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TWICE-TOLD TALES: AN ECONOMIST'S RETELLING OF THE TRANSFORMATION OF AMERICAN LAW, 1780-1860

Jenny B. Wahl*

An interpretive hypothesis is ultimately a probability judgment that is supported by evidence.

—E. D. Hirsch, *Validity in Interpretation*.¹

Morton J. Horwitz raises many provocative questions in his two-volume work *The Transformation of American Law*.² I shall focus on two: was American law truly transformed in the first half of the nineteenth century? And does his story of re-distribution best tell the tale of antebellum law?

According to Horwitz, a deliberate, large-scale change took place in American law during the early 1800s. Judges redesigned the common law to favor commerce, industry, and entrepreneurs at the expense of farmers, workers, consumers, and other less powerful people.³ As he puts it, “the tendency of subsidy through legal change during this period was dramatically to throw the burden of economic development on the weakest and least active elements in the population.”⁴

To support his thesis, Horwitz must do four things: (i) depict the baseline starting point accurately; (ii) portray the counterfactual appropriately; (iii) offer compelling evidence that the baseline differed substantially from what followed in the manner and direction he claims; and (iv) demonstrate that judges conspired to carry out their agreed-upon intent. I suggest that he falls short on all counts.

I also propose an alternative interpretation of nineteenth-century common law. My tale is more positive than normative in nature, and it appeals to efficiency

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1. E. D. Hirsch, Jr., *Validity in Interpretation* 180 (Yale U. Press 1967).

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

3. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 253-54.

4. *Id.* at 101.

rather than distributional considerations. I set the stage for my story with a discussion of the economic analysis of law. Although more empirical work needs to be done, the weight of the evidence inspected thus far renders my interpretation superior to Horwitz's in the sense E. D. Hirsch suggests.⁵

Despite the flaws in Horwitz's work, he nevertheless contributes much to the study of law, economics, and history. His work serves as a reminder to economists in particular that data comes in many forms, institutions matter, and legal rules have distributional as well as allocative consequences.

I. ECONOMIC ANALYSIS OF LAW: A PRIMER

A. *What is Efficiency, Why does it Matter, and What does Law have to do with it?*

Economists study the allocation of scarce resources. The principal standard we use to evaluate resource allocation is efficiency.⁶ By definition, an allocation is "Pareto efficient" if any reallocation that makes one person better off would simultaneously make someone else worse off. Pareto efficiency is neither a concrete notion to most people, nor is it the only definition of efficiency. And measuring "well-being" is not a simple matter. What is more, some people use efficiency as a normative criterion, whereas others simply gauge whether an allocation is efficient or not. Given these ambiguities, one can see why the economic analysis of law is often misunderstood and misapplied.⁷

5. Hirsch, *supra* n. 1, at 180.

6. Economists, like anyone else, hold opinions on how wealth and other goods should be distributed in a society. Yet most economists consider these personal opinions rather than matters for professional advice. For a variety of views on whether the common law should—or even can—promote any goals other than efficiency, see Guido Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 Hofstra L. Rev. 553 (1980); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972); Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 Hofstra L. Rev. 905 (1980); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 Hofstra L. Rev. 487 (1980) [hereinafter Posner, *Ethical*]; Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. Chi. L. Rev. 281 (1979) [hereinafter Posner, *Abuses*]; Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. Leg. Stud. 103 (1979) [hereinafter, Posner, *Utilitarianism*]. Economists can estimate distributional effects of policies and can assess which redistributive mechanisms are likely to cost the least. The latter is of course an efficiency issue—most people would rather achieve a given distributional goal at a lower cost rather than a higher cost. But economists have no comparative advantage in determining what distribution squares with the goals of a particular society; they tend to leave this to voters and policymakers. Arnold Harberger offered a unique perspective on tradeoffs. See Arnold C. Harberger, *Three Basic Postulates for Applied Welfare Economics: An Interpretive Essay*, 9 J. Econ. Literature 785 (1971) (questioning how much efficiency we are willing to sacrifice to satisfy basic needs for everyone).

7. Many scholars embrace the economic approach to law; others malign it. Often, detractors of the approach confuse positive with normative analysis. Much of the empirical work examining the law—particularly common law—simply seeks to demonstrate whether chosen legal rules tend to maximize social wealth. Some scholars have concluded that norms that arise in the absence of law can also be efficient, given certain conditions. See Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harv. U. Press 1991) [hereinafter Ellickson, *Order*]; Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. Econ. & Org. 83 (1989) [hereinafter Ellickson, *Hypothesis*]; John Umbeck, *A Theory of Contract Choice and the California Gold Rush*, 20 J.L. & Econ. 421 (1977).

Some criticism rests on the supposition that the economic approach favors the status quo. Ronald Dworkin, in particular, argued that the economic approach is a disguised theory of rights that

To clarify, consider the world as economists see it. Everyone is born with a certain amount of intelligence, inherited property, and the like. Given these endowments, we can voluntarily trade with other people to make ourselves better off—transforming brute strength or native wit into wages that will pay for food and shelter, selling the family homestead in order to buy an uptown condo, and so forth. Any such trade that makes at least one person feel better off and no one worse off is called “Pareto-improving.”

Provided that resource reallocation is voluntary, only Pareto-improving trades will take place. If people can voluntarily make Pareto-improving trades until they exhaust all gains from trade, a society can achieve a Pareto-efficient allocation of resources. Two points are worth mentioning: A given initial endowment can yield many different Pareto-efficient final endowments, because people have different degrees of bargaining power. Also, initial endowments may influence people’s willingness to trade and therefore affect final endowments.

Not all reallocation in a society is voluntary, of course. For example, changes in law can alter initial ownership of resources, provide new remedies for breach of contract, or assign the losses arising from an accident in a different way.

New zoning acts can limit the use of factories in a particular neighborhood, for instance, conferring benefits upon local residents, reducing profits for manufacturers, and raising prices to consumers. Suppose the new law requires winners to compensate losers. If they could do so and still feel better off, we could say that this law promotes a Pareto-improving reallocation. Why wouldn’t people come up with this reallocation without a law? They might. But in large, complex societies, transaction costs may make such exchanges too cumbersome for private parties to achieve on their own. Transaction costs include the costs of acquiring information, bargaining, monitoring, and the like.

Many changes in law do not make winners compensate losers. Yet we might still want zoning acts because society gains more than it loses from such laws. A legal change that confers greater total benefits than total costs (without

either fails to contain judgments on appropriate initial allocations or approves of whatever allocation actually exists. Ronald Dworkin, *Taking Rights Seriously* 97-98 (Harv. U. Press 1977). Supporters of the economic approach—especially Richard Posner—point out two flaws in Dworkin’s argument. Posner, *Abuses*, *supra* n. 6, at 291. First, positive theory evaluates only whether, starting from a given initial allocation of rights and resources, the law tends to lead to efficiency. It does not typically pass judgment on the merits of a particular initial allocation. Second, to the extent the wealth-maximization principle leads to any recommendation of initial allocation, it requires that, if transaction costs are positive, rights should vest initially in those who are likely to value them most. Specifically, people should initially have rights to their own bodies—they should be able to sell their own labor and choose their own sexual partners. *Id.* at 291.

Critics of the economic approach also question why lawmakers would necessarily promote efficiency when other goals like justice are also compelling. One response, at least in the common-law context, is that litigants are responsible for efficient law. Inefficient legal rules impose greater costs upon interested parties than efficient rules, so people will tend to litigate until efficient rules result. See e.g. Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. Econ. Literature 1067, 1070 (1989); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Leg. Stud. 1, 4 (1984); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Leg. Stud. 65, 65 (1977); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. Leg. Stud. 51, 51 (1977). To some extent, this sort of reasoning can apply to legal rules other than those created by common law.

necessarily requiring winners to compensate losers) passes a different efficiency test: the Kaldor-Hicks standard. Most economists have the Kaldor-Hicks standard in mind when they analyze rules of law. One can think of this practice in philosophical terms: what sort of law would we choose if we did not know our initial endowment nor our individual gain or loss from specific laws? In all likelihood, we would favor legal rules that generated net benefits to society.

Thus far, I have left the word “well-being” undefined. Economists generally use the term “utility” to describe an individual’s well-being or happiness. But description is one thing; measurement is quite another. To compare “well-being” or “utility” across individuals, economists often adopt a simplifying assumption: a dollar is a dollar no matter who has it. Practically speaking, then, efficient law tends to maximize social wealth and channel property rights to those who value them most.⁸

Most economic analyses of law are positive rather than normative in nature. That is, they gauge only whether a rule of law promotes efficient resource allocation.⁹ These sorts of studies take no explicit stand on the “rightness” of efficiency vis-à-vis other criteria; they merely test whether a given legal rule tends to maximize society’s wealth or whether a change in law will tend to increase social wealth. Some positive analyses also focus on incentives that laws give to certain sectors or individuals.¹⁰

B. *Transactions Costs, the Coase Theorem, and Efficient Legal Rules*

Ronald Coase’s 1960 article, *The Problem of Social Cost*,¹¹ revolutionized intellectual thought about the role and functioning of law. The essence of his theory is this: if transaction costs were zero, a society would end up with an efficient allocation of resources regardless of legal rules.¹² Different initial endowments could lead to different final outcomes, of course, but the outcome itself would be efficient. But, because transaction costs are generally positive, laws may or may not promote efficiency. If efficiency is a criterion worth considering, then lawmakers and ordinary citizens alike have a compelling interest in knowing the likely effects of laws on total wealth.

Coase’s powerful insight led to a great outpouring of scholarly work, most notably by his University of Chicago colleagues Richard Posner, William Landes, Richard Epstein, and others. Robert Cooter and Daniel Rubinfeld concisely

8. Although not everyone adopts the wealth concept, Richard Posner makes a compelling argument for its use. See Richard A. Posner, *Wealth Maximization and Judicial Decision Making*, 4 *Int'l. Rev. L. & Econ.* 131 (1984) [hereinafter Posner, *Maximization*]; Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 *J. Leg. Stud.* 243 (1980) [hereinafter Posner, *Wealth*].

9. Because judges in the Anglo-American system follow precedent, common law tends to contain “rules” that persist.

10. In an interesting recent article, Mahoney found that countries with a common-law tradition tend to have relatively larger economic growth, in part because they secure property and contract rights better than civil-law countries do. Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, 30 *J. Leg. Stud.* 503, 503-04 (2001).

11. R. H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

12. *Id.* at 42-44.

capture the essence of efficiency in law.¹³ As they explain, legal disputes are resolved efficiently when costs of dispute resolution are minimized, legal liabilities go to parties who can bear them at least cost, and legal entitlements go to those who value them most.¹⁴ If the law accomplishes this, a society will maximize its wealth.

Yet what does this really mean? One issue is what sort of law might govern a particular activity. If different systems—common law, legislation, regulation, or simply social norms—lead to the same allocative results, then efficiency considerations favor choosing the system that is cheapest to administer. If the chosen system starts to yield inefficient allocative results as a society grows larger or more complicated, then lawmakers must consider how to balance administrative and allocative concerns. At some point, efficiency may require the society to switch to a more costly administrative apparatus that moves it closer to an efficient allocation.

Another relevant issue has to do with the rules chosen within a given system—the common law, say—to cope with particular situations. When people can transact cheaply, efficient common law would contain absolute, all-or-nothing rules such as injunctions, specific performance, strict liability, or no liability.¹⁵ Why? The short answer is cheap administration. Because legal rules do not matter for allocative purposes when transaction costs are low, cheaply administered rules will yield overall efficiency. One caution: absolute initial rules (like first possession) can create perverse incentives by leading people to spend considerable money and effort in attempts to gain initial possession. These expenditures are not productive; they are actually attempts to capture monopoly rents. In other words, if people successfully acquire exclusive ownership to a valuable property right and can prevent others from competing with them, they can earn extra profits by virtue of their monopoly power.

1. Assignment and Protection of Property Rights: Equitable versus Damage Remedies in Property Law

Let us look at an example of absolute rights. Suppose I can enjoin my neighbor from building a second-story addition because it will block my view of the lake. If he values the right to build more than I value the clear view, the injunctive remedy will simply encourage us to negotiate around it—he will buy me off and build his addition. By the same token, if I cannot obtain an injunction, he will build. I would not be willing to pay what he would require to stop him. Either way, my neighbor ends up with a property right that he values more than I.

13. Cooter & Rubinfeld, *supra* n. 7, at 1070.

14. *Id.*

15. I oversimplify the debate. In fact, scholars disagree as to what sorts of rules are best in low-transactions-costs situations. For various views, see e.g. Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 Yale L.J. 1027 (1995); Calabresi & Melamed, *supra* n. 6; Louis Kaplow & Steven Shavell, *Do Liability Rules Facilitate Bargaining? A Reply to Ayres and Talley*, 105 Yale L.J. 221; A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 Stan. L. Rev. 1075 (1980); Posner, *Ethical*, *supra* n. 6.

In essence, absolute rules of law give people a known starting point for bargaining. If the law assigns property rights inefficiently, people can voluntarily agree to re-assign these rights. Property rights will eventually land with those who value them most, provided transactions costs are low. Of course, whoever initially owns a property right arguably starts from a position of bargaining strength. And recall that different initial endowments could lead to different final outcomes. So the nature of an absolute legal rule could certainly have distributional implications, as the next section discusses. Still, in the absence of transactions costs, absolute rules will lead to allocative efficiency.

When transaction costs are large, however, absolute rules run the risk of assigning property rights to the “wrong” party—the one who values an asset least. Because people cannot easily rectify the situation on their own, absolute rules could lead to inefficient allocations of property rights. Return to the erstwhile builder. Now suppose he is surrounded by neighbors, any one of whom could obtain an injunction. If he values his addition more than all the neighbors together value their view, transaction costs could preclude bargaining. No addition would arise, despite the man’s higher valuation. Conversely, suppose the man could do whatever he wishes on his own property. Even if the costs he imposes on all his neighbors exceed the benefit to him, transactions costs could prevent the neighbors from coming together to buy the man off, even if doing so would be collectively worthwhile. Here, rules that cost more to administer might be more likely to channel resources to their most valuable use.

One possibility would be a damage remedy that would require the builder to pay for the costs he places on everyone else. An important consideration, however, is whether an alternative market mechanism exists. For instance, suppose the man built an addition when he lived alone on the lake and his neighbors moved in later. Because they could see what they were coming to, the price they paid for their lots could easily reflect the difference in their valuation of property next to a two-story house rather than a one-story house. In this situation, any “damages” sustained by neighbors came out in reduced lot prices. Things could be different if the eager builder came later. It is even possible that, if these sorts of conflicts escalate, a different system of legal rules that departed from a case-by-case solution—such as zoning laws—might be cheaper to administer and preferable from an efficiency viewpoint. Moving from an absolute rule to a flexible common-law regime or from one governance scheme to another could of course also have distributional effects, as the next section of the paper explores.

2. Voluntary Transfer of Property Rights: Contract Law

People can formalize a voluntary exchange via a contract. Here, efficiency considerations come into play in several ways. For instance, what if people could have easily made a contract and did not? Do we use social resources to protect people who could cheaply have protected themselves? Most people would say no; so would efficient law. For example, if I moved next door to someone whose house blocked my view, I could either pay less for my lot than for one with an

unblocked view, or I could buy the neighbor's lot and tear the house down. Either way, I could cheaply prevent a conflict over property rights. If, instead, I chose to sue my neighbor and a court awarded me damages, such a law would perversely encourage people to seek similar nonproductive money-making schemes, using up public dollars by clogging the court system.

A second efficiency consideration has to do with the voluntary nature of a contract. If a contract is coerced or obtained under false pretenses, it is not truly a voluntary exchange yielding gains from trade. Enforcement would make little sense on efficiency grounds.¹⁶

Here is a third situation: although contracts sometimes specify ways of settling disputes or damages to be paid in the event of breach, most contracts contain gaps. When parties fail to live up to a contractual agreement and the contract does not provide a solution, the law fills in these gaps.¹⁷ If the parties could have easily done so and simply did not, this collapses to the first situation discussed. But for unforeseeable contingencies or unlikely scenarios, the cost of crafting a clarifying clause is not worthwhile, either privately or socially. In these instances, Posner and Rosenfield suggest that a court promotes efficiency if it allocate risks and estimates losses as the parties would have, had they done so themselves.¹⁸ By mimicking the market, courts will also encourage similarly situated parties to save court costs in the future by addressing now-known contingencies within a contract.

What is "mimicking the market?" Posner and Rosenfield contend that people would logically assign a risk to the party who could bear it at least cost.¹⁹ The answers to two questions help determine which party that is: who can more cheaply assess a loss associated with a particular risk?²⁰ Who can more cheaply insure against the risk?²¹ The first question has two subparts: because an expected loss depends on the probability of the risk occurring as well as the size of a loss should it occur, one needs to ask who can more cheaply estimate each element. If damages are the appropriate remedy for a given situation, expectation damages typically encourage defendants to choose the efficient course of action. Expectation damages are the amount of money that would put the plaintiff in the same position as he or she would have been had the contract been performed.²²

Suppose I move into a planned neighborhood with lakefront bungalows. The developers have agreed that nothing higher than one story will be built within

16. Some doctrines that rescind certain contracts made with minors or incompetent people or by the use of fraud or duress are in line with efficiency considerations. Others arguably are not, for example, on "unconscionability," see Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & Econ. 293 (1975).

17. Because individual parties to a lawsuit do not bear all the costs of running a court system, people tend to leave an inefficiently large number of gaps in contracts.

18. Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. Leg. Stud. 83 (1977).

19. *Id.* at 117.

20. *Id.*

21. *Id.*

22. Certainly, expectation damages can be hard to calculate. They can also exclude two significant costs—the promisee's litigation costs and the costs of the breach on third parties.

four blocks of the lake for ten years. But two years later yuppies dramatically increase their demand for lakeside condos, making the prospect of building a high-rise incredibly more profitable than anyone ever dreamed. These yuppies value a lake home far more than any of us bungalow dwellers. This is something that the developers could have more easily foreseen and insured against (by writing an exit clause in the contract, adding extra to the price of the bungalows to fund later buyouts, and the like). I could probably estimate my loss from the erection of a tall building more easily, but on the whole the parties to the original contract would likely have assigned this risk to the neighborhood developers. A court order requiring expectation damages for breach of contract would send the appropriate signal. If yuppies truly valued the property more highly, developers would be willing to pay bungalow dwellers off to close out their contracts.

Different remedies for breach of contract exist, of course. Instead of damages, courts can discharge contracts or require specific performance. Changes in contract law, like changes in property law, can have distributional effects.

3. Involuntary Transfers: Tort Law

Tort law is another area of the law that has efficiency implications.²³ Tort law has to cope with situations that by nature involve transaction costs too high to permit voluntary exchange. For example, building material sometimes falls off during construction. The law could hold the builder blameless, strictly liable for any injury that results, or liable only for injuries caused by his negligence. Furthermore, the law could also create a defense of contributory negligence, designed to give potential victims incentives to take care of themselves around construction sites.

What sort of accident law would lead to economic efficiency? Guido Calabresi put it succinctly: rules that are structured to minimize the sum of the costs of accidental harm, precaution, and administration.²⁴ One important implication of this rubric is that some accidents should occur, simply because preventing them would cost more than allowing them to happen. Another is that both injurer and victim might have the ability to prevent an accident by taking certain precautions. Efficiency considerations require us to look carefully at the costs of such precautions for both potential injurers and victims. Certainly, every victim wants someone else to pay for his injuries after an accident occurs. Yet, *ex ante*, most people would agree to some limits on compensation so as to avoid excessive caution on the part of potential injurers. Keeping a construction site perfectly safe could cost far more—to building tenants and consumers as well as construction companies—than the benefits associated with increased safety.

A third implication of Calabresi's maxim is that some rules of law cost less to administer than others. An absolute rule like strict liability might be cheaper to

23. Scholars have analyzed criminal law, family law, procedure, and other areas of law in economic terms as well as property, contract, and tort law.

24. Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 26-31 (Yale U. Press 1970).

administer in a particular case, but it could simultaneously generate more cases because victims are likelier to win if they go to court. Strict liability could even give people perverse incentives to seek victimhood.²⁵ As in other areas of law, a change in tort liability rules could potentially have distributional consequences.

C. *Law and the Distribution of Resources*

Even economists recognize that people care about things other than efficiency.²⁶ Distribution of goods and services is one. It is not only the size of the economic pie that matters, but also how it is sliced.

Morton Horwitz tells the story of nineteenth-century law as one of redistribution. As the previous section suggested, legal rules—and changes in them—can have distributive as well as efficiency implications. Naturally, we must be mindful that legal change causing some people to receive a smaller percentage of the pie could also enlarge its size sufficiently that everyone receives more pie. This result would be even more likely if changes in laws that increase the size of the pie do not systematically affect every person in the same direction in every potential conflict.

1. Changing the Initial Allocation of Property Rights

Suppose the law keeps an absolute rule, but changes who gets the initial property rights. For example, the law could initially permit me to stop any activity by my neighbor that affects me, then change to allow my neighbor to do whatever he wants on his own property. Provided transactions costs are low, society would still end up with an efficient allocation of resources. But the legal change would give parties different initial starting points and perhaps also result in different final points. We could examine these sorts of changes to see if they favor entrepreneurs, as Horwitz claims.²⁷ We could also inspect whether such changes give people greater incentives to think ahead and solve their own problems, or to use more social resources to resolve private issues. We might also explore any alterations in incentives to spend time and resources acquiring initial property rights.

2. Moving from Absolute Rights to Flexible Rules

Another legal change entails switching from an absolute rule to something more flexible. For example, the law could assign initial property rights according to first possession or by some less absolute means. Failure to fulfill a contract could result in a remedy of specific performance or one of breach and damages. Tort law could adhere to a strict liability or a negligence standard. Perhaps we

25. This is not to say that people want to be hurt. But recuperation from an injury does offer some leisure time, at least. And the perverse incentive is particularly present if the “victim” can convince the court of an injury even when none has occurred.

26. See e.g. Richard H. Thaler, *Quasi-Rational Economics* (Russell Sage Foundation 1991).

27. I do not look at this issue in detail, but Carol Rose did. See Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. Leg. Stud. 261 (1990).

could tell a transactions costs story to explain a movement in the law. But what is interesting as well is to see if such changes systematically favor the movers and shakers, as Horwitz suggests.

Considering whether law “favors” a particular group is tricky business. Moving from, say, a rule of absolute rights to the initial user to a no-damages regime might truly result in winners and losers. Such a change could yield a Kaldor-Hicks improvement in efficiency, but not a Pareto improvement. But moving from absolute rights to a damages regime—that is, allowing people to engage in activities provided they pay for all the costs—could be Pareto-improving, particularly if damages are calculated correctly. As such, no one really loses. An especially interesting question is whether a regime change—say, from a strict liability to a negligence standard—would really yield different outcomes.²⁸

Another consideration is the interaction of transactions costs and legal rules. If parties have low transactions costs and the law switches from absolute remedies to more flexible ones, the starting point for bargaining becomes less clear. Uncertainty about winning a lawsuit might deter some victims from bringing suits, which could possibly “subsidize” entrepreneurs who impose costs on others. Yet even here we must be careful. For entrepreneurs to receive benefits systematically, they would always have to take the part of the injurer or to face lower standards of care than other potential injurers.²⁹ What is more, if the entrepreneur is a producer in a competitive industry, any “subsidies” would be squeezed out of profits and deposited in consumers’ pockets. So the real shift in resources could be from injured parties to the purchasers of an entrepreneur’s product.³⁰

What if the parties face high transactions costs? Then a shift from, say, a strict liability to a negligence standard gives judges more flexibility in assigning blame, particularly when victims have some ability to prevent accidents. So if we stuck to strict liability instead of trying a negligence/contributory negligence scheme, we might actually subsidize careless people. Switching to a flexible rule thus would *take away* a subsidy, not confer one.

3. Changing the System of Governance

A third sort of potentially redistributive legal change is moving from one system of law to another. Suppose some activity initially governed by the common law switched to coverage by statute or regulation. Instead of resolving conflicts between neighbors in courts, for instance, we could institute a system of permits generated by local boards. Here the relevant test for Horwitz’s thesis is whether

28. Epstein and Hovenkamp raised this issue, saying that it is not clear that strict liability and negligence rules would systematically put people in different places. Richard A. Epstein, *Social Consequences of Common Law Rules*, 95 Harv. L. Rev. 1717, 1735 (1982); Herbert Hovenkamp, *The Economics of Legal History*, 67 Minn. L. Rev. 645, 685-86 (1983).

29. Epstein made this point for industrial entrepreneurs, then followed up by noting that Gary Schwartz actually found that firms and institutions were held to higher standards of care than mere individuals. Epstein, *supra* n. 28, at 1735.

30. Hovenkamp also made this point. Hovenkamp, *supra* n. 28, at 689.

such a move systematically favors those that he claims. That is, even if codifying law saves costs by standardization, does it also build in benefits for a particular group?

II. FOUR TESTS FOR HORWITZ

A. *What was the Historical Baseline?*

Horwitz says that antebellum American courts overthrew earlier anti-commercial legal rules and substituted negligence for strict liability rules.³¹ Yet the historical baseline he establishes is far from accurate, according to many critics.³² Let me simply mention a few of their arguments.

Brian Simpson, Peter Karsten, and Kevin Teeven critique Horwitz's contentions about contract law.³³ Before the nineteenth century, merchants and employers simply used different methods to protect their interests. Penal bonds, liquidated damages, debtors' prison, and criminal prosecutions of errant employees were effective means of contract enforcement.³⁴ And courts used remedies to protect expectation interests before, during, and after the time period Horwitz considers.³⁵ As one example of a shift in contract law, Horwitz presents the history of the law of sales as a sudden and complete switch from the sound-price doctrine to *caveat emptor*.³⁶ Yet he neglects the development of implied terms to protect borrowers and fails to establish evidence that the sound-price doctrine actually existed.³⁷

Williams, Karsten, and Schwartz also question whether strict liability in tort really was the order of the day before the nineteenth century.³⁸ As Schwartz notes, the cases Horwitz uses to show the "shift" to negligence indeed refer to

31. See Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 85.

32. For example, Bridwell does not think that judicial action of the nineteenth century was particularly novel or different. R. Randall Bridwell, *Theme v. Reality in American Legal History: A Commentary on Horwitz, The Transformation of American Law, 1780-1960, and on the Common Law in America*, 53 *Ind. L.J.* 449, 457-58 (1978).

33. See A. W. B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 *U. Chi. L. Rev.* 533 (1979); Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (4th ed., U. N.C. Press 1997); Kevin M. Teeven, *A History of the Anglo-American Common Law of Contract*, (Greenwood Press 1990).

34. Karsten, *supra* n. 33, at 157; Simpson, *supra* n. 33, at 540. Simpson also refers to Barbour's work on the early law merchant in Amsterdam. See Violet Barbour, *Capitalism in Amsterdam in the 17th Century* (U. Mich. Press 1963). Horwitz does recognize the use of penal bonds and liquidated damages in earlier periods. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 167-68.

35. As Simpson pointed out, specific performance and expectation damages both protect expectation interests, unlike say restitution or reliance damages. Simpson, *supra* n. 33, at 548, 551; Karsten, *supra* n. 33, at 60.

36. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 180.

37. See Karsten, *supra* n. 33, at 47, 57 (referencing work by Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law*, (U. Chi. Press 1988) in which, Scheppele analyzed 82 New York cases, finding that judges assigned losses in sales cases to the party in the best position to know about a defect); Simpson, *supra* n. 33, at 585.

38. Stephen F. Williams, *Transforming American Law: Doubtful Economics Makes Doubtful History*, 25 *UCLA L. Rev.* 1187, 1193 (1978), Karsten, *supra* n. 33, at 80-81, 98; Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *Yale L.J.* 1717, 1717 (1981).

negligence principles. But nowhere do these cases indicate a departure from some different liability rule.

Thus, one big “if” in the story Horwitz tells is whether the law really transformed at all. I have not sifted through pre-nineteenth century cases, statutes, and the like to establish my own historical baseline. Yet enough other scholars have raised this point that I think it necessary to mention. I do show later in this paper that Horwitz reads many cases as discarding precedent when in fact they do nothing of the kind.

B. *Does Horwitz cast the Counterfactual Correctly?*

Not only does Horwitz neglect to set his historical baseline appropriately, but he also fails to cast the counterfactual correctly—or, more precisely, at all. What he would like to show, I think, is that early nineteenth-century law injured some groups of people. To do so, he would have to demonstrate that, under a different legal regime, these groups would have had more. That is, they would have had a bigger piece of pie under alternative legal rules.

Yet under different rules the pie itself might have had a different size, as I have already noted. If, for example, nineteenth-century common law tended toward efficiency, it led to a bigger pie for all than any alternative law would have. Capitalism, and laws that facilitate gains from trade, are not part of a zero-sum game. A smaller slice of a bigger pie might actually have served up more to Horwitz’s “oppressed” groups than a bigger slice of a smaller pie.

To enter any meaningful discussion of the distributive effects of law, we must therefore also consider how the law influences the size of the pie. Unless envy is a significant motivator, people prefer a bigger piece for themselves to a smaller piece, regardless of what other people enjoy.³⁹

What would be an effective way to discuss distributive consequences, then? Horwitz could show that nineteenth-century law was actually inefficient relative to some alternative. Or he could show that nineteenth-century law fulfilled the Kaldor-Hicks standard, but not the Pareto standard, and that the losers were the groups he indicates.⁴⁰ In either case, he would have to demonstrate that the slice of pie received by his “oppressed” groups was smaller under the law that existed than it would have been under some alternative law. Both would require him to consider efficiency implications of law.

C. *How does Horwitz use Evidence? Context, Methodology, and Interpretation*

Any hypothesis worth its salt passes evidentiary tests. Horwitz’s work generates three empirical questions: How does his evidence stack up against other sorts of information we have about the antebellum period? Are his data

39. Perhaps some people would rather have less if their neighbors also have less. It is true that equity matters, and some economists, especially Richard Thaler, have conducted experiments showing this. Thaler, *supra* n. 26, at 230-34.

40. Horwitz does seem to allude to the possibility of at least Kaldor-Hicks improvement in the early nineteenth century. See Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 100.

representative or selective? Does he interpret his data accurately? Let's look at these in detail.

1. What do other Primary Sources say?

Although Horwitz uses treatises, letters, and student journals to back his arguments, he never really investigates the nature of inequality in the nineteenth century.⁴¹ Economic historians have. The consensus is that income and wealth inequality changed very little. Although the data are sparse, estimates of housing values and income from labor and property show considerable stability over time.⁴²

Economic historians have also looked at growth over the period. They have largely discarded the once-popular theory that economies reach a point in their historical development where economic growth rapidly accelerates.⁴³ Most think that annual growth rates ranged from about half of one percent annually to about one and one half percent during the antebellum period. Some suggest growth was faster after 1820, some think growth slowed down a little after mid-1840s.⁴⁴ Virtually all agree that growth in antebellum years was slower than it has been for the most recent half-century.

In short, the data give no indication of a big growth spurt consistent with the favoring of entrepreneurial activity, nor of a large widening in inequality that systematically oppressed certain groups of people. I do not have enough information to argue conclusively against Horwitz's thesis, because I have not established what growth and distribution might have been under alternative law. But I find it suggestive that growth and distribution in the nineteenth century did not significantly depart from what had come before.

Richard Epstein and William Novak highlight a different, but pertinent, point: the common law may only have been marginal during the nineteenth century. Both think that legislation and regulation had more far-reaching consequences than Horwitz acknowledges.⁴⁵ If this is true, then Horwitz

41. McClain faulted him for this. See Charles J. McClain, Jr., *Legal Change and Class Interests: A Review Essay on Morton Horwitz's The Transformation of American Law*, 68 Cal. L. Rev. 382 (1980).

42. Lee Soltow estimated Gini coefficients on housing values and found them to be .643 in 1798 and .39 in 1970, indicating much more uniformity in housing values in the twentieth century. But he also found that wealth distribution, particularly in the Southern states, did not change much from 1790 to 1850. Ency. Am. Econ. History, *Distribution of Income and Wealth* vol. 3, 1092 (1980). Soltow also reported that the best evidence indicates that the proportion of the poor from 1790 to 1860 was roughly constant. *Id.* at 1104. Robert Gallman also found that the wealth distribution was not widening in the nineteenth and early twentieth centuries. Ency. Am. Econ. History, *Economic Growth* vol. 1, 133 (1980).

43. Walter Rostow was one of the major proponents of this theory. See W. W. Rostow, *Leading Sectors and the Take-Off*, in *The Economics of Take-Off into Sustained Growth* 1 (St. Martin's Press 1963) (suggesting that the U.S. economy "took off" in the 1830s).

44. See Thomas Weiss & Donald Schaefer, *American Economic Development in Historical Perspective*, (Stan. U. Press 1994); Stanley L. Engerman & Robert E. Gallman, *U.S. Economic Growth 1783-1860*, 8 Research Econ. History 1 (1983); Paul A. David, *The Growth of Real Product in the U.S. Before 1840: New Evidence, Controlled Conjectures*, 27 J. Econ. History 151 (1967); Ency. Am. Econ. History vol. 1, 157 (1980).

45. William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (U. N.C. Press 1996), Epstein, *supra* n. 28.

emphasized an area of law that may not have figured significantly in the determination of economic growth and distribution.

2. Horwitz's General Methodology

Because Horwitz offers few clues as to how he chose his cases, evaluating his selection methodology is a challenge.⁴⁶ It is safe to say, however, that he did *not* choose the methods of other scholars by, say, reading the universe of appellate cases on a particular topic or analyzing a random sample.⁴⁷

I can offer only a few specific methodological comments. Horwitz focused almost entirely upon a few states in the Northeast and chose cases spaced widely apart in time. Other scholars, particularly Karsten, criticize Horwitz for missing key cases (particularly those that do not support his viewpoint) and misinterpreting the cases he did analyze.⁴⁸ Horwitz claims to have used leading cases and, judging from other sources, he picked some important ones. He did not, however, indicate that he had Shepardized the cases or tried to ascertain in any other way whether he had obtained cases that truly influenced the path of the law. Most disconcerting, however, is that Horwitz frequently uses dicta as evidence rather than examining the actual holding in a case.⁴⁹

3. Interpretation of Specific Cases

Out of curiosity, I selected cases that Horwitz mentions as “turning points” or “leading cases.” I read them carefully, drew my own conclusions, then compared my interpretation to that of Horwitz. Other scholars have examined a broader set of cases in certain areas, so I include below a detailed reading of only a few cases, chronologized within each topic.⁵⁰

Horwitz's thesis is that judges favored some groups at the expense of others, departing from English precedent in the process. Yet, when I review only the cases that he characterizes as important, I see no real evidence of favoritism or of judicial innovation. Instead, what emerges is a portrait of judges adapting ancient, simple, efficiency-oriented principles to new, complex situations. Perhaps more significantly, any redistribution that might have occurred via the common law

46. Other have criticized Horwitz for his apparently selective method of choosing cases to support his thesis. See e.g. Richard A. Posner, *Overcoming Law* 272 (Harv. U. Press 1995). Simpson said that Horwitz's arguments are hard to test against the evidence he provides. Simpson, *supra* n. 33, at 534-35. Bridwell characterized Horwitz as asserting intellectual development rather than demonstrating it with the data. Bridwell, *supra* n. 32, at 493, 495. Williams asked why Horwitz did not compare cases before and after the relevant time period that were similar. Williams, *supra* n. 38, at 1188.

47. For example, Gary Schwartz read all nineteenth-century tort cases in the states of New Hampshire and California. Schwartz, *supra* n. 38, at 1719. I read all slave cases from the 15 Southern slave cases, as did Thomas Morris. Jenny Bourne Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery*, (Cambridge U. Press 1998); Thomas D. Morris, *Southern Slavery and the Law 1619-1860*, (U. N.C. Press 1996). Richard Posner took a random sample of cases for his data set. Richard A. Posner, *A Theory of Negligence*, 1 J. Leg. Stud. 29 (1972).

48. See Karsten, *supra* n. 33, at 3-5, 131.

49. Others have criticized Horwitz for this, including Bridwell, *supra* n. 32, at 493; Schwartz, *supra* n. 38, at 1727; Williams, *supra* n. 38, at 1193.

50. See Karsten, *supra* n. 33; Novak, *supra* n. 45; Rose, *supra* n. 27; Schwartz, *supra* n. 38; Simpson, *supra* n. 33.

seems to have gone mostly in a direction opposite to the one Horwitz claims.

a. Mill, Dam, and Water Cases

In *Palmer v. Mulligan*,⁵¹ the plaintiff and defendant were both mill owners. The plaintiff had owned mills at his site for some forty years, although his mills had twice burned. About a year or two before the plaintiff rebuilt most recently, the defendant built his own mill 200 yards above the plaintiff's site. The plaintiff complained that he had to rebuild his mill differently as a result, did not get as much water current as before and so had to employ extra workers, and had to clear his mill of the defendant's rubbish. The jury found for the defendant and the appellate court refused a new trial.

According to Horwitz, the court abandoned precedent, refusing to apply the common-law rule that had always allowed parties to recover from any obstruction of the natural flow.⁵² Judge Livingston also supposedly rejected the accepted rule that the first user gets exclusive rights. This case is allegedly the beginning of courts' accepting the idea that ownership of property implies above all the right to develop that property for business purposes.⁵³

The case opinion is actually far more complex than Horwitz makes it out to be. The judges were divided, 3-2. The case hinged upon several important points: the severity of the injury, the length of time the plaintiff had held the site, the benefits of competition, and the interpretation of precedent. The two dissenting judges thought that the plaintiff's damages were large; the majority thought damages were slight.⁵⁴ One dissenting judge favored the plaintiff because he thought forty years of occupation raised the presumption of a grant.⁵⁵ Judge Livingston, writing as one of the majority, agreed that first users have certain rights that should not be trampled upon.⁵⁶ Yet, he also said that, if the trampling was small and the benefits to the public of competition large, additional users of a resource should not be banned.⁵⁷ Judge Spencer, also part of the majority, read precedent as saying that mills and dams always injure downstream parties, but that injuries due to withholding water and possible evaporation (as opposed to diversion of the stream) were never thought to afford a ground of action.⁵⁸

Here is an alternative way of looking at this case. Conflicts between neighboring mill owners consist of two types: the downstream mill backs up and swamps the upstream mill, or the upstream mill blocks the flow of water or sends pollution to the downstream mill. If these are the only two parties affected, transactions costs are low. Parties could therefore bargain around legal rules that do not allocate initial rights efficiently. Any rule that clearly establishes initial

51. 3 Cai. R. 307, 1805 WL 809 (N.Y. 1805).

52. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 38.

53. *Id.* at 37.

54. *Palmer*, 1805 WL 809, at [¶¶ 10, 19].

55. *Id.* at [¶ 10].

56. *Id.*

57. *Id.*

58. *Id.* at [¶ 9].

rights—like either a first-user rule or a no-obstruction rule—would be cheap to administer. Legal rights would end up with the party who valued them most.

The first sort of conflict—downstream mill swamps upstream mill—was typical in the early years of the American republic. It is also by nature a neighbor—that is, a low transactions costs—issue. If the *Palmer* case had been of this type, the plaintiff and defendant would have switched roles. The first-user rule would have given initial rights to the downstream mill and the no-obstruction rule would have given initial rights to the upstream mill. But the final outcome would be the same regardless of initial allocation—the party who valued the property most would have obtained rights to it, via bargaining if necessary. According to Carol Rose, cases of this type continued to be governed by absolute rules through the nineteenth century.⁵⁹ She finds that low-transactions-costs cases continued to use absolute rules.⁶⁰

The *Palmer* case is of the second type—upstream mill pollutes and interferes with downstream mill. Here, the plaintiff—the downstream first user—would have initial rights under either a first-user or a no-obstruction rule. But if the defendant had been considered the first user (which arguably he could have been, given that the plaintiff had no mill in operation at the time the defendant began), the two legal rules would have allocated initial rights to different parties. Still, bargaining would lead to an allocatively efficient outcome under either legal rule, provided that the conflict involved only these two parties.

The issue in *Palmer*, however, is that such conflicts are not necessarily confined to the two parties in court. Upstream parties, as Judge Spencer noted, potentially interfere with *all* downstream users.⁶¹ But not all downstream users are parties to this case. This conflict cloaks a situation with potentially high transactions costs. If the judges choose either the first user or the no-obstruction rule in a pollution/interference case, they run the risk of setting a precedent that future parties will not be able to bargain around. An alternative is to choose a less well-defined rule of reasonable use. That way, the court creates a flexible standard. Presumably, if the majority of judges had considered the injury to the plaintiff to be significant, he would have recovered damages. But, by refusing to make damages a sure thing (by getting away from the first-user absolute rule), the judges preserved the possibility of weighing alternative uses for a common resource without “freezing” rights into a potentially inefficient allocation.⁶² They also avoided giving people incentives to act unproductively by rushing to claim first use of property in order to obtain monopoly power.

In *Steele v. Western Inland Lock Navigation*,⁶³ the defendant bought land from the plaintiff to build a canal, paying a price determined by independent appraisers under statutory guidelines. The plaintiff claimed that ten acres she still

59. Rose, *supra* n. 27, at 282-84.

60. *Id.* at 287. She also explored why initial rights were assigned as they were and why they might have changed.

61. *Palmer*, 1085 WL 809, at [¶ 9].

62. I adopt Rose’s felicitous image of “freezing rights.” Rose, *supra* n. 27, at 283.

63. 2 Johns. 283, 1807 WL 874 (N.Y. 1807).

owned next to the canal were flooded because of the defendant's neglect, leading to lost productivity worth \$100. Witnesses said that only two to three acres were affected and the leakage may have had two sources: the defendant's failure to keep the canal repaired, and the inevitable obstruction of ancient drains on the land that occurred at the time the canal was originally built. The jury awarded \$50 to the plaintiff. The defendant moved for a new trial, which was denied.

According to Horwitz, the court's decision says that the destruction of the productive value of the plaintiff's remaining land was already included in the price of the sold land.⁶⁴ In his view, the canal owners caused damage by their failure to operate the canal properly, but did not pay for it.⁶⁵ This seems entirely at odds with what any economist would say prices can do. How could the original price compensate for damages wrought by negligent actions taking place later? If what Horwitz says were true, this case would set an inefficient precedent, as well as one unfair to property owners. It would also would put undue burden on the workings of land markets.

But this is a misreading of the case. Horwitz's interpretation implies that the plaintiff was displeased with the judgment. In fact, the *defendant* appealed. Moreover, the appellate opinion said that the plaintiff *should* get damages because of the defendant's neglect to repair.⁶⁶ It went on to say that the appraisal price of the land bought for the canal had—or should have—accounted for potential flooding due to a known condition. This makes economic sense—market prices can adjust to known information, and additional damages awarded would compensate the landowner twice. The appellate judge said the two issues—known conditions at the time the defendant bought the land and subsequent neglect by the defendant—should not have been conflated, but \$50 probably gave rough justice to the plaintiff.⁶⁷ Consequently, he did not want to undertake the expense of another trial that would likely yield the same result.

In *Stowell v. Flagg*,⁶⁸ the defendant, a mill owner, dammed a stream and overflowed the plaintiff's land. The jury returned a verdict for the plaintiff for common-law damages. The defendant argued that the plaintiff should have to use the statutory remedy, which allowed the jury to ascertain the damages sustained over the past year and award them. (A second part of the statute permitted this amount to measure yearly damages for the future as well, which would be awarded when sustained.) The appellate court agreed with the defendant.

Horwitz criticizes the statute, which he says relieved the mills and forced landowners to make loans to millowners.⁶⁹ He claims as well that the statute gave mill owners discretion to destroy the value of lands far in excess of any benefit they could receive.⁷⁰ He also impugns the appellate judge in *Stowell* for his

64. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 67.

65. *Id.*

66. *Steele*, 1807 WL 874, at [¶ 1].

67. *Id.* at [¶¶ 1, 2].

68. 11 Mass. 364, 1814 WL 1038 (Mass. 1814).

69. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 49.

70. *Id.* at 50.

acceptance of the statute.⁷¹

Horwitz's economic reasoning here is well off the mark. Mill owners had to pay actual damages. Why would they ever choose to inflict injuries that cost them more than any benefits they obtained? As far as landowners "making a loan," I suspect that legislators wrote the statute thinking that actual damages would be easier to ascertain than speculative damages. In fact, making the mills pay up front for potential damages would have had more of the characteristics of a loan. The statute—which, by the way, refers to the support *and regulation* of mills—was intended to streamline delivery of damages to landowners. By codifying the remedy to an ill that recurred frequently, the legislature actually reduced the burden on landowners. Yes, the statute relieved mill owners of legal bills associated with case-by-case trials, but so too did it relieve landowners. What is more, it virtually guaranteed payment to flooded landowners, although it may have taken away potentially huge common-law damage awards. In a sense, the mill act resembled workers' compensation acts—it took away the injured party's right to recover under common law, but it also ensured payment under a statute.

I do see two potential objections to the statute, neither of which is considered by Horwitz. First, juries might not have accounted for the time value of money in finding the initial damages. Landowners might therefore have been undercompensated for the first year's injury. Second, estimating future years' damages based on current injuries gave millowners the perverse incentive to increase the actual injuries inflicted later on. So, just as one might cast aspersions upon workers' compensation acts because they do not fully compensate injured plaintiffs, we might criticize the mill act. From a cursory inspection, however, I do not think the undercompensation problem was as likely under the mill act because juries estimated actual damages, at least for the first year. Under workers' compensation laws, statutory awards can be limited to a fraction of lost wages. So the question of whether mill owners enjoyed a windfall hinges upon the size of damage awards and how well they correlated with actual losses. Knowing something about this would give us far more information as to whether landowners were systematically victimized by the mill act.

Incidentally, Horwitz's critique of the judge seems ill-founded as well. As Horwitz himself points out, this judge actually disliked the statute, but lamented that he could not undo the acts of the legislature.⁷²

In *Platt v. Johnson*,⁷³ as in *Palmer*, all parties are millowners. The plaintiff, who had established a site a few years before the defendant, complained that the defendant had delayed the flow of water to the plaintiff's mill for three days, causing lost profits. The jury awarded the plaintiff \$25, but the appellate court reversed, favoring the defendant instead.

Horwitz calls *Platt* (along with *Palmer*) a turning point in the law.⁷⁴ These

71. *Id.*

72. *Id.* at 49.

73. 15 Johns. 213, 1818 WL 2241 (N.Y. 1818).

74. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 37.

cases, he states, “introduced into American common law the entirely novel view that an explicit consideration of the relative efficiencies of conflicting property uses should be the paramount test of what constitutes legally justifiable injury. As a consequence, private economic loss and judicially determined legal injury, which for centuries had been more or less congruent, began to diverge.”⁷⁵

As in *Palmer*, Horwitz misreads the judges’ reasoning. Here, the court is unanimous. One judge went so far as to say that, yes, he had dissented in *Palmer*, but this plaintiff was different because he had occupied the property for far less time.⁷⁶ He also said that the other dissenting judge in *Palmer* would have agreed with the unanimous decision in this case because the water delay here was so very small and could even have been caused by evaporation.⁷⁷ The opinion was quite matter-of-fact in saying that diversion, waste, wanton delay, or long prior use by the plaintiff might have entitled the plaintiff to prevail. But that did not happen here. The failure to award damages did not stem from a divergence in private loss and judicially determined legal injury, it came primarily from the plaintiff’s failure to link his loss causally to the defendant’s actions. I think the judges also wanted potential litigants to realize that trivialities were not matters for the courts.

Here, as in *Palmer*, the judges brought out the pros and cons of a first-user rule. They implicitly acknowledged that the rule settles expectations and costs little to administer. But assigning absolute rights to one person could also lead to a problem later. Suppose the property in question is potentially useable by many people. In the future, all potential users together might actually value the resource more than the first user, but transactions costs could foreclose bargaining possibilities. Again, the thrust of the case seems to be efficiency rather than distribution. Even if redistribution did occur, the parties are not all that different—just as they were not in *Palmer*.

Once again, in *Cary v. Daniels*,⁷⁸ both plaintiff and defendant are mill owners. Both bought their property “free from all incumbrances” from a consortium that formerly owned both mills as well as a dam between them. People gave conflicting evidence at trial about the use of the dam, with some saying that the practice under joint ownership was to open the dam’s wastegate when water rose and swamped the upstream mill. This dam was swept away, and the defendant (who owned the downstream mill) erected a new dam. The plaintiff claimed two injuries: the new dam caused more swamping than the old one with its gate closed, and the defendant’s refusal to open gates created additional swamping. The jury awarded \$300 for the first injury and \$100 for the second. In the appellate opinion, Chief Justice Shaw allowed only the \$300 to stand.⁷⁹

Horwitz says that this case shows that Shaw did not require mills to pay their own way.⁸⁰ Moreover, Shaw favored mill owners who wanted more than their

75. *Id.* at 38.

76. *Platt*, 1818 WL 2241, at [¶ 2].

77. *Id.*

78. 49 Mass. 466, 1844 WL 4311 (Mass. 1844).

79. *Id.* at *12.

80. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 41.

proportionate share, provided they met the needs of the community.⁸¹ Horwitz implies that the defendant won the appeal; he also disregards the fact that both parties are mill owners.⁸²

What Shaw actually said was that the parties had certain expectations about the flow of the stream when they bought the properties. These expectations should be fulfilled, he reasoned, so he agreed with the jury that the higher new dam created a compensable injury. The *plaintiff* won on this count. The defendant mill owner indeed paid his own way when he altered the flow of the stream with the new dam. What of the other injury? Shaw recognized that the new owners could have specified an arrangement about the wastegate at the time of purchase and did not. The plaintiff therefore could not rely upon a custom practiced when the properties were held jointly, particularly when the properties were sold “free from all incumbrances.”

My reading of the case yields a conclusion opposite to Horwitz’s: Justice Shaw in fact reinforced people’s expectations, and he did make people pay for the damages they imposed on others. He did not, however, allow the plaintiff to enjoy some vague implicit right when he could have easily made the right explicit via a contract. The court therefore gave incentives to people to protect themselves when doing so was cheap, rather than wasting society’s resources.

In *Blood v. Nashua and Lowell Railroad Corporation*,⁸³ the plaintiff was a sawmill owner and defendant a railroad. For forty or more years, the plaintiff had taken logs through part of a stream adjacent to the defendant’s property. When the defendant built a new bridge over the stream, the plaintiff made three complaints: parts of the old bridge remained and obstructed logs, the new bridge did not allow water to go as freely off the mill as the old bridge had, and the new bridge made transporting logs more difficult. Referees awarded the plaintiff \$50 for the first injury, \$200 for the second, and \$650 for the third. Chief Justice Shaw permitted the plaintiff to keep only \$200.

As in *Steele and Cary*, Horwitz leaves the impression that the plaintiff was skewered.⁸⁴ He says this decision shows that, the more extensive the indirect injury from public improvements, the more often the public nuisance doctrine was invoked to defeat recovery.⁸⁵ In fact, the plaintiff *did* recover damages for the alteration in the flow of the stream that directly affected him: he got \$200.⁸⁶ The ease with which the plaintiff had formerly floated his logs by the defendant’s property was a gift—if he wanted to keep it, why didn’t the plaintiff simply buy the property? While it is true that Shaw would not allow the plaintiff to recover damages for an injury to the public (reduced ability to navigate the stream running

81. *Id.* at 41-42. Horwitz also claims that this case came up with a rule that turned around the holding in *Tyler v. Wilkinson*, 24 F. Cas. 472 (R.I. 1827). But I read this case the same as I read *Tyler*; in both, people are entitled to reasonable use of a stream.

82. *Id.* at 42.

83. 68 Mass. 137, 1854 WL 5035 (Mass. 1854).

84. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 41.

85. *Id.* at 78.

86. *Blood*, 1854 WL 5035, at *4.

by the defendant's property), it is also true that the plaintiff could have helped himself if he had found it worthwhile. If the public had complained of reduced ability to navigate, Shaw would have rectified the situation. But he did not permit one man to recover damages that pertained to the public at large.

b. Use of Private Land—Basements and Ancient Lights

In *Thurston v. Hancock*,⁸⁷ the plaintiff built his house on Beacon Hill within 12 feet of the property line. Ten years later, the defendant dug 60 feet down about two feet away from the property line, causing the plaintiff's house to become unusable. The plaintiff sued for damages of \$20,000; the defendant prevailed.

Horwitz says this was a widely influential case that dramatically shifted the idea of dominion of land.⁸⁸ He claims that the judge broke with common-law tradition and outlined a strikingly modern theory of property rights based on the fulfillment of expectations.⁸⁹

The judge might have been surprised by this assessment. He read precedent as supporting him. To him, previous English cases suggested that the first person who built should either stipulate an arrangement with his neighbor or set back his house sufficiently from the property line.⁹⁰ The only sort of exception was for an ancient building, which the plaintiff's certainly was not.⁹¹

Karsten's detailed research reveals that English law was as the judge interpreted. Karsten also finds that antebellum American common law largely reflected the idea that one should anticipate what one's neighbors might reasonably do and plan accordingly.⁹² This ties into the efficiency notion that, if people can cheaply help themselves, the law should not have to make up for a private failure to foresee.

In *Parker v. Foote*,⁹³ the plaintiff claimed that his enjoyment of sunlight streaming across the defendant's property for the previous 24 years entitled him to permanent enjoyment. He wanted damages when the defendant put up a store that obstructed the light. The judge in the trial court agreed and instructed the jury accordingly. The jury awarded the plaintiff \$225. The appellate court overturned the award.

Horwitz says that this case overthrew English common-law precedent.⁹⁴ He implies that it did so because the ancient-lights doctrine impaired development, which was so important in the new republic.⁹⁵

But Horwitz misleads us on both points. The appellate opinion discussed at

87. 12 Mass. 220, 1815 WL 910 (Mass. 1815).

88. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 103.

89. *Id.* at 103-04.

90. *Thurston*, 1815 WL 910, at *5.

91. *Id.*

92. Karsten, *supra* n. 33, at 39.

93. 19 Wend. 309, 1838 WL 2969 (N.Y. 1838).

94. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 46.

95. *Id.*

length what the ancient-lights doctrine really was and when it came into being.⁹⁶ Justice Wilmut apparently adopted a 20-year rule at the Assizes in 1761, but most English law adhered to at least a 40-year rule.⁹⁷ The King's Bench did not consider a 20-year rule until 1786; the U.S. imported English common law as of 1776.⁹⁸ The *Parker* holding, according to the appellate judges, followed precedent.⁹⁹ This was a hard case, as the judges openly admitted; it brings out all the problems of where to draw the line for a bright-line test.¹⁰⁰

Horwitz's more serious error is his interpretation of why the court feared the ancient-lights doctrine. The judges in *Parker* worried that the 20-year rule would cause people to erect temporary dead walls to secure their right to build later.¹⁰¹ This very thing had happened in *Mahan v. Brown*,¹⁰² an 1835 case heard in the same court as *Parker*. Rejecting the 20-year rule was a rejection of antisocial behavior, not a promotion of development. In fact, Karsten suggests that having a finite-period rule could actually encourage development to occur faster, because people would build out of fear of losing the right to do so.¹⁰³

Another point is relevant: if the plaintiff valued the light so much, he could have bought the property. This is a low-transactions-cost case, and damages are a less attractive remedy than an absolute rule. As people moved to the neighborhood, the situation could potentially have become one of high transactions costs. Yet timing still favored this defendant if the new people came after he built the store. Those moving in presumably would have paid less for adjacent property if the presence of the store had bothered them. The new neighbors would not have needed court-ordered damages to compensate them; they would have accounted for any potential loss when they paid for their property.

c. *Eminent Domain, Particularly in Railroad Cases*

In *Lindsay v. Commissioner*,¹⁰⁴ the plaintiffs complained that they were not compensated for land taken to build a street. They brought a motion to prohibit the making of the street, which the court discharged. Before the street built up the surrounding area, the land had been flooded twice a day at high tide. Three important issues arose in *Lindsay*: What was precedent? What was the value of the land? What were the expectations of the parties who had obtained the original land grant?

Horwitz uses *Lindsay* as an example of abandoning the English precedent

96. *Parker*, 1838 WL 2969, at [¶¶ 1-12].

97. *Id.* at [¶ 1].

98. *Id.*

99. *Id.* at [¶ 12].

100. *Id.* at [¶ 10].

101. *Id.*

102. 13 Wend. 261, 1835 WL 2493 (N.Y. 1835).

103. Karsten, *supra* n. 33, at 152.

104. 2 S.C.L. 38, 1796 WL 546 (S.C. Const. App. 1796).

that people received compensation for land taken for public use.¹⁰⁵ But the opinion is far more complex than Horwitz implies. First of all, the judges split 2-2 on whether the motion for prohibition should be granted.¹⁰⁶ English law required compensation for the market value of houses and lots taken for a public road. Yet this land was wasteland, which arguably had little market value. In fact, the land arguably only acquired value upon the building of the road. Even if the plaintiffs theoretically were entitled to compensation, that amount might be zero in this case. Still, at least two judges in the case might technically have departed from English precedent.

The nub of the judges' disagreement, however, had to do with the expectations of the parties.¹⁰⁷ Late sixteenth-century South Carolina was far different from late sixteenth-century England. Initial infrastructure was just getting underway in the new Republic, whereas England had a network of established roads, houses, and so forth. Two judges considered the sovereign to have reserved rights to appropriate land to build roads under the state constitution.¹⁰⁸ If this were the case (as seems reasonable in early America), the initial price of land would have reflected this possibility. Compensation for land taken for roads would have paid the plaintiffs twice.¹⁰⁹ More information about initial land grants in South Carolina would certainly help decipher this case.

Lindsay is one of the few Southern cases that Horwitz cites. He includes it as if it were one of a piece with other cases. But the South—and South Carolina in particular—had legal rules about eminent domain, treatment of municipalities, and interpretation of contracts that differed from Northern law.¹¹⁰ I would have liked to see greater acknowledgment of differing states' histories, especially from a historian.

In *Callender v. Masrh*,¹¹¹ the plaintiff had built his house twenty years before, alongside an established street in Boston. Because the city surveyor determined that the steepness of the street endangered the public, he ordered the street dug down to smooth out the slope. Doing so exposed the foundations of the plaintiff's house, which had to be built up at great expense. The plaintiff won at trial but the appellate court reversed, nonsuiting the plaintiff.¹¹²

Horwitz calls this a leading case and derides the court for refusing to compensate the plaintiff for the taking of his land.¹¹³ He claims that their refusal implies that consequential damages had been included in the initial price of the

105. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 63-64, 64 n. 8.

106. Lindsay, 1796 WL 546, at *13. The judges also argued about the constitutionality of the Act of 1721 (under which the case fell) and its conformance with principles elucidated by Blackstone. *See id.* at **10-13.

107. *See id.* at **11-13.

108. *See id.* at *12.

109. Some states, including Pennsylvania, apparently wrote specific language into the original land grants. I do not know if South Carolina did and Horwitz does not shed light on this issue.

110. *See Wahl*, *supra* n. 47, at 102.

111. 19 Mass. 418, 1823 WL 1672 (Mass. 1823).

112. *Id.* at *11.

113. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 72.

land.¹¹⁴ This suggests that the court considered a taking to have occurred and simply did not require the public to pay. Such an outcome might trouble anyone, including most economists, because confiscation is involuntary. Nothing guarantees Kaldor-Hicks improvement, much less Pareto improvement.

In fact, the court determined that *no* land had been taken from the plaintiff.¹¹⁵ The plaintiff based his case on the argument that he owned the street to its middle and the city merely had an easement to use it. The court rejected this, saying that the city must have paid for the land when it was originally taken to build the road.¹¹⁶ The issue was not the land on which the road was built, it was the effect on the plaintiff's house from the city's use of the city's property. I suspect that the plaintiff attempted to use an eminent-domain argument because he knew that, if he were successful, he could reasonably argue that his property—the house as a part of the parcel of land including the street—had fallen in value. But if the city owned the road, the plaintiff had to face the fact that the city was always altering the streets.¹¹⁷ In fact, the judge asked if the plaintiff had calculated the chance of a street being raised or lowered and his lawyers said he had—but altered “only in a legal manner,” whatever that meant.¹¹⁸

Once again, the judges did not reach their decision lightly. They thought this was a hard case, and asked prescient questions about whether the legislature could have determined a way for the beneficiaries of the improvement to pay their neighbor for his losses, particularly because he had enjoyed the neighboring property as it was for twenty years. To me, this illustrates judges' implicit desire to transform what might seem to be a Kaldor-Hicks improvement into a Pareto improvement.¹¹⁹ Whether that would have been administratively feasible is another question.

What are the distributional implications of this case? The users of the street benefited whereas the landowner bore the costs. Perhaps he should have anticipated these costs. Regardless of whether he did or not, the beneficiaries of the legal rule applied in this case were likely a wide range of the population, not necessarily entrepreneurs, industrialists, or capitalists.

The *Beekman v. Saratoga & Schenectady Railroad*,¹²⁰ case concerned the building of a railroad close to the plaintiff's house and outbuildings. One question that arose was whether an act that allowed the railroad to take private property for fair compensation was a legitimate use of eminent domain. Also at issue was whether the plaintiff had originally given his consent to the path of the road and

114. *Id.*

115. *Callender*, 1823 WL 1672, at *4.

116. *Id.* at **5, 9. Alternatively, as in *Lindsay*, the original purchaser of the land accounted for the possibility of a road in the price he paid, then passed this on to subsequent buyers. *Lindsay*, 1796 WL 496, at *1; *Callender*, 1823 WL 1672, at *9.

117. Another argument in this case was whether the road was altered or simply amended, as statutes encompassed one but not the other. *Callender*, 1823 WL 1672, at *6.

118. *Callender*, 1823 WL 1672, at *5.

119. I say “seem to be” because the plaintiff probably should have taken street alterations into account when he purchased the property, so he could have avoided being a loser when the street was dug down.

120. 3 Paige Ch. 45, 1831 WL 2930 (N.Y. Ch. 1831).

whether the defendant could have built the road in any other way.

Beekman raises many of the interesting questions associated with the treatment of railroads in the nineteenth century. Certainly, railroads were a private enterprise. Yet they provided a somewhat public service—they could not refuse passage or shipment for anyone willing to pay the fare. And they took the place of other sorts of transportation, like regular roads, the land for which could have been acquired by eminent domain.

Without eminent domain, the public sector would have to negotiate with every private landowner. Holdout problems are potentially costly, and the public could be denied something quite beneficial simply because one private party hopes to extract top dollar from the government. Here we have a classic transactions cost issue—if everyone else together values the property as a public thoroughfare more than the private landowner does for his own use, without eminent domain the public might not be able to buy off the landowner.

Naturally, we would not want to overuse eminent domain. It can correct market failure when transactions costs are high, but we would not want to employ it where transactions costs are low. Ordinarily, private companies like factories can easily negotiate with private landowners in a recognized market if they want a piece of property. But public transportation is arguably different. It connects long strings of property together. The high-transactions-cost problem comes into play here, unlike in the factory setting. Permitting the use of eminent domain thus makes some sense for public transportation companies, even if they are privately owned.¹²¹ The *quid pro quo* is that society regulates tolls and oversees repairs so that these companies provide appropriate benefits to the public as well as enjoy the power of using eminent domain. The *Beekman* court made this clear, saying that the state could prosecute the railroad or even revoke its charter if it did not fulfill its public responsibilities.¹²²

What does this case say to Horwitz? He does not tackle the thorny issues of a private company using the power of eminent domain. Instead, he is outraged by a comment in the case transcript that the state could take private property, even for private use, without compensation if it wanted too.¹²³ Economists—just as Horwitz and nearly everyone else—might find this possibility alarming. If the initial price of property did not reflect an accurate possibility of its being used by the public sector, or if eminent domain were used to bypass a functioning market, economists would certainly condemn this practice as inefficient as well as unfair.

But the words that excite Horwitz were part of a blustering outburst by the defense lawyer. As a sidelight to this particular case, the lawyer wanted to emphasize the power of the state legislature. But nowhere did he suggest that a railroad could take property without paying for it, and certainly the Chancellor in

121. Using local records of transportation companies, Freyer found that the companies indeed used the power of eminent domain but did not obtain property at particularly favorable prices. See Tony Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 6 Wis. L. Rev. 1263, 1265 (1981).

122. *Beekman*, 1831 WL 2930, at *6.

123. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 65.

Beekman did not think this. Nor did the New York legislature, which only allowed a railroad to take private property by paying fair compensation that was determined by government-appointed commissioners.

Horwitz, like others before him, includes a ringing passage from *Lexington & Ohio Railroad v. Applegate*,¹²⁴ in his book:

The onward spirit of the age must, to a reasonable extent, have its way. The law is made for the times, and will be made or modified by them. The expanded and still expanding genius of the *common law* should adapt it here, as elsewhere, to the improved and improving conditions of our country and our countrymen. And, therefore, railroads and locomotive steam-cars—the offsprings, as they will also be the parents, of progressive improvement—should not in themselves, be considered as *nuisances*, although, in ages that are gone, they might have been so held, because they would have been comparatively useless, and, therefore, more mischievous.¹²⁵

I find these words remarkable for their eloquence and emphasis on the flexibility of the common law. But, according to Horwitz, the passage clearly shows that judges openly celebrated the social utility of railroads, despite the injuries they inflicted.¹²⁶ He leaves the reader with the impression that such injuries were left uncompensated.¹²⁷ This does not reflect the complexity of the case and the opinion.

The quoted passage—dicta only—tells us little about what actually happened. In *Lexington*, the question was whether the court would uphold an injunction issued by the Chancellor of Louisville to prevent a railroad from running on city streets because it reduced the value of adjoining property belonging to the plaintiffs. As in *Callender*, the plaintiffs tried to argue that the city had an easement to use the streets and, by ceding that to a private company, they deserved compensation under eminent domain. They also claimed that the railroad was a nuisance and drove down the value of their property.

Like the *Callender* court, this court determined that the road itself was already public property and rails merely provided transportation in a different way.¹²⁸ The court also distinguished a city railroad with short trains from a noisy, long, high-speed, long-distance railroad that would have required embankments and altered the grade of the road.¹²⁹ Most importantly, many people disputed the claim that property values declined. Some proposed that steam cars were safer and more easily controlled than horse-drawn vehicles. Consequently, the lots beside the road may actually have increased in value.¹³⁰

The opinion does refer to the possibility that profits from existing businesses

124. 8 Dana 289, 1839 WL 2567 (Ky. App. 1839).

125. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 75 (quoting *Lexington v. Applegate*, 1839 WL 2567, at *15).

126. *Id.*

127. *Id.* at 76-78.

128. *Lexington*, 1839 WL 2567, at **4-5. The legislature had chartered the railroad and authorized it to use the streets. Epstein said the main point of the case is that the court deferred to the legislature's judgment, not that they desired to subsidize the railroad. Epstein, *supra* n. 28, at 1731.

129. *Lexington*, 1839 WL 2567, at *10-11.

130. Karsten stresses this also. See Karsten, *supra* n. 33, at 141.

might be partially transferred to “more useful” businesses elsewhere.¹³¹ If this occurred, then the court may have been supporting what it perceived to be a Kaldor-Hicks improvement with the plaintiffs indeed being the losers, as Horwitz suggests.¹³² But the winner was not the railroad, but rather other businesses and commuters enjoying a more convenient form of transportation.

As a final consideration, suppose the judges had upheld the injunction or awarded compensation to the property owners. Who ultimately would have paid? Probably commuters. On average, these people were likely far less well-endowed than those who owned property and businesses alongside the main street. Because the plaintiffs lost, any distributional consequences from the court's judgment arguably favored the less wealthy in society.

In *Smith v. Boston*,¹³³ the plaintiff Smith protested the city's discontinued use of a street that had enabled him to get to his own property. He still had access via other public streets, but he believed his property had lost value and so wanted compensation from the city. The appellate court upheld the trial court's ruling for the defendant.

Horwitz uses *Smith* as an illustration of a private claim failing if the public generally had similar losses.¹³⁴ According to him, courts used the public nuisance doctrine not to help people, but rather to deny damages to private parties.¹³⁵

Here is a different way of looking at this case. Suppose the public sector generally makes decisions that lead to Kaldor-Hicks improvements. These might include building roads, which could give windfalls to adjoining property owners and injure other parties, and discontinuing roads, which could have the reverse effect. Transforming these sorts of Kaldor-Hicks improvements to Pareto improvements could cost quite a lot to administer—so much, perhaps that some changes benefiting society simply would not transpire. Perhaps for this reason, the public does not confiscate the incremental value of land alongside a newly built road. So it would be inconsistent to compensate private parties for losses in property value if the road shut down.¹³⁶

This might be a different case if the closure of a public road cut off all access to private property.¹³⁷ One reason for building roads is to make getting from place to place easier. People naturally rely on this, building up property along the road. Upon road closure, compensating these people for reasonable reliance expenditures might make sense. Smith was not this type of property owner.

More to the point, the distributional consequences of this case do not go in the direction Horwitz needs to make his point. Who benefits? Suppose that the legislature shut down the road as a Kaldor-Hicks-improving device. The winners

131. *Lexington*, 1839 WL 2567, at *13.

132. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 75.

133. *Smith v. Boston*, 61 Mass. 254, 1851 WL 4481 (Mass. 1851).

134. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 77.

135. *Id.*

136. Perhaps the plaintiff should have pursued the persons who sold him the lot if they had misrepresented the possibility of the road closing down.

137. Epstein faulted Horwitz for failing to mention this crucial point. See Epstein, *supra* n. 28, at 1732.

were the users of a transportation network, the loser was the landowner. I suspect that users of public thoroughfares as a class tended to be less well off than owners of land and other property.

Just as in *Lexington*, in *People v. Kerr*,¹³⁸ the principal plaintiffs owned lots along a street that was being outfitted with rails to run a city railroad at the same grade. They made eminent domain arguments as in *Callender*, saying they owned the street to its middle. The trial judge said the plaintiffs had no cause of action and dismissed the case.¹³⁹ The appellate court affirmed.¹⁴⁰

Horwitz uses *Kerr* to illustrate the powerful impulse of nineteenth-century judges to immunize private businesses from lawsuits and leave the injured without compensation.¹⁴¹ He interprets a statement by the trial judge as saying that, even though the railroad created a nuisance for the landowners, the legislature's blessing of its existence created no concomitant requirement to pay.¹⁴²

But the court's decision was based on the fact that the landowners had received compensation either via eminent domain payments at the time land was taken for the original road or through the prices they paid for lots purchased after the road was built.¹⁴³ The city railroad was simply another way of using the existing road. If the railroad were high-speed or had altered the nature of transportation along the road significantly, the opinion suggests that the court may have decided differently.¹⁴⁴

As in *Applegate*, the most noteworthy dicta has to do with the flexibility of the common law:

I do not believe that it is necessary or possible, for the courts to lay down the exact limits of the uses to which land dedicated to a street in a great city, may be applied, or for which it may be required. Any judge who should attempt to define such limits by his own knowledge or experience at the present day, while he would not doubt go far beyond what his predecessor might have dreamed of a century ago, would, with as little doubt, be left far in the back ground in the progress of civilization and improvement, which is to take place in the hundred years to come. The principle, that in the dedication to the uses of a city street is involved the right to apply the land to all the public and beneficial uses for which such streets shall, from time to time, be adapted and applied, is one which is in accordance with the nature and character of the common law, and which will accommodate itself to the exigencies of the present and the future without injury to individuals.¹⁴⁵

As in other cases of this sort, the distributional consequences of the court's decision do not support Horwitz's thesis. The beneficiaries of the ruling likely were commuters.

138. 27 N.Y. 188 (1863).

139. *Id.* at 180.

140. *Id.*

141. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 79.

142. *Id.* at 95.

143. *Kerr*, 27 N.Y. at 209-13.

144. *Id.* at 204-05.

145. *Id.* at 203.

d. *A bit of Contract and Tort Law*

Others have capably dissected the flaws in Horwitz's analysis of contract and tort law. I will therefore confine myself to a short discussion of three issues and two cases in this area.

On the negotiability of instruments: Horwitz sees these as leading to oppression of commercially unsophisticated groups.¹⁴⁶ But, in and of itself, negotiability gives people an easier way to realize gains from trade. Instead of needing a coincidence of wants to effect trade, people can use a recognized medium of exchange. Negotiable instruments work to reduce transactions costs. It is of course possible that sharp dealing or fraud could mislead people. But there the culprit is not negotiability, but rather whether reasonable parties could have understood the terms of exchange. In the classic case of *Williams v. Walker-Thomas*,¹⁴⁷ for example, one issue is whether a reasonable plaintiff could have comprehended the terms of the contract. Presumably, even Horwitz could see the desirability of opening up markets to people who could not otherwise enter them.

What about Horwitz's complaint that workers were oppressed by contracts which permitted employers to withhold all pay if the worker did not complete the period of employment? To evaluate his complaint, we need to dig deeper into the workings of the antebellum labor market. At the time, laborers were hired by the year and also by the day. Some seasons are busier than others in an agricultural workplace. As Karsten has ably explained, the only way to get the yearly market to function properly was if people could set up effective methods to deter yearly workers from defecting to the daily market when demand escalated and daily wages rose.¹⁴⁸ One such method was the "no pay until the end" rule.

Finally, a brief point about insurance cases.¹⁴⁹ According to Horwitz, at least three antebellum insurance cases rejected precedent: *Silva v. Low*,¹⁵⁰ *Thurston v. Koch*,¹⁵¹ and *Lee v. Boardman*.¹⁵² But they did not. Either Horwitz misrepresents the English law or claims mistakenly that judges did not follow precedent.

In *Silva* for instance, Horwitz suggests a new legal path appeared when the court ordered a new trial on the grounds that the jury verdict was contrary to the

146. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 219.

147. 350 F.2d 445 (D.C. App. 1965).

148. Karsten, *supra* n. 33, at 166-82. Karsten also looked at several cases to test Horwitz's claim that employers had incentives to make conditions bad for their workers near the end of a contract term. He found that, if employers did so, courts essentially considered it a situation of constructive discharge and made them pay wages. Employers therefore did not have the perverse incentives that Horwitz fears. *Id.*

149. Horwitz also claims that judges treated marine and fire insurance policies differently for developmental reasons. According to him, American courts were "substantially more liberal in allowing the insured to depart from the strict terms of fire insurance policies." Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 230. But differences in application might simply be due to divergence in available information. Moral hazard is a problem for insurance companies. Ascertaining whether the insured had a hand in causing an accident was easier in fire cases because fire sites tend to be easier to inspect than shipwrecks.

150. 1 Johns. Cas. 184, 1799 WL 574 (N.Y. Sup. 1799).

151. 4 U.S. 348 (C.C.D. Pa. 1800).

152. 3 Mass. 238, 1807 WL 759 (Mass. 1807).

weight of evidence.¹⁵³ In describing the case, he leaves the impression that the jury somehow failed to move in the direction the courts desired.¹⁵⁴ A careful reading of the opinion reveals, however, that a divided appellate court granted a new trial partly because the trial judge in his instructions gave his own opinion about where the weight of evidence lay rather than leaving the question entirely to the jury. The dicta in *Silva* about abandoning precedent are just that—dicta. Perhaps the most notable feature of this case is the lawyers: Aaron Burr for the plaintiff and Alexander Hamilton for the defendant.

In *Swindler v. Hilliard*,¹⁵⁵ the owners of a steamboat were carrying cotton for hire for two different people. The bailment contracts included the usual exemptions from liability due to damages caused by an act of God or the public enemy, but they added the dangers of fire to the list. The phrase was not intended to mean any fire, but rather the fire needed to propel the boat itself. As the defense lawyer put it, “if the loss is limited to her own fire, the shipper may be willing to encounter this risk, on the ground that in the construction of the boat, every means which the ingenuity of man can devise have be resorted to, to protect her from this very danger.”¹⁵⁶

Horwitz says that the court disputed the view that common carriers cannot contract out of negligence.¹⁵⁷ This is false. In fact, the court agreed with the general maxim of “no contracting out of negligence.”¹⁵⁸ It did acknowledge that special exceptions could be added to contracts.¹⁵⁹ But, to win a case in which the plaintiff had suffered a loss of cargo, the common carrier had to show two things: the cause of the loss was within the exception, and the carrier *did not commit any negligent act*.¹⁶⁰ As the court emphasized, “The burden of proof lies on him who should best know what the facts are.”¹⁶¹

In *Swindler*, the jury found for the plaintiff because the defendant did not prove that the cotton had been burnt by the steamboat’s fire. But the jury in *Chambers v. Hilliard*¹⁶² found for the defendant because he provided considerably more evidence of the source of the fire and the crew’s lack of negligence. Both cases were appealed, one by the defendant and one by the plaintiff. Both verdicts stood, although Justice O’Neill assented only reluctantly to the second.¹⁶³ He thought he might have reached a different conclusion about the evidence than the *Chambers* jury did, but he deferred to the jury’s verdict.¹⁶⁴

The only nugget of truth in Horwitz’s claim is that Justice O’Neill thought

153. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 142.

154. *Id.* at 142-43.

155. 2 Rich. 286, 1846 WL 2370 (S.C. App. 1846).

156. *Id.* at *14.

157. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 205.

158. *Swindler*, 1846 WL 2370, at *9.

159. *Id.* at *11.

160. *Id.* at *5.

161. *Id.* at *11.

162. 2 Rich. 286, 1846 WL 2370 (S.C. App. 1846).

163. *Id.* at *15.

164. *Id.*

that the facts in *Chambers* might have pointed to negligence on the part of the defendant. Yet O'Neill rightly allowed the jury to interpret the facts while he applied the law. Because the *Chambers* jury did not think the defendant had been negligent, they properly released him from liability. In no way did the court condone contracting out of negligence.

In *Sproul v. Hemmingway*,¹⁶⁵ the defendant's boat crashed into the plaintiff's boat in a narrow channel. At the time of the accident, the defendant's boat was being steered and navigated, but it was also being towed by someone else. Essentially, the defendant had contracted with another party to take the risk of getting the boat through the channel. The plaintiff brought a claim under the doctrine of respondeat superior, which failed.

Horwitz calls *Sproul* a turning point, claiming that it is one of the first cases to absolve a non-negligent defendant when the plaintiff was not contributorily negligent.¹⁶⁶ But the opinion does not express this view. If the defendants were instead the people towing the boat and they were not found negligent, *Sproul* might fit Horwitz's facts. But nothing about the actual defendant's negligence is at issue: all the court determined was that respondeat superior did not apply to the relationship between the defendant and those doing the towing.¹⁶⁷

Sproul, like *Applegate* and *Kerr*, contains powerful dicta about the flexibility of the common law:

The case of a vessel towed by a steamboat, is certainly new in its facts, and could not have been anticipated by the founders of the common law; but it is one of the advantages of the common law, that it depends upon plain, equitable and practicable principles adapted to all times and occasions, and broad and comprehensive enough to embrace new cases as they arise.¹⁶⁸

D. A Conspiracy of Judges?

According to Horwitz, antebellum judges radically altered the path of the law, acting together to help entrepreneurs amass wealth at the expense of the "weakest and least active" of the population.¹⁶⁹ He suggests that, if only those in charge would have used the tax system to redistribute, the process would have been more transparent and could have shifted the burden of growth onto those

165. 31 Mass. 1, 1833 WL 3424 (Mass. 1833).

166. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 90. Williams criticizes Horwitz for misrepresenting what the case says. Williams, *supra* n. 38, at 1191-92.

167. *Sproul*, 1833 WL 3424, at *3.

168. *Id.*

169. See Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 71, 101, 212. Other scholars have criticized Horwitz for failing to reveal persuasive evidence of an alliance between legal professionals and mercantile elite. Note that I focus only on the period during which Horwitz says that judges openly used instrumentalist reasoning to promote developmental goals. One of his major arguments in his second volume, Horwitz, *Transformation 1870-1960*, *supra* n. 2, is that postbellum judges abandoned instrumentalism for formalism so as to keep certain interests entrenched. Richard Posner's keen insight on this is that, if judges wanted to fool the public, why did they ground their opinions in economics during the first part of the century rather than simply using formalism at that time as well? Posner, *supra* n. 46, at 272.

who benefited from it.¹⁷⁰

Horwitz is right in thinking that the tax system provides an alternative redistribution mechanism. In fact, economists generally agree that tax and transfer policies are better ways to redistribute wealth than property law, for example. Why? Because taxation can target inequality on an individual basis whereas property law deals with average and groups—mill owners versus farmers, for example, or residents versus users of streets. Also, property owners may be different from the parties who ultimately bear the cost or enjoy the benefits of a particular law—consumers of agricultural products, users of the services of mills, ordinary boaters, riders of public transportation, and the like. And property law tends to cost more than tax law to administer.¹⁷¹

So perhaps it is only logical that judges did *not* see themselves as instruments of redistribution. Perhaps they realized that any attempt to redistribute through common law could easily backfire. Instead, antebellum American judges seemed to be doing their best to adhere to long-standing legal principles and apply them to increasingly complex situations. They also demonstrated great belief in people's ability to take care of themselves where possible, but were willing to intervene when transactions costs were high or private action was costly to undertake.

One might expect that judges who were carrying out momentous changes would have mentioned it, particularly if they departed from established precedent. But the cases Horwitz highlights show that antebellum judges held fast to what they understood to be common principles in the common law, viewing themselves as respectful of their predecessors. To be sure, they sometimes disagreed amongst themselves about the interpretation of a given fact situation—if an injury was large or small, for example—but they generally agreed that precedent mattered and should be followed where possible.¹⁷² Sometimes, of course, knowledge of precedent was sketchy, but ignorance of precedent is a different story than deliberate departure from it.¹⁷³

Did judges act in concert? Well, no, not in one sense. Like judges in many eras, antebellum American judges were independent thinkers, some of whom liked to write with a particular flourish. Judges certainly disagreed with each other about interpretation of facts or about what constituted a large amount.

170. See Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 100-01. Two questions arise: was it even possible to use the tax system for the things Horwitz mentions? And does he provide sufficient evidence that anyone deliberately chose to activate the common law instead of the tax system? McClain answered no to the second question. McClain, *supra* n. 41, at 385. Epstein also pointed out that the legislators are much easier to buy off than judges—so the problem Horwitz worries about might have been worse if the tax system were used more—and that court opinions are public, not hidden from view. Epstein, *supra* n. 28, at 1744.

171. For more on this matter, see Robert Cooter & Thomas Ulen, *Law and Economics* 104-06 (2d ed., Addison-Wesley 1997).

172. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & Econ. 249 (1976).

173. Schwartz said that judicial opinions simply were not readily available in the early years of nationhood, so it is pointless to talk about American law before the 1800s. Schwartz, *supra* n. 38, at 1727. Few lawyers and judges had access to British cases either. Boorstin argues that the early American law library consisted mainly of Blackstone's Commentaries. Daniel J. Boorstin, *The Mysterious Science of the Law* (2d ed., Beacon Press 1958).

Some of them also liked to tuck flowery or memorable phrases into their opinions. After all, these were public documents that would live long after the judges themselves expired.

Yet what matters is not dicta, but the holding of the case. In sifting through opinions, one must consider what really happened. Perhaps judges had to fit a situation into a statute or a particular scenario in order to get to a certain result. In doing so, they may have expressed opinions upon many matters or used certain sorts of language. But what counts is the judgment ultimately rendered. Here, judges generally seemed to adhere to basic principles that stressed efficiency. Does this mean judges conspired to achieve efficiency, instead of plotting to redistribute wealth? No, not necessarily. In fact, one of the attractive parts of interpreting law from an economic viewpoint is that judges do not have to act deliberately in a given fact situation—they can simply try to ascertain what people would have done to obtain gains from trade if they had only thought about it.

An aside: What about treatise writers? Did they exaggerate the uniformity of American law to suppress controversy over policy, as Horwitz suggests?¹⁷⁴ I think it more likely that treatise writers knew that, by classifying and systematizing the law, they would find a sale market for their product because judges and lawyers relied on precedent. Treatises reduced information costs. Horwitz is in fact far more susceptible to the charge of reducing the law to fit into a particular mold.

Certainly, law can have redistributive effects, and judges may mean for it to. But any redistribution that resulted from the cases I examined did not seem to point in a predictable direction. My impression—and that of other scholars—is that, if anything, antebellum common law probably channeled resources toward consumers of certain goods and services and to the less wealthy. I cannot say for sure, as I have not conducted a thorough analysis. But perhaps judges did what they did and the legislature did not counteract them because legal rules reflected what people wanted. Or perhaps legislators did not redistribute as society might have wanted. If so, any failure in antebellum law occurred not in the courts—where judges seemed to be trying to make the pie as big as possible—but in the legislature, which is better suited to determining how the pie is sliced, as Horwitz himself emphasizes.

III. SO WHAT IS THE STORY?

The tale of antebellum law certainly bears telling. Not only is it fascinating in its own right, it forms a backdrop for today's economic and legal conditions. Where we are now depends in part on what judges decided in the past. What I outline here is a stark contrast to the story Morton Horwitz tells. Mine is a positive tale of efficiency, his is a normative one of redistribution.

One point we differ on is our view of judicial behavior. The economist's model of voluntary exchange and gains from trade has the merits of simplicity and

174. Horwitz, *Transformation 1780-1860*, *supra* n. 2, at 224, 258.

plausibility. I happen to think that the story of law as one of judges trying to maximize the size of the pie for all parties involved (including taxpayers who bear the administrative costs of running the courts) is more plausible on its face than one portraying judges conspiring to get the goodies to the greedy capitalists.

But, ultimately, the proof lies in the pudding. The data I have analyzed—which I plucked directly from the pages of Horwitz’s book—simply do not support his thesis. The empirical work I have done here is suggestive, but not systematic enough to test my thesis. The next logical step might be to study a complete set of appellate cases, Shepardize what appear to be crucial cases, and link them to trial transcripts, manuscript census records that tell us about the litigants, and other historical and archival sources.¹⁷⁵

In the meantime, let me summarize the messages I received from the small set of cases that I analyzed in this paper. They suggest, among other things, that judges expected people to behave in their own interests, to protect themselves when doing so was cheap, to pay their own way, and to expect courts would attempt to mimic market transactions if possible. In other words, judges seemed concerned primarily with efficiency issues, not distributional ones. Here are a few specifics:

- If people can cheaply protect themselves with an explicit contract or a market mechanism such as a reduced price, they should do so and not come whining to the courts. People should think ahead about contingency plans, especially with regard to their neighbors (*Steele, Cary, Thurston, Parker, Callender, Applegate, Kerr*).¹⁷⁶
- If injuries are trivial, don’t waste the court’s time (*Platt*).¹⁷⁷
- If people want a benefit, they should pay for it (*Blood*).¹⁷⁸
- If people cause damage to a particular person, they must pay for it (*Steele*).¹⁷⁹
- If transactions costs are high and the public can be affected by the actions of private parties, the courts will choose a flexible remedy so as not to assign rights to those who do not value them the most. When a private party receives compensation for an injury but the public has not, the courts will not simply elevate the private award as a substitute (*Palmer, Platt*).¹⁸⁰
- The courts will try to avoid giving people unproductive incentives to spend resources simply to acquire property rights (*Palmer*).¹⁸¹
- If people tried hard to anticipate contingencies but did not address one in particular, courts will try to do what the judges think the

175. Ariela Gross used this technique quite effectively. Ariela J. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton U. Press 2000).

176. *Steele*, 1807 WL 874; *Cary*, 1844 WL 4311; *Thurston*, 1815 WL 910; *Parker*, 1838 WL 2969; *Callender*, 1823 WL 1672; *Lexington*, 1839 WL 2567; *Kerr*, 27 N.Y. 188.

177. *Platt*, 1818 WL 2241.

178. *Blood*, 1854 WL 5035.

179. *Steele*, 1807 WL 874.

180. *Palmer*, 1805 WL 809; *Platt*, 1818 WL 2241.

181. *Palmer*, 1805 WL 809.

parties would have agreed to do (*Swindler, Sproul*).¹⁸²

- The courts respect the actions of the legislature, particularly when a statute standardizes and regularizes payment of damages for injuries. At the same time, the courts will not let anyone trample on individual rights too much (*Stowell, Beekman*).¹⁸³
- The courts respect the principles of common law laid down by predecessors, but courts will also have to apply these principles to new situations that arise (*Thurston, Applegate, Kerr, Sproul*).¹⁸⁴
- Judges respect jury decisions (*Swindler, Silva*).¹⁸⁵

IV. WHAT ECONOMISTS CAN LEARN FROM MORTON HORWITZ

Despite the flaws in Professor Horwitz's work, his subject matter and method of pursuing it are worth serious consideration by economists. Fundamental concerns in the discipline of economics are how well off people are, whether we are generally better off now than before, and whether some groups prosper more than others. The institutions we set up to govern ourselves play a role in determining the answers to these questions. Somewhat surprisingly, not even institutional economists have systematically tackled the large questions Horwitz asks.¹⁸⁶ We have Morton Horwitz to thank for reminding us of the important connections between law and economics throughout history.

Horwitz also injects a much-needed consideration of distributional issues associated with law and legal changes. The law-and-economics movement concerns itself primarily with efficiency, both in looking at what legal rules evolved and why and at how people behave given the laws that exist. But, aside from Gerald Friedman, to my knowledge few current economic historians have considered the distributional effects of law in any organized fashion.¹⁸⁷ Even a positive analysis of law could be enriched by a look at distribution.

Most of all, Horwitz is praiseworthy for his accessibility. Storytelling is one of the more effective ways of conveying history, particularly when it interweaves primary texts and commentary in a readable style. I tell a considerably different story of antebellum law, but I nonetheless admire Horwitz's way with words.

182. *Swindler*, 1846 WL 2370; *Sproul*, 1833 WL 3424.

183. *Stowell*, 1814 WL 1038; *Beekman*, 1831 WL 2930.

184. *Thurston*, 1815 WL 910; *Lexington*, 1839 WL 2567; *Kerr*, 27 N.Y. 188; *Sproul*, 1833 WL 3424.

185. *Swindler*, 1846 WL 2370; *Silva*, 1799 WL 574.

186. Douglass North in particular has tried to reinject into economic history a concern with legal and institutional arrangements. Douglass North, *Institutions, Economic Growth, and Freedom: An Historical Introduction* (Elgar 1997); Douglass North, *Institutions and Economic Theory* (Elgar 1995). But even he has not analyzed Horwitz's claims in great detail. Neither have many other economic historians, institutionalist and otherwise, that I contacted while writing this paper, including Warren Samuels, Steven Medema, Nicholas Mercurio, Thomas Weiss, Deirdre McCloskey, and Robert Whaples.

187. Email from Gerald Friedman, Professor of Economics, University of Massachusetts (Jan. 22, 2002) (copy on file with author).

