UN-COVERING THE TRADITION OF JEWISH "DISSIMILATION": FRANKFURTER, BICKEL, AND COVER ON JUDICIAL REVIEW

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I. INTRODUCTION

Two seemingly unrelated issues pervade contemporary legal and political discourse: (1) the ongoing controversy over "judicial activism,"[1] and (2) the debate over cultural identity and difference, now

* Professor, University of Southern California Law Center. I owe special thanks to Marc Galanter for encouraging me to write this essay for the Conference on Jews and the Law at the University of Wisconsin Law School in 1991, and to David Hollinger for serving as a commentator there. I subsequently benefitted from correspondence with Rabbi James Ponet (Yale Hillel) and from conversations with Dennis Curtis, Leonard Long, Judith Resnik, Elyn Saks, Larry Simon, Clyde Spillenger, Ann Standley, Robert Varlotta, and Catharine Wells. As always, in matters historical and Jewish, David Myers supplied me with particularly illuminating guidance. Karen Edwards provided very helpful research assistance.

1. Classic attacks on "judicial activism," apart from those by Alexander Bickel and Herbert Wechsler, discussed *infra* at text accompanying notes 119 to 135, include Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908).

carried out under the rubric of "multiculturalism."[2] Neither of these issues is new to American legal discourse. The need to limit judicial power has been a concern ever since the Supreme Court first articulated its power to review the constitutionality of governmental action,[3] and multiculturalism has been an issue in various guises for about as long.[4] Over time, the salient context of the debate over judicial activism has shifted from the regulation of the market (and its constituent elements of private property and contract)[5] to the regulation of reproduction (and its constituent elements of family, marital, women's and fetal privacy rights).[6] Throughout different time periods, opponents

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2. For examples of contemporary legal scholars discussing multiculturalism, see, e.g., T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991); Patricia J. Williams, *Blockbusting the Canon*, Ms., Sept.-Oct. 1991, at 59; *see also* Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1512 (1991). The slew of recent books and articles attacking multiculturalism includes DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1992) and RICHARD BERNSTEIN, DICTATORSHIP OF VIRTUE: MULTICULTURALISM AND THE BATTLE FOR AMERICA'S FUTURE (1994). More measured assessments of the contemporary movement for multicultural education are included in DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES (Paul Berman ed., 1992); GERALD GRAFF, BEYOND THE CULTURE WARS: HOW TEACHING THE CONFLICTS CAN REVITALIZE AMERICAN EDUCATION (1992); Peter Erickson, *Rather than Reject a Common Culture, Multiculturalism Advocates a More Complicated Route by Which to Achieve It*, CHRON. HIGHER EDUC., June 26, 1991, at B1. An example of a legal case which raised issues of multiculturalism is Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991) (requiring state universities to act toward increasing black faculty and black administrators in accordance with consent decree).

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

4. *See, e.g.*, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 589-90 (1823) (explaining the denial to American Indians of the right to own property as being based, in part, on their failure to assimilate to Anglo-American culture). According to Chief Justice Marshall, justly famous as the architect of judicial review in *Marbury*, the "objects of the conquest" usually "are incorporated with the victorious nation .... The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people." *Id.* at 589. "But," Marshall continued:

> the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

Id. at 590. With this, the basic ideal of assimilation was laid down, along with the notion that cultural difference constitutes a rationale for legal disfranchisement.

5. In cases such as Lochner v. New York, 198 U.S. 45 (1905), and Adkins v. Children's Hospital, 208 U.S. 161 (1908), the Supreme Court invalidated statutes regulating private contractual relations. This line of cases was repudiated beginning in the mid-1930s, in cases such as West Coast Hotel v. Parris, 300 U.S. 379 (1937), which accepted the constitutionality of market regulation.

6. *See, e.g.*, MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW (1988); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990). For criticism of the "activism" of Roe v. Wade, 410 U.S. 113 (1973), expressed in judicial opinion, see, e.g., Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 785-97

of judicial activism have advanced the claim that determinations about the legitimacy of regulations rest on political value-judgments, and are not appropriately resolved through the judicial office.

Sparring over the judicial role, and its propensity for "activism" or "restraint," is not usually linked to the contemporary debate over multiculturalism. That debate is largely about schools, and about the power of education and the politics of culture that underlies it. It is a debate about cultural biases that distort educational canons and curricula, and about the impact such biases have on particular minority communities. More broadly, it is a debate about group identity and the legitimacy of cultural assimilation. Or, from the opposing point of view, it is a debate about standards of "political correctness" that threaten to undermine the universalist tradition of Western humanism. It is not a debate that usually engages the issue of judicial review. Even when attacks on Western humanism have been pressed in the courts,[7] they have not aroused the kind of concern about the judicial role that has recently surrounded abortion,[8] and that once pivoted around the regulation of the market.

(1986) (White, J., dissenting). Even before the reaction against *Roe* occurred, the activities of the Supreme Court led by Earl Warren in the 1950s and 1960s had galvanized large segments of the public against judicial activism. Particularly polarizing cases included Baker v. Carr, 369 U.S. 186 (1962) (holding that the Equal Protection Clause requires that voting districts be reapportioned in order to prevent the dilution of minority votes); Reynolds v. Sims, 377 U.S. 533 (1964) (holding that the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that an indigent defendant is entitled to free counsel in all criminal cases); Mapp v. Ohio, 367 U.S. 643 (1961) (holding that evidence obtained through illegal search and seizure must be excluded); Miranda v. Arizona, 384 U.S. 436 (1966) (holding that confessions of prisoners are invalid unless preceded by notification of constitutional rights); Yates v. United States, 354 U.S. 298 (1957) (reversing the Smith Act convictions of leaders of the Communist Party); Brown v. Board of Educ., 347 U.S. 483 (1954) (holding that racial segregation in public schools violates the Equal Protection Clause). For a recent example of the persistent criticism that the Warren Court was unduly "activist," see BORK, *supra*.

7. *See, e.g.*, Peloza v. Capistrano Unified Sch. Dist., 782 F. Supp. 1412 (C.D. Cal. 1992) (requiring a high-school teacher to refrain from discussing creationism and to teach evolutionism did not impinge upon free speech rights or violate the establishment or due process clauses); *see also* Mozert v. Hawkins County Board of Educ., 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (denying claim that "secular humanist" practice of exposing public school children to diverse viewpoints violates fundamentalist plaintiffs' freedom of religion). It is interesting to note that attacks on liberal humanist education stem from the conservative right-wing as well as from the left.

8. Controversy surrounding a *judicially*-recognized right to abortion may well have become dormant since the Supreme Court affirmed such a right in Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992), with the consequence that opposition to abortion has shifted from the legal arena to increasingly violent protests against abortion providers in the streets.

It is striking, therefore, to recall that many of the now classic statements about the nature of the judicial role—and the necessity of judicial restraint—were forged in the context of debates over public education and, more particularly, in the context of questioning the state's use of its educational authority to encourage assimilation into an officially sanctioned public culture. In this essay I chart a line of some of the most influential statements about judicial review, which, I believe, bear the imprint of their authors' views about the legitimacy of cultural assimilation. Specifically, I trace a shift from the so-called "Thayerite" or "Harvard School" of judicial restraint,[9] represented here by Felix Frankfurter and his protegé, Alexander Bickel, to the critique of judicial deference espoused by Robert Cover in his influential article, *Nomos and Narrative*.[10]

It is not coincidental that the three men selected for discussion are all Jewish. If, as I maintain here, their views about judicial review were shaped by preexisting attitudes about assimilation, then it seems plausible that these attitudes were colored by their life experiences and self-conceptions as Jews. A surprising number of the most influential statements about judicial review have been made by Jews who ascended to leading positions in the American legal academy and judicial establishment.[11] It hardly needs saying that non-Jewish scholars

9. *See* Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978). A recent essay on Thayer suggests that he was a believer in the value of cultural assimilation, and specifically notes that Thayer "lobbied hard to end the frontier oppression of Native Americans, in the hope . . . of converting them into typical American Farmers suffused by common-law and small town values." Jay Hook, *A Brief Life of James Bradley Thayer*, 1 NW. U. L. REV. 1, 7 (1993). Hook also mentions Thayer's support for America's "paternalistic solicitude toward the Filipinos" after the Spanish-American war. *Id.* These brief references to Thayer's attitudes toward cultural difference and assimilation raise the intriguing possibility that for him, too, a principle of judicial restraint was linked to a belief in the value and legitimacy of state-promoted cultural assimilation. Whether such a link exists is, however, beyond the scope of this Article.

10. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

11. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682 (1931); Morris R. Cohen, *The Process of Judicial Legislation*, 48 AM. L. REV. 161 (1914); Louis L. Jaffee, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357 (1949); Louis L. Jaffee, *The Report of the Attorney General's Committee on Administrative Procedure*, 8 U. CHI. L. REV. 401 (1941); Louis L. Jaffee, *Was Brandeis An Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967). For an analysis of Louis Brandeis' conception of the judicial role, as expressed more in judicial opinions than in scholarly writings, see ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 20-23 (1988).

To the proposition that a surprisingly large number of Jews addressed the issue of judicial review, one might counter that the number is unsurprising insofar as it roughly matches the large

and judges also are prominently associated with philosophies of judicial review. John Marshall, James Bradley Thayer, and Oliver Wendell Holmes are notable examples. For the Jewish figures under consideration here, however, there is a much more palpable link between their views about judicial review and their attitudes toward state-sponsored assimilation.[12]

To make claims about connections between Jewish self-identity and the development of legal ideas is to venture into a treacherous domain. In general, demonstrating causal connections between context and text is a challenge for even the most accomplished intellectual historian.[13] More fundamentally, the very identification of Jewish identity is a vexed enterprise.[14] To inquire into Jewish attitudes about assimilation is to assume that something Jewish persists despite Americanization,[15] but what that something is is ill-defined.[16] One must therefore hesitate before positing causal links between Jewish self-

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proportion of Jews in the legal profession, especially the legal academy, in America. This, however, does not preclude the possibility that the philosophy of judicial review expressed by Jewish jurists reflected their attitudes toward the legitimacy of state-fostered cultural assimilation which resulted from their own personal experiences as Jews.

12. On the possibility that a similar link motivated Marshall's theory of judicial review, see note 4 *supra*.

13. A similar concern is expressed in Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 676-77 (1984) (distinguishing "a study that demonstrates precisely how a specific judge's personal values and perceptions entered into the legal calculus in a particular act of judging" from casual "impressions that a Justice's background or beliefs affected a particular decision").

14. The literary critic Harold Bloom put the problem in characteristically pithy fashion:

> "American Jewish Culture," considered merely as a phrase, is as problematic say as "Freudian Literary Criticism," which I recall once comparing to the Holy Roman Empire: not holy, not Roman, not an empire; not Freudian, not literary, not criticism. Much that is herded together under the rubric of American Jewish Culture is not American, not Jewish, not culture.

Harold Bloom, *Jewish Culture and Jewish Memory*, 8 DIALECTICAL ANTHROPOLOGY 7 (1983).

15. Another way of putting this is to say that definitions of assimilation vary, depending on varying definitions of what constitutes the authentic, unassimilated identity. *See generally* STEVEN M. COHEN, AMERICAN ASSIMILATION OR JEWISH REVIVAL? (1988) (contrasting the positions of "assimilationists" and "transformationists," each of whom adopts different criteria of Jewishness, on the basis of which contrasting assessments for survival, as opposed to assimilation, are made). On the difficulty of defining assimilation, see *infra* text accompanying notes 16-17.

16. Bloom suggests that the whole effort to conceive of the Jewishness of writers in causal terms is misguided. Instead, he suggests that Jewishness is something projected onto writers or authors of ideas *retrospectively*—that is, Jewishness is not an essence that is "there" in the present, influencing things, but rather a construction applied in hindsight, its novelty yielding no less authoritative a definition of Jewishness than the ones it supplants. *See* Bloom, *supra* note 14, at 10.

identity and the attitudes toward assimilation and philosophies of judicial review examined here. Nonetheless, it seems obtuse to ignore historical and biographical data that support such links.

Put simply, my thesis is that Frankfurter and Bickel's understanding of the problem of judicial review was informed in good measure by their shared view of the acceptability, indeed the positive value, of using the state's authority over education as a tool of cultural assimilation. Cover's position, by contrast, represents a dialectical reaction against the Frankfurter-Bickel synthesis. The body of this article is devoted to unraveling these propositions.

Before proceeding, it is essential to clarify the meaning of the basic terms employed in this analysis—or rather, to explain the lurking ambiguities that attend these terms. The organizing concept of this essay, assimilation, itself eludes straightforward definition. Part of the confusion stems from the fact that assimilation, in its broadest sense, describes the process (and result) in which individuals are socially integrated and acculturated into *any* social group. Although assimilation might well be used to describe identity-formation within subgroups or transnational ethnic communities, I should make it clear that I am reserving the term for the self-identity that results from *rejecting* such "parochial" allegiances.

I do not propose here to resolve the question of whether rejecting parochial identities results in the transcendence of all particular cultural allegiances—the cosmopolitan ideal—or whether it merely leads to the replacement of subgroup affiliations with allegiance to the culture of a particular nation-state. This is a matter of interpretation, and different interpretations will lead to quite different understandings of what assimilation actually involves. Proponents of the cosmopolitan ideal tend to see assimilation—if they use the term at all—as a process which liberates individuals from the binding force of particularistic traditions. By contrast, many employ "assimilation" as an inherently pejorative term. According to these critics, assimilation involves substituting the dominant culture's values for those of the subordinated subgroup, rather than transcending the values and beliefs of any particular culture.[17]

17. My outlook here is similar to that expressed in DAVID HOLLINGER, IN THE AMERICAN PROVINCE STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF IDEAS 56-73 (1985).

It is beyond the scope of this Article to determine which of these competing views is correct. Instead, my purpose is to provide a reading of how assimilation has been understood in legal discourse, especially in the discourse of theories of judicial review.[18] The difference between the positive and negative views of assimilation goes a long way towards explaining Cover's opposition to his intellectual forbears, especially Frankfurter and Bickel. Cover's position was largely defined by his rejection of the cosmopolitan ideal of assimilation that was embraced by Frankfurter and Bickel, and by his critique of its supposed cultural or value-neutrality.[19]

Although cosmopolitanism might theoretically support the ideal of a transnational order, Frankfurter, Bickel and Cover alike were more concerned with the way in which the cosmopolitan ideal was embodied in a particular nation-state. Assimilation into the nation-state, and more particularly, assimilation into the American nation-state, was the kind of assimilation on which they trained their focus. Accordingly, when I employ the term "assimilationist," I mean to refer to those, like Frankfurter and Bickel, who endorse a primary allegiance to the state. By contrast, by "anti-assimilationist," I mean those who, like Cover, reject the primacy of national or cosmopolitan identity over membership in cultural subgroups (a position which, I reiterate, does not imply rejecting the value of acculturation into particular groups).

The ambiguities in the concept of assimilation point to corresponding ambiguities in the meaning of other key terms employed in this analysis, to wit, "liberty" or "liberal order," and "particularism." According to some definitions, liberty is flatly inconsistent with cultural assimilation of any kind, as it is with any force external to the individual, which impinges upon her choice of values or beliefs. In one view, the diminution of the power of traditional communities to determine individual beliefs—the characteristic phenomenon of a liberal order—*is not* assimilation, simply as a matter of definition. Alternatively, if this phenomenon is to be called assimilation, then that

18. Other branches of legal scholarship that focus on the issue of assimilation are feminist legal scholarship and critical race theory. The relationship between Jewish perspectives and other minority or subordinated perspectives is an extremely interesting issue, which has yet to be explored.

19. Again, it is interesting to note the parallels between Cover's critique and critiques of assimilation generated in critical race theory (building, in part, on a long intellectual tradition within African-American discourse) and in feminist discourse.

term merely designates the elimination of improper processes of inculcating beliefs.

A quite different view of liberty accepts that some degree of enculturation may not only be consistent with individual liberty, but is perhaps prerequisite to it. By the same token, cultural specificity is seen as essential to a liberal order.[20] Frankfurter is notable precisely because of his candid endorsement of this view. The idea that individual liberty and a liberal state depend on the cultural reproduction of certain values was shared by Cover and Frankfurter (and, I believe, although with less direct evidence, by Bickel, as well). What separated Cover from the latter two thinkers was thus not a different conception of liberty and its relationship to enculturation, but rather a differing assessment of the *morality* of liberal enculturation.

Similar ambiguities are harbored in the concept of "particularism," a term often used to designate cultural specificity as opposed to the condition of transcending any particular culture or set of values. "Universalism" is the common foil to particularism, but each of these terms contains manifold meanings. At first glance, the terms serve as an alternative pair of antonyms for cosmopolitanism and parochialism, respectively. Particularism used in this sense is precisely that quality of "groupness" in which bonds between group members take priority over more universal ideals. Exclusivity, to some degree, is the inevitable counterpart to such particularism, the negative face of community. By contrast, the inclusion of all individuals, *qua* individuals and not *qua* members of any particular group, is the contrasting virtue of a universalistic system, its corresponding negative face being precisely the loss of (particularistic) community.

However, the sharp contrast between particularism and universalism seems to break down if we accept the claim that liberal cosmopolitanism or universalism is a culturally-specific tradition that depends upon the reproduction of its own cultural values (to the exclusion of others). In this analysis, universalism is itself particularistic. Again, it is not my task here to assess the logic of this position, nor to evaluate the morality of such a form of particularism (if that is what universalism is). My point instead is to emphasize how slippery the supposedly contrasting terms are.

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20. This is a view put forward, most interestingly, by some of liberal cosmopolitanism's defenders as well as by its critics. For a recent example, see Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REF. 751 (1992).

Another peculiarity of these terms is that they are also used to denote a rather different contrast between two distinct styles of decisionmaking or mediating disputes. Particularism, in this sense, is taken to signify a form of reasoning that is less abstract, deductive and formalistic and, on the other hand, more contextually-oriented and "pragmatic" in its derivations and applications of principles than alternative styles of reasoning. Pragmatism is an increasingly popular synonym for particularism in this sense,[21] but references to the philosophy of pragmatism do little to *sharpen* (although they may enrich) our understanding of what particularism in decisionmaking is.[22]

It is an interesting question, what, if any, relationship exists between particularistic reasoning and the value of particularistic community? Conversely, what, if any, relationship exists between abstract formalism as a style of reasoning and liberal, universalistic ideals? Writers often invoke both senses of particularism at more or less the same time, without clearly distinguishing them.[23] Cover himself drew such a link in his influential *Nomos and Narrative*,[24] and perhaps that article is partly responsible for subsequent linkages of the two. Yet, competing styles of reasoning and the communitarian versus universalistic conceptions of the good seem like very different sets of things. There may be no necessary connection between pragmatic (or particularistic) judging and the anti-cosmopolitan ideal. The following analysis of the relationship of Cover's thought to that of Frankfurter and Bickel reveals a relation between their theories of judicial review and their respective attitudes toward particularistic (and specifically, Jewish) identity. My hope is that this analysis will help us gain a better understanding of the relationship between the two meanings of particularism, to wit: particularistic (anti-formalistic) views of judging and particularistic (as opposed to cosmopolitan) forms of self-identity.

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21. *See Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019 (1991); Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541 (1988).

22. Indeed, the very quest for precise abstract definitions may be condemned as formalism from the pragmatic point of view. It should be noted that "formalism" faces the same difficulties of definition as does its pragmatic counterpart.

23. Much recent writing on pragmatism as a virtue of judging seems to imply a kind of connection between the two senses, without actually working out its nature.

24. *Supra*, note 10.

II. FRANKFURTER

Felix Frankfurter associated his position on judicial restraint with Justices Holmes, Brandeis and Cardozo.[25] In an editorial devoted to the question, "Can the Supreme Court Guarantee Toleration?," Frankfurter approvingly quoted Justice Holmes's dissenting opinion from the anti-foreign language instruction cases of the early 1920s.[26] In *Meyer v. Nebraska*,[27] a majority of the Court had struck down state legislation prohibiting the teaching of any modern language other than English. In his editorial, Frankfurter noted that this legislation was "rooted in the same attitude of intolerance" which led Oregon, in roughly the same time period, to prohibit private education and to mandate public school education for "normal children" between the ages of eight and sixteen.[28] The Supreme Court struck down this legislation in *Pierce v. Society of Sisters*.[29]

Meyer and *Pierce* stand together as the foundation of the Supreme Court's "substantive due process" or "privacy" doctrine—the doctrine that explicates the substantive liberties assured by the fourteenth amendment. Although controversy has engulfed later applications of the doctrine to rights of reproductive control, little controversy has surrounded the right of parental control established in *Pierce* and *Meyer*. Indeed, the courts (and society generally) have continued to affirm *Pierce* and *Meyer*'s commitment to parental control as a significant limit on the "power of the State to standardize its children."[30]

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25. *See* FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION (Philip B. Kurland ed., 1970) [hereinafter EXTRAJUDICIAL ESSAYS], especially *The Constitutional Opinions of Mr. Justice Holmes*, *id.* at 22; *The Nomination of Mr. Justice Brandeis*, *id.* at 43; *Mr. Justice Holmes*, *id.* at 109; *The Paradoxes of Legal Science*, *id.* at 202; *Mr. Justice Brandeis and the Constitution*, *id.* at 247; and *Mr. Justice Cardozo and Public Law*, *id.* at 401.

26. *Id.* at 174.

27. 262 U.S. 390 (1923).

28. EXTRAJUDICIAL ESSAYS, *supra* note 25, at 175.

29. 268 U.S. 510 (1925).

30. *Id.* at 535; *see, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Webster v. Reproductive Health Serv., 492 U.S. 490 (1989); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969); Everson v. Board of Educ., 330 U.S. 1 (1947); Thomas v. Collins, 323 U.S. 516 (1945); Prince v. Massachusetts, 321 U.S. 158 (1944). For an illuminating analysis of *Pierce* and *Meyer* in their historical context, see Barbara Bennet Woodhouse, *Who Owns the Child?:* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

Justice Holmes, however, dissented from this holding, and it was with Holmes's dissent that Frankfurter cast his lot.[31] Holmes's concise dissenting opinion is worth quoting in full:[32]

> We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the [anti-foreign language instruction] statute is a lawful and proper one. The only question is whether the means adopted deprive teachers of the liberty secured to them by the Fourteenth Amendment. It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this but I cannot bring my mind to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result. The part of the act with which we are concerned deals with the teaching of young children. Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school. But if it is reasonable it is not an undue restriction of the liberty either of teacher or scholar. No one would doubt that a teacher might be forbidden to teach many things, and the only criterion of his liberty under the Constitution that I can think of is "whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." [Citations omitted.] I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried.[33]

Frankfurter's editorial was basically a tribute to this opinion. Written in 1925, when Frankfurter was a Harvard Law School professor, published as an unsigned editorial in the New Republic—the political journal which Frankfurter had helped to found in 1914[34]—the essay registered the atmosphere of intolerance surrounding the challenged

31. EXTRAJUDICIAL ESSAYS, *supra* note 25, at 177 (stating that "[i]t is not without significance that, much as he undoubtedly disliked the mischievous policy of the laws prohibiting the teaching of foreign languages, Mr. Justice Holmes found it necessary to dissent in the Nebraska school law case").

32. Holmes expressed his opinion in 1923 in Bartels v. Iowa, 262 U.S. 404 (1923), decided as a companion case under the authority of *Meyer*.

33. *Bartels*, 262 U.S. at 412 (Holmes, J., dissenting).

34. *See* HELEN S. THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 21 (1960).

legislation.[35] Only months before the *Meyer* decision, Congress had passed the Immigration Act of 1924, which severely restricted the entry of foreigners into America.[36] Behind this enactment, historians have detected not only the general xenophobia prevalent in post-World War I America,[37] but also "a specific anti-Jewish animus." Testimony during the legislative hearings on the Immigration Act repeatedly referred to "the radicalism of the Jews of the Lower East Side as evidence that Jews were inherently un-American and would never become good citizens."[38]

It is not surprising, therefore, that Frankfurter—a Jewish immigrant from Vienna who had arrived in the United States in 1894 at the age of twelve—apprehended the same nativist sentiment behind the educational policies challenged in *Pierce* and *Meyer*. In his *New Republic* essay he referred to the emergence of this sentiment as "the recrudescence of intolerance."[39] Yet he adamantly maintained that this "recrudescence" could not be countered effectively by "the Supreme Court's invalidation of illiberal legislation."[40] Intolerance, according to Frankfurter, could be combatted "[o]nly [by] a persistent, positive translation of the liberal faith into the thoughts and acts of the community. . . ."[41] And that translation was unlikely to occur if responsibility for guarding against intolerance was transferred from the people to the courts.[42] It was for this reason, Frankfurter said, that he supported Holmes's dissent.

Fourteen years later, Frankfurter was appointed to the Supreme Court, and soon had occasion to revive Holmes's deferential judicial

35. Frankfurter might also have had in mind the atmosphere of intolerance, specifically intolerance of Jews, then surrounding Harvard. *See* HENRY L. FEINGOLD, ZION IN AMERICA: THE JEWISH EXPERIENCE FROM COLONIAL TIMES TO THE PRESENT 261 (1974).

36. Immigration Act of 1924, ch. 190, § 1, 43 Stat. 153 (repealed 1952).

37. The xenophobia and nativism of American politics in the 1920s are discussed in J. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (1972) and WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933 (1963). The infusion of anti-semitism into the nativist brew of sentiments is discussed in FEINGOLD, *supra* note 35, at 264-76; ARTHUR GOREN, THE AMERICAN JEWS 81-83 (1980); ARTHUR HERTZBERG, THE JEWS IN AMERICA 15, 107-09 (1989). Hertzberg notes that before 1861, "Jews were too few to become the prime target of American nativism. This was reserved for the Irish and the Germans." *Id.* at 107. But following World War I and increasingly in the 1920s Jews became prime symbols of the unwanted, subversive alien force—often assigned a communist face—supposedly plaguing America.

38. FEINGOLD, *supra* note 35, at 265.

39. EXTRAJUDICIAL ESSAYS, *supra* note 25, at 175.

40. *Id.* at 176-77.

41. *Id.* at 178.

42. *Id.* at 175.

stance in a public school case of his own. When *Minersville School District v. Gobitis*[43] reached the Supreme Court in 1939, the political atmosphere was hardly more tolerant—though intolerance was perhaps less "recrudescent"—than in 1925. Although the domestic isolationism following World War I had lessened, xenophobia and anti-semitism were now more palpable than ever abroad. Opponents of the policy challenged in *Gobitis*—a local school board edict that required teachers and pupils to participate daily in a salute to the American flag—feared that it showed the spread of fascism.[44] The plaintiffs in *Gobitis*, Jehovah's Witnesses who believed that Scripture forbade saluting the flag, claimed that the mandatory ceremony interfered with their right to the freedom of thought and belief. Frankfurter, writing for the Court, denied this claim.

There were four basic components to Frankfurter's argument in *Gobitis*: (1) a perception of the assimilative impact of education; (2) a belief that individual liberty (paradoxically) depends on assimilation to the values of the state;[45] (3) a belief that, therefore, liberty could not be protected absolutely against the state's interest in assimilation, but instead had to be balanced pragmatically against the state's interest; and (4) a belief that the inherently pragmatic nature of judgments about individual liberty in this context justified—indeed required—judicial restraint.

That civic assimilation was the goal of the challenged program in *Gobitis* was plainly put in Frankfurter's opinion. The point of the flag salute exercise, as he saw it, was to have

> public school children share a common experience at those periods of development when their minds are supposedly receptive to its assimilation, by an exercise appropriate in time and place and setting, and one designed to evoke in them appreciation of the nation's hopes and dreams, its sufferings and sacrifices.[46]

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43. 310 U.S. 586 (1940), *overruled by* West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

44. *See* Lackland H. Bloom, Jr., Barnette *and* Johnson: *A Tale of Two Opinions*, 75 IOWA L. REV. 417 (1990); Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893 (1990); Robert J. Goldstein, *The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis*, 45 U. MIAMI L. REV. 19 (1990).

45. For a discussion of the paradoxical nature of this conception of liberty in contrast to the more conventional view that personal liberty is flatly inconsistent with being assimilated into any culture's values, see *infra* text accompanying notes 50-53.

46. *Gobitis*, 310 U.S. at 597.

The "safeguard[ing of] the nation's fellowship"[47] and the "promotion of national cohesion"[48] were the more general manifestations of the state interest he saw implicated in the dispute.

Of course, notwithstanding the palpable enthusiasm for American patriotism and "national cohesion" that Frankfurter displayed in these statements, one might argue that they simply demonstrated his commitment to judicial restraint, rather than an independent or overriding commitment to the value of assimilation. It is elementary that a holding of constitutionality is not tantamount to judicial approval of the challenged governmental program. But Frankfurter did not confine himself to observing and confirming the legitimacy of national unity as a governmental end. His language went beyond a mere certification of acceptability to a finding that "[w]e are dealing with an interest inferior to none in the hierarchy of legal values."[49]

Frankfurter's treatment of national unity as a compelling (and not merely a valid) state goal stemmed from his belief in the interdependence of individual liberty and assimilation (or dedication) to the values of the liberal state. Such an interdependence implied that conflicts between individual liberty and the state's interest in assimilation could not be resolved by absolute principles that favored only one side of the conflict. At first glance, absolute principles, such as individual freedom of conscience or a right of parental control, might seem to support the plaintiffs' position. But those rights themselves, Frankfurter saw, "presuppose the kind of ordered society which is summarized by our flag."[50] In other words, the existence of personal liberty *depends* on the continued existence of a nation constitutionally dedicated to liberty. And although a nation dedicated to liberty might sound like an absolute principle itself, it is one which requires of citizens loyalty as much as liberty—loyalty, that is, to the nation and to its constitutional principles. Liberty and loyalty, therefore, had to be balanced against each other. According to Frankfurter, "religious toleration itself is unattainable" except in an "orderly, tranquil, and free

47. *Id.* at 591.

48. *Id.* at 595.

49. *Id.* Danzig, noting the same sentence, views this "inflation" of the state interest as a device for distinguishing *Gobitis* from a line of precedents which would have supported the opposite outcome. Danzig, *supra* note 13, at 713-14.

50. *Gobitis*, 310 U.S. at 600. A similar argument was considered—and rejected—in the recent flag burning case, Texas v. Johnson, 491 U.S. 397 (1989).

society."[51] And "[t]he ultimate foundation of a free society," as he saw it, "is the binding tie of cohesive sentiment."[52]

Frankfurter then elaborated on the genesis of this "cohesive sentiment":

> Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization.[53]

Among the most important of these agencies of cultural reproduction was education. In Frankfurter's words, the preservation of a society dedicated to freedom and the "ultimate values of civilization" depends on "the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties."[54]

Frankfurter thus subsumed the particular significance of the flag salute ceremony under lofty abstractions about national unity and the cultural conditions of a free society.[55] The choice of the mandatory flag salute ritual as a means to an end might be merely tolerable. But the general purpose of inculcating devotion to what the flag symbolizes was considerably more than tolerable; it was *affirmatively good.* And this was so because the sentiment to be inculcated was one of devotion not only to national unity, but also to the principle of personal freedom, for which the nation (and the flag) were supposed to stand.

"We are dealing here," Frankfurter observed, "with the formative period in the development of citizenship."[56] The value of personal freedom had to be "ingrained," via education, in order to keep society free. The need to ingrain the value of personal freedom accordingly justified the use of state power to inculcate particular values and thereby to assimilate citizens of diverse foreign origins into a common national culture. Strictly as an issue of efficacy, Frankfurter granted that he "might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crotchety beliefs,"

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51. *Gobitis*, 310 U.S. at 595.
52. *Id.* at 596.
53. *Id.*
54. *Id.* at 600.
55. On Justice Frankfurter's tendency toward abstraction, see Danzig, *supra* note 13, at 769.
56. *Gobitis*, 310 U.S. at 598.

rather than by compelling conformity.[57] But Frankfurter deemed his suspicions about the flag salute's effectiveness to be merely speculative, given the "[g]reat diversity of psychological and ethical opinion . . . concerning the best way to train children for their place in society," and the absence of a single authoritative view.[58] Generally, he held, "[t]he influences which help toward a common feeling for the common country are manifold," and while some are "harsh and others no doubt are foolish," the important thing was not the relative efficacy of particular means but the *end* of inducing such a "common feeling" through education.[59]

That end was "surely" legitimate,[60] even though it inevitably required some degree of reliance on "those compulsions which necessarily pervade so much of the educational process. . . ."[61] Therefore, drawing the line between acceptable and unacceptable degrees of such "compulsion" was not a matter for the courts. Pragmatic, as opposed to absolute judgments were required, and these were best made by the political, as opposed to the unelected judicial branches of government. In general, Frankfurter adhered to the legal realist precept that balancing is required because there are no absolutes, only conflicting interests to be adjusted and reconciled;[62] and *Gobitis* provided yet another occasion to rehearse this realist maxim. But here it was more than a matter of conflict *between* personal and state interests that led to the necessity of balancing—Frankfurter actually saw national unity as being an *ingredient of* personal liberty. The tension therefore arose *within* the value of personal liberty, rather than between it and some interest opposing it. As Frankfurter saw, personal liberty is threatened by the very conditions on which it depends. It was, as he said, the old Lincolnian dilemma: "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence"—and hence, too weak to maintain the liberties of its own people?[63] Or to put it somewhat differently, must liberty of conscience be either subordinated to the development of loyalty (to the

57. *Id.*

58. *Id.* Frankfurter did not indicate what "place in society" he had in mind for children to occupy. The language suggests a vision of social order a good deal more illiberal than some of his other statements imply.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 200 (1992).

63. *Gobitis*, 310 U.S. at 596 (quoting Lincoln) (emphasis omitted).

national creed of liberty), or else threatened by a failure to induce fidelity to the state (which is its guarantor)?

The crucial point, for Frankfurter, was that such a dilemma is not for the judiciary to resolve—precisely because its resolution depends on pragmatic, contextual, prudential judgments offered in a spirit of experiment and speculation. If logical deduction could not gauge the correct adjustment between the individual and the state, then there was no warrant, according to Frankfurter, for the judiciary to substitute what was nothing more than an educated guess for that of other, more representative bodies of democratic government.

Frankfurter thus based *Gobitis* on the dual principles of (1) state-sponsored assimilation, and (2) judicial deference to the judgments of the more democratic branches of government. Legal historians have tended to interpret Frankfurter's *Gobitis* opinion as an expression of his personal belief in the value of cultural assimilation in a liberal society.[64] More particularly, historians have linked Frankfurter's opinion about the flag salute ceremony to the effusive statements he made throughout his life about the role of public schooling in his own experience of Americanization.[65] To these readers, Frankfurter's flag salute opinions were clearly influenced by his personal attachment to the assimilationist public schools of his boyhood.

As further evidence of the influence of Frankfurter's personal views and experience, historians have pointed to the position he took in the Court's most famous flag salute case, *West Virginia State Board of Education v. Barnette*.[66] *Gobitis* is best known, after all, not for Frankfurter's reasoning, but for the fact that within only three years it was overturned and roundly repudiated by the Supreme Court in *Barnette*.[67] It is *Barnette*, and not *Gobitis*, that has been enshrined as one of the Supreme Court's most celebrated, indeed iconic cases.[68] Commentators have seen in *Barnette* the triumph of the view, too dimly

64. *See* Danzig, *supra* note 13, at 692-705; BURT, *supra* note 11, at 41-43.

65. *See, e.g.*, THOMAS, *supra* note 34, at 50, 52-56.

66. 319 U.S. 624 (1943).

67. *Id.* For an interesting view of the activity of the "lower" courts contributing to the reversal of *Gobitis*, see Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221 (1990).

68. The treatment of *Barnette* as an icon is typified by LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1231 (2d ed. 1988) (describing the majority opinion, authored by Justice Jackson, as "one of [the Supreme Court's] most ringing defenses of liberty"); *see also* Bruce Ackerman, *Levels of Generality in Constitutional Interpretation: Liberating Abstraction*, 59 U. CHI. L. REV. 317 (1992); Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603 (1992).

apprehended in 1939 when *Gobitis* was decided, that fascism lurks in the state-imposed mandatory flag salute ceremony.[69] Writing for the *Barnette* Court in 1942, Justice Jackson clearly delineated the "pall of orthodoxy" that could result from state action compelling individuals to demonstrate loyalty to a prescribed set of beliefs.[70]

Yet Frankfurter clung to his original position and dissented from *Barnette*'s holding that the mandatory flag salute ceremony violated the Jehovah's Witnesses' rights to freedom of expression and belief. It is the overweeningly personal tone of his *Barnette* dissent that has struck most commentators as evidence of the influence of Frankfurter's personal experience and internalization of the value of cultural assimilation.[71] The confessional tone is all the more striking because it ironically accompanies one of the most famous affirmations of the necessity of judicial self-restraint. The common perception is that Frankfurter protests too much in insisting upon his own self-effacement, prefacing his profession of restraint with this remarkably personal confession:

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I would wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not

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Despite the official repudiation of *Gobitis*, Justice Scalia recently revived Frankfurter's dicta to the effect that:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious belief. The mere possession of religious convictions which contradict the relevant concerns of a political society do not relieve the citizen from the discharge of political responsibilities.

Dept. of Human Resources v. Smith, 110 S.Ct. 1595, 1600 (1990) (quoting *Gobitis*, 310 U.S. at 594-95). It remains to be seen whether the current Court will also resurrect the *Gobitis* holding. An encouraging sign that it might not, despite Scalia's proclivities for the Frankfurter view, was provided in the flag burning case of several years ago, Texas v. Johnson, 491 U.S. 397 (1989), in which the Supreme Court defended the right to burn the flag against arguments similar to the national unity argument advanced by Frankfurter in *Gobitis* and *Barnette*.

69. *See, e.g.*, Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737 (1989).

70. 319 U.S. at 642.

71. *See, e.g.*, THOMAS, *supra* note 34, at 53-56; CLYDE E. JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES 250 n.15 (1961); BURT, *supra* note 11, at 41-43.

> justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.[72]

The intriguing question is whether, as historians have posited, Frankfurter's professed dedication to judicial restraint actually *resulted* from his personal experience of fusing his Jewish identity into a new American persona. Frankfurter's process of Americanization has been well documented by himself and others.[73] By all accounts, a strong fidelity to "Americanism" resulted from

> the immensely gratifying progression of a twelve-year-old, non-English-speaking immigrant through a school system that rewarded his intellectual merit, to a profession he viewed as celebrating reason, through a series of governmental posts in which his brains and his zest brought him influence, back as a professor to that Pantheon of hard-headed rationality, the Harvard Law School, and ultimately to a position on the Supreme Court.[74]

Frankfurter's resulting sense of identity was typified in his reminiscence that "I was not a Jewish professor at the Harvard Law School, but I was a Harvard Law School professor who happened to be a Jew."[75] As Richard Danzig has explained, Frankfurter "believed that assimilation could be made compatible with a distinctive ethnic and religious identity by insisting on the irrelevance of 'race or religion or the accidents of antecedents' in the realms to which he sought admission."[76]

Such assimilation did not imply a negation of Jewish identity.[77] Frankfurter in fact participated in a number of Jewish causes during his career, including—at Brandeis's urging—the Zionist Organization of America (an involvement abandoned by Frankfurter after Brandeis's death in 1941).[78] In the early 1930s, Frankfurter discussed the plight of Jews in Hitler Germany with President Roosevelt.[79] In the 1920s—the postwar period during which *Pierce* and *Meyer* were

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72. *Barnette*, 319 U.S. at 646-47 (Frankfurter, J., dissenting).

73. *See generally* BURT, *supra* note 11; Danzig, *supra* note 13.

74. The life-summary is Danzig's. *See* Danzig, *supra* note 13, at 695; *see also* BURT, *supra* note 11, at 41 (stating that Frankfurter "embraced American citizenship with an almost religious fervor, so that . . . he was 'no longer an exile' but 'at home' ").

75. HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 37 (1960).

76. Danzig, *supra* note 13, at 696-97.

77. *Id.*; BURT, *supra* note 11, at 38. Of course, there are degrees of negation, and what counts as an expression of Jewish affiliation in one beholder's eyes may count as negation in another's.

78. BURT, *supra* note 11, at 38-39; FEINGOLD, *supra* note 35, at 252-53.

79. HERTZBERG, *supra* note 37, at 288.

decided—Frankfurter was at the forefront of faculty opposition to Harvard's institution of quotas designed to limit Jewish enrollment.[80] Frankfurter's heated dispute with the president of Harvard, Lawrence Lowell, was all the more notable given the pious, almost filial devotion to Harvard that Frankfurter expressed throughout his lifetime.[81]

Interestingly, Frankfurter and Lowell reprised their acrimonious relationship when controversy erupted over the notorious case of Sacco and Vanzetti. Frankfurter publicly supported critics' charges that the two Italian immigrants convicted of murder were denied a fair trial because of their "foreign" anarchist beliefs, while Lowell presided over an official advisory committee which denied the critics' claim and paved the way for the defendants' executions.[82] In this and many of his other activities, Frankfurter manifested a basic empathy for the immigrant experience. More specifically, he demonstrated an abiding sense of Jewish affiliation and allegiance—but one stripped of any religious or particularistic aspect that might clash with the universalist, rationalist, and meritocratic ideals to which he subscribed throughout his adult life.[83] By the time Frankfurter reached adulthood, he had cast aside the traditional religious observance of his parents, and of his own childhood,[84] and, like others of his generation, had reconfigured Jewishness into a cultural heritage rather than a personal religious creed or a particularist way of life.[85]

For his successful assimilation into American society, Frankfurter always credited the American public schools, in particular, his first teacher, "a middle-aged Irish woman," who, Frankfurter said, "was one of my greatest benefactors in life"—chiefly because she strictly forbade the other children to speak German with him.[86] Frankfurter's enthusiasm for the assimilative function of the public school never waned. In his reminiscences, Frankfurter consistently relegated his

80. FEINGOLD, *supra* note 35, at 261.

81. Frankfurter said of himself, "I have a quasi-religious feeling about the Harvard Law School." PHILLIPS, *supra* note 75, at 19.

82. HORWITZ, *supra* note 62, at 175. For discussions of the Sacco-Vanzetti case, see generally ROBERTA S. FEUERLICHT, JUSTICE CRUCIFIED (1977); FRANCIS RUSSELL, SACCO & VANZETTI (1986); WILLIAM YOUNG & DAVID E. KAISER, POSTMORTEM: NEW EVIDENCE IN THE CASE OF SACCO AND VANZETTI (1985). For discussions of the roles played by Frankfurter and Lowell, see PHILIP B. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION 5-7 (1971); PHILLIPS, *supra* note 75, at 206-12.

83. *See* Danzig, *supra* note 13, at 690-96.

84. BURT, *supra* note 11, at 38.

85. Danzig, *supra* note 13, at 708 (quoting PHILLIPS, *supra* note 75, in which Frankfurter referred to himself as a "believing unbeliever" and as a "reverent agnostic").

86. Danzig, *supra* note 13, at 710; BURT, *supra* note 11, at 39.

parents to the background and his school teachers to the foreground. (Marrying, but never having children of his own, he never had to personally confront the potential conflicts between parents and schools as a parent himself).

During the Court's deliberations over *Gobitis*, Frankfurter privately related his positive experience of the assimilationist public school, apparently with considerable effect as he convinced seven other members of the Court to subscribe to his opinion.[87] Failing to exert a similar influence on his brethren when *Barnette* was later decided, Frankfurter channelled his autobiographical reflections into the more public forum of a written dissent. Yet, while suggestive of Frankfurter's deep feelings about patriotism and his own American identity, the opinions in *Barnette* and *Gobitis* do not by themselves *prove* the historians' conjecture that Frankfurter's endorsement of judicial restraint was actually *driven* by his personal approbation of state-sponsored assimilation rather than the other way around. However, more support for this hypothesis may be found if we juxtapose *Barnette* against the later case of *McCollum v. Board of Education*,[88] in which Frankfurter once again faced off against the author of *Barnette*, Justice Robert Jackson.

In analyzing this pair of cases, it is important to recall that Frankfurter's argument for judicial restraint, as articulated in both *Barnette* and *Gobitis*, was tightly linked to his justification for civic assimilation. Indeed, Frankfurter justified both judicial restraint and state-sponsored assimilation *on the same ground*—namely, on the ground of the cultural conditions he thought necessary for liberty to prevail. Recall that at stake for Frankfurter in *Gobitis* and *Barnette* was the conflict that he perceived to lie *within* the value of liberty—its dependence on the very conditions that threatened it, in particular, assimilation into the culture of liberty, induced by the public schools. This tension greatly complicated the question of when a violation of liberty could be said to occur, and hence, in Frankfurter's view, rendered it unfit for judicial determination. Justice Jackson saw the matter altogether differently. Instead of a tension *within* rights, he saw the "sole conflict" as one *between* "authority and rights of the individual."[89] Even Frankfurter would agree that, in the absence of competing rights, violations

87. Paul A. Freund, in *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 41 (1967), quotes Frankfurter reporting to a friend that he gave a "moving statement at conference on the role of the public school in instilling a love of country in our pluralist society."

88. 333 U.S. 203 (1948).

89. *Barnette*, 319 U.S. at 630.

of rights were plain, and judicial condemnations plainly warranted.[90] Thus, Jackson's *Barnette* opinion simultaneously challenged the permissibility of state-sponsored value-inculcation, and Frankfurter's basic argument for applying a deferential standard of judicial review.[91]

Remarkably, only five years later, in 1947, Jackson and Frankfurter virtually reversed their positions on the propriety of judicial intervention in the public schools. At issue in *McCollum* was religious instruction in public schools.[92] The Supreme Court held that the challenged program violated the establishment clause of the Constitution, and both Jackson and Frankfurter concurred. However, the reasoning and concerns each expressed differed in telling ways.

Frankfurter's concurrence placed great emphasis on the theme of the public school as simultaneous symbol and agent of "secular unity."[93] The assimilative function of the public school, the same function that had justified compulsory flag salutes for Frankfurter in

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90. *See id.* at 638.

91. Jackson wrote:

> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

Id. at 639-40.

92. The particular program challenged in *McCollum* involved the provision of religious instruction in public school buildings, at the option of the student's parents, by special teachers (including Catholic priests, a Jewish rabbi, and Protestant instructors) subject to the approval and supervision of the superintendent of public schools.

93. 333 U.S. at 217 (Frankfurter, J., concurring). Frankfurter wrote:

> Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects.
>
> . . . This development of the public school as a symbol of our secular unity was not a sudden achievement nor attained without violent conflict.

Id. at 216-17; *see also id.* at 231 ("The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny.").

Gobitis and *Barnette*, here required striking down the challenged practice—because otherwise, "the children belonging to . . . non-participating sects will . . . have inculcated in them a feeling of separatism when the school should be the training ground for habits of community . . . ."[94]

What had become of the factors that for Frankfurter usually counseled judicial restraint? Frankfurter initially acknowledged that here, as in the flag salute cases, "we are dealing not with a full-blown principle, nor one having the definiteness of a surveyor's metes and bounds."[95] He was referring to the principle of a "wall of separation between church and State"[96]—a far from plain constitutional interpretation if there ever was one.[97] Frankfurter also showed his characteristic sensitivity to the social context which led to the adoption of the challenged program, a context of increasing secularization in which the confinement of religion to Saturday and Sunday schools "appear[ed] to make religion a one-day-a-week matter" and "tended to relegate the child's religious education, and thereby his religion, to a minor role not unlike the enforced piano lesson."[98]

But for once the complexities of particular contexts, and the absence of absolute principles did not lead Frankfurter to counsel deference. Instead, he insisted on judicial enforcement of the admittedly inexact principle of separation. More revealingly, he transformed the indefinite principle of separation over the course of his written opinion into one of the rare "absolutes" that he held generally justified unrestrained judicial intervention. Thus, towards the end of his opinion he proclaimed:

> We find that the basic Constitutional principle of *absolute* Separation was violated when the State of Illinois, speaking through its Supreme Court, sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement.[99]

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94. *Id.* at 227.

95. *Id.* at 217.

96. *Id.* at 213.

97. For a discussion of the controversy surrounding reading Jefferson's separation metaphor into the establishment clause, see *Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1607-1781 (1987) [hereinafter, *Religion and the State*]. Frankfurter acknowledged "a clash of views as to what the wall separates," but did not see a controversy about the principle of separation itself. *McCollum*, 333 U.S. at 213.

98. *Id.* at 221-222. *Cf.* Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion As A Hobby*, 1987 DUKE L.J. 977.

99. *McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring) (emphasis added).

Frankfurter continued in this uncharacteristically absolutist vein, linking the assimilative role of the public school to the principle of strict separation between church and state:

> Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a "wall of separation," not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. "The great American principle of eternal separation"—Elihu Root's phrase bears repetition—is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.[100]

In other words, the Court had a duty to enforce constitutional principles "in their full integrity" if non-intervention imperiled the promotion of unity by the state. But, to recall our earlier discussion, it had a duty not to do so if judicial intervention conflicted with the promotion of unity. It was left to Justice Jackson, while otherwise joining in Justice Frankfurter's opinion,[101] to make Frankfurter's usual points about the subtlety of the question,[102] and the consequently questionable competence of the judiciary to resolve the case.[103]

The inconsistency in Frankfurter's application of the principles guiding judicial review, illustrated by the juxtaposition of *McCollum* against the flag salute cases, ironically reveals his iron-clad consistency in supporting state-sanctioned assimilation. More particularly, Frankfurter's *McCollum* opinion constitutes an endorsement of assimilation into the culture of a liberal state. His reasoning in *McCollum* relies on the classic liberal division of public and private realms, with religion confined to the latter. Although appearing to sympathize with the

100. *Id.*

101. *Id.* at 232 (Jackson, J., concurring).

102. *Id.* at 236 ("When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry.").

103. *McCollum*, 333 U.S. at 232-35. It was Jackson who in this case uttered Frankfurter's usual concerns about "laying down a sweeping constitutional doctrine," the need for "some flexibility to meet local conditions, some chance to progress by trial and error," and the inappropriateness of assuming "the role of a super board of education for every school district in the nation." *Id.* at 237. *Cf. Gobitis*, 310 U.S. at 585, in which Frankfurter held that drawing the line between acceptable and unacceptable degrees of the compulsion that inheres in the educational process is not within the competence of the courts.

complaint against "one-day-a-week" religion, in the end that is precisely what he sanctioned. Moreover, as with his approbation of national unity, his endorsement of the privatization of religion was not a matter of mere permission, resulting from a policy of judicial deference; in this case, it represented an interpretation and application of the Constitution's requirements that required judicial activism in the most conventional sense of the term—it required the very sort of direct intervention that Frankfurter usually condemned as the activism of a Court acting like a "super-legislature." Frankfurter based his uncharacteristic justification for such judicial activism on the ground that it was required to prevent the state from subverting its imputed unifying function.

It would be fatuous to argue that Frankfurter was immune to other considerations, quite apart from the value of assimilation, which led other judges and legal scholars generally to endorse judicial restraint. In particular, concerns about judicial intervention in the realm of economic regulation must have played a role in inducing Frankfurter, along with other prominent jurists of his generation, to shy away from an activist court. Repudiating judicial activism generally represented an acceptance of the legitimacy of the state's regulatory economic mission.[104] However, the public school cases suggest that Frankfurter was also strongly influenced by his view of the state's legitimate cultural-regulatory mission.

Just as Felix Frankfurter's inconsistencies bespoke an abiding commitment to the value of state-sponsored assimilation, Justice Jackson's vacillations revealed the endurance of his commitment to diversity and dissent. In the end, however, Frankfurter and Jackson were perhaps not so far apart. It was, after all, *liberal* assimilation, the ingraining of the value of *personal liberty*, to which Frankfurter was committed. Frankfurter and Jackson, and their respective oscillations about judicial review, together illustrate tensions *internal to* liberalism, rather than diametrically opposed political philosophies. Together, they reflect the tension between, on the one hand, liberalism's opposition to institutionalizing particular values, and, on the other hand, its dependency, as a viable political order, on its own cultural reproduction.

104. *See* HORWITZ, *supra* note 62, at 29-30; Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657 (1988); Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597 (1987).

This tension, often submerged, was brought to the surface in the early 1980s in one of the most compelling works of American legal scholarship, Robert Cover's *Nomos and Narrative*. It is my contention that *Nomos and Narrative* represents not only a meditation on this tension, but a specific reaction against Frankfurter's unequivocal acceptance of liberalism's demand for cultural reproduction. Cover's repudiation of Frankfurter's assimilationist political philosophy went hand in hand with his rejection of Frankfurter's philosophy of judicial restraint. But before discussing Cover's relationship to Frankfurter, it is necessary to speak of Alexander Bickel, through whom Frankfurter's ideas were transmitted and refined and against whom, I will suggest, Cover directly reacted.

III. BICKEL

Alexander Bickel, law clerk to Justice Frankfurter in 1952-53,[105] appointed to the faculty of the Yale Law School in 1956, offered his first systematic formulation of judicial review in his 1960 Foreword to the Harvard Law Review's widely-read annual review of the Supreme Court's past term.[106] Shortly afterward, Bickel turned this essay, entitled "The Passive Virtues," into the centerpiece of his influential book, *The Least Dangerous Branch*. Together, these two works articulated the "counter-majoritarian difficulty" of judicial review, and extolled the virtues of a non-activist judiciary.

The political context surrounding the issue of judicial review had changed markedly since Frankfurter had formulated his positions in 1940 (*Gobitis*), 1943 (*Barnette*) and 1947 (*McCollum*). World War II had, of course, come to an end even before *McCollum* was decided. The xenophobia of the post-World War I era, in which *Meyer* and *Pierce* had been decided, had given way to the repudiation of Nazism and Fascism during World War II and its aftermath, as *Barnette* seemed to demonstrate. But while nativist sentiment against immigrants waned, and secularization increased,[107] the politics of division flourished in the United States in other forms. By the late 1950s and

105. LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY 415, 479 (1984).

106. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

107. *See Religion and the State*, *supra* note 97, at 1609, 1619; M. MARTY, VARIETIES OF UNBELIEF 69 (1964). *But see* Martin E. Marty, *Religion in American Since Mid-Century*, *in* RELIGION AND AMERICA 273, 276 (Douglas Tipton ed., 1982) (noting surprising tenacity of widespread religious faith).

early 60s, at the time when Bickel was establishing his academic career, the politics of race and racism, along with McCarthyism, had emerged as the major catalysts in discussions both of judicial review and of the socializing function of the public schools.

Bickel's article and book formed part of a larger body of contemporaneous scholarship, in which various legal scholars[108] strove to assimilate the new legacy of the Supreme Court's decision to desegregate the public schools, issued in 1954 in *Brown v. Board of Education*.[109] Although centrally concerned with the meaning of racial equality, *Brown* was also a case about the nature, and legitimacy, of acculturation conducted via the public schools. Both proponents and critics of school integration perceived it as a method of assimilating students into the public culture. Thus, the Supreme Court portrayed the issue in *Brown* as one of social and cultural enfranchisement[110]—of integration into society through the effective transmission of skills and civic values—and characterized the provision of quality education as a "cultural awakening." Conversely but consistently, Black nationalists and separatists criticized the school-integration strategy, both before and after *Brown*, precisely because they perceived that it implied the rejection of a separate black culture, and the promotion of assimilation into the white cultural mainstream.[111] No matter which side one was on, racially segregated public schools had emerged in the late 1950s as the most salient context in which the legitimacy of state-sponsored acculturation was put at issue.

Brown stood at the center of analysis for Frankfurter's several protegés who are widely credited with (or faulted for) promoting his

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108. *See generally* Jan Vetter, *Postwar Legal Scholarship on Judicial Decision Making*, 33 J. LEGAL EDUC. 412 (1983) (discussing, *inter alia*, ALBERT M. SACKS & HENRY HART, THE LEGAL PROCESS (tent. ed., Harvard Univ. 1958); HORWITZ, *supra* note 62, at 247-72 (discussing, *inter alia*, KARL LLEWELLYN, THE COMMON LAW TRADITION (1960); SACKS & HART, *supra*; LEARNED HAND, THE BILL OF RIGHTS (1958); and Herbert Wechsler, *Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)). *See* also Morton J. Horwitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599 (1979); Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981); Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561 (1988). For a discussion of Hand's philosophy of judicial restraint, see GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994).

109. 347 U.S. 483 (1954) and 349 U.S. 294 (1955); *see* Wechsler, *supra* note 108, at 22, 31-34; Bickel, *supra* note 106, at 41, 57, 78-79.

110. This point is developed by Kenneth L. Karst in *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) and *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986).

111. *See, e.g.*, Robert L. Carter, *Reexamining* Brown *Twenty-Five Years Later: Looking Backward Into the Future*, 14 HARV. C.R.-C.L. L. REV. 615 (1979).

philosophy of judicial restraint and setting the tone of American legal scholarship in the 1950s and 60s.[112] Frankfurter's own role in the *Brown* decision disclosed the tension between his separate commitments to assimilation and to judicial restraint, and the ultimate ascendancy for Frankfurter of the former. Frankfurter joined the Court's unanimous holding that segregation violated the constitutional requirement of equality, thus endorsing judicial intervention as he had in *McCollum*. Indeed, in signing onto *Brown v. Board*, Frankfurter embraced one of the most controversially "activist" decisions ever authored by the Supreme Court, despite his general adherence to the philosophy of judicial restraint. Commentators have perceived Frankfurter's ambivalence about assuming such an activist posture in his promotion of the formula, attached to the *Brown* decision, that desegregation be implemented "with all deliberate speed"—a formula designed to slow down the required pace of local compliance.[113]

Frankfurter's promotion of the deliberate speed formula would become a quintessential example of judicial virtue for Bickel, who was serving as Frankfurter's clerk at the time *Brown* was decided.[114] But despite Frankfurter's hesitation to implement desegregation through the courts, Frankfurter not only joined *Brown*; he also, four years later, joined another unanimous decision rejecting attempts to postpone the implementation of school desegregation.[115]

Given Frankfurter's general opposition to judicial intervention, it seems likely that what led him to assume an activist position in *Brown*, as in *McCollum*, was his overriding commitment to the value of assimilationist, integrationist public schools. Frankfurter perceived

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112. *See* MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 2 (1982); BAKER, *supra* note 105, at 415; Alfred S. Konefsky, *Men of Great and Little Faith: Generations of Constitutional Scholars*, 30 BUFF. L. REV. 365 (1981). In 1962, Frankfurter selected Bickel to write his biography—a task that Bickel did not accomplish before his premature death at in 1974. H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 198 (1981).

113. "The bringing of the 'all deliberate speed' formula was the major contribution of Felix Frankfurter to the desegregation process." BAKER, *supra* note 105, at 481.

114. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 244-55 (1962). For an analysis of Bickel's views about *Brown*, including the "all deliberate speed" formula, see ROBERT BURT, THE CONSTITUTION IN CONFLICT 20-25 (1992).

115. Cooper v. Aaron, 358 U.S. 1 (1958). Although, in an unusual act, all nine justices actually *signed* the unanimous decision, Frankfurter also filed his own separate concurring opinion. Notably, in his separate opinion, Frankfurter once again articulated a vision of civic education, in which "educational influences . . . flow from the fruitful exercise of the responsibility" of political officials as well as from citizens "living under the law." *Id.* at 15. The deliberate speed formula was directly rejected by the Supreme Court in Griffin v. County School Board, 377 U.S. 218, 234 (1964), and in Green v. County School Board of New Kent, 391 U.S. 430 (1968). *See* BURT, *supra* note 11, at 152 n.28.

that racial segregation, like religious instruction, thwarts the school's (and the state's) assimilative mission to achieve cultural unity, and leads instead to cultural divisiveness. Joined to a commitment to the value of assimilation, these perceptions would likely motivate a decision in favor of judicial intervention. That such a motivation in fact underlay Frankfurter's endorsement of *Brown* is suggested by the further fact that he failed to support similar activist stances taken by the Warren Court in other civil rights cases that did not involve the public school. (For example, Frankfurter did not sign onto the Warren Court's decision requiring the reapportionment of voting districts to prevent the dilution of the black vote).[116] One of Frankfurter's biographers, H.N. Hirsch, has found further confirmation of the view "that the personal value Frankfurter attached to the importance of public schools as a means of integration into American society contributed significantly to his willingness to agree with the Court's revolutionary decision in *Brown v. Board of Education.*"[117] The evidence adduced by Hirsch consists of a private memorandum, handwritten by Frankfurter while he was considering the case, in which he had copied the following statement from a newspaper article: "If the Negro is to make his due contribution to the commonwealth, he must have the knowledge, the training and the skill which only good schools can vouchsafe." This vision of education as a form of social and civic enfranchisement was subsequently adopted in *Brown*, and it obviously appealed to Frankfurter's own often-expressed idealization of the assimilative and integrative functions of public school.

The *Brown* decision, and Frankfurter's role in it, created an ambiguous legacy for his protegés who assumed the task of propagating his philosophy of judicial restraint. Frankfurter's occasional deviations from a non-activist, deferential judicial posture could have been explained by the underlying consistency of his commitment to the value of liberal assimilation—a value which served both as a justification for judicial intervention, and, in other cases, as a justification for non-judicial state action that threatened individual rights. But such a

116. Baker v. Carr, 369 U.S. 186 (1962). As my colleague, Leonard Long, points out, one might reconcile Frankfurter's rejection of the reapportionment cases with his civil rights stance adopted in *Brown* if one views the reapportionment holdings critically, as having the effect of legitimating or solidifying residential segregation. For the same reason, Frankfurter's decision in this case appears consistent with his pro-assimilationist stance. Another example of a civil rights case from which Frankfurter dissented is Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (exclusion of a "Negro" from a restaurant solely on basis of color was violation of Equal Protection clause).

117. HIRSCH, *supra* note 112, at 195.

commitment to the value of assimilation—at bottom, a particular political philosophy—was not easily reconciled with the basic principle of judicial restraint, which on its face seems to forbid judicial reliance on any political philosophy. Therefore, it is not surprising that Frankfurter's protegés refrained from making the underlying commitment to assimilation explicit, and from explicitly defending the state's interest in assimilation. As a result of avoiding this task, however, they were left with the challenge of trying to reconcile the philosophy of judicial restraint with *Brown*[118] on some other ground, or, alternatively, rejecting either *Brown*'s holding or judicial restraint.

This challenge played a central role in shaping not only Bickel's work, but also that of another prominent contemporary legal scholar, Herbert Wechsler. Wechsler, a professor at Columbia Law School, and Bickel's senior by fifteen years, though not himself a Frankfurter disciple, also assumed the challenge of confronting the tension between the activism of *Brown* and prevailing views about the necessity of judicial restraint.[119] Wechsler's *Neutral Principles* appeared in the Harvard Law Review's Supreme Court issue just two years before the appearance of Bickel's *Passive Virtues*. Wechsler's article became his book, *Principles, Politics and Fundamental Law*,[120] and much of Bickel's Foreword, and his later book, *The Least Dangerous Branch*, replied, directly and implicitly, to this work.[121]

Wechsler's and Bickel's works both display a preoccupation with *Brown*.[122] Taken together, their work can be read as an illustration of some of the tensions in Frankfurter's thought—not only the tension between his commitments to assimilation and to judicial restraint, but also tensions *within* Frankfurter's theory of judicial review. Wechsler gave voice to Frankfurter's search for formal, "plain" or, in Wechsler's famous formulation, "neutral" principles as the only basis upon which to justify judicial adjudications on the substantive merits of a case.

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118. *Cf.* HORWITZ, *supra* note 62, at 247, 253.

119. Wechsler joined the Columbia faculty of law in 1946, and made his reputation as a criminal law scholar in addition to serving as Assistant Attorney General. Sir Leon Radzinowicz, *Herbert Wechsler's Role in the Development of American Criminal Law and Penal Policy*, 69 VA. L. REV. 1, 5-6 (1983).

120. HERBERT WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961).

121. Bickel was also responding to Learned Hand's BILL OF RIGHTS (1958), which had also appeared recently in the Harvard Law Review and also criticized *Brown v. Board.*

122. *See* Wechsler, *supra* note 108, at 22, 26-27, 31-34; Bickel, *supra* note 106, at 40, 48, 50, 57, 78-97. It is interesting to see how central the legal struggle for racial equality, with its emphasis on integration, was to the thinking of American Jews in the period dating from the mid-1950s.

Bickel, by contrast, emphasized Frankfurter's anti-absolutist view of rights and legal principles, and the need for flexible, pragmatic judgments in order to mediate among them. These contrasting emphases led to—or perhaps reflected—their divergent analyses of *Brown*.

Writing first, Wechsler insisted that judgments had to be justifiable in terms of neutral principles—just as Frankfurter had insisted that judicial action could not be justified without absolute principles showing "plain" violations of individual rights.[123] Failing to find any such principle that would justify overturning segregated education, Wechsler concluded that the desegregation cases were wrongly decided.[124]

Bickel disagreed. For him, the fallacy of Wechsler's position lay not in the notion of neutrality, but in the assumption that a court was required to exercise its jurisdiction over a case whenever the technical requirements for establishing jurisdiction were met.[125] As the dialogue between Bickel and Wechsler developed,[126] it became apparent—to Bickel, at least—that the issue was not so much whether a neutral principle could be constructed to justify *Brown*,[127] but rather, whether such a principle would imply the unconstitutionality of other programs, like affirmative action or other forms of "benign" or remedial race discrimination, which, Bickel asserted, one might want to permit, at least for some period of time.[128] Thus, the problem Bickel saw was completely the reverse of the problem perceived by Wechsler. For the latter, desegregation and "benign discrimination" both were illegitimate because they both violated the requirements of neutrality. By contrast, Bickel thought that neutral principles could be constructed to justify *Brown*, but not to justify other programs aimed at remedying racism. The solution he proposed was to recognize jurisdiction in *Brown* and to affirm the constitutionality of desegregation, but to forestall adjudications of benign discrimination programs until the social context was ripe for a determination.

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123. Wechsler's insistence on neutral principles was expressed repeatedly. *See* Wechsler, *supra* note 108, at 15-17, 19-20, 22-27, 29, 31, 34-35.

124. *Id.* at 34.

125. Bickel, *supra* note 106, at 48.

126. *See* WECHSLER, *supra* note 120; *see also* BICKEL, *supra* note 114.

127. BICKEL, *supra* note 114, at 57 ("[T]he principle that a legislative choice in favor of a freedom not to associate is forbidden, when the consequence of such a choice is to place one of the groups of which our society is constituted in a position of permanent, humiliating inferiority . . . [is not] . . . lacking on the score of neutrality . . . .").

128. Bickel made this point in the later book version, not in the original article. *See id.*

Bickel's suggestion that experimentation with benign discrimination ought to be permitted *for a while* (but not necessarily forever) is a perfect example of the contextual, contingent kinds of judgments which his "passive virtues" were supposed to enable. The passive virtues were essentially techniques of argument by which jurisdiction could be avoided, even when it was technically "given." In exercising them, judges were not to use scientific logic, but rather, pragmatic "situation sense" to determine the practical effect of issuing a judgment in a particular social context. If the political situation called for a period of experimentation—for example, with "reverse discrimination"—a judge exercising passive virtue might decide to withhold jurisdiction and, hence, judicial decrees. Thus, a questionable policy could be tolerated until the passage of time permitted a clearer judgment about the merits of the policy to emerge.

As demonstrated above, Bickel and Wechsler represented the two opposing themes contained in Frankfurter's jurisprudence of judging—Wechsler, the formalist theme of the search for "plain" violations of formal principles, Bickel, the anti-formalist theme of pragmatic, contextual judgment. Yet Bickel's pragmatism paradoxically presupposes the same dichotomy between (neutral) law and (pragmatic) politics that Wechsler's formalism exhibits more obviously. Even though the passive virtues involve applying practical reason at the level of deciding jurisdiction, their ultimate purpose is to decouple pragmatic judgments from judicial decisions on the *merits* of a legal controversy. For Bickel, after all, judicial passivity is virtuous—the judge ought to defer—when questions do not lend themselves to resolution by abstract principle, but are better left to expedient, political adjustments. The underlying premise of this view is that the office of the judge is to apply principle, whereas the office of the political branches is to engage in pragmatic, situated judgment.

That Bickel held this view, despite his apparent endorsement of judicial pragmatism, becomes more evident when we compare his version of judicial pragmatism to that of contemporary legal scholars laying claim to the philosophical traditions of American pragmatism and classical "civic republican" political thought. These scholars, including Frank Michelman, Cass Sunstein, Margaret Jane Radin, and Catharine Wells[129] have articulated a vision of law and politics that softens the

129. *See* Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Radin & Michelman, *supra* note 21; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Symposium, *supra* note 21;

distinction between the two by understanding both as forms of situated, practical reason. Anthony Kronman's exposition of Bickel's thought makes evident the similarities between Bickel and these contemporary republican/pragmatists,[130] although Kronman himself does not draw the comparison. His analysis also reveals the extent to which Bickel—unlike today's proponents of practical reason, but like Frankfurter and Wechsler—maintained a belief in formalist constraints on judging.

As Kronman describes it, Bickel's "philosophy of prudence" is at first glance remarkably similar to the current republican-pragmatist view—save for views about judicial "activism." According to Kronman, "[t]he distinction between prudence and its opposite—an abstracted indifference to the intransigent complexities of the world—provides the unifying theme in all of Bickel's work and represents the core of his philosophy."[131] The same could be said of the work of today's republican/pragmatists. Like Bickel, they subscribe to a belief in "prudence as a political and judicial virtue."[132] Like Bickel, they do not believe that this implies that "either law or politics [is] unprincipled."[133] Indeed, for Bickel, as for today's republican/pragmatists, prudence or practical reason is the "pre-eminent judicial virtue," and "abstraction . . . its correlative vice."[134]

Yet today's republican/pragmatist profoundly disagrees with Bickel on the matter of judicial activism—and none claims him as an antecedent for her pragmatic view of rights and law. The crux of the disagreement is that Bickel fiercely opposed judicial activism, which he associated with the Warren Court, notwithstanding his early attempt to justify that Court's most notoriously activist decision, *Brown v. Board of Education*.[135] By contrast, Michelman, Radin, Sunstein et al. embrace the Warren Court and the active judicial role it has come to connote. They view the absence of neutral principles, and the more general intellectual defeat of formalism as arguments

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Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); Catharine Pierce Wells, *Tort Law As Corrective Justice: A Pragmatic Justification For Jury Adjudication*, 88 MICH. L. REV. 2348 (1990); *see also* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991).

130. Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

131. *Id.* at 1573.

132. *Id.* at 1569.

133. *Id.*

134. *Id.* at 1590.

135. *See* ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT 3-45 (1955).

for judicial intervention (in some cases). For Bickel, by contrast, the absence of neutral principles generally counsels leaving legal issues to the resolution of the political branches.

This difference between Bickel and today's judicial pragmatists reflects the fact that, despite his basic skepticism and pragmatism about rights, Bickel retained a belief in non-particularist "principle," as opposed to prudence, as the special office of the judge. Although the passive virtues were themselves conceived to be political and pragmatic—and judicial—they were designed with the ultimate end of decoupling the judicial function from particularism (even though they require particularist judicial judgments at the stage of deciding whether or not to hear a case). Judicial pragmatism might be legitimate, perhaps even necessary, at the level of making jurisdictional decisions, but not at the level of deciding the merits of a case. Thus, Bickel clung to a formalist conception of proper judicial review.

In drawing this duality between jurisdictional decisions and substantive decisions on the merits, Bickel adhered to Frankfurter's vision of courts pragmatically deferring to the political branches, except in cases of "plain" violations of "absolute" principles or rights.[136] Indeed, Bickel is widely known for not only following, but promoting Frankfurter's judicial philosophy. Less frequently noted is that Bickel and Frankfurter also shared a common political philosophy, a philosophy of liberal assimilation, that implicitly motivated the construction of their common philosophy of judicial review. To put the point more specifically, Bickel, like Frankfurter, was implicitly motivated by his positive assessment of the assimilative, integrative function of the public school. Despite his later misgivings about *Brown*, despite the "counter-majoritarian difficulty" that the case so obviously posed, the passive virtues served Bickel in the first place as a means for justifying *Brown*'s desegregation order. The context had changed since the courts had first addressed the issue of judicial intervention in the schools, with the political question of the "Negro" displacing challenges posed by foreign-born immigrants and native-born religious dissenters. But notwithstanding this shift in social context, the question was still one about cultural difference and integration. And the basic cultural mission ascribed to the schools by Bickel and Frankfurter remained the same: to integrate and unify the diverse subcommunities of the nation.

136. See description of Frankfurter's jurisprudence, *supra* text accompanying notes 31 to 64.

Whether Bickel arrived at this view because of his personal experiences as a Jew is impossible to prove. Unlike Frankfurter's life story, which is the subject of countless books, Bickel's biography remains largely unwritten.[137] What is known is that, like Frankfurter, Bickel was an enthusiastic product of Americanization through the public schools. Like Frankfurter, Alexander Bickel immigrated to the United States with his family as a young boy. Bickel was fourteen when he arrived in the United States from Romania, and, again like Frankfurter, he rapidly acquired unaccented English—a fact that was widely repeated about both men. They both received their law degrees from Harvard, and both married non-Jewish women (in Bickel's case, two, the first marriage lasting only six weeks.) For both men, marriage outside the faith created strains with their respective families. Of course, there were also differences between the two. Bickel came to America in 1939, on the eve of the second world war, and the Europe his family fled was already under Hitler's shadow. By contrast, Frankfurter's family's emigration from Vienna in 1894 occurred at the tail end of a wave of German-Jewish immigration to America that preceded the massive influx to America of Eastern European Jews. More so than the later Eastern European arrivals, the German-Jews generally were noted for their "astonishingly rapid acculturation."[138] As part of this original German wave, Frankfurter's arrival predated the surge of American anti-Jewish and anti-foreign sentiment that was to manifest itself in the immigration acts of the 1920s and the university quotas of the same period. Thus, Frankfurter grew to adulthood and was received into such institutions as Harvard well before they instituted the anti-Jewish policies that he was to fight against as an adult.

If the America of 1894 was different from the America of the 1920s and the 1930s, so too were the European Jews of 1894 different from those, like Bickel's family, who arrived in 1939. Although

137. Robert Burt's most recent book, THE CONSTITUTION IN CONFLICT (1992), credits Bickel with a central role in crystallizing the constitutional thought of his generation, but provides little in the way of biographical detail. Horwitz's recent history of American legal thought discusses Bickel not at all. The biographical data provided in the text is drawn from the *Who's Who in American Law*; the memorial service for Bickel held at the Yale Law School and published under the title, ALEXANDER MORDECAI BICKEL: 1924-74 (1974); and from phone interviews with Ann Standley, whose doctoral dissertation, in progress, is a dual biography of Bickel and Black.

138. GOREN, THE AMERICAN JEWS 30 (1982).

Frankfurter and Bickel both grew up in families that were more traditional than they themselves would later prove to be, only Frankfurter's family was religiously observant, whereas Bickel's family is recalled as being secularly Jewish.[139] Bickel's father was a lawyer in Romania, and his mother received an advanced degree in linguistics, which indicated that even before they left Europe, the family had moved well beyond the cultural confines of the traditional Jewish communities of Europe, typified by the *shtetl.* Indeed, one might speculate that the family's lifestyle was in some ways more insular in the States than it had been in Romania. In New York City, Bickel's father found new employment as a writer for the secular Yiddish press, and regularly hosted a socialist Zionist salon. This secular Jewish familial environment constituted the formative milieu of Bickel's teenage years. Following high school, in the early 1940s, he attended the City College of New York, an institution responsible over the decades for furthering the Americanization process for countless Jewish and non-Jewish immigrants. Unlike Harvard, which served a somewhat similar function for Frankfurter, City College in the 1940s constituted a heavily Jewish milieu, even as it functioned to assimilate its clientele.[140] The result was a distinctively Jewish, yet secularized, assimilated and Americanized culture. As for life after college, Bickel credited his service in the military as the major force in eradicating the vestiges of a parochial and particularistic (but never, for him, essentially religious) Jewish identity.

In the end, Bickel, like Frankfurter, lived his public life as a law professor who "happened to be a Jew," neither denying nor brandishing his Jewish identity. Indeed, Bickel's work suggests that for him the professional relevance of his Jewishness was even more minor and incidental than it was for Frankfurter. Unlike Frankfurter, Bickel revealed no need to preface his endorsement of the philosophy of judicial self-restraint with an avowal of his identity and membership in a persecuted minority. Indeed, even when Bickel intended to publicly affirm his Jewish identity, his actions suppressed any particularistic Jewish content, as the following anecdote may serve to illustrate.

Alexander Bickel died in 1974 at the age of forty-nine. At his Yale memorial service, Abraham Goldstein, then dean of the law school, began by telling the assembled mourners that "[s]hortly before

139. *See* ALEXANDER MORDECAI BICKEL: 1924-74, *supra* note 137.

140. Herbert Wechsler also graduated from City College, but in 1928, many years before Bickel attended.

his death, Alex asked me to describe, at this service, what it meant to him to be a Jew."[141] Goldstein went on to recount Bickel's childhood in Romania, his first languages—Yiddish, German, Romanian and Hebrew—his childhood background in *yiddishkeit* and in the labor Zionist movement. Notwithstanding his observation that Bickel's maternal grandparents were traditionally observant Jews, Goldstein emphasized that "Alex Bickel was not a man of religion," and that his parents were "loyal, in secular rather than religious fashion, to Jewish identity and the Jewish heritage." Other familiar badges of American Jewish secular identity were adduced as part of Bickel's early life experiences—his immigration to the United States at the age of fourteen, and his rapid adoption of a "fluent, graceful, unaccented English"; his father's Socialism; and his own attendance at the City College of New York.[142] In a similar vein, the next speaker, Gilbert Harrison, editor of *The New Republic*, noted Bickel's father's career in Yiddish journalism in the United States, and then noted that the younger Bickel (following his professional *pater*, Felix Frankfurter) regularly contributed "articles, reviews and unsigned notes" to *The New Republic*.[143] Harrison's next observation is perhaps the most telling. Harrison recalled,

> When our collaboration began and we were new to each other, I one day dropped the middle initial from his name on the magazine's cover in order to save space. Alex made sure it happened only once. Symbols were not expendable, one's heritage was not expendable, M for Mordecai was not expendable.[144]

Here in a nutshell is the paradox of assimilation. Bickel was, according to Harrison, fiercely proud of his Jewish "heritage," symbolized for him by the "M for Mordecai," his Hebrew middle name. Thus, Harrison relates Bickel's insistence on publishing under his middle initial as a story of Jewish identification, self-assertion and pride. Yet the bare initial, M, shorn of the rest of the letters of Bickel's middle name, would never have actually revealed itself as a Jewish name, would in fact *not* serve to symbolize Bickel's Jewish heritage to anyone other than himself, or the few of his intimate associates who already knew what the letter M stood for. The bare M thus seems as much an erasure as an assertion of Jewish identity.

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141. ALEXANDER MORDECAI BICKEL: 1924-74 1 (1974).

142. *Id.* at 1-2.

143. *Id.* at 3.

144. *Id.*

But if the aggressiveness with which Bickel defended the naked letter M to Harrison seems puzzling, it is a perfect example of the kind of enduring tie to tradition, or nostalgia that often embellishes assimilated Jewish identity. In a somewhat similar vein, Dean Goldstein characterized Bickel's Burkean belief in the value of tradition as a secularized Jewish trait.[145] Regardless of the validity of this perhaps strained attempt to find some latent attachment in Bickel's work to Jewish values, one thing Bickel's mourners and contemporaries clearly could *not* find in his work were any *overt* references to Jewish tradition or identity. In this, as in so many other respects, Bickel may be seen as the apotheosis of Felix Frankfurter, the assimilated Jew who strove never to permit parochial or personal attachments to undermine universal standards of judgment, or the cosmopolitan cultural ideal itself.

In this same respect, Bickel also serves as a foil to Robert Cover, his colleague for an all too brief time. Cover, who joined the Yale law faculty in 1972,[146] a mere two years before Bickel died, saturated his later writings in references to traditional Jewish law and learning.[147] How Cover's explicit immersion in Jewish sources relates to his rejection of Bickel's and Frankfurter's views about judicial deference is the subject of the following section.

IV. COVER

We have seen that in their personal and professional lives both Frankfurter and Bickel increasingly distanced themselves from the way of life of traditional Judaism. As members of the academic and (in Frankfurter's case) judicial elite, they adopted universalistic standards and cosmopolitan allegiances in place of particularistic ones. We have also seen that, despite their shared pragmatic conception of law, both Frankfurter and Bickel ultimately adhered to the view that pragmatic or particularistic judgments were not the proper office of the judiciary. On the contrary, it was precisely their pragmatic conception of rights that spurred them both generally to support judicial

145. *See id.* at 2 ("Alex was Jewish in his respect for tradition while welcoming the test of change; in believing that one must strive always to make people achieve the best that is in them; and in his reverence for his people's tragic history.").

146. Cover studied law, and began his teaching career in 1968 at Columbia Law School, where Herbert Wechsler taught.

147. For a brilliant analysis of Cover's use of Jewish sources, see Suzanne L. Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary Legal Theory*, 106 HARV. L. REV. 813, 822-87 (1993).

deference to the political branches. If Bickel justified the making of contextualized, particularistic judgments by judges, he did so only with respect to jurisdictional decisions, the ultimate aim of which was to decouple particularism from judicial decisions on the merits.

By contrast, recent legal scholarship has argued against decoupling particularism and contextualism from the judicial application of the law.[148] Among the first, and most forceful (albeit ambivalent) espousals of this position was Robert Cover's 1982 Harvard Law Review Supreme Court Foreword, *Nomos and Narrative*.[149] Since its publication, numerous legal scholars have adopted its critique of universalism.[150] Interestingly, among the adherents of Cover's critique are some of the contemporary followers of pragmatism and civic republicanism, discussed above in relation to the views of Alexander Bickel.[151] One might have thought that these contemporary republican/pragmatists would turn to Bickel as their natural forbear, insofar as he, perhaps more than any other American legal scholar, exemplifies the commitment to the virtue of practical reason or "prudence," as opposed to abstract reasoning. But Bickel has not been invoked as a model for pragmatism in this work. Instead, Cover has more often served as an inspiration. That Cover, rather than Bickel, is favored as a muse is perhaps a reflection of the fact that Cover's understanding of the virtue of particularism is quite different from Bickel's understanding, and is, moreover, intimately related to Cover's critique of Bickel's conception of judicial deference.[152]

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148. *See supra* text accompanying notes 129-34.

149. *See supra* note 10.

150. *See, e.g.*, Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Judith Resnik, *Dependent Sovereigns*, U. CHI. L. REV. 671 (1989); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989).

151. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1502 (1988); Radin & Michelman, *supra* note 21, at 1037-38.

152. "Muse" may be something of an overstatement. Not all legal scholars writing in the pragmatist and republican traditions invoke Cover. (The USC Symposium on Pragmatism, for example, reveals no references to Cover's work.) *See Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990). Besides the fact that writers in these traditions draw on many other sources of intellectual inspiration, Cover himself was not only a source of influence but also a product of intellectual currents, reflecting the same developments in other disciplines that influenced these writers directly. Still, one senses from numerous direct and indirect tributes the powerful influence that continues to emanate from Cover's work. In addition to the American traditions of pragmatism in philosophy, and civil republicanism in Western political philosophy, feminist theory has also served as a foundation for contemporary pragmatic critiques of legal formalism. The legal realist movement is, of course, an important precursor to the contemporary absorption of pragmatism in legal theory. *See* Catharine Wells

It is my contention that Cover's understanding of the value of particularism, in and out of the courts, not only differed from Bickel's position, but was in fact a direct reaction against it. Bickel's "passive virtues" are reconfigured in Cover's critique as the "imperial" ones of the modern nation-state, which encompasses and reigns over competing subgroups. Reading Cover's "imperial virtues" as a gloss on Bickel's passive virtues is not the most obvious interpretation of *Nomos and Narrative.* After all, *Nomos and Narrative* initially defines the imperial virtues as substantive principles of justice, rather than as criteria to guide the exercise of judicial jurisdiction. According to this initial definition, the imperial virtues are "[t]he universalist virtues that we have come to identify with modern liberalism, the broad principles of our law . . . ."[153] These universalist principles are "imperial," according to Cover, because they preside over numerous cultural entities, each with their own collective narratives, norms and laws. The *raison d'etre* of the imperial virtues is nothing other than "the need to ensure the *coexistence*" of these diverse cultural entities.[154] Simply put, the imperial values are the ground rules according to which disputes between different groups are mediated, and through which the "*coexistence* of worlds of strong normative meaning"[155] is ensured. Universalist principles are hence imperial in a double sense. Quite literally, they play the role of "umpiring" disputes between different cultural groups. And, in a more political (and pejorative) sense, they constitute the rules of an "empire," i.e., an overarching political regime, in which diverse political entities are subordinated and contained.

So defined, Cover's imperial values might seem to bear a closer affinity to Wechsler's neutral principles than to Bickel's passive virtues of jurisdiction. They appear to be substantive rules applied to the merits of disputes, rather than procedural rules used to decide when jurisdiction over a dispute will be assumed. Not until fifty pages into *Nomos and Narrative* does Cover begin to address the issue of jurisdiction. A few pages later, he refers directly to Bickel's *Least Dangerous Branch* in a footnote,[156] but even here, Cover explicitly distances

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Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 Nw. U. L. Rev. 541 (1988).

153. Cover, *supra* note 10, at 12.

154. *Id.*

155. *Id.*

156. *Id.* at 53. The first reference to Bickel appears in footnote 46, in which Cover approvingly notes that Bickel, in The Least Dangerous Branch, saw a similarity between Lincoln's resistance to the *Dred Scott* decision and popular resistance to *Brown v. Board.*

himself from interest in the "countermajoritarian difficulty," the central topic of Bickel's work.[157] Yet a careful reading of this section, suggestively subtitled "Jurisdiction as the Secondary Text," reveals that both the substance and the vocabulary of *Nomos and Narrative* respond directly to Bickel's *Passive Virtues*.

Like Bickel's *Passive Virtues*, Cover's *Nomos and Narrative* was published as the prestigious "Foreword" to the Harvard Law Review's widely read Supreme Court issue. (Wechsler's *Neutral Principles*, first delivered as the Oliver Wendell Holmes Lecture at the Harvard Law School, also appeared in Harvard Law Review's Supreme Court issue, but not as the Foreword.) Obviously, the legal and political landscape had changed in the more than twenty years since Bickel's and Wechsler's articles had appeared. Whereas their work was dominated by the seemingly black and white issue of racial segregation highlighted in *Brown v. Board*, Cover's foreword focused on a more complex intertwining of racial and religious minority positions, epitomized in the 1982 case of *Bob Jones University*.[158]

As described by Cover, *Bob Jones University* involved a predominantly white religious institution—a Christian fundamentalist university—which "attempt[ed] to establish itself as a normative community entitled to protection against statist encroachment."[159] The background to the case was the IRS's decision to withdraw Bob Jones's tax-exempt status—otherwise available to private colleges[160]—because the school prohibited its students from engaging in "interracial dating, interracial marriage, the espousal of violation of these

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157. Cover writes:

> I do not mean to belittle the fundamental conundrum at the heart of the countermajoritarian difficulty. Admittedly, insofar as administration has a secure base in the legitimating factor of popular government, the veto exercised on the basis of constitutional principle by an unelected judge presents an insoluble confrontation between principle and process. But it is difficult to ignore the fact that the tie between administration and coercive violence is always present, while the relation between administration and popular politics may vary between close identity and the most attenuated of delegations.

Cover, *supra* note 10, at 57. Also cited in this footnote are: James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1983); Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); HAND, *supra* note 108; and Wechsler, *supra* note 108.

158. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

159. Cover, *supra* note 10, at 62.

160. "Corporations . . . organized and operated exclusively for religious, charitable, or educational purposes" are generally exempt from the federal income tax. 26 U.S.C. § 501(c)(3) (1993).

prohibitions, and membership in groups that advocate interracial marriage."[161] The University claimed that this denial of tax-exempt status interfered with its constitutional right to the free exercise of religion. Or, as Cover put it, the University "claimed for itself a nomic insularity that would protect it from general public law prohibiting racial discrimination."[162] The case thus raised the question of whether a religious community is entitled to be exempt from official anti-discrimination policies.

Cover's analysis of the case forms the culmination of his more general discussion of jurisdiction, and thus makes clear the centrality to his article of the jurisdictional issues so dear to Bickel and Frankfurter. The jurisdictional doctrines, described by Bickel as "passive virtues," turn out to be an important subset—if not the paradigmatic case—of the imperial virtues, despite their initial resemblance to Wechsler's substantive principle of neutrality.

But as Cover understands them, and as he describes their operation in *Bob Jones University*, the doctrines governing the exercise of jurisdiction are anything but passive. They are, on the contrary, "apologies for the state itself and for its violence," disguised as non-substantive judgments.[163] The hidden violence and "imperialism" that Cover sees lying behind the doctrines of jurisdiction and deference cannot be understood without reference to Cover's notion of what it is that constitutes the opposite of imperialism. Cover contrasted the imperial virtues to those of a "*paideia*,"—a tight-knit, culturally-specific community, constituted by its collective norms and historical narratives.[164] If the imperial values are the universalistic principles designed to transcend cultural differences, paideic values by contrast reflect the particularistic "[i]nterpersonal commitments [that] are characterized by reciprocal acknowledgement" and "the recognition that individuals have particular needs and strong obligations to render person-specific responses."[165] They are, in short, "culture-specific designs of particularist meaning."[166]

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161. Cover, *supra* note 10, at 62.

162. *Id.*

163. *Id.* at 54.

164. Cover further elaborated the concept of a *paideia* as a "normative corpus, common ritual, and strong interpersonal obligations that together form the basis of such a paideic legal order . . . ." *Id.* at 14.

165. *Id.* at 13.

166. *Id.* at 12.

Underlying Cover's view that universalist values are imperialistic was his belief that a *paideia* is a *legal* order[167] as much as a cultural one, and that the paideic values are, by the same token, legal values—in effect, laws. The basis for this belief was Cover's view of law as nothing other than what it is interpreted to be. To this Cover added the proposition that interpretations of the law are generated by—and constitutive of—diverse, particularistic cultural communities; as a result, there are many different valid visions of the law. Cover was obviously leaning here towards a position of legal anarchism and cultural relativism,[168] but his concern was not to defend relativism as a philosophical position but, rather, to deny the privileged status of official judicial interpretations of the law. Cover condemned official judicial interpretations for being "jurispathic"—i.e., stifling the creation of law—because they put the coercive power of the state behind one and only one interpretation of the law and, thereby, deny recognition to all "[t]hose who would offer a law different from that of the state . . . ."[169] The vice of "jurispathy," coined by Cover, thus consists of the act of extinguishing the multiple visions (interpretations) of the law generated by diverse (and ever-multiplying) subcommunities. Because jurispathy is the characteristic result of official judicial lawmaking, assuming jurisdiction is itself an "imperial" act through which the law of the empire is asserted over the competing "laws" of the subcultures.

The most striking conclusion of Cover's analysis is that even the jurisdictional doctrines of deference (i.e., decisions *not* to assume jurisdiction) serve this imperialist function. Indeed, according to Cover, the act of denying jurisdiction may be doubly insidious because it involves *concealing* the exercise of jurispathic imperial power at the same time as it involves the exercise of that power itself. Deferring to the political branches—the classic solution to the "countermajoritarian difficulty"—is jurispathic because it involves a judicial commitment to the state's view of law over that of the subgroup opposing the state. The court is not just deferring to any party, it is preferring one of the contestants—the state—over its opponent. The act of jurispathy—preferring one vision of law over another—is covert in this case because instead of articulating and defending the state's vision of law on the merits, the court adopts the passive posture of avoiding judgment on the merits. In sum, Cover concludes: "The

167. *Id.* at 16-17.
168. *Accord* Stone, *supra* note 147.
169. Cover, *supra* note 10, at 49.

jurisdictional principles of deference are problematic precisely because, as currently articulated by the Supreme Court, they align the interpretive acts of judges with the acts and interests of those who control the means of violence."[170] This is Cover's central criticism of the philosophy of judicial deference. His positive prescription for the judicial role is, accordingly, an activist one, but the language in which he describes the activist role is a startling subversion of the conventional conceptions of judicial activism and passivity. According to Cover, the more that judges use their interpretive acts to oppose the violence of the governors, the more nearly do they approximate a "least dangerous branch" with neither sword nor purse, and the less clearly are they bound up in the violent suppression of law.[171] In other words, judicial *activism*—intervening "to oppose the violence of the governors"—is the judiciary's "least dangerous" posture.

Notwithstanding his stated disinterest in Bickel's "counter-majoritarian difficulty,"[172] Cover's reliance on the phrase, "the least dangerous branch"—Bickel's most famous title—clearly reveals that Cover was in fact directly responding to Bickel (and derivatively, to Frankfurter). Frankfurter, Bickel and Cover were looking at the same issues. Yet where Bickel and Frankfurter saw judicial restraint and passivity, Cover saw "violence." Where they saw withdrawal, Cover saw subterfuge. Where they saw deference, he saw "commitment"—against particularistic subcommunities and to statism, to violence and the state.

In light of Cover's manifest concern for the fate of particularistic subcommunities, it is not surprising that he, like Bickel and Frankfurter before him, soon linked the seemingly non-substantive issue of jurisdiction to the particular issue of state control over education. For Cover, the imperial virtues were "exemplified in the Court's treatment of competing claims concerning the education of children and youth."[173] Accordingly, the text of *Nomos and Narrative* moves quickly from the section on "Jurisdiction as the Secondary Text" to a new section entitled "The Imperial Virtues," which focuses entirely on conflicts over education. It is in this concluding section of *Nomos and Narrative* that the discussion of *Bob Jones University* is contained, and

170. *Id.* at 57.
171. *Id.*
172. *Id.*
173. *Id.* at 60.

used to illustrate the inferiority of judgments that rely on jurisdictional canons rather than on overt substantive judgments on the merits. What is of most interest, with regard to establishing Cover's implicit dialogue with Frankfurter and Bickel, is that Cover prefaces his discussion of *Bob Jones* with an analysis of the flag salute cases, the school prayer cases,[174] *Pierce v. Society of Sisters*,[175] and *Meyer v. Nebraska*.[176] Thus, his segue from the vice of judicial deference to the virtue of judicial review consists largely of the very same cases that Frankfurter used as a vehicle for laying down the twin principles of cultural unity and judicial deference.

The central lesson of the education cases, according to Cover, is that "[t]he public curriculum is an embarrassment, for it stands the state at the heart of the paideic enterprise . . . ."[177] In this, Cover disagreed with Frankfurter normatively, but not descriptively. Frankfurter himself had stated in *Gobitis* that the public school is one of "those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization."[178] In short, Cover and Frankfurter agreed that the public schools are dedicated to serve the functions of cultural integration and assimilation. Cover only disagreed with Frankfurter's judgment that this function was unequivocally good.[179] On the contrary, for Cover, it was an "embarrassment" for constitutional law because such a paideic function seems to contradict the state's "claim to authority for its formal umpiring between visions of the good . . . ."[180] That is, it seems to contradict the state's claim to cultural transcendence or value-neutrality.

Thus, Cover, like Bickel and Frankfurter before him, clustered the substantive issue of control over education together with the procedural issue of jurisdiction. This common bundling of issues lends further support to the view that Cover was reacting directly against Frankfurter and Bickel and their shared conception of the judiciary as

174. Interestingly, Cover does not refer to McCollum v. Board of Education, 333 U.S. 203 (1948), the case in which Frankfurter supported judicial intervention to prevent religious instruction from occurring in the public schools. Instead, Cover refers to the later school prayer cases, School Dist. v. Schempp, 374 U.S. 203 (1963) and Engel v. Vitale, 370 U.S. 421 (1962).

175. 268 U.S. 510 (1925).

176. 262 U.S. 390 (1923).

177. Cover, *supra* note 10, at 61.

178. *Gobitis*, 310 U.S. at 596.

179. Cover, *supra* note 10, at 61.

180. *Id.*

the "least dangerous branch." It also confirms the suggestion that the two positions on judicial activism—Frankfurter and Bickel's anti-activist view and Cover's critique of judicial deference—were connected, on a deep level, to differing views about the assimilative function of education. For Bickel and Frankfurter, the promise of "the least dangerous branch" was generally violated by judicial activism, and judicial interference with the public curriculum was accordingly condemned—*except* when, as in *Brown v. Board* and *McCollum*, judicial interference was required to *enforce* the assimilative function of the public school. These exceptions proved the rule that the state was to inculcate the values of a liberal democratic culture—a cultural-regulatory mission that ranked even higher than the expressed commitment to a generally passive judiciary. But if judicial restraint took a backseat to the value of cultural assimilation in these cases, that was only because these were the rare sorts of cases in which the two values clashed. In general, in the joint view of Frankfurter and Bickel, judicial restraint was instrumental to the state's cultural-regulatory mission. Moreover, both principles—judicial restraint and state-sponsored value-laden education—reflected and were justified by a common set of ends. The values of a liberal democracy, as Frankfurter had said, needed to be "ingrained," and both public education and judicial restraint were means toward achieving that end. Thus, Frankfurter and Bickel justified the project of state-sponsored assimilation.

Cover's position is not so much diametrically, as dialectically opposed to this view, as his equivocations about the *Bob Jones University* case suggest. Somewhat astonishingly (given Cover's liberal politics, in particular, his active participation in the civil rights movement of the 1960s and his unending dedication to the causes of racial and economic justice),[181] Cover criticized the Supreme Court's decision to let stand the IRS's policy of denying tax-exempt status to a racist university. The ostensible failure of the Court identified by Cover was not that it upheld the IRS decision, but rather, that it ducked the substantive issue of the legitimacy of racial discrimination

181. *See* Joseph Lukinsky & Robert Abramson, *Robert Cover: A Jewish Life*, XLV Conservative Judaism 4, 5 (1993) ("Cover was a leader in the struggle for the rights of Yale employees, in the protest at Yale against South African apartheid, and in many other efforts on behalf of civil rights and justice. During his years as a Princeton undergraduate he was a member of the Student Non-violent Coordinating Committee (SNCC) civil rights project in Albany, Georgia, working on voter registration and aid to black farmers and sharecroppers, risking his life and spending three weeks in jail.").

by religious groups in favor of a "quintessential gesture to the jurisdictional canons: the statement that an exercise of political authority was not unconstitutional."[182] With this line of argument, Cover completely subverted the Frankfurter-Bickel axiom that a finding of constitutionality is not tantamount to a judgment of approval on the merits. To Cover, such a finding was not an act of restraint, but rather, an act of "commitment" that combined the two sins of committing the coercive power of the state against a cultural subcommunity, and denying responsibility for doing just that.

Behind Cover's critique of the doctrines of judicial deference lay a developed, albeit ambivalent position about the inappropriateness of state-sponsored cultural assimilation. One might profitably label Cover's position as one of "dissimilation," to borrow a term first applied to an earlier generation of assimilated Jewish intellectuals. As defined by the historian Shulamit Volkov,[183] dissimilation is not so much the opposite as it is the counterpart to assimilation.[184] It consists of "the reupholding of Jewish identity" by those who appeared to have abandoned traditional Jewish life.[185] It is a process of self-consciously recoiling from assimilation—or "reaching the limits of assimilation and promptly halting at the brink," and then, as Volkov describes the process, turning "back and inward, seeking a new definition for one's identity, and often also a new self-respect."[186]

The process of dissimilation described by Volkov was exemplified by the generation of German Jewish intellectuals from the Weimar period who confronted the tension between the universalistic culture of liberalism, into which they were themselves raised or initiated, and the particularism of traditional Jewish life. The process of "dissimilation" for them involved a return to a Jewish tradition that they had never directly participated in. Unlike their parents, they did not seek either to repudiate or to rationalize Judaism, or to reconcile it with the dominant Western culture of catholicity and universalism. Instead, they steeped themselves in Judaism's particularity. Yet dissimilation did not constitute a simple return to traditionalism. In the process of

182. Cover, *supra* note 10, at 66.

183. Volkov credits the historian, Professor Saul Friedlander, with bringing the term "dissimilation" to her attention. Shulamit Volkov, *The Dynamics of Dissimilation: Ostjuden and German Jews*, *in* THE JEWISH RESPONSE TO GERMAN CULTURE 196 n.2 (Reinharz & Schatzberg eds., 1985).

184. *Id.* at 195-96.

185. *Id.* at 197.

186. *Id.* at 211.

engaging the classical sources of the Jewish tradition, this generation of German Jewish intellectuals substantially *reformulated* the tradition. For example, Gershom Scholem, the most widely-known member of this group, combined voracious study of a body of esoteric religious sources—the neglected texts of Jewish mysticism—with unprecedented scholarly rigor. He displayed a powerful desire, typical of the "dissimilationist" intellectuals, to leave the assimilated world of his parents for the ancestral homeland of Zion—but without surrendering a critical, and at times harsh, analysis of the chauvinistic features of nationalism.

There are striking similarities between Scholem's and Cover's thought that warrant extending the "dissimilationist" characterization to the latter as well as the former, though their life experiences differed in important respects. Like Scholem, Cover rejected the implicit assimilationism of liberal principles, and turned in his academic work to the study of classical Jewish sources. (*Nomos and Narrative* is suffused with references to such sources.)[187] Also like Scholem, Cover challenged and substantially reformulated the received view of normative Judaism.[188] Moreover, like Scholem, Cover continued to adhere to such liberal values as individual autonomy, opposition to prejudice and chauvinism, and the pursuit of civic peace. And just as Scholem objected to the very notion of a "normative" Judaism, Cover held a view of groups and group culture that was dynamic and dialectical. Both men resisted the sorts of essentialist claims about group identity that lie at the heart of the more romantic forms of communitarianism, with which Cover's thought is mistakenly confused.[189] Like Scholem, Cover saw profound divisions emergent in every culture, including Jewish culture. Even the basic conflict between particularism and universalism, which conventionally divides traditional Judaism from its Western critics, Cover reinscribed *within* the Jewish tradition. Thus, in introducing the notion of the imperial virtues, his first illustration was not Anglo-American or European, but rather, the great sixteenth-century Jewish jurist and mystic, Joseph Caro. Cover provided his own idiosyncratic translation of Caro:

> Rabbi Simeon ben Gamliel taught that even though the temple no longer existed and we no longer have its worship service and even though the yoke of our exile prevents us from engaging in Torah

187. *See* Stone, *supra* note 147, at 822-87.

188. *Id.*

189. *See, e.g.*, Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985).

> [study of divine law and instruction] and good deeds to the extent desirable, nonetheless the [normative] universe continues to exist by virtue of these three other things [justice, truth and peace] which are similar to the first three. For there is a difference between the [force needed for the] preservation of that which already exists and the [force needed for the] initial realization of that which had not earlier existed at all.[190]

Continuing in his own words, Cover explained:

> Caro's insight is important. The universalist virtues that we have come to identify with modern liberalism, the broad principles of our law, are essentially system-maintaining "weak" forces. They are virtues that are justified by the need to ensure the *coexistence* of worlds of strong normative meaning. The systems of normative life that they maintain are the products of "strong" forces: culture-specific designs of particularist meaning. These "strong" forces—for Caro, "Torah, worship, and deeds of kindness"—*create* the normative worlds in which law is predominantly a system of meaning rather than an imposition of force.[191]

Cover's imputation of universal, liberal values to a Jewish source is an example of the same kind of dialectical synthesis between Western universalism and communal particularism that Volkov's dissimilated Weimar intellectuals displayed. Cover in effect turned the conventional opposition between universalism and particularism on its head. There has been a long tradition of correlating the distinction between universalism and particularism with the fundamental cultural divide between "Athens and Jerusalem." Many intellectuals (including Jewish ones, such as Leo Strauss) have portrayed Jewish particularism as a lower level of morality than Western universalism.[192] Cover brilliantly subverted the conventional dichotomy between Athens and Jerusalem by associating universalism with the Hebrew (Caro) and particularism with the Greek (*paideia* being a Greek term).[193]

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190. Cover, *supra* note 10, at 12 (brackets in the original).

191. *Id.*

192. LEO STRAUSS, JERUSALEM AND ATHENS (1967).

193. Along the same lines, Stone, *supra* note 147, at 832, notes that the title *Nomos and Narrative* may be a "private play on words," *nomos* being the Greek translation of Torah. Others have noted that "*nomos*" and "narrative" represent translations of the Hebrew terms "Halakhah" and "Aggadah," which refer to the twin pillars of Jewish learning, the legal code ("Halakhah") and the legends, which inform its interpretation. *See* Lukinsky & Abramson, *supra* note 181, at 11; and Gordon Tucker, *The Sayings of the Wise are Like Goads: An Appreciation of the Work of Robert Cover*, XLV Conservative Judaism 7, 21-22 (1993).

In challenging this dichotomy, Cover offered an alternative to one of the most familiar Jewish responses to the charge of particularism. Jews have long sought to escape the charge of particularism by adopting the "universalist" values of the West.[194] By assimilating the culture of universalism, Jews repudiated the supposed vice of particularism; thus, universalism entailed assimilation. Cover criticized the implicit assimilationism of liberal, universalist culture; but the alternative he suggested was not a simple return to tradition or particularism. In a more dialectical fashion, reminiscent of Scholem, he tacked back and forth between the vices and virtues of both universalism and particularism.

The extent of Cover's affinity for particularism can be gauged by comparing his position to that of another, roughly contemporaneous, critique of liberalism that bears a superficial resemblance to Cover's—that of Roberto Unger.[195] Like Cover, Unger rejected the neutrality of law and, also like Cover, Unger asserted the value of constitutive communities and formative cultural contexts. But the differences between the two are instructive. Unger, unlike Cover, displayed a profound indifference to the fact that existing communities and contexts may get "smashed"—to use his own evocative term. Indeed, Unger goes so far as to prescribe "context-smashing," i.e., the disintegration of actual cultural communities, as part of the ongoing quest for justice. His vision of the value of cultural context is, ironically, decontextualized insofar as every context must yield, under his prescription, to the formation of new, more liberty-enhancing ones. In short, Unger holds a view in which community, in general, but no particular community *per se*, is a good. This abstract vision of community is of a good which is theoretically available to all, but whose availability is conditioned on not insisting upon the continued existence of any particular, extant community. Perhaps it is not farfetched to regard this as a quintessentially catholic view of community, in which all are welcome, provided one fits the new mold.

By contrast, Cover displays sympathy even for unjust communities, as demonstrated by his ambivalence about *Bob Jones University*. Unlike Unger, Cover is moved by the mere fact of a community's existence, and the psychic role it plays in its members' self-identity.[196]

194. Spinoza exemplifies the response.

195. *See* ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975); THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

196. For a similar view, *see* Ronald R. Garet, *Communality and Existence*, 56 S. CAL. L. REV. 1001 (1983). Also compare Margaret Jane Radin's defense of "personhood," as opposed to

In this respect, Cover reminds us of Bickel's conservative, Burkean appreciation for tradition. Yet Cover's sympathy for the imperfect community, for the Bob Jones universities of the world, was hardly unequivocal. Ultimately, Cover did not reject the universalist values—the "imperial virtues"—under which Bob Jones University's racism was to be condemned. The imperial virtues are, after all, *virtues* at the same time as they are vices. What Cover rejected, in the end, was not the imperial virtues, but rather, the depiction of those virtues as "passive" ones—the very depiction prescribed by Frankfurter and Bickel. Accordingly, Cover did not conclude that the court should have interfered to prevent the government (the IRS) from penalizing Bob Jones University. Rather, he suggested that the Court should have made a *stronger, more candidly value-driven statement* about why the University's racism was to be condemned, rather than relying on the jurisdictional feint of merely permitting the IRS's action to stand.

If Cover shared some of Bickel's conservative proclivities for tradition, he departed from the latter's viewpoint in calling attention to the profound *tension* between the traditions of particularistic ways of life and the still-compelling virtues of liberalism. Cover's reaction to Bickel (and, by extension, to Frankfurter) displays the dialectical quality characteristic of the process of dissimilation analyzed by Volkov. Like the German dissimilationists, Cover ultimately did not so much reject the culture of Western universalism, as he did recoil from its implicit assimilationist effects, while still retaining some of its ideals. This led him to an attempt to recapture and reformulate Jewish sources, and to integrate them into his scholarship. At the same time, it led him to focus on the matter of public education, and to frame his views about the nature and propriety of judicial review in that context.

I have been told that Cover questioned the constitutionality of public education, presumably because it involves the state's arrogation of the paeidic role. Interestingly, it was precisely this that made public education the highest of state functions for Frankfurter and for Bickel, and that led them to counsel broad judicial deference to the state in

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"fungible" property, generally, and her prioritization of entrenched personhood interests over potentially existing ones, in particular. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 947 (1982); Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFFAIRS 350 (1986).

the realm of education—and in other realms. Cover generally questioned reliance on jurisdictional principles of deference to the state. Frankfurter and Bickel refined and promoted them. Cover steeped himself in traditional Jewish learning, seeking ever greater integration between it and his scholarship. Frankfurter and Bickel defined themselves as Jews, but generally confined that sense of identity to their private life, and made it no part of their legal work. Between Frankfurter and Bickel, on one hand, and Cover, on the other, lay the passage from an affirmation of the liberal state's assimilative role to ambivalent rejection, a passage which may well mark a more general generational shift in the self-definition of American Jews.

It remains to consider how Cover's personal experience influenced his attitude toward liberal assimilation and, with that, to reconsider the applicability of the concept of "dissimilation," originally used to describe the position of Weimar Germany Jewish intellectuals.[197] Obviously, there are considerable differences between the position of Jewish intellectuals in Weimar Germany and Robert Cover's position in the United States. Cover was born in Boston during World War II, in 1943, and he was raised in an era when most overt barriers to Jewish entry into the educational and professional institutions were giving way to a flood of access. By the time he matriculated at Princeton and Columbia in the 1960s, the presence of Jews in the elite universities was thoroughly unexceptional; Cover was part of a generation of unprecedented Jewish integration into mainstream and elite institutions. English was Cover's first language, the suburbs of Boston his formative milieu, and his family life was certainly more "assimilated" in these obvious ways than the urban immigrant households of either Frankfurter or Bickel.

Yet Jewish suburban life of the post-war 40s and 50s was in some ways more strictly religious than the cosmopolitan Jewish neighborhoods of the city, which encompassed such non-religious enclaves as the socialist-Zionist salon hosted by Bickel's father, and in which Frankfurter and Bickel spent their teens. This is not to say that Bostonian and other suburbs did not harbor their own varieties of secular Jewish culture, but Cover's upbringing was rather more typical in focusing on the synagogue as the center of Jewish life.

197. The following facts about Cover's life are drawn from conversations with several of his colleagues and friends, from testimonials published in 96 Yale Law Journal No. 8, and from the edifying essay by Lukinsky and Abramson, *supra* note 181. Though my historical research has been limited, I hope it will stimulate future investigation.

Cover himself was raised in an observant, Conservative Jewish family, and he was an especially active participant in the activities of his family synagogue, and of the Conservative movement of Judaism, more generally.[198] Cover attended the after-school high school program sponsored by Boston Hebrew College, a remarkable institution, responsible for spawning a number of Jewish scholars who went on to assume posts in the secular academy. At Hebrew College, Cover studied the basic texts of Jewish law. Cover continued to study the traditional Jewish texts throughout his life,[199] just as he continued to observe the Jewish sabbath and other religious obligations and rituals, albeit in his own, sometimes idiosyncratic way.[200]

Thus, after years of professional life marked by involvement in the civil rights movement, and by scholarly work in the history of slavery and in civil procedure,[201] Cover's explicit invocation of Jewish law in *Nomos and Narrative* in 1982 did not represent his first *personal* encounter with classical Jewish sources (though it did represent the first integration of such sources into his published work). Nor did it represent the effort of a wholly secularized individual to retrieve contact with religious traditions to which he had never been personally exposed. On the contrary, "[t]he value of *Talmud Torah* was"—and always had been, as friends observed—"pervasive for Bob, in his research and in his personal life."[202]

In this respect, Cover's experience was critically different from that of Scholem and his Weimar contemporaries, who were raised in secular or even, in some cases, Christianized homes. Unlike Volkov's dissimilated Jews, Cover was not raised without Jewish faith or culture.

This is not the only way in which Cover's experience differed from that of the dissimilated Weimar intellectuals. In defining the phenomenon of Jewish "dissimilation," Volkov identified two casual factors: (1) "the hostility and exclusiveness of the host society," and

198. For a full description of Cover's involvement in Conservative Judaism, from childhood onward, see Lukinsky & Abramson, *supra* note 181, at 5-15.

199. *See id.* at 10 (describing his practice of studying *Talmud Torah* as a law student, as a faculty member at Columbia, and as a faculty member at Yale).

200. *Id.* at 12-15.

201. Cover co-authored the casebook, *Procedure*, with Owen Fiss and Judith Resnik, which was published in 1988. The casebook reflects the authors' shared interest in the interaction between procedural and jurisdictional issues, on one hand, and the autonomy of cultural subcommittees, on the other.

202. *See* Lukinsky & Abramson, *supra* note 181, at 10.

(2) "the inner dynamics of assimilation itself."[203] One need not belabor the point that barriers to Jewish social acceptance in pre-War Germany hardly bear comparison to the circumstances of American Jewish existence during Cover's lifetime. Even during the relatively tolerant Weimar period, Jews in Germany were barred from university posts and other positions, as the ideology of modern anti-semitism spread. It was these barriers that, according to Volkov, were instrumental in unleashing the process of intellectual dissimilation among the most assimilated German Jews, precisely because their positions and education induced professional and social expectations that were thwarted. Whereas these Jewish intellectuals were shut out of the academic positions for which they were trained, Cover faced few, if any obstacles to attaining an academic position, even in one of the most elite universities. By the time that Cover began his higher education, the days of the anti-Jewish quotas that Frankfurter had opposed were finally over. Thus, anti-semitism and professional exclusion clearly did not function for Cover in the same way as they did for the Weimar generation as a major catalyst for the development of dissimilationist thought.

Yet if neither anti-semitism nor the internal forces of assimilation characterized Cover's situation precisely as they did that of Scholem and his peers, the term "dissimilation" and the comparison nevertheless capture some important commonalities between Cover's thought and that of the dissimilated Weimar generation. I have already referred to the distinctively dialectical quality of thought shared by Cover and Scholem, in particular, their common tacking back and forth between the virtues (and vices) of universalism and particularism, and their joint refusal to accept a monolithic, static conception of tradition or group identity. By insisting upon the dynamic nature of group identity, and of Jewish identity in particular, both Scholem and Cover were able to fuse an appreciation for particularistic tradition with liberalism's characteristic suspicion of enforced homogeneity. By the same token, they were able to reformulate conventional notions of normative Judaism, or at least to emphasize those strands of the tradition that were most congenial to liberal values.

If Cover's motivations were not precisely the same as Scholem's, his life and, perhaps even more so, his work nonetheless embody important features of the process of dissimilation identified by

203. Volkov, *supra* note 183, at 197.

Volkov. On a personal level, though Cover did not personally traverse the passage from a thoroughly assimilated, secularized lifestyle to a belated encounter with Judaism as young adult (as Scholem did), he nonetheless mediated the tensions between Jewish and the wider Western culture throughout his life. Even his adolescent forays into leadership positions in the synagogue's youth activities were marked as much by unshrinking challenges to religious convention and beliefs as by his dedication to the Jewish community.[204] As a student at the Hebrew high school, he conceived the idea, with his teacher, Joseph Lukinsky, of creating an "American Talmud," comprising thinkers such as Marx and Freud and even the non-Jewish Darwin.[205] Lukinsky and Abramson recall the "challenging questions Bob raised in the talks he gave, in group programs, and even in casual one-on-one meetings." According to them, "these powerful challenges were Bob's characteristic way of being the devil's advocate. Though Bob was given to the hyperbolic testing of positions, his deep Jewishness was never rejected even in his most rebellious ("self-defining" would be a better term) stage." Lukinsky and Abramson also recall the "reluctance" of the synagogue's Youth Commission "to allow Bob to be a discussion leader for . . . a group from Montreal," due to the members' fear that "he was 'too challenging' and that he would destroy budding faith." Likewise Cover's faith as an adult was not conventionally religious, despite the meaning he continued to draw from religious observance and ritual[206]—though the precise characterization of his faith is subject to dispute. Some friends recall Cover as being an atheist,[207] while others hesitate over this characterization without completely rejecting it.[208] Perhaps Lukinsky and Abramson capture the matter best in their characterization of Cover as an "*apikorus*," the Jewish term for a heretic or skeptic—a term which, in their description, connotes *being a Jew* as much as it connotes a questioning of Jewish beliefs.[209] If Cover was a heretic or skeptic, he remained one *within*

204. Lukinsky & Abramson, *supra* note 181, at 6.

205. *Id.* at 7.

206. *See id.* at 14 ("[Cover] did *not* observe simply as a statement of membership in the Jewish people, for ethnic, nostalgic reasons or for purposes of Jewish identity. *Halakha* [Jewish law] was a structure of meaning . . . .").

207. I take this from personal conversations with a friend and colleague of Cover's, Dennis Curtis.

208. This comes from my correspondence with James Ponet, the Hillel rabbi at Yale, who maintained a close friendship with Cover.

209. *See* Lukinsky & Abramson, *supra* note 181, at 9-10. Lukinsky and Abramson recount a traditional Jewish tale, beloved by Cover, in which one *apikorus* goes to visit another, and is startled to find the latter praying, engaging in traditional Jewish study, and reciting the required

the Jewish tradition; yet if he was clearly within that tradition, he also inhabited the wider world around it, participating passionately in the civil rights movement, in the antiwar movement and, later, in the anti-apartheid movement at Yale. The dialectical quality in his work, observed above, reflected a complicated interweaving of the values of individual autonomy and community, freedom and obligation, that also informed his life—precisely the same kind of interweaving of traditional and modern values effected by earlier dissimilationists, such as Scholem.

Though the trajectory of Cover's life differed so markedly from the dissimilating Germans, his work performed a function similar to theirs. The vast majority of his readers, including his Jewish readers, would not share Cover's experience of a lifetime of familiarity with Jewish ritual, law, and learning, nor would they pursue such a familiarity in their adulthood. In this respect, the typical reader of *Nomos and Narrative* was much more likely to resemble the assimilated German Jew, distanced if not estranged from her ancestors' traditions, against which the young German dissimilationists rebelled. To such readers, *Nomos and Narrative* represented the value of particularistic cultures and legitimated their inclusion, as both intellectual resource and subject matter, in mainstream academic work. Regardless of whether Cover himself is aptly regarded as dissimilated, the publication of the article represented a moment in which dissimilation, as a value, was articulated to a broad audience.

There is yet another possible similarity between Cover's in his embrace of Jewish particularism and the earlier generation of German dissimilationists. A further factor identified by Volkov as a catalyst for dissimilation was the German Jewish intellectuals' encounter with Eastern European Jews, who came to Germany to pursue the relatively greater opportunities for educational and professional advancement. According to Volkov, these Eastern European Jews represented to the assimilated German Jews a more authentic Jewish identity, which they aspired to recapture. If there is no direct parallel in Cover's life to such an encounter with "the oriental Jew," one wonders if the interaction with African-Americans in the civil rights movement, quickly followed by the emergence of Black Nationalism and

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blessings over his meal. When the former questions the latter's status as an *apikorus*, insisting that "an *apikorus* is someone who doesn't do any of those things," the latter responds, "You're not an *apikorus*, you are a *Goy* (non-Jew)!"

various movements for black pride, played an analogous role in stirring American Jewish intellectuals to assert their own ethnicity.

V. CONCLUSION

My suggestions about the impact of Cover's personal experience of Jewish identity are of course only speculative, the biographical evidence being extremely fragmentary, and the connections between that evidence and the production of scholarly work being inherently elusive. And this caveat about the suggested links between personal history and legal text is equally applicable to Bickel and to Frankfurter. Perhaps one day, an intellectual history of American Jewish legal thinkers will be written that goes further in establishing the nature of these links (or in refuting them).[210] I hope that this essay will be a stimulus in that direction. What I have tried to establish here is that Cover, Bickel and Frankfurter shared a common set of preoccupations, not only with the question of an activist or passive judiciary, but also with the question of what today might be referred to as the question of multiculturalism versus "monoculturalism." It is my contention that the differing positions on judicial activism, articulated respectively by Frankfurter and Bickel, on one hand, and Cover, on the other, were shaped by their authors' respective views on the appropriateness of "monoculturalism" or assimilation as a cultural-regulatory mission of the state. I have argued that Bickel and Frankfurter shared a view of assimilation as not only a legitimate state mission, but as a state interest of the highest order. I argued further that this view implicitly fueled their development of the Thayerite position against judicial activism. I also argued that Cover subscribed to a view of assimilation that was not so much diametrically, as dialectically opposed; he exposed and condemned the hidden cultural "imperialism" of a liberal order, and embraced the value of particularism, at the same time as he denied both the possibility and the desirability of avoiding the imposition of liberal values on illiberal subgroups. I have tried to establish that just as Frankfurter and Bickel's view of the judicial role and the nature of judicial reasoning was informed by their

210. The history of the role of Jews in American law is just beginning to be written. *See* JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION (1990); *see also* BURT, *supra* note 11. The Conference on Jews and the Law in the United States at the University of Wisconsin Law School in 1991, for which this article was originally prepared, drew numerous submissions, which represent important first steps toward the assembly of this history. Some of these articles have already been published, including Pnina Lahav, *The Eichmann Trial, the Jewish Question, and the American-Jewish Intelligentsia*, 72 B.U. L. REV. 555 (1992), and Stone, *supra* note 147.

unequivocal affirmation of the appropriateness of the state's cultural-regulatory mission, Cover's view of the judicial role was shaped by his ambivalent rejection of this assimilationist goal. His understanding of subgroups as loci of law-making led him to see the inherent activism, the commitment to the state, in the seemingly passive virtues of judicial deference. Finally, I have suggested that Cover's views about judicial review and cultural pluralism not only ran contrary to the views of Bickel and Frankfurter, but were actually a direct (though non-explicit) reaction against them.