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American Legal History According to Horwitz: The Rule of Law Yields to Power

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AMERICAN LEGAL HISTORY ACCORDING TO HORWITZ: THE RULE OF LAW YIELDS TO POWER

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I. INTRODUCTION

It is a daunting assignment to comment on the monumental work of Morton Horwitz in his two volumes titled *The Transformation of American Law*.[1] It is daunting because of the sweeping breadth of Horwitz's knowledge of American case law and legal commentary. A mere law dean looking to be critical, which Horwitz will surely insist is the only approach worthy of one's time, can only hope to snipe from the security of his narrowing specialties or launch a broadside assault on the central themes of the two books. Herewith is a bit of both.

Published fifteen years apart, the two volumes reflect the evolution of what its practitioners in the American legal academy call critical thinking. Indeed, Horwitz should be counted among a small handful of individuals whose work has given substance to the often unsupported claims of the various strands of critical legal writing over the last three decades. It is a simple matter to issue condemnations of self-interested capitalists on the basis of the results in isolated cases upsetting to the political left, it is quite something else to digest more that two centuries of American legal history and draw conclusions about the significance of that historical record. Horwitz has done the latter, and has gotten it half-right, in my opinion.

The two volumes are different in at least two important respects. Obviously they are different in the periods of history discussed. Volume I begins roughly with the founding of the American nation and runs to the Civil War. Volume II begins after the Civil War, with what might be called the second founding of the American nation, and runs to 1960. Although there are many continuities through these two centuries, the historical stories are, not surprisingly, dramatically different. But these differences, stark as they are, do not explain another central difference between Volumes I and II. Volume I reflects the method and is written

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1. Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Harv. U. Press 1977) [hereinafter Horwitz, *Transformation*] and *The Transformation of American Law, 1870-1960: The Crisis in Legal Orthodoxy* (Oxford U. Press 1992) [hereinafter Horwitz, *Crisis*].

in the language of Hurstian Instrumentalism.[2] It explains the first century of our nation's legal history as the product of a complex interaction between political, economic, and social forces with heavy reliance on case law. Volume II reflects the history of ideas and methodology to which Hurstian Instrumentalism was a reaction, and is more in the language of critical studies. It explains the legal history of the post-Civil War century as Instrumentalism at the behest of the rich and powerful.

Pointing out this difference is not to suggest a fundamental shift in Horwitz's thinking from 1977 to 1992, except, perhaps, in historical methodology.[3] Rather it would appear to parallel the evolution of critical thinking in the legal academy, which is supported by, if not rooted in, an instrumentalist conception of law. The Legal Realists, to whom Horwitz devotes much attention,[4] made it clear beyond dispute that the law is what the judge and other interpreters of the law say it is.[5] Although most legal education and much legal scholarship remains firmly anchored in the methods, not just of legal process,[6] but also of Langdellian legal science,[7] to the vast majority of today's law faculty, law students, lawyers, and judges, this is not a remarkable conclusion. We continue to analogize and distinguish our way to rules, sub-rules, and exceptions to rules much as Langdell prescribed. From the perspective of a Martian, or even a Frenchman, I suspect we appear to be in pursuit of legal truths independent of human ambition, yet we readily acknowledge that law has everything to do with human ambition. We are Realists and instrumentalists one and all, yet we look for all the world like legal scientists.

No doubt there are many possible explanations for this schizophrenia.

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2. Willard Hurst is generally acknowledged to be the father of an approach to legal history that focuses on grassroots developments in the law and the usually local institutions where day-to-day legal transactions transpire. Hurst identified in our legal history an instrumentalist approach to law making and legal interpretation. *See e.g.* James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (U. Wis. Press 1967). Prior to Hurst's innovations, the methodology of American legal history was largely that of the history of ideas. *See e.g.* Perry Miller, *The Legal Mind in America: From Independence to the Civil War* (Anchor Books 1962).

3. In his introductory comments to this symposium at the University of Tulsa, Horwitz did indicate that his thinking had changed over the fifteen years separating the publication of his two volumes.

4. *See* Horwitz, *Crisis, supra* n. 1, at 169-246.

5. Oliver Wendell Holmes, Jr., laid the foundations for Legal Realism with his "prediction theory of law." In "The Path of the Law" (1897), Holmes wrote that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, Jr., Address, *The Path of the Law* (Boston U. School of Law, Boston, Mass., Jan. 8, 1897), in *The Path of the Law and Its Influence* 333 (Steven J. Burton ed., Cambridge U. Press 2000). As I will argue below, accepting the Realist premise that the law is what the judge says it is does not condemn us to the Critical Legal Studies conclusion that law is politics and nothing more. Indeed, the Realist premise underscores the importance of aspiring to the rule of law, and the lessons learned through the pursuit of inquiries inspired by realism inform our efforts to achieve the rule of law.

6 The legal process school sought a middle ground between formalism and realism—"a 'morality of process which would be independent of results.'" Lawrence Friedman, *American Law in the Twentieth Century* 493 (Yale U. Press 2002) (quoting Horwitz, *Crisis, supra* n. 1, at 253).

7. Dean Christopher Columbus Langdell introduced the case method to the Harvard Law School in the late 1800s. The method was inspired by Langdell's belief that the law could be understood through scientific investigations of legal sources. The law library is to Langdell's legal scientist what the laboratory is to the chemist or physicist. *See* James Herget, *American Jurisprudence 1870-1970* 34-37 (Rice U. Press 1990).

Consider three alternatives. One explanation that would seem to flow from Horwitz's account of our history, is that the rich and powerful rely on the apparent objectivity of legal science (or legal reason in Fuller's natural law sense[8]) to cover for their use of the law to dominate and exploit others. This sounds plausible if the accepted view is that law is discoverable through reason, which may have been the case prior to the advent of Legal Realism. But once realism became the prevalent understanding, the subterfuge would surely fail. No Legal Realist will be snookered by a judge who says he was bound by the law—that the law made him (or her) do it.

A second explanation is that proposed by Judge Posner in defense of the Supreme Court's decision in *Bush v. Gore*.[9] Given the source and the context, I assume that this is not a view embraced by many, if any, of the critical thinkers in the legal academy. Posner argues that while the Court would have been on firmer legal ground had it relied on Article II rather than equal protection, its decision was justified on pragmatic grounds.[10] The country faced a potential crisis, says Posner, and the Court acted appropriately in bringing the matter to a prompt conclusion. Notwithstanding that pragmatism (Instrumentalism) explains and justifies the result, it is important to Posner that the Court had plausible legal justifications for its decision.[11] While Posner believes that the judge, at least the experienced judge, is specially suited to making pragmatic decisions in the public interest,[12] his insistence on traditional legal justification suffers from the same shortcoming as the Horwitz explanation. Why would a society of legal pragmatists care about the plausibility of a rule of law justification for a judicial decision?

A third explanation for reliance on abstract legal reasoning in a Realist world is the possibility that judges and other interpreters of the law might be made sufficiently independent to rise above politics or might have instrumental objectives that will be served by reliance on formal rules. Indeed, the Realist recognition that law can serve the interests of wealth and power to the disadvantage of ordinary people might argue for legal structures and methods designed to constrain the concentration of wealth and power. In this view, the founders of the American nation were Realists as much as believers in natural law. Their experience confirmed for them that simply believing in and insisting upon the natural rights of Englishmen did not make it so. They set forth statements of rights in their state and federal constitutions, but as Realists they understood that governmental structure and a commitment to the rule of law would be the only effective guarantors of those rights.

Is it plausible to contend that the power of wealth and position can be constrained in the interest of the broader society or of those with little or no wealth? Or to state the question differently, is the rule of law possible, or is it just

8. Lon L. Fuller, *The Morality of Law* (Yale U. Press 1964).

9. Richard Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (Princeton U. Press 2001).

10. Posner, *supra* n. 9, at 128.

11. *Id.* at 145.

12. *Id.* at 219.

another ploy by the powerful to conceal their exploitation of the downtrodden? In the instrumentalist world Horwitz describes in Volume I, the rule of law remains a possibility, if a distant one. In the "propertized,"[13] exploitative world of Horwitz's Volume II, there is no possibility of the rule of law. In that world, the rule of law is nothing more than the rule of power rather than the constraint on power it is meant or claimed to be.

II. LEGAL INSTRUMENTALISM

The instrumentalist explanation reflected in Willard Hurst's groundbreaking work has provided a persuasive and durable approach for American legal historians who have followed in Hurst's path.[14] The history of ideas approach of earlier American legal historians was intellectually interesting and had nurtured the egos of a few, but had failed to explain grassroots legal history where the players often knew, or at least cared, little of the grand ideas. At the grassroots, people had ambitions, challenges, and conflicts in the context of natural circumstances usually beyond their control. Law was an important part of the social machinery for moving life forward. The instrumentalist perspective understands that law is the technology of social life—that the tools of law, including those not yet invented, can help to advance human causes, whatever they may be.

This is not to say that ideas have been unimportant. To the contrary, ideas have been centrally important to the history of American law. At best, grand ideas might reflect the loftiest of human aspiration. Like the beautiful and elegant building that must also be made to function through understanding of engineering, plumbing and now even electronic communication, a legal system inspired by great ideas must be engineered to achieve that greatness. This requires an understanding of human nature that comes only from the trial and error of day-to-day experience. It is one thing to make the case for liberty, justice, equality and other high ambitions, it is quite another to achieve those elusive ends.

At worst, the grand ideas mask the instrumentalist use of law by the rich and powerful to exploit the poor and powerless. This, too, requires learning the lessons of experience, particularly in a democratic, federal republic where the reins of power are divided vertically and horizontally and individual liberties are guaranteed against governmental intrusion. Majoritarian tyranny is not easy in such a system. It is an even bigger challenge for a small minority to dominate the majority. But, according to Horwitz, it can be and has been done over two centuries of American legal history.

I will return to the question of whether Horwitz has it right on the ends to which legal instrumentalism has been put, but there seems little argument that he and Hurst and many others are correct in urging an instrumentalist understanding

13. Horwitz coins this term to describe the extension of property concepts beyond the traditional common law applications to land, structures, and personal property. Horwitz, *Crisis*, *supra* n. 1, at 154.

14. *See*, most notably, Lawrence Friedman, *A History of American Law* (2d ed., Simon and Schuster 1986); Lawrence Friedman, *American Law in the Twentieth Century* (Yale U. Press 2002).

of our legal history. The law as science or law as reason approaches proved to be powerful rationalizations for legal outcomes, but they have not explained the many twists and turns of American common law and constitutional history. One might suggest that these fundamental changes in the law represent new scientific insights inspired by anomalies in our understanding, not unlike the revolutions in science described by Thomas Kuhn.[15] But this is not a persuasive explanation for legal change. Unlike the natural phenomena from which scientists draw their understanding, legal scientists rely on data entirely of our own creation.[16]

This lesson was nowhere better taught than in Grant Gilmore's *The Age of Antiquarius* (1972).[17] The nineteenth century idea that human institutions, including the law, are evolving ever closer to some abstract notion of perfection is belied daily in our legislatures, courts, and executive agencies. Choices are made, sometimes with the results intended, almost always with unintended consequences. This is not to say that there is not much to learn about why we make the choices we do, nor that we cannot influence the choices we make, but there is no denying that every human actor is an instrumentalist in the sense that multitudes of decisions are taken with the expectation or at least hope that particular results will follow.

Nor does Gilmore's indictment of nineteenth century thinking lead necessarily to the conclusion that there are no objective goods to which we might aspire. Gilmore does not condemn us to moral relativism. Rather he reminds us that we might aspire to both good and evil, and that we will make mistakes in either case. He reminds us not to confuse the "is" with the "ought." There is nothing either inevitable or preferable about the law as it is. But this does not mean that we cannot make an independent assessment of whether the law is what it ought to be. Nor that assertions about what the law ought to be cannot be objectively determined. On that question, too, we will error, but to give up on knowing and aspiring to the good is to give in to the anarchy of moral relativism. It is also to give up on the idea of constitutional government and the rule of law.

In light of Horwitz's conclusion in Volume II that the tools of law have been employed by the rich and powerful to exploit others, it is interesting to reflect on Hurst's overarching theme in *Law and the Conditions of Freedom in Nineteenth Century America.* According to Hurst, Americans faced an industrial revolution and a vast unsettled continent as they entered upon the nineteenth century. The inherited laws of water-locked, agrarian Great Britain were constraining to the ambitions and energies of the new American nation. So the law was adapted to facilitate those ambitions and release those energies. Freedom for the little guy with the gumption to take some risks in pursuit of a better life was the key to the explosive geographic and economic growth of the country. To be sure, the big guys, like the railroad tycoons, became even bigger guys, but without them the

15. Thomas Kuhn, *The Structure of Scientific Revolutions* (3d ed., U. Chi. Press 1996).

16. There is a view among some critical theorists that everything is socially constructed, but I will stick with the old fashioned idea that trees and rocks exist independent from humans.

17. Grant Gilmore, *The Age of Antiquarius: On Legal History in a Time of Troubles*, 39 U. Chi. L. Rev. 475 (1972).

little guys would not have succeeded in the isolated corners of a vast continent. In the story Hurst tells, it was not all, or even mostly, exploitation. Rather it was mostly about opportunity for ordinary Americans.

Horwitz, at least in the end, tells a very different story. His is a story of acquisition by the railroads of vast expanses of western lands and manipulation of negligence laws to avoid liability for harm to workers, adjacent landowners, and innocent bystanders. It is a story of African slavery replaced by the slavery of low paying jobs in unsafe factories and mines. It is a story of the privatization of the public interest to the benefit of a few and the detriment of the community.

Which is the better version of the instrumentalist story? Is the story of American legal history as freedom and opportunity for the average person just patriotic jingoism and a cover for class domination? Or is the story of persistent exploitation by the rich and powerful ideological fiction? Or is it, like most stories of real human experience, a mix of opportunity and circumscription, of success and heartbreak, of justice and injustice? Critical analysis, unburdened by mission or ideology, will surely reveal the story of mixed results. The problem with most tellings of American legal history is that they are burdened by ideology.[18] Indeed, critical studies legal scholarship is often referred to as a "project."[19] Horwitz, who finds in Legal Realism the roots of modern Critical Legal Studies, concludes realism otherwise expired because "its heirs had lost all connection to the Progressive politics that originally gave it meaning and inspiration."[20] Horwitz's story retains that meaning and inspiration.

III. LEGAL FORMALISM

Horwitz credits Holmes and the Legal Realists who followed in his footsteps with bringing legal formalism to its knees if not killing it off entirely. Holmes' oft quoted statement that "the life of the law has not been logic: it has been experience" was, says Horwitz, a direct confrontation to the "growing tendency toward conceptualism."[21] "It is a particular merit of the common law, he [Holmes] concluded, 'that it decides the case first and determines the principle afterwards.'"[22] If Holmes was right, as Horwitz thinks he was, what would replace natural law or legal science as the guide and explanation for judicial and other interpretive decisions? For Holmes it was pragmatism—a balancing of interests that could be adjusted over time as needs and circumstances changed. Or to state it in Horwitz's words:

> Only pragmatism, with its dynamic understanding of the unfolding of principle over time and its experimental appreciation of the complex interrelationship between law and politics and theory and practice, has stood against the static fundamentalism of

18. Critical theory insists that there is no escaping ideology.

19. *See* James L. Huffman, *Book Review*, 38 Am. J. Juris. 411, 411 n. 5 (1993) (reviewing *Theoretical Perspectives on Sexual Difference*) ("The word project is used in more than half of the essays, always in the sense of an ideologically driven enterprise.").

20. Horwitz, *Crisis*, *supra* n. 1, at 7.

21. *Id.* at 129.

22. *Id.* at 123.

traditional American conceptions of principled jurisprudence.[23]

The problem with classical American legal theory and its contemporary progeny, according to Horwitz, is a "fixation with sharply separating law from politics."[24] Until we transcend this fixation, says Horwitz, "we will continue to fluctuate between the traditional polarities of American legal discourse, as each generation continues frantically to hide behind unhistorical and abstract universalisms in order to deny, even to itself, its own political and moral choices."[25]

Call it frantic self-denial if you like, but permit me some skepticism about Horwitz's rejection of legal formalism as unhistorical and disingenuous. To the extent that abstract universalisms are sought to be justified on the basis of history, it is fair to say they are unhistorical whether the term is meant to convey that history does not confirm a universal experience or that historical constancy would somehow evidence and justify a principle to guide future decision making. Indeed, I assume that Horwitz and his fellow Realists with a mission would not agree that historical constancy justifies future outcomes. Many an injustice—racial and gender discrimination, for example—has been justified on the grounds that past practice and the status quo evidence a universal truth.[26] This view confuses life as we have lived it with life as we ought to live it.

If it is unhistorical to rely on historical experience, rightly or wrongly understood, as a justification for present and future actions, what is the relevance of history to the justification of legal outcomes? At a minimum history can describe the road we have traveled and perhaps help us to understand how and why we have chosen one route over others. It can also help us to connect the results we have experienced, which will not always be those intended, with the choices we have made. This is the task of instrumentalist history. If we can we do it objectively, that is, if we can assess the motivations and understandings of our predecessors independent from our own motivations and understandings, and if we can evaluate cause and effect independent from ideological presuppositions, we can be more effective instrumentalists in the future.

But Horwitz does not want to separate ideology from understanding. Or perhaps he believes it cannot be done—that "the American fixation with sharply separating law from politics"[27] has doomed legal theory to failure. If Horwitz is correct, what task is left for legal theory? Only more of the same, it would seem, except going forward we will recognize that law is politics, that appeals to higher authority are indefensible claims to nonexistent moral or scientific high ground, that justice and injustice are only in the eye of the beholder. In fact we will recognize that legal theory is an empty concept, that the idea of legal theory is itself a cover for politics.

23. *Id.* at 271.
24. *Id.* at 272.
25. *Id.*
26. *See e.g. Muller v. Oregon*, 208 U.S. 412, 419 (1908).
27. Horwitz, *Crisis*, *supra* n. 1, at 272.

IV. THE CASE OF PROPERTY

Central to Horwitz's conclusions about American legal history is his analysis of the evolution of property law.[28] This focus is not surprising, given the centrality of property law to the generation and protection of wealth, and given Horwitz's conviction that the law has been generally manipulated to the benefit of the wealthy. Certainly there is every reason for the wealthy to seek protection and advantage through a system of clearly defined and secure property rights, just as there is every reason for the rich and poor alike to seek advantage through the political process. But it does not follow that maintenance of a strong property rights system or expansion of property beyond the traditional categories of real and personal necessarily leads to ever greater advantage for the rich at the expense of the poor.

How one understands property goes to the core of the ideology that one brings to the question. The Lockean view that dominated thinking at the time of the founding of the Constitution saw property arising from the individual's investment of labor in the improvement of previously unowned things.[29] This was not just a practical means of identifying ownership in things. More importantly it was a statement about the value of the self-realizing, autonomous individual. This view was of a piece with the concept of popular sovereignty that served to justify the overthrow of the Crown and the creation of a democratic republic. Every individual was sovereign unto himself. Property, like the autonomy of the individual, was thought to be in the nature of things. Indeed, property arose from the fact of individual autonomy. Governments, including their authority with respect to the law of property, thus arose from the consent of the individuals.

A competing perspective, embraced by Horwitz, is that property, like other claims of individual right, is a creation of the state. The state is sovereign as a matter of fact, and whether the crown or the people exercise that sovereignty is purely a question of political power. Theoretical justifications for popular sovereignty or the divine right of kings are not of much relevance. What counts is power, which means that property rights will reflect the existing distribution of power. When the king is sovereign, it is likely that the king and those who help to keep him in power will own most of the property. When the people are sovereign, property will be more widely, dare I say fairly, distributed.

Horwitz credits Morris Cohen with formulating the proposition that property is a delegation of sovereign power by the state.[30] This was in response to what Horwitz calls the "propertizing" of much of the economy during the *Lochner* era. By abandoning the "Antebellum physicalist ideas" of property and focusing instead on expectancy value as the measure of property rights, "the legal idea of property [was pushed] to the verge of the *reductio ad absurdum* . . . . [I]t seemed to mean nothing less than a constitutional guarantee that the future should remain

28. Horwitz, *Transformation*, *supra* n. 1, at 31-62; Horwitz, *Crisis*, *supra* n. 1, throughout.

29. *See* John Locke, *Of Civil Government* (H. Regnery Co. 1955); Richard A. Epstein, *Takings: Private Property & The Power of Eminent Domain* 7-17 (Harv. U. Press 1985).

30. Horwitz, *Crisis*, *supra* n. 1, at 161.

unchanged."[31]

Here Horwitz overstates the point. It was not that the future would remain unchanged, but rather that the future distribution of wealth would reflect individual, not governmental choices. Advocates of strong and expanded property rights had in mind all manner of change in the future allocation of resources. This would, in turn, have significant consequences for wealth distribution meaning that little about the future would remain the same. The case of water rights, to which Horwitz devotes some attention,[32] is illustrative.

Horwitz suggests that the development of the appropriation doctrine of water law in the western United States was a part of the "propertizing" movement of the nineteenth century. But it is not clear that the appropriation doctrine was more private or more absolute than the riparian system inherited as part of the English common law. The riparian doctrine did recognize the interests of a community, but it was a community of riparian landowners who held a tenancy in common. As against non-riparians, the riparian right was every bit as exclusive as the appropriation right. Comparing the two systems, the riparian was more constraining of future development and change because the content of the right was variable and the transactions costs for non-riparian users of water were prohibitive, if non-riparian use was even permitted. Appropriation rights, where transferable, minimized transactions costs by being exclusive to a single user and provided much clearer definition of the content of the right. The result was rapid development, not preservation of the status quo. To the extent that changes in western water use have been constrained, it has been largely the result of public interventions in the form of subsidies for particular users or limitations on transfers or particular uses—all done in the name of the public interest.

The idea of property as delegated sovereignty might just be an expression of realism, confirmed as much by the depropertizing of the post-*Cohen* regulatory age as by the propertizing of the *Lochner* era. But Horwitz means for the idea to be more than that. He wants our understanding of property to embrace a fundamentally different ideology than the idea of property as an expression of individual autonomy. The polity or community, not the individual, is what really matters in his neo-Progressivist world. Horwitz seeks to revive and expand the idea of property affected with the public interest. Indeed, he would say that all property is affected with the public interest—or more to the point, that the traditional boundary between public and private is an artifice that serves the interests of the rich and powerful and is detrimental to the community.

This is a difference about ideology, about the most basic of human values. Although the measure of failure always seems to be the exploitation of some individuals by other individuals—that is, there seems to be no good measure of social welfare independent from the welfare of individuals—the neo-Progressivist ideology posits either that the community is what matters and individuals exist in

31. *Id.* at 163.

32. Horwitz, *Transformation*, *supra* n. 1, at 34-42.

service to the community,[33] or that persistent wealth redistribution is needed because of the impossibility of achieving equal liberty.

Either understanding stands in stark contrast to that widely held at the time of the founding that property is foundational to all human liberty and that liberty is foundational to strong and viable communities.[34] Notwithstanding three quarters of a century of Supreme Court insistence that property and other economic liberties are of a qualitatively different nature than political and personal liberties,[35] there are still some today who hold to the founder's view of the centrality of property. And there are still some today who believe that the separation of public and private spheres is essential to the preservation of human liberty. But of course if you are grounded in Holmes' jurisprudence of pragmatism, you neither care about liberty nor believe it important to community.

Horwitz's conclusion that property takes power from the community and gives it to individuals who exploit it to their personal advantage is plausible as a realist description of the historical evidence. Certainly property systems do not work without the support of the state, whether they arise from some pre-state human condition or are created from whole cloth by the state. And certainly the possession of property rights, depending on the nature and extent of those rights, does allow the rights holder to pursue personal advantage. But if the suggestion is that we should or even can dispense with property as part of a general elimination of the public-private dichotomy, a little realism might be informative.

Under conditions of scarcity, which have always been the human condition, property, or something like property, is inevitable.[36] This seems incontrovertible. Even in the purest of socialist communities, resources, whether food to eat or land to occupy or opportunity to speak in community meetings, must be allocated to individuals. At that point, one individual has something like a property right and other individuals are excluded from interfering (something very much like Hohfeld's "no right" or duty[37]). In any viable community, people will understand and acknowledge the rules for allocating these scarce resources. It is in the nature

33. Of Oliver Wendell Holmes—who provided an essential intellectual foundation for the pragmatism of the Progressives—Louis Menand writes: "[Holmes] thought only in terms of aggregate social forces: he had no concern for the individual. The spectacle of individuals falling victim to dominant political and economic tendencies, where those tendencies had been instantiated in duly enacted laws, gave him a kind of chilly satisfaction." Louis Menand, *The Metaphysical Club: A Story of Ideas in America* 65-66 (Farrar, Straus and Giruox 2001).

34. *See Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."); Mark Pollot, *Grand Theft & Petit Larceny: Property Rights in America*, xxii-xxiii (P. Research Inst. for Pub. Policy 1993).

35. Justice Stewart recognized and objected to this distinction in *Lynch*: "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account." *Lynch*, 405 U.S. at 552.

36. *See* James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. Colo. L. Rev. 241 (1994).

37. Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* 23 (Walter Wheeler Cook ed., Yale U. Press 1923).

of human society that some things are private. A Realist, with or without a mission, or perhaps I should say with whatever his or her mission may be, will surely acknowledge this fact.

But this only confirms the need for the most minimalist of property systems. A strong overlay of wealth redistribution and public purpose can still exist, but, here too, realism is not friendly to the view that the private is public—that the personal is political. Redistributions of wealth do not eliminate private claims to resources; rather they simply transfer property from one person to another. Notwithstanding the income and power disparities that have characterized American history over the last two and a half centuries and that can be fairly attributed, in part, to the existence and manipulation of property rights, the history of systems that have sought to eliminate private property is uniformly one of far greater exploitation, human suffering, and economic crisis. Property rights are essential to functioning markets and markets, with all their failings, have contributed beyond measure to the steadily and rapidly rising welfare of humans and their communities. And like property (and for similar reasons), markets are an inevitable characteristic of human society (as evidenced by the prevalence of black markets in every planned economy). Realists and pragmatists who see exploitation so clearly, should have little difficulty in seeing these realities as well.

V. CONCLUSION

Have I taken from Horwitz's monumental work what he would have me conclude? It is hard to believe that I have gotten it right. Horwitz seems quite clear in believing that a legal system that permits the rich and powerful to dominate the poor and powerless is flawed. He sees as a failing of the Legal Realists their having lost sight of the Progressive political agenda. He identifies with the Progressives, a movement expressly interested in improving the human condition and whose name seems rooted in the nineteenth century linear thinking that Gilmore condemns in his delightful essay, *The Age of Antiquarius*. If the law is nothing more than the handmaiden of power, and judgments about the exercise of power are all relative, then legal history and legal theory are politics and nothing more. The Progressives, like everyone else, are laying claim in their name to a nonexistent moral high ground.

So what is an alternative reading of the story Horwitz tells? Accepting that formalistic assertions of truth can and have been exploited in the interest of maintaining or acquiring power does not require the conclusion that there is no truth or that formalism will never serve as a useful tool in pursuit of truth. Horwitz's second volume does not flow necessarily from his first. One can embrace the instrumentalist understanding of legal history without embracing the critical conclusion that law can never escape or rise above politics.

The founders of the American nation were themselves every bit the Realists of their time. The brief life of the Confederation was sufficient to persuade them that simply declaring independence from the crown in the name of the people did not end the abuse of power. Power in the hands of the people could be as

tyrannical as power in the hands of the King. So they built a formal structure of vertically and horizontally divided powers and the state constitution makers did the same. Some still insist, as did Charles Beard in his famous history of the Constitution,[38] that this, too, was all about preserving and expanding the power of the powerful, but history has not been good to the Beard thesis.[39]

It is more than plausible to conclude that the formalities of the Constitution have constrained power in the interest of liberty and equality. Blacks, women and children, to mention only the most obvious, are better off by any measure today than they were in any prior time in our history. If formal structure can serve as an instrument for better results in constitutional law, there is every reason to believe that formalism can serve good, even Progressive, ends across the legal spectrum. To reject formalism as the tool of domination is to reject a useful instrument to the pursuit of a better world. The life of the law may be experience, but that does not mean that instrumental formalism cannot be part of that experience.

Horwitz correctly observes that formalism has been used to secure any status quo, but there is something to be said for security and stability, particularly if it is grounded on articulated principles open for discussion and revision. The alternative, which Horwitz seems to prefer, is the pragmatism of *ad hoc* balancing by judges generally insulated from the political process. *Bush v. Gore*, according to Judge Posner, is such a pragmatic decision.[40] Others, including many in the academy, have called it a clear abuse of power, even a coup.[41] And so it goes with pragmatism.

Instrumentalism does not necessarily translate into consequentialism in the narrow sense of each legal decision being *ad hoc*. The constitutional structuralist is an instrumentalist in the sense that structure is believed to be an effective instrument in pursuit of limited government and individual liberty. This is different from the law as science approach, which must argue that separation of powers is in the nature of things—that law is evolving to that higher end. It is also different from the consequentialism of critical theory.

The critical approach is suspect as history, one might even say unhistorical, and unhelpful to legal theory. It is suspect as history because it discounts the explanations of events offered by those who were involved in those events and discounts the remarkably positive results achieved. Illustrative is the framing of the constitution and the arguments of The Federalist and other proponents of ratification that limiting power in the interest of liberty was a central objective. Though written and ratified in the face of unacceptable inequalities, the principles set forth have yielded much. And at the nonconstitutional level, courts, both state and federal, have, far more often than not, exercised constraint in the name of formal rules. To discount the boring consistency of most judicial decision making

38. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (Macmillan 1935).

39. Forrest McDonald, *We the People: The Economic Origins of the Constitution* (U. Chi. Press 1958).

40. *See supra* n. 10 and accompanying text.

41. *See* quotes in Posner, *supra* n. 9, at 212-13.

(not to mention the far larger number of disputes that never reach court because the probable outcome is clear) on the basis of the relatively few cases that break with established principle, is to ignore the important effects of principle. Over the course of many years the law may be about power and nothing more, but on a day-to-day basis the law has been largely about principle. No doubt power is important and often exercised in the interest of those with power, but there is sufficient evidence of principled action to demand a broader understanding.

The Realists were right. The law can and does respond to power. But this does not mean that the law is not also about principle. The instrumentalist view of legal history is also right. Law is used to achieve desired results. But this does not mean that law is politics. The separation of law and politics—the separation of law and morality as jurisprudential debates would have it—is not just a cover for the imposition of the politics or morality of those in charge. As Horwitz demonstrates, it can and has served that purpose. However, it has also served to make the rule of law possible, if not perfectly achieved.

The rule of law is possible in an instrumentalist world. But it is not possible if there can be no principles to guide it. If Horwitz concludes that principle can never rise above politics, I think he is wrong. If his conclusion is that politics sometimes overwhelms principle, he is surely right. But that historical reality should not stand in the way of aspiring to the rule of law, which is formalism in the cause of a better world. The arguments made for formalism are not all rooted in ambitions for power. Indeed, most are rooted in ambitions for limits on power, or on assuring power to the people on the basis of equality rather than on the basis of wealth.