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Frank B. Cross, The Failed Promise of Originalism (2013), citing Tillman's The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation

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The Failed Promise of Originalism

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that *The Federalist* "did not reach an audience of any significant size" (Crane 1964, 591). Even when the essays were available to ratifying individuals, one cannot assume that they read them or were persuaded by their content. Those voting for ratification may well have made up their minds before the conventions, representing either Federalists or Anti-Federalists. There is "no good evidence that anyone, even in New York, relied on *The Federalist* as the basis for voting to ratify" (McGowan 2001, 756).

The irrelevance of at least some of the essays is obvious from the timing of their publication. At the time of Delaware's ratification, only seventeen of the eighty-five essays were in print. Pennsylvania ratified with only twenty of the essays published and New Jersey with only twenty-two (Maggs 2009a, 826). Some of the most important essays, such as *The Federalist* No. 78, justifying constitutional judicial review, were not published until after a majority of states had ratified the Constitution.

The accuracy of *The Federalist* has also been questioned. The Virginia Supreme Court observed that they were "a mere newspaper publication, written in the heat and hurry of the battle" (*Hunter v. Martin's Lessee* 1813, 27). Because it was a piece of advocacy, it may lack "usefulness as a window into the reasonable ratifier's likely understanding" (Manning 1998, 1354). Various objective errors have been identified, including an incorrect count of the members of Congress, inaccurate description of the vice president's authority, and misunderstanding about the process of electing the president (Tillman 2003). In some places, the essays appear to be contradictory (Maggs 2009a, Mason 1952), and we know that Madison and Hamilton differed on fundamental matters.

For these or other reasons, *The Federalist* was not heavily relied on in the days of the early American republic as a source of constitutional meaning. In the debates of the day, neither the Federalists nor the Republican-Democrats gave much credence to the arguments of the essays (Lynch 2000). The Supreme Court declared that the source was due "respect" but that the "correctness" of its claims could not be presumed (*McCulloch v. Maryland* 1819, 433). Although *The Federalist* has mythic status in our history, its reliability as a source of original meaning is questionable.

The use of this source in court has been criticized for failure to recognize its limitations. It is invoked as "a handbook to constitutional interpretation

that is never discussed as the hastily written and often inconsistent polemic that it is" (Richards 1997, 889–890). The justices are said to systematically cite its passages "as authority without even a cursory examination of the validity of the surrounding text or the document as a whole" (Tillman 2003, 618). This practice suggests that its citation may be more for its iconic status than as an attempt at authentic historical exposition.

It is difficult to claim that the ratifiers adopted the Constitution in reliance on the statements made in *The Federalist*. This does not entirely demean the sources as evidence of originalist understanding. It is evidence of what some leading framers believed the Constitution to mean but hardly conclusive of what the general population thought. Yet its paramount significance may be questioned.

Although some have questioned *The Federalist* for its strategic objectives, its use as an advocacy document may strengthen its value. *The Federalist* was written to persuade voters to ratify the Constitution and consequently was presumably drafted in a way that made the proposed Constitution appear desirable to the voters. Consequently, *The Federalist* may be a good representation of what the ratifiers of the time would approve. This argument is undermined, though, by the fact that *The Federalist* was aimed at ratifiers of New York. As a result, its arguments would be "naturally skewed toward" positions "that would sway New Yorkers" and away from those appealing to ratifiers of other states (Bhargava 2006, 1766). Thus, *The Federalist* may simply reflect original public meaning in New York State.

Ratification Records

If it is the ratifiers who provide the best source of original meaning, the ratification records are an obviously useful originalist resource. The classic source of ratification evidence is *Elliot's Debates*, published originally in 1836. Since that time, others have sought to put together improved materials from the ratification process, but these have been unavailable to the Court for nearly all of our constitutional history. A study found that, from 1953 through 1964, *Elliot's Debates* was the third most cited originalist source at the Supreme Court (Corley, Howard & Nixon 2005, 330).

to objectively identify certain past historical events, that does not make it impossible to draw a reasonably confident conclusion about some events. Whittington (1999, 162) claims that while the historical record for originalism is "hardly perfect" there is little basis to hold that it "is generally radically deficient." Jack Rakove (1997, 1588) argues that "skepticism about the limits of judicial reasoning does not require a blanket dismissal of the possibility that historically grounded approaches . . . might yield fruitful results." Of course, Supreme Court decisions rarely involve clear or certain questions, and history may be less plain for those matters. Thus, the practical value of history is uncertain.

Setting aside this question of the possibility of doing objective history, it is unclear whether justices could accurately find objective historical facts, should they exist. Just as "lawyers would not trust historians with their cases," it is argued, "historians shouldn't trust lawyers with the past" (Kozinski & Susman 1997, 1586). Prominent historian John Philip Reid (1993, 195–196) contends that the "crossing of history with law" is a "mixture containing more snares than rewards, as it risks confusing rules of evidence basic to one profession with canons of proof sacrosanct to another." The classic criticism of the Court's use of history was written by Alfred Kelly (1965), who reviewed numerous cases of the Court that relied on historical evidence and found them quite wanting. Alexander Bickel (1962) has shown that historical conclusions in some of the nation's most famous opinions were soon abandoned by professional historians in favor of contrary positions.

For example, Kelly's assessment of Justice Black's use of history in one case found reliance on sources that "were so stale and inadequate that a properly trained historical scholar would hesitate to suggest that an undergraduate student rely on them" (Kelly 1965, 121). In reapportionment cases, Black "mangled constitutional history" (Kelly 1965, 135). Justice Marshall engaged in "historical revelation by judicial fiat, with little if any inquiry into actual history" (Kelly 1965, 123). The *Dred Scott* opinion was characterized as very bad history. He concluded that "from a professional point of view" most of the Court's ventures into history were "very poor indeed" (Kelly 1965, 155). An updated assessment of Kelly's analysis for the modern era of originalism found that it was still apt criticism (Richards 1997). While Kelly evaluates all historical usages, his criticism applies to

the Court's application of sources such as *The Federalist* as well (Tillman 2003). Even Kelly did not call for the abandonment of the Court's use of history, however.

A more recent review was comparably critical (Derfner 2005). The author argued that the Court had bungled the history of the equal protection clause and the Eleventh Amendment. Farber (2000) likewise claims that these rulings "reflect a high degree of historical ineptitude." Derfner (2005) also notes the significance of history to gay rights decisions and how the Court in *Lawrence* conceded that it had gotten the history wrong in *Bowers*.

Other legal historians have been similarly critical of the Supreme Court's use of history in its opinions. They are "skeptical about the possibility of knowing the founders' intentions" (Richards 1997, 364–364). They emphasize the disparity between "historians' legal history" and "lawyers' legal history" and find the latter dubious (Bernstein 1987, 1578). Legal arguments from even the "most rigorous theorists" based in history have "habits of poorly supported generalization—which at times fall below even the standards of undergraduate history writing" (Flaherty 1995, 526). The Court has consistently "resorted to suspect, if not invalid, and to inconsistent, if not incompatible, methods" of originalism (Miller 1969, 3). When the Court's historical theory errs, it may not be due to simply getting facts incorrect but is more likely due to a highly selective assembly of historical facts (Miller 1969). It has been suggested that "those with legal training are . . . ill-equipped to understand the rudiments of the process of historical research" (Melton 1998, 384). Academic criticism of Supreme Court history is so common that it is considered to be flogging a dead horse (Wiecek 1988). There are some exceptions, though, who suggest that the justices' use of history is generally accurate (Daly 1954).

It may be that limitations in the Court's past use of history are due to the fact that originalism generally involves "asking questions of history that history cannot answer" (Richards 1997, 886). Modern constitutional disputes may simply be unamenable to originalist historical analysis. There are cases in which the available historical evidence "is either insufficient, or is hopelessly ambiguous, or simply cannot be made germane to our purposes" (Wiecek 1988, 234). There is a tendency for judges to read "eighteenth-century evidence as if it were formulated to meet twentieth-century standards, and hold the record to a measure of accuracy that simply is not there"

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