

# Kelsen in American Political Theory

Stephen P. Turner

University of South Florida  
turner@usf.edu

## Abstract

Hans Kelsen's lack of impact on political theory in the United States has been a puzzle. Kelsen arrived at a time in which several influential political ideas competed, none of which were congenial to Kelsen's approach, and some actively opposed to it. The narrative that relativism led to Nazism; the pragmatist rejection of the fact-value distinction; the return of natural law thinking at the University of Chicago; and a very specific conflict of perspectives at Harvard, are identified as key obstacles to the acceptance of Kelsen's view of democracy. The most important of these was associated with Carl J. Friedrich, who repeatedly attacked Kelsen, both on Kantian and Schmittian grounds.

## Keywords

Hans Kelsen, Carl Friedrich, John Dewey, Robert Hutchins, democratic theory, liberalism, neo-Kantianism

# Kelsen in der amerikanischen politischen Theorie

## Zusammenfassung

Hans Kelsens Mangel an Einfluss auf die politische Theorie in den Vereinigten Staaten ist ein Rätsel. Kelsen immigrierte zwar in einer Zeit, in der mehrere einflussreiche politische Ideen konkurrierten, aber keine davon waren mit Kelsens Ansatz geistesverwandt und einige lehnten diesen sogar aktiv ab. Die Erzählung, dass Relativismus zum Nationalsozialismus führte; die pragmatische Ablehnung der Sein-Sollen-Dichotomie; die Rückkehr des Naturrechtsdenkens an der Universität Chicago; sowie ein sehr spezieller Konflikt von Perspektiven in Harvard, werden in diesem Aufsatz als die Haupthindernisse für die (Nicht-)Akzeptanz von Kelsens Demokratietheorie identifiziert. Das wichtigste dieser Hindernisse ist eng verbunden mit dem deutsch-amerikanischen Politikwissenschaftler Carl J. Friedrich, der Kelsen immer wieder angriff, sowohl aus Kantischen und Schmittschen Gründen.

## Schlüsselwörter

Hans Kelsen, Carl Friedrich, John Dewey, Robert Hutchins, Demokratietheorie, Liberalismus, Neukantianismus

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## 1. Introduction

What explains Kelsen's apparent lack of impact on political theory in the US? And how much of this lack is a matter of appearance alone? Is the appearance the result of inappropriate comparisons, or a misleading idea of "impact"? Or was there something distinctively toxic about Kelsen's political ideas that led to them falling into obscurity? Or did Kelsen's writings on political theory, despite being published in prominent journals, fail to engage with either his American context or the subsequent development of political theory itself? These are large questions which would take us far beyond the scope of a journal article, but a narrower and still revealing answer can be given for some of them, by focusing on Kelsen's travails in finding an academic home in America. The apparent lack of impact has a more banal explanation. As political science as a discipline turned in the direction of "behavioral science," and underwent a generational change, political theory itself took on a new and non-Kelsenian mission of contributing to the improvement of democracy, which had the effect of merging "democratic theory" with empirical concerns. This change marginalized not only Kelsen, but other major thinkers of Kelsen's generation such as Harold Lasswell (Eulau/Zlomke 1999), as well as his nemesis Carl Friedrich, whose students rebelled against him and the Harvard faculty in creating the fields that became political theory (Hauptmann 2005, 207-208). One of them, David Easton, wrote the critique of received political theory that is generally credited with initiating the generational change (Easton 1951). The rise of behavioralism and its accession to the mainstream of the field had the effect of generating opposition in the form of cultish alternative non-empirical schools, such as Straussianism, and the Catholic following of Voegelin.

My focus will be the small story within this larger disciplinary story, and indeed on a small story within the small story of Kelsen's role and impact in his American context in the period between 1940 and the mid-1950s. The smaller but revealing story within this small story is about the intellectual conflicts in political theory that became apparent in the course of his struggle to find an appointment in the early 1940s. This turns out to be interesting in its own right – and is intellectually revealing beyond the administrative details of the search for a position. The basic facts about Kelsen's struggles in the US are well-known (Siqueira 2021). He was initially given a short-term appointment in the Law School at Harvard, and hoped to stay, but was quickly pushed out. He had been considered before the war at Chicago in political science and sociology, with an attempt at a joint appointment in law, but declined to come. His supporters kept the relationship alive, but when his supporters tried to hire him later, his appointment was

blocked. He received an offer from Berkeley in political science and completed his academic career there in 1953.

From a European perspective this outcome seems strange: Kelsen's reputation was based on his pre-eminence in legal philosophy. But in becoming a "political scientist," he followed the normal path of European lawyers into American academia.<sup>1</sup> Political science, rather than law schools, were concerned with international relations, which they viewed legalistically, and with what in Europe was called "public law," along with comparative constitutional thinking and the philosophy of the state and law. This was a natural home for them, and it proved also to be for Kelsen, who continued to be highly productive and original in this setting, in all of these areas. He participated in major conferences and published numerous significant and aggressive political theory articles in all of the major American political science journals of the time (*The American Political Science Review*, *The Journal of Politics*, and *The Western Political Quarterly*)<sup>2</sup>. The sole exception was *The Review of Politics*, whose editor, who had been closely associated with Carl Schmitt, was committed to the idea that relativism had been the cause of Nazism, and was deeply hostile to Kelsen; hostility which, as we will see, played a role in the failure of the Chicago appointment.<sup>3</sup>

## 2. Deweyan Democracy

Kelsen arrived in 1940 at a moment when the issue of war and of the rationale for war was still an open question. There was an active pro-war movement, which focused its propaganda on the idea of the defense of democracy, as well as a number of movements that were concerned with the problem of providing an intellectual response to Nazism, Italian fascism, and Soviet Communism. But the concept of "democracy" was contested in the larger intellectual world, especially in the 1930s when it took on a large significance. The issues were transformed by the war, then by the Cold War. But the intellectual baseline for these transformations was a long running attempt to

1 Examples would include Franz Neumann, Otto Kirchheimer, Karl Lowenstein, John Herz, and Hans Morgenthau. The rare exceptions who were appointed to major law schools, such as Wolfgang Friedmann and Max Rheinstein, carved out niches in international and comparative law. The difficulties in general for émigré scholars in American law schools are discussed in Graham 2002, who discusses other failed attempts to appoint Kelsen in law.

2 Some of these writings were collected in *What is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays* (Kelsen 1957), and my reference to them will be to this book.

3 Throughout the events discussed here, within the émigré community, there were many personal relations, interactions, coincidences, alliances, conflicts, and estrangements (especially after 1935), and particularly in connection with Carl Schmitt, many of which were rooted in the pre-emigration period, and which are far too numerous and complex to detail, but which certainly played a role in his reception.

redefine the concept by the most important “public intellectual” of the period, John Dewey, whose earlier writings, such as *Democracy and Education* (1916), articulated a vision of democracy that involved the development of democratic citizens, with a democratic ethos, associated with what he understood as the experimental method. As a commentator accurately describes this foundational text:

“Typing from his desk at Columbia University, he put together reflection on how Americans should think about democracy as more than a form of government. To Dewey, democracy is a mode of associated living, a communicable experience in which individuals interact with one another for the common good” (Howlett/Cohan 2017, 68).

This seems like a banality, but it was polemical in intent. Democracy was not a legal order, but a mode of social or “associated” existence performed by people imbued with the correctly democratic spirit, which was intrinsically oriented to collective goals. This is an idea which had many variations and looms large in what follows.

Dewey’s vision of democratic citizens assimilated the problem of their character to his view of science, which required them to reject tradition and authority in favor of “organized intelligence,” which is to say experimentalism in the context of group action. This, at least in the 1930s, meant “planning” as the model of collective political action. As was the case in Europe, planners faced legal obstacles, and in the US these were played out in highly visible conflicts between the Roosevelt administration and the Supreme Court. Dewey was bitterly opposed to legalistic constitutionalism, regarding archaic legal forms as obstacles to his sense of democracy. Indeed, the traditional American idea of the constitution as a foundational legal settlement under which Americans freely pursued their private aims was anathema to him, and, as we will see, to most of the enemies of Kelsen as well.

Dewey regarded values as inseparable from fact (Dewey 1939), and the future as open to the results of experimental social and political reform. He therefore viewed democracy as indefinable; as a term whose meaning we are in a continuous process of discovering, through the methods of experiment, through democracy itself, and by improvement through more democracy. This sounds superficially similar to Kelsen’s account of dynamic law applied to democracy. But for Dewey and the progressives, the citizens themselves were incapable of correctly discerning their interests, and educational reform was a way of making them more capable by producing democratic personalities able to learn from experience in the right way. For Dewey, this meant that the culture as a whole needed to be transformed. The radical character of this idea was typically obscured by

the style of American writing. Where European authors under the influence of neo-Kantianism constructed systems, Americans tended to appropriate common terms, especially those with positive associations, and give them new meanings. Their radical ideas were expressed not so much in the form of revolutionary rejections of received views as in persuasive redefinition of terms with positive associations, such as democracy or individualism – a complication in reading these texts that recurs with other authors to be discussed below. Nor did they go in for the construction of, or calls for, new systems or worldviews – indeed, Dewey wrote a whole book attacking the concept of *Weltanschauungen* as a form of German irrationalism (1915). Thus, rather than denounce liberal individualism and replace it with a new worldview, as the Nazis and the theorists of the New Socialist Man did, Dewey, in *Individualism Old and New* (1930) described a new individualism, transformed from the individual pursuit of pecuniary advantage to a fully social and collectively invested being of the kind Dewey considered to be necessary for democratic control of the economy.

We can say, broadly, that Dewey’s idea of democracy was inflationary: for him democracy was an idea which could be extended beyond the domain of the narrowly legalistic and political to culture and the transformation of humanity. Like its counterpart in the philosophy of science, Kelsen’s “positivism” was radically deflationary. It was directed against the vestiges of metaphysics, essentialism, and mystery mongering in continental legal philosophy, particularly with its concern for such notions as sovereignty. His basic reasoning was simple: law was “law” because it was made according to law; democracy was the rule of the people according to legal procedures; majority rule at least protected the freedom of the majority, as it chose to be free. These premises were “philosophical” or followed from basic definitions of terms. But the qualification “legal” meant a great deal. Kelsen’s phrase for the transformation of a moral or political idea like justice or freedom into a legal order was “metamorphosis” (1947, 391). And this concept defined his approach to democracy. The criterion for being “democratic” was not that the regime in question conformed to a particular substantive account of what democracies should be, but that the people expressed their will through the law to representatives and an executive and judiciary who acted in accordance with the law – and changed laws in accordance with law (cf. Kelsen 1955). It was, so to speak, a “pure” conception of democracy rather than a valuative or ideological one.

The key implication for democracy of these definitions was to move questions of substance about democracy from the “philosophical” to the political. Democracy meant that “the people” decided what rights to affirm, and what conditions to be placed on political

activities, such as speech. The criteria were not that they chose particular outcomes, nor that their electoral rules took a particular form. His picture of democracy was rather that democracy implied that everything was to be open to legal change through democratic means. For him, there were no democratic ends other than those that were selected democratically through these processes. This was far more radical, and radically democratic in its implications, than it appeared, but this was not the reason it failed to resonate. Nor did it mean that Kelsen did not have his own views about the relation of democracy to authoritarianism, or that he did not personally endorse democracy or what he took to be its values. But he did not derive these preferences from the nature of things, or from some philosophical source. This is the key to the story of "influence": by moving the issues of values to the side of the people, he de-ideologized law first, and then democracy; his successors re-ideologized it.

### 3. Chicago and Hutchins

The coming of war created problems for Dewey's general line of pro-social thinking about democracy, which was shared by many academics. Dewey struggled to convincingly describe at the meta-political level the difference between his views and those of fascism and Communism, both of which were collectivist and planning-oriented, and to explain why they were not also valid collective experiments. When he was challenged to do so he appealed to the notion of absolutism and claimed that these regimes were based on absolute principles, while his idea of experimentalist democracy was not. This argument was undermined by the fact that Mussolini had explicitly cited pragmatism, though that of William James, as an inspiration, and that the Nazi fascination with "the deed" also echoed pragmatism's emphasis on action. When in the 1940s he was faced with the question of what the war was about, he had a highly visible exchange in *Fortune* magazine with Robert Maynard Hutchins, the President of the University of Chicago and a highly visible public figure, in which Hutchins, who had come to embrace natural law thinking, proclaimed forcefully that it had to be a war about the preservation of valid liberal principles rooted in natural law, of the kind that Dewey was eager to abandon (Dewey 1944, 155-157, 180-190; Hutchins 1945, 159-160, 194-207).

This public exchange would be of little interest, if it did not cast a long shadow both on the future of American political theory and on the failure of the attempt to appoint Kelsen at Chicago. Kelsen's commitments on these issues were long established by the time of this exchange. Kelsen did not tie the notion

of democracy to any particular content or creedal statement, though he acknowledged that "no regime can wholly dispense with the ideologies that vindicate and glorify it" (1973 [1933], 104), nor to any eternal principles other than those he included in his definition: legality and the possibility of dynamic legal change through electoral representation, itself defined through these same processes. His minimalist, anti-metaphysical account of democracy left political ends to be decided by democratic procedures, and the choice of democratic procedures also to be decided by democratic procedures.

Dewey regarded "democracy" as a culture which produced, and required, a particular personality. Kelsen too discussed this issue, finding what he regarded as a relation, but not a determinate one, between mental outlooks and what he described as an ideal-type of democracy as contrasted with an ideal-type of autocracy. But his image of the citizen, which turns out to be an important differentiator between views of democracy, was different. Though both emphasize "science," they mean something different by it. Dewey's idea was fundamentally anti-political: a new kind of collective fusion was to overcome differences by what Dewey called "organized intelligence," and produce a dynamic of change. For Kelsen, science is value-free and politics could not be replaced but involved value-conflicts that required a political process, such as that of liberal democracy, based on legal procedures.

In 1933 Kelsen had defined the issue of democratic culture in terms of a contrast between the ideal types of autocracy and democracy. Autocracy, he suggested, echoing Freud, "in its inmost nature is a paternal institution" (Kelsen 1973 [1933], 106), while democracy is marked by its "rationalistic and critical undertone" (*ibid.* 1973 [1933], 104), "a fatherless society" whose "principle is coordination, its most primitive form the matriarchal fraternity relation" as well as relations of reciprocity (*ibid.* 1973 [1933], 106). Here, a "longing for freedom is modified by a sense of equality" (*ibid.* 1973 [1933], 100). Politics itself is marked by the "permanent tension, inherent in democracy between majority and minority government and opposition" (*ibid.* 1973 [1933], 101). Intellectually it tends "away from ideology, toward objective, value-free knowledge and a relativizing of allegedly absolute antitheses" (*ibid.* 1973 [1933], 108). Diversity with respect to such fundamental ideas as justice is an empirical fact: "Since humanity is divided into many nations, classes, religions, professions and so on, often at variance with one another, there are a great many very different ideas of justice; too many for one to be able to speak simply of 'justice'" (Kelsen 1947, 395). The sheer fact of diversity has political implications: rejecting absolutes and respecting "every political belief and opinion," is a practical condition of democratic free or liberal politics. Thus "relativism is the world

outlook presupposed in the democratic idea" (Kelsen 1973 [1933], 111). This was a form of liberal tolerance that most American academics would have embraced at the time. It conceded something to the idea of a democratic personality without linking it to a demand for cultural transformation, or to worries about authoritarianism.

Kelsen's version of relativism was essentially one of tolerance for other values, intellectual humility, and fidelity to facts, rather than a demand for existential decision and commitment: indeed, he made a point of the "relativizing of allegedly absolute antitheses" (ibid. 1973 [1933], 108). In Europe it represented a rejection of the collectivism of Nazism and its demand for decision, as well as of the demand on the Left for the personal transformation required to overcome bourgeois individualism. In America it was part of the conventional understanding of having a right to one's own opinions, associated with religious freedom and the first amendment. The term relativism, however, posed a problem for him when he came under the lens of émigré scholars. This proved fatal to his chances at Chicago.

Chicago was the first American university, in a complex series of attempts, to pursue Kelsen. Charles Merriam, the leading figure in the Department of Political Science, was the talent spotter in Europe for many years for the Rockefeller philanthropies, and had a high opinion of Kelsen. He sought him for an appointment with the expectation of some support from the Law School: potentially the ideal appointment structure, in a university famous for this kind of joint appointment. But between Kelsen's own reluctance to leave Geneva, partly because of visa issues for his children and partly because of the reluctance of the law faculty, which thought it had too many theorists already, this fell through. Kelsen professed enthusiasm for the university in 1938, finding "no other place better suited for my work of an ideologically-critical analysis of the idea of justice on which I have been working since many years" (quoted in Boyer 2007, 154). He delayed coming, however, and many difficulties ensued as money for the appointment dried up. The *coup de grace*, however, was revealing, and came close to the time of Hutchins' 1944/1945 exchange with Dewey. A Catholic faculty member in political science became aware of the issues that Catholics had with Kelsen's critique of Natural Law, and the narrative that blamed Nazism on the relativism and skepticism that Kelsen had associated with democracy in his 1929 book (2013 [1929]). He recruited his friend Waldemar Gurian to write a letter about it to make Hutchins aware of the issue. The letter was a pure denunciation:

"He is without doubt a brilliant legal technician, but without any understanding of political realities; though he 'understands' everything, he is in his most important works

opposed to natural law, metaphysical concepts, etc. I think he represents a mentality which is completely out of date and which is responsible for the threatening breakdown of European civilization by the victory of primitive political religions. These religions arose partially in opposition to the empty logicism and relativism of an attitude a la Kelsen" (Gurian, quoted in Boyer 2007, 150).

Gurian, a student of Max Scheler and a Catholic convert from Judaism, had a complex history. Part of his background to the issue involves Carl Schmitt, whose seminars he had attended in the early 1920s, with whom he had for a while a close relation, and whose ideas he had relied on in his earliest work, on Charles Maurras (Bendersky 1978, 133n5). For Gurian, Schmitt was a Catholic thinker, and prior to 1933, and in terms of his reputation in the English language, this was Schmitt's reputation internationally as well. Schmitt's first English publication, a translation facilitated by Christopher Dawson through the international network of Catholic intellectuals in Europe, was "The Necessity of Politics" (1932) later translated as *Roman Catholicism and Political Form* (1996). As the title suggests, it was on the political systems congenial to Catholicism, a major concern of the 1930s that had also been Gurian's central concern. It argued that the church stood apart from and entered into engagement with a variety of political systems. Gurian too, saw politics through the lens of the question of what was good for Catholicism, and not out of a love for democracy; quite the contrary. In his early work he reacted against "[t]he hollowness against which he saw the youth movements rebelling [...]" and "determined that democracy, capitalism, and the cultural structures of modern life were failing for lack of foundation beyond themselves" (Schneck 2012, 686).<sup>4</sup> The solution to the problem of reconciling Catholicism and liberal democracy, represented in particular by Jacques Maritain, was to infuse liberal democracy with the Christian spirit of the pursuit of the common good (Schneck 2012). Gurian embraced this too (Cooney 2017, 192).

This line of argument resonated with Hutchins, who appointed Maritain, as well as Leo Strauss, whom he hired on the spot with the highest salary in the department after a short interview (Baer et al. 1991a, G. Herman Pritchett, 111). The diagnosis of Nazism which Gurian promoted represented continuity from his earliest critiques of democracy and capitalism: that it was the result of a spiritual vacuum. Leo Strauss, in an influential but long unpublished paper on German Nihilism, took the same view of German history (Strauss 1999 [1941]). In the opening pages of *Natural Right and*

<sup>4</sup> For the complexities of the Schmitt-Gurian relationship and the role of Catholicism for each of them, see Cooney 2017.

*History*, without naming Kelsen, Strauss excoriated relativistic tolerance as “a seminary of intolerance” for its rejection of natural right (Strauss 1965 [1953], 6).

The term “relativism” itself was a source of confusion that worked against Kelsen in these contexts. Kelsen’s version of relativism was unlike the “relativism” that Gurian was familiar with from neo-Kantianism and his doctoral study with Max Scheler, in which different results derived from different fundamental presuppositions. It was rather, as Kelsen himself put it, an “antimetaphysical empiricism,” (1957 [1948], 199), from which specific relativistic and skeptical results could be derived. Kelsen proceeded by arguing that empiricism was grounded in “laws governing” cognitive processes “in which the chaos of sensual perceptions is transformed into a meaningful cosmos” producing a “rational cognition of reality” (1957 [1948], 200). This suggested a political analogy, which he treated as basic: these laws originated in the human mind, which gave the individual the character of an “autonomous law-giver” (1957 [1948], 200). The freedom of the individual was the source of “relativism”: cognition was not fully determined by these laws, such that the mind was a mirror, but allowed variation. But a constraint on variation was the fact that the individual empirically recognized the existence of other egos and conformed their thinking to “the external behavior” of others, yielding a degree of cognitive conformity. This process did not work for values, which were relative because “they are not based on rational cognition of reality but on the emotional forces of human consciousness, on man’s wishes and fears” (1957 [1948], 199). The fact-value distinction was thus grounded in the empirical facts of cognition, and value-relativism was an implication of these naturalistic facts. Kelsen did reject, aggressively, various non-relativistic philosophical theories of justice (1957 [1948], 1-24). But his arguments against these theories were not themselves particularly controversial. They were arguments against an absolutist, metaphysical grounding of law and democracy rather than arguments for a new “relativistic” grounding. For Kelsen, the beliefs that grounded democracy were the beliefs of the citizens, not a shared philosophical system external to democracy itself. Democratic processes were means of reconciling conflicting beliefs. This kind of “relativism” was not controversial in the American context. But the label itself became a target for thinkers like Strauss, and religionists, who never addressed Kelsen’s empiricist and naturalistic arguments. Strauss simply assimilated relativism to historicism, and directed his arguments against historicism, as, in a different way, Voegelin did.

#### 4. Harvard and Carl Friedrich

Straussianism confronted Kelsen at a highly abstract level. At Harvard, Kelsen encountered a more intimate enemy, and a more intense political situation which was already set, if not in stone, in a line of thinking that combined law, political theory, and sociology in support of a particular view of Hitler and an organized pro-war movement, composed of committees at Harvard and at a national level, to “defend democracy.” The key figure in several of the committees created to serve this cause was Carl Friedrich, a political scientist who also wrote on law and served as the American representative of Kant, editing the standard short compilation of his writings (1949) and interpreting him for popular readers. Closely associated with Friedrich in the war effort of the late 1930s were Talcott Parsons, and later Lon Fuller, an experience which formed relationships and intellectual similarities that would persist throughout their long careers.

Friedrich is the most important of the three in relation to Kelsen, at least with respect to political theory, which he taught. He is a confusing figure for many of the same reasons Dewey is: Friedrich was constantly engaged in redefining terms in common use in ways that turned them into something close to their opposite. His reviewers were well-attuned to this, as well as to the underlying consistency of his fundamental ideas over time. As Joseph Dorfman noted in a scathing review of his wartime book, *The New Belief in the Common Man* (1942) “through the dexterous use of such ambiguous terms as ‘functional’, ‘pragmatic’, ‘realistic’, ‘progressive’, the author invests the American ideal of democracy, equality and freedom, with a content which reduces the role of the common man to his status in medieval times” (Dorfman 1942, 864). The actual ideal citizen, for Friedrich, was one who obeyed their bureaucratic betters, in contrast to those who actually existed. As Dorfman puts it, “the common people, not as they are defined by the author, but as we actually know them, would not evince that sense for the ‘traditional’ standard, and accept that leadership of technologists and civil servants, which assure his so-called stability and consistency in the movement of society” (Dorfman 1942, 864).

The underlying consistency of Friedrich’s political views, as Dorfman notes, was evident. He had “already presented them in 1932 in a joint study *Responsible Bureaucracy*, especially in the concluding chapter, ‘A Federative Commonwealth of Mutual Servants’” (Dorfman 1942, 865). It was an argument for bureaucratic rule by a “responsible elite”, which persisted throughout Friedrich’s career (Greenberg 2014, 25-75). What this amounted to, as Dorfman pointed out, was the idea that bureaucrats were the embodiment of rationality, and that the kind of rationality needed was not accessible

to ordinary people; his “doctrine consisted essentially of the principle that what may appear arbitrary and therefore irrational” to an outsider ‘may be completely rational when looked at from within’” the bureaucracy (Dorfman 1942, 865), and therefore cannot be subject to normal democratic accountability.

As Anne Kornhauser puts it, he was a “statist liberal” (2015, 157). What this meant was that the elite ruled on behalf of the people with their consent and were “representative” in this sense. For Friedrich, as Dorfman puts it,

“the great age of true democracy is the medieval era, for the ‘medieval constitutional systems’ of king and ‘estates,’ according to his treatment of history, ‘provided for the expression of consent by the common men’ (Dorfman 1942, 864).

Dorfman goes on to explain how little this form of consent means, and how radical Friedrich’s repudiation of the tradition of American democracy was, despite his professed adherence to the idea of democracy. Thus

“while accepting the principle that the ultimate source of all power is in the people, he crosses it with another familiar but more elusive principle that election is not necessarily the best method of securing the representation and smooth functioning of society. It seems we need a ‘qualified majority,’ whose purpose would be to check ‘traditional’ Jeffersonian and Jacksonian democracy” (Dorfman 1942, 864).

Dorfman notes that “[s]imilar crossings and manipulations yield the author also a theory of civil service organization whose test of responsiveness to the needs of the common man is the absence of any revolution that cannot be suppressed” (1942, 865).<sup>5</sup>

Although he did not often deal with Kelsen directly,<sup>6</sup> Friedrich wrote on, and took the opposite side on, virtually every issue relating to the understanding of liberal democracy. Friedrich also was a regular in

the *Harvard Law Review* and wrote both in English and German on philosophy of law in the 1950s – treating Weber as the culmination of the destruction of the philosophy of law – an odd view at the time, given that Weber was not ordinarily recognized as a philosopher of law until the 1980s. From Friedrich’s point of view, Kelsen took further steps in the Weberian direction Friedrich denounced for removing the element of reason in law and authority. There are places in which he does discuss Kelsen directly, and always is hostile. In 1933 Friedrich dismissed as “polemical” Kelsen’s discussion of Hitler and the constitution on the grounds that Kelsen assumed the unity of the German people, i.e., thought of it legalistically, rather than treating it substantively (Kelsen 1931; Friedrich 1933, 193n21; cf. Schotter 2012). This distinction between legal and substantive turns out to be crucial, for reasons relating to neo-Kantianism, which require some explanation, but are critical to an understanding of his rejection of Kelsen.

Without going into a detailed history of the philosophical issues here, the problem is this: neo-Kantianism, by the 1920s, was in retreat, in large part because of two closely related problems – underdetermination and circularity. The core idea of neo-Kantianism was that an organized body of knowledge, such as physics or the law, had a more or less autonomous conceptual order whose presuppositions could be revealed through philosophical analysis. Unfortunately, two things happened with this kind of analysis: philosophers disagreed about the “presuppositions” – this was the problem of underdetermination – and disagreed about the nature of the conceptual order being analyzed. They tried to overcome these disagreements by redefining the object of analysis. But this just produced circularity: the object to be explained was redescribed in a way that made their preferred presuppositions seem necessary.

Kelsen, and, ironically, also Carl Schmitt, attempted to eliminate the circularity that doomed neo-Kantians generally. Kelsen did so by offering “positive law” as the fact to be explained, and noting that what counted as law was not a philosophical but a legal question, to be decided by courts. Schmitt analogously said that what is political is a political question. What they both objected to was defining the law, or politics, in a way that allowed the concepts to serve as a screen onto which one’s ideological preferences could be projected. Friedrich’s shift from legal to “substantive” concepts of constitutional order is a case in point: one could define the substance in such a way as to “presuppose” something quite different from what a written constitution itself said.

For Friedrich the substantial rather than legalistic conception of the constitutional order, as O’Neil nicely formulates it through quotations from Friedrich, was defined by the fact that there was:

5 One ongoing controversy is over the question of how Schmittian Friedrich was (cf. Lietzman 1997; Schotter 2012), and to answer this one must determine what significance to grant to changes from a term like “homogeneity” to “integration,” or how to interpret his slightly changed views of emergency powers. What is clear, however, is his extreme and long running intellectual antipathy to Kelsenian views with respect to precisely these issues. In the case of this passage, the echoes of Carl Schmitt’s exposition of the medieval idea of representation are obvious. Friedrich’s political practice as part of the occupation of Germany, as Kornhauser notes, went beyond legality to secure what he took to be constitutional order, a practice criticized by his émigré peers (Kornhauser 2015, 149–151) and in violation of Kelsenian legality.

6 When he did, as in his survey of the history of philosophy of law, it was in the most negative terms, and he made a point of treating him as a derivative minor figure and treated Weber as the degenerate end of the correct idea of the philosophy of law (Friedrich 1958).

“a residuary power of the community behind and beyond all government capable of destroying the existing constitution and establishing a new one’ (Friedrich 1963, 45). [...] [A]ny constitutional order would come to reflect the underlying norms of the political community, there was ‘no apparent reason why a greater or lesser amount of such governmental activities should be incompatible with effective restraints’ (Friedrich 1968, 36). [...] In its modern form it not only restrained and regularized official power, but because of the inevitable human reality of ‘disagreement on values, clashing with the need to take communal action,’ it also consisted in ‘procedures for achieving a compromise between [conflicting] groups.’ The institutions of constitutionalism oriented conflict toward shared norms and ends, and thereby occupied ‘an integrating position’ (Friedrich 1964, 17–18; Friedrich 1963, 274, 339, 341)” (O’Neil 2009, 290).

What motivated Kelsen’s reasoning was a desire to purify accounts of law and, therefore the state, from ideology, particularly the German metaphysical theory of the state. What Friedrich wished to do with his account of constitutions was to redescribe them in a way that allowed him to draw practical political conclusions not grounded in the text of the law, but in the nature of the constitutional order. This was convenient as a basis for emergency rule, which could be invoked to defend the constitutional order by means outside the constitution or law itself.

It is striking that this is also the focus of the “defense of democracy” that he mounted, along with Parsons and others. Parsons wrote a newspaper article in 1940 in the early stages of their efforts which reflects the same focus: Nazism was said to threaten civilization, but what needed to be defended was not the rule of the people or freedom, but “institutions,” including “judicial independence.”<sup>7</sup> And Parsons argued that “a large sphere of our affairs are governed, however imperfectly, by rules of reason” (1993 [1940], 156) in contrast to the personal devotion required by the *Führerprinzip*. Kelsen makes parallel distinctions, but with an important difference: for Kelsen it is individuals with a largely tolerant and scientific disposition who arrive at reasoned results by way of a democratic process of discussion. Friedrich’s Kantian philosophical grounding was combined with a suspicion of democratic processes: parties, popular

leaders, referenda, anything like direct democracy, and accountability. For Friedrich, it is bureaucrats who possess the neutrality necessary to rule by reason. Consequently, in contrast to Kelsen, Friedrich argued consistently for a vast amount of bureaucratic discretion and against political accountability.

It would take a long article to explain all the differences between Friedrich’s and Kelsen’s views of democracy, of philosophy of law, and of philosophy itself. What is striking, however, in relation to Kelsen’s Harvard experience, is the extent to which Friedrich defined himself against Kelsen’s views. Where Friedrich describes the common man as driven by sentiment, Kelsen discusses the relation of democracy to the mental outlook of citizens, and treats tolerance, etc. as important, and perhaps almost necessary conditions of democracy. In discussing normal politics, Friedrich describes the common man as sentimental and in effect irrational, but nevertheless claims that the process of democratic politics tends toward rationality. Not surprisingly, he had little regard for freedom. His obituarists commented that he was best known for his famous statement on the rejection of a political society which would attempt to maximize personal freedom. As he put it, “Actually I think it is much more nearly true to say that people want a minimum of freedom, rather than a maximum. Most people are very glad to leave a lot of things to other people” (Berger 1984, 32; quoting Friedrich 1967, 13), and he concluded, therefore, that democratic societies should not encourage everyone to try to have their own way politically.

## 5. Conclusion: Winners and Losers in Postwar Political Science

Kelsen’s troubles at Chicago and Harvard reflected the issues of the time, over natural law, and at Chicago and at Harvard, over the nature of law and constitutional order. But they also represented the intersection of methodological and ideological issues, which made them particularly volatile. They also involved the temporary merging of two forms of methodological discussion: one which derived from the Weimar “Crisis of the Sciences,” which was largely a crisis of neo-Kantianism, and another which derived from the American conflicts over science and objectivity in the social sciences in the interwar years.

In the postwar period, which saw a new push in the social sciences for becoming genuinely scientific, these issues came to a head. Political science had a problematic relation to these developments, and behavioralism was its somewhat tardy response. But as David Easton remembers the period, it was a time of intense methodological discussion (Baer et al. 1991b;

<sup>7</sup> There is a telling irony in this: In 1938, the US was still reeling from the controversies that followed Roosevelt’s political assault on the Supreme Court, and his successful attempt to intimidate it. Kelsen regarded this “independence” as a myth deriving from the English Civil war, in which the King’s appointed judges acted against him. But Kelsen’s point was that they were nevertheless political appointments (2006 [1925], 281). Roosevelt was stopped from enacting his most extreme “reforms” of the court by congressional opposition, which fit another Kelsenian view: the protection of freedom was not dependent on the courts, the bulwark traditionally relied on by the German Bourgeoisie but on the people.



Easton 1951, 201). It was this discussion, which reached its apogee at Chicago, which Kelsen's writings of the period contributed to. Easton's critique of political theory of 1951 is generally regarded as a turning point that revived political theory and redirected it. Political theory "revived," but did so by fragmenting into incompatible and mutually unintelligible factions – of Straussianism, Voegelinian quasi-theology, rational choice, the democratic theory of Dahl and the idea of improving democracy, and the critical thinking of Sheldon Wolin. What divided these factions were questions of methodology. Kelsen appears to have been left out: he created no cult of followers or school.<sup>8</sup>

There are perhaps two reasons for this. The theoretical writings of Kelsen's period as an American professional political scientist were combative and extensive. But much of what they said, for example in distinguishing science from ideology and rejecting natural law, fit with the American tradition of liberal tolerance of opinions, with the fact-value distinction associated with Weber, with Logical Positivism, and was obliterated by incorporation into the commonsense outlook of political scientists against which Strauss and Voegelin reacted. From this point of view, Kelsen had won: political scientists acknowledged that democracy was a valuative concept and had moved on to operationalizing it and measuring it. The idea of a philosophical grounding became the preserve of specialists and schools with a cult aspect. Kelsen's unpublished manuscript written against the idea of political ideologies as religions was an extension of the anti-ideological tenor of the 1950s and the end of ideology discussion (Kelsen 2012).

But Kelsen retired from the internal conflicts of American political science. He did not engage the political science that emerged in the 1950s under the influence of such figures as Dahl and Easton. Instead, he returned to the issues that the émigrés had brought with them, and to the émigrés themselves, notably Voegelin, whom he went out of his way to criticize for his interpretation of Weber (Kelsen 2004). This was perhaps the right choice. Nadia Urbanati has recently addressed the conflict that ultimately emerged out of the Continental tradition between a Habermasian Kantianism and a Schmitt-informed agonistic view of democracy, to propose a middle ground that Kelsen would have endorsed which recognized both the insolubility of value conflicts and the need for democratic compromise in the face of them (Urbanati 2013, 2014).

The need for a Kelsenian defense of science as antimetaphysical empiricism, the focus of his political theory writing in his time as a political science professor, has long passed. The conflict between a Kantian vision of justice based on reason and an acceptance of the existence of an irreducible ideological pluralism engaged in struggle has proved to be more resilient. It is this which has led to a revival of interest in Kelsen, who points to a more realistic third way; of compromise in the framework of democracy and law, and an image of politics as a conflict between conflicting views of democracy and reason which share a space for discussion, rather than one between absolutized ideologies.

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<sup>8</sup> One should not discount the effects of generational change, which were substantial across the social sciences. If we compare him to such contemporaries as Lasswell and Friedrich – each of whom was much younger and spent many more years in the American university system – we see a similar pattern of neglect (Eulau/Zlomke 1999; O'Neil 2009; Schotter 2012).

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## Author

Stephen P. Turner is currently Distinguished University Professor at the Department of Philosophy, University of South Florida, USA. His books include *Liberal Democracy 3.0: Civil Society in an Age of Experts* (2003). He has also written extensively on Max Weber, especially on politics, in *Max Weber and the Dispute Over Reason and Value: A Study in Philosophy, Ethics, and Politics* and *Max Weber: The Lawyer as Social Thinker*.