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The Transformation Thesis of Morton J. Horwitz: Research Problems and Implications for the Practice of Liberal Democracy

Samuel J. Astorino*

Whatever else may be said about Critical Legal Studies ("CLS"), no extended argument is required to demonstrate that its academic members have had a striking impact on the writing of American legal history. Within this particular growing body of historical literature, the work of Morton J. Horwitz of the Harvard Law School is preeminent in tracing the evolving contours of American law. Perhaps no other recent scholar writing about the history of American law has evoked such a large amount of praise, comment, and criticism. Horwitz has become effectively the standard to beat, the benchmark against which to judge, and the central interpreter of the subject, either to affirm or deny. His appeal to legal historians, at least, is traceable to the fact that he was "coming as close as legal historians can ever come to identifying a paradigm shift. His argument . . . was, quite simply a formidable act to

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The essence of this paradigm shift, as pronounced by Horwitz, has been the politicization of American law. No other historian has devoted so much careful attention to the subject of political adjudication as a reality in the face of persistent efforts to mask legal reasoning as a neutral, nonpolitical exercise. The failure to recognize the ideological nature of American jurisprudence forms the driving force of his work, as well as the basis of any CLS political agenda. Horwitz, therefore, is an academic with an attitude, devoting his skills to the deconstruction of the taught formalistic tradition of American law and to the construction of a realistic view that politics are, and should be, inextricably bound up with the making of law.

Following the publication of several articles that would later form chapters of his first book, Horwitz broke provocatively on the scene of American historiography in 1977 with the publication of The Transformation of American Law, 1780-1860, winning the coveted Bancroft Prize in American History that year. Designating it "a different work," rather than a sequel, fifteen years later came a second volume entitled, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy. Apparently, what remains to be written is a third volume on the subject of the influence of the Civil War on American legal history, and another covering the years since 1960.

We are now sufficiently distant from both volumes to assess Horwitz's capacity to inform and influence the American legal tradition. As in the case of Transformation I, Transformation II has engendered numerous reviews, often constituting lengthy scholarly essays in themselves, on the subject of Horwitz's work in the aggregate and its place in the historiography of American law.

5. Id. at vii. It remains a source of puzzlement that while Horwitz correctly underscores the dramatic influence of the war on legal discourse, he chose to write on the period from 1870 to 1960 prior to furnishing an account of the war's impact.
6. See generally references throughout this article. The best summary of the critics of Transformation I is Wythe Holt, Morton Horwitz and the Transformation of American Legal
Horwitz's work is clearly revisionist, in that it challenges specifically the orthodox view that law in this country is nonpolitical and hermetically insulated against social, economic, and political influences. That is to say that law reacts and progresses according to its own inner logic, rather than to extra-legal social forces. Horwitz thus takes his place in a long line of revisionist historians, led by Charles Austin Beard, who have set their pens to critique almost every facet of American history.

The purpose of this writing is not to undertake a comprehensive review of the two *Transformation* volumes. That task has been performed ably by others who have predominantly rated Horwitzian scholarship in the highest terms while, of course, identifying some shortcomings. The approach taken here follows the suggestion of the legal historian, John Henry Schlegel, who, while praising the excellence of *Transformation II*, found certain "tempting targets" on which to focus "my carping." Any analysis, however, must inevitably compare the two volumes, at least in cursory terms, in order to pick out particular problems to be discussed. In more specific terms, here attention will be devoted to the problems of research methodology and, more importantly, to the implicit consequences of Horwitz's thesis of law-as-politics for the democratic system of government established by the United States Constitution.

In general, American historiography in the period between the two World Wars was largely dominated by revisionist progressive historians who concluded that the nation's history was deeply colored by a sharp struggle between the wants of "the people" and the conflicting desires of "the interests." Standing astride this progressive historiography were such luminaries of the historical profession as Charles A. Beard, Vernon L. Parrington, and Carl Becker. Beard, in particular, lorded over revisionism with his insistence that even the Constitution itself was the product of "the interests," a theme that permeated the revisionist view of the rest of American history. As to legal history, Beard equally argued that,


7. It is common to see Horwitz as a Beardian disciple in every sense.


despite their claim to neutral adjudication based on logic, judges actually decided cases on the basis of their particular economic interests. These interests were conservative, anti-reformist, and almost always supportive of an economic system devoted to exploitation in the drive for profit.

The end of the Second World War brought about a dramatic shift in American historiography. A consensus interpretation that celebrated the absence of criticism and conflict, deriving mainly from Lockean thought, soon became the dominant mode of historical thought. Counted among the foremost proponents of consensus history were Daniel Boorstin, Richard Hofstadter, and Louis Hartz, whose book, *The Liberal Tradition in America* (1955), provided the bible of the new history. Rejecting the thesis of social conflict, consensus historians argued that in the antebellum period and beyond, legislators and jurists alike simply fashioned a system of regulation, franchises, and monopolies designed to promote economic growth without reference to ideological motives.

Between the Beard and Hartz approaches, the confrontation between conflict and consensus was established. In 1964, when both views were well-known in academic circles, Horwitz completed his doctoral dissertation entitled, *The Problem of the Tyranny of the Majority in American Thought*, under the tutelage of Louis Hartz. Following graduation from the Harvard Law School and serving a one-year clerkship in a federal court, he was appointed to the law faculty at Harvard.12

*Transformation I*, nevertheless, adopted a revisionist posture, despite Horwitz's apparent intellectual linkage with Hartz. Although he refrained from using the word "conspiracy," his detractors quickly labeled the book as preaching nothing less. His conclusion that an alliance between elite lawyers and "newly powerful commercial and entrepreneurial interests" created the "tendency of subsidy through legal change during this period [which] ... dramatically ... [threw] the burden of economic development on the weakest and least active elements in the population."13 Legal developments in antebellum America were seen as the conscious result of efforts by powerful elites from business, the bar, and the judiciary to shape the law as an instrument forged deliberately to secure economic growth at the expense of the less fortunate.

Horwitz called this style of legal reasoning "instrumentalism."

Methodologically rejecting the traditional approach of concentrating on "constitutional history," Horwitz's *Transformation I* dealt almost exclusively with developments in the common law subjects of torts, contracts, and property. Most important, for present purposes, was that his offer of proof for his thesis was based on a detailed examination of statutes and case law on a state-by-state basis, as well as treatises and commentaries. In this fashion, he appeared to follow the traditional method of historical research by lining up the doctrinal evidence of the cases and construing them to prove his point. Proper documentation constituted the architecture of his work. The research, moreover, emphasized his belief that changes in legal doctrine were caused by extra-legal social phenomena, especially the demands of external market forces being imposed on the law by the alliance of bench, bar, and business.14

Doctrinal research, therefore, was the methodological mainstay of *Transformation I*. Its pages are filled with such a quantity of case analysis as to dazzle the reader with the obvious energy and detailed research that went into its formulation. It was this very research that was seized upon by challengers who questioned his methods by concluding that often he had been careless in reading the cases or had distorted them to suit his own purposes.15 In their view, *Transformation I* "was a provocative thesis in search of evidence, resting more on rhetoric and passion than on fact."16 Horwitz's research simply failed to prove that a bench-bar-business relationship ever existed; and relied on his intuition that somehow economic power inevitably teams up with legal power to produce


16. White, supra note 9, at 1318-19.
results favorable to their combined interests.\textsuperscript{17}

Transformation II, on the other hand, adopted a strikingly different approach to the matter of proof and causation. Where its predecessor had ransacked case law to prove the existence of its instrumentalist metaexplanation, Transformation II, for the most part, offered a penetrating discourse on what legal scholars have said and theorized about the law. It thereby deviated starkly from the previous emphasis on cause-and-effect supported by doctrinal evidence. Transformation II emerges as an intellectual history of legal academics and their ideas during the period covered by the book.\textsuperscript{18}

The narrative of Transformation II conveys a now familiar story involving the succession of responses to the formalism taught by Christopher Columbus Langdell at Harvard a century ago. Adopting the terminology of his CLS colleague at Harvard, Duncan Kennedy, Horwitz begins his study with a scathing depiction of formalism as the "Structure of Classical Legal Thought."\textsuperscript{19} In summary, Langdellian formalism has two pernicious facets in its legal repertoire. First, it insists that law proceeds according to its own inner logic based on deductive principles emanating from case law. Law is neutral, therefore, and nonpolitical, because legal reasoning does not, and should not, react to external social forces. Under Horwitz's insistence that law is politics, the corrosive nature of Langdellian legal thought marks it as the chief enemy of progress. Secondly, the static nature of formalism, with its grounding in case law, was responsible, in Horwitz's view, for the failure of the legal system to provide simple justice in the era of Big Business and industrialization. In the hands of the formalists, law was "reified" (a term very frequently employed by Horwitz) in the sense that legal categories were abstracted from reality along thick bright lines. These abstractions were operational organizing principles of the law (i.e., negligence, consideration, strict liability, etc.).\textsuperscript{20} Here was "law in the books," rather than "law in action" as formulated by Oliver Wendell Holmes, Jr., Roscoe Pound, and Benjamin Cardozo.

\textsuperscript{17} Despite his wish to write for general historians, Transformation I proved to be often incomprehensible to them, as well as to practitioners. See Samuel J. Astorino, History and Legal Discourse: The Language of the New Legal History, 23 DUQ. L. REV. 363 (1985).

\textsuperscript{18} While falling outside the intent and purpose of this article, it is important of course, to understand the reasons for this shift as a reaction to Transformation I by Horwitz's colleagues in the CLS movement. See Schlegel, supra note 10, at 1054-55.

\textsuperscript{19} Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, 3 RES. L. & SOC. 3 (1980).

\textsuperscript{20} Transformation II, supra note 4, at 11-15.
Ultimately, the insulation of law from politics “sowed the seeds of its own destruction.”21 The classical system, given its support of a free market system that had become monopolistic, could no longer speak to the issue of a “just distribution of wealth,” leading to a “crisis of legitimacy.”22

By the turn of the twentieth century, legal thinkers, led by Roscoe Pound at Harvard and Oliver Wendell Holmes, Jr., mounted a “progressive” attack on this “mechanical jurisprudence.”23 In turn, the succeeding Legal Realists of the 1920’s and 1930’s were the “culmination of the early-twentieth-century attack on the claims of the late-nineteenth-century classical legal thought to have produced an autonomous and self-executing system of legal thought.”24 Finally, after seeking to demolish the claims of the legal process school of Henry Hart and Albert Sacks in the 1950’s, Horwitz closes with an impassioned plea that the Critical Legal Studies movement, rather than Law and Economics, is the rightful heir to the Progressive-Realist legacy.

Taken together, the two Transformation volumes tell the history of American law in three parts. Transformation I, of course, chronicles that history during the period from 1780 to the Civil War. The second part comprises the first chapter of Transformation II: the advent of classical-formalist law. The third part, the remainder of Transformation II, is a rendition of intellectual opinion regarding the perniciousness of classical legal thought in America. What holds the parts together, of course, is the theme of law-as-politics. Instrumentalism was result-oriented law that in the hands of the alliance of bench, bar, and business intentionally tilted law in favor of certain politically fashionable economic goals, culminating in the creation of a capitalist national market system. Having once achieved its ends, formalism froze those legal achievements in place by conceptualizing law as static abstracted formulas resistant to further change. Where instrumentalism redistributed wealth, formalism sought to prevent any further

21. Id. at 15.
22. Id. at 66.
23. While the term “progressive” implied adherence to the great reform movement by the same name, in legal thought the term meant the attack on formalism. Progressive legal thinkers were the legal counterpart to progressive political reformers. Horwitz’s chapter in Transformation II on Holmes was originally available to students at Harvard in mimeographed form. In this work, Horwitz stated that Oliver Wendell Holmes is “the most important and influential legal thinker America has had.” Transformation II, supra note 4, at 109.
distribution at the behest of popular majorities by building a wall of separation between instrumentalist legal ideas and a neutral apolitical system of adjudication. The fear of the formalists was that an unchecked majority also could play the same game of redistribution through the deployment of law-as-politics. The third part of Horwitz's vision is the role played by progressive legal intellectuals in their efforts to unpack and exorcise the sin of formalism from the soul of American law.

As noted by most reviewers, however, Transformation II is "a different book." The reasons for the disjunction between it and the first volume has been the source of intense speculation generated by Horwitz's own subjective attachment to a theoretical motif. What has escaped attention, however, has been the compelling perspectives of historical inquiry that separate the two volumes and raise serious questions about legal science and research methodology.

Transformation I encompassed the view that, in order to prove that instrumentalism really existed in the legal system, it was essential to research cases and statutes, in particular. As already noted, much of the criticism fell precisely on that point: that the research was thin or misguided. In any event, Horwitz had engaged in a traditional form of research. Implicit in this methodology, moreover, is a recognition that "law" means what the courts and legislators decide. If the legal historian wants to know how law was transformed, she should look at the actual conduct of the law-givers themselves, and the resulting cases and statutes, as evidence of the covering theory.

By contrast, Transformation II is largely devoid of this type of research. What accounts for the difference? It is suggested here that at least one plausible answer can be found in the very last sentence of Transformation II:

Until we are able to transcend the American fixation with sharply separating law from politics, we will continue to fluctuate between the traditional polarities of American legal discourse, as each generation continues frantically to hide behind unhistorical and abstract universalisms in order to deny, even to itself, its own political and moral choices. Where is the proof of this fixation, of the application of "unhistorical and abstract universalisms?" Aside from an emphasis

25. See, e.g., White, supra note 9, at 1350.
26. TRANSFORMATION II, supra note 4, at 272.
The Transformation Thesis of Morton J. Horwitz on Constitutional cases, especially *Lockner*, Horwitz's lament appears to flow from a presumption that because so many of his legal heroes have manned the intellectual trenches, the formalist enemy must have been on the field. As in the physical sciences, certain observable facts prove the existence of the unseen.

What is missing in all of this is scholarly proof that formalism has been alive and well also in common law jurisprudence during the last century. In short, it is required as a matter of scholarly integrity that the research methodology informing *Transformation I* be undertaken for the years 1870 to 1960. Only then will the legal historian be certain that Horwitz's heroes were fighting a live enemy. Perhaps we may even discover that the emperor had no clothes.

The task of completing that kind of research is daunting to say the least. The present status of research in the field of American legal history, despite a significant influx of double-degree scholars into the field and the creation of legal history courses in law schools, does not offer much optimism. Unlike general history and political science departments, where thousands of theses and dissertations have uncovered probably all we need to know factually about American history, law schools do not enjoy the advantage of having busy graduate students poking into every nook and cranny of our experience to compile a body of historiographical literature from which metaexplanations may flow.

It will not do to employ the term "American Law" in one sense in *Transformation I* and then use the very same language in *Transformation II*, but mean something quite different. For not only can such usage be intrinsically misleading, but becomes more so because it could be easily presumed that the thick overlay of theory girding *Transformation II* is an acceptable response to accurate factual data. The legal historian must be cautious lest her theory be one in search of evidence.

This line of criticism suggestively parallels the insight of John Henry Schlegel who has uncovered a major gap in Horwitz's research that has also been noticed by other reviewers of the *Transformation* volumes. Schlegel points to a significant omission in the Horwitzian thesis: the causal failure to provide proof of the alliance between bench and bar on one side and business on the

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other. Schlegel, of course, is not looking for an explicit agreement by these elites to engage in instrumentalism; no written memoranda of law, or contract, or recordings of table talk exists on point. Rather, Schlegel points to the research of his colleague, Alfred S. Konefsky, that traces the style of research that answers "the more general question of how ideas or broader cultural understandings arise in a community and are transmitted between and among its members."28 Horwitz did not use Konefsky's work and has had to live with the problem of failing to successfully link elite actors who, as Konefsky demonstrates, shared the same space, status, and consciousness about the direction of the nation.

Did Horwitz merely presume the existence of linkage? More particularly, and in like fashion, in Transformation II, has he presumed the existence of classical-formalist practice because of reverence for the words of his intellectual ancestors? If Americans have failed to face openly the fact that law is, and has been, politics and morality, how then to explain the Warren Court, the New Deal decisions, Roe v. Wade, and the outright politicization of the process of selecting Supreme Court Justices and federal judges except in political and moral terms?29 It would certainly come as a shock to many today, especially present-day conservatives, to learn that many legal decisions, of at least the United States Supreme Court, are not politically motivated. To repeat the point: only proper research on the possible existence of formalism will tell us whether the emperor wore clothes.30

28. Schlegel, supra note 10, at 1049 (citing Alfred S. Konefsky, Law and Culture in Antebellum Boston, 40 STAN. L. REV. 1119 (1988)).
30. In another sense, on this point, the legal historian should be sensitive to the counsel of the CLS scholar, Robert Gordon, who stated that readers are justified in asking the "Crits" to:

embed their story in a narrative context that would at least supply subjects and occasions to the narrative to show that it is human beings with reasons and motives, not disembodied Spirits, who drive the manufacture of legal concepts. Who pushed which arguments? What happened to destabilize previously stable conventions? We ought to have a rule of style: no sentence without a subject; no intellectual move without a reason . . . even if the particular subject and reason may sometimes be largely incidental to the grander thematic history of legal consciousness.


Schlegel, supra note 10, at 1059, quoted this passage from Gordon to support his contention that Horwitz missed the entire issue of employing research in social relations to establish the link between lawyers and entrepreneurs. This author argues that Horwitz was equally remiss in not telling his readers whether static formalism is still dominant in legal practice and whether, in fact, it ever existed at all.
Perhaps no other student of American law has been as open and forthright as Horwitz in demanding unqualified recognition that law is politics. In taking this stand, Horwitz has firmly rejected counter-proposals for adhering to neutral principles in law, for curtailing judicial activism, and for limiting the notion that the Constitution is a "living" document to be interpreted and adapted by different people to different circumstances. Although it may be commonplace for lawyers often to secretly smirk when it is suggested that judicial opinions are politically motivated, there still remains a deep resistance to admitting that we are a society of men rather than laws and that judges make, but do not discover, law. The distrust of judicial activism or law-as-politics lies deeply rooted in our political and legal culture, stretching from Jefferson's famous complaint to Madison that judicial activists are "sappers and miners working underground" to destroy the Republic to Lincoln's equally famous fear of judicial tyranny. Given that Jefferson and Lincoln are the two greatest theoreticians of democracy ever produced by this country, it is remarkable that so little attention has been paid to the implications for the American Constitutional system raised by Horwitz's unequivocal call for a rule that politics should guide the courts.

Surely the most dramatic exhibition of Horwitz's insistent demand has been his stern reaction to Herbert Wechsler's criticism of Brown v. Board of Education. Judge Learned Hand and Wechsler gave the Holmes Lectures at Harvard in 1958 and 1959, respectively. While it is incontrovertible that both men abhorred racial segregation, they nevertheless were convinced that Brown, while morally correct, lacked a principled basis. Where Judge Hand denied any Constitutional basis for the power of judicial review, Wechsler and the legal process school concluded that opinions must be grounded in neutral principles (albeit with a decidedly progressive result). Horwitz finds this line of reasoning to be a smokescreen designed to hide the fact that the legal process

See Joseph W. Singer, Legal Realism Now, 76 CAL. L. REV. 465 (1988), concluding that formalism has been defeated. Singer's article was a lengthy critique of LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986). Horwitz indicated that he agreed with Singer's interpretation. Transformation II, supra note 4, at 308 n.7.

31. Horwitz, supra note 29, at 8 ("A constitution meant to endure for ages can only endure if it adapts to different views held under different circumstances."). Id.


33. Judge Hand's lectures were published under the title, The Bill of Rights (1958); Wechsler's views were spelled out in his classic article, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959).
approach was, in reality, a return to formalist thought. Wechsler's argument, in Horwitz's view, "seems positively astonishing" because "Wechsler achieved neutrality through formalism ... a new conservative formulation in orthodox legal thought."\(^{34}\)

The issue at hand, however, is not only whether Horwitz's history is correct. For in addition to the throaty criticism of his earlier research, his constitutional history, especially in the area of property rights, has been attacked as a "simplification" and mono-causal in tone without appreciation of the complexities that went into making the American founding document.\(^{35}\) That aside, the remaining crucial question is why Horwitz is at pains to champion the politicization of law. Where Wechsler saw that an abandonment of principled legal reasoning would lead to a serious public loss of confidence in the judiciary, Horwitz's concluding sentence in \textit{Transformation II}, as noted earlier, chides us for hiding behind "law," thereby "denying" ourselves the benefits of moral choices.

It is not enough, of course, to argue that, given his interpretation of American legal history, he could arrive at no other conclusion. Historians, including Horwitz, are fully capable of separating their subjects from their politics. After all, to study war, or barbarism, or totalitarianism does not mean to embrace them as one's values.

The problem arises in a three-fold manner. The first is the marked tendency to draw "lessons" from history and formulate them into pronounced political causes. The second is to permit the political agenda to double-back on the history. The third is to fail to tell readers how and why the historian arrived at political values through historical research. The threshold problem confronting Horwitz's thesis is that since he believes that objectivity is either dead or impossible, it is permissible to load the argument by setting up his history so that the Realists (and now CLS) win. Nor is it defensible to couch conclusions as mere aspirations for historians "to give the best possible explanation of their historical subjects."\(^{36}\) His history fails to critique his heroes, and fails to understand that there were other sides to the story he tells.\(^{37}\) At least one of those other sides is the haunting implication that the thesis of law-as-politics poses for the American system of government.

\(^{34}\) \textit{Transformation II}, \textit{supra} note 4, at 267-68.  
\(^{35}\) Kloppenberg, \textit{supra} note 14, at 1347.  
\(^{36}\) \textit{Transformation II}, \textit{supra} note 4, at viii.  
\(^{37}\) White, \textit{supra} note 9, at 1361-62.
In many respects, it is this failure to articulate the political context that causes the greatest difficulty. As observed by Neil Duxbury, it is impossible in Horwitz’s world to distinguish between good and bad political outcomes of judicial decisions: *Lockner* or *Brown*? “To profess, as Horwitz does, that law and politics are not separate, is simply to re-emphasize rather than to tackle the issue.”

On what basis should a political judicial decision trump the power of the legislature? If courts *should* make political decisions, should they not be subject to the vicissitudes of the ballot? If law is politics, what does this say about the Nazi judges who defended themselves on the grounds that they were merely following orders issued by the political regime? Even they quoted Holmes. Finally, who will guard the guards?

The problem, of course, has been inherent in progressive legal scholarship from the very beginning. Roscoe Pound, for one, ultimately concluded that bureaucratic administrative bodies would prove to be the forerunners of absolutism by destroying the rule of law. Holmes and Cardozo emphasized, to the contrary, the need for a jurist to act as a legislator. Carried forth into Legal Realism, there has always been a very real question of how law-as-politics impacts on a civil polity that is based on a separation of powers that establishes at least one major safeguard against an overreaching judiciary.

In reality, of course, we have more than a faint notion of how Horwitz would separate the good from the bad. The CLS vision of structuralism was pioneered by the illiberalism of French political thought after the birth of French radicalism in the 1930’s. Illiberalism included different types of Marxism, structuralism, Heideggerianism with John-Paul Sartre, Maurice Merleau-Ponty, and Louis Althusser. Structuralism, in turn, was formulated by Claude Levi-Strauss in anthropology, Roland Barthes in literary criticism, Jacques Lacan in psychoanalysis, and Michel Foucault and Jacques Derrida in social criticism. Although structuralism remained suspicious and critical of Marxism, it agreed with Marxism’s

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38. Duxbury, *supra* note 1, at 270.
39. *Trial of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg, October, 1946 — April, 1949, III:* 33 (1961) (quoting Holmes to the effect that decisions follow considerations of a political or social nature, rather than solely logic or general legal doctrines). It should be pointed out that Horwitz says almost nothing about the effects of Nuernberg on the Realists, except for a sketchy view of accusations against Karl Llewellyn. See *Transformation II*, *supra* note 4, at 247-50.
hostility towards the Western liberal state, in particular, the free market system.

The gyrations of structuralism within CLS circles need not detain the reader here. The point to be emphasized is their pervasive law-as-politics perspective, interlocked with Horwitzian historiography, that might reveal the deep structures of American structuralist thought itself and, most importantly, how that thought comes to terms, if at all, with American Constitutionalism. Except to say that courts rule by fiat, so that even the boldest political decisions have their own unquestioning force, perhaps the law-as-politics policy is incompatible with American democratic practice under the Constitution. At the very least, it now appears, however, that the radical thought of the French fountainhead has shifted from adherence to illiberalism to an embrace of the liberalism of Leo Strauss and John Rawls.

Now, if that happened to Morton J. Horwitz, it would constitute the intellectual paradigm shift of all paradigm shifts. But then, the field of American legal history would cease to be as interesting, as informed, or as much fun.


41. See, e.g., NEW FRENCH THOUGHT: POLITICAL PHILOSOPHY (Mark Lilla ed., 1994).