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# 10 × 10

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The task of chronicling one's intellectual influences is generally left to the biographer or the funeral orator. To write one's own history is an uncertain exercise that proved oddly engaging. For me, it served to compel a reacquaintance with many works I had not read in a long time. Numerous candidates emerged from the recesses of the past; however, the task required reducing the list to ten and that, in turn, required a definition of the nature of the intellectual influence.

I confess that probably no book ever struck me so fully in my youth as Balzac's *Lost Illusions*. Other books transported me to ideas, worlds, passions that were transformative at different stages. But I chose to define the present task in a more limited fashion, as an inquiry into the formative influences on my career in public law. I doubt that an academic audience wants to relive the works that eased the sixteen-year-old into becoming seventeen and then eighteen.

Finding the influences on my legal intellectual development meant identifying the main themes that appear in my work. My version of public law is concerned with institutions more than individuals, with structures more than rights, with incentives more than moral claims. I expect individuals and institutions to behave strategically, to respond to the incentives offered by law, even if imperfectly. Public law takes on the mission of protecting the hopes of humanity, the ambitions of human industry, the level of security that allows creativity to flourish. This is the world of law defined by political theorists from Hobbes to Mill to the American founders. It is a highly contestable world of ideas, and it has been a pleasure to revisit some of my early guides to this world.

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## 1. Isaiah Berlin, *Two Concepts of Liberty*

A comprehensive account of the world is one of the passions of youth, or certainly of mine. Isaiah Berlin's essay, which I encountered in law school, identified the resulting, horrifying legacy of the twentieth century. The words still ring out: "One belief, more than any other is responsible for the slaughter of individuals on the altars of the great historical ideals . . . This is the belief that somewhere, in the past or in the future, in divine revelation or in the mind of an individual thinker, in the pronouncements of history or science, or in the simple heart of an uncorrupted good man, there is a final solution."

The essay accepts the inherent limitations of human design: "some portion of human existence must remain independent of the sphere of social control." The main import is to restore the liberal value of liberty from interference, even amid the pluralist disagreements over its contours and social preconditions. Looking with horror over the history of ideological total war, Berlin cast a plea for the spark of human agency over what Mill had termed "collective mediocrity."

Yet, the liberal ideal cannot exist independent of some claim to positive goods from the interaction with others. Berlin's realized human being did not live as Robinson Crusoe. Life requires an assessment of the valued added by societal interaction, defined not so much as the positive freedom to claim certain conditions of life from the collective body but by the legitimacy of the individual's consent to the inevitable constraints imposed by law and order. For Berlin, that required asking, "Who is to govern us?" Societies require collective self-direction, albeit at the risk of too much damage to the sanctity of the individual. Berlin identified this tension as the drama of the twentieth century. That conflict endures.

## 2. Richard Dawkins, *The Selfish Gene*

"We are survival machines, but 'we' does not mean just people." So begins an evolutionary account of all organisms from the basic components of our DNA to the organizational forms of society. Reading Dawkins, I was lifted from the dry statistical account of Mendelian genetics to a battle for survival defined by probabilities and strategic advantage. For me, it confirmed that the strategic elements of competition could be harnessed to evolutionary battles for survival, not only by self-conscious individuals but by all manner of organisms, simple and complex. As Dawkins would write elsewhere, and as I have tried to apply in analyzing rival forms of political organization, "everybody has ancestors but not everybody has descendants."

The difference between those that history left behind and the "replicators" was the success of the evolutionary strategy employed. Dawkins's early books are filled with the odd tales of evolutionary pressures toward nonobvious gambits, such as elaborate plumage, that proved advantageous in the struggle for reproduction, even if not obviously a gain in flight or combat. The evolutionary tale that emerges is not a simple story of dominant and recessive genes but of contested battles to maintain a genetic lineage. The translation to human society is problematic, but Dawkins ventured a first attempt with the concept of the social "meme."

Of the works addressed in these essays, Dawkins fits least directly into my work in public law. Nonetheless, the concept of influential works must take the reader as he was. Dawkins was for me the introduction to the idea that disciplined, game-theoretic insights about strategy could be applied across many domains. It helped form an approach to influential works by strategic thinkers as broad ranging as Thucydides and Philip Bobbitt.

### 3. Jon Elster, *Ulysses and the Sirens*

Democracy is ultimately about the sovereignty of popular choice. The processes of choice are confounded by the limited information available to voters, by the risk of cycling of preferences identified by the Marquis de Condorcet and Kenneth Arrow, by the sheer inertia that must be overcome in order to vote, and by the risk that short-term impulses will overwhelm enlightened higher callings. Theoretical debates about democratic legitimacy must take account of the shortcomings of human decision making and the frailties of the means of choice in creating a public policy with direction and purpose.

Elster's work, here and in his more applied assessment of constitutionalism, introduces two key concepts underlying fixed constitutional principles in a democracy. First, drawing on the historic tale of Ulysses, Elster gave an account of why democracies must be bound to certain principles. The problem that democracies face, as articulated by James Madison, was the "propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions."

Constitutions provide the intertemporal commitment that constrains the power of momentary majorities to act, requiring either formal amendment or time-consuming multiple presentments of the same fundamental change before it might take effect. Though Elster subsequently came to doubt the legitimacy of founding generations binding subsequent generations, while they themselves remain free to act, the insight into cross-temporal commitments is a critical one.

Second, Elster drew on the early work in decision sciences—now known as behavioral economics—to try to fashion the institutions of democracy to the actual humans who would inhabit them. The result was an integrated account, from a theoretical and practical perspective, of how the institutional features of constitutional democracy permit reasoned political decision making, even while admitting of self-interest and human decisional frailties.

### 4. John Hart Ely, *Democracy and Distrust*

Constitutional law, in our time, has generally not been dominated by books. Law tends to develop incrementally, and that incrementalism permits the primacy of journal writing. *Democracy and Distrust* is clearly one work that distinguishes itself in postwar

American law for its ability to capture the issues of the moment in a way that invites the inquiry of the future.

It need not have been so. The subtitle, *A Theory of Judicial Review*, makes clear that its goal was to provide a theoretical mooring for the Warren Court amid the Bickelian concerns for the “countermajoritarian dilemma” and Ely’s own discomfort with the apparently unbounded quality of *Roe v. Wade*. The result could well have been a recalibration of rights on a scale of fundamental or not. Instead, Ely makes a bold move toward political theory, grounding the role of the judiciary in the concern, inherited from Federalist No. 10, of democratic majoritarianism consuming itself.

In a three-page section bearing the book’s title, Ely ties judicial review to political competition and the need to “polic[e] the mechanisms by which the system seeks to ensure that our elected representatives will actually represent.” This section restores the central insight of *Carolene Products* away from discrete and insular minorities, as such, and to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.” In so doing, Ely, anticipates what the next generation of scholars (such as myself) would direct themselves to and rudimentarily integrates democratic theories of political competition. Ely then uses the *Carolene Products* insight to identify the Warren Court’s voting cases as a uniquely important area of judicial vigilance, precisely because of the role they played in opening the arteries of a sclerotic political system. These insights have loomed large in my work.

## 5. Owen Fiss, *Groups and the Equal Protection Clause*

In *Baker v. Carr*, Justice Brennan declared that the political rights at stake in malapportionment could be fitted into the familiar confines of equal protection jurisprudence. That early misstep sent the law governing the political process into a number of jurisprudential back alleys searching for an elusive individual rights-based approach to the allocation of political power.

Owen Fiss’s elegant essay on group-based harms signaled the limitations of such familiar equal protection law. Fiss critiqued a purely rights-based approach, organized around the antidiscrimination principle, as having a “structural limitation,” namely, that its individual-based universalism “turns out to be far from universalistic in terms of the state practices proscribed.” Instead, Fiss advanced a structural, normative theory under which black people are the “wards of the Equal Protection Clause, and any new theory formulated should reflect this practice.” The critical insight was that once society had moved beyond the first-order cases of outright racial exclusion, there had to be a normative account that could distinguish invidious discrimination from remedial race-awareness.

My work has parted company with Fiss on many occasions, most centrally on the primacy of the political process. Fiss properly noted that the “injustice of the political process must be corrected” and anticipated both a judicial role in that correction and the need for some mediating principle. Fiss drew these principles from the facts that

blacks are a distinct social group, that they are subject to perpetual subordination, and that they are lacking in political power. For my work, the point of departure is the third condition concerning political power and the prospect of restoring political integrity to an electoral system prone to disregard minority interests. In Fiss's work, by contrast, the third condition is the final justification for active judicial scrutiny to redress subordination. Yet the group-disadvantaging principle was a powerful insight into the limits of a simple rights jurisprudence in the complex intersection between law and politics.

## 6. Lani Guinier, *The Tyranny of the Majority*

I came to teaching from several years in practice, much of it handling voting rights cases. The case law at the time was dominated by *Thornburg v. Gingles* and its technical inquiry into the proof of racially polarized voting practices. The claims of minorities in the political process were fascinating; however, the cases boiled down to dreary battles of statistics. My friend Pam Karlan is fond of recalling my initial teaching inquiry of whether there was anything of interest in this whole area of law.

Once I had begun teaching, I began to correspond with Lani Guinier, whom I had known from overlapping work in practice. Guinier's early articles broke through the simple categories of civil rights advocacy by grounding the problem of ensuring minority representation in democratic theory rather than simply antidiscrimination law. Overrepresentation of cohesive majority communities through at-large elections became not a simple story of discrimination but a manifestation of the Madisonian concern for majority factions. The lack of responsiveness of all-white election officials was not a sterile evidentiary factor of a statutory voting rights violation but a realization of the tyranny of the majority. The creation of minority-concentrated districts was not simply a representational gain but raised the legitimacy stakes for governmental policies achieved without support from isolated minority representatives. Even single-member districts—ironically, the key civil rights demand—were deemed inferior to semiproportional systems.

Although my primary interests have moved beyond the questions of minority representation, there is no doubt that my introduction to what would become the law of democracy came through the persistent exclusion of black-supported candidates from elected office. Guinier signaled, early on, that the move from the first-generation demand for the franchise to the second generation of effective minority representation was the conceptual steppingstone in the emergence of the new field in the academy.

## 7. Albert O. Hirschman, *Exit, Voice, and Loyalty*

Institutional dynamics loom large in contemporary political and economic thought. The roles of the firm in the work of Ronald Coase or of the political party in the political thought of E. E. Schattschneider or John Aldrich signal the importance of the organizational framework in defining our political and economic life. However, it was Albert

Hirschman, at least for me, who harnessed the economic conceptions of the firm and competition to all manner of political organizations and who looked to the interaction between exit (quitting the firm as a consumer moves to a new product) and voice (the decision to try to alter conduct from within) to create a dynamic equilibrium in which institutions could thrive.

The connection to my work on the political process is fairly evident. In order to fill the constitutional void of how politics is supposed to sustain democracy, it was necessary to turn to a political theory of parties and how votes might be aggregated fairly to yield a government. Hirschman considerably enriched the spatial distribution models of Harold Hotelling and Anthony Downs, which had been the first great advance in how parties respond to the distribution of voter preferences. In Hirschman's work, the pressure of the party activist and the potential for demoralization emerged as determinants of how parties could be pushed more to the fringe than political science would have admitted. The result was a far more dynamic understanding of the complex pressures on political parties.

Less evident is the tie between Hirschman and the need for collective representation in mass harm litigation. The concept of exit, voice, and loyalty frames what is termed the "governance" model for class actions and other mass representations—the model that has informed my work, including as Reporter for the American Law Institute.

## 8. Machiavelli, *The Prince*

The great strategic thinkers—Thucydides, Hobbes, Machiavelli—marked my conception of public law. The strategists saw law as a subset of statecraft and viewed a legitimate legal order as providing an incentive structure that promoted the development of society through stability, commerce, and human enterprise. Reading Madison or Hamilton, among the great thinkers of the American founding generation, there was, for me, the spark of recognition of a tradition of designing the institutions of government not only for the aspirations for the good but as a bulwark against evil.

Clearly, none approached the norms of democratic tolerance that define our aspirations today. And, of course, Machiavelli, read casually, connotes cynical power for its own sake—hence "Machiavellian." Yet the strategists grasped for the interaction between the state and the flourishing of human ability. For Thucydides, this meant examining the potential and failure of unfiltered democratic rule. Hobbes and Machiavelli turned to the question of sovereign power, although Machiavelli's historic writings on Rome also capture the importance of limited power and competing institutional authority.

*The Prince* was my first sustained encounter with the understanding of law, force, and statecraft. It does lack the sophisticated exposition of Machiavelli's finer work, such as the *Discourses*. The limited attention to law is clear: "because you cannot have good laws without good arms, and where there are good arms, good laws inevitably follow, I shall not discuss laws but give my attention to arms," Machiavelli proclaims. However, what follows is the wise caution of the limits of arms, the centrality of social

policies in securing stable rule, the capacity to integrate dissident forces, and the role of satisfying basic human desires in defining the success of the state. For me at least, the world never looked quite the same after I read this book.

## 9. Mancur Olson, *The Logic of Collective Action*

The major failing of American constitutional design was the absence of any role for intermediary organizations. Madison envisioned a republic in which ambition would check ambition at the level of government and in which the citizens would express their opinions through representative elections, largely influenced by their social betters. Americans, however, are joiners, and no account of American politics even in the first contested election of 1796 can avoid the role of parties, clubs, factions, churches, trade associations, and the organizational life that fascinated de Tocqueville and others observing early America. Without these institutional actors, there is no explaining American political life.

For me (and for many others as well), Mancur Olson provided the critical window into the political economy of groups. Olson drew a picture of the absence of incentives for the creation of public goods, the irresistible temptation for free riding, the need for intense commitments to make groups credible, and the porousness of the legislative process to ground observed political reality in a struggle of groups for desired returns. The distinction between preferences and the capacity to mobilize and sacrifice for a position explains the difference between polling the public on a matter of social concern and the likely outcomes of political struggle. In the battle between diffuse interests and organized groups, the latter have the decisive hand.

Olson's work forms part of a picture of political behavior informed by Condorcet, Arrow, and the public choice approach to the economic foundations of politics. There is again the fortuity of what I happened to read in what order. But in terms of clarity of exposition and the capacity to express the practical import of difficult technical insights, it is hard to rival Olson.

## 10. Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy*

What makes democratic governments legitimate? Winston Churchill's quip about the virtues of democracy being apparent only by comparison with its alternatives captures the inherent difficulty of the inquiry. Clearly, the legitimacy of democracy comes from the fact of popular sovereignty and popular choice, but how does that work and what exactly does it entail?

Schumpeter's powerful dissection of democratic choice helped set up the basic contours of a debate that continues to this day. Schumpeter examined, and rejected, any claim that the fate of democracy turned on either the aggregation of preexisting voter preferences or the participatory deliberation of the populace. Rather, representative democracy necessarily entailed a competition for office by political elites, which

would, in turn, educate, cajole, and entice the citizens to vote for them. As Schumpeter defined the task, “the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”

Two elements of democracy stand out in this theory. First, the key to legitimacy is the presence of a competitive struggle for support. It is the fact of competition that ensures both the accountability of the political elites and legitimacy in the subsequent exercise of state authority. Second, the judgments of the people are not based on their preexisting preferences but on an evaluative assessment of the performance of those in power and on their claim to continue to be in power. The exercise of the franchise is largely a retrospective assessment of government rather than a prospective act of molding anticipated acts of state to set preferences among the electorate. The fact that “collectives act almost exclusively by accepting leadership” does not condemn democracy but gives it its vitality, so long as voters can throw the bums out.