Horwitz begins to examine that identification when he writes that St. George Tucker exposed “the vulnerability of a system of common law adjudication under a regime of popular sovereignty” (p. 20), but he does not develop this observation into a systematic critique.  

The wonderfully mystifying propensities of the law also undoubtedly accounted for much of the feebleness of the lower classes’ resistance to the expanding legal influence of “commercial interests.” Horwitz demonstrates that the courts resolved skirmishes between groups of property holders in a way that clouded the implications for small holders and the propertyless (pp. 94–97, 106, 143). By the time a challenge to a specific injustice could be mounted from below, dissidents had to confront firm legal precedent and, therefore, in effect, had to challenge the legal system itself. Under any circumstances, so broad a challenge to established authority would be difficult; under these specific circum-

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stances, with the legal system rooted in an ostensibly democratic polity, it had the poorest possible prospects. Thus, we return to the hegemony of the bourgeoisie as manifested in its ideological reconciliation of freedom, democracy, and equality.

Horwitz's political perceptions might have been more acute if he had pondered Karl Renner's insistence that property inherently generates an organization approximating that of the state. Renner maintained, "There is no equality outside society in a fictitious presocial state. Equality is a creation of law and society." Specifically, equality arose from bourgeois social relations and bourgeois law. In the United States the struggle to realize its possibilities accompanied a struggle to insure freedom of the individual. Encumbered by the illusions of an inherited bourgeois individualism and determined to maintain freedom, democracy, and equality simultaneously, the best representatives of the bourgeoisie tried to resolve contradictions. The road not taken—that of the Federalists and Whigs—might have destroyed some of the specific forms of social injustice, as Hammond believed, but surely would have introduced other and ultimately less palatable forms, as Horwitz would probably agree. The question, then, concerned not development but, as Horwitz himself observes, the kind of development; and since even workers and farmers (at least the increasing portion oriented to the market) accepted a developmental perspective while having as yet no model of their own, they fell under the hegemony of a legal system committed to the enhancement of commercial interests.

Horwitz bypasses these problems. Accordingly, he offers a tantalizing record, sound and indeed brilliant over large stretches, that comes dangerously close to playing Hamlet without the Dane. He tries to articulate the transformation of the judiciary, the legal profession, and the state generally, without articulating the specific content of that social process which resides nowhere so decisively as in political struggles. But to return to where we began: this is a major work of historical reinterpretation—the best on its subject. Its very importance and high intellectual level, therefore, demand the most searching criticism, which should be read as part of an appreciation of its learned and largely successful effort.

29 K. Renner, supra note 20, at 71.
30 Horwitz does refer often to political and social struggles, but nowhere discusses the specific struggles that rent the period. This criticism might also be applied to Renner, who tries to avoid the rigidities of the base-superstructure dichotomy, according to which the law merely "reflects" economic forces. See id. at 51–56. Renner suggestively treats the dichotomy as a "metaphor." Id. at 55. But he virtually identifies social classes with economic interests and has little to say about the political dimension—ironic from a practical politician destined to govern the Austrian state.