The Third Best Choice: An Essay on Law and History

Theodore Y. Blumoff
Mercer University School of Law, blumoff_ty@law.mercer.edu

Follow this and additional works at: https://digitalcommons.law.mercer.edu/fac_pubs

Part of the Legal History Commons, and the Supreme Court of the United States Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty at Mercer Law School Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
The Third Best Choice: An Essay on Law and History

by

THEODORE Y. BLUMOFF*

The use of history to reach "correct" solutions to legal problems is commonplace in the legal profession. Courts routinely turn to historical sources—framers' or legislators' intent, as well as their own historiography1—to resolve or give texture to the resolution of legal issues. As the courts use history in decisionmaking, so lawyers must engage in the process of recovering history, regardless of how myopic, inelegant, and poorly crafted the final product may be.2 Dean Sandalow, denying that history provides clear-cut answers and, thus, denying its capacity to serve as a useful restraint on judicial decisionmaking, nonetheless defends the process.3 He describes the jurisprudential use of history as a search "for a better understanding of the choices that must now be made and of the risks attendant upon alternative solutions."4 Justice Holmes goes still further in ascribing importance to the historical method. He allows that historical continuity is "not a duty, it is only a necessity."5 The conclu-

---

* Associate Professor of Law, Mercer University School of Law. Ph.D. 1976, St. Louis University (American Studies); J.D. 1982, Washington University.

A number of friends were kind enough to read earlier drafts and sections of this Essay, including Erwin Chemerinsky, Bob Clinton, Frank Dane, Fred Gedicks, Kermit Hall, Dick Helmlholz, David Konig, Hal Lewis, Bruce Mann, Bill Nelson, Ivan Rutledge, Jack Sammons, and Art Wilmarth. Their comments and encouragement significantly improved the final product. My research assistant, Karen Dykes Valente, provided valuable and timely help. As always, my partner, Jane McNamee Blumoff, asked the right questions and made the right editorial changes.

1. Although I focus primarily on the United States Supreme Court's effort to capture the elusive intent of framers and ratifiers, for the purposes of this Essay I make no distinction between that traditional sort of history and what I have called the Court's historiography, namely, use of its own precedent. In terms of the use of history as a dissonance reduction technique, there is no discernible difference. See infra Part III.


4. Id.

sion that necessity requires us to root in the past the answers to contemporary legal questions is perhaps more correct than Justice Holmes could have appreciated. Central to this Essay is a preliminary effort to define Justice Holmes' "necessity."  

Even as history increasingly engages lawyers and judges in their daily business, its use is increasingly under attack. The most sophisticated attack comes from those identified with the Critical Legal Studies movement, and more particularly, those schooled in the methods of contextualism and hermeneutics. The thrust of this attack is that history demands a creative interaction between the researcher and the materials, and therefore cannot reveal itself unambiguously. Under this view, our effort to find historically determinate answers is hopeless and the best researchers can achieve is discovery of the context within which decisions are made. Thereafter, the theory states, our own predilections, the lenses through which we achieve clarity, may produce alternatives, but no answers. In the end, judicial decisions are determined not by history, but by idiosyncratic considerations having more to do with personal, political, economic, and sociological values.

---

6. Just what Holmes meant when he wrote that history is "only a necessity" illustrates a problem that plagues historians. Holmes could have meant at least two things. He may have stated a truism. As the ongoing products of history, we are helpless to escape a present shaped by the past; we cannot flee that which precedes us. Alternatively, he may have had something far richer in mind; he may have stated his belief that history is a treasure that must be mined to give continuity to the present. The problem illustrated is that without some greater attention to context, we cannot know the status of an idea from historical text alone. See Skinner, Meaning and Understanding in the History of Ideas, 8 HIST. & THEORY 3, 38 (1969).

7. "Contextualism" and "hermeneutics" are processes that I can only woefully underdefine in a footnote. Perhaps the leading "contextualist" is Quentin Skinner. The gist of Skinner's position, summarized supra note 6, is that historical meaning cannot be gleaned from examination of text alone. Rather, the researcher must steep herself in context to determine the possible meanings of text. Much of Skinner's work and responses thereto are summarized in Q. Skinner, Meaning and Context: Quentin Skinner and His Critics (J. Tully ed. 1989). The discipline of hermeneutics, which originated in post-structural, European philosophy, defies simplistic definitions. Suffice it to say that while its practitioners share the epistemologist's concern about meaning and understanding, they tend to view more critically the "interpreters" role in the process of determining meaning. In-depth discussions of hermeneutics are contained in Hoy, Interpreting the Law: Hermeneutical and Poststructuralist Perspectives, 58 S. CAL. L. REV. 135 (1985); and Garet, Comparative Normative Hermeneutics: Scripture, Literature, and Constitution, 58 S. CAL. L. REV. 35 (1985). Perhaps more accessible discussions are contained in Kelley, Hermes, Clio, Themis: Historical Interpretation and Legal Hermeneutics, 55 J. MOD. HIST. 644, 661-65 (1983). The process is summarized in Nelson, History and Neutrality in Constitutional Adjudication, 72 VA. L. REV. 1237, 1241-45 (1986).

8. Skinner, supra note 6, at 49.

9. See, e.g., Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenol-
The logic of the hermeneutic-contextualist position counsels against the entire historical project in the legal context. History is not instrumental. Because historical determinacy is itself impossible to attain, the use of history as a device to constrain judges is impossible. Moreover, convincing ourselves that determinate historical answers are useful as constraining forces when such answers are literally impossible to attain works immeasurable harm on a public whose respect all in the legal profession—and especially judges—require. Sooner or later, the public will find us out. Thus, if the basis of the attack is correct and if its logic is followed to its necessary conclusion, the best and most honorable course to follow is to confess our inability to constrain judges, abandon the technique, and play straight with the public.

The thesis of this Essay is that our use of history is as essential and unavoidable as conclusive answers are irretrievable. Irretrievability exists whether the historical reality sought results from a survey of traditional historical materials in an effort to recapture original understanding, or from a common-law effort to discover the Court's own history of an issue. In either case, however, the need to attempt to recover historical truths is perceived as essential. I subscribe, for the most part, to the contextualist premise that we cannot recover sufficient historical data on issues that matter to make history determinate in the solution of current legal problems. "Issues that matter" is a key limitation. It is no doubt true that on most issues, most of the time, a kind of public professional consensus exists. As a practical matter, we could not tolerate a situation in which all issues are disputed. Those cases that arouse public and professional passion, that cause us to appraise and reappraise the Court's legitimacy, such as \textit{Roe v. Wade}, \textit{Griswold} v. 

\textoggy, 36 J. LEGAL EDUC. 518 (1986) (arguing that the convergence of a judge's perception of the law and "HIWTCO" ("how-I-want-to-come-out") is heavily influenced by her values and personal and ethical considerations).


11. Although I do not subscribe to this conclusion, I propose that "straight" in this context may include more legislative control of federal courts' jurisdiction. \textit{Cf.} M. \textit{Perry, The Constitution, the Courts, and Human Rights: An Inquiry into Legitimacy of Constitutional Policymaking by the Judiciary} 128-35 (1982) (arguing that Congress has the power to control "noninterpretive" policymaking, judicial review, by limiting the jurisdiction of the federal courts).

12. I do not intend to produce a monograph explicating in general or defending a particular historical method, although I address methodology briefly in Part II. More detailed, first-rate works that address historiography and methodology exist in ample supply. \textit{See, e.g., Clinton, Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"} 72 IOWA L. REV. 1177 (1987); Nelson, \textit{supra} note 7; Sandalow, \textit{supra} note 3.

Connecticut,\textsuperscript{14} and Brown v. Board of Education,\textsuperscript{15} the betes noires of the right, or Bowers v. Hardwick,\textsuperscript{16} and Webster v. Reproductive Health Services,\textsuperscript{17} on the left, are rarely susceptible to resolution along unambiguous, historically determinate, shared principles.

Although we may desire historically determinate answers, at least on some issues,\textsuperscript{18} that is out of the question: the past stubbornly eludes our best efforts at recapture. Our second choice may be to isolate historical trends that are sufficient to solve the present problem and allow us to feel confident about the future effect of today's disputable decision. That option, too, is highly controversial; difficulties include the tendency to confuse historical cause and effect, which undermines our confidence in the endeavor, and the impossibility of prediction. We use history, then, as a third best choice: to reduce the cognitive dissonance—post-decisional psychological tension—created by today's decision, to "prove" that that decision is rooted in the past and to provide a necessary link between a past without the current decision and the future as affected by it. The need for such proof and such links is an inescapable demand we place on ourselves.

This Essay is about cognitive dissonance theory and historical continuity. The question that inspired this Essay is a simple one: How can the justices, in the course of deciding two issues from the same jurisprudential genre, examine and reexamine the same historical setting—the framers' vision of the political theory that underlay the Constitution—and, at least from the historians' viewpoint, come away with embarrassingly contradictory conclusions? What did they do with their old note-cards, their old precedents? The search for an answer to this question led me to consider the work of cognitive dissonance theorists.

This Essay begins with an archetypal example of the Supreme Court's apparently careless use of history. The example is purposefully

\begin{itemize}
\item \textsuperscript{14} 381 U.S. 479 (1965).
\item \textsuperscript{15} 347 U.S. 483 (1954).
\item \textsuperscript{16} 478 U.S. 186 (1986).
\item \textsuperscript{17} 109 S. Ct. 3040 (1989).
\item \textsuperscript{18} Because we identify certain issues as politically "liberal" or "conservative," proponents of each side would want to invent a doctrine that permits them to employ framers' intent only on those issues that suit their predilections and for which the framers provided the politically acceptable solution. For example, conservatives would use framers' intent to argue against Roe and Griswold; liberals might use framers' intent to argue against a decision like Bowsher v. Synar, 478 U.S. 714 (1986), which seems to undermine legislative flexibility and clearly cuts against the intent of the framers, as expressed in The Federalist No. 77, at 459 (A. Hamilton) (C. Rossiter ed. 1961). This theory with respect to separation of powers cases is discussed at length in Blumoff, Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court, 73 IOWA L. REV. 1079 (1988).
\end{itemize}
drawn, not from the emotionally wrenching jurisprudence of fundamental rights, but from the more sober jurisprudence of political theory, namely, separation of powers. Part II highlights the recent historiography of law and history to describe the ineradicable problems with our first and second best choices—the search for historical determinacy and the identification of historical trends. Part III discusses cognitive dissonance theory and analyzes Bowsher v. Synar under this view. The Essay concludes that the current debate about the instrumental use of history in law is both healthy and misguided: healthy because the debate draws our attention to a much used (and misused) methodology; misguided because its premises are oblivious to the psychological demand that the game go on. When the debate overlooks this point, it prevents us from pursuing two more fruitful endeavors: learning to use history more precisely and understanding the legitimate, if attenuated, role that it can play in resolving persistent legal disputes.

I. An Illustrative Case

Among those who study the Supreme Court's separation of powers jurisprudence, acknowledgement of an outcome determinative approach to these issues is common. The approach in some ways reflects a kind of judicial schizophrenia: successive majorities of the Court have been downright contradictory in their use of history. Consider the following descriptions of the framers' intent from two fairly recent decisions. In Bowsher v. Synar, the case that struck down the Gramm-Rudman budget reduction proposal, the Court opined that "[t]he Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch . . . ." A decade earlier a unanimous Court reached the opposite conclusion about framers' intent in United States v. Nixon, the

20. I make no claim here that cognitive dissonance alone explains the work of the Court; such a claim would understate ludicrously the forces that operate on judges. Moreover, I do not attempt to answer what may be the question: how does history, as a means of reducing cognitive dissonance, work in relation to other forces, such as logic and reason, moral authority, and so on? The answer to that question would require me to do precisely what I know I cannot do and what I suspect none of us is able to do, namely, analyze the deep-seated motives of judges. My thesis, as the reader will discover quickly, is more modest.
21. See Blumoff, supra note 18, at 1151; Chemerinsky, A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases, 60 S. CAL. L. REV. 1083, 1111 (1987) ("[The Burger] Court used a different method of interpretation depending on whether the President or Congress was being sued.").
22. 478 U.S. at 722 (emphasis added); accord Myers v. United States, 272 U.S. 52, 116 (1926) (concluding that the three branches of government "should be kept separate in all cases in which they were not expressly blended").
Watergate tape case, stating that "the separate powers [of government] were not intended to operate with absolute independence."24

Bowsher's and Nixon's conclusions about founders' intent, hermetic separation versus shared authority, are irreconcilable as history. There is no doubt, however, that we can reconcile the outcomes of the cases using traditional, nonhistorical criteria.25 In fact, one could argue that recourse to history to answer the questions raised in these two cases was senseless; both addressed issues for which there is no constitutional text and about which the framers apparently gave little or no thought. The Court's historical dicta, to the extent that doctrinal distinctions are available, amount to little more than *ex cathedra* canonizations of history.26 Despite our ability to distinguish issues based on legal doctrine, the Court believes that historical bases for its opinions are necessary. Why else would it invariably couch its opinions in the language of historical determinacy? To that question this Essay now turns.

II. The Shortcomings of Traditional Theory

The inconsistent descriptions of framers' intent, left unexplained, generate serious concern about the Court's competence and even its members' mendacity. For example, on the same day that the Court decided *Bowsher* and embraced its hermetic approach to governing, it decided another separation of powers case, *Commodity Futures Trading Commissions* v. *Schor*,27 which involved a statutory device that permitted non-Article III tribunals to adjudicate state law contract claims as a part of an action for "reparations" brought by a disgruntled commodities in-


25. See generally Blumoff, *supra* note 18, at 1172-77 (reconciling *Morrison* v. *Olson* and earlier separation of power decisions concluding that at least in some circumstances Congress can both delegate executive authority and participate in the executive branch's removal function); Feld, *Separation of Political Powers: Boundaries or Balance?*, 21 GA. L. REV. 171 (1986) (suggesting that decision making should be shared by Congress and the President and "Court intervention is appropriate . . . only to prevent one political branch from upsetting the balance and excluding the other from the decision making process"); Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (attempting to reconcile the Court's apparently contradictory decisions in *Bowsher* and Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986)).

26. Professor Wiecek refers to this canonization process as the Court's power "to declare history [rightly or wrongly] and then compel the rest of society to conform its behavior to that understanding." Wiecek, *supra* note 2, at 227-28.

vestor against a trader. Unlike *Bowsher*, *Schor*'s majority disavowed bright lines and emphasized the need for flexibility in governing, that is, for sharing governing authority among the branches.\(^{28}\) The dissent, by contrast, quoted *Bowsher*'s "wholly independent" conclusion and counseled in favor of "[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence . . . of the others."\(^{29}\) The majority ignored that historically based warning. Instead, it paid self-conscious respect to preserving future legislative options. Bright-line rules might, the majority feared, "unduly constrict Congress' ability to take needed and innovative action."\(^{30}\)

Although we can and do distinguish the cases on doctrinal grounds, neither an originalist nor a contextualist approach can adequately explain the inconsistent historical descriptions of intent in *Bowsher*, *Nixon*, and the *Schor* dissent. Nor can we explain the different approaches of *Bowsher* and *Schor* in terms of the need for predictive certainty. Something beyond ordinary legal explanations is required.

A. Limitations of Historical Methodology

The unsophisticated originalist cannot reconcile *Bowsher* and *Nixon*. In his now well publicized 1985 address to the Federalist Society,\(^{31}\) then Attorney General Edwin Meese, attempting to "depoliticize the law" (and ignoring the irony contained in his characterization of that effort as putting forward the "administration's approach" to constitutional interpretation) urged a jurisprudence of "original intentions."\(^{32}\) His approach begins with the document itself and moves from an isolation of specific textual meaning to particular principles encapsulated in text to general principles about the political system.\(^{33}\) Acknowledging that interpretati-

\(^{28}\) *Id.* at 857.

\(^{29}\) *Id.* at 860 (Brennan, J., dissenting) (quoting *Bowsher*, 478 U.S. at 725, quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935)).

\(^{30}\) *Schor*, 478 U.S. at 851. The Court opted for a balancing test in lieu of deduction based on a priori conceptions of the proper locus of governing functions. For thoughtful critiques of the balancing approach, see Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 1004 (1987) ("Balancing has turned us away from the Constitution, supplying 'reasonable' policymaking in lieu of theoretical investigations of rights, principles and structures."); Nagel, *The Formulaic Constitution*, 84 *MICH. L. REV.* 165 (1985) (arguing that the Court's formulae for deciding issues that bring values into conflict alienate the public).

\(^{31}\) The speech, delivered before the Washington, D.C., Chapter of the Federalist Society, lawyers division, is printed in 19 U.C. *DAVIS L. REV.* 22 (1985).

\(^{32}\) *Id.* at 23, 29.

\(^{33}\) *Id.* at 24-25.
tion is not a mechanical process, he suggests that on some issues judicial review "requires an appeal to reason and discretion." 34

Anyone who uses a process that demands text as a starting point must have a difficult time with Nixon and Bowsher. The major issues in these cases—executive privilege and removal without impeachment, respectively—were adjudicated without reference to constitutional text. The former Attorney General acknowledges that issues arise in the context of constitutional ambiguity, in which case the rule of construction is "interpret[] and appl[y] in a manner so as to at least not contradict the text of the Constitution itself." 35 But our two cases exceed mere "ambiguity." That noun describes a different context entirely. It applies only when two interpretations are possible; here none is possible, because there is no text to begin with.

Meese's interpretive scheme must condemn Nixon and Bowsher. He writes: "The power to declare acts of Congress and laws of the states null and void is truly awesome. This power must be used when the Constitution clearly speaks. It should not be used when the Constitution does not." 36 Consistency with this theory of original intentions would have required the Justice Department to argue that Bowsher presented a nonjusticiable political question. The Reagan administration, however, through the Solicitor General, participated in the litigation and argued that the statute was unconstitutional. 37 Politically driven conceptions of constitutional interpretation will not explain Nixon's and Bowsher's discordant views of original intentions.

More sophisticated explanations of original intention fare little better. In a recent article, Professor Kay attempts to rescue constitutional original intentions jurisprudence from the contextualist-hermeneutic lance. 38 Among the points he makes in defense of originalism is that finding original intent does not require an abstract exercise devoted to recovering the meaning of a particular constitutional provision; rather, it demands that the judge determine whether particular conduct is more

34. Id. at 26.
35. Id.
36. Id. at 29. There is an unintended irony when this quote is juxtaposed to the very next sentence in the speech. There, he argued that Marbury v. Madison supported his position that if we want change, the amendment process, and not the courts, is the proper channel. The irony, of course, is that § 13 of the Judiciary Act of 1789 was hardly an example of the Constitution "clearly speak[ing]" to the constitutionality of the act, one of his administration's requirements for judicial review.
likely than not consistent with original intentions. Kay recognizes an insurmountable problem with interpretation of issues that fall outside the "central uncontroversial core of meaning" shared by the majority of lawmakers. He notes that "[i]n the areas of application where no law-making majority agreement exists, there would be no relevant constitutional rule." Where no rule exists there exists no relevant majority whose intent we can discern.

Even when there is text, the brand of original intentions he advocates has difficulties. Describing the task of recovering original intentions, Kay writes:

> The concern is simply which of two contesting interpretations is more likely consistent with the original intention. The answer will often be presumptively clear from the language the constitution-makers chose. Beyond that, it will be enough in most cases to learn what people, at the time, generally meant when they used certain language and what people involved in the process of enactment thought was at issue.

Kay's statement vastly understates the scope of the problem and summons a number of responses. First, the notion of "presumptive" clarity erects a procedural device to avoid the very sort of ambiguity inherent in history. Given special rules to eliminate ambiguity, we will find none. More importantly, it assumes what it cannot prove: that there is clarity in the text on issues that call into question the Court's role. In other words, if we accept the idea that the Constitution contains an answer to the debatable proposition before the Court, we are predisposed to find that answer in the text; we are committed a priori to the existence of an answer in the text. Our preconceptions "tend to act as determinants of what we think and perceive.”

The conclusion of this Essay suggests this observation may be overemphasized, but is nonetheless correct.

There is a second problem with Kay's assertion. His distinction between general meaning and particular intentions is not only revealing but erosive to his case. To the extent that we must determine what people "generally meant," Kay concedes a major point to the contextualist-

---

39. Id. at 243-44.
40. Id. at 249.
41. Id. at 250.
42. I am developing this idea at length in another work. Blumoff, Judicial Review, Foreign Affairs and Legislative Standing (unpublished manuscript on file at the Hastings Law Journal).
43. Kay, supra note 38, at 250.
45. Skinner, supra note 6, at 6.
hermeneutic position: language and understanding change over time, and the best we can hope for is an approximation of contemporaneous meaning, or various alternatives of meaning, based on the context of the document and not the document itself.46 Thus, Kay's own understanding recognizes that the text alone is not sufficient to capture meaning; that understanding undermines his conclusion, at least in part.

Related to that observation is a third. Describing the task in terms of ordinary standards of proof, "more likely than not," appears more manageable than discovering intent generally, but that appearance may be illusory. In reality, the standard obscures the practical difficulty. Let me illustrate. Discussing the problem of finding authoritative intent when a variety of groups have spoken and determining which voice controls within the authoritative group, Kay writes that the problem is "intractable only if there are multiple and totally contradictory intentions."47 Otherwise, the language in the text ordinarily "suggests a common core of meaning shared by all."48 Determining intent grows increasingly problematic as the issue moves further from the common core, even if we assume intent can be conclusively established in his more limited sense.49 That increasing difficulty is precisely the problem: Kay fails to acknowledge or appreciate fully that the battles we wage on issues that matter are fought at the margin of common understanding. Kay parries this response by attacking a premise of the hermeneutic approach. In the course of rejecting the legal hermeneuticist’s observation that "variability of meaning is a necessary consequence of the multiplicity of readers,"50 Kay distinguishes literary and legal interpretation. The literary critic, he writes, views a novel interpretation as a part of the job description.51 He contrasts the lawyer's job as one of finding only the "best" legal interpretation. This more limited search supposedly enhances the constraints on the legal profession.52

46. For discussions of the notion that meaning is affected both by language and the time in which it was created, see J.G.A. POCOCK, POLITICS, LANGUAGE AND TIME (1971); Skinner, supra note 6.
47. Kay, supra note 38, at 248.
48. Id.
49. But see Brest, The Misconceived Quest for Original Understanding, 60 B.U.L. REV. 204, 223 (1980) (arguing that "some major constitutional doctrines lie beyond [the] pale" of a moderate originalist approach to interpretation); Wofford, supra note 5, at 508-11 ("The essential point is that what was accepted at Philadelphia and later ratified was a group of words, not the intended interpretation of those words, whether expressed or unexpressed.").
50. Kay, supra note 38, at 237.
51. Id. at 238-39.
52. Id.
In the routine practice of law, we do not challenge the applicability of every rule through novel construction. On issues that matter, however, Kay's more modest interpretive goal is far from obvious, even if we concede that his description is accurate in "ordinary" contexts. The lawyers who represented the plaintiffs in *Roe, Griswold,* and *Brown* were successful in part precisely because they found compelling legal meanings outside the common core of shared legal understanding, although within our shared understanding of what it means to be an American. Thus, to conclude that the hermeneutic insight fails to comport with our everyday ability to communicate with a single determinate meaning does not undermine the hermeneutic argument. Rather, it suggests to me that deciding legal disputes in these difficult cases occurs at the periphery of understanding, precisely where one is least likely to recover shared understanding among the original, authoritative group whose intent purports to count as a normative matter, and precisely where a discussion of standards of proof is least helpful.

Kay makes several additional arguments that purport to demonstrate that hermeneutic insights are overstated. He claims that if we concede that "some immediate communication is possible," then the difference between "speaking and listening or writing and reading" is only one of degree; the same kind of problem arises whether the communication gap is "minutes or days to decades or centuries." This is incorrect. First we cannot question the Constitution, for example, to determine the drafters' or ratifiers' intent. We can, however, question the speaker or reasonably contemporary document drafter in an effort to refine our un-

54. Kay, *supra* note 38, at 241-42 (arguing that it is not always impossible to infer "a determinate meaning from a sequence of words uttered in a particular context").
55. In the last section of his article, Kay addresses the normative issue of whether we ought to be bound by that intent. Opining that this is the most difficult of the questions he raises, he concludes that the answer requires a moral and political "evaluation of the relative importance of competing values: the value of flexibility and adaptability on the one hand, and the value of predictability and stability on the other." *Id.* at 291-92. It is perhaps here that Kay and I are furthest at odds. As I demonstrate in the final section, it is on this very issue that history can make the greatest contribution.
56. Kay also asserts that the very breadth of the hermeneutic claim, that one cannot recover the intended meaning of statements remote in culture or time, is undermined "by the fact that history is a well-established discipline to which thousands of sensible people" have devoted their careers. *Id.* at 251-52. But each generation does reexamine and rewrite history for itself precisely because the process is in the final analysis subjective, a point even the least contextual historiographers fondly point out. *See* R.G. COLLINGWOOD, *ESSAYS IN THE PHILOSOPHY OF HISTORY* 138 (W. Debbins ed. 1965); J.H. HEXTER, *REAPPRAISALS IN HISTORY* 11-13 (1961). Rewriting occurs because the received wisdom changes with perspective. In the end, that is all hermeneutics tell us and that is enough.
derstanding of her text.\textsuperscript{58} Second, Kay's statement ignores his own implicit understanding that language changes over time. One need only contrast the definition of "liberal" in the late nineteenth century with its meaning in the 1960s and again with its connotation in the 1988 presidential election.\textsuperscript{59}

The final and most compelling reason for challenging Kay's assertion is that neither the framers nor ratifiers ever dreamed of having any intent with respect to many of these issues that matter. They were concerned with the issues of their day, not ours.\textsuperscript{60} If intent is the touchstone of judicial review, we must all agree that \textit{Griswold}, for instance, was not only wrongly but illegitimately decided. It is absurd to suppose that the fourteenth amendment's ratifiers harbored any authoritative purpose or intent with respect to reproductive freedom. Yet, an originalist as interpretively stingy as Judge Robert Bork, when questioned during his confirmation hearings, hinted that he might find a constitutional handle with which he could validate \textit{Griswold} today.\textsuperscript{61} Could a reasonably representative majority of the body politic vote to obstruct a married couple's use of contraceptives today? If the answer to that question is no, and if, as I suspect, a supermajority of us agree that \textit{Griswold}, in perspective, is a good decision, then either history as ordinarily practiced in the courtroom is misdirected, or we need to find another use for it.\textsuperscript{62}

\textsuperscript{58} Professor Kay apparently has forgotten the old children's game of "telephone" or "gossip." Only our ability to question the original speaker permits us to recover the idea communicated.


\textsuperscript{60} Skinner, supra note 6, at 50. Writing in a more general context, Skinner concludes that

the classic texts cannot be concerned with our questions and answers, but only with their own . . . . [T]here simply are no perennial problems in philosophy: there are only individual answers to individual questions, with as many different answers as there are questions, and as many different questions as there are questioners.

\textit{Id.}

One could respond by noting that, for the most part, Skinner was concerned with issues in the history ideas, and not with a search for specific answers to narrow legal questions. That is a distinction without a difference. Skinner is concerned with the same kind of divisive issues and conclusions derived from historical examination as are lawyers. The notion of classic texts certainly includes the Constitution and The Federalist Papers, the routine stuff of Court-practiced constitutional history.


\textsuperscript{62} The last section of this Essay addresses the latter, see infra notes 145-61 and accompanying text.
The originalists, then, cannot explain the apparent inconsistency in recovering original intent in cases like *Nixon* or *Bowsher*. On the one hand, as nontext cases, originalist premises must condemn the Court for exercising judicial review: one cannot locate majoritarian intent when the majority has not spoken. On the other, even the sophisticated originalist position cannot cope with utterly inconsistent conclusions. The recovery of a common core of shared understanding cannot logically lead to views of our underlying political architecture that are, to use Kay's language, "totally contradictory."\(^{63}\) Such a result itself contradicts the assumptions of the originalist project.

While the originalist approach understates the difficulty of historical research, the contextualist or hermeneutic approach overstates the case against, and undervalues the need for, such research. It overstates the case by assuming that all issues for which historical research is done are equally immune to historical determinacy. There are easy cases.\(^{64}\) It may be that they do not remain forever easy, that the extant consensus is necessarily ephemeral. Nonetheless, we simply could not function if all rules were always at issue; and somehow we do manage to muddle through. At the same time, contextualists conclude unnecessarily that because of the admitted difficulty of recovering intent on issues that matter, all intent is unavailable. Kay is correct when he observes that judges and lawyers are not required to uncover intent in a vacuum.\(^{65}\) Determining intent does not require proof beyond all doubt. This alone legitimizes most of the Court's uses of history without calling into question the Court's own legitimacy. As we move closer to the center and away from the margin of understanding, intent may be recoverable.\(^{66}\)

There is a persuasive analogous argument that we need not recover intent with absolute precision to function and make decisions within the profession. Thomas Kuhn suggests that in the physical sciences practitioners can identify a paradigm that controls their work without necessarily concurring on what it is within the controlling complex that they all agree to.\(^{67}\) They can test their research by comparing their generative hypotheses with their empirical data. Complexity propagates research, it

---

65. Kay, *supra* note 38, at 244 ("[a]ll [the judge] needs to do is decide which of two possible answers in that case are *more likely* correct").
66. Although it is probably the case that that intent which is most easily recovered is also the least useful and important.
does not stifle it. In a corollary to that observation, William Nelson argues that contextualists ignore their own premises about the complexity of historical understanding; there may exist, he suggests, more than one way to discover historical truth with respect to some issues. If that is true, it suggests that the contextualists have overstated the case against determinacy. There is something unambiguous, after all, about the tremendous percentage of lawsuits that settle and the absence of a popular revolt inspired by judicial tyranny. That absence of ambiguity might be prima facie evidence that all is not lost to history.

A fundamental problem with the approach of the contextualists deals far less with the logic of their insights into the jurisprudence of history than their underappreciation of the necessity, indeed the inevitability of such a jurisprudence. It is almost as if the very logic of their position obscures the fact that, despite its apparent illogic, the use of history to decide these cases continues. For the most part, the bench ignores contextualists. Thus we must ask several questions: Why has the bench ignored the hermeneutic insights? Why does the bench persist in its use of history? Should it?

B. Limitations of Fairness and Prediction

We could salvage history from the logic of the hermeneutic critique if we found a value for historical research in law beyond instrumentalism. If we made more modest demands on historical methodology, it might still serve some useful purpose. Two reasons frequently advanced for the use of history are related to our concepts of fairness and prediction. Neither will sustain the historical project.

Fairness and history interface in the standard case method routinely taught in law schools and used daily in legal briefs. The common law method requires us to use precedent, an inherently historical method, to treat similarly situated parties similarly. Discussing this method of adjudication, Professor Levi states the issue succinctly: "The problem for the

68. Id. at 95-96.
70. M. Tushnet, supra note 44, at 21-69, Tushnet surveys original intentions and neutral principles theories and critiques each with insight and cool logic. This latest work expands on his earlier essay. See Tushnet, supra note 10.
71. When members of the bench do respond directly to the insights of the CLS movement, as Judge Rubin did a couple years ago, they tend to talk past one another. Compare Rubin, Does Law Matter? A Judge's Response to the Critical Legal Studies Movement, 37 J. LEGAL EDUC. 307 (1987) (attacking the radical position that legal doctrine is meaningless) with Kennedy, supra note 9, at 532-33 (hypothesizing a typical labor dispute and suggesting that the judge has far more discretion than Judge Rubin would allow).
law is: When will it be just to treat different cases as though they were the same?\(^{72}\) Although Levi points out some of the differences between common law and constitutional adjudication, the method he describes and the reasoning it embodies are in pertinent part indistinguishable.\(^{73}\) Indeed, how could they not be? The idea of neutrality, of treating similarly parties who are situated similarly with respect to the law, is a constitutional guaranty.

One justification for using historical methodology, then, is implicit in the notion of neutrality.\(^{74}\) There is, however, a nearly insurmountable problem with this use of history. As others have demonstrated, no matter what principle the Court applies, the antecedent choice of the correct principle is not neutral.\(^{75}\) Even if the Court could apply the principle neutrally, the choice of rule to decide the case must favor one party or another to the lawsuit.

Professor Nelson and others concede this point, but legitimate the Court's choice through some species of party consent.\(^{76}\) Nelson defends neutrality on the basis of a Rousseauvian concept of the general will. So

---

73. This is not to say that they necessarily should be, only that they are. See generally Dickerson, Statutes and Constitutions in an Age of Common Law, 48 U. Pitt. L. Rev. 773, 779 (1987) (arguing that Court's methods for interpreting statutes and the Constitution should be distinct because the Court can supplement Constitutional meaning, but can only extract statutory meaning).
74. Nelson, supra note 7, at 1260-61, 1265.
75. Tushnet supra note 10, at 805-06. Levi came close to making this point himself forty years ago. Where case law is considered, . . . [the judge] is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which the prior judges thought important. . . . [H]e will ignore what the past thought important; he will emphasize facts which prior judges would have thought made no difference. E. Levi, supra note 72, at 2-3 (citation omitted).
76. See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J.
long as the parties agree to be bound by the rules the court applies, the principles are neutral. Only if the parties did not agree could we question the Court’s authority.

There is a certain irony in this idea. There are parties who truly consent to be bound by particular rules: arms-length contractual partners who agree in writing to choice of law provisions. They have expressly agreed to be bound by the laws of a chosen jurisdiction. Ironically, those parties are least in need of neutrality. Eighty percent of all contract litigation is governed by the Uniform Commercial Code, which exists in virtually identical form in forty-nine states.\(^7\) Thus, those who have the protection of assent ordinarily need it the least.

For the rest of us, although the idea of a legitimizing consent appears almost self-evident, finding consent is problematic. Actual consent to the ruling order, including the judicial power of the United States, has not occurred since the Constitution was ratified. Reliance on some form of tacit consent is equally troubling.\(^8\) One could argue that every time we exercise the franchise to vote, we are consenting implicitly to be bound by society’s rules. Such a position is flawed inherently and raises more questions than it answers. Does that mean that those who do not vote are not bound, or, conversely, forfeit their right to object on some sort of estoppel theory? Alternatively, are the Thoreaus of the world to be treated by a different set of standards since their unwillingness to vote reflects principled nonconformity? Consent offers an alluring, even seductive way out of the dilemma of non-neutrality, but it is also paradoxical.\(^9\)

A second potential salvation for the historical method lies in the notion that courts can locate trends in society and law and “extract [principles] from the past both to decide the pending case and to provide

---


79. Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043, 1074 (1988). Amar borrows from Rousseau for the idea that because every society inherits status quo default rules, “some form of implied consent argument is inescapable.” Although he may be correct, perhaps all that conclusion warrants is a shift in the burden of proof toward the party seeking to show a lack of consent. Carter, Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 YALE L.J. 821, 838 n.67 (1985). A status quo default rule does not address the more difficult questions of the effect of failure to consent, of how we judge the effectiveness of the rule and, most importantly, of how to challenge the rule itself short of bloodshed.
direction for the future.""80 The notion satisfies our desire for predictive certainty. Unfortunately, on issues that matter the Court's performance cannot equal the task.

Everything said in response to the idea of neutrality applies with equal vigor here. If the choice of historical precedent is non-neutral, it will continue to be in the future. The creation of a new neutral principle does not guaranty neutral selection of that principle for application in the future.

There are at least two further difficulties with the concept of the Court as a predictive organ. First, as Karl Popper pointed out, predicting future ideas is self-contradictory.81 Consider the following example.

"I predict the Court will create an entirely new penumbral right emanating from the ninth amendment, to wit: . . . ." The ellipsis suggests two possibilities, filling in the blank or leaving it open. If the idea on which the prediction is based exists today, I can fill in the blank and there is no prediction. On the other hand, I can leave the sentence incomplete in which case I have made no meaningful prediction. Thus, predicting ideas is a logical paradox; and we cannot rely on the Court's holdings as the basis of predictive certainty.

Second, even if we could create some temporary respite from the vicissitudes of legal uncertainty, even the best method of recapturing historical trends—some form of contextualism—presents inherent difficulties. Contextualism requires the historian to frame her search in the context of the then contemporary society. This approach eschews the notion of an autonomous text, and demands that the meaning of text be found within the larger milieu of its creation. As Quentin Skinner points out, without a knowledge of context we "could never grasp from a [text bound] history what status the given idea may have had at various times." Without a knowledge of that status, we cannot know its importance.82

The difficulty presented by contextualism is distinguishing cause and effect: Did the idea within the text shape the context, or did the context shape the idea? Which controls? The point is that knowledge of what caused an action, including the action of generating a new text, gets confused with understanding the expression itself. As a result, the re-

80. Nelson, supra note 7, at 1286.
81. Popper's ideas, which were directly concerned with the notion of prediction based on history, are the subject of an essay by P. MEDAWAR, Expectation and Prediction, in Pluto's Republic 309 (1982). The ideas expressed in this paragraph derive from those works.
82. Skinner, supra note 6, at 38.
searcher frequently ends up begging the question. What the text means and how the text received its shape become indistinguishable.  

Skinner’s observations seem particularly germane to the lawyer’s use of history. In *Bowsher v. Synar*, before concluding that the founders intended to create “separate and wholly independent” political branches of government, the Court quoted from *The Federalist No. 47*. There James Madison paraphrased Montesquieu and wrote that “there can be no liberty where the legislative and executive powers are united in the same person . . . .”  

This quote purported to provide support for the “separateness” conclusion.

This use of history compels at least two responses. First, the Court’s use of Madison is unacceptably selective; but for the fact that it is *the Court*, it would be laughable. The Court wholly disregarded not just contrary authority, but the rest of *The Federalist No. 47*. Madison’s entire point was contrary to that for which the Court used the document, Madison argued that so long as “the whole power” of one branch was not exercised by another, tyranny was avoided.  

As Madison conceived the issue, jurisdiction sharing between the political branches—not hermetic separation—created the essential impediment to tyrannical leadership.

Even if we concede a desire on the framers’ part to design jurisdictional independence, *Bowsher’s* methodology would remain flawed in a second way. The Court equated Madison, the context, with the Constitution, which had nothing to say about the issue of nonimpeachable removal authority. Thus, the Court not only confused cause and effect, it constitutionalized the “cause” (*one* selection from Madison’s *Federalist No. 47*) in the absence of any immediate “effect” (*constitutional text*).

To the extent that the Court ignores contradictory evidence and confuses cause and effect it violates the basic tenets of both the originalist and the contextualist. It smothers an originalist premise by ignoring evidence that bears on the understanding of the moment.  

83. *Id.* at 42-44.


86. Although it is somewhat misleading to label R.G. Collingwood an “originalist,” see R.G. Collingwood, *The Nature and Aims of a Philosophy of History*, in *Essays in the Philosophy of History* 34, 53 (W. Debbins ed. 1965) (“The infinite whole fact which it is the historian’s business to determine is . . . a world whose centre is the historian’s "immediate" perception, and whose radius is measured by the depth to which he can see into the significance of that perception.”)
could provide was alternatives. Moreover, it calls into question confidence in the Court as a purveyor of predictive certainty; in the most troubling way it bears upon the Court's legitimacy.

C. Rhetorical Hyperbole

One final and more traditional, if dismissive, approach to the particular problem raised by Bowsher's implicit rejection of Nixon's reading of history is suggested by Karl Llewellyn. In his classic work, The Bramble Bush, Llewellyn, lecturing to a group of freshmen law students, described the verbal maneuvers of advocates and judges. In the lecture, he excuses excess verbosity as an inherent risk of the profession. We all make statements in the heat of an argument that we do "not mean... except in reference to... [our] point." Llewellyn's description is apt insofar as we all tend to overstate our case as a rhetorical device calculated to convince. We could describe Bowsher as simply another example of historical ambiguity that generates different readings of history that, in turn, create different results in different cases. That conclusion is too simplistic. It does not purport to explain why we use historical materials; neither does it explain how we rationalize inconsistent conclusions drawn from the same historical materials. The response to those observations demands something beyond a characterization of the lawyers' tendency to excess verbiage.

In sum, traditional theory has shortcomings that beg for additional explanations for the use of history. Originalism invariably promises more than it can deliver. On the one hand, it erects procedural devices to overcome problems of clarity and, on the other, its usefulness is limited precisely to those cases that engender the least controversy. Moreover, at its best it cannot account for absolutely contradictory readings of the same historical phenomena. At the same time, however, contextualists tend to confuse cause and effect and tend to require moral certainty when

---


88. Llewellyn writes:

[W]ith your mind upon your object you use words, you bring in illustrations, you deploy and advance and concentrate again. When you have done, you have said much you did not mean. You did not mean, that is except in reference to your point. You have brought generalization after generalization up, and discharged it at your goal; all, in the heat of argument were over-stated. None would you stand to, if your opponent should urge them to another issue. So with the judge. Nay, more so with the judge. He is not merely human, as you are. He is, as well, a lawyer....

"pretty sure" will do. They also fail even to address the fact that for all its limitations, historicism remains a dominant feature of judicial decisionmaking. Even those who recognize that history cannot operate instrumentally and, therefore, make more modest demands of it, frequently overlook constraints on its predictive and normative value. Still, the game goes on.

III. Cognitive Dissonance

Part of the explanation for the existence of contradictory historical conclusions may lay in the theory of cognitive dissonance, which is most closely associated with the work of Leon Festinger. This section discusses this theory and the strategies that we use to reduce that dissonance. The Bowsher case is then analyzed as an example of dissonance reduction in judicial opinions.

A. Cognitive Dissonance Theory

The basic proposition of cognitive dissonance theory is that after making a decision, one experiences tension, a cognitive effect predicated in part on the degree to which the decision just reached fails to conform to the intelligent, available information that contradicts that decision.

Festinger's major works include CONFLICT, DECISION, AND DISSONANCE (1964) [hereinafter CONFLICT] and A THEORY OF COGNITIVE DISSONANCE (1957) [hereinafter COGNITIVE DISSONANCE]. Festinger's work is concisely summarized in M. DEUTSCH & R. KRAUSS, THEORIES IN SOCIAL PSYCHOLOGY 62-76 (1965). I must acknowledge specially the assistance of Frank Dane, an Assistant Professor in the Psychology Department at Mercer University. He listened to and answered all of my questions. I could not have written this Essay without his patient tutoring.

I hope I am not understood as suggesting that the theory of cognitive dissonance is the only theory that accounts for some of the phenomenon in the judicial opinions that I discuss. I have no warrant for such a broad-based assertion; indeed, even those who most strongly support the theory recognize the existence of alternative explanations. J. BREHM & A. COHEN, EXPLORATIONS IN COGNITIVE DISSONANCE (1962) (especially chapter seven). This is, however, a true essay; recognizing the limitations in theory, I nonetheless suggest that it helps to explain, even if it cannot exclusively explain, an apparent anomaly in our jurisprudence.

Brehm and Cohen, explain that a "dissonant" relationship exists between two cognitive elements when a person possesses one which follows from the obverse of another that he possesses. Thus, if A implies B, then holding A and the obverse of B is dissonant. A person experiences dissonance, that is, a motivational tension, when he has cognitions among which there are one or more dissonant relationships.

J. BREHM & A. COHEN, supra note 89, at 4. They also make clear that "cognitive elements" include any "items of information" about which one cognizes, such as "feelings, behavior, and opinions." Id. at 3.

At the simplest level, a dissonant condition exits when the smoker exclaims: "I know smoking is dangerous, but I still smoke." The expectation born of the phrase that precedes the contrastive conjunction is inconsistent with the phrase that follows it. See R. BROWN, SOCIAL
Affected by such tension or "dissonance," the decisionmaker seeks ways to reduce it.

Within that general description are several implicit assumptions that I must introduce. One is the premise that the theory applies to individual and not group decisionmaking. To the social psychologist, all decisionmaking is done by individuals. Although there is a group dynamic that can operate in collective decisionmaking contexts, that dynamic ultimately operates at the level of individuals and not the group. A second assumption that underlies this discussion is that the "decisions" of the Court are the result of decisions made by the individual justices. For the sake of simplifying the immediate discussion, I will assume a hypothetical case with one majority and one dissenting opinion. In addition, I will assume that there are only two conflicting precedents.

Making decisions yields dissonance. In the Court's procedure dissonance could occur at any number of junctures: on review of certiorari petitions or certiorari memos, at certiorari conferences, during brief reading or oral argument, during deliberations, and so on. Each justice can make up his or her mind at any stage in the process. To simplify and highlight the phenomenon, I will assume that dissonance occurs after deliberations, but before the opinion writing (and opinion joining) process is completed. This view of the process suggests that actual opinion

---

91. A fascinating example of this process is richly described in R. BROWN, SOCIAL PSYCHOLOGY: THE SECOND EDITION 200-45 (1986) (discussing the process of group polarization and individual risk-taking behavior in the context of the film Twelve Angry Men).

92. That more than one conflicting precedent usually bears upon the resolution of any particular issue simply magnifies the potential for dissonance. M. DEUTSCH & R. KRAUSS, supra note 89, at 68-69.

93. Festinger's theory, which has generated an enormous amount of research, deals almost exclusively with post-decision dissonance. As such, the theory deals with issues of bias and objectivity in an individual's assessment of decisions already reached. M. DEUTSCH & R. KRAUSS, supra note 89, at 73-74. The theory does not postulate that motivational discomfort cannot arise before a decision is made. Pre-decisional dissonance does occur.

Festinger distinguished post- and pre-decisional dissonance by suggesting that before a decision is made, the individual is more objective in her evaluation of the conflicting information. Once the decision is made, however, and a commitment to its consequences exists, the conflict increases and the decision maker is less objective in her assessment of dissonant cognitions. L. FESTINGER, CONFLICT, supra note 89, at 8-9; M. DEUTSCH & R. KRAUSS, supra note 89, at 70-71.

Dissonance theory is distinguished from normal "judgmental processes," which is the rational process of sorting through disparate information (or opinions) and giving each bit the weight it is deemed to be worth. That process, which frequently results in some sort of compromise, occurs routinely and does not necessarily arouse a tension that requires reduction. J. BREHM & A. COHEN, supra note 89, at 105-06. Rather, the process described here occurs
writing (or editing and subscribing thereto) reflects an effect of dissonance reduction.

In his 1957 work, Festinger summarized the theory in three parts as follows:

1. There may exist dissonant or "nonfitting" relations among cognitive elements.
2. The existence of dissonance gives rise to pressures to reduce the dissonance and to avoid increases in dissonance.
3. Manifestations of the operation of these pressures include behavior changes, changes in cognition, and circumspect exposure to new information and new opinions.\(^9^4\)

Dissonance occurs when the cognitive elements (available information) that have an effect on the resolution of a decision are perceived as "nonfitting" or inconsistent. When there are facts or opinions or judgments that contradict the decision just made, dissonance often occurs.\(^9^5\)

The plea—"I know X suggests Y, but despite the existence of X, I'm still doing non-Y"—creates and reflects this tension. In the court context, the dissonant cognitive elements include the contradictory facts, precedents, or policies that impinge upon ordinary judicial decisionmaking. When decisionmakers are in a "forced compliance" situation—that is, when they must make a decision—the magnitude of dissonance that attends one's exposure to inconsistent information is directly proportional to the importance of the issue to be resolved.\(^9^6\) The more important the

---

\(^9^4\) L. Festinger, Cognitive Dissonance, supra note 89, at 31.

\(^9^5\) Issues related to the amount of dissonance that accompanies a situation when the decisionmaker faces multiple alternatives exceed the scope of this Essay. Suffice it to say that the amount of dissonance is proportional to the positive and negative attributes of both the alternative chosen and those which were rejected. When the chosen alternative contains a high number of positive attributes and the rejected alternatives contain many negative features dissonance is low or nonexistent. By the same token, when the decision has a number of adverse traits and the information rejected a number of positive traits, dissonance is high. See J. Brehm & A. Cohen, supra note 89, at 24-42.

\(^9^6\) Id. at 50 ("Given the fact that a person holds a certain opinion, ... the greater the number and/or importance of his cognitions inconsistent with that opinion, the greater will be the magnitude of dissonance that he experiences."). See Frey, Recent Research on Selective Exposure to Information, 19 Advances in Experimental Soc. Psychology 41, 44 (1986) ("The intensity of dissonance depends on the relative proportion of dissonant and consonant cognitions in the person's cognitive system as well as in the cognition's relative importance.").
issue the greater is the dissonance aroused by the contradictory information.

The need to reduce the tension that dissonance imposes upon the individual stems from the entirely human desire to maintain a self-image that is consistent with the environment. Not many of us truly enjoy being out of touch with conventional behavior. Dissonance theory proposes no more than this: When we are in a state of discomfort or tension created by the existence of information inconsistent with that to which we are committed, that is, information that is inconsistent with the environment, we are motivated to “achieve consonance.” It is fair to indulge in the supposition that justices see themselves as performing a duty that requires them to act as careful, conscientious interpreters of the Constitution. In addition, each no doubt wants and needs to preserve that image and perhaps even enhance it within the process of judging. These modest imputations are both necessary and sufficient to explain the need to reduce dissonance in the judicial context.

Designs for reducing dissonance require the actor to confront the inconsistent information or opinion. Dissonance theorists speak of altering stored memory as a way to reduce dissonance. Memory may be stored in written form as well as in nerve cells and synapses; inconsistent facts and opinions can reach us in variety of ways. Thus, the judge who explains that although she is aware of inconsistent precedent she nonetheless decides as she does is acknowledging the effect of stored information on her decisionmaking process. The notion of “altering memory” has about it the air of dissembling, but dissimulation is not an issue.

theory, the lack of a precise fit is not crucial; the generalization in the text spans the typical research contexts. Id. at 4.

97. R. Brown, supra note 90, at 549 (“The human mind, it seems, has a strong need for consistency and attitudes are generally changed in order to eliminate some inconsistency.”). It is worth repeating that this dissonance exists because after a decision is reached, the individual must still confront information that suggests she is wrong. Thus the motivation exists to justify that to which the individual has committed. M. Deutsch & R. Krauss, supra note 89, at 70.

98. R. Brown, supra note 90, at 584.

99. Perhaps the most radical attempt to achieve the status of “conscientious interpreter” is Justice Roberts’ claim that he was not interpreting at all, but simply “lay[ing] the article of the Constitution which is invoked beside the statute which is challenged and ... decid[ing] whether the latter squares with the former.” United States v. Butler, 297 U.S. 1, 62 (1936).

100. Deutsch, Krauss & Rosenau, Dissonance or Defensiveness?, 30 J. Personality 16, 18 (1962) (arguing that dissonance need not follow all decisions, but that it does occur “when [the decisionmaker] perceives his choice in a given situation to be inconsistent with the conception of some aspect of himself which he tries to maintain (for himself or for others) in that situation”).

101. See L. Festinger, Conflict, supra note 89, at 133-45.

102. Frey, supra note 96, at 44.
This process of altering memory is nonduplicitous: it occurs not through deliberate efforts to conceal or prevaricate, but because it must. The existence of inconsistent information, coupled with our commitment and need to defend the decision we have just made, operate at a psychological depth that is beyond our ordinary control.

When dissonant information arrives, we generally employ one or more of three strategies for altering memory, thereby reducing dissonance. Of the three strategies for reducing dissonance, perhaps the simplest conceptually is the theory of ‘selective exposure.’ This strategy hypothesizes that the decisionmaker simply will ignore discrepant information, selectively exposing herself only to information favoring the decision already made. For example, even though a justice may have heard conflicting arguments during oral argument, once the decision is made, but before opinion writing, she will omit reexamination of the conflicting precedent. As one quickly might conclude, this phenomenon is least likely to occur when the Court splits; the dissent serves as a reminder that conflicting precedent exists. All the same, we are familiar with majority opinions that fail to acknowledge even the existence of a dissenting point of view!

The second strategy is known as ‘bolstering.’ This theory predicts that after the decision is made, the individual will consider the

---

103. In his later work, Festinger came to question whether dissonance was always aroused post-decisionally. L. FESTINGER, CONFLICT, supra note 89, at 156; M. DEUTSCH & R. KRAUSS, supra note 89, at 73. To the extent that the importance of the issue increases the likelihood of dissonance, see supra note 95, and to the extent that a decision maker knows that her decision will affect subsequent behavior, dissonance is aroused. J. BREHM & A. COHEN, supra note 89, at 300.

104. Psychoanalysts have labelled an analogous phenomenon “rationalization” and argued that this is a useful description because dissonance reduction is ultimately a species of defensive techniques. M. DEUTSCH & R. KRAUSS, supra note 89, at 74. If the use of that term helps isolate the phenomenon under discussion, the reader is invited to use it. The problem is that the idea of “rationalization,” in modern, nontechnical parlance, seems to carry precisely the wrong connotation. It suggests the very process of dissimulation that the dissonance theorists would reject.

105. See generally Frey, supra note 96 (summarizing research on the theory of selective exposure).

106. For a recent example in which the majority and dissent seemed to be addressing two different problems, see Martin v. Wilks, 109 S. Ct. 2180 (1989) (majority addressing narrow question of interface between FED. R. CIV. PRO. 19 and 24; dissent addressing larger issue of collateral attacks on consent judgments implementing affirmative action plans). See also DeShaney v. Winnebago County Dept. Soc. Serv., 109 S. Ct. 998 (1989) (majority literally failing to acknowledge dissent).

107. I again acknowledge my debt to Professor Dane for making me aware of this phenomenon. A useful explanation of the phenomenon is the following:

Adding new cognitions reduces dissonance if (a) the new cognitions add weight to one side and thus decrease the proportion of cognitive elements that are dissonant, or
discordant details, but will add consistent facts to those on which she based her decision in an effort to “bolster” support for the decision already made. As applied to the judicial scenario, bolstering occurs when the justices send their clerks out to hunt up additional precedent to support that which already favors the decision. Under these circumstances, the written opinion will usually take formal cognizance of the opposing precedent, but undermine its value—and reduce dissonance—by overwhelming the inharmonious, opposing precedent with generous helpings of compatible precedent. The Court’s use of string citations in a majority opinion may be a reflection of bolstering. It is as if the Court was saying: “Yes, you’ve found some cases for your side, but look at all the cases we found for ours!”

The final strategy, and the one which has generated the most research, is the attitude (or evaluative) change hypothesis. Attitude change in a social setting occurs in a number of ways. One is to reinterpret the dissonance-generating facts or precedents to depreciate their value or importance in the decisionmaking process. This practice is probably more familiar to us than we realize. Many of us are aware of the smoker who, asked how he can continue to smoke in the face of “all that evidence,” responds: “They haven’t proven it to me. Why I was just reading...” He has undervalued the strength of the nonconforming information. Lawyers are aware of the reinterpreted precedent, a common feature in opinion writing. It also reflects, at least in part, an attempt at dissonance reduction.

The new cognitions change the importance of the cognitive elements that are in dissonant relation with one another.

H. Markus & R. Zajonc, The Cognitive Perspective in Social Psychology, in 1 The Handbook of Social Psychology 137, 202 (3d ed. 1985). See generally M. Deutsch & R. Krauss, supra note 89, at 70-71 (“Rats and people come to love the things for which they have suffered.” Presumably they do so in order to reduce the dissonance induced by the suffering and their method of dissonance reduction is to enhance the attractiveness of the choice which led to their suffering.).

108 See Frey, supra note 96, at 45 (arguing that “dissonance reduction via selective exposure necessitates a considerable buildup of relevant cognitions by drawing selectively on the environment, whereas evaluative change necessitates nothing but change in one’s cognitions”).

109 The precise example is drawn from Frey, supra note 96, at 48-49 (summarizing the research of Feather, Cognitive Dissonance, Sensitivity, and Evaluation, 66 J. Abnormal & Soc. Psychology 157 (1963)).

There is no effort here to explain all of the Court’s opinions in terms of dissonance reduction. Some decisions may arouse no dissonance. See supra notes 95, 100. String citations reflect the justices’ belief that settled law decides the problem, despite the dissent’s contrary authority. The point is that the “belief” is both genuine and a necessary component of the reduction process.
A variant of the dissonance-reduction-by-reinterpretation strategy for changing attitudes involves not merely undervaluing the inconsistent fact, but making it irrelevant. Again, the smoking scenario provides a convenient illustration. Now the smoker who is asked the increasingly embarrassing question not only diminishes the probativeness of studies explicating the health risks of smoking, but argues that they are irrelevant. "Research on rats does not tell us anything," he will respond. The same phenomenon occurs routinely in Supreme Court opinions. Justices constantly reinterpret precedent to dismiss the inconsistent old case from the decisionmaking process. We are told that Case A, as reinterpreted, simply has no place in the current decision; it dealt with an entirely different scenario.\textsuperscript{110}

B. Dissonance in \textit{Bowsher}

To test fully the hypothesis that dissonance reduction exists in Court opinions, one would need to conduct an empirical study that measures a number of variables, including the importance of the issue, strength of the dissent both in terms of precedent and persuasiveness of argument, individual justice's commitment to the issues sub judice, and the like, across a statistically significant number of decisions.\textsuperscript{111} In the absence of such a study, I nonetheless provide persuasive evidence that such a dynamic is present in the \textit{Bowsher} opinion.

\textit{Bowsher} generated four opinions, a majority subscribed to by five justices, a concurring opinion in which two members joined, and separate dissents from Justices White and Blackmun. I propose to set out most of the substantial contradictory arguments and precedents relied upon by the concurring and dissenting opinions, and then examine the majority's responses thereto. If dissonance exists, evidence should appear in the nature of those responses.

The majority, prefacing its analysis on the notion that the founders created a government of "separate and wholly independent" political branches, concluded that the Balanced Budget and Emergency Deficit Reduction Act of 1985 ("Gramm-Rudman") violated separation of powers. The Act's transgression was to confide "Executive" functions to the Comptroller General, an agent under the control of Congress. The forbidden control existed because Congress had arrogated the authority to

\textsuperscript{110} Examples of this kind of reasoning in Supreme Court decisions are too broad to recount. \textit{See infra} text accompanying notes 140-42.

\textsuperscript{111} Such a study is beyond the scope of this suggestive essay. The Frey article, \textit{supra} note 96, at 50-70, summarizes the research on the most important variables between 1964 and 1986 in the area of selective exposure.
remove the Comptroller General for cause by joint resolution.112 Bowsher’s holding was premised on an inflexible, formalistic view of governing theory.

Justice Stevens, by contrast, purported to break free from analysis by formal deduction in his concurring opinion.113 Although he agreed with the majority’s result, he found that the statute violated separation of powers in a distinct manner. In Stevens’ opinion, Gramm-Rudman did not require that the Comptroller General “execute” the law at all; rather, he acted in a legislative capacity. As such, the Comptroller General’s authority to dictate budget cuts, a task functionally equivalent to making legislative policy, violated Article I’s bicameral and presentment requirements.114

There were two dissents. In one, Justice White borrowed from Nixon’s flexibility premises and rejected any notion of rigid compartmentalization of governing functions.115 Although White agreed with the majority that the Comptroller General’s duties under the statute were “executive,” he challenged the majority in a number of ways. First, he attacked its approach. Rather than using formal categories to determine the propriety of Congress’ ability to remove one who undertakes executive tasks, he employed a two part analysis that asked if the removal provisions prevented the Executive from “accomplishing its constitutionally assigned functions,” and if so, “whether th[e] impact [on the Executive Branch] is justified by an overriding need to promote objectives within the constitutional authority.”116 In other words, White began with the premise that Congress had the necessary and proper authority...
to pass Gramm-Rudman, and balanced the invasiveness of the use of that authority against the Executive’s ability to perform his required tasks.

Second, Justice White challenged the majority’s interpretation of the relationship between the Comptroller General’s tenure and legislative will. White pointed out that removal required a bipartisan effort that demanded a potential veto override, and thus conformed to the demands of bicameralism and presentment set out in *Immigration and Naturalization Service v. Chadha*. As such, removal of the Comptroller General was more arduous legislatively than impeachment; the latter requires for conviction only a two-thirds vote of the Senate, while a veto override requires two-thirds of both houses. Thus, Justice White found inapt the majority’s conclusion that the Comptroller General was a captive of legislative will.

Finally, Justice White relied on the unchallengeable fact that Congress, in the sixty-five year history of the statute creating the Comptroller General’s office, had never attempted to remove a Comptroller General. The Blackmun dissent rested entirely on this point; the majority, he argued, was striking down the wrong statute. Given the Comptroller General’s sixty-five years of independence from Congress, the Court should strike down the act granting Congress the authority to remove him, not the act to reduce the budget deficit.

From this illustration of the major differences that separated the various opinion writers, coupled with an analysis of the majority’s treatment of precedent, one sees evidence of all three dissonance reductions techniques—selective exposure, bolstering, and attitude (or evaluative) change both by undervaluing discordant information and by reinterpreting it.

Indications of selective exposure follow from the Court’s complete disregard for the applicability of the flexible approach from *Nixon* to the separation of powers issue. The majority ignored two dissonant cognitive elements: *Nixon*’s appraisal of the generative history of separation of powers, and its analytical framework that balanced congressional intrusiveness against the overriding need for the legislation. This failure to acknowledge a competing line of precedent is difficult to explain in traditional Llewellyn terms given the justices’ uniform agreement that the

---

117. *Id.* at 767 (discussing Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983)).
118. *Id.* at 771 (White, J., dissenting).
119. *Id.* at 778.
120. *Id.* at 783-87 (Blackmun, J., dissenting).
need to reduce the deficit was overriding.\(^{121}\) One might have expected that the acknowledged importance of the issue would argue in favor of an explanation for something as basic as the Court's overall approach to the problem. Instead, the Court ignored it. As dissonance theorists have observed the amount of dissonance aroused is directly proportional to the importance of the issue.\(^{122}\) Thus, the Court's failure to respond to discordant information that it had previously produced, its old notecards, strengthens the conviction that dissonance was aroused and reduced through the mechanism of selective exposure.

Hints that bolstering was at work were revealed in the Court's historical preamble. As I have suggested throughout, no meaningful history surrounding the Constitution's founding elucidated the issue before the Court. The framers were totally silent in the Constitutional Convention about removal of civil officers of the United States outside the elaborate process of impeachment. To the extent that substantial historical authority existed, it was Hamilton's ratification induced statement in *The Federalist No. 77* that the Senate could participate in the removal process.\(^{123}\) Neglecting that precedent and unable to bring determinative historical material to the question, the Court devoted the better part of three pages to the unquestioned proposition that there is a recognized "danger of congressional usurpation of Executive functions."\(^{124}\) The Court attempted to overwhelm the reader with historical understanding precisely because it could neither discover directly relevant material nor prove why *Bowsher*'s statutory scheme threatened aggrandizement by Congress.\(^{125}\) Despite its inability to answer that basic question, which was at

\(^{121}\) It is true that in *Commodities Futures Trading Comm'n. v. Schor*, 478 U.S. 833 (1986), handed down the same day as *Bowsher*, a slightly different majority of the Court attempted to reconcile the two approaches. It did so by using non-historical doctrinal distinctions. The attempted reconciliation ignored both the legal and factual issues raised by Justice White about the relationship between the Comptroller General and Congress. *Id.* at 856-57.

\(^{122}\) See *supra* note 95.

\(^{123}\) *The Federalist No. 77*, at 459 (A. Hamilton) (C. Rossiter ed. 1961). Before Myers v. United States, 272 U.S. 52 (1926), it was assumed by every court that looked at the issue that the power to remove was an incident of the power to appoint. Blumoff, *supra* note 18, at 1109-24.

\(^{124}\) *Bowsher*, 478 U.S. at 727. The three pages of historical materials appear *id.* at 721-24. This is not to say that the Court's own history was silent on the issue. *Bowsher* did address its own historiography within the historical section of the opinion. The full history of the Court's own forays into this area is the subject of Blumoff, *supra* note 18.

\(^{125}\) There was nothing wrong with the principle the Court elaborated in *Bowsher*, namely, that the Necessary and Proper Clause itself prohibits Congress from exercising executive functions. The problem with *Bowsher* is two-fold: (1) nothing in the statute suggested that congressional usurpation would occur, and (2) the Court's reading of history was erroneous. Blumoff, *supra* note 18, at 1145, 1173. For the suggestion that standing was improperly granted, see *id.* at 1145 n.435. See generally Blumoff, *supra* note 42.
the heart of Justice White's dissent, the Court nevertheless employed historical analysis instrumentally, as a preamble to provide a justificatory framework for its ultimate analysis.\textsuperscript{126}

That preamble also suggests dissonance reduction by selective exposure and reinterpretation. Consider, for example, the majority's discussion of the "Decision of 1789" and \textit{Humphrey's Executor v. United States}.\textsuperscript{127} The first Congress decided in 1789 that the newly created Secretary of Foreign Affairs could be removed by the President without congressional participation. That decision turned on two considerations: the nature of the office (both its high rank and its need for confidences and confidentiality) and the popularity of President Washington.\textsuperscript{128} In \textit{Bowsher}, the majority omitted any discussion of these once dispositive considerations, quoting instead from Madison to prove that any connection between the legislature and executive in the removal process would give the Senate "too much Executive power" over the President, and simultaneously "diminish the responsibility . . . of the Executive."\textsuperscript{129} The \textit{Bowsher} Court simply, and apparently disingenuously, concluded that "Madison's position \textit{ultimately} prevailed, and a congressional role in the removal process was rejected."\textsuperscript{130} The unmistakable drift of the majority's discussion, in the context of the removal conditions at issue in the Comptroller General's office, was that any congressional participation in

\textsuperscript{126} There is an unintended irony here because as more and more researchers look into the general question of the framers' intent and the separation of powers doctrine, they discover that the framers had no intent that the doctrine be used instrumentally to resolve particular problems. \textit{See} Blumoff, \textit{supra} note 18, at 1082 ("The framers . . . never intended separation of powers as a rule of decision: the doctrine was a blunt-edged political organizing principle used to construct a government."); Casper, \textit{An Essay in Separation of Powers: Some Early Version and Practices}, 30 WM. & MARY L. REV. 211 (1989) (separation of powers supportive of constitutional theory, but not doctrine partly because there was no clear doctrine. The separation of powers provision was perceived as "the chain of connection that binds the whole fabric of the Constitution."); Gwyn, \textit{The Indeterminacy of the Separation of Powers in the Age of the Framers}, 30 WM. & MARY L. REV. 263 (1989) (separation of powers doctrine intended to achieve objectives of accountability of officials and efficiency of government but no consensus among framers as to which government actions belonged to each type of organization, \textit{i.e.}, assembly of equal membership or executive hierarchically-organized council).

\textsuperscript{127} 295 U.S. 602 (1935).


\textsuperscript{129} \textit{Bowsher}, 478 U.S. at 723 (quoting \textit{1 ANNALS OF CONG.} 380).

\textsuperscript{130} \textit{Id.} at 723 (emphasis added).
the removal of an officer who executed the law was constitutionally impermissible.

The majority's use of historical precedent also reflected a clear attitude or evaluative change. In *Humphrey's Executor*, which *Bowsher* relied on, the Court had noted that "the [foreign affairs] office under consideration by Congress [in 1789] was not only purely executive [a nonhistorically based doctrinal distinction], but the officer one who was responsible to the President, and to him alone, in a very definite sense." Moreover, the *Humphrey's Executor* Court noted, when the first Congress considered the office of Comptroller of the Treasury shortly thereafter, "Mr. Madison quite evidently thought that . . . a different rule in respect of executive removal might well apply." Thus the *Bowsher* majority not only overlooked the historical record as revealed in the *Annals of Congress* (reduced dissonance through selective exposure), it rewrote and reinterpreted its own record of that record (reduction by evaluative change), in part by disregarding its own understanding (selective exposure redux).

*Bowsher* contains other examples of selective exposure and evaluative change. Justice Stevens pointed out that the removal conditions at issue in *Humphrey's Executor* were nearly identical to those in *Bowsher*. In the earlier case, the Court upheld those conditions because the "coercive influence [of presidential removal] threaten[ed] the independence" of the Federal Trade Commissioners. That independence, the Court had opined in its review of the legislative history, was critical to the commission's functioning.

The *Bowsher* majority did refer to *Humphrey's Executor*'s coercion language, and it chose to quote from the same paragraph in which the language above appeared, but omitted the language. *Bowsher* quoted the following:

The fundamental necessity of maintaining each of the three departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in

132. *Id.*
133. The Comptroller General could be removed for "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1)(B) (1982). The FTC Commissioner could be removed for "inefficiency, neglect of duty, or malfeasance in office." With respect to the crucial issue of independence from political control, the statutes are identical. 478 U.S. at 738 (Stevens, J., dissenting) (quoting Federal Trade Commission Act, ch. 113, 38 Stat. 717, 718 (1914)).
134. *Humphrey's Ex'r*, 295 U.S. at 630.
135. *Id.* at 625-26.
the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. *Humphrey's Executor,* 295 U.S., at 629-630.136

The *Bowsher* majority stopped one sentence short of the "coercive influence" on the FTC language in the preceding paragraph, and used its select *Humphrey's Executor* language to establish what are nearly opposite conclusions: first, that "Congress cannot reserve for itself the power of removal . . .";137 and second, that those nearly identical removal conditions subject the Comptroller General to congressional will.138 In sum, while *Humphrey's Executor* used the language to demonstrate that the removal conditions served the need for independence from the executive, *Bowsher* used them to establish subservience. *Bowsher's* majority both selectively exposed itself to controlling precedent and reinterpreted it at the same time.139

The majority opinion also reflects several instances of dissonance reduction through reinterpretation to irrelevance. In his dissent, Justice White indicated that removal by joint resolution would require a veto-override if the President disapproved of the resolution. That bipartisan requirement, added to the removal restrictions, led White to conclude that removal might be more difficult to effect than impeachment.140 Although the Court playfully juxtaposed the removal language with grounds for impeachment, its bottom line was to dismiss White's argument as irrelevant. "Surely," the Court wrote, "no one would seriously suggest that judicial independence would be strengthened by allowing removal of federal judges only by joint resolution finding 'inefficiency,' 'neglect of duty,' or 'malfeasance.' "141

Of course no one made such a suggestion; in fact, neither "strengthening" independence nor the judicial tenure was at issue. The question was whether the tenure conditions imposed on removal of the Comptroller General created independence from Congress. The Court opined that it did not, but it never gave a convincing reason for so deciding. Instead, in this example, it reduced a cogent factual observation to a non sequitur. Similarly, the Court disregarded almost wholly White's observation that in its sixty-five year history, Congress had never removed a Comptroller

---

137. *Id.* at 726.
138. *Id.* at 727-32.
139. *Humphrey's Executor* also raised an issue not presented in *Bowsher*, namely the ability of Congress to tether presidential removal authority. In that sense, the cases were distinguishable.
141. *Id.* at 730.
General from office. The closest the Bowsher majority came to responding to that observation was its statement that "[t]he separation of powers . . . cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress." Again, it reduced the discordant information to irrelevance, rather than face the information head on.

C. Dissonance or What?

Although other examples of dissonance reduction exist, the preceding discussion illustrates the process. Faced with many cognitive elements that failed to conform to the information it processed to reach its decision, the majority employed various strategies to reduce the accompanying dissonance. All this may leave the reader with the question: How do I know that what this author characterizes as dissonance reduction is what he claims it is? Some clue that a psychological process is at work may lie in the unacceptability of alternative explanations.

One alternative explanation for the Court’s failure to respond at all to a number of the issues raised, what social psychologists have called “selective exposure,” is that the points raised were not deemed to be important. That is, the majority neglected to respond because it felt no need to dignify trivia. That conclusion is difficult to accept with regards to a number of the omissions. Stopping two sentences short of the punch line in Humphrey’s Executor, failing to quote from that same case with respect to Madison’s opinion on the removability of the Comptroller of the Treasury, and failing entirely to respond to alternative conceptions of separation of powers and modes of analysis look more like deliberate ignorance or reckless disregard of precedent than lack of importance. Here it is crucial to emphasize again that strategies to reduce cognitive dissonance are decidedly nonduplicitous. They simply permit the decisionmaker to adjust to her decision and accommodate nonfitting cognitive elements.

Another explanation, potentially apt with respect to the Court’s use of history, accepts historical indeterminacy and notes that the Court, faced with doctrinally distinct issues, frequently uses only that history that supports a conclusion reached independent of history. This is no

142. Id.
143. For example, the Bowsher majority did not respond to Justice Blackmun at all; it made no mention of Justice Steven’s conclusion that the functions performed by the Comptroller General were “legislative”; and it recharacterized Chadha to analogize Congress’s removal authority to a legislative veto, a rather preposterous conclusion in light of the history of the office, the mechanics of removal, and the nature of the removal conditions.
response at all. It not only begs the question raised in this essay, namely, how the Court deals with its own history and historiography, but generates profoundly disturbing questions as well. If a result is not even potentially a function of history, why use it at all? And if judges and lawyers must use it in decisionmaking, why use it so selectively? Does not the process of selection threaten to undermine the very legitimacy that is assumed to inhere in the judicial use of history? What justifies disregarding your own history? This response leaves those questions unanswered, or worse, it assumes implicitly that they are not important.

Professor Llewellyn suggests a third alternative to the dissonance thesis: excess rhetoric to support an idea. That explanation suffers from at least two deficiencies. It is woefully underanalyzed. It does not tell us why the excess exists other than that the judge is a lawyer. That partakes more of phrenology than of meaningful explanation. It assumes without analysis some special logorrheic disease associated with what it is to be a “lawyer,” and fails to analyze why we change our conceptions of the law without sufficiently explicating the bases for those changing conceptions. Nor will Llewellyn’s conclusion rationalize reinterpretation of precedent. We could conclude that we reinterpret precedent whenever new facts fail to conform with existing case law, but that explanation also begs the question raised here: why not do it in a manner that appears more forthright?

We might also interpret what I have described as evidence of dissonance as personal prejudice and dispatch the questions raised here through ad hominem attacks. We could argue, for example, that the justices took contradictory positions in different cases because they were ill-informed, or that they decided the issues on entirely personal bases and then sloppily applied precedent to support that conclusion, or that they simply favored one disputant over another, or that they undertook shoddy research. None of those alternatives is particularly appealing; none is necessary in any particular case to understand the apparently haphazard use of both the nation’s and the Court’s own history.

In short, there are at least three alternative conclusions we could reach about the Bowsher majority’s treatment of dissonant elements in the context of its separation of powers jurisprudence. We could conclude that it deemed certain non-fitting cognitions trivial; that it disdained another result because it impinged on overwhelming personal predilections; 144. See supra note 88. Because Professor Llewellyn was speaking in the immediate context of judicial rhetoric, one could interpret his description as pure cynicism about the disinterestedness of judges. That conclusion, of course, would collapse his argument into nihilism or a pure will theory.
and (or) that the majority failed to do sufficient research (or appreciate what it had done). Arguably all of these explanations envision personal attacks on the judges' motives. None purports to be comprehensive, none is even theoretically verifiable, and none is necessary.

**Conclusion: The Essential Struggle with History**

An understanding of the Court's struggle with history is especially important in light of the widely shared belief that justices of the United States Supreme Court serve a public educational function. Alexander Bickel characterizes the Court's role as, in part, "moral" and "mystic"; it preserves democratic faith by "legitimating" our constitutional system.\(^\text{145}\) Despite the Court's occasional and unavoidable bow to expediency that is driven by principle, through these roles it educates the body politic.\(^\text{146}\) For Professor Burt, the pedagogical function is more immediate: the justices' commitment to giving reasons for its decisions, he writes, is a methodological feature designed in large measure "to show the loser how he should reconceive his own position and abandon his ... claim ... in light of [shared] communal principles ... ."\(^\text{147}\) Professor Ackerman goes further still. In his view, judicial review fulfills a "signaling" function that makes it plain to the public that "something special is happening in the halls of power; ... that the moment has come ... to determine whether our generation will respond by making the political effort required to redefine, as private citizens, our collective identity."\(^\text{148}\)

In the face of such authority, and as a teacher who finds himself generally unable to leave the role, I have the sense (if only visceral) that the Court does serve a public informative function. Certainly on the issues that matter—reproductive choice and civil rights, to name two—the Court's effect is immediate. Public interest groups and the press drive these decisions home without delay. On other issues, the effect is mediated in ways that go beyond this Essay. In either case, some interpretive community is mindful of the Court's apparently shabby treatment of both the Constitution's and its own history. Thus, an explanation for the Court's apparently careless use of history seems particularly appropriate, if we accept that some use of history is necessary.

---

146. Id. at 65-72 (placing the Court within the Lincolnian tension, i.e., the tension between principles and expediency). For a similar conclusion from a very different perspective, see E. CHEMERINSKY, INTERPRETING THE CONSTITUTION 90-91, 136-37 (1987).
The use of history is indispensable. First, the widespread use of historical foundations for the Court's opinions no doubt reflects the belief that such a basis provides a necessary transition between the world that preceded the opinion and the world that follows it. To the extent that the Court serves as a public classroom it, like all teachers, requires credibility. One attribute of credibility is legitimacy; and one facet of legitimacy lies in the ability of the Court to persuade the American people that the opinions its writes are not of its own making, but of the imperatives that flow from the text it interprets. Establishing constitutional imperatives requires time, a quality that a precedent-based system of jurisprudence provides. Even if we suspect that text alone cannot dictate results, public acceptability—of the Court and its decisions—demands the broadly based belief that it does.149 If the Court were tomorrow to declare that socialism is blended into the fabric of the American Constitution, for example, most citizens would react in horror. The body politic has not been prepared for such a result.150

Because the Court's poor use of historical materials threatens the viability of the very teaching task it performs, something beyond pedagogy is necessary to explain that seeming misuse. The theory of cognitive dissonance has the virtue of providing a more benign psychological explanation for uses of history that might otherwise suggest more pernicious motives. The need to attend to the tension that inheres in important decisions is a shared human trait; and sitting in a human-made pantheon does not alleviate the problem. The approach of cognitive dissonance vitiates the necessity of ad hominem attack and explains inconsistencies without challenging the justices' sagacity or mendacity, and without wallowing in a nihilistic morass. It does so, in addition, in a particularly appealing way: it requires us to view the justices as humans susceptible to the same pressures in decisionmaking as the rest of us. It also helps to explain a limitation on the instrumental use of history: the tendency to select those notecards that best support the position we have already taken.

149. As Judge Linde wrote, "[h]owever useful it is to recognize that the law emerges from what judges do, it does not serve well as a source of premises for what judges should do." Linde, Judges, Critics, and the Realist Tradition, 82 YALE L.J 227, 252 (1972).

150. The reasons listed here for the use of history are not exhaustive. See, e.g., Nelson, supra note 7, at 1260-61 (discussing neutrality and traditions as normative concerns for judges); Sandalow, supra note 3, at 1062-70 (describing evolution interpretation and the relevance of the historical process); Wiecek, supra note 2, at 232-33 (understanding history's impact on judges in the broader, anti-instrumental sense of providing perspective); Wofford, supra note 5, at 528-33 (urging that history be used not as binding, but as past insights that held shape sensible personal judgments).
That observation serves as the groundwork for the last point I intend to make. As Thomas Kuhn and others have pointed out, even in the so-called “hard sciences” induction always follows from deduction; we are always guided by what we believe we will find.\textsuperscript{151} If that is correct, it suggests two corollaries for the use of history. First, it undermines some of the force in the critical observation that the originalist is predestined to find answers in original sources. Originalist and contextualist alike are motivated by the hypotheses they carry with them to the task. Second, it suggests that we simply cannot employ history instrumentally; the existence of novelty, of unanticipated fact patterns, necessarily undermines deductive solutions based on history.

Again I draw from Kuhn. Science can discover novelty and anomalous facts in the course of normal research, that is, research directed at “problems that can be solved with conceptual and instrumental techniques close to those already in existence.”\textsuperscript{152} In science, unanticipated novelty results from discordance among the researcher’s understanding of the problem, her tools, the existing paradigm, and the newly emerging paradigm. Kuhn concludes: “Obviously, then, there must be a conflict between the paradigm that discloses anomaly and the one that later renders the anomaly law-like.”\textsuperscript{153}

Unlike the hard sciences, wherein anomaly compels the practitioner to retool periodically and thoroughly, in law we rarely acknowledge anomalous occurrences. In lieu of permitting a legal revolution, the Court acts as though the novel fact configuration is just another in a line of episodes for which the preexisting legal paradigm stands at the ready. Thus, we almost always rely on the same skills and precedents at hand, even when the fit is terribly awkward. Rather than adjusting or discarding entire paradigms,\textsuperscript{154} we generally meet conflict with incremental reinterpretation. In the end, then, the conflict is reduced—the anomaly is made to appear “law-like”—in texts that suggest that anomaly does not exist. At an individual level, cognitive dissonance often helps us understand what otherwise appears as pretense.

\textsuperscript{151} T. KUHN, \textit{supra} note 67, at 46-47; see P. MEDAWAR, \textit{Induction and Intuition in Scientific Thought} (1969); P. MEDAWAR, \textit{Hypothesis and Imagination, supra} note 81, at 115.

\textsuperscript{152} T. KUHN, \textit{supra} note 67, at 95.

\textsuperscript{153} Id. at 96.

\textsuperscript{154} This is not to say that paradigms do not change. The treatment of the commerce clause and taxing power, vis a vis the authority of Congress, in the 1930s may reflect a complete paradigm shift, one that was in the making for half a century. Cf. Ackerman, \textit{supra} note 148, at 1051-57 (The New Deal and rise of the constitutional rediscovery resulting in a redefinition of the relationship between the government and the people.).
At the same time, we remain committed to an approach to judicial decisionmaking that rests to some degree on precedent, and in which we are condemned forever to lack knowledge of the precedential value of a case on the day of judgment. 155 Unless the courts abandon stare decisis, abdicate decisionmaking when new facts arise, or vacate their role as forward-looking, problem-solving entities, we must forsake the notion of history as decisionmaker. Novelty, by definition, undermines historical determinacy. The past addressed its own problems, not ours.

To reach this conclusion does not require us a fortiori to discard history as useless. If nothing else, the psychological demands on individual justices render such a conclusion misguided. History is a necessary tool in the ever present battle against dissonance. The Court needs to employ history to fulfill its public education function. The logic of the attack on a precedent-based jurisprudence is flawed; it omits entirely any discussion of a logical use of history divorced from the critical description of its operation in the generation of doctrine.

The attack on the methodology deflects our attention from two very real problems we face in this regard, if we assume that the use of history in law is inevitable. First, we need to be teaching historiography. We need to demonstrate how to use history, even if it cannot produce "right answers." Law office history is not only an embarrassing enterprise, it tends to be profoundly illegitimate: it often misrepresents what we can know. We are all aware of the disciplinary rule that requires us to disclose "[l]egal authority in the controlling jurisdiction . . . directly adverse to the position of his client . . . ," 156 and yet our use of history flies in the face of the spirit if not the letter of that mandate.

At an equally fundamental level, we need to recognize a doctrinal strength of history, as well as its weaknesses. What history can tell us is when the battle, once raging and of seeming destructive force, is over. Two examples demonstrate this use. We no longer need to fight the war for freedom to use contraceptives. At some point in time, the public does endorse the Court's result, if only through its silent purchasing power, broadly defined. To the extent that the Court has concluded that certain powers lie outside its purview, we waste our time and energy fighting. History has demonstrated the end of a second war in this context: that the President, subject to the will of Congress if expressed only retrospec-

tively, must have the freedom to react to unforeseen international contingencies.\textsuperscript{157}

These observations have an important legitimating effect on the role of the Court. If the public now subscribes to the reproductive freedom made possible by the \textit{Griswold} decision, several conclusions are possible. First, the Court interpreted history, its own\textsuperscript{158} and the republic's, correctly. Moreover, that it has done so justifies nonoriginalist judicial review, at least in the area of individual rights. That justification finds support in the second conclusion: the public has fulfilled its oversight function, it has approved the notion of reproductive freedom, at least to the extent of that decision. That the public has not yet embraced the more far reaching implications of reproductive choice simply signifies that history has not yet reached its verdict. It does not mean that our adjudicative framework does not operate.\textsuperscript{159}

Perhaps the bottom line is that, regardless of where we line up on the immediate issues concerning reproductive rights, for example, we have no choice but to permit the Court to be wrong, even when the result of the error causes great, even unnecessary pain.\textsuperscript{160} If originalism were workable and operated as even its most sophisticated advocates envision, the precedent-based system that must adapt to new conditions that alone create doctrinal change cannot function. The antecedent choice of principles, applied to novel contexts, necessarily undermines the idea of authoritative intent. Thus, one rather paradoxical price that our commitment to the common-law, historical method exacts is recognition that public perceptions over time sometimes destroy legal doctrine. A

\begin{itemize}
\item \textsuperscript{157} This is by no means a condemnation of the War Powers Resolution, although it does have implications for justiciability. \textit{See} Blumoff, \textit{supra} note 42, at 34-49.
\item \textsuperscript{158} \textit{Cf.} Poe v. Ullman, 367 U.S. 497, 535-36 (1961) (Harlan, J., dissenting) (lack of case history as the basis for majority opinion and Harlan's basis for dissent).
\item \textsuperscript{159} This last comment should not mark me as an apologist. I am merely depicting with some accuracy a phenomenon that otherwise tends to evoke descriptions based upon \textit{ad hominem} attack. Some of the Court's recent decisions, especially in the areas of employment discrimination and reproductive rights, are, in my opinion, doctrinally, historically, and socially unacceptable. \textit{See}, e.g., \textit{Webster v. Reproductive Health Services}, 109 S. Ct. 3040 (1989) (statute that prevented use of public employees and facilities in the assistance or performance of nontherapeutic abortions not unconstitutional); \textit{Patterson v. McLean Credit Union}, 109 S. Ct. 2363 (1989) (racial harassment occurring during the course of employment falls outside protection of 42 U.S.C. § 1981). I confess that in the end we may all be nothing but advocate litigators, although I remain open to deeper descriptions of the methods of law and of judicial reasoning. \textit{See}, e.g., \textit{Winter, Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law}, 137 U. PA. L. REV. 1105 (1989).
\item \textsuperscript{160} For example, whatever one may think about the abortion issue, it cannot be denied that the Supreme Court's recent \textit{Webster} decision will obviously cause pain to those poor women who, without a public facility for a safe abortion, will return to the dark days of the back alley. \textit{See} \textit{Webster}, 109 S. Ct. 3040.
\end{itemize}
second and related cost is that as we change settled ways of viewing the "older" case, we displace the extant conceptualization of preexisting precedent; we find the "latent" meaning of the old text. This cost seems to be the inescapable product of a dynamic legal system, all of whose players suffer the same human tendencies.