MORTON HORWITZ AND THE TRANSFORMATION OF AMERICAN LEGAL HISTORY

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I. Introduction

The publication in 1977 of Morton Horwitz's The Transformation of American Law 1780-18601 was a signal event for American legal historians. Prefigured by the appearance of some of its chapters in the preceding several years2—chapters whose promise "dazzled"3 many of us who were entering the field during that time—and culminating what appeared to be a burst of energy and enthusiasm in an area previously arid, antiquarian, oriented toward the colonial era, and relatively unpopulated with sound scholars, the book seemed at long last to herald a fresh and progressive "field theory"4 with which to approach the study of American legal

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2. Chapter I originally appeared as Horwitz, The Emergence of an Instrumental Conception of American Law, 1780-1820, in 5 PERSPECTIVES IN AMERICAN HISTORY 287 (D. Fleming & B. Bailyn eds. 1971); chapter II originally appeared as Horwitz, The Transformation in the Conception of Property in American Law, 1780-1860, 40 U. CHI. L. REV. 248 (1973); a large portion of chapter VI originally appeared as Horwitz, The Historical Foundations of Modern Contract Law, 87 HARV. L. REV. 917 (1974); and chapter VIII originally appeared as Horwitz, The Rise of Legal Formalism, 19 AM. J. LEGAL Hist. 251 (1975). Slight changes in each have occurred through their reappearance in book form, but nothing essential was revised.

3. Used pejoratively by John Phillip Reid to describe my reaction to Horwitz's early work. Reid, A Plot Too Doctrinaire (Book Review), 55 TEX. L. REV. 1307, 1310 (1977). While I admit that my views have matured on these matters over the past few years, this essay will demonstrate the extent to which I am still dazzled by Horwitz.

history.

More than a tinge of freshness and progressivism was expected because of Horwitz's trenchant criticism of many of his predecessors in the field. Three general characteristics of the work of those predecessors drew Horwitz's ire. "[O]rthodox lawyer's legal history," by emphasizing timelessness, continuity, technique, professionalism, doctrine, and "logic,"—Horwitz noted in a fiery review essay—has been "part of a politically conservative ideology of legalism" which has deliberately separated and ignored the influences of politics and economics upon the law and which has paid no attention to "political struggle," in order "to pervert the real function of history by reducing it to the pathetic role of justifying the world as it is." Thus, Horwitz concluded, much of what has been done previously in legal history was actively conservative and almost consciously anti-democratic.

Second, too much emphasis had been placed by others on constitutional law. Not only are "constitutional cases . . . unrepresenta-

meant that "[r]esearch and writing should be based upon solid philosophical grounds and should be devoted to the argumentation and explication of broad but definite sociophilosophical points of view," Holt, Preface to Essays in Nineteenth-Century American Legal History at xiii (W. Holt ed. 1976), by those who operate "from the assumption that legal doctrine grows and changes only to meet certain social needs," in the desire to demonstrate the ways in which "[l]aw and legal institutions have proven to be crucial in American history. . . . To grapple with such material, only a broad and deep theoretical approach will suffice." Holt, Now and Then, supra, at 616-17 (footnote omitted).

A few others seem to have seen the primal necessity of working from and within a comprehensive field theory. See, e.g., Presser, Revising the Conservative Tradition: Towards a New American Legal History (Book Review), 52 N.Y.U. L. Rev. 700, 711 (1977). While I reject any idealistic conclusions that might be drawn from these statements—neither theories nor ideas nor laws will bring about necessary social change by themselves; nor can theory usefully be completely abstracted from history or practice—a theoretical and scientific understanding of history and law remains a sine qua non for useful legal history. As the rest of this essay will make clear, I believe that the best theoretical perspective on modern social life is provided by the works of Karl Marx, as amplified and extended by the work of many other people who write from the standpoint of the political left.

5. Horwitz, The Conservative Tradition in the Writing of American Legal History, 17 Am. J. Legal Hist. 275, 276, 283, 281 (1973). Using the excellent example of the writing of Roscoe Pound, Horwitz accurately characterized the political thrust of these writers as "anti-Marxist," who never tell us about "the growth of democracy or, indeed, of the emergence of socialism," and who dismiss seemingly democratic trends in the law, such as the codification movement during the Jacksonian Era, "either as the political goal of a lunatic fringe led by a demagogic leader or, when all else is lost, as an unwholesome and untrustworthy democratic force." Id. at 277, 280, 281.
tive either as intellectual history or as examples of social control,” Horwitz felt, but also “the excessive equation of constitutional law with ‘law’ . . . focuses historians on the nay-saying function of law and, more specifically, on the rather special circumstances of judicial intervention into statutory control.” A useful enterprise would be, Horwitz asserted, “to study the relationship between private law (tort, contract, property, commercial law) and economic change,” in order to eliminate the distortions of special circumstances and to study the manner in which judges acted positively to aid social change.6

Finally, Horwitz noted that a large group of nearly-contemporaneous legal historians, who eschewed both the simplistic and ethereal neutralism of the orthodox conservatives and the distorted focus of the constitutionalists, nevertheless were to be criticized for their adherence to a “consensus view” of American history. In a massive and relatively successful attempt to buttress the governmental activism of the New Deal by demonstrating that “laissez-faire” was the aberration and not the norm with respect to economic intervention and direction by government in the United States’ past, these historians “were much more concerned with finding evidence of governmental intervention than they were in asking in whose interest” the interventions were had. Thus, “the historical writing of the last generation [has] tended to ignore all questions about the effects of governmental activity on the distribution of wealth and power in American society.”7

Horwitz promised to show that, despite the best efforts of generations of legal historians to hide the fact, law was and is politics, actively made by lawmakers, judicial as well as legislative; and that a thorough study would exemplify the consistent trends of favoritism towards certain elements of society in the legal-history record. It was indeed quite a dazzling prospect for those of us who had partially and varyingly grasped the truths toward which we now hoped and expected to be led. Also, many legal historians who did not agree with these goals awaited the demonstration that they were apologists for an economically biased but neutrally disguised political order.

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6. M. Horwitz, supra note 1, at xii.
7. Id. at xiii-xiv.
The complete book now has been available for more than five years. It has received a good deal of critical attention, both from the left and from the right. Its general provocative excellence was recognized by its having been awarded the Bancroft Prize, emblematic of the best volume or volumes of history published in a given year. Unfortunately but not unexpectedly, scholarly criticism has focused on Transformation's weaknesses rather than its strengths, obscuring or even denying its important contributions with a volley of quibbles, distortions, misunderstandings, and even in some cases open refusals to accept the evidence Horwitz has so painstakingly gathered. Only four attempts have been made to discredit Horwitz's reading of the evidence from the nineteenth century, however. Even radical commentators, while generally more


10. See Bridwell, supra note 9; Williams, supra note 9; and Simpson, supra note 9, all discussed in part III.D. of this Article.

As this essay was going to press, a major critique of Horwitz's treatment of nineteenth-century tort law became available. See Schwartz, Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation, 90 YALE L.J. 1717 (1981) [hereinafter cited as Reinterpretation]. In a thoroughly-documented and well-written if acerbic fashion, Gary Schwartz argues that Horwitz (and others mentioned herein, such as Lawrence Friedman and Robert Gordon) have failed to show either that negligence succeeded strict liability at the beginning of this time period or that negligence law provided a subsidy for the development of industry and entrepreneurship (except in the specific instance of work-related injury). Schwartz attempts to demonstrate that the notion that liability should follow fault
favorable and more enthusiastic, have neither placed strong enough emphasis on the book’s significant breakthrough nor focused sufficiently thorough theoretical attention upon its flaws.\textsuperscript{11}

It is the purpose of this essay to demonstrate that \textit{The Transformation of American Law} is a significant and important contribution both to history and to historiography. Horwitz has shattered

has always been the norm in Anglo-American tort law, and that, at least in the nineteenth-century United States, negligence law was not discriminatory: plaintiffs won much of the time when they sued industry and entrepreneurs. \textit{See also} Schwartz, \textit{The Vitality of Negligence and the Ethics of Strict Liability}, 15 Ga. L. Rev. 963 (1981) [hereinafter cited as \textit{Vitality}].

I have neither the time nor the expertise necessary to assess the validity of Schwartz's claims, at this juncture. A few preliminary and tentative observations are, however, possible. First, Schwartz deals chiefly with New Hampshire and California cases, attempting to refute only three interpretations of cases made by Horwitz and otherwise not coming to grips with the historic social and economic context presented by Horwitz. Second, while Schwartz finds not “a single New Hampshire tort opinion that bears the stamp of the dynamic, utilitarian reasoning that Horwitz believes was characteristic of that period’s judiciary,” \textit{Reinterpretation, supra}, at 1731, the instrumentalist thesis of \textit{Transformation} is hardly disturbed. Horwitz does not claim that instrumentalism was characteristic of each and every opinion.

Third, Schwartz may be right that “strict liability” is an erroneous reading of the pre-1800 tort cases, but he is right for the wrong reasons. Schwartz’s work is founded upon an ahistoric view that some “common-sense” notion of fault, apparently roughly defined just as the core idea of negligence is defined today, \textit{see Vitality, supra}, at 991-32, 993, 995, 999, has always been “there” in Anglo-American jurisprudence. This ignores class, status, and the realities of differentials in political power and access to the courts. Robert Rabin is likely much closer to the mark when he takes into account “a conservative judiciary” and “traditional notions of class privilege, social custom, and commercial usage” to underpin his argument that “fault liability emerged out of a world-view dominated largely by no-liability thinking.” Rabin, \textit{The Historical Development of the Fault Principle: A Reinterpretation}, 15 Ga. L. Rev. 925, 960, 928 (1981). That is, nineteenth-century tort theory allowed more plaintiffs to think they would be able to sue, but probably not nearly so many actually to recover.

Fourth, Schwartz criticizes from the right. He finds Richard Posner’s law-and-economics maxims “delightfully audacious,” \textit{Reinterpretation, supra}, at 1722 n.31, but has only harsh words for Horwitz when all other torts law historians of whom he treats receive at least modicums of praise. In time-honored particularistic and stridently individualistic fashion, he twists the focus knob so as to bring into view only “A vs. B,” ignoring social context and the broader questions about the social meaning of “fault.” Most importantly, from the standpoint of this essay, Schwartz believes in the unmitigated existence of “the public morality” and “community attitudes,” \textit{Vitality, supra}, at 1003, 1004—in short, in consensus, a notion which will be called into question by the thrust of my essay.

\textsuperscript{11} The two pieces by Sugerman, \textit{supra} note 8, give a judiciously balanced appraisal of Horwitz, to which I am much indebted, but unfortunately do not treat their subject at sufficiently great length. Sugerman’s promised paper, Horwitz, Simpson, Atiyah and the Transformation of Anglo-American Law, \textit{infra} note 127, should supply some of this deficiency and should complement most of the conclusions reached herein.
the grip of conventional legal history upon the past, making it now impossible for the old apolitical, deterministic or idealistic categories to seem so powerful, so convincing, or so useful. The many who continue to practice the older necromancy will be unable to avoid peeking guiltily over their shoulders, while the rest of us have an example of a critical approach to legal history, one which by its emphasis upon political, economic, and social interaction recommends the study of legal practice and adjudication as *praxis*—as world-creating, meaning-endowing, value-full, living human activity. Horwitz has opened a whole new universe for us, the real universe of the past and present.

Transformation does, however, contain significant problems of content, attitude, and explicit theoretical perspective, problems which allow it only to point towards a useful "field theory" rather than to contain and demonstrate it. The book lies suspended between the old and the new, deeply ambiguous and troubled about the proper manner in which to treat a world both flawed and chaotic and yet so full of promise, looking to the future while unable to rid itself of much of those intellectual modes of the past it so correctly condemns. In all this it is perhaps a mirror of our times. Marxists following Gramsci have rejected a Leninesque determinism, finding it crucial to deal with artifacts such as law and the state, but without widespread agreement upon the proper theoretical treatment to be accorded such "superstructure" elements. A

14. Determinists emphasize "structure" in interpreting the following fundamental observation by Marx, giving "superstructure" an insufficient amount of attention:
   The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production conditions [sometimes translated as "determines"] the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness.
15. Important recent contributions to this debate, in English, include G. Cohen, *Karl
part of their difficulty may be understood as similar to that of Horwitz: a continuation of the use of bourgeois categorization. Horwitz cannot be sharply faulted for failure to resolve such a deep-seated problem. That so many committed and thoughtful Marxists have remained enmeshed in the coils of an essentially bourgeois determinism is ample demonstration of the sheer, overpowering difficulty of breaking with the culture of an existing mode of production absent systemic economic changes.

The increasingly chaotic and warlike circumstances of everyday life for us all render it increasingly more imperative that we find ways to change the future, in part by understanding the past, in part by coming to recognize the differences between bourgeois culture and socialist culture. Horwitz has moved legal history forward from Transformation, but a thorough critique of that work will, it is hoped, help forward movement accelerate. This essay first will attempt to summarize the main thrusts of Horwitz's argument in

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16. “By deciding to work with capitalist categories, Proudhon, according to Marx, cannot completely disassociate himself from the ‘truths’ which these categories contain.” B. Ollman, Alienation: Marx's Conception of Man in Capitalist Society 13 (2d ed. 1976) [hereinafter cited as B. Ollman, Alienation]. The first portion of Ollman's important book demonstrates the necessity of using Marx's dialectical mode of reasoning and speaking. Id. at 3-69. See also Ollman, On Teaching Marxism, in Social and Sexual Revolution: Essays on Marx and Reich 126 (1979) [hereinafter cited as Ollman, Teaching Marxism].


18. See, for example, his masterful (if overly condensed) treatment of the law-and-economics movement: Horwitz, Law and Economics: Science or Politics?, 8 Hofstra L. Rev. 905 (1980) [hereinafter cited as Horwitz, Law and Economics]. Cf. Horwitz, The Historical Contingency of the Role of History, 90 Yale L. J. 1057 (1981) [hereinafter cited as Horwitz, History]. Many of the articles in the Yale Law Journal Symposium on Legal Scholarship (of which this latter article is a part) demonstrate the manner in which others are beginning to join Horwitz on the path toward a radical legal scholarship, and it may be seen that no contributor (save Tushnet) has gone as far as Horwitz. See Kennedy, Cost-Reduction Theory as Legitimation, 90 Yale L.J. 1275 (1981).
Transformation. His essential radicalism\(^\text{19}\) will be demonstrated by contrasting his views with the arguments of those who have criticized the book from the right. The essay will conclude with a discussion of what may be learned from Transformation's flaws.

II. THE ACHIEVEMENT IN Transformation

Horwitz's thesis is that basic rules in important segments of "private law" were consciously altered or repudiated by common law judges in order to aid, legitimize, and mystify the transformation of the American economy into an entrepreneurial-capitalist one, during the period between the Revolution and the Civil War.\(^\text{20}\)

At the time of the Revolution, Horwitz claims, American law mir-

19. For purposes of this essay, radicals are those who see the systemic nature of the contemporaneous organization of society and who understand that the system is at the root of social problems. Marxists are radicals who understand precisely "how this system gives rise to these problems. . . . Marxists analyze the workings of capitalism to make sense of the patterns that radicals only see and liberals still have to learn about." Ollman, Teaching Marxism, supra note 16, at 131. Three different words, "liberal," "capitalist," and "bourgeois," each give some sense of the ethos and culture surrounding this contemporaneous organization of society; they will be used interchangeably in this Article to refer to that society and those who defend it (whether consciously or not). The interlocking, contradictory, and complex nature of liberal thought is depicted and criticized in R. UNGER, KNOWLEDGE AND POLITICS (1975).

It must be noted that contemporaneous political usage, which finds great differences between "liberals" and "conservatives," is not followed here; both of these groups are included with all of the supporters and defenders of capitalism. See Tushnet, Dia-Tribe (Book Review), 78 Mich. L. Rev. 694 (1980): "The politics of liberalism . . . are inherently conservative. They assume that contemporary American society approximates a just society . . . . They also, and concomitantly, deny the need for massive and therefore probably violent changes in the structure of the society." Id. at 709.

Richard Hofstadter long ago recognized the essential unity of America's supposed political divisions:

[T]he range of vision embraced by the primary contestants in the major parties has always been bounded by the horizons of property and enterprise. However much at odds, on specific issues, the major political traditions have shared a belief in the rights of property, the philosophy of competition; they have accepted the economic virtues of capitalist culture as the necessary qualities of man. . . . The business of politics—so the creed runs—is to protect this competitive world, to foster it on occasion, to patch up its incidental abuses but not to cripple it with a plan for common collective action.


20. As will be seen by a comparison, this section of the essay is deeply indebted to the summaries of Transformation in Foner, supra note 8; Gilmore, supra note 9, at 788-89; Presser, supra note 4, at 701-10; Sugarman, Theory and Practice, supra note 8, at 74-76.
rored English law in its promotion of calm and stability, its emphasis on protection of existing landed property rights, its focus on strict liability for invasions of person or property, and its lack of attention to the solution of typical commercial transactions. The economic realities of life in the new nation soon began a change—slowly at first, and then ever more rapidly and disjunctively—as commodities markets and futures markets came into being and as entrepreneurs, factory-builders, land-speculators, and corporation-founders replaced petty merchants and the landed gentry in positions of economic importance. American law changed also, Horwitz demonstrates, in ways that were overtly intended to aid capital growth and those who benefited from it, at the expense of other segments of society. “[S]ubsidisation through technical legal doctrine mystified the underlying political choices,” avoiding “the more open public discussion and scrutiny that would have resulted if development had been encouraged by direct taxation.”

The major change in law can be described as the advent of a “contractarian” or will theory. Grant Gilmore has succinctly summarized Horwitz’s argument:

Property interests lost their sacrosanct status as the ideas of economic growth and competition came to have a more compelling charm for the 19th-century mind than the older ideas of stability and monopoly. For strict liability and the wide protection afforded existing interests in property, there was substituted the much narrower concept of liability based on carelessness, fault, or negligence . . . [E]merging “contractarian” theories . . . purported to base liability on will, consent, or “meeting of the minds,” rather than on status or vested property rights.

Law now seemed to focus on the individual, or on individual units in society, and emphasized their independence, their ability to act and interact more or less as they chose, and their ability both to amass and to use economic power to solve and resolve the problems of daily life, rather than any need to rely upon group, communal, or civil aid. As noted by Marx (who came to these conclusions essentially during the time period of which Horwitz writes), the individualistic ethos of contractarian legalism plays a

21. Sugarman, Theory and Practice, supra note 8, at 75.
22. Gilmore, supra note 9, at 789.
necessarily central role in the growth and stability of a society based upon commodities, exchange, profit, and the supposedly bargained-for appropriation of the power of workers by employers. Horwitz capably demonstrates the truth of Marx's insight: contract (as we know it today) was both new and central to the period.

Contractarianism, as broadly defined above, became suffused throughout American law, and in several thorough chapters Horwitz carefully delineates these changes in important areas of law. In contract (strictly defined), the eighteenth-century emphasis on "just price" and fairness in interpersonal dealings gave way to assumptions of equality of bargaining power and a focus on what the parties "intended." The old "objective theory," which allowed bargains to be judged by external standards of fairness and value, was replaced by a new "subjective theory," in which caveat emptor, express contractual language, and refusal to investigate duress or inadequacy of "consideration" became the standard approach.

Soon, however, commercial needs for predictability caused the introduction of another "objective theory," as the actual, expressed "will" of the parties gave way in many crucial situations to judgment based on standards derived from commercial practices. The market now reigned supreme, having replaced "the outlook of a society in which social and moral obligations were considered superior to economic ones, and in which making the highest possible profit was not the principal motive shaping human behavior."25

23. 1 K. Marx, Capital: A Critique of Political Economy 84, 87, 170, 176, 271, 398-99, 540, 574, 583-84, 624 (Int'l Pub. ed. New York 1967) (1st ed. 1867) [hereinafter cited as K. Marx, Capital]. Max Weber is commonly held to have come to an apparently similar conclusion, "that law played an indispensable role in guaranteeing the security and certainty that capitalism required." Sugarman, however, concludes that the latter's position seems to have been that, whilst the theoretical implications of the law's coercive power to guarantee certainty and predictability would lead one to assume that the law was essential to market capitalism, in practice this was not always the case. . . . Weber contended that whilst today "economic exchange is quite overwhelmingly guaranteed by the threat of legal coercion," from "the purely theoretical point of view legal guarantee by the state is not indispensable to any basic economic phenomenon."

Sugarman, Theory and Practice, supra note 8, at 72-73.

24. Horwitz deals with contract and commercial law in chapters V and VI of Transformation, with property and competition in chapters II and IV, and with tort and damages law in chapter III.

25. Foner, supra note 8, at 37.
Not so incidentally, the labor of working people came to be viewed judicially as a commodity like any other.

In property law, the "natural flow" doctrine, which barred riparian owners from interrupting the flow of a stream to other users and enjoyers, was replaced, legislatively by mill acts which gave the owners of economically "beneficial" mills an almost unimpeded right to flood the lands of others, and judicially by doctrines of "prior appropriation" and "prescription," encouraging further mill construction by permitting the first miller on a stream to interrupt the flow and to prevent other mill construction thereby. The potential for stanching further development inherent in these rules then helped persuade judges to overthrow the rules in favor of "reasonable use" doctrines, wherein conflicting uses could be balanced and new, if competing, uses allowed. Established businesses of a public nature could in the eighteenth century enjoin competition, but Horwitz shows that early in the nineteenth century judges began granting such injunctions on the theory that exclusive franchises would promote growth. This notion was in turn discarded when it became evident that exclusivity would hamper further development; the landmark Charles River Bridge case\(^\text{26}\) "represented the last great contest in America between two different models of economic development,"\(^\text{27}\) holding against privileged exclusivity and in favor of a "free, active, and enterprising [country where] . . . new channels of communication are daily found necessary."\(^\text{28}\) Property, inventiveness, even industry itself came to be understood within the contractarian viewpoint.

Notions of strict legal accountability for "private" activity gave way to restricted liability which allowed considerable interference with others as long as one's conduct adhered to judicially established "reasonable" standards of care. New "consequential" rules of damages further limited the liability of actors such as steam locomotives, whose owners might not have to pay for fires caused by spewing sparks. Just as in other areas of law, "[t]he move from nuisance to negligence was accomplished in fits and starts,"\(^\text{29}\) not

\(^{27}\) M. Horwitz, supra note 1, at 134.
\(^{28}\) 36 U.S. at 547.
\(^{29}\) Presser, supra note 4, at 704.
in a smooth and logical development of doctrine, as successive waves of entrepreneurs seized upon various and sometimes contradictory theories of law to justify first their entry into the market and then their retention of a competitive position. These contradictions were only apparent from up close, however; overall, Horwitz successfully demonstrates that American private law moved towards a contractarian, individualistic, competitive philosophical underpinning.

As can be seen, Horwitz believes that most of “the rewriting of liability law was . . . accomplished on the judicial . . . level.”30 In theory judges were not supposed to make law, but in the late eighteenth century a revolutionary, activist self-conception of the judge’s role appeared, mushrooming in the first part of the nineteenth century into a widely-accepted “instrumentalist” approach whereby judges undertook to change or invent doctrine according to their own notions of what was useful for society, rather than attempting to adhere to old rules or to fit developments into precedent and tradition. Horwitz asserts that the instrumentalist view was necessary, as the emergence of rapid economic growth mandated the use of concepts and rules which had little or no precedent, and the communitarian ideological foundations of the older society had to be dispensed with. The notion of instrumentalism implies that activist judges understood their goals, and indeed Horwitz shows that in many instances doctrine was altered for specific developmental reasons. However, the cause-and-effect relationships were not always so simple; new rules often emerged “before new or special economic or technological pressure for change” was applied.31

Instrumentalism is a dangerous theory, relying for its socioeconomicly consistent application upon mechanisms for selection of the judiciary which are not always available in a democracy. “The open-endedness of debate, the irreverence for the past, the passionate advocacy of fundamental change . . . must be suppressed in the name of the new consensus.”32 Just as instrumental-

30. Gilmore, supra note 9, at 789.
31. M. Horwitz, supra note 1, at 3. See also, e.g., id. at 89 (negligence).
32. Gilmore, supra note 9, at 790. Eugene Genovese elaborates upon this point:

However much sentimentalists and utopians may rail at the monotonous recurrence of a positive theory of law whenever revolutionaries settle down to re-
ism was attaining its heyday in the 1820's, Horwitz finds, notions of formalism—the neutrality of law, the political impartiality of judges, seemingly blind adherence to precedent, and the like—began to seep back into private law from the realm of public law, where they had always been predominant. Horwitz concludes that by the 1860's formalism once again had become the pervasive mode of judicial exegesis.

"The reformulation of substantive law by the judges went hand in hand with a systematic reduction of the role of the civil jury."33 The eighteenth-century power of juries, usually comprised, as Eric Foner points out, of small property owners,34 to award damages according to their own sense of the equities of the situation, was severely limited by the new theories of restricted liability in a contractarian world. The jury's function of "finding" both the law and the facts—allowing jurors in essence to be the source of applicable law—was reduced to only a fragment of the latter role, as judges both issued definitive and restrictive instructions about rules of law and combined the realm of facts with other rules which essentially converted many factual issues into issues of law. Jurisdictions which had never used juries—admiralty and equity—were greatly expanded during the period.

Horwitz also depicts the role of lawyers in helping to bring about this transformation.35 Those with commercial interests had, before about 1800, consistently shunned lawyers and the common-law courts by taking their disputes to arbitrators or to special commer-

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build the world they have shattered, any other course would be doomed to failure. . . . [A]ll modern ruling classes have much in common in their attitude toward the law, for each must confront the problem of coercion in such a way as to minimize the necessity for its use, and each must disguise the extent to which state power does not so much rest on force as represent its actuality. Even Marxian theory, therefore, must end with the assertion of a positive theory of law and judge natural-law and "higher-law" doctrines to be tactical devices in the extralegal struggle.

E. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 26 (1974) (Vintage ed. 1976). As will be discussed at more length in part IV of this Article, see text accompanying notes 164-167 infra, positivism seems to take one of two legal forms, the instrumental mode or the formal mode, each containing inner tensions and contradictions which, when squeezed by socioeconomic reality, tend to force elite legal theorists to turn to the other.

33. Gilmore, supra note 9, at 790.
34. Foner, supra note 8, at 37.
35. See especially chapter V of M. HORWITZ, supra note 1.
cial courts where commercial law, more to their liking, was applied, or by using penal bonds (eliminating the issues of liability and damages) of special “struck” (i.e., all-merchant) juries in many instances in which they did resort to the common law. The law and the lawyers reciprocated this pre-1800 separation, Horwitz finds, by essentially being occupied with the problems of property owners. As commercial interests began to oppose each other—merchants versus their insurors being the instance Horwitz finds paradigmatic—and as the instrumental mode of judicial law-making developed simultaneously with a bench more understanding of and devoted to the ethos of entrepreneurial growth, litigation before the regular courts became more useful and more palatable. The limits placed on jury discretion further “enhanced the prospects for certainty and predictability,” while courts’ emerging hostility to the enforcement of arbitration awards and to struck juries in commercial cases tended to force commercial disputes to become lawsuits. Lawyers cast off their previous primary allegiance to landed interests and “became the enthusiastic allies—or perhaps the willing servants—of the new masters.”

Transformation is not a book simply about lawyers, or doctrine, or even law. As Foner has said:

[F]or Horwitz, law . . . is a way of interpreting the world . . . . The relation between law and society is a reciprocal one; law both reflects and influences social change . . . . The modifications of law which constitute the subject of this book are elements of what Karl Polanyi called the “great transformation” from a pre-market society, a historical process which affected entire ways of life, human relations, and, of course, the law.

The rise of market relations, and the corresponding rise to predominance of a market-oriented class emphasizing exchange, profits, and (eventually) the use of factories and large masses of hired workers to produce commodities, were accompanied by the gradual emergence into general social consciousness of a market ethos characterized in part by certain typical modes of thought which

36. Presser, supra note 4, at 707.
37. Gilmore, supra note 9, at 789.
were reflective of, supportive of, and derived from the new ways in which the relations of production were organized. Legal notions and relationships were a quite important part of this new capitalist culture. While Horwitz's chief occupation is in the telling of the story of the emergence of liberal rules of law in the American context, there is also evidence in many parts of *Transformation* of the advent of typically liberal elements of philosophy and belief: for example, the death of a communal and corporatistic view of society, and its replacement by a particularistic, atomistic, individualistic view;\(^9\) the emergence of revulsion against investigating questions involving substantive justice and against accepting social definitions of value;\(^40\) and the appearance of a tendency to substitute assumptions of equality and similarity for observations of inequality and difference.\(^41\)

Most important, however, is the emergence of the false neutrality with which most realities of capitalist life begin to be disguised when they are described in liberal language. It probably would be fatal for the social support (or, at least the docility) needed by the dominant elements of the system, and perhaps for the self-esteem of many members of those elites, if the actual inequalities and real, political influences of capitalism were openly reflected in the manner and means by which capitalism is described to the world. The disguises, however, were not and are not adopted consciously by elites, but arise organically as an integral part of the mystification inherent in a market ethos.\(^42\) Thus, the formal, apolitical mode of decision writing overtakes the instrumental, activist mode. Horwitz demonstrates that phrases such as "commercial uniformity" and "legal certainty and predictability" are not neutrally descriptive but mask political values of and political victories by certain elements of the population, values and victories that were resisted and opposed by many who did not want, or did not reap many immediate or large benefits from, the new market of social ordering.\(^43\)

Despite the lack of evidence presented by Horwitz, there is a

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40. *Id.* at 161, 181-82.
41. *Id.* at 240.
42. See text accompanying notes 135-137 *infra.*
43. M. Horwitz, *supra* note 1, at 212.
strong sense in *Transformation* that many people opposed the new ideas and economic organization and that many people were hurt or ruined thereby. Further, Horwitz finds manipulation of the law by the merchants and entrepreneurs, and their allies on the bench and at the bar, for the benefit of those elements which had come to dominate American society. Not only was "law . . . thought of as . . . simply reflective of the existing organization of economic and political power":44

By the middle of the nineteenth century the legal system had been reshaped to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society. . . . [L]egal doctrines . . . maintained the new distribution of economic and political power . . . [and law] actively promoted a legal redistribution of wealth against the weakest groups in the society.45

Most of Horwitz's research into changing legal doctrine demonstrates that the new rules attempted to favor entrepreneurs, businessmen, and capitalist growth-oriented interests by altering traditional notions of liability so as apparently to reallocate much of the costs of enterprise to others—to workers, to consumers, to the landed gentry, to those caught up in or injured by the dangerous consequences of growth. He concludes that instrumentalism and the new rules subsidized growth, and that an alternative and potentially more egalitarian, less open form of subsidy—taxation—was not turned to.46

At the heart of the various previous approaches to legal history criticized by Horwitz were devices whose effect has been to ignore or obscure both the manipulation of law by elites and the fact that American history has been a continuous social struggle, some groups winning, while other groups, containing much larger numbers, lost. While the conservative school has assumed the law is always neutral, ethereal, and apolitical, with lawyers and judges being professionally unconcerned in the results of legal dis-

44. *Id.* at 253.
45. *Id.* at 253-54.
46. "[T]he law had come simply to ratify those forms of inequality that the market system produced." *Id.* at 210. For the discussion of taxation as an alternative not taken, see *id.* at 99-101, 260.
putes, Horwitz has demonstrated that judges and lawyers during the early modern period of American history took sides motivated by politics and economics. While the constitutionalists deflected attention from the socioeconomic nitty-gritty by studying decisions whose language was neutrally formal and whose chief concerns seemed to be in the ideological realm of fundamental principles. Horwitz uses a study of everyday legal doctrines to hold the reader’s feet to the fire of real problems. And while the consensus historians “assumed that nineteenth-century law reflected the underlying consensus of a society united in its commitment to economic growth and entrepreneurial activity, Horwitz sees the legal system as ridden with deep social and ideological conflicts . [that] reflected far-reaching divisions in a society undergoing rapid economic transformation.”

The initial breakthrough promised by Horwitz has, in Transformation, been realized. No one can put down the book without having had shaken to the core basic assumptions about the neutrality of law and the calm, efficient, majority-approved nature of economic growth and American history. Whatever its deficiencies, Transformation has turned a corner in American legal historiography by drawing aside the curtain of fuzziness, mystique, and neutrality that has until now cloaked the history of law and attempted to keep us from seeing naked its political, biased reality. Law is but an element—if a crucial one—in the continuing social struggle. Morton Horwitz in The Transformation of American Law has at the least demonstrated that primary fact.

III. The Failure of Horwitz’s Critics

The best measures of Horwitz’s success and superiority have been given by his mainstream critics. Each has retained those characteristics of conservatism and adherence to legalistic catego-

47. Foner, supra note 8, at 37.
48. Some radicals apparently have concluded that demystification constitutes the whole of the radical task. See Davis, Critical Jurisprudence: An Essay on the Legal Theory of Robert Burt’s Taking Care of Strangers, 1981 Wis. L. Rev. 419, esp. 436 n.42; Freeman, Truth and Mystification in Legal Scholarship, 90 YALE L.J. 1229 (1981). While demystification is certainly essential, a program for change informed by materialistic social theory is concomitantly necessary in order to avoid social chaos.
ries which Horwitz pointed out and condemned, and the utility of which he refuted in *Transformation*. None has been able to assimilate or appreciate any part of the fundamental truth he demonstrated—that law is a socioeconomic phenomenon, its principles biased towards socioeconomic elites. Only three attempts have been made to dispute his interpretation of the nineteenth-century cases, and none of these has been successful. Shocked, amazed, bemused, bewildered, urbanely smug, or thoroughly rattled, these scholars have either politely applauded and then ignored Horwitz's central thesis, or have gotten angry in various scholarly ways, but none has yet successfully refuted him.

All three of the trends in writing conservative American legal history identified by Horwitz are represented among those who have criticized Horwitz from the right. Some scholars fall into more than one of the categories used, which is not anomalous (though it may result in internal contradiction) since all of these schools are basically bourgeois, supportive of the existing system in ways that a thorough understanding of that system would lead one to predict and identify. The first three sections of this part will describe Horwitz's critics using the three categories he developed, while the fourth will deal briefly with the three attempts to call his substantive interpretation into question.

49. Note 5 & accompanying text supra.


51. For a definition of the use of "bourgeois" in this essay, see note 19 supra; for a thorough treatment of bourgeois and other critiques of contemporary legal scholarship, see Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981). Both of these articles are critiqued in Freeman, *supra* note 48.


[P.S. Atiyah's history of freedom of contract in England] blends an active instrumental model (law as promoting or facilitating the needs and values of a changing society) with a reflective, passive one (law as depicting through its forms an otherwise intact social reality). This vague model . . . allows him to maintain a balanced, liberal viewpoint throughout the book.
A. The Consensus Critique

The "consensus" approach essentially derives from Charles Beard and the Progressives, Legal Realists, and New Dealers who, believing themselves to be located upon the left of American politics, supported governmental intervention to chastise and restrain business, to stabilize the economy, and to assure that disadvantaged groups receive at least minimal moral and economic support in their struggle to approximate the American dream. Consensus historians accept the primacy of economics and economic interest groups in politics (assuming their benevolence), and have little regard for the motivating importance of individuals or ideas upon history.

A restrained and unemotional branch of consensus thought adopts a rigid determinism, whereby law and other structures of thought always directly reflect patterns of social and economic organization. Lawrence Friedman's *A History of American Law*, for example,

> treats American law . . . not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society. . . .[53] The [legal] system works like a blind, insensate machine. It does the bidding of those whose hands are on the controls. The laws . . . reflect the goals and policies of those who call the tune.54

Thus, Grant Gilmore praises Horwitz's book because "it focuses on the process by which the precapitalist law of the 18th century was, as it had to be, metamorphosed. . . . Professor Horwitz has gathered a rich harvest for any reader who is interested in the process by which a system of law is transformed in response to fundamen-

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54. *Id.* at 14. In a penetrating essay, Mark Tushnet has demonstrated the inability of Friedman's deterministic approach to provide a useful analysis of legal history, see Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 Wis. L. Rev. 81, but in many ways Tushnet's criticism does not extend to the breadth and depth of Friedman's liberalism, and I believe it can be usefully supplemented by remarks made herein.
tal changes in the society which the law reflects."\(^{55}\)

Another, more optimistic and ebullient branch of the consensus school, while deterministic, is not so rigidly so, admitting of more autonomy for historic actors and ideas at intermediate levels of analysis, finding limits of the human capacity to plan and to understand located in dark and mystical notions of "drift and default" surrounding human history.\(^{56}\) Thus, Harry Scheiber allows that "none of the evidence" his review of Horwitz has brought forward "suggests that 'the weakest groups in the society' were not exploited through the law by the 'strongest.' But the form that opposition did take, in reacting to dominant trends, deserves attention."\(^{57}\)

Both branches unite, however, in extending praise to those portions of Transformation which seem to underscore the emphasis which this group of scholars always placed upon "pragmatism" ("Horwitz's . . . instrumentalism . . . advances under a new label what [Willard] Hurst called, simply 'pragmatism' "),\(^{58}\) arguing that most of the book repeats points they have been making for years: "[T]he essentials of the argument—Professor Horwitz would, I am sure, agree—are not all that novel; they have been current for 30 or 40 years."\(^{59}\)

Consensus legal historians and other Progressives and New Dealers have always emphasized the interplay of economics and pressure groups in the formulation of law—John Dawson comes immediately to mind—and the Legal Realists such as Karl Llewellyn (contrasting the Grand Style with the Formal Style of adjudication) and Jerome Frank were characterized by a common insight that judges made law. Horwitz owes these scholars a great debt—one which Gilmore is correct in presuming Horwitz readily

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55. Gilmore, supra note 9, at 792, 793 (footnote omitted).
56. Scheiber, supra note 9, at 464. For an early, somewhat idealistic analysis of "drift" in the work of the foremost member of this branch of the consensus school (Willard Hurst), see Holt, Book Review, 1971 Wis. L. Rev. 982, 987-90. For an apt critique, see Gordon, supra note 51, at 1036-37.
57. Scheiber, supra note 9, at 464.
58. Id. at 465.
59. Gilmore, supra note 9, at 791. Scheiber is a bit harsher on this point: "[T]his work . . . would have been . . . much richer . . . had it . . . been less concerned with wrapping some well-established ideas in the drapery of new rhetoric." Scheiber, supra note 9, at 459-60.
would acknowledge—but his failure to cite them as his intellectual forebears in *Transformation* is a way of underscoring that he has radically gone beyond and broken with their work. Economic pressure groups, as seen by the consensus thinkers, do not cleave into two main classes, one powerful, small, and in control, the other large, weak, and always fighting for control; and the Legal Realists never came to a coherent explanation of how or why judges made law because the Realists refused to acknowledge the existence of these two fundamental competing social forces.⁶⁰ According to the consensus historians society runs essentially harmoniously thanks to the existence of a basic social consensus growing out of competition among assumedly equal interest groups, all for the better since this agreed-upon economic growth is asserted to benefit everyone.

Consensus historian Charles McClain concludes:

> Seen from this perspective many of the changes in the common law described by Horwitz . . . seem salutary. Rather than constituting evidence of a conspiracy to gut the law of its humane core, these changes appear to reflect the legal order’s responsiveness to changed social conditions and its ability to evolve in the direction of greater flexibility, greater maturity, and, indeed, greater plain common sense.⁶¹

The arguments presented by Horwitz, reflecting a society torn between groups in struggle, not mediated by any underlying consensus, are ignored.

The chief criticism advanced by the consensus advocates is that Horwitz fails to emphasize the shifting pluralistic diversity of America and the interest groups which contend in it. “In many specific cases [analyzed by Horwitz],” asserts Scheiber, “paradoxically the litigants on both sides were often indistinguishable as to wealth and social class.”⁶² “Nor is it possible, without gross oversimplification,” argues Gilmore, “to reduce the emerging rules in such commercial specialities as sales and negotiable instruments to

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⁶⁰. This argument about the Legal Realists is elaborated upon in Holt, *Why American Law Schools Cannot Teach Justice*, 3 ALSA F., Sept. 1978, at 5; Tushnet, *supra* note 51, at 1207, 1210.

⁶¹. McClain, *supra* note 9, at 396-97 (footnote omitted).

the simple paradigm of capitalists exploiting consumers.”

While on the surface of events interests and causative patterns seem many and varied, a sophisticated class analysis which gets beneath the surface to hidden interconnections among groups, events, and interests in order to demonstrate cultural and ideological patterns and influences (an analysis which, unfortunately, is not developed by Horwitz, as will be argued in part IV of this essay) can demonstrate that, for example, cases involving solely upper class litigants yet serve upper class purposes. Taking a definition of “economics” and a notion of causation which are both entirely too narrow and constricted, the determinists of the consensus school focus too closely, expecting to find a direct, immediate, one-to-one correspondence in every instance. When their expectations are not met they conclude that division of the world into two classes is too simple, and that society’s story is really the interaction of a kaleidoscope of variously defined and shifting, relatively equal interest groups. Willard Hurst insists that, because “there was a substantial consensus on the social utility of the market,” much of nineteenth-century conflict was between members of the “upwardly mobile middle class” for whom “class attitudes and aspirations were blurred.” Stephen Presser carries this argument to extremes:

While most private law doctrines that were litigated in the appellate courts support Horwitz’s thesis of merchant and entrepreneurial ascendancy in the law, there must have been many other legal developments in the nineteenth century that had little to do with these groups. . . . [A]ction by state legislatures [other than that occasionally hinted at by Horwitz] may have had a significant social impact on American life in realms apart from economics . . .

. . . For all we know, most of the consumers and farmers, in

63. Gilmore, supra note 9, at 795.
64. See generally B. Ollman, Alienation, supra note 16, at 5-40.
65. A diversity in regional development is another favorite argument. See, e.g., Bloomfield, supra note 9, at 1106; Hurst, supra note 9, at 176.

The point is not whether regional variations exist but whether our inquiry for an explanation of legal variants should end when we discover regional origins for them. A better theoretical focus always will impel one behind geography to economics.

66. Hurst, supra note 9, at 178. Scheiber also expresses continued adherence to this consensus view, giving no justification. Scheiber, supra note 9, at 463.
absolute terms, were better off after the nineteenth-century legal changes than before. 67

This substitution of wishful thinking for analysis demonstrates both how unsettling Horwitz's views are and how strongly a cherished viewpoint lingers even when its holder suspects how little evidence he has for it. The possibility that "economics" might be defined quite broadly as a primary social factor, one which has pervasive influence upon most other "realms" of life, and the possibility that "legal developments" concerning which no commercial interests were directly represented nevertheless might be influenced significantly by social forces favorable to the overall economic interests of capitalists, are somehow never visualized.

The tendency of liberal thought to particularism makes it easy for members of the consensus school to focus on specific events without looking for deeper connections, and thus to produce evidence of variety; however, the kind of evidence of a struggle between competing interests and the concomitant lack of an underlying social consensus brought forward by Horwitz should at least give scholars pause. This is not to say that the interests of competing classes are not expressed in a variety of ways, with a variety of intensities, and indeed sometimes contradictorily, depending primarily upon one's time-period of historical focus and one's level of analysis; it is to argue that Horwitz's analysis implies a more pow-

67. Presser, supra note 4, at 720-21. Presser concludes by denying the possibility of a class analysis, while simultaneously suggesting that factors of class in the law made the burst of entrepreneurial growth possible:

Perhaps in nineteenth-century America, particularly in the West, people moved so freely from one occupational group to another that attempts to draw sharp distinctions between "farmers" and "merchants" distort social reality. . . .

Horwitz's work is most impressive not because it demonstrates the ascendance of any particular group in the law, but because it suggests that the development of American law reflects a continuing struggle between competing economic and social interests. . . .

In the limited sense that the law may have provided equal economic opportunity for those willing and able to learn the techniques of commerce and for those able to employ native intelligence, inventiveness, and shrewdness, the law may have been much more democratic than Horwitz suggests.

Id. at 721-22. What an immense amount of economic restraint can be captured by and hidden in the single word "able" in that passage! Who was "able," and why? Horwitz's theory of law can tell us; Presser's cannot.
erful explanation than that of the consensus thinkers because it is willing to take into account conflict and struggle in American history, thereby dispensing with the need for false and mystifying masks, such as the theory of an underlying consensus, and thereby attempting to explain the sources of bias which permeate American law. Horwitz's analysis does not ignore the plight of millions by assuming that growth and abundance benefited everyone to a greater extent "than before," whatever that is.

B. The Constitutionalist Critique

The school of constitutionalists has a few representatives among those teaching in law schools but is larger amongst "purer" historians. This school has arisen since the Second World War essentially in reaction to New Deal-consensus thought and to the latter's emphasis on the importance of economics. Its adherents are usually middle-of-the-road to somewhat-tight-lipped-conservative in their politics; they usually disavow economic determinism in favor of an openly idealistic approach to the interpretation of history. Following Bernard Bailyn68 and Gordon Wood,69 constitutionalist scholars find the chief motivating factor in the American experience to be ideas, particularly great constitutional principles; their pivot in history is the American colonial experience culminating in the Revolution, whence derived "those moral values that are embodied in the fundamental principles of legality, . . . a deep respect for the fundamental worth and dignity of all persons, and . . . a central commitment to the ideals of equality, fairness, justice, and freedom from arbitrary control."70 Unleashed by these powerful ideas, constitutionalists assert that the Revolution unleashed many new ideas and created many new conditions.71

70. Teachout, supra note 9, at 287.
71. Principles and ideas are so important to some constitutionalists that they find it difficult to accept any notion of "instrumental" activity by judges. John Phillip Reid, for example, takes an article by Scheiber, which argued (contrary to Horwitz) that the instrumental mode persisted long beyond the Civil War, see Scheiber, Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century, 1975 Wis. L. Rev. 1, 10 n.43, 12, as demonstrating that the concept of instrumentalism itself was "questionable." Reid then criticizes Horwitz for "continu[ing] to believe there was an era of instrumentalism." Reid, supra note 3, at 1310. For Reid's adherence to the Bailyn
Thus, according to John Phillip Reid’s critical review, “[t]he transformation of American law about which Professor Horwitz writes . . . [arose] out of the related transformation of the American economy produced by independence from Great Britain and the concurrent industrial revolution,” the latter factor treated by Reid as subordinate and determined by other factors. Reid says at another point:

The great burst of judicial energy that characterized the pre-Civil War decades was due . . . to the fact that a new nation needed new law, or because it was an epoch when questions were for the first time being asked and, by the very nature of things, many innovative decisions were certain to be made.

The principled motivations of those who made their marks as actors in history are also quite important to the constitutionalists, as therein lies the evidence of the importance of fundamentals. Never mind that this approach limits us by and large to that small segment of the population that was literate, had the leisure and the inclination to record their feelings, and was fortunate enough to have had succeeding generations recognize that what they had done was important enough to have preserved those remains. Never mind that they may have had conscious or subconscious reasons for putting down less than or more than what actually happened. Never mind that each actor in history has only a partial and biased view of events no matter how important he or she may have been. “It is, of course, asking too much of the new legal historians that they take men at their own word,” Reid expostulates.

Thus, he agrees with Horwitz that

many who thought in the Hamiltonian tradition preferred to have questions about private property and vested rights settled not by the legislature but by the judiciary, [but] their reasons

\[footnote\]

72. Reid, supra note 3, at 1312. I have transposed Reid’s negatively phrased construction here, and in the text accompanying the next footnote, to a positive construction without, I think, changing his meaning.

73. Id. at 1310.

74. Id. at 1314 n.17.
were due to legal ideology, not the fear that property might be redistributed. . . . It was the doctrine—the idea—not the implementation that troubled conservative lawyers.\textsuperscript{75}

Ideological determinism, using principles derived from the Revolutionary experience, constitutes the answer to historical puzzles:

The demise of employer paternalism may have been due as much to the rise of urbanism as to the scheming friends of business who sat on nineteenth-century courts. It may also have been due to . . . the stress by the courts upon individual freedom, a legal doctrine then attributed to the winning of independence from Great Britain. Employing only evidence available in this book, it is possible to argue that even . . . the fellow-servant doctrine . . . followed inevitably from the principles of the American Revolution . . . [N]ow the individual, free to enter or to reject a perilous employment, was made responsible for his own decisions.\textsuperscript{76}

The constitutionalists do not, of course, see themselves so narrowly. They accuse Horwitz of doctrinairely marching to the tune of “a single set of ideological coordinates,” while they see themselves as “constantly judging and discriminating, . . . responding . . . to the whole of human experience.”\textsuperscript{77} Anyone who wishes to point to factors other than ideological, however, is a victim of “Horwitzian determinism,” or rather is “a neomarxist on the scent of an economic explanation.”\textsuperscript{78} Economic determinism is evil, while neutrality (meaning the well-principled intentions of historical actors) is unquestionably good. “There is no neutrality in the legal history of Horwitz. Economics determines all issues, conspiracy explains most events.”\textsuperscript{79}

A “conspiracy” exists when a group attempts to influence events because of evil (meaning economic) motivations. But it is neither conspiratorial nor deterministic, apparently, for Reid to assert that

\textsuperscript{75} Id. at 1314.
\textsuperscript{76} Id. at 1317 (footnote omitted).
\textsuperscript{77} Teachout, supra note 9, at 246.
\textsuperscript{78} Reid, supra note 3, at 1313, 1317.
\textsuperscript{79} Id. at 1315. “It is this ‘neutrality,’ ‘comprehensiveness,’ and ‘breadth of sympathy’ . . . that we expect and need from historical writing. And it is precisely this quality that, because of its ideological preconceptions, new school historiography [i.e., Horwitz] fails to provide.” Teachout, supra note 9, at 280 n.131.
the courts were . . . opening opportunity to a wider class of citizens. If the new law encouraged individuals to employ their intelligence and inventiveness unencumbered by restraints previously protective of those possessing vested privileges or lacking in venturesomeness, the purpose of that new law can be as fairly labelled "democratic" as "Machiavellian."80

The constitutionalists cannot accept that new shackles for large numbers of people might have been substituted by the new order in place of the old restraints, or that the new "contractarian" notions of "individual freedom" might have been shams in practice for many without the means or luck to employ them. Problems of class struggle, if they ever existed on this side of the Atlantic and above the Caribbean, were for constitutionalists whisked away by a Revolution that saw most Americans united against their British oppressors on matters of principle which transcended and obliterated most petty economic grievances. Americans were blessed with liberty, justice, and rights under a benign rule of law (and a duly restrained government with fragmented power), which represented the actuality of existence for most people.81 Beginning from such a principled consensus,

the changes that Horwitz traces in pre-Civil War law, . . . taken individually, . . . can only be interpreted as efforts to free the economy from legal restrictions no longer relevant to American society. Surely at the time they seemed to promise neutral results. . . .

Who can say that contemporaries expected that these changes in law would result in the "subsidization" of a commercial class and the economic domination by a favored few? Far more likely it was contemplated that everyone would, to some extent, be a "winner."82

Individual motivations and constitutional principles remain, to the end, the only salient factors involved in history. The constitutionalists' ideologically deterministic explanations are, as a result,

80. Reid, supra note 3, at 1318.
81. "It is a simple empirical truth," the constitutionalist Teachout apparently believes, "that where there is genuine respect for the rule of law and the principles that underlie it, brutality and oppression cannot survive." Teachout, supra note 9, at 280.
82. Reid, supra note 3, at 1319-20.
quite hollow, and their "Who would've guessed?" theory of the advent of vast economic disparities, political control exerted by a "favored few," and social degradation and misery for countless people is unconvincing.

It is significant that these constitutionalists make no attempt to prove or suggest that the kinds of changes which Horwitz demonstrates to have occurred in private law did not occur, or occurred in some other fashion for different reasons than those advanced by Horwitz, and with nonredistributive results. The constitutionalists, like most idealists, operate with their heads in the sand, ridiculing the notion of deep social division and conflict because their frame of understanding does not admit of its possibility. Their complacency rests upon twin unproven hopes, or, shall we say, predictions about the past. First, and most important, they posit, life in the United States existed as a matter of everyday fact for the overwhelming majority of its citizens under the operation of a rule of law, implying that a fair and neutral governmental structure harmoniously presided over the distribution of substantial justice and guaranteed to them the rights and liberties which the Revolution supposedly was fought over. Second, and in part as a result of the first, the vast majority of citizens actually received some of the fruits of abundance and growth, while most of those who attempted to exercise their "intelligence and inventiveness" were rewarded with larger pieces of the pie; further, the amounts of these dividends increased with the economy. Thus, the constitutionalists conclude, there could have been no reason for any social division of great magnitude to have occurred.

After the 1970's, perhaps the twilight of legitimacy for the American government, the failure of both of these prongs of the American dream has become evident. "The rule of law" has been demonstrated to have been a myth;\textsuperscript{83} fairness and justice do not characterize the workings of the system at least in this century;\textsuperscript{84}


\textsuperscript{84} See, e.g., J. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (1976); R. Harris, Freedom Spent: Tales of Tyranny in America (1976); Law Against the People: Essays to Demystify Law, Order and the Courts (R. Lefcourt ed. 1971) [hereinafter cited as Law Against the People]; M. Levine, Political Hysteria in America: The Democratic Capacity for Repression (1971); R. Kluger, Simple Justice:
the existence of deep social divisions has begun to be noticed by scholars working in the Revolutionary,\textsuperscript{85} "middle,"\textsuperscript{96} Reconstruction,\textsuperscript{87} and Progressive\textsuperscript{88} periods of American history; and the pie which we supposedly have been given larger pieces of has proven to be plastic, poisonous, and increasingly devoid of any nourishing content.\textsuperscript{89} The theory of Horwitz, which takes conflict into account and which explains the existence of bias in the law, provides a much more convincing account than does constitutionalism.

C. The Orthodox Critique

The orthodox school, typified usually by the writings of Roscoe Pound, originated in the period of the rise of lawyers to organized professional status (and the rise of law teaching to a separate profession) in the last decade of the nineteenth century and the first two decades of the twentieth. Having few adherents today (but perhaps growing rapidly), it shares the idealism of the constitutionalists, differing from them only in that it focuses on the common law as its central idea rather than on those constitutional principles which came to flower because of the Revolution. The history of humans is, to the orthodox, essentially a history of the development of ideas and clusters of ideas. If not timeless, these ideas certainly are understood to have a life of their own somehow.


\textsuperscript{86} See, e.g., E. Genovese, supra note 32; A. Dawley, \textit{Class and Community: The Industrial Revolution in Lynn} (1976); H. Gutman, \textit{Work, Culture and Society in Industrializing America} (1976) (also deals with the Reconstruction period).


\textsuperscript{89} See C. Lasch, supra note 17, and other works cited there.
independent of and above society and human actors. Such concepts motivate and impel human action, as humans adapt themselves to and attempt to complete the concepts.

Concepts such as the common law are thought by the orthodox to be neutral and to grow (influenced at a great remove by slow and widely-shared changes in human custom) according to their own internal needs on a course charted by logic and reason, which are "assumed to be [themselves] governed by historically unchanging criteria." When legal historians assert that changes in the law are a product of social forces rather than the result of logic and reason, they begin "to undermine the indispensable premise . . . that its characteristic modes of reasoning and its underlying substantive doctrines may not be universal or necessary, but rather particular and contingent."

Randall Bridwell denies both that judges made law and that contemporary socioeconomic conditions or interest groups had much of an effect on the law. He conceives of the law as "a largely self ordering system supportive of autonomous individual behavior and experiment, adjusting itself with the aid of limited judicial intervention that does not effectively elevate the narrow interests of 'caste or class.'" "Autonomous individual behavior" is custom, the "vast universe of private activity" which assumes "modes or patterns" that change "as society itself changes." The judicial discretion permitted by the law "entailed the identification and elimination of inconsistencies in the judicial record," that is to say only the weeding out of mistakes, a technique whose use would be compelled to cease when "the contours of the positive rule . . . fully emerged [from] previous cases." Bridwell points out, how-

90. Horwitz, supra note 5, at 278.
91. Id. at 281.
92. Bridwell, supra note 9, at 496. See also Gordon, supra note 51, at 1028-36.
93. Bridwell, supra note 9, at 464. Bridwell allows that "new custom" could be proved as such, id. at 470, but does not tell us how common law judges could discern true custom from temporary aberration.
94. Id. at 460.
95. Id. at 464 n.47. In the same note Bridwell explains that "the cases contained built in limitations which emerged as the judicial acknowledgement of common law rules progressed to the state where the statements of positive law contained in the case was [sic] thoroughly settled." Id. Neither of these statements, nor any other that I can find in Bridwell's long article, answers the question of where the first cases and rules came from; cases, rules, and
ever, that "[t]he actual rule is nowhere personified or ever perfectly circumscribed into an inflexible definition." Thus, while "the common law process" has the "essential capacity to reach ever more mature stages of development" by producing an increasingly "effectively inclusive or complete articulation of the standards" and by extending rules to other subject-matter areas, this process is limited by custom and existing precedent and was "largely based upon the continuous recognition of an ongoing order of actions which judicial action only touched upon intermittently, and in a fashion supportive of the ongoing order." Rules are separate entities which define themselves to be complete; inconsistencies are obvious because of the law's internal logic; and the whole "process" is "supportive of the ongoing order." In Bridwell's view, Horwitz mistakes the ordinary limited discretion of the common-law process for "instrumentalism" because he has not studied sufficiently deeply to understand the continuities involved and to see how already developed principles were merely being extended and adapted to new evidence of custom.

Bridwell's theory that judges act only or primarily to flesh out, to apply, or to extend legal rules because of the very existence of the rules and of an "ongoing order" fails to convince on two accounts. First, the underlying assumption that society is an essentially harmonious and consensus-oriented entity whose history extends immemorially into the past directly ignores the possibility of social disruption and disharmony. Second, judges do not seem to act in the fashion he postulates. In Transformation Horwitz presents evidence contrary to both of Bridwell's assumptions. In the crucible, Bridwell is able in a forty-five page article to present

the law are assumed by the orthodox to exist. Bridwell does acknowledge that the narrow range of discretion was necessary "for the adjustment of rule to practice," but his extraordinary idealism is demonstrated by his conception of what would have existed in the absence of discretion: this necessary "adjustment . . . would have to have been self-executing." Id. at 470. Ideas would correct themselves, without human intervention, and judges would be reduced to mere mouthpieces for the law!

96. Id. at 464. For the orthodox, rules are not only hard to pin down; they obey something like the Heisenberg principle, in that the very attempt to measure them is disturbing to them. "[A]lmost any attempt to isolate legal or Constitutional phenomena [sic] rends the 'seamless webb' [sic] of history and to some degree inevitably distorts the truth." Id. at 451 n.8.

97. Id. at 465, 466.
no convincing evidence that Horwitz is wrong.\textsuperscript{98} The best he can do is to tell us that the job is difficult:

Admittedly, phenomena such as "judicial discretion" are not easily quantified. . . . The ability of a prevalent decisional technique to accomplish extensive and profound doctrinal change and still remain the same technique or constitutional common law process is an exceedingly complex phenomenon to understand . . . . Horwitz's book adds little to our understanding of this process, and at most presents largely unsupported conclusions with a mere description of doctrinal change, sometimes stated inaccurately.\textsuperscript{99}

[T]he application of some quite familiar techniques for analysis of legal data [would] enable Professor Horwitz to derive a more defensible and more accurate meaning from it. . . . A simple consideration of implicit principles common to a wide variety of case data would have disclosed certain general consistent "theories" in the case law itself, which would in turn explain what specifically appears to be "transformation."\textsuperscript{100}

Bridwell cites no substantive cases and gives no "general consistent theories" to refute Horwitz's massively presented documentation of legal change over an eighty-year period in several major subject-matter areas. His orthodox ideological-deterministic argument is merely asserted.

Ironically, it is Bridwell who castigates Horwitz for selective use of the material,\textsuperscript{101} and the empty irony of the orthodox critique is compounded by the following remarkable charge: "The conspiratorial antics of the great mass of the American judiciary, glancing sidelong at one another as they step in unison to gratify big business by consciously overthrowing the private law of the country is somehow a spectacle which one finds difficult to accept without some real proof."\textsuperscript{102} Why are not the actions of judges (robbed of any independent use of their intelligence, it is true) who adhere to

\textsuperscript{98}Bridwell does spend 20 tedious pages on one attempt at disproof, which will be treated in the succeeding section of this essay; his convoluted and difficult argument is not very convincing.

\textsuperscript{99}Id. at 495.

\textsuperscript{100}Id. at 493-94.

\textsuperscript{101}These castigations occur frequently. See, e.g., id. at 494.

\textsuperscript{102}Id. at 472.
custom and precedent in the common-law process equally "conspiratorial?" Do not Bridwell's judges "step in unison," only to a different tune? Immediately preceding the passage last quoted, Bridwell notes that the common-law judges rode herd on each other—"no judge or group of judges could escape the matrix of rules being observed by the greater number"; are these not "sidelong glances" of people "consciously" in lock-step? Conspiracy is not conspiracy when it is a consensus, apparently.

A variant of the orthodox argument, smugly produced by law-and-economist Stephen Williams, supplies a large gap in Bridwell's scheme by identifying the mode by which custom is taken into account by common-law judges. No conspiracy indeed, it is all a matter of utilitarian efficiency, which, Williams is sure, is timeless and neutral, not an approach invented in the late eighteenth century as a way of justifying contemporary value judgments. The "thread of utilitarianism stretches back into the remotest reaches of Anglo-American law," he asserts, utilitarian language coming more into use post Bentham, "seep[ing] into judicial opinions . . . thereafter." Effortlessly ignoring Horwitz's identification of instrumentalism with bias and partiality, Williams transmogrifies the overt attempt of the judges to stimulate growth into a neutral, natural application of standards of efficiency. Courts are supposed to aid growth: "The central problem is one of assuring that rights be readily marketable—a prerequisite if private rights in property are to allocate resources efficiently." Indeed, courts always did, though they may have been ignorant of what they were doing:

[W]e may note some general reasons for skepticism about the idea that pre-"transformation" law was innocent of utilitarian goals. . . . It seems scarcely credible that society could long exist without viewing a goal of maximizing aggregate utility . . . as at least relevant to a substantial number of cases. . . .

. . . [S]o many legal justifications preceding utilitarian analysis are patently tautological . . . [that] it seems natural to suppose that the utility of the rule, rather than the tautological

103. Id.
104. Williams, supra note 9, at 1187.
105. Id. at 1201.
106. Id. at 1198.
Utilitarian efficiency itself has here become the timeless central idea of orthodoxy, which, since it "seems natural," is assumed not to be partial or economically biased.

The members of orthodoxy want to shut out from their consciousness any possibility that law might be partisan, produced by political efforts to achieve the interests of this or that segment of the social whole.\(^{108}\) They ignore the desires and demands of any segment of the population that is not "supportive of the ongoing order," and elevate the partisan results of social interaction and coercive governmental behavior into immemorial custom or utilitarian efficiency supposedly understood and voluntarily adhered to by all. Ideas enable the orthodox to ignore the realities of discord and social struggle, but, like all liberals, they bottom their understanding and approach upon an assumed consensus.\(^{109}\) They too

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107. \textit{Id.} at 1202.

108. The \textit{Maitre de ballet} of law-and-economics has recently "come out of the closet" of scientific neutrality, arguing in two recent articles that utilitarian efficiency is utilized by courts to maximize the wealth of the wealthy. \textit{See} Posner, \textit{The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication}, 8 \textit{HOFSTRA L. REV.} 487 (1980); Posner, \textit{Utilitarianism, Economics, and Legal Theory}, 8 \textit{J. LEGAL STUD.} 103 (1979), criticized aptly in Horwitz, \textit{Law and Economics}, \textit{supra} note 18 (the "closet" quote is from \textit{id.} at 912). It will be interesting to see whether this radical shift from neutrality to ideology will, as Horwitz predicts, split apart the law-and-economics movement, but the event does provide additional evidence for the thesis that the Rule of Law is rapidly crumbling. \textit{See generally} Holt, \textit{The Future of the Rule of Law: Notes on Post-Liberal Jurisprudence} (1981) (unpublished manuscript).

The connection between Bridwell and the patriarch of the modern legal utilitarians, Friedrich von Hayek, is noted by Sugarman, \textit{Theory and Practice}, \textit{supra} note 8, at 99 n.26.

109. Thus, Bridwell finds himself "more in agreement with Hurst" despite the latter's determinism because, "contrary to Horwitz's view, ... Hurst has consistently emphasized broad popular support for legal change in America." Bridwell, \textit{supra} note 9, at 492 n.118. Reid, also representing an idealist school, similarly bridges the putatively immense chasm between himself and the economic determinists: "In the legal history of Professor Hurst, economic interests struggled against other economic interests. ... The courts acted as neutral referees ... Hurst attributes the transformation ... to drift and inertia ..." Reid, \textit{supra} note 3, at 1321. The primary factor in the analysis of all these superficially diverse scholars is not their scholarly findings, not the theoretical framework (emphasizing ideas of economics) within which those findings are located, but their aversion to the very mention of social discord and divisions. Bridwell and Reid accuse Horwitz of tailoring his evidence to fit preconceived theories, Reid, \textit{supra} note 3, at 1317; Bridwell, \textit{supra} note 9, at 492-93, but it is evident that liberal scholars tailor their evidence to fit their theories too. Their work is just as political as is the law they strive to see as neutral.
have been unable to present any convincing arguments that the doctrines of law which Horwitz demonstrates to have emerged in the early national period of our history were not produced in an "instrumental" fashion to serve partisan purposes, attempting to aid certain segments of American society at the expense of others.

D. The Failure of Substantive Critiques

Three attempts have been made to gainsay Horwitz's reading of the evidence from the nineteenth century. Two of these, by Randall Bridwell and Stephen Williams of the orthodox school, are quite unconvincing. Bridwell fails to come to grips with the substance of Transformation, that is, Horwitz's thorough survey of the basic areas of common-law adjudication to cull evidence of judicial attempts to aid economic development. Bridwell essentially snipes at flanks, choosing the adjective area of conflict of laws for the burden of his refutation, and fighting on the territory of Swift v. Tyson, a decision which Horwitz does not proclaim to be openly instrumental (since it was not). Rather, in a short discussion which has met with the approval of other reviewers, Horwitz argues that Justice Story disguised a prodevelopmental decision in neutralistic, already outdated natural law theory, requiring federal diversity courts to apply general commercial rules favoring negotiability rather than the peculiar New York rule which Tyson thought applied, one which would have stanchèd negotiability.

Although it is hidden in a confused flurry of criticism and depreciation, Bridwell's agreement with the prodevelopmental nature both of Swift and of the general doctrines of commercial law emerges from a close reading. "[E]verything practical encouraged states to leave general commercial custom intact as they found it,"

110. 41 U.S. (16 Pet.) 1 (1842).
111. The eight-page discussion of Swift (out of Horwitz's 348 pages), M. Horwitz, supra note 1, at 245-52, 345-46, has been noted with approval by Horwitz critics Gilmore, supra note 9, at 789-90, and Scheiber, supra note 9, at 461.
112. Bridwell variously accuses Horwitz of misunderstanding general commercial law prevalent before the Civil War, misunderstanding the content and role of the conflicts rules of the time, misinterpretation of the federal system of courts and of contemporary ideas of federalism, oversimplification, selective use of evidence, and crudity of presentation; he concludes, "All this is just about as wrong as it could be." Bridwell, supra note 9, at 473-92, 479.
because such was supported by “the customary practices of innumerable private parties pursuing their own autonomous commercial dealings.” Bridwell even finds it “quite ordinary” that judges would undertake “the gradual recognition of widely held and objectively provable practices.” It is surprisingly unsurprising to him that “decisions reflect the views and practices of the majority of the commercial world.” The world has become “the commercial world,” and only a “majority” of that; the only relevant people are those with sufficient resources to pursue “autonomous commercial dealings.” Bridwell’s consensus underpinnings, however, preclude his recognition of the partiality and bias of his beliefs. His argument reduces to the naked assertion that Horwitz must be wrong in attributing overt class bias to judges because it is only natural for them to have followed “widely held” commercial practices—and Bridwell makes this argument, significantly, with regard to a case which does not contain the kind of openly developmental language Horwitz demonstrates in many other instances.

Williams attempts to show that the law in three areas—negligence, nuisance, and riparian rights—did not change as drastically as Horwitz claims it did. In each instance his attempted proof falls far short of being persuasive. Horwitz argues that the advent of entrepreneurial capitalism persuaded many judges to introduce an element of fault into torts, thus altering that field’s theoretical basis from strict liability to negligence. The argument is not new, but Charles O. Gregory had urged that 1850 was the turning point, whereas Horwitz wishes to move the date back a half century. Williams agrees with the contrary, idealistic argument of E.F. Roberts that strict liability was never the rule, fault being required in accidental injury cases long before 1800. Williams finds comfort in several early English cases, but Horwitz had at-

113. Id. at 490-91. Mr. Tyson, who presumably was pursuing his own autonomous commercial dealing, was apparently as wrong-headed as Horwitz was to prove to be: “It is difficult to imagine any real expectations Mr. Tyson might have had being defeated by the Swift decision.” Id. at 490 n.115.
114. Id. at 491.
115. Id.
118. Williams, supra note 9, at 1190, 1215-18.
tempted to reject the Roberts argument solely on the basis of American cases. Williams cites no American cases to refute Horwitz's claim that the American and British developments were different, quibbles with Horwitz's reading of several admittedly obscure and difficult decisions, and concludes weakly and idealistically that, "[a]fter looking at his core authorities, one emerges suspecting that American law contained vast empty reaches waiting to be filled." The assertion that decisions which dealt with contemporary problems in contemporary if obscure terms are meaningless and "empty" not only fulfills the historian's task poorly but also fails to convince that Horwitz is wrong. Rather, one is moved to reject Williams's arguments instead.

One has seen Williams's strongest point by this time. He advances several arguments that might constitute exceptions to Horwitz's view of nuisance law, but admits that "it is hard to ascertain the extent to which [these exceptions] may have commanded judicial adherence at any given moment," and again fails to cite a single American decision to refute Horwitz. Williams notes that there are not a lot of cases to back up Horwitz's claim that riparian law changed from a concept of natural flow to one of reasonable use, in order to allow courts to interrupt stream flow for developmental reasons, but again he cannot find much with which to dispute Horwitz either, coming to rest on the assertion that "for all their talk of 'balancing,' courts have very rarely denied relief to an established user whose interests were substantially interfered with by a newcomer." The reason for Williams's production of popguns when cannons were announced is not long in evidencing itself: he agrees with development and, like Bridwell, finds it natural for courts to promote economic growth. "Surely the public purpose is making possible the production that would have been foreclosed if every adversely affected riparian owner were allowed an injunctive remedy." If "maximizing aggregate utility" is the goal of all sane judges, as Williams thinks it is, then one ought to

119. M. Horwitz, supra note 1, at 91 & n.156.
120. Williams, supra note 9, at 1193.
121. Id. at 1196.
122. Id. at 1199.
123. Id. at 1200.
124. Id. at 1202, discussed in text accompanying note 107 supra.
expect very little substantive difference between Williams and Horwitz with regard to the nineteenth century cases, and that is what one finds.

The third criticism seems more formidable. In an urbane essay, one of the doyens of contemporary English contractual legal history, A.W.B. Simpson, has disputed Horwitz on many significant points in Transformation’s study of contract law. While it has proved beyond my competence to investigate the charges made, it appears that Simpson’s critique is not very forceful either. First, Simpson lines himself up with the developmental idealism of Bridwell and Williams: “many of the doctrines that [Horwitz] identifies as characteristic of the transformation were common in the eighteenth century.”

Second, the British legal historian David Sugarman has investigated some of the competing claims made by Horwitz and Simpson about the history of contract law. Sugarman finds several substantive and methodological flaws in Simpson’s work which partially undercut the force of Simpson’s critique. If Sugarman is correct, Simpson’s criticisms carry significantly less force in important respects than would otherwise be the case. Sugarman’s work should be published soon, but, given my sympathy with his previous conclusions, I assume the correctness of his judgment in this instance.

Third and most important, Betty Mensch has concluded that the recent, massively detailed history of modern English contract law (written by Oxford University Professor P.S. Atiyah, the other doyen of English contractual legal history) “provides detailed and convincing evidence that Horwitz was right” in his analysis of doctrinal change, as distinct from the social and economic conclusions to be drawn therefrom. Indeed, Atiyah acknowledges his debt to Horwitz. Atiyah’s undoubted orthodoxy on social and eco-

125. Simpson, supra note 9.
126. Id. at 542.
128. See note 11 supra.
129. Mensch, supra note 52, at 756 n.9; see id. at 756-58, passim.
nomic matters,\textsuperscript{131} plus his detailed doctrinal conclusions, confirm both that Horwitz is essentially correct (at least in the realm of contract law) and that \textit{Transformation} cannot be dismissed as the product of sheer prejudice or bias. Neither Simpson nor Williams nor Bridwell has managed substantially to refute Horwitz’s reading of the nineteenth-century American cases.

E. Conclusion

The comparison of \textit{Transformation} to the work of those who have criticized it from the right has put into even starker, more favorable contrast the signal achievement of Horwitz. He is willing to accept that there might have been deep social and economic divisions in the American polity during the period 1780-1860, with certain interest groups consistently getting the greater share of the spoils from the struggle. He argues that this was both reflected in and enhanced by changes in major doctrines of law, and that judges and lawyers, far from being professionally neutral, allied themselves with those who benefited, the rising entrepreneurial and industrial capitalists. All legal historians of the three liberal schools in current vogue, in their theories and in their research, unquestioningly accept an underlying social consensus as a fundamental axiom. Some conventional legal historians are idealists, who ignore or submerge economic and social factors; others are determinists, who elevate economic factors to the front of analysis but understand them only on the surface, failing to look beneath them for the hidden interconnections and influences which demonstrate deep tensions and conflicts of interests. All, however, as has been shown, rest on consensus.\textsuperscript{132}

A materialist view of history, carefully utilizing Marx’s dialectical methodology,\textsuperscript{133} describes the past and present very differ-

\textsuperscript{131} Id. at 220-24, 389-90 (carefully adopting an orthodox political position).
\textsuperscript{132} Cf. Freeman, supra note 48, at 1233-34, 1236.
\textsuperscript{133} One cannot repeat too often that Marx’s dialectical approach involves the rejection of a familiar bourgeois way of looking at the world in favor of the development of a more comprehensive, qualitative, substantive approach which, among other things, disavows the liberal fact/value distinction and the liberal mode of definition-by-isolation. See B. Ollman, \textit{Alienation}, supra note 16, at 5-40, \textit{passim}; notes 16, 64 & accompanying text supra; Ollman, \textit{Teaching Marxism}, supra note 16, at 125, 126, 136:

[U]]ndoubtedly the major hurdle in presenting Marxism . . . is the bourgeois
ently. It discovers that humans have been in fundamental conflict in all of recorded history over the means available to reproduce their daily lives in a physical sense ("the means of production"), and that these conflicts take place between social groups identifiable by their access to control of the means of production. Those in control exploit the others, who must toil for the controllers. Those who do not have control wish to escape the oppressiveness of being subordinated to others and the deprivation of the products of their labor, in order to satisfy their own needs. Chief among these needs is to retain and fulfill the basic attributes of humanity, to attain "the full and free development of every individual."

Different "modes" of production, or methods of extracting labor from workers, have existed at different times. The present epoch is one of capitalism; the workers create and donate surplus value to capitalists essentially through a process of mystification rather than one involving brute force or fear. Workers consent to the system because they are supposedly free to contract with employers for their labor-time, inequalities of bargaining power being success-

ideology, the systematic biases and blind spots, which even the most radical bring with them. ... Underpinning and providing a framework for all [bourgeois biases and blind spots] is an undialectical, factorial mode of thinking that separates events from their conditions, people from their real alternatives and human potential, social problems from one another, and the present from the past and the future. The organizing and predisposing power of this mode of thought is such that any attempt to ... present a Marxist analysis of any event is doomed to distortion and failure unless accompanied by an equally strenuous effort to impart the dialectical mode of reasoning. ... It is important ... [to] see that formal education in America is in large part training in how to think undialectically.

134. Marx was especially careful to oppose idealism:
My dialectic method is not only different from the Hegelian, but its direct opposite. To Hegel, the life-process of the human brain, i.e., the process of thinking, which under the name of "the Idea," he even transforms into an independent subject, is the demiurges of the real world, and the real world is only the external, phenomenal form of "the Idea." With me, on the contrary, the ideal is nothing else than the material world reflected by the human mind, and translated into forms of thought.

1 K. Marx, Capital, supra note 23, at 19. While this quote may be taken to reinforce a deterministic version of the "structure"-"superstructure" dichotomy, see note 14 & accompanying text supra, it appears to me that Marx is linking together the mind and the material world rather than disjoining them.

135. Id. at 592.
fully hidden behind the appearance of fairness and freedom. The
mystification resonates throughout the culture of the capitalist so-
cial system. Inequalities in access to power are successfully hidden
within structures of liberal democracy, constitutionalism, and the
rule of law. 136 Inequalities in access to satisfaction of needs are suc-
cessfully hidden within a flood of consumer products, the availabil-
ity of stock ownership, welfare supports and other governmental
redistributive schemes, and belief in freedom of opportunity. Class
lines are blurred, and struggle is defused or deflected, as most peo-
ple are unable fully to sense their own objective interests resulting
from their objective economic situation. 137 Ideologues, such as his-
torians, reproduce the mystification by investigating only the ap-
pearances, accepting without question such fundamental liberal
notions as consensus when the existence of consensus is what they
should be questioning scientifically.

Horwitz has radically broken with liberal legal history and its
mystifying categories and assumptions. He has demonstrated the
bias of law and law-people in the period 1780-1860, destroying the
myth of the neutrality of law and opening the way for the study of
law as an active element of human socioeconomic history in the
manner of E.P. Thompson, 138 Eugene Genovese, 139 Douglas Hay, 140
and Staughton Lynd, 141 among others. 142 Transformation ranks


137. The two-class model used by Marx may be better understood, to the extent it might
be thought to be descriptive of contemporary social formations, as a metaphor rather than
as an objective reality. Marx wrote during a time when capital and labor stood blankly op-
posed to each other, snarling across a rather clearly defined abyss. Proletarian conditions
today form a part of almost everyone's objective experience. See works cited in note 17
supra.


139. See E. Genovese, supra note 32, esp. 25-49.

140. See Hay, Property, Authority and the Criminal Law, in D. Hay et al., Albion's Fa-
tal Tree 17-63 (1975). Hay is critiqued in Sugarman, Theory and Society, supra note 8, passim.

141. See, e.g., Lynd, Government Without Rights: The Labor Law Vision of Archibald
Cox, 4 Indus. Rel. L.J. 483 (1981); Lynd, Investment Decisions and the Quid Pro Quo
Myth, 29 Case W. Res. L. Rev. 396 (1979); Lynd, The Right to Engage in Concerted Ac-

142. See, e.g., Law Against the People, supra note 84; Glasbeek & Rowland, Are Injur-
ing and Killing at Work Crimes?, 17 Osgoode Hall L.J. 506 (1979); Klare, Judicial Deradi-
calization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941,
(with Mark Tushnet's recent book The American Law of Slavery\textsuperscript{143}) as the most suggestive, comprehensive, and sustained work to be produced by the critical legal theory movement of aware legal scholars which has emerged in the past five years.\textsuperscript{144} The product of a slow but steady disaffection with bourgeois historiography and politics, it is and should remain a model for us all and a monument to the struggle toward demystification which most of us must go through.

Nevertheless, problems remain with Transformation as an exemplar of materialist history. In much of his methodology, in most of his explicit efforts at summary and analysis, and in many of the attitudes he exhibits, Horwitz did not effect the same radical break with the premises of liberal legal history as do the impact and approach of the volume as a whole. While, as noted before,\textsuperscript{145} many of the aspects of materialist historiography are subjects of considerable debate and part of the problem can be attributed to a similar retention of aspects of liberal ways of thinking, the attempt to delineate some of these problems may help to reduce the occurrence of similar confusion and, thus, to accelerate the advance of materialist scholarship.

IV. THE PROBLEMS WITH Transformation

A. The History of Capitalism

Two common misconceptions about the past mar Transformation. One may be called the "golden era" error, and the other con-

\begin{itemize}
  \item 144. A Conference on Critical Legal Studies was organized in 1977, when few of its members were Marxists. A majority of the participants in the 1982 meeting of the Conference in Cambridge appeared to be Marxists. Many of its members, and some others, consider themselves to be a part of a critical legal theory movement. See Kennedy, supra note 18, at 1275; Freeman, supra note 48. While Business Week's estimate of 10,000 Marxists now teaching at the college level or above is obviously overdrawn, there has been a significant growth of materialist membership on university faculties and particularly in law schools in very recent times. See U.S. NEWS & WORLD REPORT, Jan. 25, 1982, at 42-45.
  \item 145. See notes 13-16 & accompanying text supra.
\end{itemize}
cerns the dating of the advent of capitalism. Many historians who perceive conflict and social tension in a given period will conclude that it represents a declension from a previous time when harmony prevailed. 146 At points, Horwitz describes life in colonial America as though a real consensus existed then, in a socially undifferentiated world free from class struggle. "[V]iolations of the tort law were [then] universally regarded as unjustified and antisocial acts," he says; "[l]aw [was] once conceived of as protective, regulative, paternalistic and, above all, a paramount expression of the moral sense of the community, . . . [of] the legal and ethical culture of the small town, of the farmer, and of the small trader." 147 The reader is led to conclude that capitalism reared its ugliness only with the advent of an outburst of entrepreneurship in the 1790's.

At other points in Transformation, however, there are overtones of a different analysis, where colonial law is said to reflect the interests of "[t]he great English gentry, who had played a central role" in shaping it. 148 As Simpson observes:

A Marxist might have argued that the English commercial bourgeoisie, linked with elements of the landed classes, forged an equitable theory of contract in the eighteenth century as a weapon in their struggle with a law reflecting earlier, less commercial times; and that once it triumphed, the new order cut back on the dangerous legal doctrines it had used against the old. 149

McClain is in accord: "the class which created the common law and was most protected by it was the class at the top of the hierarchy—the English landed aristocracy." 150 As Genovese has noted, "Historically, private property has meant bourgeois property . . . . The early advance of capitalism may, therefore, be measured by the doctrinal advance of 'absolute' property, most notably in land." 151 Rather than the advent of capitalism, Transformation concerns a change from one form of it to another. Eric Foner sums

146. See, e.g., J. Auerbach, supra note 84.
147. M. Horwitz, supra note 1, at 81, 253, 186.
148. Id. at 36.
149. Simpson, supra note 9, at 535-36.
150. McClain, supra note 9, at 396; accord, e.g., Gilmore supra note 9, at 794; Winship, supra note 9, at 754; Bloomfield, supra note 9, at 1107.
151. Genovese, supra note 8, at 732 (footnote omitted).
it up: "what Horwitz is describing is precisely a change from what [C.B.] Macpherson calls 'possessive individualism,' in which property is valued primarily as a guarantee of individual autonomy, to a market view of property as a means to economic development and capital accumulation." 152

Marx insisted that "the modern history of capital dates from the creation in the 16th century of a world-embracing commerce and a world-embracing market," 153 with "the first beginnings of capitalist production as early as the 14th or 15th century." 154 England led the way. The British North American colonies were settled as "colonies," and were treated as such by the mother country. While much of the settlement had an enduring frontier quality, there eventually developed major cities where many people engaged in commerce (and even banking), and The Legal Papers of John Adams, among other sources, make clear that emerging elitist and professionalistic groups of lawyers in the urban centers were beginning to devote themselves at least in part to the affairs of businessmen long before 1800. 155 Poverty and wretchedness existed both in the countryside and in the cities, and increasingly after 1700 inflation was a major problem, particularly during the crises which led to the Revolution. 156 Social historian Edward Pessen's recent conclusions deserve quotation at length:

A dramatic inequality of condition long antedated Tocqueville's visit to America. . . . In the century prior to the American Revolution, colonies in every geographical section of British North America witnessed the emergence of families possessed of substantial real and personal property. . . . American communi-

152. Foner, supra note 8, at 38; C. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke (1962); cf. 1 K. Marx, Capital, supra note 23, at 89:
Man has often made man himself, under the form of slaves, serve as the primitive material of money, but has never used land for that purpose. Such an idea could only spring up in a bourgeois society already well developed. It dates from the last third of the 17th century . . . .
153. Id. at 146.
154. Id. at 715. See also S. Cohn, The Laboring Classes in Renaissance Florence (1980).
156. See D. Hoerder, supra note 85, passim.
ties without exception witnessed increasing concentration or maldistribution of wealth with the passage of time. . . . [I]n almost every colony a small, wealthy ruling class "dominated the local political machinery [and] filled all or nearly all the important local offices". . . . It is a fair summary that over the course of the colonial era several thousand families, constituting less than one percent of the American population, had amassed great riches based on diverse sources, lofty social prestige and a near monopoly of influence and power which they appear to have regarded both as a fitting recognition of their possessions and eminence and as a means of promoting their own personal interests and those of their class.\(^{157}\)

The Salem witch craze, the "Regulator" movements in backcountry Carolina before the Revolution, and the rebellions, such as Shays', that flared up in the 1780's and 1790's against the new regime, demonstrate the potential for social unrest and class division.\(^{158}\) While capitalism may have entered a period of rapid entrepreneurial growth in the United States with the advent of nationhood, it was the dominant mode of sociopolitical relations long before 1800, with concomitant crises, social struggle, and the biased use of law to aid elites. There was no "golden" colonial era, except in Pessen's sense.

B. The Organic Nature of Capitalist Culture

Capitalism is a way of life, not merely a set of economic relationships. The particular mode of production of any epoch infuses and is infused by a concomitant organic culture, an interrelated, possibly internally contradictory, but characteristic complex of institutions, feelings, habits, beliefs, interpretations, morals, and


doctrines:

According to Marx, social conditions determine character, both directly, through their effect on the individual's powers and needs, and indirectly, through the creation of interests which he then strives to satisfy . . . . The visible result is a psychological and ideological superstructure which is practically the same for all men caught up in a given set of material relations.159

For most people, the result is internalized and is only partially consciously perceived to be a peculiar, historically specific phenomenon; during the heyday of capitalism, most people feel that the capitalist ethos is "natural." It is not a surface, intellectual brush with ideas; an individual's whole approach to and appreciation of the world—his or her emotions, perceptions, speech, and thought—are influenced and formed by the underlying material relations. They are the way she or he understands reality.160

Horwitz notes that the instrumental mode of decisionmaking re-shaped some rules "before new or special economic or technological pressure for change in the law . . . emerged."161 He explains this

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159. B. OLLMAN, ALIENATION, supra note 16, at 120. Marx stated this truth as follows: Upon the different forms of property, upon the social conditions of existence, rises an entire superstructure of distinct and peculiarly formed sentiments, illusions, modes of thought and views of life. The entire class creates and forms them out of its material foundations and out of the corresponding social relations. The single individual, who derives them through tradition and upbringing, may imagine that they form the real motives and the starting point of his activity . . . . [A]s in private life one differentiates between what a man thinks and says of himself and what he really is and does, so in historical struggles one must distinguish still more the phrases and fancies of parties from their real organism and their real interests, their conception of themselves, from their reality. K. MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 47 (Int'l Pub. ed. New York 1963) (1st ed. 1852) [hereinafter cited as K. MARX, EIGHTEENTH BRUMAIRE]. Closely related to this is the "structure"-"superstructure" problem. See note 14, & text accompanying notes 13-16 & 145 supra.

160. Christopher Lasch reaffirms that "social patterns reproduce themselves in personality." C. LASCH, supra note 17, at 50-51. Mark Tushnet terms this a "psychology of ideology which . . . has been neglected by prominent Marxist scholars until recently[...] . . . people must interpret the material conditions of their existence in ways that make their experience coherent. . . . [T]he primary, though not exclusive, material conditions that shape interpretations of the world are the material social relations of production." M. TUSHNET, supra note 143, at 31-32.

161. M. HORWITZ, supra note 1, at 3.
apparent cause-effect anomaly by postulating autonomous economic interests peculiar to judges, lawyers, and "the law," unconnected with the interests of entrepreneurial capitalism, which produced the changes before they were "necessary." As has been seen, however, capitalism had been dominant in American social relations for a long time; it was "in the air." Judges, lawyers, and legal commentators, formed psychologically and intellectually by and caught up in the ethos of capitalism, would have some feeling for "the way things ought to be," and could have in effect invented solutions for problems which might not have yet occurred. Economics and law, as ideological phenomena, interact not in a linear, simple, one cause-one effect way, but in a complex, interrelated, organic fashion.

Another, more important consequence of the organic nature of capitalism is a deeper perspective on the notion of "instrumentalism." Horwitz has argued in a linear cause-and-effect mode: "instrumentalism" rises to "dominance" after about 1820, being phased out in favor of a newly-dominant "formalism" around 1860.

162. Organicism is not idealism in disguise; it is, however, the materialist posture of the same perceptual mode. Idealists reify to abstraction, attempting (whether consciously or not) to isolate the perceived phenomenon from its socioeconomic context. Materialists also reify, but they refuse to disconnect their perceptions from each other and from the historic social and economic matrix within which their origins, meanings, and consequences lie. Much of the confusion at the heart of Davis, supra note 48, lies in its idealistic failure to grasp this distinction. While phenomena persist after their matrix of genesis has subsided, due to the collective existence of human mental capabilities such as memory, K. Marx, Eighteenth Brumaire, supra note 159, at 15, and while humans strive not only to reproduce themselves but also to escape the realm of "necessity and mundane considerations" for the purpose of developing "human energy as an end in itself," 3 K. Marx, Capital, supra note 23, at 820, both of which render socioeconomic determination mediate rather than immediate in many instances and produce "relative autonomy," the human situation is nevertheless still best understood materially, since "the true realm of freedom . . . can blossom forth only with th[e] realm of necessity as its basis." Id.

163. The victory of economic subjectivism at law enormously strengthened its supporters within the economics profession itself. The ideological struggle [over the nature of contracts] 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, and legal thought increasingly resting its pretension to science upon an economic reality perceived as pure market mechanism, but in fact partly a result of the very legal intervention sanctioned by the economic theory to which it was now appealing in the name of scientific objectivity.

Genovese, supra note 8, at 731-32.
Since *Transformation* focuses almost exclusively on decisions from the northeastern United States, that is, upon the region rapidly undergoing capitalist development, variations from, or negations of, the prescribed rise-dominance-fall pattern on some other regional (or perhaps temporal) basis could be used as a solid argument for rejecting the Horwitz theory.

An organic approach might observe that the legal aspect of the ethos of capitalism is positivism, and that legal positivism usually has been expressed in one of two modes of judicial reasoning—instrumentalism or formalism—as demanded by material conditions and the job to be accomplished. "Instrumentalism" is a useful legal-positivist mode when a fundamental attack must be made upon a received legal tradition, or where frontier conditions exist. Thus, "instrumentalism" probably lasted long past 1860 on the frontier and in frontier conditions or frontier areas of law, and it was as useful in firming the foundations of emerging monopoly capital in the first four decades of this century (by a generation of Legal Realists) as it had been in establishing the foundations of entrepreneurial capital a hundred years before. Formalism, on the other hand, as Horwitz says, never disappeared. It was always the mode used—by the same judges—in public law and especially in the constitutional law field. We should not be surprised if both coexisted, perhaps sometimes being evidenced side by side in the same opinion. In fact, while instrumentalism has enjoyed periods

164. As noted by, for example, Scheiber, supra note 9, at 462; Bloomfield, supra note 9, at 1106.

165. See Presser, supra note 4, at 721 n.69; Bloomfield, supra note 9, at 1106, 1107. See generally Scheiber, supra note 71, esp. pp. 8, 10, 12, 13-17.


166. M. Horwitz, supra note 1, at 253-56. That the same judges were involved was noted by Bloomfield, supra note 9, at 1104.

167. See Scheiber, supra note 71, at 5 (footnotes omitted):

[Although] American judges frequently rejected or modified common-law doctrines and precedent, . . . [they also] bent far . . . to acknowledge the basic validity of . . . "ancient English and American authorities". . . . American judges felt constrained to cast emergent riparian law in the traditional framework. . . . In the closely related field of eminent domain law, . . . judges continued to honor formalistic precedents that had relied upon higher-law notions of inalienable property rights.
of prominence, formalism was (and is) probably the "dominant" mode, if such judgments be useful, because it provides the better mystification within which economic interests can maneuver. An organic culture can contain contradictory notions existing side by side, both of which serve the dominant economic interests but in very different ways.

Further, the "formalistic"-"instrumental" dichotomy is too sharp, seeming to separate phenomena which actually perform some similar functions. "Formalism" is instrumental, if by that term we mean "activist," because it too allows judges leeway to manipulate rules to achieve desired results. Scheiber points out that "even when they posited formalist doctrines of higher law and inalienable rights, post-1865 due process decisions favored" business and economic growth.\(^{168}\) Moreover, "instrumentalism" is formalistic, if by that term we mean "false," since the biased nature of judicial manipulation is still hidden. No instrumentalist judge openly stated that his action was taken to benefit a small segment of the population. Instrumental opinions are infused with something like the idea of consensus: economic growth is for the good of all, and all really desire it. The judicial display of naked bias toward any small, elitist interest group is incompatible with the security and legitimacy of the capitalist system of government. No instrumentalist decision overstepped these bounds.\(^{169}\) An organic conception of society avoids the particularism inherent in liberal culture.

The way in which neutralist formalism and "consensus" instrumentalism disguise the partisan purposes and uses of law is an example of the ideological function of law. In addition to its two more obvious tasks—the repressive function, exemplified by the criminal law and similar methods of "legitimately" exerting force, and the facilitative function (overemphasized by Horwitz) of rendering matters easier for the elites—"law must discipline the ruling class and guide and educate the masses."\(^{170}\) Discipline becomes necessary because the ruling class is fractured and divided against itself, and its overall interests do not always coincide with the

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168. Id. at 12; accord, Gilmore, supra note 9, at 797.
169. Cf. Bloomfield, supra note 9, at 1105.
170. E. Genovese, supra note 32, at 27.
desires of this or that segment. (Law is not the only institutional form used for such a purpose.) Perhaps the most important function of law is, however, educational and cooptative, to achieve for the dominant elites what has become known as "hegemony." The juridical system is one of the instruments "by which . . . the ruling class imposes its viewpoint upon . . . the wider society." ¹⁷¹

The ideology of the ruling class is not simply a falsification of the facts; it is a distortion which focuses too narrowly and partially, from an angle favorable to the elites. The supposedly neutral or "consensus" nature of law is such a distortion, since law does not represent a consensus of the interests of all in society; rather, it represents the interests of some disguised as the interests of all. ¹⁷²

The central relationship in capitalism, that of worker to capitalist, also is distorted in such a fashion. The worker appears to sell her labor-power freely to the capitalist, when in fact most workers have no alternative other than to starve. ¹⁷³ "Freedom of contract" is thus a way in which law is ideology.

A major criticism of Transformation, and of Marxist scholarship in general, has noted a focus on the facilitative function of law, to the exclusion of consideration of its ideological function. Horwitz has provided evidence for this criticism by arguing forcefully that the effect of instrumental decisions was redistributive. Charles McClain, for example, notes that Horwitz has failed to show the redistributive effects.¹⁷⁴ Stewart Macauley, in the same vein, has for years been documenting the argument that the fundamental rules of contract law are essentially irrelevant to the conduct of capitalist business.¹⁷⁵ Robert Gordon helps to redirect the focus:

Morton Horwitz' much-criticized thesis that 19th century judges fiddled the liability rules in part to help transportation and industrial enterprises externalize their costs . . . seems to me perfectly correct if taken as a proposition about judicial ideology: it's what the judges repeatedly said they wanted to do. Whether

¹⁷¹ Id. See also M. Tushnet, supra note 143.
¹⁷³ See generally Mensch, supra note 52, at 767 n.43.
¹⁷⁴ McClain, supra note 9, at 394-95.
the rules had any such effect is a totally different question, not resolvable by doctrinal history and possibly not resolvable at all.\textsuperscript{176}

Although it is likely that contract and liability law were in fact more facilitative than Macauley and Gordon give them credit for, an organic perspective on law in capitalist society would not fail to take into account law's ideological function. Mark Tushnet has analyzed the ways in which law serves such a function: first, he says,

[L]egal doctrines appear as evidence of the dominant consciousness, which by justifying the institutions of a society to its members serves to support those institutions. . . . A coherent body of doctrine may [also] demonstrate [to lawyers] how rules of law that in fact perpetuate domination are nonetheless consistent with [important ethical] traditions. . . . [Finally,] legal doctrine may serve to reconcile people in the wider society to the conditions of their existence. . . . [T]he details of doctrine . . . derive from fundamental structures of legal thought which penetrate society and help justify its arrangements.\textsuperscript{177}

In other words, the apparent economic relations in society are reinforced by laws that appear to be based upon them; as social institutions with the appearance of fairness and common consent, and as the only apparent legitimate social ordering devices, the laws are persuasive and useful. Private law was supremely ideological in establishing social tone, social boundaries, and a pattern for belief in the way things were supposed to be.

Horwitz has overlooked the ideological significance of constitutional law by his refusal to include it within his purview. The ideology of constitutionalism was crucial to "acceptance" of the new private-law doctrines by many whose real interests in fact conflicted with those of the entrepreneurs, and was thus essential to the creation of the appearance of a social consensus. A major, perhaps the major, means of reconciliation with and indoctrination of the lower orders by the leaders of society after their triumphs in


\textsuperscript{177} Tushnet, supra note 8, at 98-100; cf. Balbus, Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law, 11 L. & Soc'y Rev. 571 (1977); B. Ollman, Alienation, supra note 16, at 196-98; 1 K. Marx, Capital, supra note 23, at 71-83; 3 id. at 831.
the Revolution and in the Constitutional Convention was the diffusion throughout American culture of the liberal-democratic ideology of fundamental rights and principles. The notion of government under a rule of law always has been a powerful civilizing factor, and now it was coupled with the appearance, and with more than a little of the reality, of civil freedom guaranteed by open, debated, fundamental public documents which apparently severely limited governmental power and gave much of the populace the apparent power to have some effect upon that government.

Whether or not these were real advances, and I am inclined to conclude that despite the many shortcomings and failures of bourgeois democracy exhibited from the outset the changes had much that was progressive about them, the ideological nature of law made them appear to be very real. Many people came to believe that they had won a large measure of individual and collective freedom by independence from Great Britain and by the establishment of democratic government under law, and American governments and much of the elite went to enormous lengths to reinforce those beliefs.

As a result, the new government became "legitimate," and the culture of entrepreneurial capitalism became the ethos of American democracy, excluding and crushing all competing visions of democratic life. Genovese accurately concludes that "with the legal system rooted in an ostensibly democratic polity, [a challenge to established authority] had the poorest possible prospects."

178. See E. THOMPSON, supra note 138, at 258-69 (1975); Holt, supra note 108.
180. Accord, Tushnet, supra note 136, at 1350.
181. E. GENOVESE, supra note 32, at 608; Genovese, supra note 8, at 735.
182. Genovese, supra note 8, at 735-36. Perhaps Genovese expects both a too well articulated class consciousness and a too modern tone and substance for contemporaneously-held concepts of the solutions to economic difficulties when he also concludes that "even [nineteenth-century] workers and farmers (at least the increasing portion oriented toward the market) accepted a developmental perspective while having as yet no model of their own." Id. at 736. Marx predicted that most preproletarian classes, and especially peasants and the petty bourgeoisie, would be conservative in their protest goals, and that a full class consciousness on the part of the oppressed could only occur under the conditions of fully developed capitalism:

The lower middle class, the small manufacturer, the shopkeeper, the artisan,
Many protests by dissident elements within American society were made, but they were weak, diffuse, unsuccessful, and ignored. The hegemony of constitutional ideology helped to diffuse and destabilize social protest, making possible widespread acceptance of judicial instrumentalism and lawyerly elitism, and ensuring acceptance of the changes in substantive law which Horwitz details.

C. Determinism

The tendency in liberal historiography toward determinism has already been noted. 183 An unsophisticated linear notion of cause-and-effect relationships expects direct connections at all points between economics or economic interests and events or ideology, rather than the complicated analysis involving multiple interactions between material “structure” and political, psychological, and other “superstructure” elements which Marx actually used.

When dealing with real situations, Marx does not offer the development of technology or any other version of the economic factor as self-generating, but as the result of a cluster of factors coming from every walk of life and from every level of social analysis. Likewise, when concerned with actual events, Marx does not treat political and cultural progress as an automatic response to changes in technology; his explanation is invariably complex, and it is not always economic factors which play the leading role. 184

Such a sophisticated methodology is to be expected from the organic nature of capitalism and the holistic dialectic which Marx used to understand and describe it, points which were not apparent to many early Marxists, sparking a “structure”-“superstructure” debate which endures. 185

Throughout Transformation Horwitz unfortunately emphasizes

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183. See notes 50-56 & accompanying text supra.
185. See note 14 & accompanying text supra.
the primacy of economics and economic motivations in the narrow, liberal sense, and both radicals\textsuperscript{186} and liberals such as Bloomfield have noted his determinism:

\begin{quote}
[Horwitz] never makes clear, for example, why judges favored one entrepreneurial group over another, or what kind of special relationship existed between the bench and the marketplace. At times he posits an effective collaboration between elite lawyers, big businessmen, and sympathetic judges. At other times he credits judges alone with anticipating economic trends, and occasionally he identifies legal change with the workings of an impersonal Zeitgeist.\textsuperscript{187}
\end{quote}

We still need a description of the mechanics of legal change in nineteenth-century America which will demonstrate that all three, and more, of these mechanisms or linkages were operative, and will explain why each type of linkage was appropriate in certain instances. Struggle existed both within the elites and between classes; history, tradition, custom, precedent—all the ways that results of past struggles have persisted—played important parts; entrepreneurs themselves likely attempted to influence the outcome of some litigation; and we need to know much more about the social backgrounds and interactions of specific lawyers, judges, and other legal actors.\textsuperscript{188} These categories represent different kinds of linkage.

The modes of the expression of economic interests are many, varied, and constantly interacting. To understand history requires that the variety of linkage mechanisms be explained, especially so that “economics” comes to be understood, not as a concatenation of impersonal forces that emanate mysteriously from goods, money, greed, and the invisible hand, but as the extensive variety of ways in which humans in social, work-related groups attempt through interaction to satisfy their needs and desires, \textit{plus} the ways in which those interactions (including the reified remains of

\textsuperscript{186} See Tushnet, \textit{supra} note 8, at 105-07; Genovese, \textit{supra} note 8, at 729.

\textsuperscript{187} Bloomfield, \textit{supra} note 9, at 1105. This criticism has been made, although somewhat less elegantly, by many of those who have reviewed Transformation from the right. See, e.g., Winship, \textit{supra} note 9, at 755.

past interactions\textsuperscript{189}) act as boundaries or limits to each other.\textsuperscript{189}

D. Class and Class Struggle

The most important weakness in \textit{Transformation} is Horwitz's narrow and limited formulation of class and class conflict. He has demonstrated a willingness to write history in terms of a struggle between business or commercial interests, on the one hand, and a vaguely defined group of losers, on the other, and he presents some good evidence thereof. Horwitz does not, however, exhibit a rigorous theoretical grasp of the nature of the struggles or even of the participants therein. At times it appears that the groups engaged in conflict were self-defining; at times, the groups seem to be defined by their occupations; at times there is a liberal concept of classes as defined by social position or status; and finally it sometimes appears that membership in the groups depended upon the outcome of phases of the struggles. \textit{Transformation} can be put down or dismissed as hokery on grounds that Horwitz has failed to define the winners and the losers in the battles he depicts, and it has been\textsuperscript{191}.

Materialists understand "class" to refer to the way in which groups of people, within a given mode of production, have access to the means of production. In an emerging capitalist society there are two primary ways in which persons can be so described: laborers, who must sell their labor-power and have no real access, and capitalists, who buy labor-power to extract surplus value therefrom and have control of the access. There may be subsidiary classes, most notably peasants and the petty bourgeoisie, who have been created by a previous mode of production and who are in the pro-

\textsuperscript{189} See K. Marx, \textit{Eighteenth Brumaire}, supra note 159, passim, esp. 15-18; E. Wright, supra note 17.

\textsuperscript{190} When a Marxist analyzes a particular event or . . . specific doctrines, he or she must not pretend that the structural determinants of a dominant ideology operate directly to produce those doctrines [or the event]. Rather, transient political forces, the influences of intermediary groups, and the need . . . to present law as a neutral force, all intervene to produce what has come to be called a specific conjecture inserted into the general structure of capitalist society.

Tushnet, supra note 136, at 1348.

\textsuperscript{191} Presser, supra note 4, at 719-24; Reid, supra note 3, at 1318-20; Scheiber, supra note 9, at 463-64.
cess of being dissolved by the forces of capitalism into the working class. If one focuses more closely, each of the two main classes is fractured into lesser groups. Struggle is the definition of the relationship between the two central classes in capitalism because of their inherent mutual antagonism over access to the means of production. It is not merely a sometime thing involving a few visible battles spread over time, after each of which genuine harmony prevails—although, in large part due to the mystification generated by capitalism and in no small part due to powerlessness of the workers, open and violent conflict breaks out only from time to time. “Class” and “struggle” are thus terms descriptive of economic relationships. Categories of kinship or occupation or social status are not determinative of membership in a class (though each is important).

Horwitz variously identifies the winners as entrepreneurs, commercial interests, or businessmen, rather than as capitalists. At points he talks about struggles within this group, for instance between speculators and improvers of land, or between business enterprises and their insurors, but Horwitz has no theoretically clear position that, although the elite has a single interest in maintaining its dominance over the lower classes, antagonism between various groups inside the elite is naturally a part of the war of all against all for a bigger share of the market. His imprecision allows his critics to conclude that occupational fluidity, a characteristic of the nineteenth century, contradicts any assertion of the existence of a single ruling class. The liberal critics also can define the insurors to be underdogs (rather than capitalists), since they had less power than the entrepreneurs they insured, which, since they apparently won their battle, means that the “ruling class” did not always come out ahead.

Whether it is useful to view the ruling class as a whole or as an externally united set of internally warring interests depends upon the purposes of the inquiry and the level of abstraction. Marx in Capital, and Marx and Engels in the Manifesto, generally took the broadest analytical perspective, discussing social struggle at the

192. M. Horwitz, supra note 1, at 61 & n.153.
193. Id. at 154, 228-29.
194. See Reid, supra note 3, at 1318; Presser, supra note 4, at 723.
level of capital versus labor; but in The Eighteenth Brumaire, Marx focused in much more closely upon class struggle in France during the period 1848-1852 and made clear his understanding that many different factions and interests made up the ruling class.\textsuperscript{195} Erik Olin Wright has recently emphasized the necessity of understanding whether one is utilizing the analytical level of "capital in general" or that of "many capitals."\textsuperscript{196} Genovese accurately notes that Transformation is primarily a description of "a struggle within the bourgeoisie and only secondarily between the bourgeoisie as a whole and other classes."\textsuperscript{197} Use of Wright's suggested analytical level of "many capitals" would have sharpened the description while avoiding giving the impression that the volume deals primarily with the conflict between capital and labor. Theoretical rigor also would have prevented Horwitz from seeming to describe history in terms of clashes between discrete interest groups, whose membership is fluid and who shift positions and opponents easily. Class forces are not interest groups, but are intricately and intimately related both in internal struggle and in interclass struggle. The relations and the struggle need to be depicted plainly in order that the nature of the winners can be delineated.

More important is Horwitz's failure to tell us who the losers were. The book appears, to many liberal critics, to have been an attempt to accomplish just that, but in fact throughout Horwitz pays little attention to those who presumably paid the price of development and whose interests did not in fact coincide with the emerging liberal "consensus." At one point he notes "strong elements in American society opposed to the expanding values of a market economy" who reflected "a still dominant precommercial consciousness of rural and religious America."\textsuperscript{198} At another point he concludes that "the legal system had been reshaped . . . at the expense of farmers, workers, consumers, and other less powerful groups within the society."\textsuperscript{199} At still others he notes how those

\textsuperscript{195} K. Marx, Eighteenth Brumaire, supra note 159, at 23, 27-28, 36-37, 46-48, 90, 95, 102-03, 107, 122.
\textsuperscript{196} E. Wright, supra note 17, at 122 & n.13. See also id. at 48 n.37, 73 n.66, 188 n.13.
\textsuperscript{197} Genovese, supra note 8, at 732.
\textsuperscript{198} M. Horwitz, supra note 1, at 211.
\textsuperscript{199} Id. at 253-54.
Horwitz has lumped together groups that ought to remain analytically separate: the old winners (gentry), those outside the immediate mainstream of growth who must still have suffered (farmers, shopkeepers), and those who were most intimately involved in the rapid changes in the organization of production (workers, artisans, immigrants, consumers).

As Genovese and Scheiber note, much more attention should have been paid by Horwitz to the political battles of the period. Who opposed corporations, and why? Who advocated more taxation, and why? What about protests specifically raised by workers, or slaves, or rural elements? What sorts of changes occurred after important economic events such as the Panic of 1837, and why? To what extent were regional conditions important? What sorts of alliances did various lower segments of American society form, with each other and with elite groups, and why?

We need to know who really lost what during the emergence of entrepreneurial capitalism, if only to still the insensitive and upper-class-oriented arguments of liberals who persist in asserting that some groups got a “free ride” (that is, they supposedly received benefits they were contemporaneously unaware of, which presumably cancelled out burdens they were aware of), or that the losers were always the immoral, the lazy, and the undeserving, or that, because of occupational fluidity and the trickle-down effect of emerging abundance, nobody really lost. It is likely that such studies collectively will show that real wages and income diminished for many American workers and that degrading working conditions increased; that concomitant ills beset other lower segments of northern and western American society (as Genovese has demonstrated for slaves in the South); that, in short, proletarian-like conditions began to emerge for many, all concomitant with (if not directly caused by) the changes in substantive law detailed in Transformation. Horwitz’s history unfor-

200. Id. at 140-41, 146.
201. Genovese, supra note 8, at 734-36; Scheiber, supra note 9, at 463-64.
202. See Presser, supra note 4, at 721.
203. See Reid, supra note 3, at 1317.
204. See Presser, supra note 4, at 722.
205. E. GENOVESE, supra note 32, and other works by Genovese.
tunately does not tell us much about the losers, and by its obscurity in use of loose liberal interest-group characterization it can reinforce a notion that nothing was really lost.

Case law is likely to have little to do directly with workers or their conditions, but Horwitz omits most areas of law which did take the interests of workers into account. A three-page discussion of "the application of the will theory of contract to labor contracts" advert to a branch of the law that must have been directly important to working class interests, but beyond the notion that certain doctrinal inconsistencies in early labor law "seem . . . to be an important example of class bias," the investigation is disappointingly legalistic, doctrinal, and free from overtones of economic consequences. The focus of most of the book is from the top down, concerned with the ways in which elite tools were used during elite interactions to serve essentially elite purposes.

A central example concerns the alternative to unbridled economic growth: Horwitz uses the term "redistribution" without elaboration of other social changes that would inevitably be entailed. Deterministic—that is, it assumes that the "mere" rearrangement of social wealth-holding would have solved the most pressing and difficult of social problems—the term "redistribution" connotes a focus on narrowly defined "economic" interests rather than humane ones, seeming to ignore the difficulty of achieving a systemic solution which would eliminate social oppression. The real interests of those who attempted to refuse to go along with the nineteenth-century ethos of capitalism lay in achieving an entirely different egalitarian ethos emphasizing genuine freedom and social cooperation, and did not stop abruptly at demands for a larger

206. M. Horwitz, supra note 1, at 186; see id. at 186-88.
207. Id. at 188.
208. Id. at 68, 101, 255.
209. [T]he realm of freedom actually begins only where labor which is determined by necessity and mundane considerations ceases; thus in the very nature of things it lies beyond the sphere of actual material production. Just as the savage must wrestle with Nature to satisfy his wants, to maintain and reproduce life, so must civilized man, and he must do so in all social formations and under all possible modes of production. With his development this realm of physical necessity expands as a result of his wants; but, at the same time, the forces of production which satisfy these wants also increase. Freedom in this field can only consist in socialized man, the associated producers, rationally
or more equal share of the pie. What the upper classes feared was "redistribution."

By focusing on elites, Transformation subliminally reinforces the view we are supposed to have that only the rich, the powerful, and the important are crucial or interesting. It admits of the possibility of class struggle but then shies away from the ways in which legal interactions might have demonstrated the ugly reality of class conflict and class bias. To Horwitz's gentleness, compassion, and outrage—to his break with the liberals—must be added the strength of a materialist analysis of history. Horwitz's story must be taken further, expanded, drawn from the standpoint of the losers; succeeding works in radical legal history must deal with class and class struggle.

V. CONCLUSION

Despite its shortcomings, which can be remedied by Marxist historiography, Transformation stands as a monumental achievement. Bourgeois historians and bourgeois historiography have been demonstrated to be what they are, biased and partial rather than neutral and timeless. The "consensus" assumptions underpinning all schools of mainstream American legal history have been shown to be partisan, and partisan from the standpoint of the elite. The way has been cleared for legal historians to place the focus where it belongs, on socioeconomic evidence of class conflict. Law now will be viewed as an element of praxis, that is, meaning-creating human activity.210 Also, since law is a fundamental ideological phenomenon,211 important contributions to the "structure"-"superstructure" debate can be expected, aiding the resolution of central Marxist theoretical problems as we continue to come to grips with

regulating their interchange with Nature, bringing it under their common control, instead of being ruled by it as by the blind forces of Nature; and achieving this with the least expenditure of energy and under conditions most favorable to, and worthy of, their human nature. But it nevertheless still remains a realm of necessity. Beyond it begins that development of human energy which is an end in itself, the true realm of freedom, which, however, can blossom forth only with this realm of necessity as its basis.

3 K. Marx, Capital, supra note 23, at 820.
210. See note 12 & accompanying text supra.
211. See note 14 supra.
our rejection of the bourgeois radical disjunction between subject and object, between consciousness and actuality, and as we continue to develop a socialist culture.