Tulsa Law Review

Volume 38
Number 4 *The Scholarship of Sanford Levinson* Volume 38 | Number 4

Summer 2003

Self-Historicism

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Among the contributors to this symposium, I may be the person with the longest acquaintance with Sandy Levinson. I want to begin, therefore, with a recollection of the period of my earliest contacts with Sandy—a recollection that, as I hope to show, has some bearing on some of the aspects of Sandy's work that most interest me.

As I recall things, it was the spring semester of 1965, in my second year at Harvard University, when I took the second half of Robert McCloskey's course on the American Supreme Court.[1] Sandy was the teaching assistant in charge of the section to which I was assigned. At some point during the semester, the section took up the question of Congress's power to enforce the Fourteenth Amendment, then a matter of substantial political controversy as Congress struggled to respond to the civil rights movement. As I recall, Sandy asked whether the Constitution gave Congress the power to abolish private schools in states that had previously segregated their schools, as a means of implementing the rights identified in *Brown v. Board of Education*,[2] and notwithstanding old decisions like *Pierce v. Society of Sisters*.[3] And, as I recall, my response pretty much ended the discussion: "Yes."

Or, at least, that's how I remember it. But, I also know that for many years Sandy carried with him the firm recollection of having read what he called "my" senior paper on Oliver Wendell Holmes—whereas I *know* that he couldn't have done that, because my senior paper was on *Prigg v. Pennsylvania*[4] and *Swift v. Tyson*.[5]

I use these examples to introduce an argument connected to Sandy's long-standing interest in historical memory.[6] The casebook of which he is a co-author is organized historically—relentlessly so, I would put it, to the point where I

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1. Sandy, of course, has taken over the task of updating McCloskey's classic book, *The American Supreme Court* (first published in 1960), whose argument provided the framework for McCloskey's course. For the most recent edition, *see* Robert G. McCloskey, *The American Supreme Court* (3d ed., rev. by Sanford Levinson, U. Chi. Press 2000).

2. 347 U.S. 483 (1954).

3. 268 U.S. 510 (1925).

4. 41 U.S. 539 (1842).

5. 41 U.S. 1 (1842).

6. Evidenced, for example, in Sanford Levinson, *Written in Stone: Public Monuments in Changing Societies* (Duke U. Press 1998).

personally would find it quite difficult to teach from. I take the implicit argument of the casebook to be that students cannot understand constitutional law, even contemporary constitutional law, without reflecting on the historical circumstances in which constitutional doctrine was articulated.

I want to raise one large question about the historicizing impulse, in two contexts.[7] The question is: What's the status of the normative judgments made by a person with a historicist sensibility? Let me begin with two definitions of that sensibility, both taken from Sandy's work. First, Sandy and Jack Balkin write, "the conventions that determine what is a good or bad legal argument are not fixed, but change over time in response to changing social, political, and historical conditions."[8] Second, they write a bit later in the same article,

> legal materials and the internal conventions of legal argument are, at any point in time, genuinely constraining on practitioners of legal argument and not infinitely malleable . . . [but] they are sufficiently flexible to allow law to become an important site for political and social struggle. [Also,] legal materials and conventions of legal argument are themselves gradually changing in response to the political and social struggles that are waged through them.[9]

Suppose a person who agrees with these historicist formulations says, "The Supreme Court's decision last week in *Smith v. Jones* is patently inconsistent with the Constitution properly understood, as that understanding is reflected in a long line of precedents, the original understanding of the relevant constitutional provisions, and widely accepted judgments about the proper role of judges in a democratic society." What exactly is the claim here? That *everyone* in today's legal culture must agree? Surely not, given that well-socialized lawyers—the Supreme Court majority that's being criticized—evidently disagree. Is the claim that every *reasonable* participant in that culture must agree? But, then, the historicist sensibility kicks in to point out that the author's own standards of reasonableness are a "response" to the "social, political, and historical conditions" in which the author finds himself or herself, and that those standards—not, in the present context, the Supreme Court's decision—are the "site" of "political and social struggle." Or, to put it another way, the normative claim, which presents itself as detached from politics, is entirely political. And, then, why should someone who does not share the author's political predispositions agree with, or even care about, the normative claim?

The casebook defends its historicizing thrust in pedagogic terms, arguing that students who can place old decisions in historical perspective will be in a better position to evaluate contemporary constitutional law: They will be "better equipped to ask . . . whether well-trained lawyers in our own era could be . . .

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7. I am quite aware that the questions I raise implicate rather deep philosophical questions. I know that I am not in a position to provide answers to those questions (and that this venue is probably not the one in which to try). This brief comment should be taken, then, as a set of thoughts provoked by Sandy and his work rather than as a comprehensive attempt to address the issues I identify here.

8. Jack M. Balkin and Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of* Bush v. Gore, 90 Geo. L.J. 173, 174 (2001).

9. *Id.* at 181.

engaged in the rationalization of great injustices in the name of our Constitution . . . ."[10] The historicist sensibility, that is, is a way of combating what Charles Black called "the normative power of the actual."[11]

Seen in another way, though, the historicist sensibility is a method of estranging and alienating oneself from one's own society, to the point where one sees one's fellow citizens pretty much as one would see members of some foreign nation.[12] Now, of course it's true that a person with historicist sensibilities can make normative judgments. Both the casebook and the article from which I have quoted do so, the casebook about slavery (something of a cheap shot, of course), and the article about *Bush v. Gore* (I leave it to readers to decide whether the same parenthetical comment is warranted here). What happens, though, when one's historicist sensibilities kick in with respect to one's own normative judgments? To invoke a central phrase in the United States constitutional tradition, exactly how can a person with a historicist sensibility come to believe that we can "establish[] good government from reflection and choice, or [instead] whether [we] are forever destined to depend for [our] political constitutions on accident and force"?[13]

Consider first slavery, a central feature in the casebook and in other parts of Sandy's work. The reason that criticizing lawyers and judges whose actions and decisions supported slavery is a cheap shot is that *our* political, social, and economic circumstances make slavery normatively inadmissible according to the criteria we think appropriate (and those criteria are entirely uncontroversial). The problem is that the historicist knows that *their* political, social, and economic circumstances made slavery a morally *defensible* system according to the criteria they had available.

I come at this as someone who has studied the non-constitutional law of slavery from the inside, so to speak, in my first book and in another to be published later this year.[14] In both, I attempted to figure out how well-socialized lawyers, who weren't, as it appears from the evidence, moral monsters generally, could think themselves into a position of defending, or at least developing the legal structure for, one institution that was morally monstrous. Of course there's no question about *our* normative judgment about slavery. But what of *theirs*? That is, take a historicist position about slavery itself.[15] Suppose we were living in

10. Paul Brest, Sanford Levinson, J.M. Balkin & Akhil Reed Amar, *Processes of Constitutional Decisionmaking: Cases and Materials* xxxii (4th ed., Aspen L. & Bus. 2000).

11. Charles L. Black, Jr., *The Death Penalty Now*, 51 Tul. L. Rev. 429, 434 (1977). The proximate source of the reference is Morris R. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 582 (1933), which in turn attributes the phrase to Georg Jellinek.

12. The usual reference here is to Leslie P. Hartley, *The Go-Between* 9 (Hamish Hamilton 1953): "The past is a foreign country: they do things differently there."

13. *The Federalist No. 1* (Alexander Hamilton). In the present context, Hamilton's phrase "*accident and force*" substitutes for the historicist's *changing social, political, and economic conditions*.

14. Mark V. Tushnet, *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest* (Princeton U. Press 1981); Mark Tushnet, *Slave Law in the American South:* State v. Mann *in History and Literature* (U. Press Kan. forthcoming 2003).

15. The conditions for doing so are, I think, quite restrictive. There was a moment in the historiography of slavery when the study of slavery was de-moralized—at a point when the claims of

the South of 1855 and were, in particular, well-socialized lawyers (and were, therefore, white men). What would we think? Or, perhaps more precisely, what can we say of analytic interest about the normative judgments made by the people who were actually there?[16]

The historicist sensibility pushes us to ask: Given the historical circumstances in which people found themselves, how could they do otherwise? The classic text on this question is by Stanley Fish—or, more precisely, by the pitcher Dennis Martinez as quoted by Fish. When asked by a reporter what his manager Earl Weaver had said to him when Weaver walked to the mound, Martinez replied, "He [Weaver] said, 'Throw strikes and keep 'em off the bases,' . . . and I said, 'O.K.'"[17] As Fish points out, this could have meant a number of things, including, "What a dumb question to ask." But, as Fish recognizes, the more interesting possibility is opened up by the rest of what Martinez said, which is the focus of Fish's argument: "'What else could I say? What else could he say?'"[18] That is, as well-socialized professionals, Weaver and Martinez—and the antebellum Southern lawyers—did the only thing they could do. They were socialized to the point that what they did was fully determined by their social role.

This may seem inconsistent with the claim, quoted earlier, that the legal materials and conventions are open to alternative interpretations even within a particular legal culture. Yet, that claim goes to the culture as a whole, and may not be true of individual participants in the culture. That is, we know (actually, we don't really know this, but we hope that it might be true) that some Southern lawyers were able to see ways in which the legal materials available to them could be used to challenge, or at least to ameliorate the harshness of, slavery. Those lawyers, we can assume, deployed those arguments and thereby made them available to other well-socialized lawyers, who could in turn have adopted them. We can criticize the lawyers who did not, on the ground that they rejected normatively more appealing arguments that were in fact available within the legal culture. They could have adopted the arguments and remained well-socialized lawyers, and the fact that they did not opens them up to moral criticism.

The difficulty with the foregoing argument is that the word "could" has to do too much work. True, perhaps if we consider the lawyers solely as lawyers, the

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African Americans for civil rights were unquestioned and unquestionable except by the most regressive elements of American society. As times changed and those claims became more controversial, the study of slavery became re-moralized, making it more difficult to take a historicist stance on slavery itself. For a somewhat more extended discussion, *see* Mark Tushnet, *Constructing Paternalist Hegemony: Gross, Johnson, and Hadden on Slaves and Masters*, 27 L. & Soc. Inquiry 169, 170-72 (2002).

16. Robert Cover offered an analysis in his argument that people faced with what he called a "moral-formal dilemma"—in which their moral judgments conflicted with the formal requirements of the legal system within which they found themselves—would escalate the rhetorical stakes by saying, for example, that the very survival of slavery was at stake unless a particular rule were adopted. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 199, 229-32 (Yale U. Press 1975). The difficulty with this argument is that what Cover describes as the elevation of the stakes would be described—and perhaps accurately—by the participants themselves as simple realism.

17. Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 Yale L.J. 1773, 1773 (1987) (brackets and ellipses in original).

18. *Id.*

arguments were available to them. But, a historicist would insist, these people were not only lawyers, but also sons and fathers, merchants and slave-owners, and so on through a long list of social roles they occupied. It's conceptually possible, but empirically unlikely, that the socialization into all of the roles of a person who defended slavery still left room for reflection and choice. More likely, once we understand everything about the defender of slavery, we'll see how the cumulation of all his roles made it impossible for him to choose any course other than the one he pursued—what else could he do, as Martinez asked?[19]

Turn now to contemporary controversies, and reflect on our own normative positions. It follows pretty straightforwardly from the Martinez position that of course we hold normative positions, and we think them normatively justified—again, what else could we do?[20] This, though, raises a question implicit in Martinez's response. Fish reads Martinez's comment as having at least two meanings. The first is the one I've been exploring. The second is that it was a disdainful dismissal of the reporter's question as incredibly stupid. Martinez said, in effect: Why do you care what Earl Weaver said, given that he had to say what he did?

Similarly, while it's true that I hold a range of normative views that I believe to be fully justified by the normative criteria I think correct, it's something of a mystery to me why anyone should care what they are. The historicist sensibility, at least when coupled with a modicum of self-awareness,[21] de-privileges one's own position, which one ordinarily and understandably privileges. In a sense, self-historicism is self-alienation or self-estrangement. It makes us stand outside ourselves, and probably ought to lead us to think about why we hold the views we do, just as it leads us to think about why antebellum Southern lawyers held the views they did.

One way in which this happens is reasonably clear.[22] We have our views, but again and again we run up against people who disagree. Sandy and I think that *Bush v. Gore* was egregiously wrong; Nelson Lund thinks it was obviously

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19. As noted earlier, I don't want to get into what I believe to be a complex philosophical literature about whether we can blame someone for acts that were fully determined by things external to the actor.

20. Here I think that Balkin's position, as reported in Balkin & Levinson, *supra* n. 8, at 193-94, is not only correct but inevitably correct when understood in the right way. Balkin asserts that he can take positions internal to the legal system because "he lives in the present, not the past," and can inhabit multiple roles, such as "detached analyst, external critic, and invested participant." He concludes, "One simply needs to be clear about which role one is playing . . . ." *Id.* at 194. This, though, exposes a flaw in Balkin's analysis, I think. From whence does that clarity flow? Or, put another way, on what basis can the historicist confidently assert that, right now I'm being a detached analyst but in a few minutes I'll start playing the role of invested participant? What role is the historicist playing in making *that* statement?

21. Perhaps Balkin's position, described in the immediately preceding note, makes sense because, at the moment he allocates himself to one or the other role, he lacks the self-awareness that historicism forces on us.

22. Another mechanism is psychological self-analysis. I think it's a matter of some regret that psychoanalysis and other variants of depth psychology have fallen out of fashion, because they probably would help us understand the processes at work today, as a parallel to the way historical inquiry allows us to understand the processes at work in the past.

correct.[23] What does a person with a historicist sensibility have to say about that sort of normative disagreement? Well, just about the same thing such a person says about normative judgments made in the past: They arise out of the social, political, and economic circumstances of the people making them.[24]

As applied to contemporary controversies, the historicist sensibility may be in some tension with the academic enterprise. If I hold the views I do because I have to hold them—again, what else could I do?—then why should anyone bother to present to me arguments supporting alternative views? I'll dismiss them as loony, or ill-founded, or inconsistent with the facts of the world as I understand those facts; the standard moves are well-known. Against this skepticism, people sometimes point to what they believe to have been rationally motivated changes in position. Sandy, for example, says that his views about the Religion Clauses were changed by his reading of and thinking about arguments offered by Michael McConnell.

The historicist's question would be whether those changes were indeed rationally motivated. Before saying yes, the historicist would look for such things as changes in Sandy's life circumstances between the time he formulated his initial position on these questions and the time he came to accept McConnell's arguments. Changes in such circumstances might directly affect the views Sandy holds, or they might affect the degree to which he is attached to those views, thereby opening space for *other* influences on his views.[25]

One way the historicist might think about this is the following: Given my life experiences, of course I hold the normative views I do, and given their life experiences, of course the people who disagree with me hold the ones they do. The next thought is obvious. What if my experiences had been just a little different from the ones they actually were?[26] The answer seems equally obvious: I can't be confident that I would hold the views I do, or hold those views with the same degree of attachment.

With that possibility in hand, I want to conclude by suggesting one possible valuable consequence of a widely spread historicism applied to contemporary as well as past legal issues—a de-escalation of the rhetoric of political discussion. The historicist sensibility has at least two pathologies associated with it. The first is demonizing the opposition. That occurs when a person embedded in his or her circumstances simply cannot—precisely because of that embeddedness—believe

23. Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 Cardozo L. Rev. 1219 (2002).

24. The *Bush v. Gore* example is too easy, of course, because of the tight correlation between one's views on whether the Court was right or wrong and one's party affiliation.

25. To note some possibilities (without asserting that they played a role in Sandy's life): development of a friendship with someone who was a more devoted practitioner of your religion; development of such a friendship with someone deeply committed to some other religion; conversion of one's child to another religion—and either the ensuing alienation between you and your child or the continued strength of the family bond.

26. What follows is developed from conversations with Mike Seidman. Some aspects of it are explored in Louis Michael Seidman & Mark V. Tushnet, *Remnants of Belief: Contemporary Constitutional Issues* (Oxford U. Press 1996); others are developed in much more detail in Louis Michael Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (Yale U. Press 2001).

that anyone else living in the same society could sincerely hold different views from his or her own views. On running across people who disagree, such a person will attribute the disagreement to venality, corruption, or evil. Another pathology is almost the reverse, a relativism in which the historicist who understands the contingency of his or her commitments cannot get excited about the equally contingent commitments of others.[27]

Perhaps, however, the historicist can avoid these pathologies. When I recognize that I might today be holding quite different views had my experiences in the past been just a little different, I might become somewhat less passionate about the views I actually do hold. The rhetorical stakes of political discussion might decrease if the historicist sensibility becomes pervasive and lots of people treat their own views in the slightly detached way that self-historicism might induce. In this way, self-historicism might be seen as a type of enlightenment, restoring the role of reason and choice in political deliberation.

But, of course, one would have to raise historicist questions about the sensibility that would generate a version of historicism with such benign consequences. Historicism asks us to question the degree to which reason and choice play roles in human action. Yet historicism offers itself as a product of reason. Its proponents purport to offer reasons explaining why historicism is a better way of thinking about human action than alternatives. So, what are the conditions of the United States constitutional culture that made it possible for Sandy and his colleagues to produce such a well-regarded historicist casebook on constitutional law?

27. So, for example, someone who offers a historicist account of the normative reasoning of slavery's defenders might well be charged with moral relativism or indifference to the immorality of slavery.