Legal protection of private property is the *sine qua non* of capitalism. This underlying assumption is not merely limited to Marx, who explicitly stated the relationship between the state and law to property.\(^1\) Classical economists from Adam Smith to today's neoclassical economists recognize expressly or implicitly that fundamental facets of capitalism, such as private ownership and voluntary exchange, cannot exist without protection of the law. But the law existed prior to capitalism. Various legal regimes have existed throughout human society, each reflecting, enforcing, and emphasizing societal norms. American law today is certainly multifaceted, but the twin pillars of property and contract law serve to uphold a legal regime that protects private property and encourages the voluntary exchange of goods and services for profit. How then, did modern American law become so inexorably intertwined with capitalism?

Historians and legal scholars have examined the history of the law and its relationship to the rise of capitalism. While a wide array of legal doctrines has been explored, this paper will trace the historiography of modern American contract law. Specifically, it will examine the historiographical trends associated with the modern conception of contract as "a meeting of the minds" between two juridical equals, sanctioned privately through consideration—the payment or forbearance of a good or right. This so called "will theory" of contract finds its roots in nineteenth-century jurisprudence, when it was hailed as a great discovery in legal science, allowing for greater certainty and predictability in increasingly complex economic transactions. Though the will theory remains largely intact today, the narrative of its relationship to capitalism has changed over time. Progressive era historians were the first to point out the inequalities resulting from the will theory, but limited their critique to the realm of government reform. The Consensus school, influenced by the judicial success of the New Deal era, extolled the virtues of the will theory citing its favorable impact on American society at large. In the 1970s, having learned the lessons of judicial power during the Warren Era, and influenced by the social upheavals that spawned other critical histories (such as race and gender studies), legal

realists and critical legal scholars mounted a scathing critique of the Consensus school. They contended that the will theory was a conscious effort of the legal system to align itself with capitalist interests.

If there are any consistencies in the historiography to note, it is the scholars’ firm belief that the law is the gatekeeper of ideas and policies. Accordingly, each generation of scholars believed that the law had, or could provide, a positive solution to the perceived problems of a capitalistic society. Their historiographical trajectory brings us to the present, where contract ideology has dominated our understanding of, not only capitalism but, virtually all of our social and economic interactions. Modern American contract law is cloaked in the language of equality and liberty, but disguises the colossal inequality of contractual outcomes. Thus, for those who wish to address the iniquities of modern capitalism, the history of contract law is an appropriate place to begin.

In 1861, English jurist Henry Maine wrote, “the movement of the progressive societies has hitherto been a movement from Status to Contract.” This oft-quoted phrase neatly encapsulates the zeitgeist of the legal profession in antebellum United States. Contract law was viewed by contemporary lawyers, social theorists, businessmen, and abolitionists alike as the embodiment of freedom and individual rights. The “will theory” of contract purported to reflect both the material demands of the new economy and the intellectual traditions of the Enlightenment. It sought to rationalize increasingly complex market interactions. And despite the omission of women and blacks, the will theory was touted as having created a legal paradigm of juridical equals. That is, a legal system in which all private individuals were viewed as equals under the law. And in the lineage of Enlightenment thinkers before them, proponents of this classical contract theory brought with them a methodical and scientific approach. The law, legal formalists believed, was autonomous, and like the laws of physics, inherently divinable.

The famed American jurist, Oliver Wendell Homes, Jr., challenged this classical doctrine of legal autonomy in the late nineteenth century. Widely considered to be the inspiration for the nascent legal realism school, Holmes rejected the formalistic overtones of classical legal thought. “The life of the law has not been logic; it has been experience...The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics,” begins Holmes’s seminal treatise, The Common Law. Holmes believed that the law was instrumental and that it has and should be shaped to conform to the needs of society. Reflecting this philosophy, Holmes wrote, “The doctrine of contract has been so thoroughly remodeled to meet the needs of modern times, that there is less here than elsewhere for historical research.” While Holmes departed from formalistic conceptions of the law, he nevertheless accepted, and even

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4 Ibid., 247

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propounded, the will theory of contract law. His view that contract law was shaped to meet the needs of a changing economy was certainly consistent with his endorsement of the efficacy of the will theory.

While Holmes in all likelihood believed that the will theory of contract was a positive development in legal theory, he did not assent to a laissez-faire vision of contract theory. In fact, in his famous dissent in *Lochner v. New York* (1905), Holmes laid the intellectual groundwork for those who would later question the historical purposes and social impact of the will theory of contract. *Lochner* involved a New York law that established a ten-hour day and a sixty-hour week for bakery workers. A five-member majority of the Supreme Court struck down the law holding that the legislature could not interfere with the employment contract of an employer and employee absent a showing of real or substantive danger to the health or morals of the employees.5 Dissenting, Holmes stated, "...a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez-faire."6

Holmes’s critique of legal formalism and his refusal to embrace the economic theories of the wealthy as part of his jurisprudence launched an entire school of legal theorists and legal historians. This legal realism school owed its direct lineage to Holmes. The realists rejected the legal formalism of classical theory and for the first time, began to question the underlying purpose of the will theory of contract. If the law is instrumental, by whom was it utilized, and who benefited from it? Though the will theory of contract was well-established law by the turn of the century, Progressive-era scholars made the first critical analysis of the historical origins of the modern legal system.

In 1923, legal scholar and economist, Robert Lee Hale argued in *Coercion and Distribution in a Supposedly Non-Coercive State*, that coercion was inherent in the market economy, and that the legal rules of property and contract served to reinforce the coercive nature of the market. In describing the nature of the employment contract, Hale wrote, "If the non-owner works for anyone, it is for the purpose of warding off the threat of at least one owner of money to withhold that money from him (with the help of the law)."7 Hale contended that the coercive power of employers is inherent in the market economy, but that, "It is the law that coerces [the employee] into wage-work under penalty of starvation."8 Thus, Hale assailed the underlying assumption of the will theory of contract—a meeting of the minds between two equals—by arguing that many contracts, such as employment contracts, are not entered into voluntarily. Coercion is accepted by society, Hale posited, because "the undoubtedly coercive character of the pressure exerted by the property-owner is disguised."9

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6 Ibid., 75.
8 Ibid., 475.
9 Ibid., 474.
The renowned Wisconsin School labor historian John R. Commons also levied an historical critique of the contract theory using a legal realist’s lens. Tracing the evolution of contract law to seventeenth century England, Commons observed that courts, under pressure from artisans and merchants, developed rules to limit the special legal privileges afforded to feudalistic monopolies. These artisans and merchants were now able to seek redress in common law courts, rather than be subjected to the private courts of lords or barons.10 As the new capitalist class began to challenge the old feudal order, the concept of freedom of contract became increasingly associated with liberty. In response to the new demand for commercial rules, English common law developed rules for the enforcement of contracts. The law recognized and sanctioned new instruments of capitalism, such as contracts based on bills of exchange, contracts for goods or service to be performed in the future, and eventually established the will theory of contract. These common law rules, Commons argued, were transferred to America. More importantly, however, was the transmission of the concept of freedom of contract as liberty. Commons critiqued the dimensions of this new “liberty” in the context of the unfair bargaining position of employers and employees.

The capitalist system has been built up, as we have seen, on the enforcement and negotiability of contracts, and it is as difficult for the lawyer of today to appreciate the custom of employer and employee in breaking labor contracts as it was for the lawyers of the Sixteenth and Seventeenth Centuries to authorize the custom of merchants in enforcing promises and buying and selling them. While the violation cannot be penalized against either the employer or the employee...the only effective liberty of the wage-earner is the alternative opportunities offered by those third parties.11

Commons specifically criticized the will theory of contract as resting upon a false assumption of juridical equality. As between an employer and an employee, Commons argued that in formulating a legal theory of contract, the court should have applied a quantitative measurement of the parties’ relative bargaining power, and balanced the choice of alternatives available to the employer and employee respectively in a world of limited opportunities.

Both Hale and Commons directed their critiques to the state, which is not surprising given the Progressive-era emphasis on benevolent state action and the anti-monopolistic sentiment of the time. The Hale-Commons strand of legal realism recognized the implicit inequality in the will theory of contract, but was convinced that the appropriate remedy would be stronger state protection for the weaker contracting party through legislation. This mode of thought ran

11 Ibid., 303.
throughout progressive reform efforts to limit working hours, establish minimum wage laws, and improve working conditions. It is important to note that neither Holmes, nor Hale or Commons argued that the will theory of contract was affirmatively developed by the capitalist class specifically to create or exploit unequal bargaining relationships. Rather, these early legal realists argued that the will theory was developed by a capitalist class in order to adapt to a new market economy; the law simply reflected the inequities of that market economy.

Though the early legal realists rejected classical legal formalism, they were hardly ardent instrumentalists. The concept that a nascent capitalist class adapted its legal rules to a new economic reality is something of an “instrumentalist-lite” position. The Hale/Commons position suggests that capitalists did not create the will theory for the purpose of furthering their own interests; they merely adapted existing rules to a changing economic landscape. The next generation of legal scholars and legal historians, however, placed considerable agency in the hands of lawyers and judges. For them, legal changes and innovations positively drove the development of capitalism. Capitalists did not simply respond to economic changes with legal ones, they wielded the law as a powerful tool to achieve an economic regime that aligned with their interests.

In the 1950s, those interests were viewed by the consensus school of historians as generally positive and advantageous for American society. Led by Willard Hurst (widely considered the founder of modern legal history) at the University of Wisconsin, consensus historians portrayed a tradition of legal activity that promoted economic growth to the benefit of all. As a consensus historian, Hurst rejected the notion that the will theory of contact was created by a capitalist class to the detriment of a working class. As a product of the New Deal, Hurst and his contemporaries were undoubtedly optimistic about the law’s power to achieve positive social change.

In Law and the Conditions of Freedom, Hurst argued the American law in the early-nineteenth century encouraged freedom and economic expansion for the benefit of society. In reviewing records of frontier charters, Hurst made three assumptions about the public policy of the early-nineteenth century: (1) human nature is creative, and it is socially desirable that there be broad opportunity for the release of creative human energy; (2) as a corollary, men must possess liberty in order to exercise this creativity; and (3) the United States is uniquely positioned to foster both liberty and creativity as a result of its natural abundance. As a result, lawyers and judges created laws that protected and promoted the release of individual creative energy by ensuring that men had liberty to act freely with minimal public or private interference.

In the field of contract law, Hurst applauded the will theory of contact. Aside from a few vestiges of traditional contract theories (such as a court’s

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12 James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States (Madison: The University of Wisconsin Press, 1956), 5-6.
13 Ibid., 6.
refusal to enforce an agreement on the grounds that it violated public policy or the consideration doctrine, which allowed courts to invalidate contracts based on unfairness), Hurst stated:

The nineteenth-century presumption always favored the exercise of the autonomy which the law of contract gave private decision makers. Thus, the restrictive features of the doctrine of consideration were offset by the general rule that, absent such gross inadequacy or consideration as to evidence fraud, mistake or duress, the courts would not make the existence of a contract turn on the judges' appraisal of the worth of the exchange.\(^4\)

This conception of the law was the culmination of decades of legal advocacy. Beginning with seventeenth-century, land contracts, Hurst observed that the abandonment of traditional doctrines such as primogeniture (the right of the firstborn to succeed to an estate) in favor of contractual transfer of land evidenced "our early interest in turning land into a more readily transferrable good."\(^5\) It was this spirit of creative expansion that, according to Hurst, prevented Southern plantation owners from creating a feudal landed class; ignoring completely the issue of slavery, he characterized them instead as "agricultural industrialists and miners of soil."\(^6\) Following in the footsteps of contractual rules for real property, new legal rules continued to proliferate in areas of commerce, employment and finance. The will theory of contract provided a rational framework for parties to engage in increasingly complex economic transactions while maximizing individual autonomy and minimizing state or judicial interference. In codifying these new legal rules, Hurst contended that "Law thus ratified values early and deeply instilled in the behavior of the people."\(^7\)

Hurst, however, was not oblivious to the problem of winners and losers within the new legal and economic order. It might be more accurate, though, to simply say that Hurst was aware of the winners. Hurst acknowledged the staggering successes of Rockefeller, Carnegie, and Ford. Yet, at the same time, Hurst contended that same freedom of contract that permitted these men to reach such towering heights also permitted the freedom of association for groups such as the Knights of Labor, the American Federation of Labor, and the National Woman Suffrage Association.\(^8\) Furthermore, Hurst pointed out that the new legal regime had fostered an era of unprecedented economic and population growth to the benefit of all. And while he acknowledged the labor strife of the late-nineteenth century, Hurst argued that Progressive-era legislation did not reflect a political course correction in the social order, but rather an effort to

\(^{14}\) Ibid., 12.
\(^{15}\) Ibid.
\(^{16}\) Ibid., 13
\(^{17}\) Ibid.
\(^{18}\) Ibid., 85.

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enforce a more rational calculus in the total economy by conserving “the community’s labor supply” and mitigating “the human costs of the machine.”

If Hurst and the consensus school of legal historians were influenced by the positive changes of the New Deal era, then certainly the tumultuous events of the 1960s and 1970s affected the subsequent generation of legal historians. They were impressed by the legal gains made by the Warren Court, and were well aware of the power that judges could exercise in shaping the political landscape. After all, some of the most influential decisions in American law—Brown v. Board of Education (1954), Miranda v. Arizona (1966), and Roe v. Wade (1973)—had been decided in their lifetimes. These historians, while still legal realists, were far more critical of the will theory of contract.

Spearheaded by Morton Horwitz at Harvard Law School, this generation of legal historians argued that the will theory of contract was the result of a conscious alliance between judges and the mercantile class during the early-nineteenth century. Horwitz’s The Transformation of American Law, 1780-1860 was groundbreaking when it was first published in 1977, and remains the seminal text with which legal historians today must grapple. Every bit the legal realist and instrumentalist, Horwitz argued that during the antebellum period, “the common law performed at least as great a role as legislation in underwriting and channeling economic development...As judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules, they were lead to frame general doctrines based on a self-conscious consideration of social and economic policies.” Where Horwitz broke from the consensus school, however, was in his emphasis on the distribution of wealth resulting from the new legal regime. The central thesis of the book is that, “one of the crucial choices made during the antebellum period was to promote economic growth primarily through the legal, not the tax, system, a choice which had major consequences for the distribution of wealth and power in American Society.”

Modern contract law, Horwitz contended, was simply a reflection of choices made by the capitalist class and by the legal professionals aligned with them. The will theory of contract was:

fundamentally a creature of the nineteenth century. It arose in both England and America as a reaction to and a criticism of the medieval tradition of substantive justice...Only in the nineteenth century did judges and jurists finally reject the longstanding belief that the justification of contractual obligation is derived from the inherent justice or fairness of an exchange. In its place, they asserted for the first time that the

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19 Ibid., 97.
21 Ibid., xv.
source of the obligation of contract is the convergence of the
wills of the contracting parties.\textsuperscript{22}

Horwitz emphasized that the legal contract regime preceding the will theory
was one that commonly balanced the equities of contracting parties. The
eighteenth century doctrine of consideration allowed courts to refuse specific
performance of any contract where they determined that consideration was
inadequate. The rule was stated by South Carolina Chancellor DeAussure as late
as 1817, “It would be a great mischief to the community, and a reproach to the
justice of the country, if contracts of very great inequality, obtained by fraud, or
surprise, or the skillful management of intelligent men, from weakness, or
inexperience, or necessity could not be examined into, and set aside.”\textsuperscript{23}

Thus, Horwitz argued that the prevailing legal tradition of contract law
in the eighteenth century was one of fairness. But this legal regime of equity was
essentially antagonistic to the interests of commercial classes. Horwitz
contended that the law did not provide clear-cut assurances to businessmen, and
undermined business transaction by scrutinizing them for their substantive
equality.\textsuperscript{24} Because equitable review of contacts depended very much on the
facts at hand, it was by definition inimical to the predictability of future
contracts. As a result, merchants and businessmen endeavored to create legal
forms of agreement free from the often-capricious nature of equitable review.

The resulting legal assault on the tradition of equity took three forms.
First, the creation of expectation damages as an appropriate remedy for breach
rather than restitution or specific performance underscored the shifting
understanding that the objective of contract was to create an expected return,
rather than to simply exchange particular property. Second, the repudiation of
the consideration doctrine was championed by legal scholars who
conceptualized the contract as a sacred bargain between two individuals, and
should be free from judicial interference.\textsuperscript{25} Lastly, the adoption of the doctrine
of caveat emptor, or “buyer beware,” shifted the burden of ascertaining a fair
price away from the community and onto the contracting parties. These legal
strains coalesced to form the modern will theory of contract. By 1844, Horwitz
contended that the will theory of contract had fully superseded the traditional
equitable doctrine to become the dominant legal theory.\textsuperscript{26}

What Horwitz found particularly striking, however, is the degree to
which capitalist market theory had infused nineteenth-century legal opinions,
and the lengths to which judges would go to disguise economic objectives and
legal rules. Relying on the formalistic language of law-as-science, nineteenth-
century judges “discovered” legal rules, which merely happened to benefit the
merchant and business class. For example, in turning the previous equitable

\textsuperscript{22} Ibid., 160
\textsuperscript{23} Ibid., 165; “Chancellor” was a title roughly equivalent to a justice of the modern state court of
appeals.
\textsuperscript{24} Ibid., 167.
\textsuperscript{25} Ibid., 178.
\textsuperscript{26} Ibid., 185.

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doctrine on its head, nineteenth-century judges permitted commercial traditions and norms to be considered in contract disputes as part of the will theory of contract.27 Commercial customs and universal customs of merchants were admissible to ascertain the “mutual agreement of the parties,” but community traditions and notions of fairness were strictly inadmissible.28 This, judges reasoned, was simply the law of contract.

On the basis of this evidence, Horwitz came to the conclusion that the legal profession had consciously aligned itself with the emerging capitalist class. Ironically, this new legal regime instrumentally created formalistic concepts of the law. Hiding behind the shield of legal formalism, nineteenth-century lawyers and judges shifted a disproportionate amount of economic power to capitalistic individuals and corporations who were best positioned to utilize these new rules in the new market economy. This transformation in American law fundamentally altered the distribution of wealth in the nation, and caused the legal profession to pick the winners (capitalists) of a new economic and social order.

Transformation set off a firestorm of debate in both the legal and historical communities. Hurst himself reviewed the book somewhat favorably, but disputed Horwitz’s implication that the legal changes in the nineteenth century reflected a “Machiavellian” conspiracy of the mercantile elite and the legal class to rise to prominence.29 Consensus historians cited a lack of evidence demonstrating that the legal profession’s interests were, in fact, aligned with the mercantile elite. They alleged that common law opinions alone, without economic data of the legal profession or letters between businessmen and their lawyers, were insufficient to establish unity of interests.30 From the left, Marxist legal scholars and historians criticized Transformation for failing to explicitly prove that particular legal changes resulted in the broader redistribution of wealth, and how the ideology of the legal profession affected legal change.31 And from the emerging Chicago School of economic-minded jurists, Horwitz was criticized for his rosy portrayal of pre-will theory contract law.32 Furthermore, they argued that Horwitz failed to account for the importation of several equitable principles that could serve to nullify a contract, such as unconscionability, fraud, mistake and duress.33 Nevertheless, it was clear that Transformation had fundamentally altered the landscape of both legal history and the legal profession. If, as Horwitz argued, the legal profession created law like the will theory of contract out of whole cloth to advance certain interests,
then how else had law been utilized historically, and perhaps more importantly, how should it be utilized?

This conception of the law as instrumental and jurisprudence as interest politics gave birth to the Critical Legal Studies School of legal history in the late 1970s. Heavily influenced (and eventually joined) by Horwitz, these scholars reevaluated a wide array of legal theories from the perspective of interest politics, marginalized groups, and class conflict. Some, like Duncan Kennedy at Harvard Law School, expanded on Horwitz’s thesis. Kennedy agreed that nineteenth-century judges had consciously created the will theory of contract to benefit the capitalist class, and had disguised their efforts in the concept of “liberty.” “Free will in law,” Kennedy argued, “followed from, indeed was simply the practical application of, the freedom of individualist political, moral and economic theory.”34 Kennedy and many Critical Legal Studies scholars, advocated for a return to traditional doctrines of equity. Citing the limited power and application of doctrines such as unconscionability to reign in the will theory of contract, Kennedy urged judges “to throw out, every time the opportunity arises, consumer contracts designed to perpetuate the exploitation of the poorest class of buyers on credit.”35

A focus on the legally sanctioned exploitation of the poor and working class naturally led to critical legal histories of the employment contract. Robert Steinfeld’s study of unfree labor challenged the concept that “contractual labor” in seventeenth-and-eighteenth-century England and America was “free” labor. His argument was based on the fact that breach of employment contract subjected a worker to criminal punishment and thus gave employers the remedy of specific performance.36 Steinfeld borrows from the tradition of Horwitz to account for shifting legal theories of labor contract and argues that, “In the end, it was not the inexorable logic of the market but a complex process of contingent social, cultural, and economic struggle in each place that led to the collective repudiation of unfree contractual labor.”37 Central to Steinfeld’s premise is that ideologies, such as the possessive individualism inherent in the will theory of contract, coupled with republican notions of liberty, resulted in a paradigm shift in the legal conception of the employment contract.

Amy Dru Stanley significantly expanded the analysis of the will theory of contract in From Bondage to Contract. Stanley contends that modern contract theory became so engrained in the American ideology that it became a

35 Ibid., 1777
36 Specific performance grants the plaintiff what he or she actually bargained for in the contract instead of money damages. For example, if a buyer seeks to recover for purchasing defective machinery under a theory of specific performance, the buyer could only be compensated by receiving the actual working piece of machinery he or she had bargained for. Under a theory of monetary damages remedy, the buyer could recover the value of the machinery he or she had bargained for, and potentially lost profits incurred as a result of the receipt of defective machinery.
worldview. "That worldview idealized ownership of self and voluntary exchange between individuals who were formally equal and free... In the age of slave emancipation contract became the dominant metaphor for social relations and the very symbol of freedom." By extending her analysis of contact law to both the employment relationship and the marriage relationship, Stanley exposes the contradictions of the will theory of contract. In drawing from sources such as labor leaders, reformers, and early feminists, Stanley provides a far broader conception of contract theory than the legal historians before her. In fact, Stanley's blend of legal history with intellectual history, labor history, and women's history eschews categorization and provides a brilliant example for legal historians to examine beyond legal opinions and briefs.

Stanley argued that the ideology of the will theory, coupled with the rise of industrial capitalism fostered the decline of slavery, since "freedom" became inexorably linked with "freedom to contract." In the post-emancipation world, Stanley adeptly demonstrated, contract theory normalized wage labor, yet was not extended to the marriage contract. Both scenarios, she contended, were rife with unfreedom, yet liberty of contract was used to justify both. In perhaps the most skillful portions of her book, Stanley compared and contrasted the situations of the beggar and the prostitute. Beggars in the post-bellum period, Stanley demonstrated, were subject to vagrancy laws and compulsory work. Despite the rhetoric that individuals were free to contract, judges and lawmakers contorted contract law to define coercive forced-work laws as preventing beggars from obtaining a benefit (handouts) that they had not properly bargained for. Stanley presents this as an example of individuals exercising their freedom not to engage in wage labor, but whose freedom was denied under the guise of contract law. In contrast, legislatures and judges prohibited prostitution. Though ostensibly a scenario under which a woman sought to freely engage in a contractual exchange, the law of contract did not apply since prostitution was characterized as the sale of one's self, rather than one's labor. Stanley presents this as an example of individuals seeking to exercise contractual freedom, but whose freedom was also denied under the guise of contract law.

The dichotomies and ambiguities in contract law, evidenced by Stanley, bring us to the present day. Though the two concepts, the will theory of contract and capitalism, may have had distinct origins, it appears that they are now inexorably intertwined. While the law, and contract law, in particular, has been instrumental in the development of capitalism, it has also cemented itself as an ideology and a worldview. It is, however, a worldview that continues to be controlled, as Horwitz posited, by the capitalist elite. Any cursory review of economic news today is rife with the concept of liberty of contract and its unequal distribution of power. Executives are entitled to golden parachutes because they were made by contract—the interests of the community be

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39 Ibid., 99.

40 Ibid., 137.

41 Ibid., 263.
damned. The contracts of public employees, on the other hand, are more malleable—the interests of the community warrant their alteration or non-enforcement. If, however, the legal profession is the gatekeeper of social and economic ideas as the long tradition of legal realists from Holmes to Horwitz to Stanley would have us believe, then it is incumbent upon lawyers and judges to more closely analyze the winners and losers of capitalism. If the life of the law has indeed been experience, then perhaps we might consider a return to principles of equity and substantive justice—a move from status to contract and back again.

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