Philosophy, History, and Judging

Donald P. Boyle Jr.
PHILOSOPHY, HISTORY, AND JUDGING

A judge often calls on "history" to decide a case. Because history plays such a large role in judicial decisions, an inquiry into the philosophy of history may shed some light on judges' handling of different types of history, and their own philosophy on the matter.

This Note reviews the philosophy of history as it relates to the decision-making process in judging. Many commentators have discussed judges' use of history as a decisional tool—but few have inquired into the significance of a judge's idea of what history is. Two judges with different ideas of the nature of history will use that history in different ways. The Note uses recent cases on religion in the public schools to demonstrate the use of history by a district judge and the United States Supreme Court. The Note concludes with an appeal for a greater historical awareness on the part of judges.

PHILOSOPHY OF HISTORY

Inquiring into the nature of history1 is a matter of epistemology. The reader of history seeks an authoritative version of past events.2 History may be one of the oldest of the sciences: stories,
whether true or false, have circulated as long as people have wondered what happened before them.³

The eighteenth-century historian Giambattista Vico believed that history was a more proper study than the natural sciences:

[I]n the night of thick darkness enveloping the earliest antiquity, so remote from ourselves, there shines the eternal and never failing light of a truth beyond all question: that the world of civil society has certainly been made by men, and that its principles are therefore to be found within the modifications of our own human mind. Whoever reflects on this cannot but marvel that the philosophers should have bent all their energies to the study of the world of nature, which, since God made it, He alone knows. . . .⁴

One knows best what one has made oneself. The study of history for Vico, and for those who agree with his assessment, is thus one of self-discovery—of the individual self and of the culture. Some philosophers deny our ability to recapture the past; without having been there in person, they say, no true knowledge of the events can come to us at this remove. Yet, this inevitable uncertainty should not compel the conclusion that historiography is a hopeless endeavor.⁵

Thinkers of many Western countries and of strikingly dissimilar backgrounds and approaches have tackled the philosophy of history⁶ with varying degrees of success. Each seems to come to a dif-

⁴ Id. at 96.
⁶ The phrase "philosophy of history" was invented in the eighteenth century by Voltaire, who meant by it no more than critical or scientific history, a type of historical thinking in which the historian made up his mind for himself instead of repeating whatever stories he found in old books. The same name was used
different conclusion as to the nature and use of such a philosophy.\textsuperscript{7} Doubters of historical truth still exist today.\textsuperscript{8} Even the most optimistic historian can agree that the past is not \textit{completely} knowable; but then, neither is the present. A modern commentator notes: "[T]he perplexing paradox of all historical work is that what actually happened can never be recaptured, although historical research would lose its point without a belief that more of it can be recaptured than is presently known."\textsuperscript{9} Still, "[t]he fundamental assumption of the model of history as description is that good history can accurately portray past reality."\textsuperscript{10}

The method of historical research varies from individual to individual, but historiographers have classified the dominant approaches as "scissors-and-paste" and "scientific." A type of history that one finds all too often in judicial opinions is the "scissors-and-paste" method. The historian, or judge, searches for testimony of witnesses to the past events and, by cutting them out and pasting them together, creates a story that seems authoritative. Little or no analysis of these witnesses may follow.\textsuperscript{11}

\textsuperscript{7} See id.
\textsuperscript{8}\textsuperscript{15}
\textsuperscript{7.} See id.
\textsuperscript{8.} The historian Carl Becker wrote that one's view of history is so inextricably linked to the way one lives that history differs from person to person and generation to generation. \textit{See} C. Becker, \textit{Everyman His Own Historian}, in \textit{Everyman His Own Historian} 242-43 (1935). For criticism of this approach in Becker and other writers, see M. Mandelbaum, \textit{The Problem of Historical Knowledge: An Answer to Relativism} (1967).

\textsuperscript{11.} History constructed by excerpting and combining the testimonies of different authorities I call scissors-and-paste history . . . . [I]t is not really history at all, because it does not satisfy the necessary conditions of science; but until lately it was the only kind of history in existence, and a great deal of the history people are still reading to-day, and even a good deal of what people are still writing, belongs to this type.

The historian and philosopher R.G. Collingwood decried the pitiful example of the "scissors-and-paste" historian. He asserted that the more properly practicing "scientific" historian does not merely pass on collected facts to his readers as historical truth, but instead makes a critical choice about the "facts" that he has discovered:

"The scientific historian does not treat statements as statements but as evidence: not as true or false accounts of the facts of which they profess to be accounts, but as other facts which, if he knows the right questions to ask about them, may throw light on those facts. . . . The scissors-and-paste historian is interested in the "content," as it is called, of statements; he is interested in what they state. The scientific historian is interested in the fact that they are made." 12

Although the method seems silly by Collingwood's description, "scissors-and-paste" historiography was, nevertheless, during the nineteenth century, mainstream contemporary historical thinking. A twentieth-century mind, looking back through a nineteenth-century "scissors-and-paste" historian's work, may find little to admire in that once-popular approach.18 Most writers on historiography agree, however, that a purely "scientific" history—a history uncluttered by the passions and superstitions of the historian—could never be written, and, more important, might never be read.14

12. R. COLLINGWOOD, supra note 6, at 275.
13. Edmund Wilson, for example, wrote of Hippolyte Taine:

Taine was always emphasizing the scientific value of the "little significant fact." Here, he says, he will merely present the evidence and allow us to make our own conclusions; but it never seems to occur to him that we may ask ourselves who it is that is selecting the evidence and why he is making this particular choice. It never seems to occur to him that we may accuse him of having conceived the simplification first and then having collected the evidence to fit it; or that we may have been made skeptical at the outset by the very assumption on his part that there is nothing he cannot catalogue with certainty under a definite number of heads with Roman numerals, in so complex, so confused, so disorderly and so rapid a human crisis as the great French Revolution.

14. For undoubtedly there can be no history without a point of view; like the natural sciences, history must be selective unless it is to be choked by a flood of

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Despite the method of historical research chosen, problems remain. The German philosopher Friedrich Nietzsche identified some of these problems when he examined historical practice in the nineteenth century, and his criticisms are applicable to today's scissors-and-paste and scientific historians. Friedrich Nietzsche had an organic view of history: history was a living thing with which living humans must contend. Nietzsche discussed this problem in an early essay, *On the Use and Disadvantage of History for Life.* In that essay Nietzsche discussed three methods of

poor and unrelated material. . . . But as a rule, these historical “approaches” or “points of view” cannot be tested. They cannot be refuted, and apparent confirmations are therefore of no value, even if they are as numerous as the stars in the sky.


15. Karl Jaspers described Nietzsche’s approach:

Historical science is not timelessly valid knowledge of a finished and unchanging state of affairs; rather history (Historie) as knowledge changes with history (Geschichte) understood as a series of actual occurrences within the world. Nothing past is unalterably dead: Whatever issued from an authentic source lives on beyond a new present to undergo unforeseeable transformations. It is forgotten and again revived, it is discovered after seemingly having been known for some time, and it provides a new impulse after it has long been regarded as insignificant.

K. JASPERS, NIETZSCHE: AN INTRODUCTION TO THE UNDERSTANDING OF HIS PHILOSOPHICAL ACTIVITY 236-37 (1965).

Nietzsche, although not a historian by profession, had important things to say about the historiographical practices of his time. Yet, one writer warns: “[A]lthough Nietzsche may be among the most stimulating of writers, he is the unsafest and most erratic guide imaginable.” P. GYEL, USE AND ABUSE OF HISTORY 53 (1955). One can use Nietzsche’s criticisms, however, without adopting all other statements that he made. Nietzsche’s invocation of myth impressed one historian who found fault in the philosopher’s other views:

The truth is that societies and nations live and shape their policies by the myths they believe in, and hence arises the ethical responsibility of the historian. Such myths are ideological interpretations of history and their primary virtue is that they should be useful. Their function is to secure social cohesion, to assure the common man that he belongs to a cause greater than himself, and to create the blissful expectation of well-being hereafter. It is not necessary that the myth should be true, but only that it should be “useful.” Though ostensibly it interprets the past, its real concern is the future; history is the screen on which the ideal future is projected. Myth is essentially “practical history.”

A. RICHARDSON, HISTORY SACRED AND PROFANE 244-45 (1964).

history: the monumental, the antiquarian, and the critical.¹⁷ History, wrote Nietzsche, is dangerous because its misuse can affect the way people live in the present.

Monumental history springs from an awe of past actors and events:

That the great moments in the struggle of the human individual constitute a chain, that this chain unites mankind across the millennia like a range of human mountain peaks, that the summit of such a long-ago moment shall be for me still living, bright and great — that is the fundamental idea of the faith in humanity which finds expression in the demand for a monumental history.¹⁸

Misuse of monumental history can also hurt the past:

As long as the soul of historiography lies in the great stimuli that a man of power derives from it, as long as the past has to be described as worthy of imitation, as imitable and possible for a second time, it of course incurs the danger of becoming somewhat distorted, beautified and coming close to free poetic invention; there have been ages, indeed, which were quite incapable of distinguishing between a monumentalized past and a mythical fiction, because precisely the same stimuli can be derived from the one world as from the other. If, therefore, the monumental mode of regarding history rules over the other modes—I mean over the antiquarian and critical—the past itself suffers harm. . . .¹⁹

The danger of a judge’s use of “monumentalism,” even if we admit that a judge is not exactly Nietzsche’s “man of power,”²⁰ lies in that attitude’s petrification of the past. By worshipping past events and actors, the judge diminishes the significance of their present successors. Further, each of the three kinds of history must be used carefully:

¹⁷. Id. at 68, 73-76.
¹⁸. Id. at 68.
¹⁹. Id. at 70-71.
²⁰. The reader should not confuse this “man of power” with Nietzsche’s “superman.” Here, Nietzsche means only “a powerful man.” For a definition of the “superman,” see infra note 31.
If the man who wants to do something great has need of the past at all, he appropriates it by means of monumental history; he, on the other hand, who likes to persist in the familiar and the revered of old, tends the past as an antiquarian historian; and only he who is oppressed by a present need, and who wants to throw off this burden at any cost, has need of critical history, that is to say a history that judges and condemns. Much mischief is caused through the thoughtless transplantation of these plants: the critic without need, the antiquary without piety, the man who recognizes greatness but cannot himself do great things, are such plants, estranged from their mother soil and degenerated into weeds.21

Each of these historical methods has its use, but one should not employ one method to the detriment of the others. A judge who goes too far with any one of them will err, as would a professional historian.

The antiquarian historian longs for stability in the recounting of the past. “History thus belongs in the second place to him who preserves and reveres—to him who looks back to whence he has come, to where he came into being, with love and loyalty; with this piety he as it were gives thanks for his existence.”22 The desire always to preserve can be harmful to those who must live in the present, for the antiquarian historian, by an obsessive concentration on preservation, is blind to the present.23 To Nietzsche, overuse of antiquarianism stifles the “man of action”24 and impedes the work of today.25

Nietzsche’s last category is critical history:

[Critical history] is an attempt to give oneself, as it were a pos-teriori, a past in which one would like to originate in opposition to that in which one did originate:—always a dangerous attempt

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22. Id.
23. The details of the past reassure the antiquarian historian that his home has endured and will endure: “Here we lived, he says to himself, for here we are living; and here we shall live, for we are tough and not to be ruined overnight.” Id. at 73.
24. “[T]he man of action . . . , as one who acts, will and must offend some Deity or another.” Id. at 75.
25. Id.
because it is so hard to know the limit to denial of the past and because second natures are usually weaker than first.\textsuperscript{26}

The critical historian-judge will move the law in a new direction—in that direction where the law must go—by rereading or “misreading”\textsuperscript{27} the historical record to accommodate the new impulse: “If he is to live, man must possess and from time to time employ the strength to break up and dissolve a part of the past: he does this by bringing it before the tribunal, scrupulously examining it and finally condemning it . . . .”\textsuperscript{28}

In discussing the three types of history, Nietzsche wanted to shift the focus of his contemporaries, who, he thought, cared more for the past than for the present.\textsuperscript{29} He appealed to the best in his contemporaries as they tried to read history:

To sum up: history is written by the experienced and superior man. He who has not experienced greater and more exalted things than others will not know how to interpret the great and exalted things of the past. When the past speaks it always speaks as an oracle: only if you are an architect of the future and know the present will you understand it.\textsuperscript{30}

Nietzsche’s theory is thus somewhat limited for judges. If one takes the theory on Nietzsche’s terms, one must acknowledge that few, if any, judges are supermen.\textsuperscript{31} One wonders what judges would or could make of Nietzsche’s essay. Certainly, they could recognize

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\textsuperscript{26} Id. at 76.
\textsuperscript{28} F. Nietzsche, \textit{supra} note 16, at 75-76.
\textsuperscript{29} Nietzsche may have been guilty of antiquarianism himself when he wrote:

[W]e moderns have nothing whatever of our own; only by replenishing and cramming ourselves with the ages, customs, arts, philosophies, religions, discoveries of others do we become anything worthy of notice, that is to say, walking encyclopedias, which is what an ancient Greek transported into our own time would perhaps take us for.

\textit{Id.}, at 79.
\textsuperscript{30} Id. at 94.
their own and previous judges' uses of history in the way that Nietzsche decries.

Today, the sophistication of the analytical method is less important than its utility. As one commentator observed:

[T]he professional scholar's preference should not be for the historical context that is simplest but for the context—whether simple or complex—that has the greatest capacity to stimulate research and expand the boundaries of knowledge. The capacity of a thesis to expand knowledge, however, does not justify its acceptance by a judge, whose main duty is to resolve cases on the basis of existing knowledge, not to expand it. The only reason for a judge to prefer a simple historical interpretation would be a belief that it mirrored reality, but . . . reality is too complex to be captured in any simple, unidimensional way.32

**Historical Methods**

In addition to Nietzsche's criticism, the historian must be aware of other analytical challenges associated with historiography: personal bias, truthseeking, and the historian's educative function. Historical philosophy assumes that historians strive for an objective truth; yet history is fundamentally subjective. Unless a historian merely lists facts without more, perhaps in the style of tables and graphs, personal bias will enter the analysis in the historian's very choice of material.33 No two historians need choose the same sources in their retelling of the same past event.

Such personal bias becomes important when the subject is constitutional history.34 The historian will write, consciously or uncon-

33. Even a collection of tables and graphs will be biased; the historian chooses the material to quantify and the scales to use. Such reliance on tables and graphs to tell the story is called "quantitative" history. In the mid-twentieth century, historians argued over the appropriateness and usefulness of this method of historiography; but now, "[s]cholarly battles are fought . . . over where the proper borders of quantification are to be drawn." E. Breisach, HISTORIOGRAPHY: ANCIENT, MEDIEVAL, AND MODERN 340 (1983).
34. It is not a unique historical task to deal with fragmentary sources, or to reconstruct group intent in the preparation of a document, or to recognize that a document contains compromises and a certain amount of general, even designedly imprecise, language. What is distinctive about the historical problem in this instance is that it is not merely historical. It is also political. Because it is concerned with the Constitution, historical research on the intent of the fram-
Constitutional matters are profoundly matters of self-government in the American system. The bias of a judge-historian may have great effects on the lives of everyone outside the court, although they have no opportunity to replace the judge through election. Consequently, the judge should strive always to insure that personal experience equals community experience.

The reader of a history may naturally assume its truth. Without overt evidence of a historian's agenda, one often believes one is reading the facts as they occurred. Such confidence, however, ignores the fact that the historian is not an oracle, but rather a truth seeker.

Historians perform an educative function. Some are more obvious in their attempt than others, and some modern writers of history may desire less teaching and more presenting. Yet historical tradition counsels otherwise:

Most people get their ideas of civic virtue, of what constitutes patriotic and heroic conduct, from their histories. From the same source they also get their general views of the course of human events and of the factors which determine it. Thus, classic historians, Livy, Tacitus, and Plutarch, preached the value of liberty and of patriotic service to country. Modern romantic historians similarly preach the virtue of barbaric strength and of the unsophisticated and untutored simplicity and love of freedom of the barbaric invaders of France and England, for exam-

C. Miller, supra note 1, at 159.

35. See M. Cohen, supra note 5, at 20.


37. See F. Nietzsche, supra text accompanying note 30 (“When the past speaks it always speaks as an oracle . . . .”); see also M. Cohen, supra note 5:

The actual writers of history are fallible human beings subject not only to bias but also to that limited capacity for knowledge that characterizes all humans. Even if our historian is a most accurate observer and completely impartial the amount he can observe for himself is generally a very small part of what he narrates. For the most part he must rely on the testimony of others. Now we know how unreliable are even eye-witnesses of any striking event or accident, how conflicting is their testimony. We discover this unreliability, however, only when we have a multiplicity of witnesses or else independent circumstantial evidence such as fingerprints or other material remains.

Id. at 18.
ple. History written in this vein is hardly distinguishable from mythology, but must not every historian write history in terms of the social values that he recognizes?  

Recognizing the subjective quality of the historical effort, one should not condemn histories as merely "stories," but instead use the creative quality of history to one's advantage. Such an approach could avoid the artificiality of much discussion about historical events.

Nevertheless, the historian’s creative effort may lead to analytical fallacies that impede a reasonable understanding. Giambattista Vico noted three prejudices, or sources of error, against which historians have to be always on their guard: first, the notion that “whenever men can form no idea of distant and unknown things, they judge them by what is familiar and at hand”; second, the

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39. It is a common error, for instance, to suppose that the framers of the American Constitution were clear in their own minds as to whether they intended to give the courts power to declare statutes unconstitutional. We cannot always read into the past a contemporaneous awareness of issues that have become clear and important to us. The historian must put himself imaginatively before the event he describes in order to appreciate the standards prevailing at the time of action and thus to estimate the possibilities of which the actual event is only one.

Id. at 80.

So obviously has it seemed necessary to adopt the categories of the modern "developed" legal system that much of legal history has become a sort of legal embryology—a search for the rudimentary forms of the “full-grown” legal system. The present becomes the culmination of all the past, and the present forms of institutions seem to be their inevitable forms. The imagination is thus closed to the infinite possibilities of history.


In James Joyce's Ulysses, Stephen Dedalus meditates on history while teaching a class of young schoolboys about the Romans:

Had Pyrrhus not fallen by a beldam's hand in Argos or Julius Caesar not been knifed to death. They are not to be thought away. Time has branded them and fettered they are lodged in the room of the infinite possibilities they have ousted. But can those have been possible seeing that they never were? Or was that only possible which came to pass? Weave, weaver of the wind.

J. JOYCE, 1 ULYSSES 49 (H.W. Gabler ed. 1984).
40. G. VICO, supra note 3, at 60.

This axiom points to the inexhaustible source of all the errors about the principles of humanity that have been adopted by entire nations and by all the scholars. For when the former began to take notice of them and the latter to investigate them, it was on the basis of their own enlightened, cultivated, and
"conceit of nations": "Every nation, . . . whether Greek or barbarian, has had the same conceit that it before all other nations invented the comforts of human life and that its remembered history goes back to the very beginning of the world,"41 third, the conceit of "scholars, who will have it that what they know is as old as the world . . . ."42 The historian should "re-enact the past in his own mind,"43 but he should acknowledge that this is what he is doing, not reconstructing "the real past" from the materials that he finds. In doing so, the historian's power can be great.44

JUDICIAL USES OF HISTORY

The problems of historiography previously discussed attain a special status in the area of judicial decision making. Judges have used history since the founding of the republic to support their decisions.45 Yet, they seldom have questioned each other on the very propriety of this adjudicative method. "History cannot answer or even address the question of whether modern Americans ought to obey the intentions of the Constitution's founders. That question belongs to political theory (or philosophy) or constitutional law and must be answered in the terms of those other spheres of discourse."46 Not all Americans, including some of the country's philosophers and poets, share this high regard for history in America's courtrooms.47 The Supreme Court is loath to break with tradition, however, and looking to history to resolve present disputes is a practice as old as the Court itself.48 By invoking the magnificent times that they judged the origins of humanity, which must nevertheless by the nature of things have been small, crude, and quite obscure.

Id.
41. Id. at 61.
42. Id. Vico states two other principles that have some relevance for legal discussion: "Men of limited ideas take for law what the words expressly say." Id. at 93. "Intelligent men take for law whatever impartial utility dictates in each case." Id. at 94.
43. R. COLLINGWOOD, supra note 6, at 282.
44. "Gibbon was able to use history to sustain a body of social theory that profoundly affected the thought of his own and subsequent generations." Nelson, supra note 10, at 1243 n.18.
45. See Kelly, supra note 11, at 119-21.
47. See M. COHEN, supra note 5, at 16-17.
48. In one sense, . . . the Supreme Court has always used history. Indeed, any examination of the problem requires some rather careful consideration of what the "use of history"
“long-lost intent” of the Constitution’s framers, the Court can legitimate its decisions.49

Such use and abuse of history by the Court sparks fierce conflicts among the Justices. Justice X’s creative invocation of history will undoubtedly offend the sensibilities of Justice Y, although Justice Y did the same to X in a previous case. Justice Jackson described the problem thirty-six years ago:

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.50

Divining the intention of the framers of the Constitution is certainly a difficult task, about which commentators have written a great deal, especially in recent years.51 Although the difficulty of the task as a general constitutional method is understood, the use-by the Court implies. There is, after all, a fairly close relationship between the day-to-day methodology of the judicial process and that of historical scholarship. When a court ascertains the nature of the law to be applied to a case through an examination of a stream of judicial precedent, after the time-honored Anglo-American technique, it plays the role of historian. A historian might well say that in this process the court goes to the “primary sources.”

Kelly, supra note 11, at 121.

49. See id. at 131-32. “The originalist’s invocation of history must further the task of explicating what the people adopted, or it is an arbitrary attempt to impose the dead hand of the past on the contemporary polity—a sort of political ancestor-worship.” Powell, supra note 46, at 666-67.


fulness of its application is disputed. At times, the Court has recognized that a blind adherence to a putative "original intent" is undesirable, if not impossible. Dangers exist, not only in the Court's ignorance of historical method, but also in its rigid adherence to particular historical theories.

A more flexible approach to our nation's past is required, one which recognizes the limitations of the historical effort. Flexibility, not rigidity, should be the rule. The Supreme Court Justice, act-

52. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a constitution that we are expounding . . . a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."


Justice Brennan's statement in 1963 applies as well to many cases today in which the Supreme Court uses "history" of the eighteenth century to reach its result: "Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices." Abington School Dist. v. Schempp, 374 U.S. 203, 241 (1963) (Brennan, J., concurring). "We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee." Marsh v. Chambers, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting).

53. Justice Holmes believed that the Court should not import a sophisticated current philosophy into the Constitution, and therefore undermine democracy: "This case is decided upon an economic theory which a large part of the country does not entertain . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

Justice Harlan criticized the Court for reading a foreign "principle" into the Constitution: Today's holding is that the Equal Protection Clause of the Fourteenth Amendment requires every State to structure its legislature so that all the members of each house represent substantially the same number of people; other factors may be given play only to the extent that they do not significantly encroach on this basic "population" principle. Whatever may be thought of this holding as a piece of political ideology—. . . I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or authorize this Court to do so.


54. We are guided in our search of the past by our own aspirations and evolving principles, which were in part formed by that very past. When we find in his-
ing as historian, should recognize the personal role that the Justice plays in creating that history, always keeping one eye on the present while searching the recesses of the past for clues to constitutional meaning. Benjamin Cardozo recognized such flexibility as both a desideratum and a practical reality in constitutional cases:

The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law.

Justice Frankfurter wrote: “If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness.”

A. Bickel, The Least Dangerous Branch 109-10 (2d ed. 1986).

55. See Bickel, supra note 52, at 59.

56. B. Cardozo, The Nature of the Judicial Process 17 (1949). A more cynical commentator described the judicial application of precedent as profoundly affected by the judge's own perceptions and values:

There is no precedent that cannot be distinguished away if you want to distinguish it. The use of a precedent always implies a value judgment, a judgment that similarities between the precedent and the following decision are important and that dissimilarities are relatively unimportant. The application of precedent thus always involves a process of selection or discrimination. But one man's pattern of selectivity is not the same as another man's.


57. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 528 (1947).

A good example of the Court's creative use of history is Bolling v. Sharpe, 347 U.S. 497 (1954). There, the Supreme Court ruled that racial discrimination in public schools in the District of Columbia was a denial of due process of law. In reaching the result, the Court noted: “Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.” Id. at 499 (emphasis added) (citing Korematsu v. United States, 323 U.S. 214, 216 (1944) and Hirabayashi v. United States, 320 U.S. 81, 100 (1943)). The converse of this statement seems true: racial classifications had been firmly embedded in the practice of the United States and its gov-
In looking toward a flexible, creative use of history, the Supreme Court could learn from literature. The writer of a historical novel, for example, may invent characters who never existed, or change the accepted view of history to suit the work’s purposes. The judge who writes opinions with such creative freedom will necessarily run into the self-erected judicial boundaries. A judge who knows how to use history creatively, but who is willing to set limits on fancy, is the paradigm. The judge would do well to keep in mind Nietzsche’s warning of the dangers of critical history.

THE ALABAMA RELIGION CASES: CREATIVE HISTORY IN PRACTICE

Having discussed how a judge might use history creatively in order to reach an otherwise elusive result, this Note next considers some recent opinions illustrating the creative use of history in practice. In Jaffree v. Board of School Commissioners, Judge Brevard Hand of the United States District Court for the Southern District of Alabama attacked the United States Supreme Court’s use of history in deciding cases under the first amendment’s religion clauses. On appeal to the Supreme Court, the opinions of

58. The novelist Horace Walpole wrote, “I have often said that History in general is a romance that is believed, and that Romance is a History that is not believed; and that I do not see much other difference between them.” G. Day, From Fiction to the Novel 7 (1987) (quoting 15 Horace Walpole’s Correspondence 173 (W. Lewis ed. 1951)). Oscar Wilde encouraged the literary critic to change the past through a critical effort of the present:

The one duty we owe to history is to rewrite it. That is not the least of the tasks in store for the critical spirit. When we have fully discovered the scientific laws that govern life, we shall realize that the one person who has more illusions than the dreamer is the man of action. He, indeed, knows neither the origin of his deeds nor their results. From the field in which he thought that he had sown thorns, we have gathered our vintage, and the fig-tree that he planted for our pleasure is as barren as the thistle, and more bitter. It is because Humanity has never known where it was going that it has been able to find its way.


59. See supra text accompanying note 26.


61. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. Const. amend. I.

the Court (majority, concurrences, and dissents) all discussed the subject of history as it related to the issue on appeal—whether Alabama's statute authorizing a one-minute moment of silence in public schools for "meditation or voluntary prayer" was unconstitutional. On remand, Judge Hand removed from the Mobile County public schools textbooks that allegedly advocated the beliefs of "secular humanism" and thus violated the first and fourteenth amendments as an establishment of religion. The United States Court of Appeals for the Eleventh Circuit reversed the latter case, Smith v. Board of School Commissioners, without regard to issues of historical interpretation. The ultimate results of these cases are not as important, however, as the reasoning of the judges who decided them—for their reasoning will affect future cases.

Wallace v. Jaffree

The Trial Court

Ishmael Jaffree, whose children attended public schools in Mobile County, Alabama, brought suit in the Southern District of Alabama seeking a declaration that "certain prayer activities" in his children's school violated the establishment clause of the United States Constitution. He also sought an injunction against these activities. One of the teachers in the schools led her students in a daily prayer, apparently before lunchtime. Another teacher had her class recite the Lord's Prayer.

In analyzing the issue before him, Judge Hand looked first to the Supreme Court's precedent on school prayer. He examined Engel

63. Id. at 40.
65. 827 F.2d 684 (11th Cir. 1987).
67. Id.
68. The prayer was:
   God is great, God is good,
   Let us thank him for our food,
   Bow our heads we all are fed,
   Give us Lord our daily bread.
   Amen!

   Id. at 1107. Another teacher led her class in an abbreviated version of this prayer. Id.
69. Id.
v. Vitale," and found the Court's historical discussion in that case unconvincing: "The assertion by the Court that the establishment clause of the first amendment applied to the states was unaccompanied by any citation to authority. This conclusion was reached supposedly upon its examination of historical documents."71

Next, Hand reviewed Abington School District v. Schempp,72 which found that the requirement of separation of church and state forbade Bible readings in public schools. Hand wrote that "[t]he Court in Abington reasoned from its own precedent rather than independently reviewing the historical foundation of the first and fourteenth amendments."73 Dissatisfied with the Supreme Court's historical analysis of the meaning of the establishment clause, Hand stated that the "intent" of his opinion was "to take us back to our original historical roots . . . ."74

The court then discussed the defendants' two theories: first, the framers intended the first amendment to apply only to the federal government, and second, the fourteenth amendment did not incorporate the first amendment against the states.75 Hand relied on a historian, James McClellan, who testified at trial, to shed light on the original meaning of the first amendment. McClellan stated that ten of the fourteen states that adopted the Constitution "placed Protestants in a preferred status over Catholics, Jews, and Dissenters."76

In attacking the famous wall between church and state, Hand enlisted the aid of another historian, Robert Cord. Cord challenged the traditional interpretation of Thomas Jefferson and James Madison as believers in separation of church and state in his book Separation of Church and State: Historical Fact and Current Fic-

70. 370 U.S. 421 (1962).
73. 554 F. Supp. at 1112.
74. Id. at 1113 n.5.
75. Id. at 1113.
76. Id. at 1115. Perhaps encouraged by McClellan's testimony, Hand warned later in the opinion that "[a] member of a religious minority will have to develop a thicker skin if a state establishment offends him. Tender years are no exception." Id. at 1118 n.24. See also J. Story, Commentaries on the Constitution of the United States §§ 1867, 1871 (1970) (1st ed. 1833) (object of first amendment was to prevent oppression of Christian minorities, not to protect members of other religions).
tion."\(^7\) In that work, Cord interpreted Jefferson's "wall of separation" to mean only that the federal government could not establish a national religion or forbid free exercise.\(^8\)

Moving to the defendants' second theory, Hand found that "[t]he historical record clearly establishes that when the fourteenth amendment was ratified in 1868 . . . its ratification did not incorporate the first amendment against the states."\(^9\) Here, Hand relied on Charles Fairman's famous article criticizing the historical method of Justice Hugo Black.\(^8\) For Hand, the "paramount consideration" in interpreting the Constitution was legislative intent rather than Supreme Court precedent.\(^8\) He explored the legislative history and concluded that "Mr. Justice Black misread the congressional debate surrounding the passage of the fourteenth amendment when he concluded that Congress intended to incorporate the federal Bill of Rights against the states."\(^8\)

After reviewing the historical materials, Judge Hand paused to consider the options open to him. He found two methods of interpreting the Constitution. The first was to attempt to ascertain the original intent of the framers of the document, and hew faithfully to that intent; the second was to "treat the Constitution as a living document, chameleon-like in its complexion, which changes to suit the needs of the times and the whims of the interpreters."\(^8\)

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78. R. Cord, supra note 77, at xiv.


80. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949).

81. 554 F. Supp. at 1119-20. Here Hand quoted the Supreme Court itself: "The intention of the lawmaker is the law." Id. at 1120 (quoting Hawaii v. Mankichi, 190 U.S. 197, 212 (1903) (quoting Smythe v. Fiske, 90 U.S. (23 Wall.) 374, 380 (1874))).

82. Id. at 1122. Here Judge Hand parted company with Robert Cord, who wrote that the fourteenth amendment did incorporate the establishment clause against the states. Hand wrote that "Cord uncritically adopted the analysis of the United States Supreme Court in reaching his conclusion." Id. at 1124 n.33.

83. Id. at 1126 (emphasis added).
Hand's choice of language revealed his preference: he would “interpret the Constitution as its drafters and adopters intended.” Hand's choice of language revealed his preference: he would “interpret the Constitution as its drafters and adopters intended.”

The Supreme Court's interpretation, however, stands in the way of a district judge who differs with it. Unlike the Supreme Court, which can overrule its own decisions, a lower federal judge has no such power. Judge Hand apparently did not feel constrained by the traditional role of the district courts in the federal system—

Judge Hand apparently did not feel constrained by the traditional role of the district courts in the federal system—he found a way to reverse the United States Supreme Court. First, he quoted Justice William O. Douglas, who wrote that the Constitution is more important than what other judges may have written about it. Hand then quoted other Justices and commentators to justify his decision to “overrule” Everson v. Board of Education and the other cases mandating strict separation of church and state. Hand also discussed Justice John Paul Stevens's difference with the Court's interpretation of 42 U.S.C. § 1981 in Runyon v. McCrory. In that case, Justice Stevens had joined the majority's opinion because of the weight of precedent, although he made clear that he disagreed with the Court's prior interpretation of the statute. Judge Hand found Justice Stevens's surrender to be almost a breach of duty: “Where Mr. Justice Stevens was unwilling to dis-

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84. Id. “Let us have faith in the rightness of our charter and the patience to persevere in adhering to its principles. If we do so then all will have input into change and not just a few.” Id.
86. “A judge looking at a constitutional decision may have compulsions to reverse past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.” 554 F. Supp. at 1127 (quoting Douglas, Stare Decisis, 49 COLUM. L. REV. 735, 736 (1949)).
89. 427 U.S. 160 (1976). The Supreme Court recently voted to reexamine this decision. See Patterson v. McLean Credit Union, 108 S. Ct. 1419 (1988). Justice Stevens, however, dissented from the vote to reconsider Runyon. See id. at 1422 (Stevens, J., dissenting).
90. See 427 U.S. at 189-90. Compare Justice Harlan's view of precedent with Justice Stevens's: “[M]y usual practice is to adhere until the end of Term to views I have expressed in dissent during the Term. . . .” North Carolina v. Pearce, 395 U.S. 711, 744 (1969) (Harlan, J., concurring in part and dissenting in part). “Harlan’s usual practice was to continue for the duration of a Term to adhere to his positions expressed in dissents. After the end of the Term he would consider himself bound by the precedent he had originally opposed.” Bourguignon, The Second Mr. Justice Harlan: His Principles of Judicial Decision Making, 1979 SUP. CT. REV. 251, 279-80.
sent from his brethren in a case involving statutory construction, this Court feels a stronger tug from the Constitution which it has sworn to support and to defend."

Supposing that he might be only "a voice crying in the wilderness," Hand concluded that the Supreme Court's historical interpretation of the meaning of the establishment clause was faulty. He concluded that, because the establishment clause of the federal Constitution "does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional."  

The United States Court of Appeals

The United States Court of Appeals for the Eleventh Circuit consolidated Jaffree v. Board of School Commissioners with Jaffree v. James. Jaffree challenged school prayer activities that were unrelated to the three Alabama statutes which mandated a one-minute "period of silence" and authorized Alabama public school teachers to lead the students in prayer. The court found the statutes unconstitutional. Unlike Judge Hand, the court of appeals did not make its own investigation into the history of the establishment clause. In the view of the Eleventh Circuit, the Supreme Court had the sole responsibility of making historical determinations: "[T]he Supreme Court has considered and decided the historical implications surrounding the establishment clause. The Supreme Court has concluded that its present interpretation of the first and fourteenth amendments is consistent with the historical evidence." The court of appeals also found that Judge Hand had misunderstood the role of stare decisis in the federal system: "Judicial precedence serves as the foundation of our federal judicial system. Adherence to it results in stability and predictability. If

91. 554 F. Supp. at 1128 n.39.
92. Id. at 1128.
93. Id.
94. Id.
96. Id.
97. Id. at 1536.
98. Id. at 1532.
the Supreme Court errs, no other court may correct it." The court then reversed Judge Hand's dismissal of the actions and remanded.

The United States Supreme Court

Before deciding on the constitutionality of the Alabama prayer statute, the Supreme Court felt required to reaffirm its earlier cases holding that the first amendment applies to the states. Judge Hand had ruled that because the state of Alabama was free to establish religion, the prayer statute must stand. The Supreme Court found this a "remarkable conclusion."

Perhaps shocked by Judge Hand's lengthy criticism that the Court had erred from historical truth, the Supreme Court proceeded to reaffirm its analysis. The Court agreed with Hand, insofar as he had argued that the first amendment was not originally intended to apply against the states. Hand's analysis of the meaning of the fourteenth amendment, however, did not sway the Court. The incorporation of the first amendment in the fourteenth amendment's due-process clause was an "elementary proposition of law."

Turning next to the significance of the "original intent" of those who drafted and ratified the first amendment, the Court admitted that those framers probably would not have found any protection in the amendment for non-Christians. "But when the underlying

99. Id. at 1533.
100. Id. at 1537.
101. The Supreme Court determined that the narrow issue on appeal was whether the statute "authoriz[ing] a period of silence for 'meditation or voluntary prayer,' is a law respecting the establishment of religion within the meaning of the First Amendment." Wallace v. Jaffree, 472 U.S. 38, 41-42 (1985).
102. See supra text accompanying note 94.
103. 472 U.S. at 48.
104. See supra text accompanying notes 79-82.
105. See supra text accompanying notes 79-81.
106. "No State shall... deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV, § 1.
108. "At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." Id. at 52.
principle has been examined in the crucible of litigation, the Court has concluded unambiguously that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.\textsuperscript{109} Unlike Judge Hand, who preferred a history of safe literalisms,\textsuperscript{110} the Court reached beneath the obvious meaning of the constitutional text to find the meaning better suited to the needs of today's pluralistic nation. The Court, as it had done in earlier establishment clause decisions,\textsuperscript{111} essentially rewrote history, and fashioned a first-amendment principle to fit the country's spiritual needs. The five members of the majority thus explicitly endorsed a flexible interpretation of the religion clauses, an interpretation that has expanded the clauses' protection with time.

Justice O'Connor, concurring in the judgment,\textsuperscript{112} wrote that reliance on history to reach the result that the prayer statute was constitutional was not improper: "Particularly when we are interpreting the Constitution, 'a page of history is worth a volume of logic.'"\textsuperscript{113} She conceded that a burden lies on those who would challenge long-established practices.\textsuperscript{114} She could not be satisfied, however, even assuming that the intent of the framers on this issue would be dispositive, that such a statute would pass muster under the eyes of the drafters and ratifiers of the first amendment: "When the intent of the Framers is unclear, I believe we must employ both history and reason in our analysis. ... Although history provides a touchstone for constitutional problems, the Establishment Clause concern for religious liberty is dispositive here."\textsuperscript{115}

Justice Rehnquist, in dissent, attempted to demonstrate the inaccuracy of the Court's historical analysis through the years.\textsuperscript{116} The invocation of Thomas Jefferson's "wall of separation" had led to poor results because of the Court's misconception of history:

\textsuperscript{109} Id. at 52-53 (emphasis added).
\textsuperscript{110} See supra text accompanying notes 22-25 for discussion of Nietzsche's "antiquarian historian."
\textsuperscript{111} See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).
\textsuperscript{113} Id. at 79 (1985) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).
\textsuperscript{114} Id. at 80. O'Connor noted, however, that school prayer statutes were not in fact long-established. Id.
\textsuperscript{115} Id. at 81.
\textsuperscript{116} Id. at 91 (Rehnquist, J., dissenting).
Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.117

Rehnquist was unable to use the majority's "principle" of the first amendment because he found the obvious historical facts overwhelming. For both Rehnquist and Hand,118 the correct principle was an adherence to the historically demonstrated original intent of the framers.119 Rehnquist did not merely repeat Judge Hand's historical analysis—he went to the primary sources himself in order to glean the meaning of the past.120

Justice Rehnquist would use this rediscovered historical understanding to depart from the twentieth-century establishment clause cases. He was unafraid of overturning years of precedent to do this. "[S]tare decisis may bind courts as to matters of law, but it cannot bind them as to matters of history."121 Unlike Judge Hand, however, Justice Rehnquist was unwilling to overrule the incorporation doctrine.122 Rehnquist argued that even if the first amendment did apply to the states through the fourteenth amendment, the Alabama prayer statutes were constitutional because of the original intent behind the first amendment.

Rehnquist's dissent repeatedly appealed to "history" as he interpreted it. That "history" taught Rehnquist that the first amend-

117. Id. at 92.
118. See supra text accompanying notes 75-82.
119. "[O]ur Establishment Clause cases have been neither principled nor unified. . . . [T]he greatest injury of the 'wall [of separation]' notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights." 472 U.S. at 107 (Rehnquist, J., dissenting).
120. Rehnquist relied on J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION (1891) and the writings of Thomas Jefferson and James Madison. Rehnquist cited Hand's historian Robert Cord as well. 472 U.S. at 104 (Rehnquist, J., dissenting).
121. Id. at 99. "There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in Everson." Id. at 106.
122. Id. at 113.
ment "forbade establishment of a national religion, and forbade preference among religious sects or denominations." Rehnquist asserted; "[i]f a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it."125

Smith v. Board of School Commissioners

Judge Brevard Hand noted at the end of his opinion in Jaffree v. Board of School Commissioners that, if reversed on appeal, "then this Court will look again at the record in this case and reach conclusions which it is not now forced to reach."127 In a footnote, Hand wrote:

[Cl]ase law deals generally with removing the teachings of the Christian ethic from the scholastic effort but totally ignores the teaching of the secular humanist ethic. It was pointed out in the testimony that the curriculum in the public schools of Mobile County is rife with efforts at teaching or encouraging secular humanism—all without opposition from any other ethic—to such an extent that it becomes a brainwashing effort. If this Court is compelled to purge "God is great, God is good, we thank Him for our daily food" from the classroom, then this Court must also purge from the classroom those things that serve to teach that salvation is through one's self rather than through a deity.128

Faithful to this intention, Judge Hand attempted to purge "secular humanist" textbooks from Mobile County's classrooms in Smith v.

123. Id. at 106.
124. Id. at 113.
125. Id. at 112. To Rehnquist, only the framers' intentions are controlling today: "Any deviation from their intentions frustrates the permanence of [the Constitution] and will only lead to the type of unprincipled decisionmaking that has plagued our Establishment Clause cases since Everson." Id. at 113.
126. See supra text accompanying notes 66-94.
128. Id. at 1129 n.41.
Board of School Commissioners, the Jaffree case on remand from the Eleventh Circuit.

The bulk of Hand's opinion in Smith was devoted to trial testimony which, he believed, showed that secular humanism is a religion. The court sifted through conflicting testimony on the beliefs and practices of secular humanism. In concluding that secular humanism is a religion, Judge Hand scolded a witness, Dr. Paul Kurtz, a self-proclaimed secular humanist, for his misuse of history:

Dr. Paul Kurtz testified that secular humanism is a scientific methodology, not a religious movement. In his testimony he attempted to make a case that humanism generally, and secular humanism in particular, is the entire body of western philosophical and scientific thought. He thus attempted to claim for this ideology the heritage of learning found in all prior western civilizations. Dr. Kurtz's attempt to revise history to comply with his personal beliefs is of no concern to this Court.

After this reprimand, the court defended history against those who would seek to waylay it:

This Court is not in the business of writing, or rewriting, history texts. But it is this Court's solemn duty and obligation under the first and fourteenth amendments as interpreted by the Supreme Court . . . to protect the rights of these plaintiffs and defendants to the free exercise of their various religions, unimpaired by an officially sponsored version of history that ignores the facts that give the first amendment its importance and significance.

Judge Hand's commitment to "history" is ironic; indeed, he seems to have learned nothing from the Supreme Court's discussion of constitutional history in Wallace v. Jaffree.

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129. 655 F. Supp. 939 (S.D. Ala. 1987). Hand realigned the parties, so that students, parents, and teachers who had been defendant-intervenors in Jaffree became plaintiffs in order to address their claim of the county's establishment of "secular humanism" in the classroom. Id. at 943-44.
130. Id. at 980-83.
131. Id. at 982.
132. Id. at 985.
133. See supra text accompanying notes 104-11.
Conclusion

Judges will continue to appeal to history as they try to decide the controversies of the present. Their judgments will always be limited, however, by their own idea of history. An awareness that history as a concept has a fluid meaning and that the very "facts" that make up history can change would yield more satisfactory results. A judge's own philosophy of history—static or fluid—will affect the judge's reading of history. With this realization comes new insight into the judicial decision-making process.

Donald P. Boyle, Jr.

134. See supra text accompanying notes 26-59.