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Ten Works That Mattered Most

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From 1988–2000, he was, first, assistant professor, then full professor of law at the University of Michigan Law School, before joining the NYU faculty in 2001.

Reflecting back for this project has been both intriguing and depressing, a bit like writing the obituary for your own funeral. I have learned at least two things. One is that I have not been one to take a consistent set of themes, approaches, or methods and work them through my own scholarship over and over again. Some works that I consider influential cast a general shadow over my thinking, but I do not see how I drew on them in any direct way in any of my work. Other works I consider influential did inform my own writing directly, but only certain pieces, or just for a time, before I moved on to other ways of exploring law. I knew I was intellectually restless, for better or worse, but I do not think I had realized how much so before this project.

The second thing I have learned is also disturbing: the window of years in which one is capable of being influenced is exceedingly narrow. I trace most of these works to a five- or six-year period, which starts in law school and runs through my first few years of teaching. Perhaps that is because I had specialized in quantum chemistry and physics; in college, I took few courses in American history, or political theory and science, or philosophy. So I came to law school as an empty vessel, and the reading I poured in then and for a few years after, with an intensity I look back on with some alarm, was aimed at figuring out the foundations for this new discipline. That reading, from that period, has left a more lasting impression than anything since. Is that because the questions seemed so fresh, the need for answers so urgent? Or because, whatever the questions, our minds can remain open and fluid only for a relatively short amount of time?

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1. Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism*

Sometimes a book is important not wholly on its own, but for a series of books it best represents in one's mind. Such is the case for me with this book, which stands in as well for a number of others on related themes from which I learned a great deal, such as Bernard Yack's *The Longing For Total Revolution*, Niklas Luhmann's *The Differentiation of Society*, Don Herzog's *Happy Slaves*, and Isaiah Berlin's *The Roots of Romanticism*. All are works from within a certain understanding and interpretation of liberal political theory; all show this conception of liberalism emerging out of specific historical struggles and debates, rather than out of a series of philosophical deductions from abstract concepts, such as liberty or autonomy; and many of these works take on critiques of liberalism by showing the full-blown alternatives to liberalism to which these critiques have sometimes led, and against which liberalism is best understood. In particular, as Constant works out his moderate liberalism in the aftermath of the French Revolution, Holmes shows, over and over, how various liberal ideas (such as about neutrality or the public-private boundary) should not be understood as abstract propositions about truth or morality but as strategic positions designed to organize government and politics in better ways than the alternatives.

Similarly, Holmes, through the interpretation of Constant, presents a distinctive theory of the role that rights play in liberal regimes. Holmes argues that liberal rights, such as to dignity, equality, freedom, or property, did not, in the history of liberalism, have as their object inborn qualities discoverable in discrete individuals, as if rights are to be valued because they reflect underlying human nature. Instead, rights were created and defended because they helped to solve fundamental problems of modern societies, including the tendency of the state to swallow up other spheres of society through a relentless expansion of the political domain. The view of rights, constitutions, the design of government, and the differentiation of liberal societies in these works all influenced a good deal of my early work on American constitutional practice.

2. Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*

Like *samizdat* material, this unpublished casebook manuscript was passed hand to hand from roughly 1958, when the *Tentative Edition* was put together, until 1994, when it was finally published long after the authors' deaths. For me, its influence lies not in the book's more commonly known themes—its core legal-process ideas that theorize the appropriate institutional allocation of authority to decide the content of law—but its contribution to understanding the paradigmatic legal act: interpretation.

Hart and Sachs combined a theory of language, which emphasized communication as a social practice, with a compelling vision of how law itself should function as a social institution to generate a distinctly American alternative to English and European formalist methods of interpretation. Fortunately, they wrote before disputes

over constitutional interpretation came to dominate and distort American debates over interpretation; they were free to focus on the more routine, but at least as important, interpretation of the legal materials—statutes and regulations—characteristic of the modern state. In the purposive vision of both law and interpretation they offered, courts were not to treat individuals laws, and law more generally, as a mindless set of possibly arbitrary edicts. Instead, laws were purposive strivings; and the system of law was to be treated as one that aspired to consistency, to nonarbitrariness, to rules and principles of which those affected by law could make sense. This view helped reveal judging and legal interpretation to be forms of art and craft; within the constraints of text and language, judges had room to perform small acts of beauty and grace, as they solved the puzzles of legal texts by helping to bring consistency, order, and reason to the essential task of interpretation. Modern critics sometimes accuse Hart and Sachs of romanticizing the process of legislation, but they were more sophisticated than this cheap and easy cynicism; hard-headed realists, they nonetheless aspired to a compelling vision of what law ought to be.

3. Elizabeth Anderson, *Value in Ethics and Economics*

This is a bit of a cheat. I spent two years collaborating with Liz on an article (the first for both of us) that preceded this book. And it is not the book per se but the conversations and collaboration that are the source of the influence. By this time, I had been persuaded of the shortcomings of both utilitarianism and rational-choice theory; I was searching for alternatives. However, the only alternative to utilitarianism in law and political philosophy was a rights-based deontology that I could never find persuasive because it seemed too rigid, impractical, and formal. Liz and I discovered a common bond around these shared concerns. I have always understood the expressive theory of action and value, reflected in the collaboration with Liz, and which forms the backbone of her book, as a general framework for an alternative—the best available, in my view—to utilitarianism and deontology.

Expressivism is a way of recognizing that essential distinctions in values and interests exist, without insisting that the only way to respect those differences is through a system of rights that runs completely roughshod over all other collective concerns. By emphasizing the reasons for actions, expressivism articulates what we know to be true: that the meanings of actions, whether individual or collective (through government, for one), are central to what we care about and respond to. Isaiah Berlin and others had persuaded me already of the plurality and incommensurability of values. Expressivism helped underwrite those convictions, as well as furthering my interest in the cultural dimensions of law and policy. Within law, particularly constitutional law, expressivism helped me frame an alternative to balancing doctrines (the legal analogue to utilitarianism) and “rights as trumps” formalisms (the legal version of deontology). Much of my early work, whether about specific constitutional doctrines, constitutional law and theory more generally, or critiques of rational-choice theory and public policy, is fueled by this expressivist perspective.

4. Alexander Bickel, *The Least Dangerous Branch*

Still the deepest work on the practice of constitutional adjudication. The beauty lies in Bickel's ability to take seemingly fine-grained, esoteric, even technical issues of legal doctrine and reveal the profound issues of political theory and practice beneath them. Put the other way around, Bickel suggested how the unresolvable tensions concerning the role of a supreme court in a democratic society—the tension inherent in constitutionalism itself—could be managed through the artful deployment of tools and techniques that the legal system makes available, particularly doctrines that shape when the Court acts and refrains from acting. Part of the book's power resides in the way Bickel envisioned the Court as engaged in continuous interaction with the political and social environment.

As a result, Bickel did not insist on formal logical consistency of doctrine for its own sake, as does so much constitutional scholarship, then and now. He wrestled with the tension between principle and expediency, traced that struggle to Lincoln, and cast the Court's history and role within the arc of that narrative. He recognized that the Court acted within a political context but did not reduce the Court to a political institution in any simple sense; nor did he give that larger context excessive weight in understanding the institution of judicial review. Bickel situated the Court in this larger context in ways more subtle, incisive, and, in my view, more accurate than much written since. So, too, his particular vision of judicial restraint continues to resonate. I return to my opening thought: beneath even the most arcane or technical doctrines of law lie the profound moral and political struggles of the age, and law can afford a range of supple, delicate tools for managing those struggles. This is what Bickel saw in the legal framework within which the Court exists. This is the great beauty of law in general, for those willing to see it.

5. Frank Michelman, “Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy”

Michelman's corpus of writings was a great influence for a number of years, and I could have chosen any of many articles. The themes of this one¹ are both characteristic of his work and, perhaps, the most directly tied to my own interests. Like so much of Michelman's early work, this piece tacks back and forth between specific doctrinal puzzles in law (in this case, local government law) and competing economic and noneconomic political philosophies that both describe how government operates and reflect normative justifications for democratic government. Michelman begins by developing exceptionally probing accounts of the assumptions behind public-choice visions of democracy and what he called, at the time, a public-interest alternative account. He then linked these competing accounts to alternative conceptions of freedom, one rooted primarily in Kant, the other in Hobbes.

¹ Frank Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *INDIANA L.J.* 145 (1977).

Having worked out in elegant detail and depth the premises and ideas behind these competing accounts of democracy and liberty, Michelman then turned to local-government law cases in which the legal materials were unclear enough that judicial decisions inevitably had to draw on background views that ran through these views on the purposes of government, however implicit those views might be, to resolve difficult cases. Part of the inspiration of Michelman's work, in general, was the exceptional fairness and seriousness with which he engaged competing positions, including those with which he disagreed. Part of what I admired and absorbed was the tragic or candid sensibility, in which he acknowledged that some conflicts were ultimately unresolvable, and which allowed him to recognize what was lost, as well as gained, in the inevitable moment of choice. Like Bickel, though in more philosophical a vein, part of the beauty of Michelman's work lies in his ability to reveal, beneath even small issues of public-law adjudication, the world of political morality and theory that inevitably informs legal decisions.

6. Charles Taylor, *Philosophical Papers*, vol. 1 (*Human Agency and Language*) and vol. 2 (*Philosophy and the Human Sciences*)

Early in my academic career, I read widely, and without any particular direction, to discover how I was inclined to think about law as a social institution and practice. I found myself drawn to reading these essays over and over. Taylor is an elegant, concise stylist who convinces with the lucidity of his writing. Although none of the essays deal directly with law, they engage a range of philosophical questions about interpretation, language, meaning, human agency, rationality, and questions in political philosophy that were central to my concerns in thinking about law. Taylor's writing about second-order desires, or desires about desires, was particularly influential. An important essay for me was "The Diversity of Goods," in which Taylor argues that the central flaw in utilitarianism is its inability to capture or grasp qualitative contrasts that play a central role in moral thought and social practices. He developed this notion of qualitative differences in value in many different directions. Coming at the question from a different angle than Berlin, he, too, asserted that the world of the moral could not be reduced to one general type of good but that we valued a plurality of goods, some perhaps incommensurable with others. He developed a nonconsequentialist approach to political morality that continues to influence me greatly, in which what matters are not just the consequences actions bring about but what the reasons are that motivate those actions. Other particularly influential essays include "Interpretation and the Sciences of Man," "Social Theory as Practice," "Rationality," "What is Human Agency?" and "Self-Interpreting Animals." Since law is a social practice, and legal scholarship can be seen as one of the social sciences, I found Taylor's penetrating, bracing insights on these questions to be of great benefit as I began to think about my own work.

7. Edward Purcell, *The Crisis of Democratic Theory*

From this book I learned a great deal about the development over the twentieth century of American ideas concerning democratic theory, legal theory, the social sciences, political theory and science, ethics, and conceptions of the foundation of values, and, most impressively, of the way developments in these different areas influenced each other, while also reflecting changes in the larger political context, such as the rise of totalitarian regimes in Europe and the post–World War II world, which pressed Americans to confront their understandings of American democracy and its foundations. This book is an exceptionally rich history of ideas, in which the idea of democracy itself is the unifying concern. As one of my first exposures to work that situated the history of ideas in political and cultural context, the book helped me think about theoretical debates in various fields as the reflections of particular concerns of specific eras. The book helped me see American legal theory not as a continuous “development” but as a series of ideas that responded to the dominating concerns of different eras. It fostered an appreciation of the connections between ideas or debates in legal theory and other areas, such as the social sciences. And the book enabled me to recognize the various struggles to make sense of American democracy, and how best to justify it, that had occurred throughout the twentieth century. I was also impressed by the book’s suggestion of how highly philosophical debates, such as those between objective versus more pragmatic conceptions of value, lay beneath much larger issues, including the question of how best to understand American democracy.

8. J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South*

I learned as much about the dynamics of political power from this magisterial book as from any other, as well as about the role of legal arrangements in constructing and stabilizing political power. And political power has become a dominant focus of my more recent work. This book is a model of historical method. Kousser manages to fuse an extraordinary amount of pathbreaking quantitative work with rich, qualitative and interpretive analysis; the two approaches mutually reinforce each other to drive a compelling narrative and set of claims that, nearly forty years later, still remain definitive. I’ve taken a good deal of historical information from this work into my own writing; however, the influence of the book goes beyond the narrowly factual.

Most broadly, Kousser helped me appreciate just how powerful the pursuit of political control is as a causal and motivational force for groups, parties, and interests. Kousser shows that cultural forces we might tend to think of as dominant drivers of historical processes in the United States—such as race in the late nineteenth century—are inextricably bound up with the partisan pursuit of political power or are even subordinate to that pursuit. The book also shows how even small changes in the way elections and the pursuit of political power are organized and channeled through

law can have profound effects on democracy, policy, and culture. In an academic world today in which the formal institutions of politics and political power are often considered passé and far less interesting than social and cultural forces, Kousser's book remains a much-needed reminder of how much politics and its organization always matter, and in ways often lost sight of in scholarship today.

9. Mark Kelman, *A Guide to Critical Legal Studies*

Throughout law school, I voraciously read works in Legal Realism and its more modern variant, Critical Legal Studies (CLS). I spent some time trying to decide which works in these traditions have shaped my thinking the most; I finally gave up and decided to choose Kelman's work of synthesis as a way of avoiding having to single out artificially one or two works from within these two large traditions. The realists of most influence include some of the usual suspects, Hale, Felix, Morris Cohen, and Dewey, for their critiques of overly conceptual, formalist approaches to law and their development of a distinctly American vision of legal pragmatism; however, I also include less familiar realists, like Max Radin, for insights into statutes and their interpretation.

Within CLS, one strand I found influential was work on the choice between legal rules and standards, a recurring problem that early CLS work helped identify and analyze. Another strand was the critique of conventional microeconomic premises and thought, a critique that ultimately found a more systematic, rigorous, and empirical expression in behavioral law and economics. Critical work on legal history was also influential, in particular, Robert Gordon's theoretical work about methods of understanding legal and social change, *Critical Legal Histories*. Gordon's emphasis on the ways in which legal rules and decisions can shape the way we perceive and understand the world ("law as constitutive of consciousness," in the jargon-ridden shorthand usually invoked) has influenced my work on how the Supreme Court envisions democracy and the source of threats to it. To be sure, the extremes of realism lapse into incoherence, and I am not drawn to the politics associated with CLS. Indeed, I am struck by how some of my choices are at war with those of others. Hart and Sachs is a *bête noire* for CLS. And Stephen Holmes, as well as the associated works, were inoculants against the excesses of CLS-style political thought. Yet even so, realism and CLS provided rich, provocative lines of thought that occupied my mind for many years.

10. Watty Piper (a pseudonym), *The Little Engine That Could*

The book that made me love books.