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The Transformation of American Law, 1780-1860

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THE TRANSFORMATION OF AMERICAN LAW, 1780-1860. By *Morton J. Horwitz.* Cambridge: Harvard University Press. 1977. Pp. xvii, 356. $16.50.

It is in no way snide to suggest that *The Transformation of American Law* is a long-awaited book. The brilliant portions of the overall argument that Morton J. Horwitz of the Harvard Law School previously laid before us only whetted appetites for the full-course feast. The wait has proved worthwhile. The result is a Lucullan banquet of memorable quality and proportions. This volume is a seminal work in the meaningful sense that it has reshaped the framework for the interpretation of American legal history.

Although *The Transformation of American Law* must be read to appreciate its subtlety and complexity, the basic argument is straightforward. The author describes how in the seventy or eighty years after the American Revolution, industrial and mercantile groups associated themselves with judges and courts to transform the system of private law in their own interests. This alliance of commerce and the judiciary overthrew the precommercial and antidevelopmental legal doctrines and institutions of the eighteenth century. The legal system became an instrument for the direct promotion of economic growth. The result was that the American legal system underwent a major transformation which was essentially complete by 1850: "[I]t enabled emergent entrepreneurial and commercial groups to win a disproportionate share of wealth and power in American society" (p. xvi). The transformed legal system became a major instrument in the hands of the newly powerful commercial groups in society.

Common-law judges played an essential role in the emergence of an instrumental conception of law in the early nineteenth century; the judiciary began to use common law as an instrument of change. According to Horwitz, eighteenth-century judges had conceived of the common law as composed of fixed and almost immutable principles. Moreover, they believed that English case law provided an answer to all matters not covered by statute (p. 8).

> What dramatically distinguished nineteenth century law from its eighteenth century counterpart was the extent to which common law judges came to play a central role in directing the course of social change. Especially during the period before the Civil War, the com-

> mon law performed at least as great a role as legislation in underwriting and channeling economic development. In fact, common law judges regularly brought about the sort of far-reaching changes that would have been regarded earlier as entirely within the powers of the legislature [pp. 1-2].

Thus nineteenth-century judges began to conceive of common-law adjudication as a process of making and not merely discovering legal rules. This led them to frame general doctrines based on a self-conscious consideration of social and economic policies.

The author traces the emergence of an instrumental conception of the common law in such areas as property, contract, and commercial law, and the promotion of economic growth and competition. Contemporaries, for example, came "to regard property as an instrumental value in the service of the paramount goal of promoting economic growth" (p. 53). Horwitz shows how

> the conception of property gradually changed from the eighteenth century view that dominion over land above all conferred the power to prevent others from interfering with one's quiet enjoyment of property to the nineteenth century assumption that the essential attribute of property ownership was the power to develop one's property regardless of the injurious consequences to others [p. 99].

This sweeping redefinition of the norms of property ownership was manifested, for example, in tort law with the displacement of traditional doctrines of strict liability and just compensation by the negligence standard, which allowed greater freedom for enterprising but hazardous uses of property.

This development was also reflected in the revised legal status of the corporate franchise. As a legal presumption in favor of competition emerged in the common law for the first time, franchise owners of property lost the right to exclude competition (p.111). Within a generation after 1820, Horwitz observes, "judges and jurists had come to agree that a policy in favor of competition was a *sine qua non* for further economic development" (p. 139), and his extensive discussion of the *Charles River Bridge* case (pp. 130-39) well illustrates this theme.

By the time of the Civil War, procommercial doctrines had supplanted anticommercial rules in much of American law. Judicial recognition of newly emergent actuarial concepts resulted in liberalization of the law governing marine and fire insurance. State legislatures repealed or modified laws against usury in response to the demands of the emerging market system. In some areas where state judges and legislatures resisted pressure for change, the federal judiciary established procommercial doctrines by overriding state law. Horwitz describes the successful efforts of federal judges to give national effect to rules protecting holders of negotiable instruments

despite the existence of conflicting state law (pp. 220-26). These developments in legal doctrine were accompanied by changes in the character of the legal profession and its role in society. For example, commercial lawyers who specialized in such new fields as marine-insurance litigation became the leaders of the bar and entered into an alliance with the bench and commercial interests to promote economic development and to reduce the power of juries in civil matters.

The fruition of an instrumental conception of the common law in promoting economic development was accompanied, especially after 1850, by what Horwitz describes as the rise of legal formalism. Once the creation of new common-law rules supportive of economic development was achieved, a flexible and instrumental conception of law was no longer needed (p. 254). The commercial interests and the judiciary recognized that it had become essential to give common-law rules the appearance of being self-contained, apolitical, and inexorable. The author suggests that the deep pressure toward formalism in nineteenth-century law was ultimately designed to preserve the advantages secured in the transformation of the law. Having achieved a substantial redistribution of wealth and power on behalf of the more aggressive elements of society, the procommercial forces were not interested in further exercises of instrumentalism which could only work to their detriment. Consequently, private law acquired the previously contrasting antiutilitarian and formalistic cast of public law, which had protected the commercial and entrepreneurial interests from legislative encroachments on property rights (pp. 255, 259). Horwitz concludes that "the paramount social condition that is necessary for legal formalism to flourish in a society is for the powerful groups in that society to have a great interest in disguising and suppressing the inevitably political and redistributive functions of law" (p. 266).

The history of substantive law is the most neglected aspect of American legal history. Thus Horwitz's history of developments in the common law is one of the most important contributions of the volume. It is immensely useful to have available an explanation of what a series of statutory changes and common-law decisions apparently meant. The author is particularly aware of the limits of constitutional history as a guide to understanding changes in the American legal system in the nineteenth century (p. xii). In contrast to the usual emphasis on developments in constitutional law, Horwitz's focus on the relationship between private law and economic change evidences "the more regular instances in which law, economy, and society interacted" (p. xii). This approach is ultimately a most fruitful and enlightened form of legal history, but the intellectual and scholarly talents necessary to carry out such a task successfully are great.

Horwitz is well aware of the importance of translating the mysterious science of the law into more general and accessible categories for professional historians and other nonlegally trained scholars (p. xi). Yet it is debatable whether he has succeeded in his goal of general communication. While the general thesis and many of the chapters are readily comprehensible, parts of the volume, especially the lengthy chapter on developments in contract law, are very difficult reading either for practicing historians or for generally educated readers. In my view only specialists will be able to understand and evaluate the validity of Horwitz's major discussion of how the law of contract was transformed in an increasingly commercial society by the development of extensive markets and how the equitable conception of contract law was overthrown by the will theory after 1825. The chapters treating substantive law are formidable reading. The situation is not helped by the tendency of Horwitz and other legal historians to slight the existing historical literature in their writing of legal history.[1] Historians will find few references in this volume to the traditional topics of antebellum history. While this is in many ways a tribute to the originality of Horwitz's analysis, it also makes it too easy for general historians to ignore his contributions. It will be a great tragedy if economic, political, and intellectual historians of antebellum America, who are ultimately the largest audience for *The Transformation of American Law*, do not make the necessary efforts to assimilate the author's findings into their understanding of the era.

Historians have an inherent skepticism about books which emphasize great transformations over time and which focus on dichotomies between an earlier and later experience. Almost any book dealing with transformations seems to exaggerate the degree of change from a relatively primitive past to a more modern present.[2] While the notion of a transformation makes for a good title, it leads scholars with more familiarity with an earlier period, such as the colonial era of American history, to question the accuracy of presentation of their special field. Quotations such as the following only add to their skepticism: "By 1820 the legal landscape of America bore only the faintest resemblance to what existed forty years earlier. While the words were often the same, the structure of thought had dramatically changed and with it the theory of law" (p. 30).

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1. For my discussion of similar tendencies in recent writings of Julius Goebel, Jr., and William E. Nelson, see Flaherty, Book Review, 40 U. CHI. L. REV. 467 (1973) (review of J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOLUME I, ANTECEDENTS AND BEGINNINGS TO 1801 (1971)); Flaherty, Book Review, 26 U. TORONTO L.J. 109 (1976) (review of W. NELSON, THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975)).

2. *See, e.g.*, R. BUSHMAN, FROM PURITAN TO YANKEE (1967).

Although I am ultimately persuaded that major changes occurred in the American legal system in the seventy or eighty years after the American Revolution, I am not as certain that some form of an instrumental conception of law did not already exist in the colonial era. Lack of evidence and lack of research contribute to the uncertainty. There are very few reported judicial opinions for the colonial era of American history. Thus, although the judicial decisions and jury verdicts in particular cases are available, the reasoning normally is not. In addition, no scholars have studied colonial civil litigation intensively enough to reach appropriate conclusions about the presence or strength of an instrumental conception of law during this time. Some of us who work in early American legal history believe that there is at least the possibility that the colonial judiciary was acting in an instrumental fashion in many of their decisions and suspect that antidevelopmental attitudes were not as common in the eighteenth century in the American colonies as Horwitz suggests.

There is also the danger that the notion of a transformation will suggest much faster-paced changes than actually occurred. The transformation of the common law in the hands of the early nineteenth-century judiciary was in fact very slow-paced, a fact which Horwitz acknowledges on several occasions: "The effort to free property law from its antidevelopmental premises was still very much a struggle at mid-century" (p. 40).[3] As Horwitz mentions in connection with the development of an aspect of contract law, there was "a period of uneasy compromise between the old learning and the new" (p. 170), and the broad validity of this theme is suggested by the work of Chancellor James Kent of New York, one of America's premier jurists, whose opinions in the 1820s owed more to the old school than the new.[4] The late eighteenth and early nineteenth centuries had a transitional character for many aspects of private law (p. 170).

There is a further risk that the notion of the transformation of American common law in the hands of the judiciary in the seventy or eighty years after the American Revolution will neglect the seeming inevitability of such changes. The Revolution had a liberating effect on society and removed the restrictions on economic development imposed under the British colonial rule. The aftermath of the Revolution also saw the beginnings in the United States of the process of industrial and economic growth, which had already begun in England. The gradual introduction of turnpikes, canals, railroads, and private corporations made changes in the law and legal system

3. Other statements recognizing that the transformation in property law was not completed by mid-century can be found at pp. 104-05, 108.

4. *See, e.g.*, Horwitz's analysis of Chancellor Kent's opinions dealing with the right of the owner of a franchise from the state to exclude competition (pp. 124-26).

inevitable. Horwitz's *The Transformation of American Law* is in fact a documentation of the transitions and changes which occurred with the beginnings of industrialization. The surprising fact is that this transformation was so slow-paced, convoluted, and confused. State courts in particular had to be dragged along in certain areas of substantive law by the commercial interests. It is not clear that the author has satisfactorily resolved the degree of interaction between economic changes and the legal system, although he does on occasion recognize that eighteenth-century legal assumptions were undermined by "a startling variety of complicated economic changes" (p. 114). He observes, for example, that "the most decisive influence on the courts" in terms of the development of new attitudes toward competition and economic innovation was probably the advent of the railroad (p. 137). It would also be useful to know more about comparable developments in English common law. A number of new legal developments do appear in both England and America at the same time—for example, the first recognition of expectation damages after 1790 (p. 174) and the determination of the legal liability of employers for negligent injuries of workers in the 1830s and 1840s (pp. 208-09). Examination of English developments might shed light on the question whether instrumentalism was a necessary conceptual framework for legal change.

The Transformation of American Law is full of outstanding research and stimulating hypotheses and generalizations. Each chapter uses case after case to trace the details of changing conceptions in the common law. Even the approximately eighty pages of learned footnotes contain many substantive discussions. It is unfortunately beyond the capacity of any single reviewer to test Horwitz's evidence at present; his overall conceptions and specific conclusions will have to be evaluated over time.[5] If this learned volume does not stand the test of time and achieve the greatness that is already predicted for it, it will at least require an army of researchers to prove the author wrong.

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5. It may be instructive to reflect in this connection on the findings of one legal historian who tested the use of primary evidence in a recent monograph. *See* Zobel, Essay Review, 50 NEW ENGLAND Q. 138 (1977) (review of W. NELSON, *supra* note 1).