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## History and Interpretation

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## HISTORY AND INTERPRETATION®

Stephen M. Feldman\*

Sanford Levinson has written on many topics, including the nature of American constitutionalism,<sup>1</sup> monuments and culture,<sup>2</sup> and constitutional stupidities.<sup>3</sup> In this essay, though, I focus on only two of his works. The first is an article written in 1982 entitled *Law as Literature*.<sup>4</sup> The second is the constitutional law casebook that Levinson has co-authored since 1983 entitled *Processes of Constitutional Decisionmaking: Cases and Materials*.<sup>5</sup> I choose these two works for three main reasons: both have influenced constitutional scholarship; the article and the book interrelate in provocative ways, appearing sometimes complementary of and sometimes opposed to each other; and the two works have directly and indirectly influenced my own scholarship in important ways.<sup>6</sup>

Part I of this essay focuses on Levinson's *Law as Literature* article, especially its assertions of relativism and nihilism in constitutional interpretation.<sup>7</sup> Part II turns to Levinson's constitutional law casebook, particularly its emphasis on a historicist approach to constitutionalism.<sup>8</sup> Part III explores how these two works by Levinson have influenced other constitutional scholars.<sup>9</sup> Part IV, the Conclusion, is more personal, as I explain how Levinson's works have affected my own scholarship.<sup>10</sup>

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1. Sanford Levinson, *Constitutional Faith* (Princeton U. Press 1988).

2. Sanford Levinson, *Written in Stone: Public Monuments in Changing Societies* (Duke U. Press 1998).

3. *Constitutional Stupidities, Constitutional Tragedies* (William N. Eskridge, Jr., & Sanford Levinson eds., N.Y. U. Press 1998).

4. Sanford Levinson, *Law as Literature*, 60 *Tex. L. Rev.* 373 (1982).

5. Paul Brest & Sanford Levinson, *Processes of Constitutional Decisionmaking: Cases and Materials* (2d ed., Little, Brown & Co. 1983).

6. See e.g. Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* (Oxford U. Press 2000) [hereinafter Feldman, *Intellectual Voyage*] (using historical approach to explain American jurisprudence); Stephen M. Feldman, *Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State* (N.Y. U. Press 1997) [hereinafter Feldman, *Please Don't*] (using historical approach to explain separation of church and state).

7. See text accompanying *infra* notes 12-23.

8. See text accompanying *infra* notes 24-53.

9. See text accompanying *infra* notes 54-76.

10. See text accompanying *infra* notes 77-86.

## I. INTERPRETATION: THE ARTICLE

Levinson began the article, *Law as Literature*, by stating the theme captured in the title: law should be understood as a type of literature. To illuminate this conception of law, he explained how it was implicit even in the late-nineteenth century legal science of the Langdellians:

For Langdell law was essentially a literary enterprise, a science of extracting meaning from words that would enable one to believe in law as a process of submission to the commands of authoritative texts (the rule of law) rather than as the creation of willful interpreters (with submission concomitantly producing the rule of men).<sup>11</sup>

This reliance on the understanding of authoritative written texts, Levinson continued, is paramount in the constitutional rhetoric and politics of the United States. Citizens, in theory, owe fidelity to the Constitution as an authoritative text that stands above even democratic or majoritarian processes.<sup>12</sup>

Yet when Levinson was writing, in 1982, literary criticism was riven with disputes about the methods for and the possibility of understanding texts. “[T]he emphasis of much contemporary [literary] theory,” Levinson wrote, “is an attack on the stability of meaning (or, concomitantly, on the possibility of establishing techniques by which to retrieve meaning) at any given moment.”<sup>13</sup> Many literary critics had become metaphysical anti-realists, no longer believing that they could “ground description or analysis in a purported reality beyond the descriptions or analyses themselves.”<sup>14</sup> As such, they viewed “the project of ultimate truth-seeking [as] based on philosophical error [because] it presumes a privileged foundation for measuring the attainment of truth, and it is precisely this foundation that Nietzsche and most of the more radical literary theorists deny.”<sup>15</sup>

Since law was a type of literature, Levinson reasoned further, the contemporary approaches to literary criticism could be imported into the jurisprudential realm.<sup>16</sup> Predictably, then, a decreasing number of constitutional scholars still believed that the Constitution had a stable or objective meaning, based on either the plain meaning of the text or the original intentions of the framers.<sup>17</sup> Indeed, “[i]f one takes seriously the views articulated by Nietzsche, Rorty, and Fish (among others)” —and Levinson was clearly one who took such views seriously—“one must give up the search for principles and methods of

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11. Levinson, *supra* n. 4, at 374. For a discussion of Langdellian legal science, see Feldman, *Intellectual Voyage*, *supra* n. 6, at 91-105.

12. Levinson contrasts the American and English conceptions of a constitution. “Anyone familiar with English political discourse [knows that] debate in England centers on the right or wrong of a particular bill, not on its fidelity to a presumptively authoritative text that stands above parliamentary activity.” Levinson, *supra* n. 4, at 375.

13. *Id.* at 377.

14. *Id.*

15. *Id.* at 383-84.

16. *Id.* at 384. Levinson wrote: “If we consider law as literature, then we might better understand the malaise that afflicts all contemporary legal analysis, nowhere more severely than in constitutional theory.” *Id.* at 377.

17. Levinson, *supra* n. 4, at 378-79.

constitutional interpretation.”<sup>18</sup> “For a Nietzschean reader of constitutions,” Levinson elaborated, “there is no point in searching for a code that will produce ‘truthful’ or ‘correct’ interpretations; instead, the interpreter, in Rorty’s words, ‘simply beats the text into a shape which will serve his own purpose.’”<sup>19</sup>

Levinson did not find his own argument felicitous, yet he could see no acceptable alternative. “To put it mildly,” he wrote, “there is something disconcerting about accepting the Nietzschean interpreter into the house of constitutional analysts, but I increasingly find it impossible to imagine any other way of making sense of our own constitutional universe.”<sup>20</sup> We were doomed to an interpretive relativism, confronting multiple constitutional readings without any means of identifying the correct one. Thus, “[t]here are as many plausible readings of the United States Constitution as there are versions of Hamlet.”<sup>21</sup> In fact, even worse, Levinson admitted that he saw no way to “combat” against “nihilism.”<sup>22</sup>

## II. HISTORY: THE CASEBOOK

In 1975, Paul Brest authored a new casebook in constitutional law entitled *Processes of Constitutional Decisionmaking: Cases and Materials*.<sup>23</sup> Unsurprisingly, Brest’s construction of the book seemed to be influenced by the legal process school of thought. He had received his law degree from Harvard in 1965,<sup>24</sup> when legal process thinking still dominated jurisprudence. Not coincidentally, then, in the *Acknowledgments* section of his new casebook, Brest specially noted that “[t]he last several chapters of this book are filled with references to . . . Hart & Wechsler’s pathbreaking *The Federal Courts and the Federal System* . . .”<sup>25</sup> That federal courts casebook,<sup>26</sup> which Henry M. Hart and

18. *Id.* at 385.

19. *Id.* (quoting Richard Rorty, *Nineteenth-Century Idealism and Twentieth-Century Textualism*, in *Consequences of Pragmatism (Essays: 1972-1980)* 151 (U. Minn. Press 1982)). Levinson characterized John Marshall as “perhaps, the great Nietzschean judge of our tradition.” *Id.* at 389.

20. *Id.* at 385. He added: “To view [the Constitution] as a genuine source of guidance is naive, however heartbreaking this realization might be.” *Id.* at 378.

21. *Id.* at 391.

22. Levinson, *supra* n. 4, at 392. Levinson concluded, pessimistically: “That we cannot walk out of offending productions of our national epic poem, the Constitution, may often be anguishing, but that may be our true constitutional fate.” *Id.* at 391-92. His final paragraph ended as follows:

And, just as constellations are human attempts to link the separate stars, so are doctrinal analyses likely to serve as similar attempts to demonstrate that the cases themselves are meaningfully linked and intellectually patterned. All such writing (and reading) is a supreme act of faith. We can hope that some future conjunction of author and reader will provide a common language of constitutional discourse fit for “a nation of supple and athletic minds,” but for now we can only await its coming and make do with the fractured and fragmented discourse available to us.

*Id.* at 402-03 (quoting Walt Whitman, *Democratic Vistas*, in *Walt Whitman: Complete Poetry and Collected Prose* 993 (Library of Am. 1982) (citations omitted)).

23. Paul Brest, *Processes of Constitutional Decisionmaking: Cases and Materials* (Little, Brown & Co. 1975).

24. *The AALS Directory of Law Teachers 2001-2002*, at 318 (West 2001) [hereinafter *AALS Directory*].

25. Brest, *supra* n. 23, at vii-viii.

Herbert Wechsler first published in 1953, was one of the foundational pillars for the legal process approach.

What was (and is) legal process?<sup>27</sup> Legal process scholars were primarily concerned with two interrelated concepts: governmental institutions and governmental processes. In the early 1950s, Hart and Albert Sacks explicated these concepts in their well-known though long-unpublished course materials, *The Legal Process: Basic Problems in the Making and Application of Law*.<sup>28</sup> “The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed.”<sup>29</sup> Legal process scholars thus focused, in part, on distinctions among governmental institutions: the legislative, executive, and judicial branches, as well as the state and federal governments. This concern was stated nowhere more clearly than in the *Preface* to the first edition of Hart and Wechsler’s casebook: “In varying contexts we pose the issue of what courts are good for—and are not good for—seeking thus to open up the whole range of questions as to the appropriate relationship between the federal courts and other organs of federal and state government.”<sup>30</sup>

Furthermore, according to the legal process scholars, the appropriate lens for understanding governmental institutions was, of course, process. Scholars such as Hart, Sacks, and Wechsler sought to specify the processes or procedures that defined and legitimated the various governmental institutions. For instance, according to Hart and Sacks, a court’s decision was legitimate if the judge or judges followed the appropriate processes or procedures for judicial decisionmaking, called “reasoned elaboration.”<sup>31</sup> Reasoned elaboration required a judge to give reasons for a decision, to articulate those reasons in a detailed and coherent manner, and to relate the decision to a relevant rule of law applied in a manner logically consistent with precedent.<sup>32</sup>

Paul Brest’s casebook on constitutional law, as evidenced by its title, *Processes of Constitutional Decisionmaking*, unquestionably fell into this legal process tradition. Previous constitutional law casebooks traditionally had been organized around substantive principles and doctrines of constitutional law. Chapters thus would typically focus on topics such as Congress’s power under the Commerce Clause, substantive due process, and freedom of expression.<sup>33</sup> Brest

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26. Henry M. Hart, Jr., & Herbert Wechsler, *The Federal Courts and the Federal System* (N.Y. Found. Press 1953).

27. For a more extended discussion of the legal process school of thought, see Feldman, *Intellectual Voyage*, *supra* n. 6, at 115-23.

28. Henry M. Hart, Jr., & Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 4 (tentative ed., Cambridge 1958).

29. *Id.*

30. Hart & Wechsler, *supra* n. 26, at xii.

31. Hart & Sacks, *supra* n. 28, at 164-67.

32. *Id.*

33. For an example of this traditional approach, see Gerald Gunther & Noel T. Dowling, *Cases and Materials on Constitutional Law* (8th ed., Found. Press 1970).

abandoned this orthodox approach for a process-based orientation, as he explained in the *Introduction* to the casebook:

*Processes of Constitutional Decisionmaking* was born of personal frustration in teaching constitutional law from existing casebooks. After several introductory chapters on judicial review, all of the books proceeded to examine bodies of substantive doctrine, subject by subject. Questions of *how* courts arrived at their decisions continually arose, but answers remained continually elusive. The same was true of questions concerning the different modes of judicial review and the proper decisionmaking roles of legislatures and other nonjudicial institutions. . . . This book is premised on the belief that an explicit focus on the processes of constitutional decisionmaking offers an understanding of the structure, operation, and doctrines of the American constitutional system that the conventional organization cannot provide.<sup>34</sup>

Brest consequently divided the book into two parts. The second part, called *Processes of Constitutional Adjudication and the Allocation of Decisionmaking Authority*, was patently focused on classic legal process issues such as the criteria for judicial decisionmaking (elaborating the process of adjudication) and congressional power to interpret the Constitution (elaborating the institutional powers of Congress).<sup>35</sup> As Brest specified, “[q]uestions of institutional authority and of procedure become paramount in Part 2.”<sup>36</sup> The first part of the book, meanwhile, was called *The Sources for Constitutional Decisionmaking*. “Its central inquiry,” Brest explained, “is how *any* decisionmaker—a legislator, an official, or a judge—who is charged with applying the Constitution can determine what it permits or requires.”<sup>37</sup> Part One, that is, focused on the processes or “techniques” of constitutional interpretation,<sup>38</sup> “the starting point for most exercises in constitutional decisionmaking.”<sup>39</sup> Overall, then, Brest’s casebook was concerned with the “criteria intrinsic to the processes of constitutional decisionmaking”<sup>40</sup> because it was precisely those criteria that made “a difference in the outcome of decisions.”<sup>41</sup>

The second edition of the casebook was published in 1983. Significantly, Brest had added his former star student, Sanford Levinson, as a co-author.<sup>42</sup> Whereas many casebooks barely change as they move from one edition to the next, Brest and Levinson radically transformed *Processes of Constitutional Decisionmaking*, and the primary agent of change was the new author, Levinson.<sup>43</sup>

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34. Brest, *supra* n. 23, at 1 (emphasis in original).

35. *Id.* at 955-1335.

36. *Id.* at 2.

37. *Id.*

38. *Id.*

39. Brest, *supra* n. 23, at 1.

40. *Id.* at 3.

41. *Id.* at 5 (quoting Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* 30 (Stanford U. Press 1961)).

42. Levinson graduated from Stanford Law School in 1973. *AALS Directory*, *supra* n. 24, at 705.

43. In a telephone message, Levinson stated that while the new edition was a “joint undertaking,” it was “undoubtedly true” that he was predominantly responsible for the “turn to history.” Telephone

To be sure, the co-authors retained not only the legal process-oriented title but also, and more important, a general concern for issues of institutional authority and processes of constitutional decision, which had distinguished the first edition. Yet, just as surely, the second edition moved away from a narrow legal process focus to a more historicist approach to constitutional law.

Brest and Levinson expressly discussed the transition to a historicist approach in the *Preface to the Second Edition*. First of all, they openly acknowledged their growing ambivalence toward legal process:

The first edition of *Processes* explicitly adopted the ideology of the legal process tradition. Its hypothesis was that there existed decisionmaking procedures that could yield correct or legitimate decisions. Although the validity of this hypothesis remains a central concern of the book—for it is a crucial matter, about which every student must come to his or her own judgment—the second edition manifests our skepticism about the legitimating power of process and about the meaning of “legitimacy.”<sup>44</sup>

Moreover, they reorganized the book into four parts, with the all-important Part One, nearly one-third of the book, expressly “organized in historical fashion.”<sup>45</sup> Indeed, according to Brest and Levinson, Chapter One “introduces many of the recurring procedural themes of the course within a *chronological structure* that is new in this edition.”<sup>46</sup> The point of this new historicist approach was to place constitutional disputes and decisionmaking within the concrete and specific contexts in which they had arisen. “The materials thus introduce,” the authors explained, “the concept of constitutional government, the allocation of decisionmaking authority between the judiciary and nonjudicial institutions, and some basic problems of constitutional interpretation, while placing the constitutional controversy in a broader social and political context.”<sup>47</sup>

Part One therefore examined “recurring constitutional issues” within four historical periods: the founding period, the Marshall and Taney Courts period, the post-Civil War to 1937 period, and the 1937 to World War II period.<sup>48</sup>

Without sacrificing doctrinal continuity, this organization illuminates relationships among seemingly discrete bodies of legal doctrine, and between the constitutional system and the society in which it operates. It takes doctrine seriously on its own terms and as a manifestation of both social forces and the legal consciousness of a period, while illustrating both the contingency and continuity of legal doctrine.<sup>49</sup>

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Message from Sanford Levinson to Stephen M. Feldman (Sept. 25, 2002). Levinson noted, though, that Brest had already demonstrated his interest in a historical approach to constitutional law in a recently published article. *Id.*; see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 218-22 (1980) (criticizing originalist approaches to interpreting the Constitution).

44. Brest & Levinson, *supra* n. 5, at xxxiii (footnote omitted).

45. *Id.* at xxxi. Part One was 393 pages out of a total of 1377 pages.

46. *Id.* (emphasis added).

47. *Id.*

48. *Id.* at xxxi-xxxii.

49. Brest & Levinson, *supra* n. 5, at xxxii.

Because of this historical and contextual approach to constitutional law, Brest and Levinson emphasized issues in their book that other casebook authors either slighted or ignored completely.<sup>50</sup> The most notable example of this difference was in their treatment of the law of slavery. Besides the notorious *Dred Scott v. Sandford*,<sup>51</sup> which found its way into many casebooks, Brest and Levinson included cases such as *The Antelope*,<sup>52</sup> *Prigg v. Pennsylvania*,<sup>53</sup> and *Groves v. Slaughter*.<sup>54</sup>

### III. THE INFLUENCE OF LEVINSON'S WRITING

While Brest and Levinson admitted their growing disenchantment with legal process, they did not openly acknowledge that their historicist approach was in tension with the basic tenets of legal process. As Brest had explained in the first edition, legal process assumed that constitutional decisions were legitimate if the Justices (or judges) had followed the accepted processes or criteria of constitutional adjudication.<sup>55</sup> But a historicist approach suggested that the very existence of legitimacy was often a matter of perspective and therefore questionable. To the extent that constitutional decisions were deemed legitimate, it was more a function of contingent historical circumstances than a matter of the application of some abstract criteria or principles.

In fact, by questioning and undermining the legal process approach, Brest and Levinson fit into a broad intellectual trend of the 1980s, as many legal scholars repudiated or at least began to doubt the validity of legal process.<sup>56</sup> This broad trend was epitomized in Levinson's own article on constitutional interpretation, *Law as Literature*. After all, in that article, Levinson had maintained that constitutional interpretation could not be objectively grounded on text or framers' intentions.<sup>57</sup> Constitutional adjudication was relativistic and nihilistic, rather than principled and legitimate.<sup>58</sup> From this perspective, then, Levinson's article was consistent with his casebook.

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50. Levinson emphasizes this difference between *Processes of Constitutional Decisionmaking* and other casebooks in an article. Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 Chi.-Kent L. Rev. 1087, 1089-90 (1993).

51. 60 U.S. 393 (1857).

52. 23 U.S. 66 (1825).

53. 41 U.S. 536 (1842).

54. 40 U.S. 449 (1841).

55. Brest, *supra* n. 23, at 3-5.

56. Feldman, *Intellectual Voyage*, *supra* n. 6, at 123-62.

57. Levinson, *supra* n. 4, at 379. Levinson stated,

[T]he plain meaning approach inevitably breaks down in the face of the reality of disagreement among equally competent speakers of the native language. Intentionality arguments . . . face not only the problem of explaining why intentions of long-dead people from a different social world should influence us, but also . . . the problem of extracting intentions from the collectivity of individuals and institutions necessary to give legal validity to the Constitution.

*Id.*

58. *Id.* at pt. III.

Moreover, if the success of a law review article is measured by the number of times that it is cited in subsequent articles by other authors,<sup>59</sup> then Levinson's *Law as Literature* article was extraordinarily successful. A Westlaw search in the Journals and Law Reviews ("JLR") database uncovered 220 citations to this article.<sup>60</sup> Many of those citations were for the proposition that constitutional interpretation was either relativistic, nihilistic, or both. Levinson's article, it would be fair to say, became the standard citation for this extreme critical postulate.

For example, even before Levinson's article had made it into print, Owen Fiss cited it as representative of "a new nihilism, one that doubts the legitimacy of adjudication."<sup>61</sup> Fiss denounced this nihilism as "unwarranted and unsound, but [as nonetheless] gaining respectability and claiming an increasing number of important and respected legal scholars, particularly in constitutional law. They have turned their backs on adjudication and have begun a romance with politics."<sup>62</sup> Another writer criticized those commentators, citing Levinson,<sup>63</sup> who emphasize "the internally contradictory or radically subjective nature of norms."<sup>64</sup> Yet another writer condemned those who claim that "[i]f we are not objectivists or foundationalists . . . chaos will be loosed upon the law. Nietzschean nihilism (or skepticism, or indeterminacy, or quietism) will reign."<sup>65</sup> The citation? Levinson.<sup>66</sup> Yet again, another writer declared: "Many share the view of Sanford Levinson of the University of Texas School of Law: '. . . [t]here are as many plausible readings of the United States Constitution as there are versions of Hamlet.'"<sup>67</sup>

Thus, Levinson's *Law as Literature* article, along with his casebook, helped to undermine the legal process perspective on constitutional adjudication. Even further, his casebook also stood at the forefront of an intellectual movement toward an alternative conception of constitutional scholarship. That is, Levinson

59. For one serious and one satirical look at the process of winning citations, see Ian Ayres & Fredrick E. Vars, *Determinants of Citations to Articles in Elite Law Reviews*, 29 J. Leg. Stud. 427 (2000) (serious); J. M. Balkin & Sanford Levinson, *How to Win Cites and Influence People*, 71 Chi.-Kent L. Rev. 843 (1996) (satirical).

60. The search query was as follows: levinson /2 law /2 literature. This search, conducted on September 26, 2002, uncovered citations not only to the original publication of the article in the Texas Law Review, Levinson, *supra* n. 4, but also to its reprint, Sanford Levinson, *Law as Literature*, in *Interpreting Law and Literature: A Hermeneutic Reader* 155 (Sanford Levinson & Steven Mailloux eds., Northwestern U. Press 1988).

61. Owen M. Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739, 740 (1982).

62. *Id.* Interestingly, Fiss cited one other scholar besides Levinson as representative of this nihilist outlook. It was Paul Brest. *Id.* at 740 n. 3 (citing Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L.J. 1063 (1981)).

63. Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 Wm. & Mary L. Rev. 827, 827 n. 5 (1991).

64. *Id.* at 827.

65. Mark Kingwell, *Let's Ask Again: Is Law Like Literature?*, 6 Yale J.L. & Humanities 317, 319 (1994).

66. *Id.* at 319 n. 2.

67. Jeff Broadwater, *Taking Its Toll: Partisan Judging and Judicial Review*, 4 J. App. Prac. & Process 41, 41 (2002) (quoting Levinson, *supra* n. 4, at 391). For some additional similar citations to Levinson's piece, see Arthur Austin, *The Top Ten Politically Correct Law Review Articles*, 27 Fla. St. U. L. Rev. 233, 250 n. 130 (1999); Benjamin Means, *Culture and the Law: Monuments to the Past in a Leveling Wind*, 97 Mich. L. Rev. 1617, 1620 n. 9 (1999); Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 Colum. L. Rev. 215, 226 n. 56 (1999).

did not merely help break apart the legal process edifice, he also helped build—or provided an impetus for—a new scholarly approach: historicism. While the influence of the Brest and Levinson casebook on the way professors *teach* constitutional law is unclear,<sup>68</sup> the book was a harbinger of change in the way many professors *write* about constitutional law.<sup>69</sup> An increasing number of legal scholars, including Michael J. Klarman, Stephen M. Griffin, and Barry Friedman, seek to understand American constitutionalism from a historical perspective, particularly one that accounts for all of American history, not just the framing.<sup>70</sup>

Griffin elaborates:

[A]ll the theories of constitutional interpretation normally discussed by scholars accept an ahistorical view about the role that the constitutional principles of the early republic can and should play in the complex democracy of the present. The emphasis in these theories—characteristic of American constitutionalism from the beginning—is on how the fundamental principles adopted by the Founding generation can solve contemporary constitutional problems. This approach is completely implausible from an historicist perspective.<sup>71</sup>

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68. In an e-mail message, Levinson wrote: “I think that the adoption rate has held fairly steady at about 30-35 adoptions, but I’m really not at all sure.” E-mail from Sanford Levinson to Stephen M. Feldman, *Casebook Adoptions* (Sept. 30, 2002). Yet, a new co-author on the fourth edition of the casebook, Akhil Amar, reported otherwise: “I don’t have any hard numbers in hand; but I can report based on conversations with George Serafin at Aspen that the book has indeed gained considerable ground with the 4th edition—roughly doubling our share and placing us third overall, according to rough estimates.” E-mail from Akhil Amar to Stephen M. Feldman, *Casebook Adoptions* (Sept. 30, 2002). Unfortunately, Aspen Publishers, the current publisher of the book, refused to provide any information regarding the number of adoptions.

69. I certainly do not mean to suggest that the Brest and Levinson casebook was the only or even the primary cause of this transition in constitutional scholarship. For instance, another book that may have provoked many constitutional scholars to take a historicist turn was Foucault’s *Discipline and Punish*. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans., Pantheon Books 1977). For a more extensive discussion of the changes in legal scholarship and the causes of those changes, see Feldman, *Intellectual Voyage*, *supra* n. 6, at 137-87. For a discussion of the turn to history in constitutional scholarship, see G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 Va. L. Rev. 485 (2002).

70. See Stephen M. Griffin, *Constitutional Theory Transformed*, 108 Yale L.J. 2115 (1999); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. Pa. L. Rev. 1, 5-7 (1998); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 1-7 (1996). Friedman and Smith write: “[H]istory is essential to interpretation of the Constitution, but the relevant history is not just that of the Founding, it is that of all American constitutional history.” Friedman & Smith, *supra*, at 6-7.

This historical approach to constitutional law resonates with the historical new institutionalism that is blossoming in political science. New institutionalists, in general, explain how Supreme Court Justices are influenced by both their political preferences and the structural or institutional mechanisms in which they operate (as Justices). For a helpful explanation of the new institutionalism, see Keith E. Whittington, *Once More unto the Breach: Postbehavioralist Approaches to Judicial Politics*, 25 L. & Social Inquiry 601 (2000) (reviewing *Supreme Court Decision-Making: New Institutional Approaches* (Cornell W. Clayton & Howard Gillman eds., U. Chi. Press 1999); *The Supreme Court in American Politics: New Institutional Interpretations* (Howard Gillman & Cornell Clayton eds., U. Press Kan. 1999)). Rogers M. Smith is an example of a historical new institutionalist. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 509-10 (Yale U. Press 1997).

71. Griffin, *supra* n. 70, at 2120. Elsewhere, Griffin explains that “[c]onstitutionalism should be appreciated as a dynamic political and historical process rather than as a static body of thought laid down in the eighteenth century.” Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* 5 (Princeton U. Press 1996).

Griffin's statement underscores how a historicist approach manifests a seismic shift in constitutional scholarship. Legal process scholars typically assumed that judges were to decide constitutional issues by applying principles—some legal process theorists wrote of “neutral principles”<sup>72</sup>—enduring values that could be traced to the actions of the constitutional framers.<sup>73</sup> But as Griffin explains, a historicist approach undermines this conventional outlook. Unsurprisingly, then, Levinson himself has tried to push his historicist insight beyond where it first appeared in the second edition of *Processes of Constitutional Decisionmaking*. His extensive and more recent work on the canon in constitutional law is directed toward shifting the focus of constitutional law teaching from Supreme Court cases and current doctrine to a broader focus on the historical circumstances and contingencies of constitutional rhetoric and decisionmaking.<sup>74</sup> For instance, he has argued vigorously that the law of slavery should be extensively covered in introductory constitutional law courses, not only through discussions of nineteenth-century Supreme Court cases but also through speeches made by politicians and abolitionists.<sup>75</sup>

Finally, while Levinson's casebook and his *Law as Literature* article were consistent insofar as they both questioned and undermined the legal process approach to constitutional law, the two works were also, in a different way, in tension with each other. In particular, a historicist approach to constitutional law provides a possible response to the purported problems of constitutional interpretation raised in Levinson's *Law as Literature*. In that essay, Levinson seemed to say that constitutional interpretation was relativistic and nihilistic.<sup>76</sup> The Supreme Court Justices were unconstrained and therefore decided cases as an imposition of will, an exercise in power. But a historicist viewpoint might suggest otherwise. Constitutional interpretation is never unconstrained. Historical circumstances or contingencies—or interpretive traditions—always constrain the Justices when they adjudicate constitutional issues.<sup>77</sup> Constitutional interpretation might appear unconstrained if we contemplate it in some abstract never-land, but Peter Pan does not sit on the Supreme Court. In the real world, the Justices are necessarily situated within the traditions of the American constitutional

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72. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15-16 (1959).

73. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 58 (2d ed., Yale U. Press 1986) (first edition in 1962).

74. *Legal Canons* (J.M. Balkin & Sanford Levinson eds., N.Y. U. Press 2000); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963 (1998).

75. Levinson, *supra* n. 50, at pt. III.

76. See Levinson, *supra* n. 4, at pt. III.

77. I discuss this approach to constitutional interpretation in a number of articles. Stephen M. Feldman, *An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship*, 54 Vand. L. Rev. 2351, 2370 (2001); Stephen M. Feldman, *Made for Each Other: The Interdependence of Deconstruction and Philosophical Hermeneutics*, 26 Phil. & Soc. Criticism 51 (2000); Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 Mich. L. Rev. 166, 174-75 (1996); Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 Geo. L.J. 2243, 2245-46 (1993) [hereinafter, Feldman, *Persistence of Power*].

community.<sup>78</sup> To be sure, these constraints are not objective—firm and unmoving—but they are constraints all the same.

Notice, too, that this recognition of the forcefulness of history or tradition does not relegate us to some type of Burkean conservatism. To say that we are necessarily embedded in and thus constrained by our communal traditions does not require us to celebrate our traditions. We can remain critical, or at least try to be so.<sup>79</sup> Regardless, though, we never can completely escape our own histories, our own communal traditions. Partly for this reason, Levinson himself subsequently co-authored an article, with Jack Balkin, that returned to the question of interpretation.<sup>80</sup> Levinson and Balkin acknowledged that many readers had read Levinson's *Law as Literature* piece "as asserting the infinite malleability of the Constitution."<sup>81</sup> In this later article, though, Levinson and Balkin suggested that while Levinson's earlier piece was not truly misunderstood, Levinson had at least modified his position. In legal interpretation, they explained, "*not* anything goes."<sup>82</sup>

#### IV. CONCLUSION

For a conclusion, instead of merely reiterating what I have already explored, I shall discuss how Levinson's work, particularly *Law as Literature* and *Processes of Constitutional Decisionmaking*, have influenced my own scholarship. Without doubt, this is somewhat narcissistic, but so what? Many legal scholars have taken a narcissistic turn, at least once in a while.<sup>83</sup> More important, I believe that by relating Levinson's writing to my own, I can cast his work in an unusual and provocative light. Why? Because the relationship between our works is ironic, perhaps even perverse, in the following sense. Over the years, I have relied extensively and expressly on one of Levinson's works, while I have never overtly used or relied upon the other. Yet, the one that I have explicitly relied upon, I have sought to repudiate. The other, which I have never expressly used, has had enormous positive albeit indirect influence on my work.

The piece that I have extensively and expressly focused upon is *Law as Literature*. Much of my writing has aimed in part toward refuting Levinson's relativistic and nihilistic position without accepting the conservatism of writers like

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78. Philip Bobbitt argues that constitutional adjudication is legitimate if the Justices follow one or more of six accepted "modalities of constitutional argument." Philip Bobbitt, *Constitutional Interpretation* 12-13 (Blackwell 1991).

79. See Stephen M. Feldman, *How to Be Critical*, 76 Chi.-Kent L. Rev. 893 (2000) (explaining how to be critical).

80. Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. Pa. L. Rev. 1597, 1603 n. 25 (1991).

81. *Id.*

82. *Id.* at 1614 n. 64 (emphasis added). Balkin and Levinson suggested that they had modified their positions when they wrote: "we also may have too easily accepted that the paradigm of interpretive debate was a solitary scholar lecturing on Keats' *Ode to a Nightingale* from a lectern. Yet it has become increasingly clear that many acts of interpretation are performative utterances which simultaneously constitute acts of power." *Id.* at 1613.

83. See Feldman, *Intellectual Voyage*, *supra* n. 6, at 176 (discussing the self-reflective quality of much postmodern legal scholarship).

Raoul Berger and Robert Bork.<sup>84</sup> In one article, I explained Levinson as follows: many constitutional theorists accept an “either/or—either we can ground knowledge on an objective foundation, or we have only relativistic subjectivity.”<sup>85</sup> Some of these theorists, though, “then conclude that objectivity is indeed impossible since . . . meaning depends on our prejudices. Consequently, according to these theorists, the interpreter imposes meaning on a text through the exercise of will and raw political power.”<sup>86</sup> Who were these deconstructive theorists? My primary citation was Sanford Levinson. In fact, as was true for other writers, Levinson became my standard cite for a scholar who maintained that constitutional interpretation was relativistic and nihilistic, or as I pejoratively phrased it in one article, he was someone who had “surrendered to relativism (or nihilism).”<sup>87</sup>

Thus, my repeated citations to *Law as Literature* were not in approbation. To the contrary, I presented Levinson’s position as one extreme that I sought to avoid. Like Levinson, I was concerned with the either/or—either we can ground knowledge on an objective foundation, or we have only relativistic subjectivity. And like Levinson again, I rejected the possibility of grounding knowledge on some objective foundation, especially in constitutional adjudication. Conservative theorists such as Berger and Bork maintained that we can directly access the plain meaning of the constitutional text or the framers’ intentions.<sup>88</sup> To me, this claimed objectivity seemed spurious, and patently so. But whereas Levinson therefore viewed himself as doomed to relativistic subjectivity, I set forth to explain a third way: the either/or was a false dichotomy. Objectivity, to be sure, was impossible, but that reality did not send us into a relativistic nosedive toward nihilism—or at least that was what I set out to demonstrate.<sup>89</sup>

While I have dwelled upon (the refutation of) Levinson’s *Law as Literature* position, I have never expressly relied upon his constitutional law casebook. I have been teaching constitutional law for more than fifteen years and have always used a competing book.<sup>90</sup> Yet, I consider myself to be fully immersed in the historicist turn of constitutional scholarship. For close to a decade, most of my writing, as opposed to my teaching, has viewed both constitutional and

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84. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press 1990); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harv. U. Press 1977). Another objectivist was Ed Meese. Edwin Meese III, *Address before the D.C. Chapter of the Federalist Society Lawyers Division*, in *Interpreting Law and Literature: A Hermeneutic Reader*, *supra* n. 60, at 25.

85. Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 Wis. L. Rev. 679, 714 n. 198.

86. *Id.*

87. Feldman, *Persistence of Power*, *supra* n. 77, at 2252, 2252 n. 47. For another example, see Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 Iowa L. Rev. 661, 691-92, 691 nn. 218-19 (1991).

88. Berger, *supra* n. 84, at 45, 363-72.

89. I take some comfort in recognizing that Levinson himself has modified his position so that he no longer believes that judges are unconstrained when they interpret the Constitution. Levinson & Balkin, *supra* n. 80, at 1614, 1614 n. 64.

90. Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, *Constitutional Law* (4th ed., Aspen L. & Bus. 2001).

jurisprudential problems through a historical prism.<sup>91</sup> Legal scholarship that focuses solely on Supreme Court doctrine (or doctrine from other courts) seems, to me, to be missing a crucial aspect of the picture, if we wish to see American constitutionalism at all clearly. Constitutional developments need to be explained within their respective social, cultural, and political contexts. In short, I now see the constitutional world very much as Levinson has long been urging in his casebook. His contribution to the general intellectual turn toward historicism has undoubtedly helped to push me toward that viewpoint.

One final question needs to be addressed, and I suspect that if Professor Levinson has read this essay to this point, he is thinking about the same question. Several times, I have participated in discussion groups with Levinson and have heard him speak at conferences. An incredibly high percentage of those times, he has pushed the conversation around to the teaching of constitutional law. At which point, he has unabashedly pitched his casebook to the discussion group or the conferees. He has done the same in writing as well.<sup>92</sup> ““There is an alternative,”” he has declared. ““You do not have to teach from a traditional doctrinal book.”” And, without doubt, he always has made a lot of sense: if constitutional law is as much history as it is doctrine, then why not teach from a book that emphasizes history?

But I have resisted the change. Of course, I have my reasons. Law students want doctrine, not history. The bar exam tests doctrine, not history. My class notes were originally centered on doctrine, not history, though I have worked in more and more history over the years. The Levinson casebook does not cover the First Amendment religion clauses, but I think those materials are important and interesting. Despite these reasons, however, Levinson is right, at least to a degree. In an ideal world, constitutional law, even in law schools, should be taught more from a historical perspective. In fact, I would not be surprised if Sandy one day grabs me and says, ““There is an alternative. Why not switch?””

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91. Feldman, *Intellectual Voyage*, *supra* n. 6; Feldman, *Please Don't*, *supra* n. 6; Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 *Vand. L. Rev.* 1387 (1997); Feldman, *supra* n. 85.

92. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 *Harv. L. Rev.* 963, 967 n. 23 (1998); Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 *Chi.-Kent L. Rev.* 1087, 1088 (1993).

