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Extract from Frank B. Cross, The Practical Meaning of Originalism (Mar. 1, 2012) (unpublished manuscript), citing Tillman's The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation

Seth Barrett Tillman

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The Practical Meaning of Originalism

There are two distinct aspects to the criticism of the Court's use of history, as necessitated by originalism. The first is that the justices are not trained historians and that the legal procedures they use distort the search for historical truth, sometimes called law office history. The same criticism has been made of academics' presentation of originalist arguments.[284] The Second Circuit has observed that "judges are not historians with fancy robes and life tenure."[285]

David Strauss discussed this problem in the context of *Brown v. Bd. Of Education.*[286] He observes that while Judge McConnell believes that the opinion was correct on the standards of originalism,[287] the Court conceded otherwise. This meant that "the best lawyers in the country, the best historians in the country, the Supreme Court justices and their clerks, with all the resources available to them and with every incentive to discover the original understanding, did not succeed in recovering that original understanding."[288] This suggests that the effective operationalism of original understanding may not be realistic.[289]

In *Brown*, the justices could not find originalist support for their desired result. The more common practice, though, is for the justices to exaggerate the originalist support for their conclusions. Thus, "to some degree all of the justices seek to determine original interpretations where the available historical evidence is too ambiguous to support them."[290] A major flaw commonly ascribed to the Court is its use of history without appreciation of context.[291]

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284 *See* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995) (suggesting that the "habits of poorly supported generalization – which at times fall below even the standards of undergraduate history writing – pervade the work of many of the most rigorous theorists when they invoke the past to talk about the Constitution").

285 Arnold's Wines, Inc. v. Boyle, 571 F.3d 185, 200 (2009). *See also* Velasquez v. Frapwell, 160 F.3d 389, 393 (1998) (noting that "judges do not have either the leisure or the training to conduct *responsible* historical research or *competently* umpire historical controversies").

286 David Strauss, *Panel on Originalism and Precedent,* in ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra* note 000, at 220. McConnell's exposition can be found at Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of Tradition?*, 25 LOY. L.A. L. REV. 1159, 1172-74 (1992).

287 McConnell's argument is contested. *See, e.g.*, Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1804 n. 211(2007) (describing McConnell's claim as implausible).

288 *Id.*

289 *See also Living Originalism, supra* note 000, at 284-285 (discussing contrasting originalist views of the result in *Brown*).

290 *Clio and the Court: A Reassessment, supra* note 000, at 887.

291 *Clio and the Court: A Reassessment, supra* note 000, at 889. The author notes that *"The Federalist* seems always to be used in this manner – a handbook to constitutional interpretation that is never discussed as the hastily-written and often inconsistent polemic that it is." *Id.* at 889-890. *See also* Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 WEST VA. L. REV. 601 618 (2003) (suggesting that the justices "systematically cite passages [of *The Federalist*] as authority without even a cursory examination of the validity of the surrounding text or the document as a whole").