BOOK REVIEW

THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY. By Morton J. Horwitz: Oxford University Press, 1992.

Reviewed by Steven C. Papkin

Upset by Theodore Roosevelt's loss in the 1912 election, a group of disgruntled intellectuals set out to found a new magazine that could carry the Progressive torch into the future. Financed by a wealthy banker, the new magazine would be free from economic worries. It would have an upper-middle-class bias and publish both high-brow and muckraking articles without having to cater to popular tastes or advertisers.[1] This new magazine was *The New Republic.*

The first page of the first issue proclaimed:

> *The New Republic* is frankly an experiment. . . . If *The New Republic* [can] bring sufficient enlightenment to the problems of the nation and sufficient enlightenment to its complexities, it [will] serve all those who feel the challenge of our time. . . . If we are unable to achieve that success under the conditions essential to sound and disinterested thinking, we shall discontinue our experiment and make way for better men.[2]

Embedded in this moral declaration is the essence of Progressivism, an early Twentieth-Century belief that the practical application of science and rationality could solve social problems. While "Progressivism" and the founders of *The New Republic* stood for liberal reform, "Progressivism" with a capital "P" should not be confused with the "progressivism" of other lib-

1. CHARLES FORCEY, THE CROSSROADS OF LIBERALISM: CROLY, WEYL, LIPPMAN, AND THE PROGRESSIVE ERA, 1900-25 153-192 (1961).

2. THE NEW REPUBLIC, Nov. 7, 1914, at 1.

Reflecting, perhaps, the excitement many liberals feel at the election of the first Democratic president in twelve years, the phrase, "A Journal of Opinion which seeks to Meet the Challenge of a New Time," appeared on the cover of the Feb. 1, 1993 issue marking the inauguration of Bill Clinton.

The New Republic's continuing belief that the method of social reform is as important as the reform itself was reiterated two weeks later in a commemoration of Justice Thurgood Marshall. While praising Marshall as a towering figure for leading the legal battles against segregation, the magazine was "less enamored of his performance on the Supreme Court, where he was often guided [more] by sensitivity to injustice than by the text and history of the Constitution." *Notebook*, THE NEW REPUBLIC, Feb. 15, 1993, at 9.

eral-left Twentieth-Century movements. Progressivism was more than a simple demand for abstract social justice, for it stressed means as well as ends. As *The New Republic*'s initial lead editorial suggests, Progressivism was about science and experiments leading to enlightenment.

By the turn of the Twentieth Century, industrialization, urbanization, and immigration had greatly changed America from the agrarian nation it had been. However, America's governmental institutions were relatively unaltered from the early 1800s and, consequently, seemed ill-equipped for a modern nation. The 1880s and 1890s had been turbulent times witnessing labor unrest, the Haymarket Square riots, and the Populist movement. America appeared to be mired in chaos.

Progressivism was a response to this crisis. It was hardly a popular, cross-class movement, for it consisted of a newly-created upper-middle class of confident professionals and trade specialists. These people did not come from old wealth. They were a product of an urban-industrial America that put a premium on specialized skills. Historian Robert Wiebe has written that a consciousness of unique skills shaped these individual's lives. They demonstrated their identification by striving to improve the skills of their crafts or businesses and by joining professional organizations.[3]

These notions of technique and rationality revolutionized, for example, the study of American history.[4] Earlier efforts at writing history had been simple glorifications of the American past or the supposedly inherent racial characteristics of Anglo-Saxon-Germanic peoples. The Progressive historians, however, were trained academics who looked for more accurate explanations of historical events. Progressive history began with Frederic Jackson Turner's reading of his paper "The Significance of the Frontier in American History" at a meeting of the American Historical Association in Chicago in 1893. Turner described the Westward expansion of the United States and argued how successive pioneer movements had broken ties with European civilization and created a new, democratic man. He felt that it would be impossible to understand the American character without examining the social economic factors that

3. ROBERT H. WIEBE, THE SEARCH FOR ORDER 111-13 (1967).

4. *See, e.g.*, RICHARD HOFSTADER, THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON (1968).

had shaped it.[5]

The most famous work of Progressive history was Charles A. Beard's *An Economic Interpretation of the Constitution of the United States*. Beard argued that the Framers of the Constitution supported the document both for economic and for ideological reasons. He claimed that those most in favor of the Constitution were speculative purchasers of war bonds who stood to benefit from ratification, for the Constitution promised to pay off war bonds at full value, regardless of whether the current holder was an original purchaser or a speculator who had purchased the bond at a discount after the war.

Beard's book, however, was not a polemic against monied interests, but rather an attempt at dispassionate analysis of data. Forty percent of the book was devoted to the dry recitation of data on the bond holdings of the members of the Constitutional Convention and the impact of economics in the votes for ratification.[6] Beard explained his goal: "I simply sought to bring back to the mental picture of the Constitution those realistic features of economic conflict, stress, and strain . . . ."[7] In short, Beard's work was typical of Progressivism. Beard, a

5. A typical passage from the essay reads:

> The United States lies like a huge page in the history of society. Line by line as we read this continental page from West to East we find the record of social evolution. It begins with the Indian and the hunter; it goes on to tell of the disintegration of savagery by the entrance of the trader, the pathfinder of civilization; we read the annals of the pastoral stage in ranch life; the exploitation of the soil by the raising of unrotated crops of corn and wheat in sparsely settled farming communities; the intensive culture of denser farm settlements; and finally the manufacturing organization with city and factory system. This page is familiar to the student of census statistics, but how little of it has been used by our historians. Particularly in eastern States this page is a palimpsest. What is now a manufacturing State was in an earlier decade an area of intensive farming. Earlier yet it had been a wheat area, and still earlier the "range" that had attracted the cattleherder. Thus Wisconsin, now developing manufacture, is a State with varied agricultural interests. But earlier it was given over to almost exclusive grain-raising, like North Dakota at the present time.
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> Each of these areas has had an influence in our economic and political history; the evolution of each into a higher stage has worked political transformations. But what constitutional historian has made any attempt to interpret political facts by the light of these social areas and changes?

FREDERIC JACKSON TURNER, *The Significance of the Frontier in American History*, *in* THE FRONTIER IN AMERICAN HISTORY 11-12 (1920)(citations omitted).

6. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1935). The text is 325 pages. Chapter 5, *The Economic Interests of the Members of the Convention*, is 82 pages. Chapter 10, *The Economics of the Vote on the Constitution*, is 49 pages. Together the two chapters account for 131 pages—or 40 percent—of the book.

7. *Id.* at viii.

trained historian, sought to make use of his special skills to elucidate a problem.

Professionalization was also pronounced in medicine. American medical doctors had always been trained, but their craft was scientifically imprecise. Therefore, they had to compete with other types of healers like osteopaths. In the late 1800s, however, medical researchers determined that diseases were caused by specific microorganisms. Energized by these and other breakthroughs in knowledge, medical doctors organized by means of the American Medical Association, which became their national voice. Membership in the AMA jumped from 8,400 in 1900 to over 70,000 by 1910. Doctors immediately set about limiting entry into their profession, and the government complied, putting most osteopaths out of business.[8] The professionalization of medicine represented the crusading, technical spirit of Progressivism.

Lawyers also began organizing themselves around the turn of the century, although their professional organizations never became as powerful as the AMA. When the American Bar Association was founded in 1878, its growth was slow. There only were 1,718 members in 1902.[9] Seeking increased respect for the bar, the first members of the ABA tended to come from the upper stratum of the profession. While hardly crusading, the founders of the ABA stressed the professional and technical aspects of Progressivism, for they sought more uniformity among state laws and warned against too close an association with big business.[10]

Lawyers' increasing consciousness of their profession did not come as a surprise. After the Civil War, more and more young lawyers were trained at law schools, rather than as office apprentices. In addition, the notion of law as a science was beginning to gain credence. The most noteworthy development in this area was the appointment of Christopher Columbus Langdell as Dean of the Harvard Law School. Langdell introduced the case method of instruction, in which students would read appellate opinions. These opinions would be carefully chosen

8. WIEBE, *supra* note 3, at 113-115; *see also* PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE (1982).

9. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 650 (1985).

10. *Id.* at 651.

to reflect certain principles of law. Langdell wrote in the introduction to his contracts casebook:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.[11]

Because Langdell believed that sound principles were more important than historical context, it was not essential that students read recent or even American cases. In fact, Langdell's casebooks, written in the 1870s and later, consisted mostly of English opinions decided before 1850.

Langdell considered legal education different from other types of learning, which required practical training. In his opinion, law could be learned from studying only printed materials; the law professor, therefore, merely had to be well-versed in those materials. He wrote that "what qualifies a person . . . to teach law is not experience in the work of a lawyer's office, not experience, in short, in using law, but experience in learning law."[12] Langdell's methods spread to other law schools. By 1902, only thirty years after Langdell began teaching, twelve schools were using casebooks, thirty-four clung to traditional textbooks, and forty-eight used some sort of mixture. Eventually, every major law school succumbed.[13]

Langdell's teaching method was just one manifestation of the formalism that dominated late Nineteenth-Century American legal thought. Formalism stressed the natural, non-political nature of law.[14] The rise and subsequent breakdown of legal formalism in the face of the Legal Realist critique is one of the main themes of *The Transformation of American Law, 1870-1960*, the second volume of Harvard professor Morton J. Horwitz's history of American law. The first volume was published in 1977 and won the coveted Bancroft Prize in American His-

11. CHRISTOPHER COLUMBUS LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS viii (2d ed. 1879).

12. CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817-1917 26 (1918), *quoted in* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 28 (1985).

13. FRIEDMAN, *supra* note 9, at 616-17.

14. For a modern defense of formalism and some responses, see Symposium, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y (forthcoming 1993).

tory.[15] In the second volume, Professor Horwitz's primary argument is that the legal formalism of the late Nineteenth Century was too rigid for the social problems of the Twentieth Century. Decisions, for example, like *Lochner v. New York*,[16] which struck down legislation setting maximum hours for bakery employees in New York, indicated to a generation of scholars that legal thought was out of step with the times. There are two subthemes of Professor Horwitz's book. The first theme traces the schism that later developed among legal Progressives between those who stressed social reform and those who stressed legal method; the second develops the impossibility of separating law and politics.

Professor Horwitz begins by describing the structure of formalist thought. He writes that formalism developed out of a desire that had existed since the founding of the republic to create a neutral state. Americans wanted a legal system that could avoid taking sides in conflicts between religions, social classes, or interest groups.

> The separation between law and politics has been a central aspiration of American legal thinkers. Operating uncomfortably within a democratic political culture that has been obsessed with the threat of "tyranny of the majority," American jurists since the Revolution have striven to embody "a government of laws and not of men" in a conception of an autonomous system of laws untainted by politics.[17]

Formalism divided the law into categories. Not only was there a sharp distinction between private and public law, but there were also thick lines separating private law areas such as contract, tort, and property.

Coinciding with the rise of Langdell, other legal thinkers in the 1870s called for more formalistic and scientific arrangements. For example, negligence became the organizing principle of tort law. The goal of the principle of negligence was to develop rules and processes that could be agreed upon by all parties, even if these parties sought different results. This process of deductive reasoning from general principles led to in-

15. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977).

16. 198 U.S. 45 (1905).

17. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 9 (1992).

creasingly abstract notions and the apparent divorcing of the legal system from reality. For example, notions of property became so dephysicalized that almost any government action came to be viewed as a taking, thereby preventing any type of regulation. The abstract legal science of formalism would eventually collide with the more concrete social science of Progressivism.

The Progressive response, known as Legal Realism, would ultimately triumph. Professor Horwitz argues that realists were unified not by social science, as many scholars today believe, but rather by the notion that the law was out of touch with reality. Their rallying cry was Justice Holmes's statement that "the life of the law has not been logic, it has been experience."[18] The most important legacy of Realism, for Professor Horwitz, was its challenge to the orthodox claim that law could be separated from moral and political discourse.[19]

The Realist critique of formalism gave birth to the administrative state. If abstract principles did not decide concrete cases, then broadly-written statutes could not limit administrative discretion. Consequently, administrators were to be granted great latitude in resolving issues by scientific methods; eventually the crises of the Depression brought this doctrine of delegation to preeminence. This history supports the major theme of Professor Horwitz's book—that formalistic legal doctrines and institutions were ill-adapted to conditions of the Twentieth Century and had to change.

Professor Horwitz, however, also uses this now-familiar story to make broader points about his subthemes of the separation between two schools of the Progressive movement and the inseparability of law and politics. The growth of administration, for many Progressives, sparked fears of an arbitrary and oppressive system. The legalist tradition represented by Dean Pound wanted judicial oversight, while the scientific tradition stressed by James M. Landis, chairman of the Securities and Exchange Commission and later dean of the Harvard Law School, argued that courts were too insensitive and lacked the necessary expertise to carry out reformist social engineering. This schism within the ranks of the Progressive movement was

18. *Id.* at 187-88 (quoting OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Mark D. Howe ed., 1963)).

19. HORWITZ, *supra* note 17, at 193.

more than just an argument over the relative merits of courts and administrative agencies; at its most fundamental level, it was an argument over whether substance or procedure was more important.

During the era of New Deal economic regulation, the legalist school was "conservative" and the scientific school was "liberal." According to Professor Horwitz, this partisanship flip-flopped during the McCarthy era. During the 1950s, it was the conservatives who claimed that courts should give administrators unfettered freedom to determine who was and was not a subversive:

> The Cold War marked a new era in attitudes toward the deference due agencies and the value of procedures. . . . The former advocates of individual rights and due process suddenly became enthusiasts for vesting administrative agencies with discretionary authority to censor publications, supervise and register private organizations, deport legally-resident aliens after denying them formal hearings, and adjudicate in less formal, administrative tribunals the loyalty and dangerousness of U.S. citizens.[20]

Professor Horwitz asserts that this change in position proves that law and politics cannot be separated.[21]

Perhaps what Professor Horwitz finds most upsetting about postwar legal thought was the harsh academic criticism that greeted *Brown v. Board of Education*.[22] Two of the sternest rebukes were given in the form of consecutive Holmes Lectures at the Harvard Law School by Learned Hand in 1958 and Herbert Wechsler in 1959. Judge Hand's lectures, which were pub-

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20. *Id.* at 240.

21. Professor Horwitz also points to the 1978 Supreme Court decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), in which the Court tried to curtail attempts by the U.S. Court of Appeals for the District of Columbia Circuit to add procedural constraints to environmental legislation. The D.C. Circuit had been concerned that the government was not regulating rigorously enough. Professor Horwitz quotes Professor (now Justice) Antonin Scalia as writing that *Vermont Yankee* was a "major watershed" in freeing agency policymaking from judicial constraints. HORWITZ, *supra* note 17, at 242-243 (quoting Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345). A political conservative was arguing that agencies should be given greater freedom to regulate the economy. Since the New Deal, however, conservatives had been calling for more judicial supervision over agency decisions because, in their view, agencies had been increasingly captured by those that they were supposed to regulate. According to Professor Horwitz, this case provides more proof that law and politics cannot be separated. *Id.*

22. 347 U.S. 483 (1954).

lished as *The Bill of Rights*,[23] challenged the very legitimacy of constitutional judicial review. He saw "nothing in the United States Constitution that gave courts any authority to review decisions of Congress," and that any such authority would violate the principle of separation of powers.[24]

One year later, Professor Wechsler criticized the *Brown* decision because it could not be justified by neutral principles.[25] Professor Wechsler disagreed with Judge Hand that the Court should not be able to make value choices. Rather, he thought that the Court could make value choices as long as they were based on neutral principles that transcended any immediate result. In effect, Professor Wechsler argued the same position advocated by Dean Pound and the other Progressives concerned with procedure schism over a half-century earlier. Although the results of Professor Wechsler's views are perhaps shocking from the perspective of a later generation, he did not think that racial discrimination and freedom of association constituted neutral principles. For example, with freedom of association, there was no neutral way in which a court could choose between denying it to those who wish it or imposing it on those who avoid it. Showing his sympathy with the result of desegregation, Wechsler concluded, "[I]s there a basis in neutral principles (for ending segregation)? I should like to think that there is, but I confess that I have not yet written the opinion."[26]

For Professor Horwitz, the rigidity of Professor Wechsler's brand of process-oriented jurisprudence is inadvisable. He proposes instead that an understanding of the appropriate role of law includes the ability to adapt to changing circumstances; this, according to the author, is the lesson of the transformation of American law from 1870 to 1960. Professor Horwitz concludes this history with a plea for a jurisprudence independent of any method:

> "[R]esult oriented" jurisprudence is regularly equated with opportunism, and principled jurisprudence with sticking to one's principles regardless of the consequences. Only pragmatism, with its dynamic understanding of the unfolding of

23. LEARNED HAND, THE BILL OF RIGHTS (1958).

24. *Id.* at 10, *quoted in* HORWITZ, *supra* note 17, at 258.

25. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). According to Professor Horwitz, this is the second-most cited law review article ever written. HORWITZ, *supra* note 17, at 265.

26. Wechsler, *supra* note 25, at 34, *quoted in* HORWITZ, *supra* note 17, at 265-67.

> principle over time and its experimental appreciation of the complex interrelationship between law and politics and theory and practice, has stood against the static fundamentalism of traditional American conceptions of principled jurisprudence.[27]

While Professor Horwitz's book is well-researched, scholarly, and thoughtful, his plea for a jurisprudence unconcerned with process ultimately fails, for both historical and practical reasons. The problem with Professor Horwitz's history arises from the dichotomy, which he himself carefully elucidates, between substance-oriented and procedure-oriented reformers among the Progressives.[28] Professor Horwitz keeps referring to the Legal Realists as "Progressives," with a capital "P." However, "Progressivism," as distinguished from "progressivism," was very much concerned with professional accountability as well as with the Realists' insights from social science.

Professor Horwitz fails to appreciate fully the technical spirit of Progressivism that laid the foundations for Legal Realism. Progressives advocated more than just social reform. Their movement was greatly affected by the historical period, an era of rationalization and professionalization. Therefore, Progressives sought to achieve reform by using their professional skills. These skills were important to them, and they would not quickly abandon them for social expediency. If Charles Beard or a *New Republic* writer, applying the tools of his trade, reached a conclusion different from what most reformers were demanding, he probably would have held to his principles. Therefore, Professor Horwitz should not be so critical of Judge Hand and

27. HORWITZ, *supra* note 17, at 271.

28. According to Professor Horwitz, Legal Realism has been defined too narrowly by stressing its sociological aspects. He thinks that historians have put too much emphasis on the 1931 exchange in the *Harvard Law Review* between Roscoe Pound and Karl Llewellyn. HORWITZ, *supra* note 17, at 172-85 (citing Karl Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931)). Dean Pound had been an early advocate of sociological jurisprudence, but he had become increasingly conservative in relation to younger scholars like Professor Llewellyn and Jerome Frank, who only a year earlier had written the Realist manifesto *Law and the Modern Mind*. In response to Dean Pound's charges, Professor Llewellyn gave a list of twenty "Realists." Because most of that group were associated with the social scientists, Professor Horwitz argues that historians have tended to overemphasize the social scientific aspects of Realism. In Professor Horwitz's opinion, Professor Llewellyn deemphasized the substantive reform content of Realism and merely stressed its technology. HORWITZ, *supra* note 17, at 180-81.

Professor Wechsler, for as practitioners of a profession, they were simply carrying on one aspect of the Progressive tradition.

The practical problems with a pragmatic jurisprudence as the ideal are also great. Professor Horwitz is correct in stating that Americans look to the legal system to provide order, for they lack a long history or national religion to unite them. However, it is hard to see how the pragmatism that he endorses would be good for the American people. The judicial branch is elitist and undemocratic. Article III judges are not elected and receive life tenure. Therefore, the American people can rightfully expect to select these lifetime judges on the basis of a set of disclosed judicial principles. Professor Horwitz wants "pragmatic" judges who somehow possess a "dynamic understanding" of law, politics, theory, and practice and, therefore, should be given unaccountable power to decree law at will. Leaving aside the practical difficulty of how any one individual could ever acquire the necessary wisdom, Professor Horwitz's vision is discomforting at best and absolutely terrifying, suggesting absolutism, at worst.

A second practical problem with Professor Horwitz's vision is that it would entail the misreading of any professional mind. People want to use the special skills they have acquired. This innate desire acts as a powerful counterbalance to the corresponding tendency to act for one's own ends. Of course, individuals do bend with the political winds and make compromises. However, there are probably many judges who do hold fast to legal principles and make decisions with which they may disagree as a matter of personal politics.

For example, Justice Hugo Black, who only receives a scant two references in Professor Horwitz's book, was a firm believer in judicial restraint. A former United States Senator, Justice Black had faith in both the people and the political process, so he only voted to strike down laws he found unconstitutional according to his principles. Although the history Justice Black used to back his argument on incorporation may have been faulty, to his credit he at least staked out a position on Constitutional rights and clung to it.

For example, in *Griswold v. Connecticut*,[29] Justice Black voted to uphold a state statute forbidding information about contra-

29. 381 U.S. 479 (1965).

ceptives from being distributed to married couples. While Justice Black personally found the law distasteful, he saw nothing in the Constitution forbidding it. Justice William O. Douglas, writing for the majority, stated that there was a right to privacy stemming from "penumbric" emanations of the Bill of Rights. Justice Black wrote in dissent:

> There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitutional.[30]

Justice Black added that the Supreme Court should not use the Due Process Clause, Ninth Amendment, or "any mysterious and uncertain natural law concept" to strike down laws with which it disagreed. Remembering *Lochner*, he wrote that concepts of "natural justice" are no less dangerous when the court uses them to enforce personal rights, rather than economic rights.[31]

Today, Justice David Souter seems to have inherited Justice Black's role of sticking to his judicial philosophy, even when his political instincts lead him in the opposite direction.[32] As an example of this, many conservatives felt betrayed by Justice Souter's vote not to overturn *Roe v. Wade*[33] in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[34] If Justice Souter's vote was compelled by his understanding of the law, however, then he voted exactly as the American people have a right to expect of him.[35]

Judges, lawyers, and legal academics are like other human beings in that they are complex creatures; they act for a variety of reasons. No doubt politics often motivate individuals to act in certain ways. It is also plausible, however, that professional

30. *Id.* at 507 (Black, J., dissenting).

31. *Id.* at 522.

32. The parallel, however, is not completely accurate, for while Justice Black was a believer in following the will of the legislature, Justice Souter tends to be more mindful of carefully following judicial precedents, even those of possibly more "pragmatic"—to use the term as Professor Horwitz would—courts. *See infra* text accompanying note 27.

33. 410 U.S. 113 (1973).

34. 112 S. Ct. 2791 (1992).

35. The same arguments might be made of the votes of Justices O' Connor and Kennedy, but their nominations and confirmations were not so near the decision in *Casey*, so the expectations of many conservatives would necessarily be more attenuated than in the case of Justice Souter.

responsibility can be an equally strong motivator. Ironically, Critical Legal Studies, the legal school of thought that Professor Horwitz represents, sees law as nothing more than politics. In denying legitimacy to law as an institution, Critical Legal Studies itself becomes a new type of formalism, similar to the "old" formalism it denounces. In holding that legal professionals act for one reason alone, Critical Legal Studies is as out of touch with reality as the orthodox formalism that Professor Horwitz attacks in this history book.