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Some Horwitzian Themes in the Law and History of the Federal Courts

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ALTHOUGH NEITHER VOLUME OF MORTON HORWITZ'S PATHBREAKING work *The Transformation of American Law* focuses on issues of federal jurisdiction and procedure, many of its themes resonate richly in those areas. Indeed, some of its insights and conclusions apply as forcefully to those fields as they do to the areas that *Transformation* examined in detail.[1] In the law and history of the federal courts, three Horwitzian themes loom as particularly significant.

THREE RESONANT THEMES FROM *TRANSFORMATION*

First, Morty probed beyond those who have emphasized the Jacksonian roots, laissez-faire economic assumptions, or allegedly pro-corporate biases of the late nineteenth-century Supreme Court to highlight the marked differences that existed between what he called its "old" and "new" conservatives. The old conservatives, Morty told us, were "suspicious of corporate power," experienced "anguish" when they considered the nation's growing industrial concentration, and held views that were "rooted in an increasingly nostalgic vision of the naturalness and necessity of a decentralized, competitive market system."[2] In contrast,

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One of the highest tributes I could pay Mort Horwitz is to admit the perplexing difficulty—shared, I suspect, by many who contributed to this volume—of selecting a specific topic to discuss. It was a confounding challenge to try to pick out from the sweeping, provocative, and brilliant body of Morty's scholarship some particular aspect that might be fairly and reasonably discussed in brief compass. For their invaluable assistance in preparing this essay, I wish to thank two New York Law School students, Jared Kagan and Sara J. Mirsky.

the new conservatives "came to understand the corporation as a normal and natural mode of doing business" and "proclaimed the inevitability and efficiency of large organizations that derived from economies of scale."[3] Morty found the gulf between the two groups apparent, for example, in their contrasting attitudes toward corporate law and anti-monopoly legislation,[4] and he saw the balance on the Court between the two positions shifting from old to new during the 1890s, a decade torn by widespread social strife and a severe economic depression that generated a "widespread" feeling among Americans "that the country was falling apart."[5]

The law and history of the federal courts confirm both the difference that Morty identified between an old and new conservatism on the Court and the pivotal role that the crisis of the 1890s played in shifting the Court from the former to the latter. In jurisdictional matters, for example, the Court in the 1870s was clearly suspicious of large national corporations and quite sympathetic to the ordinary individuals who sought to sue them. During that decade it reshaped jurisdictional rules to allow federal courts to hear suits against foreign corporations in forums outside their chartering states, and its decisions were designed to ensure that such corporations could be held accountable for the wrongs they committed.[6] Rejecting the antebellum principle that a corporation was "present" and could be "found"—and hence sued—only in the state that granted its charter,[7] the Court held in *Railroad Co. v. Harris* in 1870 that foreign corporations were "present" and could be "found" and sued in any federal court in any state where they were actively doing business or had consented to suit as a condition of doing local business. While the defendant railroad sought to avoid jurisdiction by contending strenuously for the antebellum principle, the Court reasoned that in a nationalizing corporate economy the consequences of maintaining the old rule would be unfair and abusive. Under the antebellum principle, it explained, "however large or small the cause of action, and whether it was a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another state. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility."[8] Thus, in *Harris* the Court altered the law to allow those with claims against foreign corporations to seek their redress in convenient and accessible local federal courts, thereby relieving them of the heavy practical burdens they would face if required to bring their suits in distant chartering states. *Harris* was, in Morty's terms, a classic old conservative decision.

By the 1890s, however, much had changed. No longer was the choice between local and distant forums a critical issue in suits pitting individual claimants against national corporations. Rather, the newly pivotal issue in such suits was the choice between state and federal courts sitting in the same state. For a variety of

legal and practical reasons the federal courts had become particularly advantageous forums for national corporations, and consequently individual plaintiffs sought assiduously, even desperately, to avoid them and maintain their actions in state courts. To assist them, states enacted a variety of laws designed to prevent foreign corporations from removing suits to federal court.[9] One such tactic was to "adopt" out-of-state corporations, especially railroads acquiring in-state roadways, as local corporations. Such adoptions were intended to deprive foreign corporations of diverse citizenship with the enacting state's citizens and thereby prevent them from removing state court suits brought against them by those citizens. By the 1890s, however, the Court had also changed, and its earlier solicitude for ordinary individuals who sued foreign corporations had disappeared. In 1896 a new conservative Court held in *St. Louis and San Francisco Railway Co. v. James* that, for purposes of federal diversity jurisdiction, corporations were citizens only of their chartering state and other states could not make them local "citizens."[10] The decision meant that corporations would remain jurisdictionally diverse from the human citizens of every state but one. Consequently, national corporations would enjoy the widest possible access to the federal courts and be able to exploit systematically the compelling advantages they enjoyed in federal forums across the nation. Not surprisingly, the Court's opinion showed concern for neither the severe practical burdens that removal loaded on individual plaintiffs nor the powerful pressures it placed on them to settle their claims cheaply or abandon them altogether. Its reasoning, moreover, was arbitrary, unconvincing, and devoid of social or economic analysis.[11]

The gulf between *Harris* and *James* exemplified a fundamental shift in the Court's social attitudes that was equally apparent in other jurisdictional areas. Before 1892, and especially after passage of the restrictive Judiciary Act of 1887–88, the Court construed diversity jurisdiction narrowly and tightened its requirements in a variety of ways.[12] Then, the restrictive consequences of both the statute and the Court's decisions aided those who sued corporate defendants by making it easier for them to bring and hold their actions in the state courts. In the early 1890s, however, with no change in the controlling jurisdictional statutes, the Court suddenly reversed course. Across a range of issues, it began consistently to broaden the scope of diversity jurisdiction, allowing corporate defendants ever-greater opportunities to remove actions to the federal courts.[13] Indeed, the Court also reshaped federal question jurisdiction to achieve the same results. In 1892 it carved out a special rule that allowed federally appointed receivers, in the absence of diversity, to remove common-law tort suits against the corporations they represented on the dubious ground that the receiver's federal appointment created a federal question sufficient to confer jurisdiction on the national courts.[14] In the social and political context of the 1890s, the abrupt alterations that the Court made in a wide variety of jurisdictional doctrines and the consistent social results it thereby achieved supported only one conclusion. The justices were purposely

remolding the rules of federal jurisdiction to protect corporate defendants against personal injury actions.

The Court's shift from an old to a new conservatism was equally apparent in its development of the "general" federal common law under *Swift v. Tyson*.[15] Between the 1870s and the 1890s, strict limits on the ability of common carriers to contract out of liability for personal injuries gave way to new rules that facilitated such liability-avoiding agreements; rules favoring insurance claimants in suits against insurers withered and were replaced by exacting rules that favored the companies; and overt hostility to the unforgiving fellow-servant rule transmogrified into profound admiration.[16] In 1873, for example, the old conservative Court viewed the fellow-servant rule with deep skepticism, terming it "more technical than just" in one decision and "unsupported by reason" in another.[17] Twenty years later, however, a new conservative Court enthusiastically embraced the rule and gave it a sweeping formulation. "*Prima facie*," the Court declared in *Baltimore and Ohio Railroad v. Baugh* in 1893, "all who enter into the employ of a single master are engaged in a common service, and are fellow-servants."[18] In a dozen years after the early 1890s, the Court issued a stunning range of common-law decisions that protected corporate enterprise, fostered the new national economy, and imposed the growing risks of industrialism on the weakest and most vulnerable members of society.

Thus, the transition from an old to a new conservatism that Morty identified in such areas as corporate, antitrust, and constitutional law occurred equally in the Court's jurisdictional decisions and common-law rulings. The most decisive changes, moreover, occurred at the time he specified, the 1890s, and as a result of essentially the same forces he suggested—market nationalization, industrial conflict, the rise of a militant populism, the most severe depression in the nation's history, and the resulting anxieties generated within the legal profession's unnerved elite.[19]

A second point Morty made about the difference between old and new conservatives may be even more important and perhaps less widely appreciated. During the 1870s and 1880s, he wrote, "the real source of division in the Supreme Court" was the "different views of the dangers of federal power and of governmental centralization."[20] Morty illustrated his point by comparing the views of Justice Samuel Miller with those of Justice Stephen J. Field. In 1874 Miller was willing to hold in *Loan Association v. Topeka* that a state constitution contained an "implied limitation" on the power of municipalities to issue bonds. The danger of "class" legislation, Miller reasoned, required that such bonds be issued only for a valid "public purpose," a purpose that did not include subsidizing "private" economic enterprise.[21] While Miller was thus willing to construe a state constitution innovatively and expansively, he was unwilling to do the same with the federal Constitution. In a case decided only three years after *Loan Association,* Miller refused to incorporate into the Fourteenth Amendment the same idea of implied

constitutional limitations on the taxing power.[22] His refusal, Morty argued, was rooted in his "respect for the federal system" and his unwillingness to expand the reach of national power.[23] Field, in contrast, had no such qualms. Rather, he sought early and avidly "to force just such an expansive view of the Fourteenth Amendment on the Supreme Court."[24] In opinions written on circuit in the early 1880s, Field used the federal Constitution to limit the power of states to tax, and in a variety of other areas he pressed consistently for an expansive interpretation of the Fourteenth Amendment. By the 1890s, Morty argued, Field's broad interpretation—and the idea of implied federal constitutional limitations on legislative power—had become a "deeply ingrained part of American constitutional doctrine."[25]

Morty's point is critical, and it resonates broadly in the law and history of the federal courts. Beginning in the 1890s the United States Supreme Court began to turn away from values rooted in earlier concepts of federalism—except, of course, in racial matters—and to embrace values responsive to the new nationalizing and centralizing corporate economy. As it did so, it became a powerful force for a parallel and adaptive centralization in American law and government. It was thus judicial "conservatives"—in the circumstances, quite aptly termed "new"—who took the lead in forging a more highly unified national market, a more far-reaching national law, and a more muscular and activist federal judiciary.[26]

Much of this story is familiar, especially its central constitutional elements. The rise of what came to be called substantive due process and liberty of contract—those invigorating doctrines of national judicial power—even led some historians to label the whole period from 1890 to 1937 the *Lochner* era.[27] Morty, of course, discussed many of these constitutional developments and suggested that the Court's liberty of contract decision in *Lochner* was a catalyst for the development of "Progressive Legal Thought."[28]

The law and history of the federal courts show that the centralizing thrust of the new conservatives extended well beyond *Lochner* and its famous constitutional companions. To enforce its new constitutional doctrines and principles, the Court reoriented the work of the lower federal courts, reshaped jurisdictional law across the board, and expanded both the reach and power of the federal judiciary. Indeed, over the course of little more than a quarter of a century from 1890 to World War I, it essentially created the powerful and commanding federal judicial system of the twentieth and twenty-first centuries.[29]

The new conservative Court acted boldly and broadly. It abandoned the assumption that the federal judiciary existed primarily to protect non-residents from bias or prejudice and accepted, instead, the view that its primary role was to enforce federal law and federal rights regardless of citizenship.[30] It abandoned the view that adjudicating private law actions under diversity jurisdiction was central to the federal judiciary's role and embraced, instead, the view that adjudicating federal law claims under federal question jurisdiction was paramount.[31] It sharply

narrowed the scope of the Eleventh Amendment, which limited federal judicial power, while steadily expanding the scope of federal equity jurisdiction to conduct corporate receiverships, check state regulatory activities, and enjoin strikes and other efforts to organize labor. It broadened the scope of the independent federal common law, undermined the idea that state courts were coequal expositors of federal law, and advanced the proposition that the federal courts were the "primary" defenders of federal rights. It blocked a variety of state efforts to limit the jurisdiction of the federal courts, created new procedural doctrines to ensure that those who opposed state regulatory efforts would be able to challenge them in federal court, and inscribed in a variety of doctrinal areas the fundamental premise that federal jurisdiction existed to check and, if necessary, trump the jurisdiction of state courts.[32]

The Court's treatment of its own appellate jurisdiction exemplified its centralizing shift. In the early twentieth century the Court gradually broadened the category of state court judgments that it would review as "final," expanding the scope of the "record" it would consider in determining finality[33] and accepting jurisdiction even when further proceedings or collateral actions were continuing.[34] Furthermore, it announced the constitutional principle that state courts were required to provide meaningful remedies in cases involving actions by state officials that violated the federal Constitution and that, if the state judiciaries failed to do so, the Court would review and reverse their judgments.[35] Similarly, it began to impose clearer due process limits on the ability of state courts to deny federal claims on state procedural grounds[36] and seemed to tighten the standards it would apply in evaluating the "adequacy" of state court judgments that had the effect of foreclosing consideration of federal rights.[37] An "untenable construction" of state law could not be allowed to defeat a federal right, the Court insisted in 1904. "To hold otherwise would open an easy method of avoiding the jurisdiction of this court."[38]

Perhaps most striking and innovative was the Court's sudden announcement that its jurisdiction to review state court judgments included the power to examine not just the law but the facts as well. What had previously been an "inflexible rule" that the Court would not reexamine a state court's findings of fact[39] was transformed into a rebuttable presumption with two highly serviceable exceptions. In a series of four cases handed down in 1912 the Court advanced, implemented, and then codified "two propositions" that were, it claimed in the last of the four, "well settled."[40] If a state court denied a federal right, the Court could reexamine the facts either when a party claimed that "there was no evidence whatever to support" the denial or when a state court's findings were "so intermingled" with its conclusions of law that it was "essentially necessary" to reexamine the former in order to review the latter.[41] The decisions provided a substantial new tool for the cause of judicial centralization and federal supremacy, a typical product of Morty's activist and nationally oriented new conservatives.[42]

A third point that Morty stressed, one that runs through much of his work, is the importance and pervasiveness of the public-private distinction. He argued that the distinction, rooted in antebellum state constitutional law, was intended to wall off a "non-coercive" area of individual freedom and self-regulating market relations from the area where "coercive" state regulatory powers properly operated. The distinction became "more formal and systematic" during the 1870s and spread from eminent domain and the taxing power into a wide range of other legal fields, including torts, contract, property, and commercial law.[43]

Confirming Morty's emphasis on its pervasive spread, the public-private distinction also became critical in the law of the federal courts. Repeatedly, the Court used it to remold and expand the scope of federal judicial power. Four milestones, all imposing tighter judicial limitations on legislative power, demonstrated its pervasive use.

First, and most obvious, the distinction underwrote the Court's elaboration of a "state action" requirement in the Fourteenth Amendment. Dealing primarily with a series of potentially explosive race cases in the 1870s and early 1880s, the Court limited the amendment's reach to formal governmental actions and excluded from its purview all forms of "private" behavior.[44] In its state action guise, the public-private distinction perfectly suited the Court's policy goals at the time. Limiting the reach of the potentially revolutionary new amendment served both the federalism interests of the Court's old conservatives and the racial interests of the whites who were contemporaneously forging the terms of the post-Reconstruction settlement.

Revealingly, too, when the Court first used the public-private distinction to restrict the Fourteenth Amendment, it viewed the new provision as a source not of judicial authority but of legislative power only. The amendment, it explained in 1880, at the exact time it was establishing the state action requirement, authorized Congress alone to safeguard the rights that the new provision established. "It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed" by the Fourteenth Amendment, the Court declared in *Ex parte Virginia*. "It is not said that [the judicial] branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions."[45] Thus, when the Court originally incorporated the public-private distinction into its Fourteenth Amendment jurisprudence, it conceived the limitation as directed specifically at the legislative, not the judicial, power.[46]

Next, the distinction appeared in the Court's interpretation of the Eleventh Amendment. In a series of cases culminating with *Hans v. Louisiana* in 1890, the Court held that the amendment recognized a comprehensive principle of state sovereign immunity that barred the federal courts from hearing suits against states regardless of whether they were brought by citizens or non-citizens.[47] While *Hans* successfully blocked a variety of troublesome suits designed to collect on

repudiated southern state bonds, it also created a striking new constitutional problem. If the Eleventh Amendment barred suits against states in federal courts, how could parties who sought to challenge state regulatory actions bring their suits in those courts? Over the years the Court had experimented with a variety of concepts and distinctions to answer that question[48] before finally and cleanly resolving it by shaping another version of the public-private distinction. In 1908 it ruled in *Ex parte Young* that, when a state agent attempted to enforce an unconstitutional law, he was "stripped of his official or representative character" and subjected "in his person to the consequences of his individual conduct."[49] Thus, the official stood before the courts not as a "public" person but as a "private" person. Because the Eleventh Amendment did not bar suits against private persons, the federal courts were consequently free to assert jurisdiction over them and enjoin their actions whenever they impaired federal constitutional rights.

That application of the public-private distinction raised, in turn, a subsidiary question. What if the unconstitutional actions of state officials were prohibited by the laws of their own states? If such officials disobeyed state law and, in effect, betrayed their office, could they fairly and properly be seen as acting on behalf of the state? The Court also struggled with that question[50] before finally resolving it by once again aptly retailoring the public-private distinction. This time it simply broadened the former category. Officials who took actions forbidden by the law of their states, the Court held in 1913, remained public actors subject to the Fourteenth Amendment and enjoinable by the federal courts.[51]

A final problem still remained, however, for *Young*'s resolution of the Eleventh Amendment problem created a constitutional conundrum. If the Eleventh Amendment did not prevent the federal courts from issuing injunctions because state officials enforcing unconstitutional laws were "stripped" of their official status and became in law only private persons, how could the actions of such private persons violate the Fourteenth Amendment, which, after all, was limited by the state action requirement and could therefore reach only public officials? Again, the public-private distinction, suitably and this time rather ruthlessly readapted, enabled the Court to hack through the constitutional Gordian Knot. For Eleventh Amendment purposes, state officials would be considered private persons standing beyond the provision's reach and therefore subject to suit in federal court; for Fourteenth Amendment purposes, such officials would be considered public actors subject to all of the provision's commands and enjoinable for its violation. Thus, in a jurisprudential tour de force, the Court cast aside the Aristotelian principle of non-contradiction and conferred on state officials a uniquely split constitutional personality, determining that they were, at the very same time and in regard to the very same actions, both public and private persons.[52]

The Court's reasoning in those various cases made perfect sense as matters of policy and purpose. In its different guises the public-private distinction that ran

through the Court's Eleventh and Fourteenth Amendment decisions served the same single purpose. In each formulation the distinction ensured that the federal courts would be able to protect the kinds of rights they regarded as fundamental and check state regulatory efforts they regarded as improper. All confirmed Morty's argument about both the pervasiveness and utility of the public-private distinction and the politico-institutional purpose that animated the new conservatives.

THE NATURE OF "CLASSICAL LEGAL THOUGHT"

Drawing on these three themes, as well as others, Morty advanced a double argument about the general jurisprudence of the turn-of-the-century Court. He maintained, first, that the justices sought to establish a "real constitutional check on the legislature" and, second, that their efforts drove "the intellectual process by which the categories of Classical Legal Thought became ever more essentialist."[53] On the first point he was surely right. The Court's decisions were clearly designed to provide effective checks on legislative action as well as categorical lines that would seem readily and properly enforceable by the courts.

On the second point, however, the "essentialist" nature of the Court's classical legal thought, some skepticism may be in order, depending, of course, on exactly how one interprets the concept "essentialist." The Court's repeated and deft adaptations of the public-private distinction in its Eleventh and Fourteenth Amendment decisions—and the consistent results it achieved thereby—suggested a Court that utilized "bright-line" reasoning pragmatically and creatively, not a Court in deep thrall to substantively "essentialist" categories and boundaries. Or, to put the point another way, insofar as the Court appeared to be essentialist, that appearance masked—in at least a good many areas—a quite self-conscious and policy-based instrumentalism. Indeed, in every area I have reviewed—the jurisdiction of the lower courts, the rules of the federal common law, the institutional powers of the Supreme Court, and the general vision of the federal judiciary's proper constitutional role—the Court's jurisprudence was flexible, adaptive, purposeful, and policy driven.[54]

If those examples are not convincing, consider one more—the Court's construction of the fundamental constitutional concept of a state. Addressing the Eleventh Amendment, the Court held in *Hans* that "states" enjoyed a sovereign immunity that barred suits against them in the federal courts. Immediately, however, it began not to expand but to shrink the meaning of the term "state." On the very day it decided *Hans*, in fact, the Court held in *Lincoln County v. Luning* that counties did not come within the meaning of the term "state" in the Eleventh Amendment and—to spotlight its narrow definition of the term—announced unnecessarily that cities, towns, and other municipal corporations were also

excluded from its meaning.[55] The following year the Court affirmed the principle that the term "state" in the Eleventh Amendment did not necessarily include state officials[56] and started down the road that led haltingly but directly to *Ex parte Young* and the critical holding that state officials were also excluded from the definition of the "state," even if injunctions against them could absolutely prevent "states" from acting or enforcing their laws. Subsequently, the Court ruled that the Eleventh Amendment did not bar suits against states in federal court brought by the United States government[57] and that it did not prevent the United States Supreme Court from reviewing actions against states brought in state courts pursuant to state laws that authorized such suits but limited them solely to the states' own courts.[58] The Court, in other words, constricted the Eleventh Amendment severely by defining the term "state" with exceptional narrowness, thereby barring from the federal courts only the tiniest fraction of cases that could be brought to prevent states and their local government units from implementing their chosen policies.

In contrast, in construing the statute establishing its own mandatory appellate jurisdiction, the Court gave the term "state" an entirely different meaning. The federal judicial code provided a right of mandatory appeal to the Court from any final state court judgment that rejected a federal law challenge to "the validity of a statute of any state."[59] The word "state," as well as the word "statute," seemed to give the provision a specific and easily understood meaning. In its decisions, however, the Court stretched both terms far beyond their normal usage. "Any enactment, from whatever source originating, to which a State gives the force of law," it declared in 1877, "is a statute of the State within the [provision's] meaning."[60] Subsequent decisions held expansively that the bylaws and ordinances of municipalities as well as the orders of state regulatory commissions fell within the provision's definition of "statutes" of a "state."[61] A state "may legislate" in any number of different ways and "delegate legislative authority to subordinate agencies, such as municipal councils and state commissions," the Court explained in 1928. "But whether this power be exerted in one form or another, or by one agency or another, the enactments put forth, whether called constitutional provisions, law, ordinances or orders, are in essence legislative acts of the State." All—"no matter what their form or by what agency put forth"—came within the definition of a statute of a state.[62] Thus, in determining when parties could take appeals as of right to challenge state court judgments that denied federal law claims, the Court strained the statutory terms and stretched the concept of a state to include within its definition the actions of all of a state's regulatory agencies and local government units. It was a sweeping and nearly all-inclusive definition of the term "state" that far exceeded the scope of the narrow and sharply exclusive definition that the Court gave the same term in construing the Eleventh Amendment.

Though the two definitions were near-polar opposites, they produced in their different contexts identical consequences—just as did the Court's various

formulations of the public-private distinction in its Eleventh and Fourteenth Amendment decisions. Each definition stretched the power of the federal judiciary over the actions of state and local governments. Indeed, the Court acknowledged that underlying purpose. In blunt words that fairly applied to its decisions in all those areas, the Court explained its expansive construction of the jurisdictional statute by declaring that the Constitution's "protections" applied to every "form in which the legislative power is exercised" and that the jurisdiction of the federal courts was "designed to be in aid of such protection."[63]

Those radically inconsistent definitions of the concept of a state represented judicial instrumentalism in its baldest form. Thus, while it was surely true that the Court sought to create a "real constitutional check on the legislature"[64] and that it often relied on bright-line categories in doing so, it seems doubtful that the Court's "essentialist" language—at least in its decisions shaping the contours of the federal judicial power—either directed the justices' decision making or reflected their belief in substantively "real" legal categories and boundaries.[65] It seems, rather, that such language was an accepted tool of judicial reasoning deployed to serve the public values and institutional arrangements that the Court's varying majority combinations thought fundamental and desirable.[66] On the basis of the shrewd analyses in *Transformation II*,[67] moreover, I suspect that—in spite of a few seemingly contrary statements about the "essentialist" nature of classical legal thought[68]—Morty would, to some extent at least, agree with that conclusion.

A HISTORIAN'S ACHIEVEMENT

Although the themes I have discussed address major historical issues, they represent only a slight part of Morty's profound scholarly contributions. Indeed, I would do a grave injustice to the overall body of his work if I did not at least mention some of the other principal themes he explored: the close relation between law and politics, the struggle over distributional policies implicit in legal rules, the challenges of democratic constitutionalism under a "living" Constitution, and the compelling need for a "dynamic fundamentality" that operates "without Fundamentalism."[69] These themes, too, resonate in the law and history of the federal courts, though exploring their salience and significance would require a multi-volume study devoted to each. Thus, I do not here attempt specifics but only acknowledge both the relevance and importance of these additional Horwitzian themes for any effort to understand the law and history of the federal courts.

I also mention this last group of themes for another and broader purpose, to acknowledge more generally the breadth and depth of Morty's work and, further, to suggest that in exploring these fundamental and controversial themes, Morty has

rendered the highest service that historians can offer. He has identified crucial issues, asked incisive questions, challenged established and comfortable assumptions, and illuminated central and enduring aspects of our national experience. For if law is not merely politics, it is nonetheless so intimately connected to politics that the two can be distinguished only with the greatest care and insight; and if American law has not been dominated by a continual effort to block legislative redistribution, it has nonetheless been profoundly shaped by many such efforts at many different times; and if the Constitution was written to establish certain timeless principles and permanent institutions, its meaning has nonetheless of necessity evolved as America and the world have changed; and if our most fundamental constitutional values must be honored and preserved, we can accomplish that only by understanding the significance of complex historical changes, adapting our laws and institutions to sustain those values in a living world, and rejecting the pieties, pretenses, and polemics of simplistic "originalisms" in all their forms. The preservation of those fundamental constitutional values requires, as Morty wrote in another context, a concerted effort to create and maintain a truly vibrant "democratic culture" in order "to make democracy a practical reality."[70]

For affirming so powerfully that paramount American goal, as well as for his magnificent scholarly achievements, we honor him and we thank him.

NOTES

1. Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977); Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992).

2. Horwitz, *Transformation II*, 105, 92, 66.

3. Ibid., 79, 66.

4. Ibid., chap. 3.

5. Ibid., 142.

6. *Railroad Co. v. Harris*, 79 U.S. (12 Wall.) 65 (1870); *Ex parte Schollenberger*, 96 U.S. (6 Otto) 369 (1878).

7. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588–89 (1839); *Marshall v. Baltimore & Ohio Railroad Co.* 57 U.S. (16 How.) 314, 328 (1854). By the 1850s it seemed settled that for diversity purposes, corporations would be considered "citizens" of their state of incorporation, and that they could bring suits on contracts in the courts of other states. Established doctrine still generally held, however, that corporations themselves could be sued only in their chartering state.

8. *Harris*, 79 U.S. (12 Wall.) at 83–84. *Accord Schollenberger*, 96 U.S. (6 Otto) at 375–77 (1878).

9. Edward A. Purcell Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958* (New York: Oxford University Press, 1992), 201–2.

10. *St. Louis and San Francisco Railway Co. v. James*, 161 U.S. 545 (1896).

11. See Purcell, *Litigation and Inequality*, 18–19, 297 n. 28.

12. E.g., *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan*, 111 U.S. 379 (1884) (party seeking entry into federal court must affirmatively plead, and prove, the basis of federal jurisdiction);

Graves v. Corbin, 132 U.S. 571 (1890) (removal statute should be construed strictly against jurisdiction).

13. Purcell, *Litigation and Inequality*, 266–72.

14. *Texas and Pacific Railway Co. v. Cox*, 145 U.S. 593 (1892), established the principle, and *Tennessee v. Union and Planters' Bank*, 152 U.S. 454, 463 (1894), brought the resulting "federal question" within the "well-pleaded complaint" rule. See Purcell, *Litigation and Inequality*, 268–71.

15. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

16. Purcell, *Litigation and Inequality*, 67–72, 76–86.

17. *Packet Co. v. McCue*, 84 U.S. (17 Wall.) 508, 514 (1873); *Railroad Co. v. Fort*, 84 U.S. (17 Wall.) 553, 558 (1873).

18. *Baltimore and Ohio Railroad Co. v. Baugh*, 149 U.S. 368, 384 (1893). Similarly, the Court shifted its primary justification for the follow-servant rule from a narrow and grounded justification based on social practice (that workers in small-scale and highly localized enterprises had the ability to observe their fellow workers firsthand and thereby protect themselves against any observable lack of care, skill, or capacity on their part) to a sweeping and abstract rationale based on contract ideology (that workers in any enterprise, of whatever nature or scope, knowingly and willingly accepted the risks of their jobs in exchange for wages that were appropriately calibrated to compensate for those risks). Compare, e.g., *Hough v. Railway Co.*, 100 U.S. (10 Otto) 213, 217 (1880) *with Chicago, Milwaukee & St. Paul Railway Co. v. Ross*, 112 U.S. 377, 382–83 (1884).

19. Horwitz, *Transformation II*, 29–30, 142. *Accord* Purcell, *Litigation and Inequality*, 272.

20. Horwitz, *Transformation II*, 24.

21. Ibid., discussing and quoting from *Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655 (1874).

22. *Davidson v. New Orleans*, 96 U.S. 97 (1877).

23. Horwitz, *Transformation II*, 24. Miller's decision in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), was the classic example of an old conservative decision. See Horwitz, *Transformation II*, 24, 69.

24. Horwitz, *Transformation II*, 24.

25. Ibid., 25.

26. On the turn-of-the-century Court's role in state building, see William E. Forbath, "Politics, State-Building, and the Courts, 1870–1920," in *The Cambridge History of Law in America*, vol. 2, *The Long Nineteenth Century (1789–1920)*, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 643–96.

27. *Lochner v. New York*, 198 U.S. 45 (1905).

28. Horwitz, *Transformation II*, 3.

29. Edward A. Purcell Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* (New Haven, Conn.: Yale University Press, 2000), 39–46; Michael G. Collins, "Before *Lochner:* Diversity Jurisdiction and the Development of General Constitutional Law," *Tulane Law Review* 74 (2000): 1304–20; Edward A. Purcell Jr., "The Particularly Dubious Case of *Hans v. Louisiana*: An Essay on Law, Race, History, and 'Federal Courts,'" *North Carolina Law Review* 81 (2003): 2039–55.

30. Purcell, "Particularly Dubious Case," 2043–49.

31. Purcell, *Litigation and Inequality*, 272–88.

32. Purcell, *Brandeis and the Progressive Constitution*, 41–45; Purcell, "Particularly Dubious Case," 2045–55.

33. Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure*, 2nd ed. (St. Paul, Minn.: West, 1996), vol. 16B, sec. 4009, 151–55. Earlier the Court considered only

the "judgment" itself issued by the court below, but during the 1920s and 1930s it began to include the opinion below and even other material from the record as a whole in its review. E.g., *Clark v. Willard*, 292 U.S. 112, 118 (1934).

34. *Carondelet Canal & Navigation Co. v. Louisiana*, 233 U.S. 362 (1914); *Detroit & Mackinac Railway Co. v. Michigan Railroad Commission*, 240 U.S. 564 (1916); *Missouri ex rel. St. Louis, Brownsville & Mexico Railway Co. v. Taylor*, 266 U.S. 200 (1924); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (1931).

35. *General Oil Co. v. Crain*, 209 U.S. 211 (1908); *Ward v. Board of Commissioners of Love County*, 253 U.S. 17 (1920); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931).

36. *Saunders v. Shaw*, 244 U.S. 317 (1917); *Postal Telegraph Cable Co. v. City of Newport*, 247 U.S. 464 (1918); *New York Central Railroad Co. v. New York and Pennsylvania Co.*, 271 U.S. 124 (1926); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

37. *Chapman v. Goodnow's Administrator*, 123 U.S. 540 (1887); *Rogers v. Alabama*, 192 U.S. 226, 231 (1904); *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917); *Davis v. Wechsler*, 263 U.S. 22, 24–25 (1923). See Laura S. Fitzgerald, "Suspecting the States: Supreme Court Review of State-Court State-Law Judgments," *Michigan Law Review* 101 (2002): 119–40.

38. *Terre Haute and Indianapolis Railroad Co. v. Indiana*, 194 U.S. 579, 589 (1904). *Accord Leathe v. Thomas*, 207 U.S. 93, 99 (1907); *Vandalia Railroad Co. v. Indiana ex rel. City of South Bend*, 207 U.S. 359, 367 (1907).

39. Richard F. Wolfson and Philip B. Kurland, *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States* (New York, 1951), 198.

40. *Creswill v. Grand Lodge Knights of Pythias of Georgia*, 225 U.S. 246, 261 (1912). The three earlier cases in the sequence were *Kansas City Southern Railway Co. v. C. H. Albers Commission Co.*, 223 U.S.573 (1912); *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U.S. 655 (1912); and *Washington v. Fairchild*, 224 U.S. 510 (1912).

41. *Creswill*, 225 U.S. at 261. The Court repeatedly reaffirmed the new power it claimed, even when reviewing judgments based on jury verdicts. See Wolfson and Kurland, *Jurisdiction of the Supreme Court*, 199, 202–5.

42. Although the Court employed a vigorous rhetoric, it reversed state court decisions resting on state law grounds relatively rarely. E.g., *Erie Railroad Co. v. Purdy*, 185 U.S. 148 (1902); *Chicago, Burlington and Quincy Railway Co. v. Illinois*, 200 U.S. 561 (1906). Its reversals did not, of course, invariably favor corporate interests, e.g., *Schlemmer v. Buffalo, Rochester and Pittsburg Railway Co.*, 205 U.S. 1 (1907), and on occasion remedied instances of particularly egregious racial abuse. E.g., *Carter v. Texas*, 177 U.S. 442 (1900); *Rogers v. Alabama*, 192 U.S. 226 (1904).

43. Horwitz, *Transformation II*, 11–12. See also Morton J. Horwitz, "The History of the Public/Private Distinction," *University of Pennsylvania Law Review* 130 (1982): 1423–28.

44. *United States v. Cruikshank*, 92 U.S. 542, 554 (1876); *Virginia v. Rives*, 100 U.S. 313, 319–22 (1880); *Neal v. Delaware*, 103 U.S. 370, 386, 389 (1881); *Civil Rights Cases*, 109 U.S. 3, 8–26 (1883).

45. *Ex parte Virginia*, 100 U.S. 339, 345 (1880) (emphasis in original).

46. A decade later the Court reversed its position and announced that the federal judiciary could indeed enforce the Fourteenth Amendment. *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*, 134 U.S. 418, 457 (1890).

47. *Hans v. Louisiana*, 134 U.S. 1, 10–19 (1890).

48. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406–7 (1821) (distinguishing between suits brought by and those brought against states; also distinguishing between suits involving "federal

questions" and those based on diversity of citizenship); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857 (1824) (distinguishing between suits in which the state was and was not the "party named in the record"); *Poindexter v. Greenhow*, 114 U.S. 270, 290 (1884) (distinguishing between suits brought against the "state" and those brought against a state's "government"); *Reagan v. Farmers' Loan & Trust Co.*, 154 362, 390 (1894) (distinguishing between suits that did and did not affect a state's "property" or "pecuniary obligation"); *Barney v. City of New York*, 193 U.S. 430, 439 (1904) (distinguishing between suits in which state officials acted "*virtute officii*" and those in which they acted "*colore officii*").

49. *Ex parte Young*, 209 U.S. 123, 160 (1908).

50. See, e.g., *Barney v. City of New York*, 193 U.S. 430, 437–38 (1904); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 37 (1907); *Siler v. Louisville and Nashville Railroad Co.*, 213 U.S. 175, 192 (1909); *City of Memphis v. Cumberland Telephone and Telegraph Co.*, 218 U.S. 624, 629–32 (1910).

51. *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 287–88 (1913).

52. Id. at 285–87.

53. Horwitz, *Transformation II*, 30.

54. The justices did not, of course, simply rule in favor of either their own economic interests or the interests of corporations generally. Rather, they were influenced in varying and complex ways by the dominant intellectual assumptions of their day and guided in their thinking by a range of institutional, professional, doctrinal, cultural, political, social, moral, and personal factors. Whatever their purposes and motivations in any individual case, they generally knew, within their own contextually shaped but individualized frames of reference, the values they sought to serve and the results they sought to achieve. Thus, the "instrumentalism" referred to here is not the kind of one-dimensional interpretation that Owen Fiss identified as the "instrumental hypothesis." Owen Fiss, *Troubled Beginnings of the Modern State, 1888–1910* (New York: Macmillan, 1993), 15.

55. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). Ten years later the Court held specifically that cities did not share the Eleventh Amendment immunity. *Workman v. New York*, 179 U.S. 552 (1900).

56. *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891).

57. *United States v. Texas*, 143 U.S. 621 (1892).

58. *Smith v. Reeves*, 178 U.S. 436 (1900).

59. The statute authorized jurisdiction over judgments from the highest court of the state in which a judgment could be had. It was originally part of Sec. 25 of the First Judiciary Act, 1 Stat. 73, 85 (1789). It was denominated Sec. 709 in the Revised Statutes of 1873; codified as Sec. 237 in the Judicial Code of 1911; and modified by the Act of Feb. 13, 1925, c. 229, 43 Stat. 936. The provision was subsequently codified at 28 U.S.C. Sec. 1257 (2) before finally being repealed in 1988.

60. *Williams v. Bruffy*, 96 U.S. 176, 183 (1877).

61. *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U.S. 18, 31 (1888) ("by-law or ordinance"); *North American Storage Co. v. Chicago*, 211 U.S. 306, 313 (1908) (ordinance); *Grand Trunk Railway Co. v. Railroad Commission*, 221 U.S. 400, 403 (1911) (order of state commission); *Lake Erie & Western Railroad Co. v. State Public Utilities Commission*, 249 U.S. 422, 424 (1919) (order of state commission).

62. *King Manufacturing Co. v. City Council of Augusta*, 277 U.S. 100, 103–4 (1928).

63. Id. at 104.

64. Horwitz, *Transformation II*, 30.

65. Late nineteenth- and early twentieth-century legal thought has been widely examined, and scholars have increasingly recognized its variety and complexity. See, e.g., Harry N. Scheiber,

"Instrumentalism and Property Rights: A Reconsideration of American 'Styles of Judicial Reasoning' in the Nineteenth Century," *Wisconsin Law Review* (1975): 1–18; Stephen A. Siegel, "John Chipman Gray and the Moral Basis of Classical Legal Thought," *Iowa Law Review* 86 (2001): 1513–99; William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (New York: Oxford University Press, 1994); Bruce A. Kimball, "Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature," *Law and History Review* 25 (2007): 345–99; Brian Z. Tamanaha, "The Bogus Tale about the Legal Formalists," April 2008, St. John's Legal Studies Research Paper No. 08–0130, available at http://ssrn.com/abstract=1123498. My point is that in one substantial area—the law of the federal courts—the Court's thinking was highly practical, adaptive, and instrumentalist. See, e.g., Purcell, *Litigation and Inequality*, 262–91, 394–96 nn. 13–15; Purcell, *Brandeis and the Progressive Constitution*, chap. 2 and 319–20 n. 3.

66. "Categorical" reasoning seems an inherent tool of legal analysis. Notions of "public" and "private" evolve over time, for example, and justices continue to use them to demarcate enforceable, if new and shifting, doctrinal boundaries. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 486 (2005) (expanding concept of "public" purpose to justify government taking); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (using concept of "true private choice" to justify government aid to religious schools); *United States v. Katz*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (using "private" nature of location to identify scope of Fourth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (using notion of "zones of privacy" to prevent government from denying contraceptives to married couples). See, generally, Larry Alexander, "The Public/Private Distinction and Constitutional Limits on Private Power," *Constitutional Commentary* 10 (1993): 361–78. Even Justice Holmes could use such reasoning. See, e.g., *Smith v. Kansas City Title Co.*, 255 U.S. 180, 213 (1921) (Holmes, J., dissenting) (espousing a limited and sharply defined theory to identify the scope of federal question jurisdiction). His "convictions" on the issue, Holmes explained privately, were "categorical." Mark DeWolfe Howe, ed., *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916–1935* (Cambridge, Mass.: Harvard University Press, 1953), 312.

67. E.g., Horwitz, *Transformation II*, 18–19, 27–31.

68. E.g., "Nineteenth-century legal thought was overwhelmingly dominated by categorical thinking—by clear, distinct, bright-line classifications of legal phenomena." Horwitz, *Transformation II*, 17. The "intellectual goal" of the judges was "to decide whether a dispute fell within one or another mutually exclusive category." Ibid., 18. Note, however, the immediate qualification Morty added: "While judges and lawyers of the nineteenth-century clearly believed that there were identifiable bright-line boundaries that judges could apply to a case without the exercise of will or discretion, it is all too easy to caricature their position. Most legal thinkers believed that legal categories contained what we might call a 'core' and a 'periphery.'" Ibid., 18.

69. See, e.g., Horwitz, *Transformation II*, passim; Morton J. Horwitz, "The Constitution of Change: Legal Fundamentality without Fundamentalism," *Harvard Law Review* 107 (1993): 30–117; Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang, 1998).

70. Horwitz, *Warren Court*, 99.