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No doubt, in some ultimate sense, all the contributors to this project would list roughly the same ten books or authors beginning with the Bible and the Greeks and almost ending with Marx, Darwin, Freud, and Einstein with some variations in the middle and at the very end. Leaving the cosmic aside, I have chosen works more immediate to my particular professional development. In many instances, I have cheated by designating clusters of works rather than single volumes that stand for particular courses I have taken or relatively large-scale intellectual endeavors that have engaged me.

1. Wolfgang Friedman, Legal Theory (third edition)

Wolfgang Friedman’s Legal Theory was the sole text in an undergraduate course “Jurisprudence” taught at UCLA by Professor Foster Sherwood that I attended after courses in the history of political thought taught by Currin Shields, using the old Coker anthologies. In later years and at more elite places, it became the vogue to expose undergraduates to whole “great works” rather than the bits and pieces of anthologies or the secondary summaries of texts. Whatever the merits of that approach, the merits of the less-ambitious enterprise were twofold. First, instead of rushing and skimming to cover long reading assignments, I was taught to mine short passages as deeply as possible. This mining was not, however, in the Leo Strauss mode, then coming into vogue, but simply one of paying close attention to text in a rather

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common sense way. The second great advantage, exemplified by the Friedman text, was early exposure to a very wide range of thinkers and thought even if only very superficially. I came to graduate school at least vaguely aware of Rudolph von Ihring and the Scandinavian realists and Roscoe Pound and neo-Thomists and others, a good many of whom were unknown to both law students and political science graduate students specializing in “public law” both at the beginning and, often, even at the end of their graduate training. None of this succeeded in making me a jurisprudent; however, all of it rendered me particularly aware of where my then very narrowly concentrated concerns with U.S. constitutional law might eventually lead me.

Less concrete, but probably just as important, was what I suppose might be called the romantic impact of the Friedman volume, the glimpses it gave of a European world of thought that was very exotic and appealing to someone who had grown up in Los Angeles. Both as a student and in my early years as a teacher, I thought of myself as very much a pragmatic student of the nitty-gritty of American politics as opposed to the airy abstraction and historicism of my political theory colleagues and the exotic “camel counting” of the country specialists in comparative politics. Yet the Friedman effect, or perhaps merely affect, was always there somewhere in reserve.

2. William Stubbs, On the English Constitution

Let Stubbs stand for a long bibliography of works on the history of common law from which undergraduates were asked to read almost at random in a course entitled the “Anglo-American Legal System” taught by J. A. C. Grant. In spite of its title, the course involved a strong element of comparison with civil law systems.

American political science is conventionally divided into a number of subfields, one of which traditionally was called “public law.” In reality, public law political scientists devoted themselves, almost exclusively, to the constitutional decisions of the U.S. Supreme Court. Political science is interested in political institutions such as legislatures, executives, and political parties. Public law political scientists, willy-nilly, became the experts on courts as political institutions and law in general as an instrument of governance.

The Anglo-American course taught that not just constitutional law but all of law and, most particularly, the great areas of “private law”—property, contract, and tort—were significant tools of governance and that, therefore, all kinds and levels of courts all over the world were political actors. It would then appear foolish to seek to build up any general model of courts or of the political origins and functions of law by extrapolation solely from one rather atypical body of law dealt with by one rather atypical court of one modern nation-state.

Stubbs and others introduced the wonderfully complex and esoteric developments of the common law: pie powder courts, exchequer chamber, nisi prius law. French dinners at the inns, and on and on. The law and its institutions were neither simple nor logical nor always successful even in their own terms. Law constantly changed while typically claiming not to have done so. It was made by widely varying processes, participated in by a wide range of actors, and implemented in equally complex and often incomplete ways. All of this provided infinitely valuable perspectives for
studying the hundred leading constitutional decisions of the Supreme Court while providing incentives to go beyond that study.

Together with Friedman’s jurisprudence and the history of political thought more generally, Stubbs and his like simultaneously provided a good liberal arts education in the history of Western civilization and an enormously important corrective to the Supreme Court—and to the constitutional law preoccupations of public law political science.


After the flourishing of sociological jurisprudence and realism in the 1930s, there was a kind of postwar hiatus in political and legal theory until the rise of Rawls and Dworkin, who were causes and effects of a new era of legal thinking. In this hiatus period the Hart-Fuller debate was one of the few U. S. vehicles for the long struggle between positivism and natural law, which had experienced a revival in reaction to the horrors of the war. In part, because of the prominence of the Supreme Court and its constitutional decisions and the continuing echoes of the New Deal–Supreme Court controversies and, in part, because of concerns over the cooperation of the German judges with the Nazi regime, almost inevitably the debate was cast less in abstract terms of the nature of law and more in terms of proper decision making by the judiciary.

Alongside this debate rooted in legal theory, there was a strong current of thought about judging equally rooted in democratic political theory. This was the “judicial self-restraint” movement that, in one form or another, came to dominate academic legal commentary on the Supreme Court. The overwhelming majority of prominent law school teachers of constitutional law were liberal Democrats for whom the New Deal Court crisis was their paradigmatic constitutional experience. Their response was either to celebrate total or near total judicial quiescence on constitutional issues or the “preferred position doctrine,” which, to put the matter shortly, would encourage the Court constitutionally to further liberal and Democratic interests while stripping conventional property rights of all constitutional protections.

In that postwar period, Learned Hand was the most esteemed of all American judges. Hand stood at the intersection of the dominant democratic political theory of the day and judicial realism. If unelected judges inevitably exercised lawmaking discretion, it followed that in the U.S. democracy they should make as little law as possible, leaving that task to the people and their representatives or surrogates. In many areas of law, Hand devised doctrines that transferred lawmaking from judges to voters or markets.

I was privileged to attend Hand’s Holmes lectures at Harvard, then published as The Bill of Rights. It was a moving experience to hear the speaker deliver an unqualified encomium to freedom of speech only to conclude that because all constitutional rights decisions of the Supreme Court were essentially political, lawmaking decisions, the Court ought not to declare statutes unconstitutional on First Amendment or any other Bill of Rights grounds. The demos must rule here as elsewhere.
Thus, whether courts merely enforced higher rights, natural or constitutional, or made rights under the pretense of merely enforcing them, the question of the day was: In the context of American democracy, what should the Supreme Court do about rights claims. My own writings on U.S. constitutional law were centered both on questions of what the Supreme Court was and should be doing about rights claims and how and why the judicial self-restraint controversy had arisen and continued. Those writings were clearly, and sometimes explicitly, responses to Hart-Fuller-Hand.


I might well have lumped Wechsler in with Hart-Fuller-Hand. He, too, stands at the intersection of legal theory and issues regarding the role of the courts. If we can really articulate agreed-upon principles of constitutional law, it may make little difference whether they are man-made or reflections of natural law. If, as the pluralists would have it, democracy consisted of an accommodation among partially clashing and partially common interests, then a body neutral as to all the interests could assist in the accommodation by preventing any group from overreaching, thus facilitating rather than obstructing democratic processes. Thus, a supreme court other than Hand’s totally self-restrained one may wield constitutional judicial power in ways compatible with and supportive of democracies.

For a time, and, in part, because it presented a liberal critique of Brown v. Board, Wechsler’s article became very central to constitutional commentary. It became central to me for a very particular reason. From my point of view, the assertions of neutral constitutional principles and the rationale of Supreme Court action in terms of such principles was patently and breathtakingly false. Yet the legal academy took up Wechslerism with glee in what I perceived to be a desperate attempt to flee the realism of Hand. (Later it was borne home to me that Hand was, in a sense, the American school of Kelsenian positivism. In calling for constitutional courts and constitutional judicial review, Kelsen had explicitly excluded rights review because rights were partially common interests, then a body neutral as to all the interests could assist in the accommodation by preventing any group from overreaching, thus facilitating rather than obstructing democratic processes. Thus, a supreme court other than Hand’s totally self-restrained one may wield constitutional judicial power in ways compatible with and supportive of democracies.

For me, then, the central question raised by Wechsler was: Why do lawyers desperately cling to proclamations of judicial neutrality in the face of, to me, the obvious falsity of such claims? The intensity of that professional fiction might be a clue to the basic nature of courts themselves and to why nearly all societies created and supported judicial institutions. Thus, what was very much a peculiarly American debate about the compatibility with democracy of constitutional judicial review by the U.S. Supreme Court, opened vistas to the basic question of the fundamental nature of all courts everywhere.

It was in this Hart-Fuller-Hand-Wechsler debate regarding constitutional rights and Supreme Court judicial review that I encountered the work of Norman Dorsen among leading rights advocates and activists. Every commentator on the Supreme Court necessarily shaped some stance on “judicial activism” in response to their vigorous rights advocacy.
5. Robert Dahl, A Preface to Democratic Theory, and V. O. Kay, Politics, Parties and Pressure Groups

These books represent the pluralist, empirically based political theory that dominated American political science and my training under Robert McCloskey, Arthur Maass, and V.O. Key in the late 1950s. That pluralism saw government decisions as episodes of active and reactive policy making, implementation, and political communication, as the products and further producers of long, complex chains of mutual influence among many actors including voters, legislators, bureaucrats, political executives, policy entrepreneurs, interest groups, communities of professionals, and other holders of expert knowledge. Every political act was a current stab at policy making representing an accumulation of partially conflicting interests and a communication of commitments and intentions for the future. The games were never ending; the scores were constantly changing; the teams were large, and not all the players were always on the field.

My self-selected job was to place the decisions of the U.S. Supreme Court where they belonged and actually were—in this complex matrix of pluralist American politics, using the same tools of analysis as those employed by political scientists studying other aspects of American politics.

The negative side of this identification with American pluralism was my subsequent reaction to post-Weberian European social thought à la Habermas, Bordieu, Derrida, and so on. When I finally encountered them, they appeared to me as presenting an overly intellectualized, excessively esoteric, and only seemingly original version of the down-to-earth American pluralism that American political science had been practicing all along. Obviously, if you were going to study judicial decisions as political acts, you were going to have to pay attention to the entire range of persons, organizations, and institutions that communicated with the courts and determined what political questions reached the judges and what the responses to their answers would be. No doubt, much of my writing could be decorated with footnote references to European fashions, but I have never seen any particular usefulness in doing so.

My public law studies as a Harvard graduate student were largely confined to the constitutional decisions of the Supreme Court. My pluralist-oriented studies of American politics, however, moved me into concerns about regulatory politics. Those politics inevitably assigned a large role to technical experts and to the claims of expertise by the regulatory agencies. Issues of technocratic versus democratic politics arose only peripherally in constitutional adjudication but were a constant in regulation. Given initial concerns both with the Supreme Court as constitutional lawmaker and with regulatory politics, it was hardly a great leap forward to discover the nonconstitutional regulatory and administrative law decisions of the U.S. Supreme Court and then those of other U.S. courts. Study of nonconstitutional, regulatory judicial decisions, then, naturally concentrated the concern for expertise, endemic to all regulatory politics studies, on the questions raised by judicial review of the supposedly expert decisions of regulatory agencies. Study of regulatory politics, as part of pluralist American politics, led me to break out of an exclusive concentration on Supreme Court constitutional decisions, which was then a feature of American public law.
political science, and to a particular concern with the role of nonexpert judges in reviewing technocratic decision making.


Perhaps it is now something of a truism that serendipity is often a powerful force in scientific and scholarly inquiry. As an assistant professor in the Stanford Department of Political Science, I was placed on a departmental search committee to identify someone who might be hired in “organization” or “decision” theory. Although my own work had concentrated on the decisions of the U. S. Supreme Court, I knew nothing about decision theory.

Given my earlier studies, as indicated above, I did know something of the evolution of the common law and was convinced that judicial decisions were just that, decisions, not simply logical, nondiscretionary derivations from legal texts or constitutional principles. Concern for common law as opposed to the exclusive concern for constitutional law, which marked much of public law political science, also meant that I was compelled to see lawmaking as the cumulative result of a collective decision-making process by a large number of judges over time within a set of courts easily conceived of as an organization. The common law was, after all “judge-made law.” Moreover, it was repeatedly asserted that this collective decision making was governed by a set of rules or practices called *stare decisis*, although there was endless debate over precisely how much leeway that practice left for individual judicial discretion in applying and adding to the stock of precedents.

Preoccupied with common law *stare decisis*, suddenly plunged into the search-committee duty of reading the works of March, Lindbom, and others, and committed to showing that judicial decision making was not a thing apart but simply one form of political decision making, I could hardly avoid noticing that the whole jargon of *stare decisis* consisted of expressing, in a peculiar, specialized language, the rules and practices of “incremental” decision making that March, Lindbom, and others claimed marked all collective, organizational decision making. Incrementalism explained the balance between stability and change that was the great mystery or paradox of the common law, which supposedly followed precedent but obviously had changed a lot over the centuries. Just as important for me, the correspondence of *stare decisis* and incrementalism decisively supported the claim that judicial decision making was not peculiarly jurisprudential but was, rather, a subset of political decision making more generally.


In the regrettable not-large-enough literature in English on the law and courts of cultures other than those of the West, these two works stand out because they
provide unique gateways through original research of a particularly difficult kind. One is created through interviewing the dwindling generation of elders who can provide firsthand accounts of a major transition in a tribal legal culture. The other is based on research in the most extensive set of records of the longest-lasting political culture in the world, written in a language then mastered by few in the West.

The Cheyenne Way, in a great confirmation of Marxist theory, shows a momentous change in the law and legal institutions of a tribal society as a result of a fundamental change in the relationship of its members to the means of production. Its main economic activity was buffalo hunting, which, in its earlier home in the forests, required high levels of personal initiative, with individual hunters on foot stalking individual animals. This very singular initiative became counterproductive when the tribe moved to the Great Plains. Now teamwork among a considerable number of hunters was necessary to achieve an efficient hunt. Moreover, the hunt was now on horseback so that horses became a crucial productive tool. The authors expose central innovations in the tribal law of hunting and horses and the invention of new legal institutions to implement those changes. Llewelyn is probably most famous for his notion of the “trouble case”: however, the greatest value of this book is its signaling of the value of studying a legal culture as it is coming into existence or experiencing a fundamental change. The linkage of a North American tribe to the European Union is not obvious but important.

At the time Bodde and Morris worked, about the only records of the enormously long history of imperial Chinese law were the archives of the Board of Punishments in the capital. These recorded every serious case that had been tried in the courts of the district magistrates. Their analysis thus appears, and appeared to them, to be derived from a relatively complete record of the work of imperial law courts, although at the time almost no records from the district magistrates courts themselves were available. Even though they themselves are not particularly struck by it, Bodde and Morris present an enormous paradox, a regime officially dedicated to a Confucian ethic of compromise, accommodation, and moral suasion perpetuating the most detailed and draconian code of penal law in world history. That paradox became, for me, one of the entry points in a search to discover the relationship between mediation and litigation, which, in turn, I believe, to be central to understanding the basic nature of courts.

Subsequent research in more recently available records of the magistrates’ courts themselves indicates that those magistrates were far more engaged in mediation and less in litigation than the records of the Board of Punishments suggested. It reveals the intimate and mutually supporting relationship between mediation and litigation.

8. Mark Twain, Innocents Abroad

The Chinese paradox leads me to Mark Twain’s Innocents Abroad, which seems to combine Tolstoy’s presentation of Natasha’s perception of the ballet and Andy Griffith’s low-down account of what the country boy saw at his first football game. The conceit of all three is a description of a highly elaborated, ritualized, conventional rule-laden cultural performance through the eyes of persons entirely innocent of those conventions and so seeing the performances stripped naked of all the emperor’s clothes.
With entire justification, it is often noted of my own work that I have no method. Throughout my career I have largely avoided teaching graduate students because I really have almost nothing to say to them about how they should work. Twain is a favorite of adolescent readers, no doubt, because he remained an adolescent himself, ever anxious to see through the pretentions of the adult world. For me, the starting point of much research is noticing something paradoxical or silly about what my betters, the adult experts in some field of legal knowledge, are saying. How can it be that an essential characteristic of courts is dichotomous, winner-take-all solutions when nine-tenths of American litigation ends in settlement or plea bargain. How can it be that Chinese judges are always severely penal when they are supposed to be agents of a Confucian regime? How can it be that there is no appeal in Islamic law when the greatest of Islamic empires constructed precisely that kind of ranked, pyramidal hierarchy of judges that is everywhere else associated with appeal? To the extent I can, and without the literary talent, I seek to be Twain’s innocent abroad.

9. Mauro Cappelletti, Monica Seccombe, & Joseph Weiler, Integration Through Law

Of course, the immediate response to a query about influential books is to think of those you have read. Perhaps it is too egotistical to include one or more that you wrote. I do, however, want to include this, a book in the making of which I participated. Americanists may not know this massive, multivolume, multiauthor endeavor; however, it is surely central to students of the European Union and a landmark in comparative law studies for its mixing of American and European perspectives. Here was a Llewellyn and Hoebel–like chance to study a new legal system in the making and one both sui generis and reflecting and borrowing from a number of existing systems. Mauro Cappelletti was a man of incredible entrepreneurial energy. Then, near the beginning of his career, Joe Weiler was on the way to becoming the leading scholar of EU law. The project deliberately tempered the tendency of European legal scholarship toward doctrinal abstraction with American legal pragmatism and the then-blossoming American tendency to treat “law” as “law and politics.” For a complete neophyte to participate as a sort of general dogsbody from nearly the beginning to the end of this project provided a unique cram course in everything about the EU and an opportunity to participate in a sort of continuing grand congress of European legal scholarship.


My final entry, again, cheats by citing a cluster of works and, again, is not so much about reading as about “working on.” Advising on doctoral dissertations often does
as much for the adviser as for the advisee. In the post–World War II world, constitutional bills of rights and rights implementing judicial review spread around the world. Precisely because U.S. public law political science so concentrated on U.S. judicial review implementing constitutional rights, the discipline was forced to pay some attention to non-American matters by this new foreign concern with what previously had been thought of as an American exceptionalism and insert what previously had been thought of as phenomenon peculiar to the U.S.

Alec Stone Sweet has emerged as the leading American scholar of constitutional judicial review in Western Europe. Through a happy accident, I became entangled in his dissertation, which became the first of his books listed above, and, consequently, a particularly conscious beneficiary of the second. My involvement with Alec has happily kept me abreast of European developments in constitutional judicial review.

Tom Ginsburg came as a Ph.D. candidate to the Jurisprudence and Social Policy Program at the Law School of the University of California, in which I teach, with an extraordinary background in matters Asian. At the time, I was interested in, but, as usual, totally without the expertise or language skills necessary to pursue, a new extension of judicial review studies. For obvious reasons those studies had been pursued in the context of established democracies. A new question would concern the role of judicial review in polities in transition from one-party to competitive multiparty political regimes. Such a question threw together a host of strange bedfellows in Asia, Latin America, and the former Soviet sphere.

Ginsburg has become a leading figure in studies of judicial review in transitional regimes, and we are now experiencing a further extension into the study of review in authoritarian or quasi-authoritarian regimes that may or may not be transitioning. All of these studies, in turn, provide us with a better and better basis for moving to fundamental questions of what constitutions, judicial review, and courts really do. In all of this I am happily, and parasitically, carried along by the help of friends.