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The Practical Meaning of Originalism

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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. The Second Circuit has observed that "judges are not historians with fancy robes and life tenure." 

David Strauss discussed this problem in the context of Brown v. Bd. Of Education. He observes that while Judge McConnell believes that the opinion was correct on the standards of originalism, 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." This suggests that the effective operationalism of original understanding may not be realistic.

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. A major flaw commonly ascribed to the Court is its use of history without appreciation of context.

284 See Martin S. Flaherty, History "Live" 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 unpire historical controversies").


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").