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THE STUDIED AMBIGUITY OF HORWITZ'S LEGAL HISTORY

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It is no accident that the commentators assembled today are constitutional and political theorists as well as legal historians. It is no accident that Professor Horwitz ended his paper by stating: "It is time for us to bridge the chasm between legal theory and legal history."[1] The excitement of legal history today, for most of us who entered that discipline in the late 1960s and early 1970s and for those who have entered since then, is in the interface of legal history and contemporary ideological debate. In addition, the excitement of contemporary theory, for those currently engaged in it, is increased regularly by exposure to history, particularly history as a source of the deep premises and ideological boundaries of a culture as it confronts the passage of time. No contemporary legal historian has been concerned more persistently with the relationship of legal history to contemporary political and legal theory than Horwitz. One might even say that no contemporary legal historian has bequeathed to his audience a wider set of evocative constructs for use in historiographical and polemical debate.

I want to speak generally about some of those Horwitzian constructs, and more specifically about the ones that form the focus of our discussion today—republicanism and liberalism. In the course of speaking, I want not only to refer to Professor Horwitz's contributions, but also to describe the use of those contributions by others.

I.

Professor Horwitz's scholarship has been wide ranging. He has covered time periods from before the Revolution to the present

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1. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987).

and touched on subjects as diverse as early nineteenth-century water rights decisions and the political agenda of contemporary welfare economists. Nonetheless, I discern a pattern in his work, and, more significantly for present purposes, a pattern in the reaction to that work.

Horwitz's own pattern is to intervene in a historiographical discussion, identify the conventional historiographic wisdom informing that discussion, critique that conventional wisdom, and suggest that the discussion should be reframed around certain evocative and fruitful constructs that are offered as part of a new "window" into the subject matter being discussed. Professor Horwitz observed, for example, that judges in early nineteenth-century America engaged in "instrumentalist" modes of reasoning and discourse, at least in private law subjects,[2] whereas judges in the same subjects, by mid-century, shifted to "formalist" modes.[3] The late nineteenth and early twentieth centuries formed a backdrop for the emergence of an "objectification" or "neutralization" of such doctrines as causation in tort law.[4] Justice Holmes, in his later academic and early judicial career, can be seen as a "positivist"; previously he had been a "pre-positivist."[5] The first third of the nineteenth century marked the origins of a "public-private distinction" between spheres of law, and more fundamentally, spheres of life. Prior to the emergence of that "distinction," law was perceived as a holistic entity, and living in the world was not radically separated into "public" and "private" compartments.[6]

One may already notice that Horwitz's evocative constructs function on more than one level. They have both a specialized, historiographical meaning and a generalized meaning derived from the vocabulary of current political discourse. The most ubiquitous example is formalism. Prior to Horwitz's use of that construct in

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2. *See* Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, 5 PERSP. IN AM. HIST. 287 (1971).

3. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 253-66 (1977).

4. *See* Horwitz, *The Doctrine of Objective Causation*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 201 (D. Kairys ed. 1982).

5. *See* Horwitz, *supra* note 1, at 73.

6. *See* Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

The Transformation of American Law,[7] the word was in existence in legal and philosophical scholarship and had been used, although not precisely defined, in several different ways. Llewellyn referred to a "formal style" of judicial opinion writing, using the word "formal" to capture a tendency to reason syllogistically from premise to conclusion and to place heavy reliance on "string citations" of prior precedents.[8] Morton White, in an influential 1948 book,[9] identified early-twentieth-century social thought with an "antiformalist" epistemology, defining formalism only implicitly as a mode of thought and discourse that Holmes, Charles Beard, Thorstein Veblen, and other early-twentieth-century scholars were "revolting" against. Finally, Duncan Kennedy published an essay on "legal formality," in which he used the word to signify an entire system of interconnected professional and jurisprudential assumptions, a "deep structure" of modernist legal thought.[10]

Horwitz's "formalism" thus evoked a variety of meanings at the same time, and although the context of Horwitz's formalism was clearly historical, the overtones of the word were presentist as well as historiographic. Moreover, at times Horwitz appeared to be using "formalism" in a near-universalistic manner, suggesting characteristics basic and endemic to the legal system in American culture. This usage produced the second pattern: widespread interest in Horwitz's "window" on the past by a variety of scholars, not all of them legal historians or even lawyers or historians; a widespread disagreement on what Horwitz meant or could have meant by the term; and the appearance of numerous efforts to critique or apply Horwitz's "thesis," signified by the formalism construct, to any number of historical, historiographical, or contemporary political issues. One consequence of this effect has been to so obscure and muddle the meaning of formalism that recent work on nineteenth-century American law has tended to abandon it.[11]

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7. M. HORWITZ, *supra* note 3.

8. *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

9. *See* M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1948).

10. *See* Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

11. *See, e.g.*, G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980); C. Dalton, Losing History: Tort Law in the Nineteenth Century and the Case of *Rylands v. Fletcher* (unpublished manuscript).

The first pattern emerging from Horwitz's work, then, is a self-conscious interfusion of legal theory with legal history through the use of an evocative construct or constructs capable of being perceived on multiple levels. The second pattern is the tendency of others to emphasize the level of meaning they find most interesting or most objectionable, to the exclusion or distortion of other levels.

II.

I turn now to the paper before us, with the purposes of discerning whether the first pattern I have identified previously is present in this work, and speculating whether the second pattern will once again surface, and if so, with what consequences.

In this paper, after some warmup, Horwitz turns to "the current debate over republicanism versus liberalism in early American political and constitutional thought," a debate that he hopes "will spark a new age of reconsideration of the entire body of American constitutional history."[12] This warmup is not accidental; Horwitz seeks to establish by his exploration of the republican-liberal debate a "line of development . . . between the liberal ideal of a neutral, night-watchman state of Madison's tenth *Federalist* and the ideas of neutrality that were most elaborately expressed in the classical legal thought of the Lochner era,"[13] those ideas having been the subject of the warmup. In short, Horwitz reveals one of his thematic purposes before exploring the republican-liberal debate: to establish liberalism as a linear ideology spanning American constitutional history.

Horwitz now enters the debate. In vintage fashion he intervenes in a historiographic controversy with the aim of providing a new "window." In the process he once again produces some evocative constructs. This time, however, the constructs are republicanism and liberalism themselves, terms that have their own evocation in the historical literature of the Revolution, the framing, and the Marshall Court periods. Horwitz develops his own definitions of these constructs, but because of their current historiographical meanings, his intervention becomes a more formidable task. In addition, the terms republicanism and liberalism have contemporary

12. Horwitz, *supra* note 1, at 63.
13. *Id.*

normative political meanings; they evoke particular ideological stances. Horwitz thus is confronting multiple evocations with a vengeance in this foray.

Horwitz is aware of these difficulties. He refers to the complexities ignored when one works with "ideal types" in intellectual history. He characterizes his intervention as brief and superficial, and he recognizes that no single thinker totally embodies a "republican" or a "liberal" point of view. Then, however, he is off to the races, advancing pungent characterizations of a great many well-known names, from Adam Smith and Jefferson to Bernard Bailyn, Gordon Wood, and J.G.A. Pocock.[14] He also offers us a model for distinguishing republicanism from liberalism. This model is itself a striking example of the Horwitzian pattern.

Liberalism, in my rearranged version of the model, is composed of four elements: a subjective theory of value, a conception of individual self-interest as "the only legitimate animating force in society," a theory of "the public interest" as inseparable from the aggregate of individual interests, and a "night-watchman" state.[15] Republicanism is also composed of four elements, each an alternative to liberalism. "Republicans," for Horwitz, hold an objective theory of ideals of the good life, a belief in politics and political participation as fundamental animating forces, a theory of the public interest as autonomous and objective, and a belief in a positive state that is capable of promoting civic participation and the "virtue" that attends it.[16] As structured, the model permits us to see republicanism and liberalism as ideologies in almost perfect opposition.

The model also is structured to permit us to infuse the historical meanings of the ideologies with contemporary normative political meanings. The distinction between a subjective and an objective theory of value evokes the subject-object dichotomy, a concept bequeathed with historical origins but also having special connotations in twentieth-century structuralist and poststructuralist thought. The distinction between individual self-interest and political participation as animating forces was perceived dimly by con-

14. *Id.* at 65-66.
15. *Id.* at 66-67.
16. *Id.* at 67.

temporaries of the framers, but not as a dichotomy. The stark opposition between the two concepts is a modernist perception. Similarly, the differing conceptions of the public interest offered by the model can be extracted from the ideas of the framers or their oppponents, but not as radical alternatives; that "alternative" alignment is modernist. Finally, the idea of a positive state promoting virtue was a deep premise of the framers' generation, but the idea of a night-watchman state, as Horwitz uses the term, was barely on the horizon. Not even Joyce Appleby's Jefferson held that idea in the form constructed by Horwitz.[17]

Horwitz's model, then, employs ideas and concepts that were present in the formative period of American constitutional ideology, but it presents those ideas and concepts in a package that has distinctly contemporary implications. The thematic purpose of the model emerges as twofold: not only to link the liberalism of the framing period with the later liberalism of the *Lochner* era, with which Horwitz began, but also to "recover" republicanism, an oppositionist ideology that "lost" over the course of time, was suppressed by mainstream liberal thought, and now offers the possibility of resurgence.

III.

The revitalization of republicanism as a contemporary political ideology represents the last step in Horwitz's thematic progression; the frame around his "window," so to speak. I will postpone discussion of the revitalization of republicanism at this point to look more closely at the earlier steps in Horwitz's argument, recalling his twin purposes. Each of these earlier steps required him to intervene in the received historiography of late-eighteenth-century and early-nineteenth-century republicanism and liberalism. The following is an outline of Horwitz's interventions, linking specific interventions to general purposes.

The first purpose is the linking of eighteenth-century and late-nineteenth-century liberalism. Horwitz begins with the idea that the framers of the Constitution were liberals, as demonstrated by

17. *See* Appleby, *What Is Still American in the Political Philosophy of Thomas Jefferson?*, 39 WM. & MARY Q. 287 (1982).

The Federalist No. 10[18] and the just compensation clause of the fifth amendment.[19] Liberalism's principal political goal was the neutralization of the state, the market, and the law so as to strip each of those entities of its substantive character. A side effect of this intervention was the suppression of substantive legal arguments, such as arguments from natural law, and the elevation to prominence of procedural and process arguments, which were perceived as "neutral." Liberalism defined law as a "necessary evil" whose purpose was the neutralization of substance so as to make historically contingent phenomena, such as the emergence of market capitalism, appear to be nonideological and inevitable. Because proceduralism, the idea of a "night-watchman state," and the disappearance of natural law arguments were prominent features of late-nineteenth-century and early-twentieth-century thought, that body of thought was derived largely from the framers. And because a conception of law as a "necessary evil" and a neutral entity—and a transformation of legal categories from substantive to procedural—inevitably results in the elevation to prominence of the idea that one adheres to law not because it is "good" but because it is "there," the framers were not only classical liberals but also positivists.

The second purpose is the establishment of republicanism as a "suppressed alternative," or a "losing" ideology. Republicanism was affirmative regarding law: its conception of law was "positive and emancipatory." Republicanism, contrary to conventional wisdom, was more of an egalitarian than an elitist ideology. It was more "Scottish" than "oppositionist English." A central feature of republicanism was its insistence on a small unit of government, thus making the facilitation of civic virtue a manageable goal through close contact between the people and their representatives. The framers and other liberals undermined the "small size" premise by claiming that the pursuit of the ideals of "freedom" and a large state were not incompatible. They argued falsely that the "small-large" dichotomy was a division between the Antifederalists, who favored "direct democracy," and those who favored a more balanced system of representation. The liberal undermining

18. THE FEDERALIST No. 10 (J. Madison).
19. U.S. CONST. amend. V.

of republicanism is responsible for the separation of law from morals, from conceptions of the good, and from a substantive conception of the "public interest" that has characterized legal thought since the time of the framers. This conclusion, developed to support the second purpose, is the same conclusion that supports the first purpose: that the framers were liberals, ancestors of modern positivism, and suppressors of republican ideology. I now want to consider Horwitz's interventions on the two levels at which they are addressed, as historiographical correctives and as normative political statements.

As historiographical correctives, I find the interventions vulnerable to informed criticism. Although Horwitz occasionally speaks as if ideal types should not be taken too seriously, and admits in one place that such "liberals" as Madison were "still wavering between two paradigms,"[20] each of his interventions can be critiqued at the historiographical level as overdrawn. To take just two examples, the correspondence of Madison and Jefferson suggests that one of their abiding concerns was the problem of extending the republic over a large amount of territory. In addition, for every Marshall Court decision that can be explained in terms of an expansionist or free-market sensibility,[21] there is one dripping with assumptions about the substantive, "natural" character of legal rights, demonstrating an ambivalence about the role of the state in a nation continuing to grow and to diversify, and invoking such authorities as the "first principles of republican government."[22] Other examples could be offered.

Suffice it to say that Horwitz's entire analysis is vulnerable to criticism on several fronts. First, at the time of the framers and the Marshall Court, republicanism was not a suppressed alternative ideology but a mainstream ideology. Second, what Horwitz has characterized as the suppression of republicanism can be understood better as a fundamental ambivalence in mainstream republican ideology, an ambivalence caused by the painful accommodation of the ideals of virtue and civic participation to population

20. Horwitz, *supra* note 1, at 64.

21. *See, e.g.*, Ogden v. Saunders, 25 U.S. 213 (1827); Gibbons v. Ogden, 22 U.S. 1 (1824); McCulloch v. Maryland, 17 U.S. 316 (1819).

22. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515 (1832); Wilkinson v. Leland, 27 U.S. 627 (1829); Terrett v. Taylor, 13 U.S. 43 (1815); Fletcher v. Peck, 10 U.S. 87 (1810).

and geographic expansion along with attendant commercial enterprise. Third, liberalism did not so much suppress republicanism as evolve out of it, maintaining republican assumptions far into the nineteenth century and discarding them only painfully. Finally, Horwitz's version of republicanism is far more egalitarian and democratic than mainstream republicanism, in its 1787 or 1835 version, ever was.

Although Horwitz surveys some important scholarship relevant to the historiographical debate in which he is intervening, he does not mention other scholarship, particularly the work of McCoy,[23] Wilson,[24] and Howe.[25] These works suggest that the interaction of republicanism and liberalism turned out, at least until the 1850s, very differently from the scenario Horwitz presents. Finally, Horwitz intimates that republicanism posited a relationship between ideology and law, law being constitutive of cultural ideals rather than in the service of those ideals. This intimation is belied not only by scholarship on that relationship, such as the works of Newmyer[26] and Konefsky,[27] but also by the treatise writers of the early nineteenth century, such as Tucker,[28] DuPonceau,[29] and Story.[30] In those sources, law appears both as a vital feature of the republican vision, a means by which citizens of the republic learn their natural rights and facilitate their political participation, and as a mechanism for implementing policies consistent with republican assumptions, such as the modification of English common law doctrines to conform to the conditions of life in a republican, as distinguished from a monarchical or despotic, society. Horwitz's

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23. D. McCoy, The Elusive Republic (1980).

24. M. Wilson, Space, Time, and Freedom: The Quest for Nationality and the Irrepressible Conflict 1815-1861 (1974).

25. D. Howe, The Political Culture of the American Whigs (1981).

26. R.K. Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic (1985), *cited in* Horwitz, *supra* note 1, at 69 n.50.

27. A. Konefsky, Legal Culture in Antebellum Boston (unpublished manuscript) (available in *William and Mary Law Review* office).

28. Blackstone's Commentaries (S. Tucker ed. 1803, reprint 1969).

29. P. DuPonceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States (Philadelphia 1824).

30. J. Story, Commentaries on the Constitution of the United States (1833, reprint 1970).

"window," then, appears capable of being cracked and perhaps even shattered, at least as a historiographical revision.

IV.

The historiographic vulnerability of Horwitz's analysis, when considered in light of what I take to be the twin purposes of that analysis, raises two questions. First, did Horwitz intend his analysis to be read on a historiographic level at all, or at some other level? Second, notwithstanding Horwitz's intent, how will his analysis be read? Here we return once again to the general observations made earlier regarding the two patterns.

If one compares Horwitz's treatment of the republicanism-liberalism debate with other current treatments, one finds that it stands virtually alone. The professional historians—Appleby and Pocock being symbolic figures but by no means exhausting the list of significant contributors—have confined themselves to the conventional primary and secondary sources of their profession, deemphasizing their contemporary politcal agendas while conceding that those exist. The law professors who recently have discovered the debate—Frug,[31] Sunstein,[32] Ackerman,[33] and most prominently Michelman[34]—have made only a slight pretense of being faithful to conventional historical sources. They have extracted a meaning for republicanism that "fits" with their own versions of the belief that civic participation and community dialogue can result in a more positive and egalitarian political ethos. Horwitz stands alone in attempting to be a "professional" legal historian and a contemporary political theorist simultaneously. He is also unique, as I have suggested, in the twin levels of his interventions and the studied ambiguity of his vocabulary.

Horwitz's grand strategy in this paper has been to intervene at the level of historiography with the purpose of revising conventional historiographic wisdom. At the same time, he seeks to "free

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31. Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

32. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

33. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

34. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

up" contemporary political debate by exposing liberalism as a "winner" and republicanism as a "loser," and by emphasizing the techniques that produced that outcome. Once that exposure penetrates contemporary consciousness, the hidden alternative of republicanism might emerge as a viable contemporary ideology. That is why it is so important for Horwitz's presentation that his versions of republicanism and liberalism be taken as either authoritative or at least plausible. That is why he seeks to "revise" the debate in the manner that he does.

Given Horwitz's place in the debate and his strategy in addressing it, the second pattern becomes crucial. If Horwitz's account is taken as sufficiently authoritative and provocative as was, say, his account of early-nineteenth-century American private law,[35] then perhaps the whole cycle of the late 1970s will recur. The most significant indication that this may be occurring is a growing "university consciousness" in academic communities, signified by the simultaneous "liberal arts" emphasis of current legal scholarship and the increased political consciousness of liberal arts scholars. Some potential ironies, however, may form part of the second pattern. I shall close by noting two such ironies.

The first irony is one of nomenclature. The studied ambiguity of Horwitz's terminology may not survive the readings of others. The meaning of texts is not exhausted by their authors' intentions, and the evocative words of Horwitzian syntax may produce a reaction quite different from what Horwitz intended. He may be read, for example, as advocating a return to an elitist, hierarchical, homogeneous conception of the public good. Such a conception is part of the connotative baggage of the word "republican."

The second irony is one of time. Horwitz's intention to demonstrate the inseparability of legal history and legal theory may be read as a claim to use legal history in the service of legal theory, and thus "torture" the history.[36] Alternatively, Horwitz's belief that legal history can at a minimum illuminate legal theory may run up against the tendency of one generation to "rewrite" an-

35. *See* M. HORWITZ, supra note 3.

36. Appleby, *The Republican Roots of Our Constitutional Order*, 19 CENTER MAG., May-June 1986, at 3, 5. Appleby states, "We had tortured eighteenth-century texts into saying something about democracy, or equality, or class, when in fact these texts were talking about quite different things." *Id.*

other's history Contemporary politics then becomes an overwhelming "historical" force, making some theories acceptable and others not, regardless of a given theory's sophistication or subtlety

The use of history to illuminate the present is treacherous and complicated. When one adds to that the reconstruction of history as a projection of the future, the burden may have become too much for any one scholar to carry