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Theme v. Reality in American Legal History: A Commentary on Horwitz, *The Transformation of American Law, 1780-1860,* and on the Common Law in America

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> While the events of the past are the source of the experience of the human race, their opinions are determined not be the objective facts but by the records and interpretations to which they have access. Few men will deny that our views about the goodness or badness of different institutions are largely determined by what we believe to have been their effects in the past. There is scarcely a political ideal or concept which does not involve opinions about a whole series of past events, and there are few historical memories which do not serve as a symbol of some political aim. Yet the historical beliefs which guide us in the present are not always in accord with the facts; sometimes they are even the effects rather than the cause of political beliefs.
>
> F. A. Hayek**

INTRODUCTION

Morton Horwitz's *The Transformation of American Law, 1780-1860*[1] is a serious and thoughtful attempt to describe some of the basic, general themes in American law during one of its most energetic and creative periods. Professor Horwitz assembles a vast body of data consisting principally of judicial opinions and doctrinal writing, but which also extends to economic, social and political history. He attempts to extrapolate from this data the common

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* Professor of Law, University of South Carolina School of Law. Portions of this article were based upon a recently published treatise, R. BRIDWELL AND R. WHITTEN, THE CONSTITUION AND THE COMMON LAW, THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM, Lexington Books, D.C. Heath and Co. (1977). The author wishes to express his thanks to D.C. Heath and Co. for permitting the use of some of the material herein, as well as to Professor Ralph U. Whitten, who developed many of the ideas herein with the author. Thanks are also due to Professor Maurice Holland of Indiana University School of Law, who read the manuscript of this article and offered many valuable suggestions. For a more complete treatment of the subjects discussed here, the treatise should be consulted.

**F. HAYEK, CAPITALISM AND THE HISTORIANS at 3-4 (1954).

[1]Harvard University Press (1971) [hereinafter cited as HORWITZ]. For some recent reviews of Horwitz's book, see Gilmore, Book Review, 86 YALE L.J. 788 (1977); Kettner, Book Review, 8 J. INTERDISCIPLINARY HIST. 390 (1977); Genovese, Book Review, 91 HARV. L. REV. 776 (1978); Wroth, Book Review, 28 HARV. LAW SCHOOL BULLETIN at 30 (1977); Foner, Book Review, THE NEW YORK REVIEW OF BOOKS (1977); Reid, Book Review, 55 TEX. L. REV. 1307 (1977); Hurst, Book Review, 21 AM. J. LEGAL HIST. 175 (1977); Winship, Book Review, 31 SOUTHWESTERN L.J. 751 (977). The best review to appear thus far is Presser, Book Review, 52 N.Y.U. LAW. REV. 100 (1977).

threads and general patterns which can give the reader genuinely fundamental insights into our legal process, indeed into the nature of the process by which common law is generated, or as some say "created" and applied by the judiciary.[2] In his description of precise causes for the emergence of much nineteenth century doctrine, Professor Horwitz's work is much more thematic than similar recent attempts to present comprehensive insights into our legal history,[3] and much more reliant on his own interpretations of original sources of a general nature. He also extends his inquiry beyond the more regional or localized works, though many of the essentially local studies certainly have broader, national implications.[4] Thus, in the breadth of both the raw material analysed and the ambition of the monograph to expand upon the narrower doctrinal treatment of its parts, Professor Horwitz should be commended.[5] However, neither the ambitious scope of such a work, nor the laudibile intent of its author to raise the level of his inquiry above that of our previous historical pioneers who sought to reveal the substance and general character rather than the often confusing particulars of our legal past,[6] are the final measure of success. For, though Professor Horwitz has attempted to prove much, what he has *actually* proved may be summarized with rather startling brevity. Relatedly, the points upon which his proof and analysis can with all charity he said to have failed utterly are rather numerous.[7] Moreover, among his numerous errors one may readily see one central mistake more fundamental than the others, indeed one which in all probability produced the others. This recurrent problem concerns the method by which Professor Horwitz seeks to demonstrate the major themes of his book—his most essential proof is clumsily lifted completely out of its context so that its significance

[2]More than anything else Horwitz seeks to illuminate the common law process as an instrument for legal change "[s]ince few historians have . . . thought through the problems of using this concept in a comment law context." HORWITZ, *supra* note 1 at XV. Indeed, emphasis on the judicial role is the keynote of Horwitz's whole analysis. It is precisely this facet of his study that is the weakest. The ingenious way in which Horwitz distorts the common law process is of primary interest to anyone who wished to thoroughly understand this book and appraise its worth.

[3]*See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW(1973). Professor Friedman relied mainly on secondary materials for his work, and his presentation of the major themes in American legal history is more various and diverse than Horwitz's focused economic interpretations.

[4]*See* W. NELSON, THE AMERICANIZATION OF THE COMMON LAW (1975).

[5]*See* Holt, *Now and Then: The Uncertain State of Nineteenth Century American Legal History*, 7 IND. L. REV. 615, 626 (1974), where Holt quotes Horwitz's dissatisfaction with too much "detail" in the writing of American legal history, to the neglect of "broader interpretative themes." Indeed Horwitz in his new book allows that "This study attempts to challenge certain features of 'concensus' history that has continued to dominate American historiography since the Second World War." HORWITZ, *supra* note 1, at xiii. In producing much of this history, "Even sophisticated lawyers, who regularly address themselves to the policies imbedded in contemporary legal rules, tried to treat the historical study of law with an arid formalism that is striking and surprising." *Id.* at xi - xii, A distaste for the particulars of legal rules, and their technicalities forms a large part of the new preference for thematic "intellectual" history.

[6]For example, see R. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1950) for an attempt to synthesize and explain a great mass of doctrinal detail.

[7]This point is developed further in later parts of this article. See notes 21-124 *infra* & text accompanying.

is invariably distorted and its meaning thoroughly changed.[8] In this respect alone, Professor Horwitz's book exemplifies the increasing prevalent condition of American legal historical scholarship more vividly than any book in decades. Even more importantly the apparent reason for this spirit of even handed distortion is an erroneous conception of the common law process, particularly the English common law system. Horwitz's misconstruction of the common law system is a product of his failure to treat any of the major legal issues analysed in their broader historical context. More than any other factor, this causes Professor Horwitz to conceive of each chosen piece of legal datum as evidence of a novel or revolutionary change in the legal system. Thus a great amount of evidence which appears quite conventional in context is by extraction and narrow presentation made to fit into his "transformation" motif.

More than anything else, Horwitz's book purports to be about the common law process. This is of course one of the most debated themes in American legal history, and one with much relevance to current issues of judicial authority and discretion. Much has been said and written about the powers which judges have traditionally enjoyed in our legal system and their capacity to discretionarily employ their authority to apply, or perhaps also provide, binding rules aimed at serving particular social or economic purposes, as well as the appropriate sources of the legal rules so applied.[9] Naturally what the judges did in the past is highly relevant to the analysis of the broader issue of the current status of the common Law. Ironically, it is in describing the concept and practice of common law adjudication in our early national period that Horwitz's new book fails the most. It will therefore be useful to analyze particular examples of Horwitz's method of proof, and to discuss at some length the operation of this common law system in certain areas critical to his proof in order to illustrate the broader context and the

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[8]Though almost any attempt to isolate legal or Constitutonal phenonamena rends the "seamless webb" of history and to some degree inevitably distorts the truth.

However, there is a vast difference in the distortion caused by the interjection of the observer and his inevitable selectivity and focus upon particular data, and the overly narrow partial representation of a phenomena such as the common law process, resulting in a mistatement of its content. It is the latter, more serious, flaw which charactrizes Horwitz's book.

[9]Professor Horwitz's current book is in large measure an attempt to expand upon and provide further proof for the thesis of his earlier writing in article form, as his introduction indicates. See Horwitz, *The Emergence of an instrumental Conception of American Law 1780-1820* in V. PERSPECTIVES IN AMRICAN HISTORY 287 (1971); Horwitz, *The Transformation ifn the Conception of Property 1780-1860,* 40 U. CHI. L. REV. 248 (1973); Horwitz, *The Rise of Legal Formalism,* 19 AM. J. LEGAL HIST. 251 (1976). As Professor Nelson aptly observed

> "The key point, however, is that legal rules and traditions do service beyond the period of their immediate usefulness to dominate groups, and in doing so, take on a status that is autonomous to the immediate political interests of those groups. This semi-automonous body of law, which can and does serve as a restraint on decision makers, surely is a legitimate object of historical study." Nelson, *Legal History—Annual Survey of American Law,* 1973-74 N.Y.U. L. REV. 625, 640. *See* BURGER, GOVERNMENT BY JUDICARY (1977).

operational rules and principles of decision-making which his artificial selectivity has managed to obscure. If as Professor Nelson claims this is "one of the five most significant books ever published in the field of American legal History,"[10] the book and the developments it analyses certainly deserve this extended treatment. The process by which this demonstrable distortion has been produced can than be placed in the context of broader tends in the writing of legal history, and some observations can be made on a much debated subject: the efficient relationship between legal and historical training and methods of investigation and analysis.[11] This may be accomplished by considering the following: (a) a description of *what* Professor Horwitz attempts to prove, that is, his central theme; (b) the methods he employs in attempting this proof and the particular errors associated with several elements of it; and (c) a description of certain of the broader subject matter areas critical to Horwitz's analysis of the common law process and to his basic theme, including a more thorough description of the common law precess itself in the context of two extremely important elements in Horwitz's thesis—the general commercial law and the conflict of laws. Also thoroughly analyzed and evaluated will be one of William Crosskey's controversial themes as it applies to the common law process in the federal courts,[12] and Horwitz's

[10]"The comment is attributed to William A. Nelson, Yale University." S. Bremer, Book Review, 52 N.Y.U. L. REV. 700, 716 n.52 (1977).

[11]As Frederick Maitland remarked, though lawyers seldom seem to make good historians and the lawyers method often conflicts with historical objectivity, legal training is nonetheless important in doing good legal historical work. "But we can say this, that a thorough training in modern law is almost indispensable for anyone who wishes to do good work on legal history." Maitland, *Why the History of England Law Was Not Written,* in FREDRICK WILLIAM MAITLAND, HISTORIAN 132, 140 (R. Schuyler ed. 1960). Horwitz has elsewhere observed that a reasoning process common to the lawyer's technique, has produced a "conservative tradition in the writing of our legal history." In comparing the effect of legal reasoning process upon historical objectivity, Horwitz draws a comparison to the writing of scientific history, in which " 'earlier ages are implicitly represented as having worked upon the same set of fixed problems and in accordance with the same set of fixed cannons that the most recent revolution in scientific method has made seem scientific." Horwitz, *The Conservative Tradition in the Writing of American Legal History,* 17 AM. J. LEGAL HIST. 275 (1973), quoting, T. KUHN, THE STRUCTURES OF SCIENTIFIC REVOLUTIONS at 137-38 (2d ed. 1970). In other words, the lawyer's attempt to synthesize a current postulate or principle from past data, which may represent disorder and conflict rather than a continuum, results in a distortion of the acutal past condition analyzed. Amazingly enough, some recent writers have regarded the recognition of "ideological conservatism" in the writing of legal history as a path-breaking insight. See *Auerback,* Book Review, 85 YALE L.J. 855 (1976). This particular observation is, however, one of the older recognized historiographic themes. See W. HOLDSWORTH, THE HISTORIAN OF ANGLO AMERICAN LAW 138-41 (1928); C. FIFOOT, LAW AND HISTORY IN THE NINETEENTH CENTURY 8, 14-15 (1956). In evaluating Professor Horwitz's books, we shall isolate and discuss the relationship between legal methods of investigation and analysis of data.

[12]The reference is, of course, to W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953). For a detailed discussion of parts of Professor Crosskey's work particularly his interpretation of the development of conflict of laws and commercial law rules in the federal courts. See note 56 *supra* & text accompanying. For an excellent account of the "reception" of the controversy generated by Crosskey's famous work, see Wollan, *Crosskey's Once and Future Constituion,* 6 POLITICAL SCI. REVIEWER 129 (1975). One objective here is to supply some much needed data and analysis relevant to these excerpts of Crosskey's work, as they have not been forthcoming since its publication nearly twenty-five years ago.

treatment of it. Our objective will then be to briefly illustrate and critique Horwitz's theory and methodology in a selective fashion, and to test his theories against the broader and more fully developed background of a major subject matter area. The conclusion will emphasize the thematic and subjective characteristics of much of our modern legal literature, and hopefully provide some sound insights into the relevance of the lawyer's craft to the analysis of legal historical data. Not only may the worth of Horwitz's book and its contribution to our understanding be thereby better appraised; but also what this and numerous other articles purport to describe—the role of the judge in the American system—may be better understood.

BASIC THEMES

The central themes of Horwitz's monograph may be stated briefly. During the years in question, 1780-1860, a wholly novel theory emerged in American law, and appeared in judicial decisions in the area of private law. This new "conception" of American law resulted from the collapse of the older theory of the common law as a body of just principles autonomous from human institutions, but discernable by the application of human reason.[13] In its place emerged a theory of law, including common law, which identified legal rules wholly with human will, thus coming full circle from the old view. As Horwitz puts it, "The result of this transformation in the underlying basis for legitimacy of the common law was that jurists began to conceive of the common law as an instrument of will."[14] This dramatic shift in legal theory also led to an equally dramatic shift in the judges' conception of their own role and their ultimate objectives in the common law process. "As judges began to conceive of common adjudication as a process of making and not merely discovering legal rules, they were led to frame general doctrines based on a self conscious consideration of social and economic policies."[15] The shift from the supposed "discovery" of legal rules to rational and "self conscious articulation" of them heightened the judicial awareness that what was being

[13]The characterization which Horwitz places upon the old or eighteenth century conception of the common law is entirely incomplete and misleading. Characteristically, he confines his discussion of this complex phenomenon to certain parts only, and contrasts the supposed change in legal theory to the single narrow facet of the common law process which he has chosen to represent it. A whole or more sophisticated explanation of the common law process, as it was conceived in the eighteenth century, will render all of Horwitz's evidence of novelty and change quite conventional. The recurrent practice of taking evidence out of context—such as the narrow view of the common law—which Horwitz uses to create the appearance of change whenever other data is compared to the extracted artificially limited evidence of the common law thus accelerates and distorts the observer's sense of movement away from old doctrine.

[14]HORWITZ, *supra* note 1, at 22.

[15]*Id.* at 2, appearing in a chapter entitled "The Emergence of an Instrumental Conception of American Law," which is the name Horwitz gives to this new judicial rulemaking power. Likewise Horwitz asserts, "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." *Id.* at 1.

done was the making and enforcement of far ranging social policy. "For the first time, lawyers and judges can be found with some regularity to reason about the social consequences of particular legal rules."[16] Similarly, jurists began to frame legal arguments in terms of "the importance of the present decision to the commercial character of our country."[17] Thus, not only did a large number of new legal rules, new precedent, emerge during this period, but both the *way* in which the rules were created and their *purpose* were also novel. These features and their effect on the judicial role in our common law processes are central to Horwitz's work.[18]

Equally important, however, is the *result* of this jurisprudential change, for as it concentrated far ranging power in the courts, Horwitz argues, the precise conception of the social and economic policies resulting from the new power also became clear. The new direction pursued by the judiciary armed with their novel and instrumental theory of law was to support dominant, growing capital and economic forces, that is "big business" and the commercial classes, by restructuring the private law in order to create an extensive system of legal subsidies. As Horwitz contends "Having destroyed or neutralized earlier protective or regulatory doctrines at the same time as they limited power of juries to mete out the rough and discretionary standards of commercial justice, a newly established procommercial elite was able to align itself with aggressive business interests."[19] Thus, "[I]n the period between 1790 and 1820 we see the development of an important new set of relationships that make this position of dominance [of commercial interests] possible: *the forging of an alliance between legal and commercial interests.*"[20] The judiciary,

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[16]*Id.* at 2.

[17]*Id.* (*quoting* Liebert v. The Emperor, Bee's Admir. Rep. 339, 343 (Pa. 1785)).

[18]*See* note 2 *supra.*

[19]HORWITZ, *supra* note 1, at 211.

[20]*Id.* at 140 (emphasis added). The results of the alliance and the emerging system of private law subsidy rules, Horwitz alleges, did no good for the economically weaker elements of society. "It does seem quite likely that they did contribute to an increase in inequality by throwing a disproportionate share of the burdens of economic growth on the weakest and least organized group in American society." *Id.* at 101.

> For seventy or eighty years after the American Revolution of major direction of common law policy reflected the overthrow of eighteenth century precommercial and antidevelopmental values. As political and economic power shifted to merchant and entreprenurial groups in the postrevolutionary period, they began to forge an alliance with the legal profession to advance their own interests through a transformation of the legal system.
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> Law, once conceived of as protective, regulative, paternalistic and, above all, a paramount expression of the moral sense of the community, had come to be thought of as facilitative of individual desires and as simply reflective of the existing organization of economic and political power.
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> . . . .
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> By the middle of the nineteenth century the legal system had been reshaped to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society. Not only had the law come to establish legal doctrines that maintained the new distribution of economic and

then, employed a new conception of their common law authority to shake off the restraints of earlier common law substantive principles, and in so doing conspired with the business world to redistribute society's resources in a manner favorable to the commercial elite.[21] The thesis is straightforward enough, but the proof of these claims must be tested. That requires a discussion of the data used by Horwitz to support this transformation theme and the method of its presentation.

In discussing the law lectures of James Wilson delivered in Philadelpia in the 1790's, Horwitz remarks: "Wilson revealed the extent to which he had come under the spell of modern [sic] conception of law as a sovereign command."[22] In the passage Horwitz quotes from Wilson, a hypothetical dispute is put by Wilson as an illustration of the principle legitimizing positive rules of law. Wilson denies the asserted duty to obey a particular principle simply because it may arguably be moral to do so, because such an "injunction", without more "possessed no human authority."[23] Horwitz concludes,

> "Thus the bases for obedience to law was set entirely within the modern framework of a will theory of law . . . This definition of the basis of obligation in terms of popular will was a far cry from the eighteenth century conception of obligation derived from the inherent rightness or justice of law. The result was distinctly postrevolutionary phenomenon: an attempt to reconstruct the legitimacy not simply of statues, but of common law rules, on a consensual foundation. Wilson, for example, insisted that custom was intrinsic evidence of consent."[24]

Indeed, as Wilson put it, in the continuance of customary rules revealed "the operations of consent universally predominant."[25] "Thus," says Horwitz,

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political power, but, wherever it could, it actively promoted a legal redistribution of wealth against the weakest groups in society.

Id. at 253-54.

At one point Horwitz allows that this massive overhaul in the private law may have come "only by inadvertance" thus avoiding a flat statement of a conscious "conspiracy theory" involving lawyers, judges and businessmen. The degree of consciousness is, however, irrelevant to whether the doctrinal changes actually took place outside conventional common law theories and according to a new conception of law.

Even if Horwitz's theory of a rather unified class oriented activism in the early American judiciary is accepted, the economic interpretations which he makes of the case law are very questionable. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 183-85 (2d ed. 1977), discussing Horwitz's economic interpretations of certain features of nineteenth century contract law in Horwitz, *The Historical Foundations of Modern Contract Law,* 87 HARV. L. REV. 917 (1974). Full consideration of Horwitz's economic analysis is beyond the scope of this paper.

[21]*See* HORWITZ, *supra* note 1, at xvi, citing R.H. Coase's famous theorem on the effect of legal rules on efficiency. Though it is debatable whether efficiency is affected by altering the legal rules without "transaction costs, distribution of resources is an entirely different matter.

[22]HORWITZ, *supra* note 1, at 19.

[23]*Id.*, citing 1 THE WORKS OF JAMES WILSON 180 (R. McCLoskey ed. 1967) [hereinafter cited as WILSON]. See WILSON at 112-14.

[24]HORWITZ, *supra* note 1, at 19. See WILSON at 122.

[25]*Id.*

"Wilson had significantly concluded that the obligatory force of the common law rested on nothing else but free and voluntary consent."[26]

What, precisely, is the *old* view with which Wilson's remarks are contrasted? According to Horwitz, it is "the inherent rightness or justice" of a particular rule, which is very different from consent. In understanding Horwitz's method, several things must be noted. For one thing, this characterization is an artificial and misleading characterization of the old view of law, albeit a characterization absolutely indispensable to Horwitz's claim of novelty and ultimately to the transformation theme of the book. Even more importantly, however, the contention that purely consensual explanations of the common law were in Wilson's time new is simply an error.[28] In fact, "natural law" or "law of reason" justifications for common law rules *and* consensual explanations of their origins were both a part of the common law tradition long before the American Revolution.[29] Horwitz's vision of a "law of nature"

[26]HORWITZ, *supra* note 1, at 19. See WILSON at 184-85.

[27]HORWITZ, *supra* note 1, at 19.

[28]A thorough description of the different views of the precise relationship between natural theory and the positive law, particularly customary law, is beyond the scope of this work. It is enough for our purposes to note the conjunctive use of natural law and consensual explanations for the obligatory force of legal rules. Horwitz ignores this highly important fact by presenting the older theory of legal obligation in terms of a completely unexplained reference to the "discovery" principle of common law adjudication. As Professor Christie has observed "The ability of the natural-law tradition to attract sustained widespread intellectual interest in modern times has not been helped by the tendency of supporters and detractors of the tradition to carry on their debate by means of cliches." G. CHRISTIE, JURISPRUDENCE 78 (1973). Moreover, as he remarked, "[T]here really is no such thing as a coherent natural law tradition with a common core of specific intellectual and moral concerns but only a constant groping by many diverse thinkers for the essence of law." *Id.* The important point to remember, however, is that the structure of the analysis of natural law has not been along the mutually exclusive lines of consent and "discovery" of disembodied devine principles, but has integrated the latter theoretical explanation for the 'essence of law" with consensual forms of positive rulemaking, which characteristically include custom or common law. See C. ST. GERMAIN, DOCTOR AND STUDENT OR DIALOGUES BETWEEN A DOCTOR OF DIVINTY AND A STUDENT OF THE LAWS OF ENGLAND 14 (16th ed. 1761) [hereinafter cited as GERMAIN]; F. POLLOCK, ESSAYS IN THE LAW, 179 (1922).

Much of the influential writing on the subject also recognized the compatability of the process of exercising human will to create positive law with essentially "devine" and natural principles of a supposedly immountable and universal character. *SEe* T. AQUINAS, SUMMA THEOLOGICA SECUNDA PAR, Q 90. Arts I and II (1273-76), from Dominican Province Translation (London, 1915). As Aaninas remarked upon the related or compatible exercise of human will and the devine standards that governed and validated the exercise, "[T]his participation in the external law in the rational creature is called natural law." *Id.* at Q 91, Art. III. "Therefore all laws insofar as they partake of right reason, are derived from the external law." *Id.* Q 93, art. III. "Natural reason" was regarded as a "general condition" to which positive laws must conform, though each mainfestation of reason in the form of positive laws entails *different* positive principles among different people or different places. See *id.* Q. 91, art IV. But most importantly "the consent of the whole people expressed by a custom" was a well understood function of the natural law. *Id.*, Q. 97, Art III. We will later herein more thoroughly consider the manifestations of this particular aspect of natural law theory in the case law. At any rate, regardless of the particular espistomological problems with the theory, its compatability with positive customary rules of law of a recognized consensual nature was perfectly evident in the classical philosophy and judicial exigesis of the natural law system.

[29]J. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 32 (1957); F. POLLOCK, ESSAYS IN THE LAW 64 (1922).

rationale yielding to the consensual one is grossly overstated, for both elements had long been regarded as essential to a complete description of the common law process. Moreover, even if one accepted Horwitz' view, it is not clear why the alleged emphasis on consent would cause the *judiciary* to emerge as the most significant and powerful element in the legal system. Such a persuasive preoccupation with consent would rather seem to be an invitation to legislate, and perhaps tend to reduce rather than encourage the extensive judicial activity which Horwitz points to in support of his thesis. If such a new conception were really widely or deeply held, one would expect more than a passing remark from the judiciary in defense of the massive doctrinal overhaul which they were producing.

METHOD OF PROOF: FLAWS IN EVIDENCE

It is clear that Horwitz's proof for the existence of the new "instrumental" theory of law, and the procommercial results it was consciously used to produce, rests mainly upon the demonstration that nineteenth century judicial action was itself novel in character. In the styles of decisionmaking which typified it, and in the effects it was capable of producing, this judicial action is described by Horwitz as being thoroughly novel. This is of course indispensable to the argument that a new theory of judicial action, a new conception, was born; for unless Horwitz can successfully argue that this era represented a new jurisprudence, his primary contribution would simply be the identification of doctrinal changes which had *some* impact on the distribution of societies resources. It is thus critical for Horwitz to show that the *way* is which rules of common law were changed was novel, and not just that some novel rules emerged.

One of the first and most important indicators of the evidence of an instrumental conception concerns the manner in which the older common law authority was, according to Horwitz, harmonized by the courts with an allegedly modern theory—the "will theory" of law. Two facets of the argument which provide evidence of this new rationalization are critical to Horwitz's argument: (1) the characterization of the *old* concept of common law authority—(i.e. what legitimized common law rules), and (2) the identification of a *new* explanation in contrast with the old. In the treatment of these elements, illustrating a process of proof that is quite literally pathological to Horwitz's work, the data representing the old view is narrowed and completely removed from context—and in some cases left entirely unexplained—so that the evidence tendered as representing the new view will assume an exaggerated contrast when compared with the old, thus appearing strikingly distinct. The important point, however, is the fact that abundant evidence from the English common law system demonstrates a pre-eighteenth century awareness of both the consensual rational for common law authority and the utility of judicially fashioned rules—two elements which Horwitz defines as

"distinctly postrevolutionary."[30] (For example, in the *Case of Tanistry*, decided by the King's Bench in 1608 all the trappings of the instrumental conception of law are apparent.) The question there was whether a customary rule of Irish law—the tenure of tanistry—or the English common law rule of primogeniture should prevail.[31] Both the source of legal obligation in the common law system and the utility of these competing rules were discussed by the court. As the reporter described the principles relating to the common law:

> "[A] custom, in the intendment of law, is such an usage as hath obtained the force of a law, and is in truth a binding law to such particular place, persons or things as it concerns; and such custom cannot be established by the king's grant . . . nor by act of parliament, but is *lex non scripta*, and *made by the people* only of such place, where the custom runs."[32]

Is the phrase "made by the people" suggestive of some consensual explanation of the common law process, or merely the jargon of the old "discovery" theory of the common law?[33] The case places the source of common law obligation within a voluntary or consensual process. As the case continues: "For where the people find any act to be good and beneficial, and apt and agreeable to their nature and disposition, they use and practice it from time to time . . ."[34] Further underscoring the conceptual justifications thought to apply to common law rules, the court disallowed the alleged custom of tanistry, and illuminated the relationship between the determination of reasonableness and consent itself by characterizing such allegedly binding customary rules as "prejudicial to a multitude of subjects or to the common wealth in general, and commenced by wrong and oppression, and not be voluntary consent of the people. . ." and as such "they are adjudged unreasonable."[35]

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[30]HORWITZ, *supra* note 1, at 19.

[31]See 80 Eng. Rep. 516 (1608). Under the Irish custom, property descended to "oldest and most worthy man of the blood and surname."

[32]80 Eng. Rep. 519 (1608).

[33]HORWITZ, *supra* note 1, at 248 referring to "common law rules, which were thought to be discovered from 'immutable principles of natural law and abstract justice.' "

[34]88 Eng. Rep. 520 (1608).

[35]88 Eng. Rep. 520-21 (1608). The court elsewhere sets up a distinction between a custom and "positive law," stating that "chescun custome nest unreasonable give est contrarie at particular rule ou maxine del positive ley," and also between these two elements and the "law of reason." As to a custom contrary to the public good or somehow injurious to the multitude and favoring only some particular person, "tiel custome est repugnant al ley de reason, gives est desuis touts positive leyes," that is, repugnant to the law of reason which transcends even positive laws. 80 Ens. Rep. 520 (1608). Under this heirarchy of legitimizing principles a custom may prevail, if not "unreasonable," or against a "positive law" but neither avail if contrary to the law of reason. This will be discussed in § C, *infra* in the description of the common law process. The most important point is that all were viewed as compatible with consent, and consensual explanations were ordinarily given conjuctively with the others. It is necessary to delay full discussion of the common law process and its legitimizing principles until the later section, because it is too complex and important to allow piecemeal examination.

Thus, autonomous and regular party behavior could be observed by the courts under standards principally involving general acceptance, continuity and certainty, and could become a governing rule of decision. The consensual explanation as the overriding source of legitimacy of the rule was a familiar element in the language of the common law, and was employed in a manner compatible with what Horwitz describes as a separate and exclusive "natural justice" or discovery" rationale.[36] Indeed, consent was employed in a manner which demonstrated its essential relationship to the transcendent requirement of "reasonableness."[37]

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[36]HORWITZ, *supra* notre at 19.

[37]Moreover, the classical debate about the natural law from the middle ages onward embraced consensual explanations for customary law. As St. Thomas Aquinas observed in *Summa Theologia* of 1273-76, "[T]he consent of the whole people expressed by a custom counts far more in favour of a particular observance, than does the authority of the sovereign, who has not the power to frame laws, except as representing the people." T. AQUINAS, SUMMA THEOLOGICA, SEUCNDA PARS, O. 97, Art. III (1273-76) from the Dominican Province Translation (London 1915). Indeed the language of "reason," "reasonableness" or "natural law" was merely a theoretical justification of the processes of the common law. Rather than signifying some detached process of discretionary selection among certain disembodies natural rules, such language was the companion of the "consensual" description and theory behind the process of evolving rules of decision. As Matthew Hale, writing in 1671, remarked of the common law:

> [T]here is great reason for it; for it is not only a very just and excellent law in itself, but it is singularly accommodated to the frames of English Government, and to the disposition of the English nation, and such as by long experience and use is as it were incorporated into their very temperanment, and, as a manner, became the complection and constitution of the English Commonwealth.

THE HISTORY OF THE COMMON LAW OF ENGLAND 30 (C. Gray ed. 1973).

Thus, the language of consent was one of *the* most familiar elements in both municipal law and private international law in the eighteenth century, and during earlier periods. As Christopher St. Germain pointed out in describing the elements of the common law within English jurisprudence of the early sixteenth century, customs were observable facts, to be "determined by the justices," which derived their authority from their acceptance "by our lord the king, and his progenitors and all his subjects." GERMAIN *supra* note 28, at 19. As Horwitz remarked in his attempts to describe the supposed novelty of Wilson's views, "however much Wilson argued over whose will ultimately legitimized legal commands," a description of the principles of legitimation in terms of consent was "entirely modern." HORWITZ, *surpa* note 1, at 19. It was not, and however much one debates such procedures for identifying consent, the theoretical and consensual justification for the rules themselves may have been modern for Christopher St. Germain, writing in 1523 but a 250 year discrepancy in Horwitz case for novelty is hardly insignificant!

Other evidence of the older consensual view abounds in the literature of the Engligh common law, and was largely adopted with the rationale for the common law system in America. For example, in the introductory remarks to his report of cases from the King's Bench from 1601-1621, Sir William Davies remarked on the principles from which the rules of the common law—indeed the common law process—derived legitimacy and obligatory force.

> Therefore as the law of nature, which the Schoolman calls *jus commun* and which is also *jus non scriptum*, being written only in the heart of man, is better than all the written hours on the world to make man honest and happy in this life, if they would observe the rules therof: so the customary law of England, which we do believe call *jus commun*, as coming nearest to the law of nature . . . and which is also *jus non Scriptum*.

Davies Report 4 (1615). In contrasting statutory laws, which are "imposed upon the subject," with common law rules, which must be "tried and approved" before they assume the status of governing rules, Davies was merely reiterating the familiar theory of common law rules as

In describing postrevolutionary American legal theory, Horwitz asserts that much of the historical evidence clearly reveals the growing recognition of unprecedented judicial descretion. For example, Horwitz quotes Zepheniah Swift from his *System of Laws of Connecticut* (1795) as arguing that "If a determination has been founded as mistaken principles, or the rule adopted by it be inconvenient, or repugnant to the general tenor of law, a subsequent court assumes the power to vary from it or contradict it. In such cases they do not determine the prior decision to be bad law; but that they are not law."[38] Horwitz concludes that "Swift then came as close as any jurist of the age to maintaining that law is what the courts say it is."[39] It is clear, however, that this characterization of precedent was a highly conventional one, and referred to judicial authority to construe precedent collectively and to decline to follow a judicial pronouncement deviating from the weight of authority. In short, it was a traditional view of common law *method* regarding the construction of a general rule from previous cases, and not a claim to modify clear rules because of some judicial policy at odds with them. The judicial technique Swift described was addressed to the *clarity* of the previous case technique, not to the weight which might be given a case which *accurately* represents the rule.

As Blackstone had remarked about three decades earlier in the context of a discussion of the method of rendering a series of judicial pronouncements internally consistent in their description of the common law rule: "For if it be found that this former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was not law."[40]

As other writers have recognized, the discretion permitted by this procedure entailed the identification and elimination of inconsistencies in the judicial record of common law rules, and not the rejection on policy grounds of a clearly evidenced law.[41] If a line of relevant cases contained some judicial

originating in *de facto* popular consent. As Sir Frederick Pollock observed, "the elements of reason and custom have been recognized by the highest authorities as inseparable and strengthening one another." F. POLLOCK, ESSAYS ON THE LAW 64 (1922).

[38]HORWITZ, *supra* note 1, at 25, *citing* SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 41, 46 (1975).

[39]*Id.*

[40]ST. G. TUCKER, BLACKSTONE'S COMMENTARIES (1803) [hereinafter cited as TUCKER]. Indeed the entire discussion in Blackstone concerns preventing judicial deviation from the "authentic record" of fixed customarily and consensually derived standards of conduct, rather than the judicial ability to say what the law is. What Swift referred to, and what Blackstone and older commentators were referring to, was the necessity for a particular "reasonable" decision in terms of congruity with the entire judicial record of precedent, rather than according to some general conception of "reasonableness." *See also* M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45 (C. Gray ed. (1973)).

[41]Indeed, it has long been observed that the use of the terms "reasonableness" or "inconvenience" had their origins in the judicial attempt to achieve some conformity between the particular principles of the common law and the overriding conditions of the "natural law" by excercising judicial discretion in a quite limited fashion, and not according to some general power of "judicial legislation." See Winfield, *Public Policy in the English Common Law,* 45 HARV. L. REV. 76, 79-82 (1928) [hereinafter cited as Winfield]. As Winfield remarked, it is obvious that

pronouncements which were at variance with the rule articulated by the majority of them, it would of course be foolish to follow those decisions. A series of decisions which purport to collectively state the existing legal principles must of course raise problems of construction in litigation when a court attempts to derive the rules of law from them and determine what they mean to a new state of facts. Horwitz thus mistakes the inevitable lack of absolute consistency in the judicial treatment of legal rules over the course of time, and the method developed by the common law for dealing with this inconsistency, with some creative power to legislate.

These examples should adequately illustrate the Horwitz methodology: the highly selective use of artificially circumscribed and oversimplified evidence in representing the *old* legal process, so as to exaggerate the sense of change and novelty associated with the *new* process.[42] Moreover, these are intended *only* as illustrative examples, for an real insight into Horwitz's method will require a somewhat more extended analytical apparatus. This will be necessary because Horwitz not only subjects particular legal principles to his method, but does so with whole areas of the law and the legal system; therefore, before any meaningful evaluation of Horwitz's thesis is possible, an alternative context for each significant legal principle used by Horwitz will have to be presented. Only in this fashion can we test the claims for novelty of any given element of evidence and turn the thesis for novel conception of law which in Horwitz's opinion these elements demonstrate. This necessitates a closer look at the cornerstones of Horwitz's case for the transformation of American law.

THE COMMON LAW PROCESS, THE GENERAL COMMERCIAL LAW AND CONFLICT OF LAWS

Since Professor Horwitz relies heavily upon his interpretation of the "general commercial law" in the federal courts, particularly its treatment by

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when "the founders of our common law spoke of 'reason', 'the law of reason,' 'the law of nature,' they doubtless had a vision of some abstraction and wished to make the law harmonize with that" *Id.* at 99. The fact that these ideal conditions were at times identified with "the postulated eternal immutable law of nature", rather than taking the form of the "classical creative natural law of the seventeenth century" should not deceive the observer of the common law into believing in some continuous, prerevolutionary "discovery" monolith employed to rationalize judicial discretion. The older authorities reveal a system much more complex than this, and the classical texts in the nature of the law, much as ST. GERMAIN'S DOCTOR AND STUDENT, *supra* note 28, were in reality expressions of what most lawyers and jurists "felt and practiced." See *id.* at 77. See R. POUND, LAW AND MORALS 36 (1923), quoted in Winfield, *supra* at 84 n.46. Winfield has observed the interesting fact that two quite different books, DOCTOR AND STUDENT with its theoretical description of the "vital spirit" of the English legal system, and Fitzherbert's incredibly complex NEW NATURA BREVIUM (1534), were both recommended by Matthew Hale to aspiring students of English law. See Winfield, *supra* at 79. *See generally* Knight, *Public Policy in English Law,* 38 L.Q.R. 207 (1922).

[42]Amazingly, sometimes Horwitz actually splits the elements of the old or traditional common law system and calls one "old" and the other "new." Two integrally related principles in the

the Supreme Court, and since this issue implicates an important part of William Crosskey's debated thesis on the subject, it will be useful to address both the common law process and the general commercial law at some length.

The Common Law Process

First, an important distinction must be drawn between the common law process and common law rules.[43] Though the two are related, the failure to distinguish these two elements in the analysis of the common law system has accounted for much confusion. The most fundamental element in understanding both the *system* of rules and *process* which produces such rules is an understanding that the way in which the process places limits upon judicial discretion in the classical system is not in the "making" of law as that process is currently understood, but rather in the application of certain general principles in the construction of presumptively binding legal rules contained in precedent, so as to augment and extend the precedent to new situations. Under these decisional rules as they were conceived and articulated in the eighteenth century, the judicial decisions comprising precedent or authority in a particular legal point were commonly said to be "evidence" of what the governing legal rule actually was.[44]

This characterization, though often derided as a fictional rationale and justification for judicial legislation, actually was a part of the general recognition that the common law process was comprised of several very distinct phases.[45] These phases may be most generally described as a process of evolu-

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common law process are labelled as distinct because varying emphasis may be found on one element as opposed to another in previous judicial opinion, and thus the illusion of change is created by asserting a chronology for the appearance of each element of proof which in fact did not exist. This feat of legerdemain is one of Horwitz's finest.

[43]Differing emphasis upon these two facets of the overall process-rule content and decisional technique—has long been a part of discussions on the common law, and has accounted for a great deal of the confusion about the role of the common law in the post-revolutionary American system. It is interesting that this emphasis is a natural result of the overall process of maturation in the common law system which produces various degrees of specificity and completeness among different subject matter areas.

[44]*See* TUCKER *supra* note 40, at 68-73. This of course is the conventional terminology which was embraced in the general commercial law decisions and which has often been confused with some "discovery" or "brooding omnipresence" characterization of the common law. Actually the phrase was descriptive of the relationship between precedent and law, rather than descriptive of a general legal theory alone. The way in which the rules which the precedent evidenced were in fact circumscribed under the common law system (for example, according to locality) contradicts the characterization of such phraseology as a mere endorsement of some unfettered judicial authority to discover correct or reasonable general uniform rules de novo in each case. *Compare* Horwitz, *supra* note 1, at 245 and his erroneous characterization of Swift v. Tyson, 42 U.S. (16 Pet.) 1 (1842) *with* notes 72-77 *infra* & text accompanying. *See also* M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45-46 (C. Gray ed. 1971); L. Lewis, *The History of Judicial Precedent* (pt. II), 46 L.Q.R. 341, 353-55 (1930).

[45]Significantly, some modern writers have seen that the focus on one particular phase of the common law process to the partial exclusion of others has in fact accounted for much disagree

tion from a judicial inquiry into autonomous fact—for example, the fact of a certain general and long standing standard of party behavior, that is, a custom—to a state in which the factual inquiry has produced in the "authentic records" of the common law a sufficiently precise and inclusive description of the rules of conduct that the primary factual inquiry has disclosed.[46]

At each stage in which a question of a similar nature occurs, the necessity to make factual inquiry of the same type as in the original case is lessened because the court has already created in the form of a precedent a useful, though partial, description of the governing standard.[47] The basic

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ment and confusion in the literature. As Larry Arnhart has recently pointed out, the scholarly analysis of whether or not and how the English common law was "received" or incorporated into the American judicial system has often been colored by this selective characterization. In discussing the conflict between the opinions of Justice Joseph Story and Professor Crosskey on the nature of the common law in America, Arnhart remarks that "Crosskey quotes the passages in *Swift v. Tyson* where Story refers to Cicero's description of a law that is the same everywhere, but Crosskey denies that Story's decision rests on anything beyond the positive law." that is the rules of decision actually in force. "Hence, while Story can explain the reception of the common law as the transmission to America of those general principles of natural justice that had been a part of the English common law, Crosskey has to demonstrate that the English common law was formally adopted in America as positive law." Arnhart, *William Crosskey and the Common Law,* 9 LOY. L.A.L. REV. 545, 553 (1976). Thus the measurement of the status of the common law is conducted by the differing standards of rule content as opposed to similarity of *general* principles in the decisional process. The problem with the Story-Crosskey conflict stems from a differing emphasis on the content of precedent as opposed to the principles of the decisional function. Really, the conflict stems from the effect of the purely positivistic rationale for legal rules on the analysis of the common law system, as opposed to a system of though less insistent on identifying the rule content with a sovereign command. See *id.* at 593-94; note 73 *infra* & text accompanying.

[46]The following general description or model should be borne in mind when considering the particular evidence of the common law process discussed later in this section. To the degree to which the abstract description is a valid generalization for the process, and to which the American decisions of the nineteenth century actually conform to it, the claim for revolutionary transformation in the common law system will be refuted. As Arnold Toynbee remarked:

> The operation of constructing a model is different from the operation of testing whether it fits the phenomena. But, so far from its being proper to dissociate the two operations from each other, it would seem to be impossible to obtain sure results from either of them if they are not carried out in conjunction. The model has to be constructed out of only a fraction of the total body of data, or we should never be able to mount it for use in investigating the remainder. But, just on this account, the structure will remain tentative and provisional until it has been tested by application to all the rest of the data within our knowledge. Conversely, our picture of the data as a whole will remain chaotic until we have found a model that brings out in them a pattern of specimens of a species.

A. TOYNBEE, A STUDY OF HISTORY 53 (rev. ed. 1972). It is this precise task that we now have preceded Horwitz's selective inferences from isolated data. Until this is done we are unable to "tell whether the items in a particular conglomeration of data that we have picked out of the chaos, like a child picking spillikins out of a heap, have hung together accidentally." *Id. See also* F. HAYEK, LAW, LEGISLATION AND LIBERTY 29-30 (1973).

[47]For examples from the English system where a rule produced by earlier factual inquiry attained sufficient definition so as to remove the need for further proof of custom, and to allow the rule to be finally classified as a rule of law, see Magadara v. Hoit, 89 Eng. Ref. 597 (1691); Bramwich v. Lloyd, 125 Eng. Ref. 870 (1699).

The degree to which a common law rule could be deemed "settled" by a congruous series of judicial decisions was critical also in the treatment of state rules of decision by the federal courts, especially in diversity cases. This was, however, merely a function of the established common law

philosophical conception behind this process is that the ultimate source of the standard is not the court, which only reflects or evidences the standard on the occasion when its intervention is necessary, but rather the vast universe of private activity which achieves "reciprocal orientation" of individual action by voluntarily assuming certain modes or patterns of behavior or custom. The *actual rule* is nowhere personified or ever perfectly circumscribed into an inflexible definition, because the permutations in the custom or standard as practiced follow progressively changing patterns as society itself changes. The "blackletter rule of law," although it constitutes the fond dream of most law students, is at best an imperfectly articulated representation of the ongoing process of limited judicial intervention. As many commentators have pointed out, this "primacy of the abstract"[48] is a traditional element in the whole common law process, and stereotyped renderings of a particular rule of law, though known, do not themselves eliminate the necessity to understand the application of the abstracted rule through the search for precedent.[49] In debating the application of case law to a particular state of facts, the debate is thereby actually focused upon the degree to which party behavior may be said to conform to the general standard of which the abstract rule in the cases is evidence.[50]

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function of deriving articulate precedent from a course of judicial decisions and therefore pertained to state as well as federal cases. See the cases collected in R. POUND, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW, 227 (1913). Just as Professor Horwitz mistakes federal cases performing an ordinary "rule construction" function or common law resolution of an extraterritorial case with overt deviations from presumptively applicable state law, see HORWITZ, *supra* note 1, 211, he also fails to appreciate the degree to which any individual case represents a particular phase within the common law process of rule settlement. For example, at one point Horwitz remarks that "one looks in vain for any general observations on the nature and limits of the binding authority of commercial custom." *Id.* at 189. Yet the cases contained *built in* limitations which emerged as the judicial acknowledgement of common law rules progressed to the stage where the statements of positive law contained in the cases was thoroughly settled. For example, The Reeside, 20 F. Cas. 458 (C.C.D. Mass. 1837) (No. 11,657), which Horwitz cites on another point, HORWITZ, *supra* note 1, at 197, represents the characteristic decline in judicial willingness to liberally admit factual proof of the content of custom after the contours of the positive rule had fully emerged in previous cases. See 20 F. Cas. at 459.

[48]F. HAYEK, LAW, LEGISLATION AND LIBERTY 30 (1973). Significantly, Professor Horwitz treats evidence of the abstract quality of common law rules as a postrevolutionary novelty. *Horwitz, supra* note 1, at 144. *See* J. Story, *A Report of the Commissioners Appointed to Consider and Report Upon the Practicability and Expediency of Reducing to a Written and Legitimate Code the Common Law of Massachusetts, or any Part Thereof; Made to His Excellency the Governor, January, 1837,* in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 698, 701 (1951) [hereinafter cited as Story].

[49]*See generally* Stimson & Smith, *State Statute and Common Law,* 2 POLITICAL SCI. Q. 105 (1887).

[50]Moreover, the forces external to unfettered judicial discretion of the sort envisioned by Hobbes and his school set qualifying standards, or over-all tests for utility and "convenience", on each individual decision since its success was largely dependent upon successful integration over a wide variety of decisions spanning a long period of time. M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND xxxii-xxxiii, 45 (C. Gray ed. 1971). This feature of the common law process is ignored by Horwitz's argument for a high level of authority in each individual judge. Among courts without authority to bind other courts—*i.e.,* among courts whose authority was *inter se* persuasive—the degree of unanimity of opinion which would have been required for the unified

The common law process itself has this essential capacity to reach ever more mature stanges of development in two essential respects. First, the process matures in the degree to which accumulated judicial references to a given standard have produced an effectively inclusive or complete articulation of the standards. This causes the need for further factual inquiry to be lessened. The process of accumulating related precedent on like or similar cases is the obvious example. Secondly, the process mature to the degree to which the factual inquiry and gradually evolving complex evidence of the rule is extended to more and different subject matter areas. The common law when considered from the standpoint of rule content has thus achieved a state of definition and sophistication similar to a *corpus juris* on some subjects, though it is relatively incomplete as to others.[51] The various levels of maturation according to subject matter area should be born constantly in mind in assessing the evidence which follows herein. Relatedly, the potential differences in rules among different places which, in some but not all respects, are governed by the same *general* principles can also be accounted for in the common law process. This aspect of the growth of the common law produced the familiar distinctions between so-called "general" and "particular" or "local" customs or laws. This multiphase process was often recognized and articulated by the jurists of the nineteenth century in a manner strikingly parallel to the functional descriptions of the common law precedent in the eighteenth century. As Justice Redfield of the Vermont Supreme Court remarked in a commercial law case in 1854:

> [U]ntil such rules became necessarily settled by practice, they have to be treated as matters of fact, to be passed upon by juries; and when the rule acquires the quality of conformity and the character of general acceptance, it is then regarded as a matter of law. It is thus that the commercial law has from time to time grown up.[52]

Thus, the common law process ultimately reached a state of maturation in which the "authentic record" of the positive rule is to be found in the case law.[53] Obviously this created a problem with the movement of the rules themselves along the lines of autonomous party behavior since the transactions litigated will be tested against the judicial record and not according to a

alliance with the commercial "elite" to work is of course obvious. It is the limited nature of common law intervention, however, and the wide variety of judicial opinion forming the collective prevailing law which makes the conspiracy which Horwitz envisions unlikely.

[51]STORY, *supra* note 48, at 706, where the feasibility of codifying the common law is described as dependent to the degree to which any particular subject where judicial decisions have made the legal principles capable of "distinct enunciation." *See also id.*, at 729-30 for a reference to distinct subject matter areas within the common law which have reached to a "distinct" phase of "enunciation."

[52]Atkinson v. Brooks, 26 Vt. 569 (1854). *See also* STORY, *supra* note 48, at 698, 701 (1951). *Id.* at 702-03. *Compare* M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45-46 (C. Gray ed. 1971).

[53]See F. HAYEK, LAW LEGISLATION AND LIBERTY 100 (1973).

factual inquiry upon a clean slate. How does the system change? How is the same progressive consensual private authority shared among various individuals and groups in society allowed to continue its influence on the formulation of the rules? This of course was one of *the* most critical questions in the common law process and was in part treated under the conception of "disuetude" or the discontinuance of a general custom by disuse or contrary usage replacing it. This function of the process called upon the judges to evalute claims for the irrelevance of custom or its discontinuation in fact, and their task in so doing greatly resembled evaluation of evidence of a particular custom allegedly displacing a general one—that is, evidence of a peculiar local rule which constitutes a variation in the otherwise applicable general rule. It is here that the exercise of judicial discretion was most critical, for naturally the burden of displacing a well recorded positive rule either by demonstrating its general or local invalidity was greater and much different than the task of demonstrating the *initial* existence and content of the rule.[54] The judges were, in short, called upon to evaluate the relationship between the *record* of autonomous party behavior—or custom—as opposed to new and unrecorded evidence of a general or local standard deviating from that record.

It is in the performance of this critical task that much of the evidence Horwitz mistakes as a new conception of law was produced. It is, however, absolutely essential to bear in mind that the exercise of judicial discretion in this fashion was vastly different than an unfettered instrumental authority to compose rules out of the judges' conception of good social or economic policy. For in the case of the actual common law process, the record as evidence of the fact of a rule and new and contrary unrecorded facts were the objects of judicial inquiry, and always tied judicial activity and discretion to autonomous behavioral phenomena described in the old books under the head of customary law. The most fundamentally significant implication of this process is that it did *not* comprehend an all inclusive design or set of social policies for the society to which it applied; it was largely based upon the continuous recognition of an ongoing order of actions which judicial action only touched upon intermittently, and in a fashion supportive of the ongoing order rather than in a fashion designed to manipulate or wholly reform it. In intervening, the role of the judge was to apply the extant

[54]Similarly, the basic expectations supported by a particular rule may require some changes in the applications of the rule as facts change. This function resembles the judicial acknowledgment of changes in customary practices and allows those changes to be reflected in precedent. For example, if the raison d'etre of a property law rule was the protection of certain expectations which private parties have about the use, enjoyment, or development of property, the common law would permit judicial acknowledgement of changes in those expectations as the technological possibilities for use and development made them possible. It required no transformation of legal theory to transform the precedent in any given area. For example, consider the judicial reaction to new development demands on the use of water in the riparian rights cases, described in HORWITZ, *supra* note 1, at 34, *et seq.*

"authentic record" of these autonomous standards, if any, in conjunction with an empirical investigation of their evolving use in actual practice so as to cause the resolution of a dispute by judicial action to conform as near as possible to the legitimate expectations of parties as determined by external common standards of conduct. This interstitial method of dispute resolution was often heralded by the older writers in their discussions of the "convenience" of the common law, as compared with legislation. As Sir John Davies remarked, the common law

> doth far excell our written Laws, namely our statutes of Acts of Parliament: which is manifest in this, that when our Parliaments have altered and changed any fundamental points of the Common Law, those alterations have been fund by experience to be so inconvenient for the Commonwealth, as the Common law has in effect been restored again. . .[55]

In short, the classical model for common law adjudication roughly sketched above is based upon an entirely different set of assumptions about the relationship between law and judicial action on the one hand and the actions of the individual and society on the other. It keyed the evalutation of judicial action to the level of maturity, the rule content aspect, of the common law according to various subject matters, and the degree to which autonomous behavior provided a reliable guide to the formulation or exigesis of rules of decision. Not all subjects were able to satisfy these traditional tests with equal success, as might be expected. The point that must be borne in mind is that highly traditional criteria may very well account for what might appear to be a judicial "unwillingness" to follow a particular alleged rule of common law, rather than some instrumental design to make new and better law, unrestricted by any forces external to the judicial process.[56]

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[55]*Davies Report* 5 (1615).

[56]On the compatability of this theoretical description of the common law system and that existing in eighteenth century England and American, see TUCKER, *supra* note 40, at 67-79 (footnotes omitted); Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact* 51 POLITICAL SCI. REVIEWER 731 (1976). As Professor Nolan points out, though the commentaries were not often used so much as authority to dispose of a particular legal question as to illuminate a particular issue or legal area, its impact upon the American judiciary was nonetheless profound as a lucid description of the English legal system. As Justice Joseph Story remarked it was "a work of such singular exactness and perspicacity, of such finished purity of style, and of such varied research, and learned disquisition, and constitutional accuracy, that, as a textbook, it probably stands unrivaled in the literature of any other language." Story, *The Value and Importance of Legal Studies,* in MISCELLANEOUS WRITINGS OF JOSEPH STORY 503, 547 (W. Story ed. 1852).

It is clear that the various phases in the common law system and the varying degrees of judicial discretion required to facilitate it were very much in the minds of eighteenth century judges and jurists. The judicial functions of applying a relevant precedent to novel facts by extending its general principle to cover them included: the construction of the general rule from a collection of somewhat inconsistent case law in order to assess whether any given case contained a "reasonable"—that is accurate—statement of the governing rule, the required sensitivity to proof of new custom, or the decline and abandonment of old custom, the geographic limitations signified by the distinction between "general" customs and "particular" or local customs, the

The basic question is, is the above model an accurate generalization of the conception of the common law system extant during the late eighteenth century and more importantly, if it is, how much did the adaption of this form familiar to the American system after the revolution result in a transformation of the process and its underlying premises? To successfully demonstrate a change in the total conception of law and judicial action, writers such as Professor Horwitz must demonstrate not merely a change in *precedent,* which is a phenomenon distinct from the source of legal obligation, but also demonstrate that whatever changes occurred did so in a manner *not* in conformity with an accurate model of the older conception of this common law process.

An understanding of the origins and mechanics of judicially applied rules during the early federal period is essential to a correct understanding of the judicial role. The fundamental error in Horwitz's analysis lies in confusing the terms "precedent" and "law," and a consequent failure logically to pursue the ramifications of maintaining a once well-understood distinction between the two in analyzing early cases. It is this fundamental distinction in the common law decisional process which accounts for at least some of Professor Horwitz's

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limitations of precedent to the sovereign from which it originated, the harmonizing of different and potentially conflicting rules according to an extraterritorial custom, or private international law. All these were comprehended in a complex, highly flexible evolutionary system. The resultant ability to distinguish the source of the law, the legitimizing principles behind it, and precedent or case law which it produced enabled the common law to grow both widely and quickly. Despite Blackstone's insistence on the great age of custom which would be enforced by the courts, Tucker stated in a footnote in his American edition of Blackstone's COMMENTARIES that:

> It may be therefore doubted whether any custom can be established in the United States of America. For, Time of memory hath been ascertained by the Law to commence from the reign of Richard I, and any custom, in England, may be destroyed by evidence of its non-existence, at any subsequent period. Now, the settlement of North American by the English did not take place 'till the reign of Queen Elizabeth, near four hundred years afterwards. TUCKER *supra* note 40, at 76 n.7. Moreover, the same adaptability had existed a century before he wrote.

See Goebel, *King's Law and Local Custom in Seventeenth Century New England,* in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 83 (D. Flaherty ed. 1969). As Goebel described the conditions in the New England colonies, "Each colony had, of course, its peculiar characteristics, but in the seventeenth century before the Leviathan common law had been set in motion, the basic factor was the transplantation of local institutions and customary law." *Id.* at 119-120. Others, of course, have also recognized the long standing practice of analogical extension of customary roles within the common law process. *See* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLAND LAW 183 (2d ed. reissued 1968) (footnotes omitted) [hereinafter cited as POLLOCK & MAITLAND].

See also J. CARTER, LAW 69-71 (DeCapo ed. 1974) [hereinafter cited as CARTER].

The ratio descedendi of the system was not the enforcement of judicially created, class oriented rules, but the preservation of a wide range of private expectations by adjusting the judicial record of the rules to autonomous party behavior. This theory of the common law system could of course permit great expansion and change in the common law *rules.* Thus a critical question becomes whether the inherent flexibility of the traditional system, rather than the appearance of a revolutionary new "instrumental" one accounted for the doctrinal growth during the period considered. The conclusion of this writer is that a lack of familiarity with the decisional mechanics of the English common law system has caused Professor Horwitz to mistake their use in America with judicial inventiveness and novelty.

confusion about the indicia of changes in the "law," that is the basic theory, as opposed to doctrinal change within an existing theory.[57]

Indeed, Professor William Nelson in an excellent study of the operation of the pre-revolutionary legal system in Massachusetts has concluded that English common law and local custom played a role in the administration of justice in that "colony."[58] Suggesting at least the possibility that a conventional adaptation of the common law system could have accounted for the variety of new legal rules produced by the judicial process there, Nelson describes the authority of the jury in Massachusetts to find the law as enacted in regard to a disputed fact in a case as "virtually unlimited," which gave the "representatives of local communities assembled as jurors . . . effective power to control the content of the province's substantive law."[59] Because of the power of juries, the legal system Nelson describes could not serve as an instrument for the enforcement of coherent social policies formulated by political authorities, either legislative or executive, whether in Boston or in local communities, when those policies were unacceptable to the men who happened to be serving on a particular jury. The ultimate power of juries thus raises the question whether the judgments rendered in the courts on a day-to-day basis were a reflection more of law set out in statute books and in English judicial precedents or of custom of local communities.[60] Professor Nelson concludes

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[57]An understanding of the possibilities for expanding legal rules under the prerevolutionary judicial system as it was then understood in England and America (certainly the understanding of the system may vary from place to place in some respects) is essential to determining whether new precedent equals new legal theory, as Horwitz claims. We cannot otherwise assess the real novelty of each bit of evidence Horwitz adduces for the supposed transformation. For example, Horwitz alleges that it is part of the "new" view of the law to allow private parties to calculate in advance consequences of particular courses of conduct." HORWITZ, *supra* note 1, at 26. However, this allegation of novelty arguably concerns an element in the common law process that was absolutely essential to the "old" conception, and was one of the results of the interstitial, empirical process of evolving law from autonomous fact that made the common law so "convenient," even in the eyes of commentators two hundred years before the American Revolution.

[58]W. NELSON, AMERICANIZATION OF THE COMMON LAW 28-29 (1975) [hereinafter cited as NELSON].

[59]*Id.*

[60]It would be wrong, however, to conclude that community custom was the sole source of prerevolutionary law. In most reported cases, lawyers called the attention of jurors not to rules laid down by custom but to rules of common law . . . . The usual function of custom was only to fill in interstices in statute or common law . . . . The unceasing efforts of counsel to find the rules of common law and to argue those rules to juries suggests . . . that juries were swayed by those rules, that they generally decided cases in accordance with them, and hence that the common law of England rather than local custom was the usual basis of the law. But the fact remains that in every case they decided juries possessed the power to reject the common law and that juries as well as judges and even legislators did on occasion permit local custom to prevail over clear common law. In short, the communities of prerevolutionary Massachusetts freely received the common law of England as the basis of their jurisprudence but simultaneously reserved the unfettered right to reject whatever parts of that law were inconsistent with their own views of justice and morality or with their own needs and circumstances.

Id. at 30.

that both local custom and the English common law were applied by the jury in prerevolutionary Massachusetts, and his explanation of this indicates that, with the possible exception of the scope of the law finding function of the jury, the Massachusetts system resembled the typical common law process,[61] The interaction between the "received" common law of England and the articulation of local deviations, is, of course, suggestive of the frequently made distinction between the common law as a body of rules, and the common law as a continuous process of adjusting such rules according to new factual inquiry and the exegesis of extant rules.[62]

The appearance in Massachusetts of a flexible and adaptive common law system in which local opinion about presiding custom interacted with the judicially originated statements of common law rules is revealing. It demonstrates that prerevolutionary lawyers and jurists did not view the common law as a monolithic body of rules, the departure from which entailed a revolution in legal theory, but rather viewed it as also entailing a process by which the positive rules could change. Now the exact placement of the discretion to depart from precedent as between this jury and judge is of course critical. But the varying emphasis on judge as opposed to jury had for centuries been critical to the adaptability of the common law process, and the decision about when to "let in" new custom or practice to modify the effects of a given common law rule had occurred before the revolution. Christopher St. Germain's account of the differing authority to determine general as opposed to local custom was one example,[63] but so were the perennial outcries about the variation between a previously acknowledged common law rule and current practice,[64] a phenomenon common to the centuries both preceeding and following the American Revolution.[65] For this *not* to have been so, the adjustment of rule to practice in the common law process, that is such things as discretion and the proof of new or local custom, would have to have been self executing. They were not, but rather called for some judicial discretion, albeit prompted by the urgings of private parties and their advocates. But the main point is that the Horwitz thesis so understates and ignores the discretionary dynamics of the conventional or traditional system that he mistakes the ordinary for the revolutionary.[66] Thus a number of features in the

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[61]TUCKER, *supra* note 40, at 68-76.

[62]Jones, *The Common Law in the United States: English Themes and American Variations,* in POLITICAL SEPARATION AND LEGAL CONTINUITY 92, 134 (H. Jones ed. 1976).

[63]*See* note 65 *infra.*

[64]*Id.*

[65]Compare the reaction to Lord Holt's reliance on rules at variance with the prevailing practice, in C. FIFOOT, LORD MANSFIELD 15-17 (1936) and the complaints of the commercial community against the common law courts in the nineteenth century discussed in Chorley, *The Conflict of Law and Commerce,* 48 L.Q.R. 51 (1932). *See also* I. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 342-50 (5th ed. 1956).

[66]Indeed, Nelson provides further evidence of this awareness in the concluding chapter of his work, in which he describes how juries were brought under control of the courts, and the entire Massachusetts system first rigidified, when judges followed precedent closely, and then, by

prerevolutionary common law process relate directly to judicial discretion, and comprise the traditional dynamics of judicial action by the common law system which modern writers mistakenly regard as novel. First was the conception of legal obligation and the source of rules as distinct from precedent. Change in the former simply cannot be proven by pointing to change in the latter. Next was the process of "rule settlement," whereby the judicial inquiry into the application of a formerly recognized principle provided a good deal of discretion. Unless previous cases spoke intelligibly about litigated factual situation, some relatively more independent judgment by the judiciary was necessary in order to resolve the case.[67] Similarly, the necessary decision about the accuracy with which any given opinion in a larger number of opinions reflected the rule which cases sought to collectively articulate often provided a degree of judicial discretion.[68] As Blackstone described the process, the general adherence to particular precedent admitted "of exception where the former determination is most evidently contrary to reason . . . . ."[69] This was not a license to reject any given law for policy reasons. Judges "do not pretend to make a new law, but to vindicate an old one from misrepresentation."[70]

Thus, in the process of "rule settlement" the effective limits of individual judicial descretion are largely set by the coherency of the judicial declarations taken as a whole and compared with any one such pronouncement. As Sir

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the 1820's relaxed, when judges began to accept the "propriety" of departure from precedent. NELSON, *supra* note 58, at 167-74. Nelson describes the reasons for this "shift in attitude" as being the transfer of law-finding power from juries to judges, which threatened to "impose a straitjacket on future legal development" and the fact that judicially administered legal change had become "an abiding and unavoidable feature of the legal system," by the early nineteenth century, which in turn resulted in a situation whereby if "judges [had] said that they were merely applying precedent in bringing about such change" they would have been ignoring reality. *Id.* at 171. Apparently, Professor Nelson means that the "shift in attitude" by the judges was toward a view that they could make law, or, in his words, "that the direction of change was a matter of choice from competing policies rather than deduction from first shared principles." However, the early nineteenth century system he describes is perfectly compatible with the traditional common law system, leading one to suspect that Professor Nelson may be confusing an ongoing evolution of custom, and a consequent expansion or refinement of the precedent designed to evidence custom, with a mere departure from or "overruling" of precedent.

Nelson identifies certain contemporary statements about the common law with what he feels is a totally novel recognition of a new sort of judicial authority. For example, Chief Justice Parker's remark that the "principles of common law . . . . [would] undoubtedly apply" coupled with the observation that the *application* of those principles would vary from age to age, was taken by Nelson as an insight which the judges in the prerevolutionary era failed to have. *Id.* at 172. But again what indicates the *novelty* of those observations? Similarly, the absence of any real cohesive "procommercial elite" in the sense of a monolithic and unified force, pushing the development of precedent entirely in one direction suggests the process for change rested on influences which were much more diffuse than Horwitz suggests. See the discussion of this point in Presser, Book Review, *Revising the Conservative Tradition, Towards a New American Legal History* 52 N.Y.U.L. REV. 700, 706 (1977).

[67] TUCKER, *supra* note 40, at 69.

[68] *Id.* at 69-71.

[69] *Id. See also* POLLACK & MAITLAND, *supra* note 56, at 184-85.

[70] *Id.* at 70.

Matthew Hale put it, the "consonancy and congruity" of decisions was in the long run an effective guide to their correctioness and weight, and it was this standard, and not individual judicial perceptions which measured the "reasonableness" of a particular pronouncement.[71] When carefully considered, this is of course one of Professor Horwitz's more extreme oversimplifications of the process, though admittedly oversimplification is more acceptable than selective, misleading and incomplete use of data. For clearly no such judge or group of judges could escape the matrix of rules being observed by the greater number, or the forces which operate upon the exercise of judicial discretion, such as the metamorphosis of autonomous practice along which the adjustments of precedential record in the common law process gradually, if roughly, followed. The conspiratorial antics of the great mass of the American judiciary, glancing sidelong at one another as they step in unison to gratify big business by consciously overthrowing the private law of the country is somehow a spectacle which one finds difficult to accept without some real proof. Simplifying the complex forces working a change of precedent so that they fit some linear *neo-Marxian* model explaining all such phenomena as manifestations of class interests is of course a handy way of dispensing with most data beyond the change in precedent.

Additionally, the geographically limited application of some governing rules—represented by the distinction between general and local laws—entailed the judicial evaluation of evidence establishing deviations from the previously acknowledged common law rules. As will be shortly demonstrated, many cases dealing with this ordinary process of assigning certain weight to both localized peculiarities and to allegedly general deviations from a rule which had become relatively settled in previous precedent, have been mistaken by Horwitz as shifts in and out of entirely different conceptions of law. The case law, however, made it clear that once a customary rule, such as a rule of private international law of a commercial nature, had universally established itself and become judicially recognized in precedent among a variety of states and nations, naturally the burden of proving as a matter of fact that the weighty record of party behavior should be called into question, in particular places or generally, was quite high. This was only a method of establishing stability through the use of a reasonable presumption given to evidence of the widespread utility and universal approval of a particular way of doing things; it did not foreclose an inquiry into the facts of autonomous party behavior in future cases.

Lastly the integration of this decisional system with the American Federal Constitution provided still more jurisdictional complications and controversy surrounding the relative authority among different sovereignties.

It will now be useful to take this collection of decisional principles and employ them to test the Horwitz thesis. The degree to which their presence in

[71] M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45-46 (C. Gray ed. 1971).

the case law relied on by Horwitz accounts for precedential change will hopefully enable us to more reliably assess the "transformation" thesis.

The General Commercial Law and Conflict of Laws

As Professor Horwitz correctly observes, "One of the most interesting and puzzling developments in all of American legal history is the appearance of the Supreme Court's decision in *Swift v. Tyson* in 1842."[72] As a case brought under the diversity of citizenship jurisdiction, *Swift* raised questions about the effect of local or state common law rules and, should state law be in applicable, the content of potentially alternative rules of decision. Horwitz attempts to analyse both the independence of the federal judiciary from peculiar "localized" rules of commercial law, which would have in the absence of diversity jurisdiction been applied by state courts, and the *apparent* variations in the opinions of the Supreme Court about the status and content of the general commercial law. However, he does so within the "transformation" dialetic applied to state cases. Further, this shift from purely state cases to the federal opinions involves a set of totally new relationships between the federal and state governments and, in the context of the diversity jurisdiction, among the states themselves—a point either generally unknown to or ignored by Professor Horwitz. He did, however, sufficiently recognize that *something* in the universe of legal relationships with which law dealt had changed in the shift to federal case law, so that he felt compelled to call on William Crosskey for help, albeit to employ one of the weakest aspects of Crosskey's general theseis.[73] In the context of Horwitz' thesis, the basic issue is

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[72]HORWITZ, *supra* note 1, at 245; Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

[73]Horwitz argues, "As Professor Crosskey saw, 'the now prevailing conflicts-of-laws technique ha[d] little application in the eighteenth century and was the slow development of a later time,' roughly after 1820. The shift to a 'conflicts' approach reflected the erosion of the orthodox view that, since judicial decisions were mere 'evidence' of a 'true' legal rule, a conflict of decisions inevitably meant that one of those rules was simply mistaken. The field of conflicts of laws, then, arose to express the novel view that incompatible legal rules could be traced to differing social policies and that the problem of resolving legal conflicts by assuming the existence of only one correct rule from which all deviation represented simple error." HORWITZ, *supra* note 1, at 246. Two basic errors are contained in Horwitz' interpretation of Crosskey: First, the notion that a belief in the natural law foundation of legal rules entailed the assumption that all *particular* rules of law would of necessity be identical is entirely false, since the structure of the natural or eternal law argument entailed the use of those more abstract notions of the legitimacy of legal rules as theoretical and philosophical justifications for *particular* rules that admittedly differed from place to place, or nation to nation. The *positive* laws among nations were justified by the theorems of natural and eternal laws but their precise *content* was not required by this theory to be identical, whatever the different epistomotogical views of the natural law philosophies throughout history may have been. *See* HALE, CONSIDERATIONS TOUCHING THE AMENDMENT OR ALTERATION OF LAWS, in I. HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND, 269-70 (1787). Compare the various forms of law and ultimate source of legal rules in T. AQUINAS, SUMMA THEOLOGICA, Pars Secunda Q. 91 Arts. I-V, with Germain, supra note 28, at 4. Human laws or positive laws were generally treated as "particular determinations" which though possessing a good deal of variety, simply conformed to certain "other essential conditions" of a general nature for their validity. T. AQUINAS, SUMMA THEOLOGICA, Pars Secunda Q. 91, Art.

this: was there a growing body of transcendent legal rules known as the "general commercial law" which was acknowledged by the federal courts and which would literally supercede otherwise applicable state rules of law, and if this is so, is this evidence of a willingness of the federal courts, like their state bretheren, to engage in self conscious, interest-oriented judicial legislation?

a. *Obligatory "Local" Law in the Federal Courts*

In order to deal with this dual question it is necessary to first consider the true scope of the federal power in regard to diversity jurisdication. In *Swift v. Tyson*,[74] Mr. Justice Story construed § 34 of the Judiciary Act of 1789 to make certain local laws obligatory in the federal courts, but to exclude certain kinds of laws from its operation. Justice Story regarded as obligatory "the positive statutes of the state . . ." and state cases construing them, and laws pertaining "to things having a permanent locality," such as real estate, *and* other "matters . . . intraterritorial in their nature."[75] Contrariwise, nothing required the federal courts to follow state laws applicable "to questions of a more general nature."[76] Furthermore, Story clearly did not make the distinction between statutes and case law determinative of what was obligatory, but rather included both within the scope of the obligation to follow local law. The obligation was determined by the nature of the question and not by the nature of the legal pronouncement.[77]

In the first place, Story referred not only to statutes as obligatory but also as "established local customs having the force of laws."[78] Further it was clear that there was a distinct interplay between extraterritorial matters and local customs, which could become sufficiently developed and certain to counteract the general principles, in which case they would control.[79] Additionally, commercial cases arising under the diversity jurisdiction were by definition extraterritorial to the sovereignty of any single state. Clearly Justice Story recognized that this implicated a pool of case law including but not limited to

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III. Horwitz's implicit contention that the underlying belief in the system would require the rules of negotiability, for example, to be literally the same among various states or nations is rather absurd. However there are even more profound objections to his statement. In the manner in which private international law and conflict of laws rules actually developed and were employed in America after the Revolution, clearly no such requirement of literal rule conformity was ever thought necessary. See text *infra* in this section. Secondly, Horowitz's statement of the meaning and Crosskey's quote is mistaken and misleading. W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 563 (1953).

[74]41 U.S. (16 Pet.) 1 (1842).

[75]*Id.* at 18-19.

[76]*Id.* at 18.

[77]*Id.* See the erroneous conclusion in this point drawn by Professor Gray in J. GRAY, THE NATURE AND SOURCES OF THE LAW 254-56 (2d rev. ed. 1972).

[78]41 U.S. (16 Pet.) 1, 18 (1842).

[79]*Cf.* Bliven v. New England Screw Co., 64 U.S. (23 How.) 420, 433 (1859); Hazard's Adm'r v. New English Marine Ins. Co., 33 U.S. (8 Pet.) 557 (1834).

that of any given states, and called for an independent judgment on the part of the federal courts. In such cases "the state tribunals are called upon to perform the like function as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract of instrument, or what is the just rule furnished by the principles of commercial law to govern the case."[80] To have done otherwise would have been to abdicate their primary function in diversity cases—to insure impartial justice between citizens of different states.

Equally important, however, was the recognition of a variety of subject matters which were or could be "localized" by a state, so that the local rule could be obligatory on the federal courts. Most importantly, "localization" required a *particular form* of local pronouncement about the legal issue in question *and* a congruity between the commercial and private international law conflict principles. A body of interstate common law rules dictated when and under what circumstances one state could localize a transaction *vis a vis* another. The case law taken as a whole reveals that federal courts would defer to localization, by statute or judicial decison, only in accordance with general conflict of laws principles. This was, moreover, a practice in accord with conceptions of sovereignty inherent in *both* the federal and state cases.[81] Under these conceptions, sufficiently clear local laws—either statutes or decisions—would be obligatory when they pertained to matters local per se, such as real property within the state, and where they pertained to certain features of commercial transactions as well.[82] The federal case law makes it clear that the judges were concerned with determining which set of potentially relevant rules the private parties may legitimately have assumed were relevant to their transaction. In cases where an articulate localization had taken place, even if the rule thereby promulgated differed from the general rules of the law mer-

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[80]41 U.S. (16 Pet.) 1, 19 (1842).

[81]Even so, the cases would have to speak to a differing fact situations, and speak with sufficient clearity about the legal rule. Otherwise the federal courts would have to engage in a construction of whatever authority there was, even if the local laws were statutory in form, or took the form of unclear judicial pronouncements construing statutes.

See, e.g., Richardson v. Curtis, 20 F. Cas. 707 (C.C.S.D. N.Y. 1855) (No. 11,781). *See also* Townsend v. Todd, 91 U.S. 452, 453 (1875): "The question depends upon the recording acts of the State of Connecticut; and we are bound to follow the decision of the state in their construction of those acts, *if there has been a uniform course of decisions among them.*" (emphasis added). The point in the text is closely related also the the practice of the federal courts to disregard state decisions in diversity cases when the parties had entered into their transaction, etc. under a prior course of decisions. The federal courts would, however, be reluctant to construe local statutes, since any construction of ambiguous language might be at variance with the meaning ultimately ascribed to it by the state cases. *See* Coates v. Muse, 5 F. Cas. 1116 (C.C.D.Va. 1822) (No. 2,917). Thus, construction of statues unaided by state judicial decision was, according to Chief Justice Marshall, therefore, a matter of necessity, to be entered into only reluctantly; and the reason was that the "exposition of the acts of every legislature . . . the peculiar and appropriate duty of the tribunals, created by that legislature." *Id.* at 1117.

[82]19 F. Cas. 1270 (W.D.Va. 1846) (No. 11, 383), *aff'd on other grounds,* 29 U.S. (18 How.) 470 (1850).

chant, and the shared extraterritorial rules of sovereignty—the conflict of laws rules—pointed to the state where the localization had occured, the rule would be followed, but not otherwise.[83] Thus, rather than the "either-or" conflict between the transcendent and instrumental general law and applicable local law, the pattern that *actually* emerged was one in which parties to commercial transactions were obligated under the conflict of laws principles which controlled commercial cases to look to the appropriate state, in order to determine whether there had been a localization by statute or custom, of the relevant controlling law. If none was found, it could be presumed that the general custom prevailing in the commercial world would be applied, at least in the federal courts in cases within the diversity jurisdiction. This did not, of course, eliminate all uncertainty from interstate commercial dealings; but it did provide a regularized, relatively coherent system within which the expectations of the parties to various commercial transactions could be generally preserved intact. Moreover, it provided ample space for local variations from general commercial jurisprudence, enforceable in both state and federal courts, thus securing the only important state and party interests in the application of local rules.[84]

Not only would the common pursuit of rules limiting state sovereignty be conducted by the federal and state courts, but also both sets of courts consistently observed further limitations on common law authority, which were designed to better serve private expectations. For example, the federal courts would not follow local decisions, even where they were clear, in cases where the decisions had become settled only after the transaction litigated had occurred.[85] Thus the timing of the state precedent with respect to the disputed

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[83]*Id.* at 1272. There were of course many commercial cases, like *Prentice,* in which the federal courts routinely adhered to state decisions construing state statutes, construing such statutes independently only when no state authority was available to assist them. *See, e.g.,* Oates v. National Bank, 100 U.S. 239 (1879); Townsend v. Todd, 91 U.S. 452 (1875); Sumer v. Hicks, 67 U.S. (2 Black) 532 (1862); Henshaw v. Miller, 58 U.S. (17 How.) 212 (1854); Brasher v. West, 32 U.S. (7 Pet.) 608 (1833); Beach v. Viles, 27 U.S. (2 Pet.) 675 (1829); DeWolf v. Rabaud, 26 U.S. (1 Pet.) 476 (1828); Bell v. Morrison, 26 U.S. (1 Pet.) (1828); Paine v. Wright, 18 F. Cas. 1010 (C.C.D. Ind. 1855) (No. 10,676); Greene v. James, 10 F. Cas. 1151 (C.C.D.R.I. 1854) (No. 5,766); Cleveland P. & A.R. Co. v. Franklin Canal Co., 5 F. Cas. 1044 (C.C.W.D. Penn. 1853) (No. 2,890), Betton v. Valentine, 3 F. Cas. 311 (C.C.D.R. 1852) (No. 1, 370); Boyle v. Arledge, 3 F. Cas. 1108 (C.C.D.Ark. 1849) (No. 1,758); Bennett v. Boggs, 3 F. Cas. 221 (C.C.D.N.J. 1830) (No. 1,319).

[84]A full development of all the cases wherein the federal courts would differ to local authority, as opposed to presuming that private parties had acted under the expectation that extraterritorial rules were relevant to their conduct, is beyond the scope of this work. For a more complete description of the shared common law rules governing the choice between state and extraterritorial authority, see R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW, THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM. (1977).

[85]This was especially true when the retroactive enforcement of a common law rule would have placed a disproportionately heavy burden on nonresidents, whose expectations were central to the diversity jurisdiction. *Compare* Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841) and Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847) *with* Nesmith v. Sheldon, 48 U.S. 17 (7 How.) 812 (1849). It is interesting to note that in the former two cases wherein the Supreme Court

transaction, and a decisional principle disfavoring retroactivity under certain conditions, plus the required correspondence between sovereignty-limiting rules of interstate common law, plus the rule construction function which often required an independent judgment about the content of local law, all served to provide a context for the diversity cases infinitely more complex than the "transcedant instrumental law v. local law" dichotomy supporting the transformation thesis.[86] An examination of the early federal cases involving more than one state illustrates a complicated judicial function which is not adequately explained by Horwitz.

b. *Single State v. Multistate Elements in the Common Law*

In finding that the federal courts indulged in self conscious, interest oriented judicial legislation creating a general commercial law, Proffessor Horwitz discusses several early federal cases and the celebrated *Swift* opinion. For example in *Mandeville v. Riddle* (1803),[87] Justice Marshall speaking for the Court reversed a lower court opinion in a diversity case which had held that, despite a Virginia rule against the negotiability of promissory notes, which would have been necessary to permit assignees of such notes to sue remote assignors in a claim of assignment, the assignee could sue anyway, a result apparently contrary to the state rule. In reversing, Marshall (according to Horwitz) held that a state statute would have been necessary to confer assignability or negotiability upon such notes. Absent this, the federal court should not allow recovery. As Horwitz saw the significance of the decision, "Most important of all in terms of the much debated issue of whether the early federal judiciary enforced a general commercial law, Marshall treated the question as simply one of applying Virgina law, offering not the slightest suggestion that the federal courts had any independent power to establish

refused to give retroactive impact to state court decisions which would have disallowed transactions apparently legal when consummated, the burden of the state decision would be felt primarily by nonresident holders of negotiable instruments taken by exchange for slaves sold within the state in question. In *Nesmith,* however, wherein the court followed local law which affected transactions apparently legal when consummated, the burden of complying with the decision fell equally upon residents and nonresidents alike, which of course helped to dispel the suggestion of bias present in *Groves and Rowan.*

[86]For other cases discussing the limits imposed in the operation of state law in diversity cases, consider Union Bank v. Jolly's Adm'rs, 59 U.S. (18 How.) 503 507 (1855); Watson v. Tarpley, 59 U.S. (18 How.) 517 (1855) referring to the necessity for imposing the limitations on the operation of local law described in the text so that local laws would not "affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the constitution and laws of the United States . . ." *Id.* at 520. Professor Horwitz sees Watson as further evidence of an "instrumental" conception of law, HORWITZ, *supra* note 1, at 225 n.57, but it appears from the facts of the case that conventional private international law conflict rules would not have subjected the plaintiff to the Mississippi statute, that is this would *not* be a case where Mississippi could "localize" the rule of decision under these facts. The Watson opinion regarded the Mississippi rule as "a violation of the commercial law, which a state woud have no power to impose." *Id.*

[87]5 U.S. (3 Cranch) 290 (1803). HORWITZ, *supra* note 1, at 220.

rules of commercial law."[88] This significant case was brought up a second time six years later, resulting in what Horwitz claimed to be a reversal of Marshall's original position.[89] The Chief Justice, "despite the contrary view of the Virginia judges," held "out of the blue" that the endorsee could sue a remote endorser.[90] This result, according to Horwitz, meant the "Marshall's own conception of the underlying source of negotiability had radically shifted from the position that it arose only through legislative command to the view that it was founded on 'the general understanding' of the nature of the contract itself."[91]

The implicit assumption relied upon by Horwitz is that the law of Virginia was applicable to the case, absent some federal rule which might displace it. This assumption alone renders Horwitz explanation deficient because the issue was not exclusively the effect of the "legislative command" of Virginia upon the parties' contract, but rather it included the relevance of the laws of other states, as well as principles of law common to more than one state in a multi-state transaction. The form of the local rule was not so important to the outcome of a case under diversity jurisdiction as was the limitation on the effect of the local law, however manifest, upon a multistate transaction. The federal courts' general understanding of the conflict of laws rules set limits on the effect of any loal law and a federal court could depart from it by adverting to a common multistate rule or the rule of some other state involved in the transaction without displacing the local rule with a federal one. Horwitz's presumption of the applicability of the rule taken from the state where the federal court is sitting is a corollary of his "either-or, instrumental v. local" dialectic, but unfortunately belies an ignorance of the principles of federalism observed by the federal courts.[92]

Horwitz treats these and other apparently commercial law decisions,[93] and the subsequent *Swift* opinion by Joseph Story as an endorsement of a

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[88]HORWITZ, *supra* note 1, at 221.

[89]Riddle v. Mandeville, 9 U.S. (5 Cranch) 322 (1809).

[90]HORWITZ, *supra* note 1, at 223.

[91]*Id.* at 221.

[92]The diversity jurisdiction upon which the original suit was based necessarily raised issues other than the abstract relationship between the federal courts and the single state of Virginia. The extraterritorial form of the transaction in question—a note ultimately endorsed to a citizen of another state—potentially implicated the rules of the foreign state and consequently the rules of private international law which would be relevant to differences among the legal rules of states implicated in the transaction. This result was necessarily tied to the question of the degree to which the federal courts were bound by the local view of *Virginia alone*. In short, Horwitz has provided no analysis of the degree to which non-federal rules of law obligatory on federal courts sitting in diversity cases *included interstate rules*, which set the limits on the ability of individual states *inter sese*, to "localize" legal rules for multistate transactions. Since interstate relations in the private law area were involved in such diversity cases along with federal-state relations, the role of private international law, including conflict of laws rules, was a critical question in diversity litigation and the resolution of these issues explains the superficially dissimilar results of the federal case law. However, Horwitz merely treats the dissimilarities in the holdings as battle over the acceptance of transcendent commercial law in federal courts.

[93]See his treatment of Withers v. Greene, 50 U.S. (9 How.) 213 (1850) in HORWITZ, *supra* note 1, at 224.

general commercial body of law and related judicial authority to "discover" its contents, subject to the important limitation that state rules in a statutory form, unlike "discovered" common law rules, are obligatory on the federal courts in diversity cases.[94] The issue is thus simply put: Will the federal courts abide by local rules or, in an ultra-traditional reversion to the natural law "discovery" model as described by Howitz, will they rather follow their own abstract concept of the general law?[95] *Swift* was thus a return to the "pure" natural law discovery model of judicial decisions to vindicate the new partisan, interest-oriented "instrumental conception" of law. Further Horwitz argues that, ironically, the efficacy of the *Swift* opinion itself was eroded by the rise of the "conflicts approach" pursuant to which a federal court could selectively opt out of the otherwise binding local state rules. Though the conflict of laws principles employed by the federal courts were an assault on the natural law theory used in *Swift* to avoid undesirable local rules of law, the conflicts approach itself served the same instrumental ends. All this is just about as wrong as it could be.

Critical to the understanding of the actual significance of the general commercial law and conflict of laws principles as employed by the federal judiciary and their relationship to the source of legal obligation is an understanding of the relationship between these subjects and the law of na-

[94]HORWITZ, *supra* note 1, at 225, where Horwitz erroneously asserts that Watson v. Tarpley, 59 U.S. (18 How.) 517 (1855) was retreat from the natural law thesis of *Swift*. *Watson* is discussed later in this section.

[95]See HORWITZ, *supra*, note 1, at 245-46. The status of the "general law" dealt with in Swift v. Tyson is in typical fashion treated by Horwitz in terms of the "declaratory" theory, which would permit freedom from judicial pronouncements of the states since these were undifferentiated "evidence" of actual laws, and require only the observance of state statutes by federal courts. See *id.* at 245. The positivistic view of law, classifying even judicial decisions as sovereign pronouncements, and the "discovery" theory which would not so classify them, were made to seem in conflict. This misleading characterization of the "old" view has produced a misleading characterization of *Swift* itself.

Thus, by this point, the discrete views of the state courts and jurists, those of the federal judiciary, the complex questions of interstate relations and federalism involved in diversity cases, and the role of private international law rules in settling these issues in both the federal and state courts, are all subsumed under the natural law v. positivism dialectic that is the heart of the "transformation" theme. As Horwitz remarks:

> The jurisprudence of the treatise on *Conflicts* [by Justice Story] shows no trace of the view that differing [legal] rules of commercial law can be reconciled by reference to one overriding general law. Indeed, the treaties is written precisely because such a view of law can no longer satisfactorily explain the existence of a growing number of conflicting legal rules. In short, the conception of law put forth by Mr. Justice Story in *Swift v. Tyson* stands sharply opposed to the jurisprudence of his treatise on *Conflict of Laws* written just eight years before.

HORWITZ, *supra* note 1, at 248-49. The essentially narrow description of the natural law tradition and the *alleged* incompatability between divergent legal rules (or the acceptance of them as fact) and the continuation of the former natural law basis for rules has again produced the impression of profound change, and of a massive change of mind affecting nearly every one over the span of a few years. However, the method by which the rules of private international law including the "general commercial law" were integrated with the diversity jurisdiction through traditional common law processes reveals that the *Swift v. Tyson* approach was *perfectly* compatible with the approach in Story's treatise on Conflict of Laws.

tions generally. Just as the law of nations must deal with multinational transactions, the creation of a federal government in the United States required a means of dealing with multistate transactions. The means employed were not novel in that they followed the pattern set by international law, and followed a pattern of judicial decision-making which repeated the earlier incorporation of multinational principles in the English common law.[96] In understanding the role of commercial law as a part of the law of nations, it is important to recognize that there was originally no sharp distinction drawn between civil admiralty and maritime jurisprudence and commercial law. They were one and the same jurisprudence, and only after the passage of time did they become thought of as separate parts of international law.[97] Consequently, because commercial law was originally customary law, and because it was also a branch of private international law, it was dealt with in the same fashion by the courts as cases within the general customary system of common law adjudication.[98]

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[96]Sack, *Conflict of Laws in the History of English Law,* in 3 LAW, A CENTURY OF PROGRESS 342 (1937) [hereinafter cited as Sack].

[97]G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 5 (2d ed. 1975). *See also* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 657-59 (5th ed. 1956); Scrutton, *General Survey of the History of the Law Merchant,* in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 7-8, 11-12 (1909) [hereinafter cited as Scrutton]. *See also,* Adler, *Business Jurisprudence, 28 HARV. L. REV. 135 (1914); Burdick, What is the Law Merchant?,* 2 COLUM. L. REV. 470 (1902); Ewart, *What is the Law Merchant?,* 3 COLUM. L. REV. 135 (1903); Kerr, *The Origin and Development of the Law Merchant,* 15 VA. L. REV. 350 (1929); Thayer, *Comparative Law and the Law Merchant;* 6 BROOKLYN L. REV. 139 (1936); Tudsbery, *Law Merchant and the Common Law,* 34 LAW Q. REV. 392 (1918). See CROSSKEY, *supra* note 78 at 568:

> "Hence, [in the eighteenth century] it was considered that there was, in such cases, a complete defect of applicable local law; and the natural law, modified by international custom, was again regarded, in the rather rare cases in which such questions arose, as the appropriate rule of decision. But it was a natural law, and customs, as to what to do when such foreign local matters were involved."

[98]STORY, *supra* note 48 at 698, 705 (1851). *See also* the extensive reporter's note to Mandeville v. Riddle, 5 U.S. (1 Cranch) 290 (1803), found at *id.* 367. The note contains an excellent description of how the commerical law was received by the federal courts, and seems strongly to indicate that the process was one of deriving law from custom, rather than any intrumental process. *See* especially *id.* at 374. Moreover, there were numerous state cases in which the same view was taken of the international customary character of the commercial law process. Perhaps the most enlightening state case expanding upon the concept that commerical custom and usage were part of the law of nations was Atkinson v. Books, 26 Vt. 569 (1854). Judge Redfield, in an eloquent opinion, dealt with an issue similar to that which had confronted Story in *Swift v. Tyson:* whether a bona fide holder, who had accepted the note as collateral security for a preexisting debt, was indeed a holder for value. He then referred "to the English law, and the general commercial law." According to

> the general commercial usuage, there is, then, no essential difference in principle, whether a current note or bill is taken in payment, or as collateral security for a prior debt, provided the note is, in both cases, truly and unqualifiedly negotiated, so as to impose upon the holder the obligation to conform to the general rules of the law merchant in enforcing payment.

Id. at 574.

For other state cases, accepting the general rule of *Swift,* whether extended to include holders for collateral security of merely for payment, or whether decided before or after *Swift* itself, *see* Petrie v. Clarke, 11 Serg. & Rawl 377 (Pa. 1824); Steinmetz v. Currie, 1 Dall. 269 (Pa.

Similarly there was eventually a clear identity of function between substantive commercial law rules and conflict of laws rules which governed their application. It was thus quite appropriate for eminent writers on these subjects to describe conflict of laws doctrine as but a "branch of commercial law."[99] The conflict of laws rules designed to serve legitimate party expectations and intentions by making it universially obvious which of the potentially involved substantive rules applied to any given case. The commercial law rules interacted with the conflict of laws rules to serve this end. This was possible because of the increasingly regular, sterotyped forms which the commercial law had in many of its aspects assumed. It had become, as it were, a sort of international or interstate language, which enabled the parties to engage in "reciprocal orientation of their actions" across state lines.[100]

For example, it was clear to parties in commerce from the facts of a transaction, particularly the forms by which it was conducted, whether or not it pertained to an extrateritorial as opposed to a purely municipal or local set of governing rules. Various sets of rules, including customary ones both recorded and unrecorded in precedent, were present to govern or control most any transaction, and the conflict of laws principles when logically applied to a given transaction revealed whether it was confined to a particular sovereign or not. Thus, in creating a negotiable bill of exchange, certain commonly recognized features were necessary before the instrument became negotiable, a quality considered to be the very essence of such an instrument, and to constitute "its true character."[101] Such terms as "or order" and "or bearer" were, according to the general or extraterritorial methods of commerce, essential to negotiability. The form which the transaction assumed according to the common multi-state language of commerce determined whether its consequences were to be measured by one set of rules or another, that is by particular, or local, as opposed to general, or multistate rules.

It is of course quite tempting to view the conflicts approach as the real antithesis of the general commercial law in that the latter signifies an identical substantive rule shared by various sovereigns while the former signifies a set of

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1788). *See also* Carlisle v. Wishort, 11 Ohio 173, 192 (1842). *See generally* Story, *Growth of the Commercial Law,* in W. STORY, THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 262 (1852). It is clear that *both* federal and state courts were acutely aware of the disutility of extensive departure from the rules of general commercial law. See Aud v. Magruder, 10 Cal. 282 (1858), where the California Supreme Court discusses this issue at length.

[99]J. STORY, COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE 136 n.3 (4th ed. 1860) [hereinafter cited as STORY, BILLS OF EXCHANGE].

[100]J. STORY, COMMENTARIES ON THE LAW OF PROMISSORY NOTES 184-84 (6th ed. 1868) [hereinafter cited as STORY, PROMISSORY NOTES]. *Compare* STORY, BILLS OF EXCHANGE, *supra* note 99 at 136 *et seq., with* STORY, PROMISSORY NOTES *supra* at 176 *et seq.,* and STORY, BILLS OF EXCHANGE, *supra* note 99 at 175 *et seq.,* 183-85, 216, *with* STORY, COMMENTARIES ON THE CONFLICT OF LAWS at 575 *et seq.,* 598 (3d ed. 1946), respectively, for another illustration of the integral relationship in the textual treatment of commercial law and conflict of laws.

[101]STORY, BILLS OF EXCHANGE, *supra* note 99, § 3. *See generally id.* §§ 32-69, at 41 *et seq.* on the requisites of a negotiable bill and the characteristics it assumes by becoming negotiable. *See* C. TIEDEMAN, A TREATISE ON THE LAW OF COMMERCIAL PAPER §§ 1-9, at 1-24 (1889).

independent rules which determines which of various different sovereign rules prevail at the expense of others. This is the antitethical characterization made by Professor Horwitz: but what if several sovereigns who would be implicated in a multistate transaction have different rules on the substantive principle at issue (for example the requisites of negotiation, or the effects of receiving negotiable paper as collateral security, or the particular terms of restrictive endorsement) but would, on the other hand, all choose the same sovereign as the source of the applicable rule? Are identical conflict of laws principles themselves a part of the general commercial law even though they sometimes result in the application of a substantive rule observed by only one of several implicated sovereigns? Naturally the problem of classification was somewhat ambiguous, and unless one placed so much emphasis on the technicalities of rule selection in multistate transactions so as to insist that *true* general commercial law includes only *substantive* commercial rules but not other legal rules, then the relationship between choice of law or conflict of laws rules and the substantive rules themselves becomes obvious[102] Indeed, the employment

[102]Professor Horwitz's observation that the process of selecting among admittedly different governing standards, as opposed to applying a "universal" or "general" law was per se a repudiation of the "natural law theory" which could contemplate only one "true rule" is unsupportable. Actually many early cases *within* England acknowledged the difference between various local customs and formulated a sort of "intranational" choice of law approach dependent upon a classification of the cases resembling the continental distinction between "personal" and "real" statutes or laws. *See* Rutter v. Rutter, 23 Eng. Rep. 400 (ch. 1683); Chomley v. Chomley, 23 Eng. Rep. 663 (ch. 1688); Webb v. Webb, 23 Eng. Rep. 680 (ch. 1689). Likewise the acknowledgment of these distinct customs, the acknowledgment of the content of the "general" law, or law merchant, *and* the content of a possible deviant local foreign law, were all dealt with the initial, factual inquiry stage of the common law process. On the "general law" *see* Vanheath v. Turner, 124 Eng. Rep. 20 (C.P. 1621); Pierson v. Pounteys, 80 Eng. Rep. 91 (K.B. 1609). On the acknowledgment of foreign rules, see particularly Holman v. Johnson, 98 Eng. Rep. 1120 (KIB. 1775); Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (K.B. 1774). The "shift" to an adjustment of a case with extraterritorial features according to a foreign rule differing from English common municipal law as opposed to a general common rule was not a shift in legal theory, but both really resulted from the inevitable divergence of legal rules among municipal laws, even in the case of once common or general rules. *See* Sack, *supra* note 96, at 349-50, 376-77. Moreover, the *lex loci* approach was often consciously evaluated in terms of the traditional common law function of supporting party expectations. For example counsel in the *Mostyn* case argued as the use of foreign law: "For it [the action] must be determined by the law of the country, or by the law of the place where the act was done. If by our law it would be the highest injustice, by making a man who has regulated his conduct by one law, amenable to another totally opposite." *Id.* at 1024.

Indeed, the way in which Professor Horwitz creates the impression of novelty by assigning new and entirely subjective motives to highly conventional processes is strikingly revealed in his discussion of the treatment given the law merchant in the American state courts. Horwitz notes the use of the "struck jury", a practice which he asserts is a manifestation of "mercantile control over the rules of commercial law", and the eventual decline of the expert merchant jury to enunciate governing rules "under the pretext of fact finding"; HORWITZ, *supra*, note 1 at 155, 157. The eventual decline of the process is seen by Horwitz as representing a growing "pattern of judicial hostility to competing sources of legal authority," and as such constituting another novel postrevolutionary trend indicative of the overall transformation of the legal system. *Id.* at 159. Actually, Horwitz fails to appreciate how closely this development in America paralleled that which occurred in England about two centuries earlier, and the fact that this development there occurred entirely *within* highly conventional common law processes. The phenomenon which

of common rules either implicitly or explicitly observed by all concerned sovereigns to mitigate the inevitable differences in the substantive rules and their application among different nations and states, was essential to the successful settlement of multistate problems. The form in which a particular multistate transaction was conducted would in the contemplation of *both* the state and federal courts implicate a body of law which no state alone was constitutionally competent to supply because of the limiting conception of sovereign authority embodied in private international law rules.

This will, if properly understood, explain why the various state cases were not thought to be in direct conflict with some obligatory pronouncement

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Horwitz characteristically mistakes as revolutionary *actually* concerned the relative weight to be assigned to precedent which represented various stages of maturation within the common law process. The "pattern" was merely one of the typical and gradual judicial acknowledgements of customary rules in which increasingly dispositive weight was given to these judicial acknowledgements as they became more precisely "settled," or relatedly extended themselves to new and different applications of a rule of decision. For example, after a series of internal changes in which the common law courts began to exercise jurisdiction *within* England over cases technically arising within counties other than that in which suit was laid, the courts in the early seventeenth century extended their jurisdiction to cases wherein a truly *international* as opposed to *intranational* choice of law question might arise. In so doing, the courts began a long process by which common, international customary rules were incorporated into the common law by treating their existence initially as fact questions, and later as legal or precedential matters. *See* Sack, *supra* note 96, at 342. As Sack describes the process

> [T]he common law courts appear to have treated the law merchant not as a law but as a custom. The rules of the law merchant had to be pleaded specially, and proved, each time, as a fact.
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> . . . The rules of that law gradually ceased to be treated as questions of fact. In 1699, Judge Treby declared, with reference to bills of exchange, that there no longer was any need to allege and prove the custom.

And so gradually, the law merchant became 'part of the Common law.' *Id.*, at 376-77. For cases illustrating the movement toward the recognition of positive rules of the *lex mercatoria* in the common law process, see Martin v. Boure, 79 Eng. Rep. 6 (K.B. 1603) (first *common law* case dealing with a foreign bill of exchange), Pierson v. Pounteys, 80 Eng. Rep. 91 (K.B. 1609). Vanheath v. Turner, 124 Eng. Rep. 20 (C.P. 1621), Magadara v. Hoit, 89 Eng. Rep. 597 (K.B. 1691), Bromwich v. Lloyd, 125 Eng. Rep. 870 (C.P. 1699).

As the various exegesis of the common *lex mercatoria* became "municipalized" local variations were treated the same way internal variations in the English common law system had initially been treated—as factual questions which were addressed by reference to a common *choice of law* rule. The function of the choice of law rule was the same as the initial general law rule, and was incorporated into the initial "fact-finding" stage of the common law process in the same manner as the general law. The conflict or choice of law rule ultimately developed a very efficient interplay with the general law rules themselves in the American federal system, a fact largely ignored by our legal scholars. *See generally* Sack, *supra* note 96. The old "natural law" theory thus neither commanded absolute uniformity in the rule content of positive law, nor any particular method of addressing deviations from identical rules.

If the judges' "unwillingness any longer to recognize competing lawmakers" is a product of an increasingly instrumental "vision of law" as Horwitz claims, it is an "instrumental vision" established in our "received" common law system almost synchronous with the initial settlement of our country. A "continuation" rather than a "transformation" thus apty describes such precedential development in post-revolutionary America—at least in terms of basic common law processes—whether or not what was being done is labelled as "instrumental." If all that is being said is that we *inherited* and "instrumental vision" of law, then the most that can be said of Horwitz's research is that, like many before him, he has "discovered" the common law.

about the correct rule of general commercial law by a federal diversity court and why most state decisions were not in any case obligatory on the federal diversity courts. Professor Horwitz's "Federal Court v. Local Rule" metaphor is, it will be observed, entirely inaccurate.[103] To fully understand the litigation in the early federal cases, it must be understood that the ability to discern in advance which body of rules and usages would be deemed relevant to a trasaction was the key to understanding the early commercial decisions. It was here that a decisional technique, which was the legacy of a customary system attentive to autonomous part behavior, was felt the strongest. Most importantly the mature system of mercantile law and the mechanisms for selecting and acting according to given sets fo particular or general usages was evident not only to parties, but to courts, and was critical in assessing the degree to which any particular judicial decision could be though to represent the pretensions of a sovereign *to exclusive dominion over an issue,* as opposed to an *interpretation* of extraterritorial, general law.

This was largely possible because the commercial law had in many areas—for example, negotiable paper—assumed a certain generally recognized formality through the dealings of private parties. As one writer decribed the character of commercial practices relating to negotiable paper, "The rules of law on the subject of negotiable paper are more exact and technical than those of any other department of Mercantile Law.;"[104] The certainty of the rules meant certainty of consequences through the use of particular forms prescribed by international custom. It was through the use of these forms of commercial dealing that it was made evident to parties and to courts that the backdrop of usage, so important in fulfilling the aims sough by the parties, would at times be usages among states, and common to many, rather than peculiar to any one of them. The use of these forms, or failure to do so, would in many cases be a clear indicator of which sort of customs—municipal or local, as opposed to extraterritorial—would be applicable to the transaction. It is of utmost significance that *both* the federal and state courts would identify the appropriate or governing precedent according to the formalities of the transaction, and judge the consequences to the litigants according to whichever body of rules their behavior had implicated—extraterritorial or intraterritorial ones. Did an agruably relevant state precedent *purport* to be (or not to be) in accordance with extraterritorial rules, as opposed to local ones? That was a question. The answer to it dictated the body of case law with which the state case was to be compared.

The value of a judicial decision as precedent in extraterritorial cases was determined with reference to a wider field of data and by different standards than was the case with purely municipal rules, and this was so without affec-

[103]See Horwitz's characterization of the conflict of laws rules in HORWITZ, TRANSFORMATION, *supra* note, at 246, and the discussion of MANDEVILLE at notes 57-61 *supra* & text accompanying.

[104]T. PARSONS, LAWS OF BUSINESS FOR ALL THE STATES OF THE UNION, WITH FORMS AND DIRECTIONS FOR ALL TRANSACTIONS 156 (1869).

ting any considerations of federalism whatsoever. It is enough for our present purpose to note the implication of prevailing extraterritorial custom through the use of well understood transactional forms and the role this played in judicial settlement of private disputes. Quite naturally the federal court sitting in a diversity case which *per se* involved *some* multistate elements (and usually in the commercial law cases actually involved an interstate or multistate transaction) would have to determine what the appropriate source of the governing rule was, and by adverting to the presumptively applicable multi-state rules of a customary origin in such cases should not be confused with a pretension to "make" the governing law by blatantly ignoring a local state rule. Further, in deciding controversies within the context of this mulitstate customary system, state judges would thus resort to extraterritorial considerations, and in so doing they did not manifest the act of a sovereign "freezing" a rule within its geographical power to do so, but rather acted in a cooperative fashion in an area over which they could not pretend absolute authority. The originally non-sovereign origin of commercial rules in the common law process, of course, accounts for the fact that judicial opinions were not referred to as laws but only as evidence of the law, and this aphorism was even more apt in the state cases admittedly dealing with transactions over which the state involved could not pretend any absolute authority, that is in cases involving extraterritorial or multistate rules. Thus, if a large portion of the common law rules involved "interstate common law," then federal judicial exegesis of the principles contained in these rules posed no direct conflict with state sovereignty at all. And more to the point, such cases cannot be construed as examples of judicial creativity in conflict with presumptively applicable state rules, because under such an interpretation the conflict is absent. At least no more of a conflict or deviation from state case law would be represented than is present in the *ordinary* common law process of construing precedent which takes place *within* the state. The ultimate results in applying the general rules may vary from court to court as may opinions about their true content, but this of course proves nothing about any novel or instrumental variety of judicial power.

Under this view of the commercial law as originally customary law, and as subject to the common law process, the nature of diversity jurisdiction in commercial cases should be apparent. In a customary law system in which the purpose of a grant of subject matter jurisdiction is to protect nonresidents form local bias, it would be essential that the intentions and expectations of the parties to every dispute be determined by a tribunal independent of the apprehended local prejudice. The law applied would be determined by the exercise of independent judgment by the impartial tribunal, just as factual disputes between the parties would be resolved by a presumptively unbiased trier of fact. Neither function, law determining or fact finding, would be dispensable to the achievement of the jurisdictional objectives. Indeed, abrogation of the law determining function in a customary law system would

have certainly defeated the purposes of the jurisdictional grant, since by hypothesis law was being created or adopted *not* by a particular sovereign, but by the private actions of the parties over a long course of time. Thus, failure of the federal courts to exercise independent judgment on the controlling elements of law in commercial cases would have *violated* the doctrine of separation of powers, because it would have involved a disregard by them of the congressional command embodied in the diversity jurisdiction to provide impartial justice in disputes between citizens of different states.

For example, in the *Mandeville* case, the basic problem was defining the content of the multistate or extraterritorial rule to which the parties adverted by using a particular transactional form—a note. The rule content on the particular legal issue involved—the negotiability of a promissory note—was a matter of much debate. The duty to follow the rule once identified was not debatable however, nor was the effect of an attempted localization of the legal rule in a manner contrary to the limitations on state sovereignty provided by the conflict of laws rules, that is by the interstate common law.[105]

In viewing the federal case law of the early nineteenth century as a whole, it is striking to observe how the general conceptions of sovereign authority—particularly rules of private international law—correlated with judicial choice of relevant precedent. The common law process in both the federal and state courts evolved a set of commonly accepted general rules which dictated when the courts of any particular sovereign would be looked to as authority. The inventiveness or instrumental character of any given judicial decision would have to be assessed against the background of precedent that all courts concerned would have regarded as relevant. The interaction of the substantive rules and the conflict rules dictated to the common law courts *which* precedents were relevant. Unless the cases from the state where a diversity court happened to be sitting were automatically accepted as authoritative, then federal cases appearing to depart from them are not germane to the degree of judicial discretion being exercised. That is, if the state cases *themselves* are addressed to subjects or situations over which the state has no absolute authority, then the body of judicial data which other courts, including federal ones, may evaluate to resolve a dispute is *not* confined to the state cases. Departure from a state precedent under this assumption thus may be nothing more than a departure from any precedent which inaccurately states the rule revealed as the whole body of relevant cases. Once the question of federal v. state sovereignty drops out, all that remains are federal and state cases which must be viewed collectively as part of the common law process shared by both federal and state courts, rather than as clashing exponents of "local v. instrumental" law. The degree to which the common law process was amenable to the incorporation of rules of private international

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[105]R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 175, n.79 (1977).

law by which both the state and federal courts would measure the correlative position of the states as sources of law for multistate disputes, and the resultant degree to which judges conceived of such rules as a part of the common law process is therefore crucial to the "instrumental" thesis. This is so because it is critical to the presumed applicability of the state precedent *where* the federal court happened to be sitting. The resolution of this question will destroy the impression of tension existing exclusively between the federal and the state common law rules from the state wherein the federal court sits, which is so critical to the Horwitz thesis. For it is true that the integration of private international law rules into the English common law system had proceeded apace for over a century before the American Revolution, and continued in both the American federal and state courts thereafter.[106]

In summary, the Horwitz thesis proceeds from an artifically narrowed conception of the common law process, based on evidence taken from the larger context. This conception is transferred to the American federal system without any analysis of the subtle but observable constitutional and jurisdictional changes which the system entailed. Federal and state cases are thus equally subject to the over-simplifying transformation dialectic, with the result that federal cases are judged against the background of a narrow pool of case authority which Horwitz regards as exclusively applicable—the state cases where the federal courts are sitting. Thus any arguable departure from *those* cases is taken as more evidence of the new instrumentalism.

If one accepts the foregoing hypothesis about a more complex system of rules governing sovereignty having been integrated into the common law system, however, the pool of authority relevant to the federal court would include other state cases as well as federal cases in situations involving matters beyond the exclusive authority of any one state, and yet not committed to federal authority. The "rule construction" function alone would thus account for an apparent departure from the state cases from the state in which the federal court sat, simply because the pool of relevant case data is *ex hypothesi* much larger than just the cases of that state.

C. Conflict of Laws and Interstate Common Law

It is clear that the conflict of laws scheme in private international law was integrated into the common law process in the federal courts in order to accommodate the operation of the local laws of the coequal states and to insure the necessary protection, under the diversity jurisdiction, of the expectations of noncitizens and foreigners.[107] The diversity jurisdiction operating under the merely declaratory injunction of the Rules of Decision Act was

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[106]Sack, *supra* note 96, at 376.

[107]*See* Brown v. Van Braam, 3 U.S. (3 Dall.) 344 (1797). *Compare* Warren, *New Light on the History of the Federal Judiciary Act of 1780,* 37 HARV. L. REV. 49, 88 n.84 (1923), *and* Crosskey, *supra* note, at 822-24.

naturally not taken by the federal courts to require unconditional obedience to local laws (a presumption essential to create the illusion of contrast in Horwitz's use of the apparently deviant federal case law to prove the "instrumental thesis). Rather, the coequal sovereign status of the states in a federal system made apparent "some limitation on the operation" of the Rules of Decision Act's directive, and it was a limitation which arose "whenever the subject matter of the suit is extraterritorial."[108] To have blindly imitated local rules would "clearly defeat nearly all objects for which the Constitution has provided a national court."[109]

The application of the Rules of Decision Act in accordance with private international law conflict of laws principles is in fact the quite logical outcome of the transfer of the conventional common law approach to the federal system. Viewed in this light, the activities of the federal courts during the early nineteenth century appear as quite a conventional adaptation of the jurisprudential and decisional norms of English law to the American federal system. Clearly *Swift v. Tyson,*[110] long the controversial symbol of illegitimate judicial creativeness, cannot be adequately explained by Horwitz's oversimplified and crude "discovery" or "natural law" model. Though the decisions of the New York courts were unsettled on the basic point of law involved in *Swift,*[111] Justice Story assumed *arguendo* that they *were* settled and rested his decision upon the non-obigatory nature of the local decisions under the facts of the case.[112] Story's initial explanation for this is essential to an understanding of what was going on in *Swift.* He stated: "It is observable that the Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law."[113] In other

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[108]Van Reimsdyk v. Kane, 28 F. Cas. 1062 (C.C.D.R.I. 1812) (No. 16871), at 1065, *rev'd on other grounds sub nom.* Clark v. Van Reinsdyk, 13 U.S. (9 Cranch) 53 (1815).

It has long been recognized that implicit limitations on the sovereign authority of coequal states were judicially enforceable by the federal courts, even when a judgment of a state court was involved. The Law of Nations then played a role as an implicit element in the Supreme Courts view of the full faith and credit clause, U.S. CONST. art. IV, § 1, and a fortiori played a large role in their view of the extraterritorial effect of state laws. *See* Rheinstein, *The Constitutional Basis of Jurisdiction,* 22 U. CHI. L. REV. 775, 791-96, 802 (1955). Compare Nussbaum, *Rise and Decline of the Law of Nations Doctrine in Conflict of Laws,* 42 U. COLO. L. REV. 189 (1942).

[109]Van Reimsdyk v. Kane, 28 F. Cas. 1062, 1065 (C.C.D.R.I. 1812) (No. 16871).

[110]41 U.S. (16 Pet.) 1 (1842). Swift v. Tyson involved the legal issue of whether or not a preexisting debt was valuable consideration for a negotiable instrument, and thus sufficient to give the holder immunity from defenses existing between the endorser and the obligor. Since it was a diversity case, the question of which body of rules could be used to answer this question naturally arose. Justice Story's opinion in *Swift,* declining to be bound by the judicial opinions of the New York courts, has been characteristically interpreted by Horwitz as an "instrumental" attempt to impose procommercial national legal rules, invented by the federal judges, upon unwilling state judges. HORWITZ, *supra* note, at 245-52. This essay presents a different view.

[111]41 U.S. (16 Pet.) at 16-18.

[112]*Id.* at 18-19.

[113]*Id.* at 18. *See also* Gloucester Ins. Co. v. Younger, 10 F. Cas. 495, 500-01 (C.C.D. Mass. 1855) (No. 5, 487).

words, there had been no "localization" of the rule of commercial law involved since the Courts of *New York themselves* purported to follow the general commercial law, not to deviate from it by establishing a rule derived from some "positive, fixed, or ancient local usage." Once the importance of this fact is understood as to *Swift* and all similar cases within the ambit of the general commercial law, the justification for the federal courts making an independent judgment about the applicable rule of law becomes clear. Appreciating the significance of this fact within the context of the unique jurisdictional and constitutional status of the federal courts and within the context of the commercial and conflict rules relevant to that unique status, is absolutely essential to reading the real meaning of *Swift* and similar cases.

It also becomes clear why § 34 of the Judiciary Act did not bind the federal court to follow state courts decisions in general comercial cases—*i.e.* why state decisions were not "laws," but only "evidence of . . . laws,"[114]

When the state courts of a particular state *themselves* purport to follow the general commercial law in particular cases, they create a set of expectations on the part of nonresidents who deal with the citizens of that state. The expectations are that the general customs of the commercial world will operate to control transactions entered into with citizens of the state, or within the state, and the nonresidents can act accordingly in their dealings by ignoring the possibility that their transactions will be controlled by some other rules. This does not, of course, mean that the subjective state of mind of the nonresident will be examined to determine whether he was aware of local deviations from the general commercial practice in a given locality. Rather, it means that when a state encourages its citizens to act in accordance with stereotyped general commercial practice, rather than *formally* localizing a practice by statute, or by explicit recognition in a judicial decision that the state in given transactions is *not* following general commercial law, it creates expectations on the part of outsiders that those stereotyped forms mean the same thing in the state that they mean everywhere else. If, therefore, a noncitizen relies on these implicit representations in his dealings with residents of a state, and if the state subsequently applies a rule to the dealings which deviates from the general practice, the expectations of the noncitizen have been defeated. He has, in short, been misled by the state's apparent approval of general commercial law.

Just as the common law courts characteristically had to determine which universe of general or particular customs and positive rules derived from customs a particular transaction implicated, so the federal courts in performing their decisional function would pursue the inquiry into the content of the governing rule in the same manner as the state courts, that is to discern the content and application of the correct general, extraterritorial rule. In this sense, and not in some vague "discovery" sense the federal courts were perfor-

[114]Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842).

ming a "like function" as the state courts. The necessity for both sets of courts to engage in the exegesis of extraterritorial rules was the product of the fact that, unlike England, the United States was not a unitary system wherein judicial *enforcement* (as opposed to promulgation) of common law rules could proceed unaffected by the limitations on the general legal authority of coequal sovereigns.

If one asks the question, what would one *expect* to happen under the adaptation of conventional common law judicial techniques in dealing with the consequences of federalism, what *actually* happened makes a good deal more sense, and the novelty thesis of the current revisionists such as Horwitz suffer by being thus placed in an historical context they would rather ignore. Consequently, the federal court, to protect the expectations of the noncitizen, had to make its own independent judgment about the general commercial principles, rather than relying on the decisions of any given state, since those decisions were only "evidence" of what the general commercial practice was, rather than "law."

In the above example reference to the fact that the "maker used terms of negotiability in his contract" is an implicit reference to a set of principles which would give the words chosen that effect. In describing the parties' choice of form in just this way, the primary significance of the acknowledgment of such principles by the parties and the fact that the principles transcended state boundaries and thus state sovereign authority is made clear. Otherwise such words should not have the capability of "binding him [the maker] to the endorsee" at all if they would not have that effect under the law of the place where the note was made. The predictable implication of general customary rules from the use of particular transactional forms is thus perhaps the most consistent feature in the analysis of these multistate problems, and is the key to understanding the authority of judicial decisions about them.

Swift v. Tyson itself is a prime example of how the diversity jurisdiction operated to preserve the intentions and expectations of the parties when their dealings had taken place against the assumed background of general commercial practice.[115] Thus everything practical encouraged states to leave general commercial custom intact as they found it, rather than to attempt to "localize" general rules of commerce in accordance with some supposed state policy. It is the conformity of such commercial law opinions as *Swift v. Tyson* to an extremely broad international constituency, and the support found for such decisions in the customary paractices of innumerable private parties pur-

[115]It is difficult to imagine any real expectations Mr. Tyson might have had being defeated by the *Swift* decision. He employed an instrument clearly subject to negotiation in foreign states, or to persons therein, according to usages or rules generally observed. It is interesting to note the reliance on party expectations in many of the more modern discussions of conflict of laws. See A. Shapira, *'Grasp All-Loose All': On Restraint and Moderation in the Reformulation of Choice of Law Policy*, 77 COL. L. REV. 248, 265-68 (1977).

suing their own autonomous commercial dealings, that best illustrates the fictional quality of "instrumentalist" views of judicial decision making as a distinctly early nineteenth century phenomenon. Such a characterization merely shifts the description of a perfectly traditional judicial function from the gradual recognition of widely held and objectively provable practices to a subjective evaluation of judicial behavior. This creates the impression that something quite ordinary is in fact new.

It seems illogical to assert the supposed novelty of "instrumentalism" in judicial activity, the engineering of social and economic policy according to judicial perceptions, when in fact the supposedly instrumentalist decisions reflect the views and practices of the majority of the commercial world. Historically speaking, cause and effect are thus reversed, and the judicial role is described as one of creating rather than recognizing. We may of course admit to a degree of discretion in employing the processes of reasoning and analogy in the common law decisional process, but the question which plagues historians of the period concerns the basic assumptions from which judicial decision making begins. For if, as appears to be the case, the proponents of instrumentalism and their interpreters base their opinion that judges came in the early nineteenth century to "view their role" as lending support to economic maximization by departure from precedent or upon some other novelty in the judicial opinions, their proof seems to fail.[116] As has already been shown, departure from precedent does not necessarily signify any change at all in the judicial view of the source of law, and the highly traditional nature of opinions now viewed as examples of judicial inventiveness seems to undermine the basic theory. The insistence in viewing judicial activity in purely positivistic terms has created the impression of conflict and novelty where none existed in fact. The subtle aspects of the decisional process have been conveniently characterized from time to time as "glittering generalities."

The current acquiescence to a positivistic legislative model in analyzing judicial activity has created a distorted impression of the legal history of the early national period. Deviations from precedent or the articulated purposes of an announced rule in early cases have been viewed by the standards of expediency and convenience thought to be relevant to the wise legislator, and the notion that judicial pronouncements were in fact reactions to a universe of changing customary practices and expectations has been discounted. The "invisible hand" has become a favorite target of critics anxious to explode the notion that legitimate philosphical and practical differences separated the judges and the legislator. Judicial as opposed to legislative function is a "fiction which "nobody believes."[117] However, the starting point for the judicial

[116]*See generally* Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Rubin, *Why Is the Common Law Efficient?* 6 J. LEGAL STUD. 51 (1977).

[117]*See* Stimson & Smith, *State Statute and Common Law*, 2 POLITICAL SCI. Q. 105, 106 (1887).

function and its necessarily limited interference with the vast bulk of human activity which typifies the early nineteenth century case law, particularly in the admittedly significant commercial law area, indicates that the "innovative" judicial work was accomplished without a revolution in the theory of legal obligation. It is, moreover, the breadth of the constituency supporting the rules of private commercial law which makes the characterization of judicial activity in this area questionable. The social intercourse which produced the mature *lex mercatoria* is grossly simplified by the positivistic model. In fact, early commentators explicitly recognized the diffuse source of the rules of law and the resultant relative inability to mold them according to economic or class preferences.[118]

The nonpreemptive character of federal decisions on local matters, and the general acknowledgment of "like function" performed by both state and federal courts in extraterritorial matters,[119] all dispel the specter of powerful federal intervention of an "instrumental sort." The utterance of the sovereign was simply not regarded as being quite as important in resolving private matters as it is today.

CONCLUSION

Ironically, it is the "common law context," the common law system, which more than anything else Horwitz seeks to illuminate while it is that feature of Anglo-American legal history he has apparently explored the least. The use of suggestive intellectual constructs such as "the will theory" of law and various bits of evidence taken out of context as suggestive of some novel conception, such as the "consensual" descriptions of the common law process, reveal one of the greatest apparent weaknesses of our current so-called "intellectual history." Precisely, the "intellectual" developments sought to be proved actually are the *a priori* assertion with which the author *begins* rather

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See Holt; *Now and Then: The Uncertain State of Nineteenth Century American Legal History,* 7 IND. L. REV. 615 (1974). The author notes the process by which these sweeping theories such as instrumentalism are based upon slight evidence.

"Horwitz's support for his views seems somewhat weak and will require some sublaternal monographic aid, but the thesis is convincing." *Id.* mat 632. However it is quite possible that the emphasis upon the positivistic creative, legislative model in analyzing early case law causes the significance of isolated and slight evidence to be overstated. The case law must be evaluated in whole units—for example private commercial law adjudications in specific courts or jurisdictions.

[118]*See* 1 I. PARSONS, A TREATISE ON THE LAW OF SHIPPING AND THE LAW AND PRACTICE OF ADMIRALTY 4-5 (1869), where Parsons notes that commercial law rules, being "founded as they were upon the necessities, and the usages of the merchants generally" are by their general acceptance in an extensive commercial community are "seldom, if ever, materially affected by the rights and prejudices of caste or class." Indeed, one interpretive theme which seems to divide legal historians is the question of whether or not judicial action in America has taken place within a broad social consensus. Contrary to Horwitz' view, James Willard Hurst has consistently emphasized broad popular support for legal change in America. See J. HURST, LAW AND SOCIAL OORDER IN THE UNITED STATES 226 (1977). My own view of the period is more in agreement with Hurst.

[119]Atkinson v. Brooks, 26 Vt. 569, 582 (1854).

than demonstrates. "Intellectual history" of the sort necessarily employs arbitrarily selected evidence judged by its superficial conformity to a "theme" rather than its relationship to elements in a real context. Forgetting the injunctions of many past analysts of legal theory,[120] extrapolations from evidence selected for its compatability with a preconceived theme obscure what people to any given time actually thought. A disembodied chain of extrapolations emerges which in reality is only consistent with itself, and the real devotees of the preconceived theme are hardly ever worried about the fact that adherence to it requires us to believe that the characters whose thoughts we seek to know often to constantly vascillate in their most basic ideas.[121]

In short, almost everything is measured by these gross extrapolations from incomplete data—such as Horwitz's fantastical explanation of the use of conflict of laws principles as a repudiation of natural law's one "true rule," making this subject area convincing evidence of the changed theory of law. The point is that "conceptual" assertions with no regard at all for the *legal* context in which the evidence occurred appear to be insufficient as a basis for "intellectual history." This legal context is in reality as important an ingredient as the construction of our intellectual, legal part as any other data. It is as if Professor Horwitz sought to carefully exclude from consideration the *holdings* of all the case data he analyzed, and rely exclusively on *dicta*. But the conceptions and rules of construction which shaped the meaning of judicial pronouncements were (and are) themselves an important part of the historical and intellectual context of the data used. The overall pattern of the case law and the structured meaning which the cases collectively had for lawyers and jurists simply will not permit the use of apparent deviations in outcome among cases plus selective dicta to successfully carry off the "transformation" thesis.

The intellectual apparatus which lawyers *then* employed to illustrate the conformity of superficial outcome differences with consistent general principles strongly suggests that the meaning Professor Horwitz ascribes to their actions its false. Not only would the application of some quite familar techniques for analysis of legal data enable Professor Horwitz to derive a more

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[120]"To lurk under shifting ambiguities and equivocations in matters of principal weight is childish." *R. Hooker, The Laws of Ecclesiastical Polit,* Bk. VIII, ch. 1, § 2 p. ____ , in THE WORKS OF RICHARD HOOKER, J. Kemble, ed ( ).

[121]Practically everyone in Professor Horwitz's scenario changes his mind incessantly. Chief Justice Marshall regularly has "radical shifts" in his understanding of basic legal questions, HORWITZ, *supra* note 1, at 223, and Justice Story "sharply opposes" his own recently held views with regularity. *Id.* at 248-49. While theories of law appear, vanish and then reappear like some ghostly shade. See *id.* at 196, where the "theory of preexisting custom" having died, rematerializes briefly and then vanished again (or does it?). This passage is particularly worth a second reading. Surely people do change their minds, and ideas come and go, but certainly one would think that a chosen theme which converts the mass of evidence about our legal past into such a chaos would be at least initially scrutinized in light of explanations which would accord some of the principal characters at least a degree of consistency.

defensible and more accurate meaning from it, but to do so would have illuminated the milieu of our early law according to intellectual techniques which those living then employed. But serious analysis of intellectual change in legal history has come to repudiate its less fashionable intellectual apparatus, with at least the lay reading public probably none the wiser. A simple consideration of implicit principles common to a wide variety of case data would have disclosed certain general consistent "theories" in the case law itself, which would in turn explain what specifically appears to be "transformation." Selective use of outcome differences plus dicta in the case data hardly measures up to the traditional composite analysis and search for underlying "thematic" principles common to the lawyer's art.

Such books are of course written for people, perhaps by people, who already fervently believe what they seek to prove. Thus, the "intellectual history" at its apparent finest ironically turns out to be the most unmitigated form of "consensus history," an even more formidable and counter productive variety than the "old" consensus history because it relies more on the *a priori* structure of its arguments and initial preconceptions and less on empiricism, which is easier to deal with analytically and therefore more to be avoided in this new "intellectual history." The postulation of these intellectual constructs has a way of becoming an effective substitute for serious inquiry into intellectual change. The inefficacy and weakness of the new potent revisionist *genre* are, however, better concealed than former purely doctrinaire methodology, because it effectively assumes all the popularized hallmarks and trappings of respectability, replete with declaration after declaration that what is being revealed is "consciousness" and other "emerging" things. An abstract litany of soothing, comforting, largely apparitional theorems with a false though convincing appearance of novelty emerges, and this in turn lulls us into an increasingly comfortable indifference to naive assumptions that the contemporaries of the eighteenth century *really* meant what they said, and knew themselves as well as we know them. In fact, a sort of protective coloration asserts itself, an effective scholastic camouflage, whereby the more empirical and evidence-oriented writing can be rejected as a sort of "advocate's brief," and crabbed "arid formalism," as having too much "detail" and not enough proof. Amazingly, some who opt for the broader themes without proof, or with half-proof, acknowledge the lack of support for such thesis as those of Horwitz, but find that the "thesis is convincing" anyway.[122] How we are to be convinced without proof is hard to say. Perhaps half-proof of correctness is though to equal proof of half-correctness, so that the proponents of thesis without proof assume the thematic writers such as Horwitz must be at least half right in what they say.

Likewise by contrast, the more conventional empiricism, which in the unlikely event it appears at all in the face of unchallenged orthodoxy, ap-

[122]*See* Holt, *Now and Then: The Uncertain State of Nineteenth Century American Legal History* 7 IND. L. REV. 615, 639 (1974); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 1-7 (1973).

pears more and more to be really "not with it." A general plea has been made for a good deal less of the "lawyer's detail" and for more emphasis on broader interpretive themes, and surely what this represents is on the whole good. But, on the other hand, hopefully this essay has at least provided a plausible argument for some close scrutiny of the work product that purports to satisfy this demand, and has provided some evidence of the dangers of the popular aversion for the "adversaries' brief" or the art of "narrowing cases to fit their facts." As Frederick Maitland observed, lawyers usually don't make good historians, but to be a good *legal* histroian, being a lawyer helps, and the classical function of lawyers plays a large part—albeit a technical and often forbidding part—of understanding our legal past with any degree of accuracy.[125] The ascent to the ambitious observation of broad themes runs the strong risk of loosing a precise and indispensable knowledge of the various important strands in the whole theme, and the rush to turn a beacon on the whole of the law and its fundamental meaning may shed more light on the observer than on the subject.

Admittedly, phenomena such as "judicial discretion" are not easily quantified. The relationship between extant precedent, judicial discretion and precedential change resulting from a mixture of these two common law elements is difficult to define precisely. The ability of a prevalent decisional technique to accomplish extensive and profound doctrinal change and still remain the same technique or constitutional common law process is an exceedingly complex phenomenon to understand, as is the point at which thoroughgoing precedential change is a fact attributable to a wholly new conception rather than being an extension of the old. Horwitz's book adds little to our understanding of this process, and at most presents largely unsupported conclusions with a mere description of doctrinal change, sometimes stated inaccurately.

This is apparently a rather critical stage in the research and writing of American legal history. This book and similar ones illustrate one of the more serious problems in this critical phase. Particularly, the promising and necessary emphasis on theme is quite likely to turn out to be a set of blinders, rather than enlarging our vision as it should. Once the blinders are removed and our vision is in fact expanded, the original theme which the blinders produced quickly evaporates. The delicate construction of the evidence outside of any extended context and the weakness of the arguments when the context is supplied indicates that this praticular book, like any overly doctrinaire approach to a complex subject, actually superimposes the final result on artifically constructed evidence, rather than developing it from the historical data. Even more interesting is the intellectual process which may employed to undermine Professor Horwitz's transformation theme at almost every turn, for

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[125]F. Maitland, *Why the History of English Law Was Never Written,* in FREDERICK WILLIAM MAITLAND, HISTORIAN 132, 140 (R. Schuyler ed. 1960).

it boils down to one of the more elemental analytical tools of the lawyer: the comparison of a good deal of data, primarily from case law, in order to discover if some implicit pattern in the data can illuminate it, and assist in its whole comprehension. The pattern is, when articulated, a useful model in the search for the more important, if less overt, fundamental legal processes at work and is one of the vital intellectual tools employed to expand knowledge beyond the suggestive impressions conveyed by mere doctrine. In seriously investigating legal change, it must form *at least* a competing role in the analytical process. The by-products of the complete separation of thematic or intellectual history, from the more formal, albeit "arid," process of case analysis on a vast scale can be most countrproductive, as Horwitz's book demonstrates. The merging of both federal and state cases, which in fact represented extremely different constitutional and jurisdictional contexts, and evolved under different influences and considerations, within the simple "transformation" dialectic really obscures much that is relevant. We should then cautiously refrain from the "lawyers formalism v. thematic or intellectual history" dichotomy and thereby better avoid thoroughly confusing either of the forms with reality, and confusing pretensions of proof in an agreeable disguise with actual proof. The intellectual apparatus of the profession should not be the handmaiden of fashion, which seems to be a result more possible than many of us would like to believe. In short, the "Theme" may be quite expansive, and the understanding it permits quite narrow.

Naturally it would be a mistake to conclude that the alternative interpretation offered here—of a largely self ordering system supportive of autonomous individual behavior and experiment, adjusting itself with the aid of limited judicial intervention that does not effectively elevate the narrow interests of "caste or class"—is a whole or complete picture of reality. As an historian of science once remarked: "If there is a lesson in our story it is that the manipulation, according to strictly self-consistent rules, of a set of symbols representing one single aspect of the phenomena may produce correct, verifiable predictions, and yet completely ignore all other aspects whose ensemble constitutes reality."[124] But the doctrinaire insistence on a narrow "strictly self-consistent" theme hides the richness of the whole ensemble with its widely varied judicial personalities, complex and various jurisdictional and constitutional considerations, and astonishingly diversified array of private interests (many of which respond to their legal environment without leaving any litigational record). It states a claim for law upon life which is, I think, a bit overstated and too self-important, and is a theme which inverts the position of the individual *vis a vis* the law as it was understood during the early national period, at least as I read it. The emphasis upon a simple theme which calls our attention to this richness and complexity, if only by burying it under a doctrinaire plot, may be Horwitz's greatest service to our understanding of Amercian legal history, and for this he should certainly be praised.

[124]A. KOESTLER, THE SLEEPWALKERS A HISTORY OF MAN'S CHANGING VISION OF THE UNIVERSE 533 (1959).