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## MEN OF GREAT AND LITTLE FAITH: GENERATIONS OF CONSTITUTIONAL SCHOLARS\*

ALFRED S. KONEFSKY\*\*

In the fall of 1980, at the annual meeting of the American Society for Legal History, one of those periodic, obligatory academic

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\* This article was originally delivered on May 4, 1981 as the 10th Annual Samuel J. Konefsky Lecture, Brooklyn College, City University of New York.

I would like to acknowledge a number of people whose insights and criticisms helped shape the piece: James B. Atleson, Jerold S. Auerbach, Dianne Avery, Richard Ellis, Alan Freeman, Morton J. Horwitz, Jack Hyman, Al Katz, Elizabeth Mensch, Richard Parker and John Henry Schlegel, most of whom are members of the intellectual community of the Buffalo Law School, and whose demanding standards result, in a peculiar manner, in fashioning an intensely supportive environment. In addition, Melanie Cyganowski provided valuable research assistance.

A final personal note: I am the son of Samuel J. Konefsky, in whose name Brooklyn College established the lecture series in 1971. Except for several visits at other institutions, my father spent thirty-three years teaching constitutional law in the political science department at Brooklyn College. During that time, he wrote four books: *CHIEF JUSTICE STONE AND THE SUPREME COURT* (1945); *THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER* (1949); *THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS* (1956); and *JOHN MARSHALL AND ALEXANDER HAMILTON: ARCHITECTS OF THE AMERICAN CONSTITUTION* (1964). He accomplished all this after having arrived in America in 1926 at the age of eleven, illiterate, and also blind as a result of an accident that occurred while emigrating to this country. A brief eleven years later he graduated from Brooklyn College, and was hired immediately there to begin teaching political science. Needless to say, grappling with his legacy has been my central preoccupation for a time, at the very least since his death in 1970. It helps explain why someone primarily interested in nineteenth century American legal history turned to this topic for the lecture. I hope this piece proves as helpful for others because of its intellectual content and themes, as it was cathartic for me. The original opening of the lecture read as follows:

I have sat here in the past listening to people begin this lecture by saying very nice things about my father. And I quietly wondered what it is that I should say about my father—a very heavy burden, that, I might add, has been plaguing me for a decade. So I decided to make it brief—and only say that he was by far the best teacher I ever had, that I learned more from him than I have from anyone else, and that almost all the formal education I got from him was around the dinner table, mostly by disagreeing with him. He had a very sagacious mind and was, from my perspective, infuriatingly patient. We disagreed about almost everything—sometimes, but not always, thoroughly irrationally on my part. I guess that's the nature of fathers and sons and in a sense, what I have to say tonight is about him and about me.

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stock-takings occurred with the type of title we all recognize as familiar from the late 1960's and 1970's—this one was called, more or less, "Is Constitutional Law/History Dead?"<sup>1</sup> The panel obviously was designed to reassure all of us that the discipline was alive and well and thriving, but the less than vigorous performances of the participants belied this assertion. The presentations were, for the most part, narrow and pedantic. There was little animation and, saddest of all, few ideas. I left with the conclusion that if there had once been a golden era of constitutional law, it was easy to understand why it still shines so brightly when compared to today's dialogue.

My consideration of the past and present state of constitutional scholarship must begin with the people who fostered the ideas that resulted in this glowing image of the early scholarship. I have decided to focus on seven people (my father, the eighth, is included by implication)—all constitutional scholars, all born in the early part of this century or before—who made significant and lasting contributions to constitutional law and constitutional history. By examining their backgrounds and personal histories and the relationship of those characteristics to the ideas they pursued and communicated, and then by comparing that substantial body of work to our current plight, I think we can begin to grasp why today's scholarship seems so unsubstantial.

Let me begin with an exercise in collective biography. I will look at two groups: first, a group of four political scientists, all born in the last quarter of the nineteenth century in the United States, and second, a group of three law professors, two of them born in this century, one in the last century, all three of them Jewish immigrants. The political scientists are Edward Corwin, Charles Grove Haines, Alpheus T. Mason, and Carl Swisher. All were prominent in their time, but their identities are lost to all but the handful of constitutional history fanatics that remain today. The law professors are Felix Frankfurter, Alexander Bickel, and

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1. Harry Scheiber points out that "[w]hen the final program was prepared, . . . the more cautious title 'The Crisis in American Constitutional History and Public Law' was adopted." Scheiber, one of the participants on the panel, contends that "there is little reason to proclaim or even seriously debate the 'death' of that field." His published article is, if my recollection serves me, a somewhat expanded version of his original panel talk. It was by far the best of the lot. See Scheiber, *American Constitutional History and the New Legal History: Complementary Themes in Two Modes*, 68 J. AM. HIST. 337, 337 n.1 (1981).

Gerald Gunther. There are generational as well as other differences between the two groups, but in many ways, the two younger immigrants built their careers on the intellectual legacy left by the earlier generation of both constitutional lawyers and political scientists. There are also intellectual differences, to be sure, within the groups. While not entirely monolithic, they represent two relatively cohesive fronts for examination. An understanding of the shared experiences of the men in these two groups helps formulate a theory about why each thought in the manner they did, when they did.

## I.

What are the backgrounds and common experiences of the political scientists?<sup>2</sup> First, all of them, born between 1878 and 1899, were raised in rural environments: Haines and Mason in Maryland, Corwin in Michigan, and Swisher (from old Virginia stock) in West Virginia. Three of them, Corwin, Haines, and Swisher, were sons of farmers. All but one of them went to small, private colleges (two in Pennsylvania, one in West Virginia); Corwin, went to a state school, the University of Michigan, where, as an undergraduate at the end of the nineteenth century, he listened to the lectures of the strict constitutional traditionalist, Andrew McLaughlin. All emigrated from their small, relatively isolated undergraduate environments to more cosmopolitan, and in three cases, decidedly urban, centers of graduate training—Haines to Columbia in the first decade of the twentieth century; Corwin, during the same decade, to a Ph.D. at the University of Pennsylvania in history, not political science, under the tutelage of the venerable historian, John Bach McMaster (Corwin despite his historian's training taught political science for almost all of his career); Swisher to Brookings in Washington, D.C. in the late 1920's; and Mason to Princeton in the early twenties where he studied under Corwin. Their teaching careers progressed rapidly, and three of them were established relatively

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2. The brief biographical data gathered in the following paragraphs was gleaned from the following sources: Corwin: Mason, *In Memoriam*, 57 *AMER. POL. SCI. REV.* 789 (1963); *Obituary*, *N.Y. Times*, April 30, 1963, at 35, col. 1. Haines: 42 *NAT'L. CYCLOPEDIA OF AMERICAN BIOGRAPHY* 599 (1958); Dykstra & Grant, *Obituary*, 43 *AMER. POL. SCI. REV.* 106 (1949). Mason: *WHO'S WHO IN AMERICA* 2170 (1980). Swisher: *NAT'L CYCLOPEDIA OF AMERICAN BIOGRAPHY*, Vol. J 294 (1964); *Obituary*, *N.Y. Times*, June 16, 1968, at 68, col. 3. As far as I have been able to determine, no standard biographical work has appeared on any of them.

quickly at the universities where they were to spend most of their lives—Corwin, immediately at Princeton, Mason almost immediately at Princeton through the Corwin connection, Swisher, first for five years at Columbia, then at Johns Hopkins, and Haines, who took a little longer to settle eventually at the University of California at Los Angeles.

What can we discern from the patterns? I hope not that the sons of farmers are slated to become constitutional historians—I would not want to wish that on the sons. What is apparent though is first, the general movement from rural to eastern urban environments, where the established centers of learning were at the turn of the century, and second, the predominance of two universities—Columbia and Princeton—whose influence is crucial to understanding why these men chose to write on what they wrote and with whatever discernment they brought to their tasks. Haines was trained at Columbia, and Swisher taught there two decades later at the outset of his academic career; Corwin and Mason were permanent fixtures at Princeton from 1905. Further, two significant intellectual figures in the story of the rise of political science, Frank Goodnow at Columbia and Woodrow Wilson at Princeton, reflected in that relatively new academic discipline the major contours of the social and political movement of Progressivism. Haines and Corwin worked with Goodnow and Wilson and were thus exposed to many of the debates about the direction the nascent discipline ought to take. Mason and Swisher were only a decade or so removed from this legacy.

The story of Progressivism in America is well-known.<sup>3</sup> Though a multi-faceted movement, it was primarily concerned with reforming American government and making it more responsive and more democratic, and appealed primarily for a return to the values of an American past. Progressives were alarmed by the American

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3. Some of the standard interpretative works from different angles of vision include: R. ABRAMS, *CONSERVATISM IN A PROGRESSIVE ERA: MASSACHUSETTS POLITICS, 1900-1912* (1964); S. HABER, *EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1890-1920* (1964); S. HAYS, *RESPONSE TO INDUSTRIALISM, 1885-1914* (1957); S. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (1959); R. HORSTADTER, *THE AGE OF REFORM: FROM BRYAN TO FDR* (1955); G. KOLKO, *THE TRIUMPH OF CONSERVATISM, 1900-1916* (1963); G. KOLKO, *RAILROAD AND REGULATION, 1877-1916* (1965); J. WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900-1913* (1968); R. WIEBE, *BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT* (1962); R. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967).

present with its enormous concentrations of wealth and economic power, labor strife, potential for radicalism, the unsettling effect of the influx of immigrants, and widespread corruption. However, the rise of the discipline of political science and its response to Progressivism, is not a generally well-known tale. Therefore, a more detailed word need be said about that interaction and where our subjects fit into it.

Early work in political science, from 1880 to about 1900, was dominated by John W. Burgess, professor of political science at Columbia.<sup>4</sup> As a perceptive observer has recently noted, “[f]or over thirty years, Burgess’ school, his journal (the *Political Science Quarterly*), his students, and *their* students dominated the study of American government and politics.”<sup>5</sup> Yet it is difficult for the late twentieth century mind to grasp the attractiveness of Burgess’ theories and work. He believed in an essentially racial theory of civilization—that the Teutonic/Aryan race was especially blessed with the capacity of civil government, that the state was, through “the forms and structures” of “tangible government,” the embodiment of some sort of mystical and ideal “spirit of a people,” by which he seemed to mean certain culturally determined values, and that one could trace the evolution of these institutions in the constitutional history and political theory of Western thought. In short, he represented in America the German historical school of scholarship. His counterpart in the field of history was Herbert Baxter Adams, who practiced his art at Johns Hopkins.<sup>6</sup> And it was Adams under whom Woodrow Wilson learned history and against whom he rebelled. At Columbia, Frank Goodnow led the charge against Burgess. At stake was the question of what would be the scope of the subject area for the new discipline, and within

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4. The account in the following paragraphs relies heavily on Frisch, *The Hope of Democracy: Urban Theorists, Urban Reform, and American Political Culture in the Progressive Period* (paper delivered at the Annual Meeting of the Organization of American Historians, New Orleans, April 13, 1979, forthcoming in *POL. SCI. Q.*). For the rise of the discipline, see generally A. SOMIT & J. TANENHAUS, *THE DEVELOPMENT OF AMERICAN POLITICAL SCIENCE* (1967); for what happened at Columbia, see R. HOXIE, *A HISTORY OF THE FACULTY OF POLITICAL SCIENCE: COLUMBIA UNIVERSITY* (1955).

5. Frisch, *supra* note 4, at 4 (emphasis in original).

6. *Id.* at 3-6. See also J. HERBST, *THE GERMAN HISTORICAL SCHOOL IN AMERICAN SCHOLARSHIP: A STUDY IN THE TRANSFER OF CULTURE* (1965); Cunningham, *The German Historical World of Herbert Baxter Adams: 1874-1876*, 68 *J. AM. HIST.* 261 (1981); Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 *L. & Soc’y REV.* 9, 14-15 (1975).

this, what would be the content and contours of the American version of democracy.

The first battles were fought over, of all things, the role in American political life of the city. Why the city? The cities, rife with corruption, were teeming with the immigrants that made Burgess squirm; they were the seedbed of foreign ideas (for which read, socialism), and the natural Progressive setting to determine if the uniquely American experiment could work. The city was where American democracy would live or die—the city was the last great American hope. And Wilson and Goodnow did not think that the hope was in any way related to John Burgess' view of the world. The "spirit of the state" was not what was important—what was important were local administrative units, microcosms of self-government, where it could be shown that government could and would function. The cities were not to be conceived of as organic, idealized, autonomous entities which were designed merely to deliver services and control order. Cities were interconnected with other aspects of society, not isolated. Wilson and Goodnow thought that the social and economic roots of society's problems should be recognized and attacked. Governmental powers should be used to address social problems, and to infuse the local political process with the necessary tools to foster real structural change.

Goodnow's work on city government and Wilson's work on administration show that their vision of the role of political science was suffused with Progressive ideas.<sup>7</sup> Both were pragmatic, practical, and activist—and also on the cutting edge of empiricism. They sought to develop a political theory which would provide a modern, democratic example—a symbol. Urban reform would, in a sense, legitimate the new political science, and confirm the importance of the city to the new political vision. The city would become the very representative administrative organ of a responsive, effective, pluralist democracy.

Though the tangible focus of their discipline was the city, their obsession was clearly democracy. Why? In 1905, Jane Adams had spelled out the alternative threat: "The rapid growth of the socialist party in all crowded cities." She had been equally blunt about why the threat was present; it was, she wrote, "largely due to the recognition of those primary human needs which the

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7. For Goodnow, see Frisch, *supra* note 4, at 11-16; for Wilson, *id.* at 6-7, 11-12.

well established governments so stupidly ignore." And she had eloquently concluded: "All that devotion, all of that speculative philosophy . . . concerning the real issues of life, could, of course, easily be turned into a passion for self-government and the development of a natural life, if we were truly democratic from the modern evolutionary standpoint."<sup>8</sup>

This was the environment in which our first political scientists—Corwin, Haines, Mason, and Swisher—were trained, and they carried many of these same concerns from the urban reform movements to their chosen subdisciplines of constitutional law and constitutional history. And just like their teachers, their own writing reflects the debate underway at the time of their arrival in the discipline, though it focuses instead on the role of the Supreme Court in American life. This focus was deliberate; in the late nineteenth and early twentieth centuries the Supreme Court was actively reviewing much Progressive legislation and, more often than not, declaring it unconstitutional.<sup>9</sup> To Progressives, nonelective judges were, in mechanical and formalistic opinions, overturning social legislation promulgated by popularly-elected legal assemblies which sought to redress social grievances. These constitutional scholars found that practice intolerable; for them "judicial review" became the battlecry under which to rally, in much the same way the urban reformers, their teachers, had taken up the cause of the city. Judicial review lacked legitimacy because it was anti-democratic and interfered with the expressed will of the people. The Court was unresponsive to the needs and desires of the people; it was, therefore, compromising the great democratic experiment. Thus Corwin, Haines, Mason, and Swisher at various times adopted a kind of reformist-realist critique of formal legal and institutional forces that they thought stood in the way of progress.<sup>10</sup>

A detailed examination of the work of the political scientists is beyond the scope of this article. A few general impressions will suffice for now. In 1914, Haines published his influential work on the

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8. Quoted in Frisch, *supra* note 4, at 18.

9. There are numerous accounts of this phenomenon, some of the older chestnuts still retain the power of some of their insights. See, e.g., R. McCLOSKEY, *THE AMERICAN SUPREME COURT*, chs. 5 and 6 (1960); A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (1960).

10. The thrust of this critique is captured quite well in Belz, *The Realist Critique of Constitutionalism in The Era of Reform*, 15 *AM. J. LEGAL HIST.* 288 (1971).



*American Doctrine of Judicial Supremacy* in which he complained of the growth of judicial power and its alignment with conservative political and economic causes. Haines linked the lack of political democracy with the Supreme Court's protection of powerful economic interests. Yet his solution, in his revised edition of 1932, was to suggest somewhat paradoxically that courts engage in "social engineering" to remedy social problems—absolutely in the face of and in conflict with his seeming concern with the antidemocratic bias of active courts.<sup>11</sup>

Haines, for most of his career, was also faithful to his original training under Goodnow at Columbia, merging his academic life with a Progressive's commitment to urban reform and efficient government. Between 1912 and 1914, he was executive secretary of the League of Pacific Northwest Municipalities and as late as 1939 served as a Commissioner of the Department of Water and Power in Los Angeles. His commitment to good government was founded in a faith in "majority rule, direct legislation, and public ownership."<sup>12</sup> He believed that law reflected social and economic forces—he was influenced heavily in this regard by Charles Beard from that very same Columbia political science department.<sup>13</sup> And Beard, one year before he published his influential and controversial *Economic Interpretation of the Constitution* in 1913, wrote a book entitled *American City Government*. Beard, of whom Corwin was very critical,<sup>14</sup> pointed the way in an even further departure from Burgess and the traditional model. Enough so that Andrew McLaughlin, Corwin's old mentor at Michigan, felt constrained in 1914 in his presidential address to the American Historical Association, to complain that "many of us are even now looking out upon the field of constitutional history as a branch and only a branch of economic history."<sup>15</sup> Haines was not as alarmed.

Corwin, though quite critical of what he conceived to be reactionary Supreme Court decisions, was the most troubled of the group about what he perceived to be the erosion of "objective, ra-

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11. See Belz's discussion of this problem, *id.* at 304-05.

12. Dykstra & Grant, *Obituary*, *supra* note 2, at 107.

13. On Beard, and particularly his role in the Columbia political science department, see R. HOFSTADTER, *THE PROGRESSIVE HISTORIANS* 179-181 (Vintage ed. 1970).

14. Corwin, *Book Review*, 7 *AM. POL. SCI. REV.* 330 (1913). (A review of C. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1912).)

15. Quoted in Belz, *supra* note 10, at 298.

tional principles" in constitutional adjudication. In his view, simple politically or economically expedient formulas could not be substituted for fundamental principles. He was therefore not totally opposed to judicial review.<sup>16</sup>

Swisher saw the problem in his characteristically succinct way. "The current and fundamental question about the process," he wrote relatively late in his career, "is whether restraint in terms of restrictions . . . is vital to the democratic process, or whether it goes so far as to prevent achievement by government of the ends which society is seeking more and more to achieve through political organization."<sup>17</sup>

It would be, however, missing the point to characterize the focus of these men's scholarship as the legitimacy of judicial review. The major intellectual problem for all of these constitutional scholars, the one which obsessed them, was the scope and viability of American democracy. How to insure that the people's will was expressed and regarded, how to guarantee that power was not usurped, especially in the face of what they conceived to be static constitutional interpretation based on outdated principles—that was the question. Yet, as they strove to answer this question as their careers unfolded, they were ineluctably caught in certain tensions, dilemmas, and contradictions. They tried to remain consistent but found it increasingly difficult to do so as they remembered the lessons of the past. An example is Haines, at the advent of the New Deal, calling for judges to be "social engineers" only twenty years after urging, during the Progressive period, a severely limited use of judicial review. But while they struggled for that consistency, they had an absolutely abiding, burning, inspiring faith in one central ideal: democracy. That is what makes them appear, on an emotional if not always on an intellectual level, so attractive. They had a faith which many modern constitutional scholars seem to lack.

Sometimes, however, they appeared incoherent—Haines and Corwin in particular. And they were so, I suggest, because for all of

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16. For analysis of Corwin's work, see Newton, *Edward S. Corwin and American Constitutional Law*, 14 J. PUB. L. 198 (1965); Mason & Garvey, *Introduction to E. CORWIN, AMERICAN CONSTITUTIONAL HISTORY ESSAYS ix-xxiii* (1964); Loss, *Introduction to 1 CORWIN ON THE CONSTITUTION 17-43* (R. Loss ed. 1981).

17. C. SWISHER, *THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES 24* (1946).

their faith, they basically misconceived the central problem in American life. They understood that what drove their interest in linking democratic theory to the American judiciary was their concern for the economic and social welfare of the polity. And they thought they could submerge the problems of American economic and social life by returning to the fundamental strength of American political life, its democratic character. But focusing as they did on democracy could postpone only for so long the confrontation between competing visions of economic welfare. What they missed, what brought the note of incoherence to their scholarship, was that the problem was not democracy; the problem was capitalism.

The scholarship of Corwin, Haines, Mason, and Swisher seems so vital today because its authors believed in something; yet paradoxically in the act of believing they were implicitly beginning the process of stripping away the garb of democracy to reveal the contradictions of capitalism. By revealing the inequalities within the social order and attempting to remedy them, they paved the way for an examination of the articulated and unarticulated premises upon which the order was based. The task of reassurance they set out to accomplish by redirecting democratic theory was in the long run undermined by the process of delineating the painful truths they were forced to confront in order to accomplish their work. The coherence of democratic theory suffered in the rush to examine, embrace, and remedy social dislocation. As a result, what eventually emerged was a full-scale debate centering on the contours of capitalism and a self-conscious investigation of social conditions, within which democracy, the legitimating political theory, was submerged.

## II.

The careers of the immigrants replicated in the field of law much of what the lives of the progressive political scientists revealed. Frankfurter, Bickel, and Gunther represent three generations,<sup>18</sup> but in a sense, they are closer to each other than the generations of political scientists are because Gunther and Bickel were very closely tied to Frankfurter's image and example.

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18. Frankfurter is of Corwin's and Haines' generation; Gunther and Bickel are a third generation, if you count Mason and Swisher as the intermediate group.

Frankfurter's life is now almost legendary:<sup>19</sup> the emigration from Vienna at the age of twelve, the ancestry derived from rabbis and scholars (a familiar pattern in Jewish intellectual and academic circles—in the context of this discussion it also includes Bickel and my father), the enormous academic success at City College, followed by the conquest (as a student) of the Harvard Law School, public service under Henry L. Stimson, the return to Harvard as a law professor, involvement in politics and public affairs (Sacco and Vanzetti, of course, and writing for the *New Republic*), his maintenance of a pipeline between Cambridge and Washington (comprised of his students who became Supreme Court law clerks for Holmes and Brandeis), his relationship with FDR, work, and vicarious work through his former students, in the New Deal, and finally his appointment as associate justice of the United States Supreme Court. Felix Frankfurter was the assimilationist's dream come true. Accepted at almost all levels of American life to which he aspired, he gained access to power and influence essentially unchallenged, and was appropriately rewarded for his accomplishments. His life was the reflection of America as a land of opportunity. And Frankfurter almost never looked back, except to bask in the reflected glory of having made it in America.

What lessons did he learn from his own success? Basically, that America's promise was in her democratic impulses, which created opportunity for anyone to strive. His work started with that premise and his scholarly writing and his career as a judge showed that he never departed from that idea. And like the political scientists, he also never questioned that belief. There was a difference though. Unlike his rural-bred contemporaries, Frankfurter constantly worked to remind everyone that he was both an American and that he was socially desirable. He was consumed with his need to know, or at least be acquainted with, the "right" people. In this way, he is reminiscent of Brandeis' early career, another Jew in an alien society, late nineteenth-century Boston, and Brandeis' enormously complex relationship with Brahmin culture. Brandeis, en-

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19. The basic biographical outline, with some interesting interpretive insights, may be gleaned from H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981); Lash, *A Brahmin of the Law: A Biographical Essay*, in *FROM THE DIARIES OF FELIX FRANKFURTER* 3-98 (1975). These may be supplemented with care by the printed transcripts of Frankfurter's own musings on his life (recorded by the Columbia Oral History Project) and available in H. PHILIPS, *FELIX FRANKFURTER REMINISCES* (1960).

dowed with a formidable intangible called "character," made his peace with it.<sup>20</sup> While Frankfurter felt that he owed full allegiance to a political and social system that allowed him to rise to the top, he also apparently thought he had a lot to overcome. Suffice it to say that he was never as happy as he was the year he spent at Oxford in the early 1930's.<sup>21</sup>

Frankfurter's work reflects his absolute faith in the democratic process.<sup>22</sup> For him, as for Haines, Corwin, Mason, and Swisher, the key question was how to accommodate the implications of judicial supremacy, that is, judicial review, with democratic theory. His answer seemed to be that courts should retreat. Judicial self-restraint was the appropriate judicial philosophy because it allowed legislatures to become "laboratories" for the democratic experiments reflecting the will of the people. Judges should not intervene and impose their views on this process. Instead, judges were to defer to the powers allocated elsewhere in a democratic society and avoid deciding constitutional questions whenever possible. The avoidance techniques, picked up from Brandeis and later more fully developed by Bickel,<sup>23</sup> would guarantee one thing—that the essence of democracy was and should remain in its process. So when he became a Supreme Court justice, mindful of the way the late nineteenth- and early twentieth-century Court had interfered with Progressive legislation, and the way the early New Deal court had upset early New Deal legislation, he preached the gospel (perhaps, in a way an inapt metaphor, but not entirely) of deference and inactivity. The contrast is very striking; at the pinnacle of his career, he became powerless and confined in the role he assumed as the ultimate reward for his competence. The irony—Frankfurter's embrace of judicial deference at this stage of his career—reflected his

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20. See A. GAL, *BRANDEIS OF BOSTON* (1980).

21. "Life that year was rich, abundant and stimulating. It was very happy for both of us at Oxford. I should sum it all up by saying that it was the fullest year my wife and I spent—the amplest and most civilized." *Quoted in Phillips, supra* note 19, at 277.

22. The literature on Frankfurter as judge is quite enormous. See, e.g., C. JACOBS, *JUSTICE FRANKFURTER AND CIVIL LIBERTIES* (1961); W. MENDELSON, *JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT* (1961); FELIX FRANKFURTER, *THE JUDGE* (W. Mendelson ed. 1964); FELIX FRANKFURTER ON THE SUPREME COURT (P. Kurland ed. 1970); P. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* (1971); H. THOMAS, *FELIX FRANKFURTER, SCHOLAR ON THE BENCH* (1960); G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 317-68 (1978).

23. For Brandeis, see *Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); for Bickel's approval of Brandeis' techniques, see A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 2* (1957).

deep ambivalence at his having arrived and his fear that it would be somehow swept away.<sup>24</sup> Now he could reward democracy and leave it unfettered. Process guaranteed order; theorizing about social justice was delegated elsewhere in a democratic society, not in courts.

Of Frankfurter, it was written that

it is relevant . . . to remark on the fact that Felix Frankfurter—a member to be sure of a cultivated family with strong intellectual traditions—started life in the United States as an immigrant Jewish boy . . . . Such a career is a tribute to the personal gifts and power of the man, and in a secondary way also to the society which permitted itself to benefit from those gifts. . . .<sup>25</sup>

The author of that passage on Frankfurter emphasizing the new homeland's acceptance of the immigrant—the summing up of the assimilationist's success—is, significantly, Alexander Bickel. The excerpt, though about Frankfurter, is just as descriptive I think, of Bickel, for Bickel clearly aspired to wear Frankfurter's mantle.

Bickel arrived in this country in 1939 at age fourteen, having emigrated with his family from Romania.<sup>26</sup> His career replicated Frankfurter's:<sup>27</sup> City College, then the Harvard Law School, followed by a Supreme Court clerkship with Frankfurter, and then an academic career—at Yale instead of Harvard. (The parallels even extend to Bickel's contributions to the *New Republic*.)

Bickel grew up in New York in what someone has called “a

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24. For a suggestion as to how the assimilationist's impulse may have affected his perceptions of constitutional issues as a judge, see Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 S. CT. REV. 257.

25. Bickel, *Justice Frankfurter at Seventy-five*, NEW REPUBLIC, Nov. 18, 1957, at 7. In the same essay, Bickel wrote the following describing Henry L. Stimson, one of Frankfurter's mentors: “He was nearly to perfection the public servant who knows how to strike the balance between the duty of deference to the popular will, and the responsibility of guiding our people along paths of reason and decency, conforming with the traditions and aspirations of our society.” *Id.* at 8.

The suggestion seems to be that Frankfurter used Stimson as a role model—this is even more striking, perceptive, and revealing of both immigrants—Frankfurter and Bickel—in describing and explaining the nature of some of their assimilationist impulses.

26. The barebones of the biographical data has been gathered from a variety of sources: Harrison, *Alexander M. Bickel: 1924-1974*, NEW REPUBLIC, Nov. 23, 1974, at 7; Bork, *A Remembrance of Alex Bickel*, NEW REPUBLIC, Oct. 18, 1975, at 21; *Obituary*, N.Y. Times, Nov. 8, 1974, at 42, col. 1.

27. Needless to say, the parallels have not gone unnoticed. See, e.g., Purcell, *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C. L.-C. R. L. REV. 521, 528 (1976). In addition to this incidental observation, the Purcell essay contains much of interest on Bickel's work.

Jewish intellectual salon."<sup>28</sup> His father, Schlomo Bickel, was the figure around whom the circle revolved. He was a Yiddish essayist and literary critic, but most interestingly, Schlomo Bickel had been a successful lawyer in Bucharest before coming to America. In New York he abandoned the practice of law (it was not always easy for immigrant lawyers to reestablish their careers here, though it was possible), and devoted himself to a life of Jewish culture. In a very revealing essay, entitled "Three Generations," Schlomo described his heritage and family. His father, Alexander's grandfather, went from Europe not to America, but to Israel, apparently finding the image of America unsatisfactory, and his brother, Alexander's uncle, chose to remain in Europe, as a doctor and also as a philosopher, justifying assimilationist impulses, until emigrating late in life to Canada. The philosopher-uncle is quoted as saying that

I can never drain away the stream of Jewishness that my inherited way of life and my upbringing and my education have left in me. But I must confess to you that if I have a son I shall bring him up free from all religion, and do all I can to give him the chance of assimilating to the surrounding people, particularly to the dominant people of the state.<sup>29</sup>

Bickel's father did not share his view—hence his transformation after arriving in New York from lawyer to Yiddish literary figure in an essentially inhospitable environment, keeping the cultural candle burning in an enclave. Alex Bickel himself seemed to choose his uncle's and Frankfurter's path.

As a student at Harvard, Bickel came under two significant influences.<sup>30</sup> One, the Frankfurter strain, was quite explicit in the curriculum and in the inbred faculty narcissistically reflecting its own image. The other strain was less explicitly represented on the faculty and in the classroom, but it nevertheless steadily shaped debate in legal academic circles, even though it was often criticized at Harvard. This was the fallout from the Columbia and Yale-based legal realist movement of the late 1920's and 1930's. The legal realists maintained that law was at its base infused with values, often the subjective social or economic values of judges, or more widespread, unexpressed endemic ideological values permeating society. Law was not value free—it was contingent, and time bound,

28. Bork, *supra* note 26, at 21.

29. Bickel, *Three Generations—A Memoir*, 34 COMMENTARY 324, 331 (1962). I am grateful to Jerold Auerbach for drawing my attention to this essay.

30. See Purcell, *supra* note 27, at 522-27.

and situational.<sup>31</sup>

Bickel understood and accepted, at some level, the basic realist position, but did not concede that law, therefore, was likely to be arbitrary or capricious. For him, the question was what kind of coherent intellectual formulation could be devised that was true to the Frankfurter strain and that also took account of the realists' insights. Bickel's immigrant experience told him, particularly in light of the Europe he had left behind, that law was too important in bracing the social order to be abandoned to expediency. And so he sought to create a universe in which the rule of law, democracy, order, and social needs could co-exist. In the judicial realm, this meant a process-oriented judiciary that was loathe to reach difficult and complex decisions, that respected institutional competence, that relied on reason (known as reasoned elaboration), and that only made major and critical judgments when it could be sure, and only when it was sure, that the judgment was in line with the fundamentally shared views and values of society—the last point, of course, being the one which Bickel isolated as one of Frankfurter's strengths.

Bickel's judicial philosophy stemmed from a political insight about America, and not a fully worked out political theory or philosophy—lawyers rarely have political theories or philosophies. But Bickel did have an insight about the operative implications of democracy that triggered his belief in the passive virtues of judging. He believed that legislatures might occasionally, in the heat of the moment, respond to what he called "expediency." As legislative bodies, they are "ill equipped" to deal with "a coherent body of principled rules." Courts, he contended, are better able to deal with principles than legislatures are. In the fullness of time, courts drawing on reason and society's "enduring values" are more likely capably to judge society's needs, especially if legislatures have caved in to expediency. Bickel, therefore, since he pitted expediency against principle, was for a limited form of judicial review, even though it had "counter-majoritarian" or "antidemocratic" implications. But because it did, it must be severely restricted. The

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31. On the realists, see Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFFALO L. REV.* 459 (1979); White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 *VA. L. REV.* 999 (1972); Purcell, *American Jurisprudence between the Wars*, 75 *AM. HIST. REV.* 424 (1969).



way to arrest its antidemocratic tendencies was to assure that the judging be apolitical, neutral, objective, and reasoned—in other words, as process-oriented as possible. Courts were only justified in acting on principles based on shared or fundamental values on which society had agreed.<sup>32</sup>

Bickel, then, was pulled at least two ways at once: towards process and towards acting on principle. Why judges should or should not act, or when, was not always clearly delineated. Being capable of identifying American shared values upon which to act was important to the immigrant's mission—a sign of true acceptance and adaptation. Yet eventually, he settled on process as the ultimate, objective principle: indeed he worshiped as one of the cult of craft and process. For courts the focus on procedure created the appearance of neutrality and disinterestedness, allowing society's forces to play out their battles elsewhere. One can almost discern the spectre of Naziism and Stalinism behind the belief in order and process. Still the tension was the same for Bickel as it had been for the political scientists and for Frankfurter, between the necessity of maintaining social consent and majority rule—democracy—and the potentially antidemocratic results of judicial review.

For the native-born Progressive political scientist, the city was the hope and symbol—and the constitutional historians among them decreed that the democratic exercise should not be hampered by courts. For the immigrants, America itself was the embodiment of the hope—likewise, the last great hope. Their faith was placed in a culture that at least theoretically could assimilate and accept them as no culture had before.<sup>33</sup>

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32. For a statement of Bickel's views, see A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-28 (1962).

33. In order to offer additional evidence of at least the demographic point, Gerald Gunther and my father, I suppose, should fill out the picture, though both fall in a slightly different place than the Frankfurter-Bickel model. Gunther, born in Germany, emigrated in 1938 when 11 years old, attended Brooklyn College instead of City, then the Harvard Law School, clerked for Learned Hand, and then was selected to clerk for Frankfurter. At the last minute he was donated as a clerk by a generous Frankfurter to the new, incoming Chief Justice, Earl Warren—I'm sure a disappointment to Gunther. I suspect that the fact he became a gift from Frankfurter to Warren ought to have been an enormous compliment to Gunther, since Frankfurter, ever vigilant and always manipulative, almost certainly executed the transaction from ulterior motives. He no doubt wanted to insure that Warren would remain completely orthodox, and repulse all suggestions of activist heresy and thought as the thoroughly trained Gunther would stand as the guardian of the proper values. So much for the best laid plans, to which Bickel's critical attacks on the Warren Court

The central formative experiences of the Jewish immigrant constitutional lawyers then are clear—the intellectually stimulating and inspiring environments of City College and Brooklyn College, the Harvard Law School, (these institutions were to them what Columbia and Princeton were to the political scientists), the model of Frankfurter, the quest for assimilation, the paradoxes of legal realism, and ultimately the promise, in a troubled world, of American democracy, their lives a constant reminder of its hope and sanctuary. It is not too difficult to understand the passion which drove them to write of this last hope—the promise of democracy—and make of it an article of faith. It is a faith totally gone from almost all of today's relatively limited examples of constitutional scholarship.

### III.

Why the present spate of insignificant constitutional scholarship is upon us is traceable, I think, to two general causes: one, in the political science camp, the other, in the lawyers' camp—both related to each other. The political scientists' interest in constitutional law has waned, in part ironically, because of the success and perceptiveness of the original contributions of scholars like Haines and Corwin. As one commentator has noted,

[s]keptical toward constitutionalism [these scholars] ultimately denied the significance of constitutional principles, theories, and rules as causative forces in history. They concluded . . . that constitutional issues were not real issues. . . . For if constitutional issues were but a superficial manifestation of economic or social reality, it was understandable that scholars should study reality at first hand, rather than once removed in its legalistic reflections.<sup>34</sup>

And so the social sciences slowly turned to ways to measure a variety of phenomena that would tell us about how things worked,

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will attest. *See generally* A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970). (I do not mean to suggest either that Gunther was seduced by Warren or that Warren was uninfluenced by his clerk.) In any event, Gunther was exposed to many of the same influences as Bickel, with one addition—a number of years of political science at Brooklyn College under Samuel J. Konefsky, himself a product of Brooklyn College, and also the political science department at Columbia University, but alas, an immigrant political scientist, and not a lawyer. At Brooklyn College, Gunther was my father's research assistant where he contributed some important work to a book, edited by my father, on, need I have to say it, Felix Frankfurter. *THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER* (S. Konefsky ed. 1949).

34. Belz, *supra* note 10, at 305.

what caused or better yet, did not cause social phenomenon—the efflorescence of empiricism. On the political science/constitutional law side, these neutral appearing searches turned increasingly behavioristic, and measured all sorts of things. The principle of constitutionalism in a democracy, so central to the scholars of the early part of the century, was easily lost to political realism.

On the legal side, a similar development occurred. For a time the immigrants picked up the banner of democracy bequeathed to them by the political scientists. But the root of the demise of constitutional scholarship in law likewise can be traced to a confrontation of sorts with realism—legal realism. The realism of legal realism dictated some recognition of the subjectivity of values, and of the impact of social forces. Objective principles were thus no longer readily identifiable. “Because the various sectoral interests asserted themselves in the legislative process,” it has been noted, “it yielded acceptable results, not because the results were consistent with principles of justice, but because they were produced by an acceptable process.”<sup>35</sup> If society could not agree on a substantive meaning of justice, at least scholars could focus on its procedural setting. And so process was substituted as an acceptable form of principle, with the result that democratic constitutional scholarship ultimately chose to ignore the social and economic questions which were at the root of the Progressives’ theorizing about democracy and thus central also to the Frankfurter strain of legal constitutional theory. Justice was not to be mentioned in the same sentence with law. Pluralistic democracy turned away from attempting to redress substantial inequalities created in a capitalist economy. In fact, pluralism tended to reinforce substantive inequality for the climate of process encouraged overlooking the social and economic roots of inequality.

In recent years the debate has slowly turned still farther away from democracy. As liberal legalism retreated into process in order to avoid its confrontation with social and economic realities, and eschewed activism because it could not identify shared moral principles, its scholarship of legitimation became increasingly contradictory and incoherent. Modern constitutional scholarship in the

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35. Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 *TEX. L. REV.* 1307, 1314 (1979).

law schools illustrates the incoherence.<sup>36</sup> It is unilluminating, formal, and increasingly divorced from its social base. Unlike the scholarship of Frankfurter and Bickel, it has little passion, little faith. For the most part, modern scholars are still elaborating, as normal scientists do, the old, conventional paradigm, without much sense of or reference to what so animated the original group of contributors. The direction, wrong or not, of the older group is far more understandable when placed in its historical context.

If there is hope, I believe it lies in a still younger group now working in the field, some of whom seem to believe that the heart of the problem is capitalism.<sup>37</sup> Democratic capitalism is only one version of democracy. The economic soil in which democracy is nurtured gives it its substantive meaning of justice. To that extent, the pluralist constitutional theory upon which the immigrant law professors based their theory of law has been found lacking by some. Once again, as in the case of political science, it is the roots of economic and social reality which have attracted the attention, but with a difference. These younger legal scholars, unlike the empirical political scientists, seem ready to address the problem of trying to establish a substantive basis of justice using concepts and standards that do not accept traditional economic or social constructs. Sometimes they are simply critical of the older tradition (a good place to start), and sometimes they are painfully utopian. They are adept at stripping away the contradictions of process-oriented jurisprudence and slowly they are beginning to build an alternative political vision of constitutional law—one that does not shirk from puzzling out a meaningful conception of justice, even if this conception rejects earlier work and the conditions of society upon which it was based. This is not a shell game to them. What I like most about them is their passion and their faith.

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36. For an important article on this problem, see Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

37. In this group, I would place Paul Brest, Alan Freeman, Richard Parker, and Mark Tushnet though I am sure that not all of them would necessarily wholeheartedly share or endorse the diagnosis of the problem offered at this point in the text. See Brest, *supra* note 36; Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Parker, *The Past of Constitutional Theory—and its Future*, 42 OHIO ST. L.J. 223 (1981); Tushnet, *supra* note 35; Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980); Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981).

If my passion has a source, I think it may be reflected in the spirit captured by a poem with which I would like to close—a poem whose passion belies the fact that it was written by a law professor, Saul Touster, in the 1960's. It is entitled "The Statue of Liberty."

Stunned  
 by the immaculate skyline  
 of your throat,  
 my grandfather paused,  
 gathered what strength he had  
 and climbed steerage and thighs  
 into the tourist air.  
 Here at your sea-washed hem  
 he fell  
 under the shadow of your earlobes  
 dazzled  
 by an outrageous chandelier.  
 Gulled of his bare belongings  
 he bathed in the sink  
 after the soup greens,  
 watched the paint peel  
 and smelled in Victorian gas cocks  
 something dangerous.  
 And yet for you, America,  
 the elbows of his black serge shone  
 and the seaweed in his beard  
 his love  
 as if he had discovered you.

*America!*  
*Thief!*  
 Give me back  
 my grandfather's eyes!<sup>38</sup>

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38. S. TOUSTER, *STILL LIVES AND OTHER LIVES*, 25-26 (1966). I am very grateful to James Atleson for bringing this poem to my attention. After reading a draft of this lecture, he suggested that the poem might be a fitting way to conclude the piece. Reprinted by permission of the University of Missouri Press. Copyright 1966 by the Curators of the University of Missouri.