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THE SUPREME COURT AND THE FEDERALIST PAPERS:
IS THERE LESS HERE THAN MEETS THE EYE?

Melvyn R. Durchslag*

INTRODUCTION

Printz v. United States\(^1\) raised an issue of constitutional law that had not previously been determined, whether the United States could require executive state officials to implement federal laws.\(^2\) As demonstrated by the 5–4 split on the Court and the commentary in its wake, Printz was not an easy case. Justice Scalia, writing for the majority, began his analysis with a statement that has become increasingly familiar in recent years: “Because there is no constitutional text speaking to this precise question, the answer to the [constitutional] challenge must be sought in historical understanding and practice.”\(^3\) What made the decision in Printz stand out from the crowd was not its explication of historical materials nor the way in which these materials were detailed. Rather, it was the dispositive effect of one set of those materials, The Federalist. Both Justice Scalia’s majority opinion and Justice Souter’s dissent focused on the language of various The Federalist in a way that can best be described as the historical record equivalent of statutory interpretation. Justice Scalia’s word-for-word discussion of these early attempts to convince fence sitters in New York to vote to ratify the proposed Constitution covers some six pages of the United States Reports.\(^4\) Justice Souter’s equally detailed discussion covers the same number of pages.\(^5\) This comprises twelve pages of excruciating detail concerning what we can or should imply from the language used (and not used) by Alexander

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* Professor of Law, Case Western Reserve University. I appreciate the efforts of Jonathan Adler, Jessie Hill, Emery Lee, Andy Morriss, and Bob Strassfeld who read and provided constructive and useful criticism of earlier drafts of this paper. I also thank my research assistants who, over the course of several years of fits and starts, did much of the detail work necessary to a project such as this. In alphabetical order they are Rami Bardenstein, Elise Camita, Kimberly Eberwine, Rob Hahn, Carrie Nixon, and Michael Todd.


2 Id. That is not entirely fair. While dealing with a requirement ostensibly imposed on the states’ legislative bodies, Justice O’Connor’s majority opinion five years earlier in New York v. United States, 505 U.S. 144 (1992), noted that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.” Id. at 188 (emphasis added).

3 Printz, 521 U.S. at 905.

4 Id. at 910–15.

5 Id. at 971–76 (Souter, J., dissenting).
Hamilton and James Madison. Certainly for Justice Souter, if not Justice Scalia, what Madison and Hamilton may or may not have suggested about the federal government's authority to impress state officers in the service of national law was determinative not only of the original understanding but, more importantly, the outcome of the case. "In deciding these cases . . . it is The Federalist that finally determines my position. I believe that the most straightforward reading of No. 27 is authority for the Government's position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45." Because of the extraordinary and, as this paper will demonstrate, rarely seen reliance upon The Federalist, some illustration (in less than twelve pages) is required. First, Justice Souter:

Hamilton in No. 27 first notes that because the new Constitution would authorize the National Government to bind individuals directly through national law, it could "employ the ordinary magistracy of each [State] in the execution of its laws." . . . [H]e states that "the legislatures, courts and magistrates of the respective members will be incorporated into the operations of the national government, as far as its just and constitutional authority extends." . . . The natural reading . . . is not merely that the officers of the various branches of state governments may be employed in the performance of natural functions; Hamilton says that the state governmental machinery "will be incorporated"

. . . . .

Madison in No. 44 supports this . . . . He asks why state magistrates should have to swear to support the National Constitution . . . . His answer is that national officials "will have no agency in carrying the State Constitutions into effect. The members and officers of the State Governments, on the contrary, will have an essential agency in giving effect to the Federal Constitution."

. . . . .

6 The Federalist was but one prong of a four-pronged argument by the majority. Justice Scalia also found support for the decision in the practice of the Congress immediately after ratification (also a historical argument), the constitutional structure, and the Court's prior decisions. Consequently, it may be that Justice Scalia's extensive discussion of The Federalist may have been largely in response to Justice Souter's dissent. On the other hand, six pages seems a bit much, particularly if the other three prongs of the majority's analysis are as strong as the majority would have one believe. Indeed, Justice Scalia's general commitment to an originalist method of interpretation reinforces the conclusion that the meaning of Hamilton and Madison's words are central both to his analysis and his result.

7 Printz, 521 U.S. at 971 (Souter, J., dissenting).
In No. 45, Hamilton says that if a State is not given (or declines to exercise) an option to supply its citizens' share of a federal tax, the "eventual collection [of the federal tax] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States." And in No. 36, he explains that the National Government would more readily "employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments."

Justice Scalia, for the majority, replies:

[N]one of these statements necessarily implies — what is the critical point here — that Congress could impose these responsibilities without the consent of the States. They appear to rest on the natural assumption that the States would consent . . . .

. . . . JUSTICE SOUTER finds "the natural reading" of the phrases "will be incorporated into the operations of the national government" and "will be rendered auxiliary to the enforcement of its laws" to be that the National Government will have "authority . . . , when exercising an otherwise legitimate power . . . , to require state 'auxiliaries' to take appropriate action."

These problems are avoided, of course, if the calculatedly vague consequences the passage recites — "incorporated into the operations of the national government" and "rendered auxiliary to the enforcement of its laws" — are taken to refer to nothing more (or less) than the duty owed to the National Government, on the part of all state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law . . . . It also reconciles the passage with Hamilton's statement in The Federalist No. 36 that the Federal Government would in some circumstances do well "to employ the state officers as much as possible, and to attach them to the Union by an accumulation of their emoluments" . . . .

JUSTICE SOUTER contends that his interpretation of The Federalist No. 27 is "supported by No. 44" . . . . In that Number, Madison justifies the requirement that state officials take an oath to support the Federal Constitution on the ground that they "will have an essential agency in giving effect to the federal

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8 Id. at 971–75 (first and third alterations in original) (citations omitted).
Constitution.” If the dissent’s reading of The Federalist No. 27 were correct . . . , one would surely have expected that “essential agency” of state executive officers (if described further) to be described as their responsibility to execute the laws enacted under the Constitution. Instead . . . Federalist No. 44 continues “The election of the President and Senate will depend, in all cases, on the legislatures of the several States. And the election of the House of Representatives will equally depend on the same authority in the first instance; and will, probably, forever be conducted by the officers and according to the laws of the States.”

It is most implausible that the person who labored for that example of state executive officers’ assisting the Federal Government believed, but neglected to mention, that they had a responsibility to execute federal laws.9

*Printz* is not the focus of this paper. It is, however, the inspiration for it. At the time, I had not recalled reading a case in which *The Federalist*, by name, played such a decisive role. Nor did I recall reading a case where the meaning of *The Federalist* was so vigorously debated as it was in *Printz*. In only one other case did I recall any Justice parsing the words used (or not used) by Publius in the way Justices Scalia and Souter did in *Printz*.10 Was the discourse in *Printz* between Justices Scalia and Souter unusual, something of an oddity even for prior Courts inclined to pay homage to the “framers’ intent?” Was it more than unusual? Was it unprecedented? Has *The Federalist* taken on increased significance in recent years, or has it always been of major importance in interpreting ambiguous constitutional text? These (and others) are the questions that prompted this study and upon which it will hopefully shed some light.

Interest in the Court’s use of *The Federalist* is not new. Professor Charles Pierson did an extensive study on the subject in 1924.11 Professor James Wilson did the same in 1985.12 And in 1998 Professor Ira Lupu, in response to a provocative article by Professor William Eskridge13 did a decade-by-decade study of the number

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9 *Id.* at 910–15 (majority opinion) (second alteration and third omission in original) (citations omitted).


13 William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998) (arguing that courts should reject legislative history in interpreting contemporary statutes but should rely on the views of the framers in interpreting the Constitution).
of times The Federalist was cited by the Supreme Court from 1790 through 1998. Professor Lupu’s findings demonstrate that from 1980 to 1998, The Federalist was cited more often by the Supreme Court than in the combined period from 1890 to 1979. These, and other efforts, are invaluable contributions to any discussion of the reliance on history to interpret constitutional text.

This study expands upon the work of Professor Lupu and others, but it is different in several ways. First, while largely quantitative, this study is qualitative as well. That is, it is an attempt to determine not only the number of cases in which The Federalist was cited or the theoretical reason why it was cited, but more significantly, the importance that The Federalist played, both in the analysis of the Justices citing it and in the outcome reached by those Justices.

Professor Peter Smith’s recent study of “originalism” in the current Court concludes that “originalism’s advantage over other approaches to constitutional interpretation with respect to its ability to constrain judicial discretion is marginal.” Peter J. Smith, Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning, 52 UCLA L. REV. 217, 284 (2004) [hereinafter Sources of Federalism]. More specifically, Professor Smith’s comparison between the federalism majority and the federalism dissenters reveals that their respective use of historical materials depends on how much weight each gives to the views of anti-Federalists. Id. at 257. The majority tends to read The Federalist, for example, to suggest that the Constitution accommodates the views of the anti-Federalists, whereas the dissenters read The Federalist Papers to suggest that the Constitution rejected those concerns. Id. For an illuminating and useful, albeit abbreviated, history of originalist analysis by the Supreme Court, see Barry Friedman & Scott B. Smith, The Sedimentary Constitution, 147 U. PA. L. REV. 1, 11-33 (1998).


The Supreme Court and The Federalist, supra note 14, at 1328; Wilson, supra note 12, at 66.

McGowan, supra note 17.

Importance in analysis and importance in outcome are obviously related. However, as this study demonstrates, frequency of citation does not necessarily translate into importance, either in analysis or outcome, a conclusion which is hardly new. See Rakove, supra note 17, at 248. Consequently, my conclusions differ from those of Professor Wilson, who appears at points to equate frequency of citation to analytical importance. See, e.g., Wilson, supra
The concentration of this article on the importance of *The Federalist* to the opinion's analysis and eventual outcome is differently focused than Professor Manning's study, which analyzed whether or not *The Federalist* was cited as "authoritative" evidence of . . . intent." Sometimes the two are the same, but not inevitably so. *The Federalist* can be read as authoritative on the question of original understanding, but original understanding may be largely unimportant to a Justice's analysis. In that event, this study would conclude that *The Federalist Papers* cited were an insignificant influence on the Justice's analysis and/or conclusion. Conversely, it may be that original understanding was a significant aspect of analysis and/or result but *The Federalist Papers* cited were unimportant, either generally or relatively, to determining what that understanding was. In that case, this analysis, and that of Professor Manning, would converge. *The Federalist* would be both insignificant (no matter how many times it was cited) and not "authoritative."

This study, unlike that of Professor McGowan, is not an attempt to determine the reasons or the purposes for citations to *The Federalist*. Nor does this paper reach any normative judgments about which reasons are defensible. Nevertheless, Professor McGowan's work may well shed light on some of the conclusions this paper reaches regarding the significance of *The Federalist* to the opinion's outcome. For example, McGowan concludes that for much of the 18th and 19th centuries, the Court used *The Federalist Papers* "as a source of wisdom that might enlighten [it] on how to interpret the Constitution in a particular case. On this view, *The Federalist* would be the rough equivalent of Blackstone, Coke, or Kent." Citing *The Federalist* as a source of wisdom aids in establishing the Court's "ethos" as an institution wedded to a method of judging that transcends the parties to the litigation and the politics that generated the dispute. *The Federalist*, in other words, is cited less for its authoritativeness in interpreting Constitutional text than for establishing the Court as an objective and trustworthy arbitrator. Indeed, if McGowan is correct, the reasons for mentioning *The Federalist* may have little to do either with the analysis or the outcome reached by the citing Justice.

This might well explain, for example, why a decidedly originalist Taney Court, while mentioning *The Federalist* frequently, seemingly placed no more reliance (and often less) on *The Federalist Papers* than on a number of other interpretative sources. It may also explain why Justice Thomas's historical analysis sometimes

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note 12, at 85, 86, 89, 90, 92, 94–99.

21 John F. Manning, *supra* note 17, at 1337 n.3. See also *Sources of Federalism*, *supra* note 16 (refuting the idea that originalism hinders judges from allowing their personal views to dominate their legal analysis).


23 *Id.*

24 *Id.* at 822–25.

25 *Id.* at 824.

26 *See infra* note 67 and accompanying text.
eschews reliance on *The Federalist* in favor of other historical evidence, or why Justice Scalia's frequent citations to *The Federalist* seem, at times, to be innocuous. Finally, Professor McGowan's "ethos" explanation might shed light on the frequency of *The Federalist* citations by Justices not ordinarily thought of as originalists: Justices Brennan and Douglas, for example.

Second, as the next section reveals, this study looks at a variety of matters pertaining to citation to *The Federalist*, including the Justice citing *The Federalist* and the pattern of that Justice's citations, and whether the citations appear in majority, dissenting, or concurring opinions. Finally, as is also explained in the next section, this study is not broken down decade-by-decade, but rather "era-by-era." Consequently, it may be difficult to compare exactly the quantitative aspects of this study with those who, like Professor Lupu, used different time periods. To assist in that regard (as well as to provide the reader with a starting place for evaluating my conclusions) an appendix is attached.

As the title of this paper suggests, the quantitative measure of increasing citations to *The Federalist Papers*, whether measured in absolute terms, the rate of citation per case decided, or in the percentage increase from one era to another, do not match my conclusions regarding the importance of *The Federalist Papers* to Constitutional interpretation.

I. CONSTRUCTION OF THE STUDY

The Appendix illustrates how the study was conducted. The vertical part of the grid divides the decisions into nine periods of time, the first being the pre-Marshall period extending from 1789 to 1800. This is followed by the John Marshall years, 1800 to 1835. The third time period is from 1835 to 1865, the end of the Civil War. This is followed by the period between 1865 and 1900 (roughly the post-Civil War period to the election of Theodore Roosevelt and the beginning of the Progressive Era), which is then followed by the period between 1900 and 1937 when the Franklin D. Roosevelt appointees assumed control of the Court. The sixth period extends from 1937 to 1953, the beginning of the "Warren Era." The seventh period is the years of the Warren Court, from 1953 to 1969, followed by the Burger years, from 1969 to 1986. The final period is the current one, the Rehnquist years from 1986 to 2002, the year selected to cut off the empirical study.

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28 See infra notes 458-60, 479-82 and accompanying text.

29 See *The Supreme Court and The Federalist*, supra note 14, at 1328 n.2.
Several things may have occurred to the reader even at this early juncture. First, why were the periods selected as they were, particularly in light of the decade-by-decade data already accumulated? Second, which is prompted by the first, aren’t the temporal divisions both arbitrary and inconsistent? Four of the nine periods are defined by who was serving as Chief Justice while five span the stewardship of at least two and, in several cases, three Chief Justices. Why not either define all “eras” by decades, by the presiding Chief Justice, or some other way? Admittedly, the lines drawn here are, like most lines, arbitrary in the sense that one can think of different, even arguably better, dividing points. Moreover, the lines, particularly those that define the “era” by the Chief Justice, are overly simplistic — they fail to account for a variety of factors that influence what prompts Justices to decide as they do and how shifts occur during those periods of stewardship. If those are the criteria, the plea is guilty. On the other hand, there are good reasons to temporalize as I did.

First, the decade-by-decade approach was rejected despite its ease because the purpose of this study is not simply to replicate, question, or expand upon previous studies. Moreover, a decade-by-decade analysis takes no account of what else was occurring in the country that might (or might not) have influenced how cases were decided. Nor does it account for the influence of particular Justices or Chief Justices on the Court’s approach to constitutional interpretation, at least not without some significant extrapolation of the data. To explore or even speculate on these matters is beyond the scope of this paper and the expertise of the author. Others more competent and better trained may, however, find this breakdown helpful.

The periods could have been defined by who was serving as Chief Justice. That was rejected as well. Between 1789 and 2002 there have been fifteen Chief Justices. Some, like John Marshall, Roger B. Taney, Earl Warren, and William H. Rehnquist, served for enough years that the period is more or less defined by their stewardship, at least in popular parlance. In some of these periods the Chief Justice had, or is commonly perceived to have had, a decided influence on the direction of constitutional law during that period. This is true of the Marshall, Warren, and Rehnquist eras, although an argument could be made that the Rehnquist Court built upon the rulings of the Burger years, thus making it arbitrary to separate the two. However, the Burger Court revolution, such as it was, was largely limited to criminal procedure cases and holding the line on the use of the Equal Protection Clause in selected

30 See Thomas W. Merrill, The Making of the Second Rehnquist Court: A Preliminary Analysis, 47 St. Louis U. L.J. 569, 569–70 (2003) (noting that the Rehnquist Court saw a dramatic shift in the nature of cases decided, the number of cases decided, and the doctrinal import of the cases decided after 1994).
"social welfare" cases. The Rehnquist Court has left a distinct legacy, particularly, although not exclusively, in federalism cases.

Finally, and most importantly, the periods chosen largely, although not entirely, correspond to temporal categories used by leading legal historians. For example, Lawrence Baum splits his 1985 study of the Supreme Court into the pre-Marshall, Marshall and Taney Courts, the period between 1865 and 1935, and the period from 1937 to 1985, which he subdivides into the Warren and Burger Courts. Robert McCloskey's latest work, as revised by Sanford Levinson, is divided into six time periods: 1789 to 1810 (the pre-Marshall years), 1810 to 1835 (the Marshall Court), 1836 to 1864 (The Taney Court), 1865 to 1900 (the "Guilded Age"), 1900 to 1937 (the "Judiciary and the Regulatory State"), and 1937 to 1959 (the "Modern Court").

The horizontal axis is self-explanatory. The first two categories (from left to right) are the name of the case and its citation. The third category notes The Federalist Papers cited. This category may, however, be under-inclusive. For example, both Calder v. Bull and Fletcher v. Peck cited generally to The Federalist but mentioned no one paper in particular. Sections of Marbury v. Madison read like The Federalist No. 78 without any attribution at all. And much of the analysis in M'Culloch v. Maryland reads like The Federalist Nos. 33 and 44 again without specific attribution. Consequently there might be some

34 ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (revised by Sanford Levinson, 3d ed. 2000). Professor Levinson added Chapters Eight and Nine, the former analyzing civil rights and civil liberties cases and the latter exploring judicial monitoring of the new welfare state. These two chapters are not organized according to time periods.
35 3 U.S. (3 Dall.) 386, 391 (1798).
36 10 U.S. (6 Cranch) 87, 122 (1810).
38 THE FEDERALIST NO. 78 (Alexander Hamilton).
40 THE FEDERALIST NO. 33 (Alexander Hamilton).
41 THE FEDERALIST NO. 44 (James Madison).
42 The reason for this has nothing to do with the unavailability of The Federalist Papers during these early years. The Federalist Papers were first published, in hard-bound form, in 1788, a year after the Constitution was ratified. Moreover, The Federalist Papers were frequently referred to in Congressional debates starting in the summer of 1789. Rakove, supra note 17, at 235–40.
inaccuracy, the amount of which is difficult to tell, in findings about the extent to
which various opinions and various Courts relied on *The Federalist Papers* and the
degree of that reliance. The remaining categories concern whether *The Federalist*
was cited in a majority, concurring, or dissenting opinion, and which Justices cited it.

The most important category, the importance that the citing Justice attached to
*The Federalist Papers* cited, does not appear on the horizontal axis at all. This is
assessed in the text. The range of importance can vary from unimportant, to useful
as support for a textual or structural argument, to being important as explanatory of
ambiguous text, to determinative of a particular constitutional position, to every
nuanced degree of those possibilities. Sometimes it is easy to determine into
which category the citation falls, as it was in Justice Souter’s dissenting opinion in
*Printz*. That, however, is the exception. Take, for example, Chief Justice
Marshall’s nearly wholesale use of Publius’s arguments in *Marbury* to establish the
principle of judicial review. One might say that *The Federalist* was not at all
important to the decision since it was not cited. It was merely “coincidental” in the
sense that both Marshall and Hamilton were Federalists and agreed that judicial
review was necessary both to protect the rule of law and to ensure the supremacy of
federal law. That is, the same result would have obtained even if *The Federalist No.*
78 had not been written. On the other hand, it is certainly possible, probably
likely, that *The Federalist No. 78* significantly influenced Marshall’s views on the
role of the Court and that those views led to the Court’s unanimous decision that
both legislative and executive acts were subject to judicial oversight. Similarly,
it is difficult to determine the “true” importance of *The Federalist* to Justice Scalia’s
majority opinion in *Printz*. Was it the contemporaneous congressional history that
decided the “original understanding” issue, making his extended citation of *The

43 I tried and ultimately rejected a suggestion that I quantify, or at least objectify, the
importance of *The Federalist Papers* to each decision and code that objectification in the
appendix in a separate vertical column. Despite (or probably because of) the relative ease of
doing so, such an attempt, as explained above, would be less accurate and thus more
misleading than a textual description.

44 See *Printz* v. United States, 521 U.S. 898, 971 (1997) (Souter, J., dissenting) (“In
deciding these cases, . . . it is The Federalist that finally determines my position.”).

45 Compare *Marbury* v. Madison, 5 U.S. (1 Cranch) 137, 176–79 (1803), with *The
Federalist Papers* No. 78 at 505–08 (Alexander Hamilton).

46 *Marbury*, 5 U.S. (1 Cranch) at 176–79.

47 Cf. Larry D. Kramer, *But When Exactly Was Judicially-Enforced Federalism “Born” in
the First Place?*, 22 HARV. J.L. & PUB. POL’Y 123, 127–28 (1998); Larry D. Kramer,
*Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV.
215, 247 & nn.133–34 (2000) (asserting that hardly anyone even saw *The Federalist* 78 and
that Hamilton wrote it to rebut Brutus’s assertion of “so sweeping a power on judges”);
McGowan, *supra* note 17, at 756, 827–32.

48 *Marbury*, 5 U.S. (1 Cranch) at 178.

Federalist superfluous?\textsuperscript{50} Were the two more or less equal in their importance? Or, was Justice Scalia’s extended recitation of The Federalist meant more to respond to Justice Souter’s dissent than to support the majority’s arguments?\textsuperscript{51}

So what exactly does this study measure? Clearly it cannot, at least not without significant doubt, match the frequency of citation of The Federalist Papers (or any other historical source) with its influence because, as discussed above, there is some probability that the conclusions will be underinclusive. It is certainly plausible that a Justice might have been influenced by historical materials (or any other materials) without citing them. About the least one can do, and the only thing that this study does, is to look at the relationship between the historical rise of The Federalist Papers and their apparent influence.\textsuperscript{52}

The first was easy. The Federalist’s apparent influence, however, is necessarily a matter of judgment. Some judgments took little thought. Citations of The Federalist appearing in a string of citations, either of multiple Papers or of Papers with other material, historical or otherwise, were placed in the “uninfluential” category. Citations of The Federalist preceded by a “see, e.g.,” “cf.,” or similar modifier were treated likewise. Footnote citations had a presumptive unimportance to them that textual citations did not, whereas references which quoted portions of The Federalist Papers were more likely to be viewed as influential than was a declaratory sentence followed by a simple reference to a particular paper. Most difficult to categorize were (1) instances where The Federalist was cited for analytically essential but largely background points and (2) opinions in which The Federalist was cited and quoted but where it was only one relatively small part of a far larger historical discussion containing other primary source material and case precedent. This paper will attempt to explain the conclusions reached for each category.

The analysis will proceed as follows. Each time period will be discussed separately. The raw data as to the number of cases during that period in which The Federalist was cited, the specific papers cited, the Justices citing The Federalist Papers, and the type of opinion citing The Federalist Papers will be presented. For purposes of presentation, a plurality opinion has been categorized as a majority opinion and an opinion which was a partial concurrence and a partial dissent has been counted as a dissent. Each era will be compared to the one previous; this comparison will include the number of cases citing The Federalist Papers, the kinds of opinions in which the citations occurred, and the comparative citation patterns of Justices who served during both periods. Finally, in most periods, particularly those up to the Warren Court, the citation patterns of Justices who cited The Federalist will be described; although in the interest of time, space, use of virgin timber, and avoiding rank boredom, not every opinion will be analyzed. The Appendix, however, will

\textsuperscript{50} Id. at 909–10.

\textsuperscript{51} Id. at 911–15 & nn.7–9.

\textsuperscript{52} I thank my colleague Jessie Hill for reminding me of this important caveat.
provide the basic information for those who wish to supplement the text. From the Warren Court forward, analyzing every Justice who cited The Federalist proved problematic. Some cited The Federalist Papers often; others cited them very infrequently. Those in the latter group will not be discussed individually, although their opinions were checked in order to ensure that an opinion that relied significantly on The Federalist was not overlooked.

Finally, the last section, Section IV, will draw some general conclusions about the importance of The Federalist Papers to constitutional analysis and outcomes.

II. THE FACTUAL ANALYSIS

A. The Pre-Marshall and Marshall Years: 1789–1835

The first forty-six years of United States Supreme Court jurisprudence reveals that references to The Federalist Papers appeared in twelve cases. Only one of those cases, Calder v. Bull, was decided prior to 1800, when John Marshall became the Chief Justice. At the end of an exhaustive effort to define an ex post facto law, Justice Chase noted that Blackstone defined ex post facto laws as Chase himself did and that “[Blackstone’s] opinion is confirmed . . . by the author of The Federalist.” It is impossible to tell the degree to which Justice Chase relied upon The Federalist rather than his own understanding.

During the Marshall years, The Federalist Papers were noted in eleven cases and thirteen opinions. Not all of these opinions mentioned The Federalist Papers by number. For example, Justice Johnson’s dissenting opinion in Fletcher v. Peck referred generally to “letters of Publius.” In Cohens v. Virginia, Chief Justice Marshall similarly referred to The Federalist Papers only in general language.

53 The Pre-Marshall and Marshall years have been combined because only one case in the eleven years before John Marshall was appointed Chief Justice mentioned The Federalist Papers.
54 3 U.S. (3 Dall.) 386, 391 (1798).
55 See U.S. Const. art. I, § 9 cl. 3.
56 Calder, 3 U.S. (3 Dall.) at 390.
57 This does not include cases, such as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), in which the Court’s reasoning resembles or is an exact replica of that used by “Publius.” See supra note 45 and accompanying text.
58 10 U.S. (6 Cranch) 87, 144 (1810) (Johnson, J., dissenting).
60 Id. at 418–20. Marshall referred to The Federalist in only two other cases, M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431–33 (1819), and Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449, 469 (1829). Like his citation in Cohens, these cases referred to The Federalist generally and not by specific number. Moreover, in neither of the cases were The Federalist Papers cited in any way that could conceivably be characterized as crucial to the decision. Indeed in both M’Culloch and Weston, the only reason for citing The
References to specific Papers appeared in only three majority opinions: The Federalist No. 82 in Justice Washington's opinion in Houston v. Moore, Justice Story's mention of The Federalist No. 42 in United States v. Smith, and his footnote reference to The Federalist No. 29 in Martin v. Mott.

Dissenters made far greater use of The Federalist Papers during this period than did those who authored majority opinions, and when The Federalist Papers were cited, they were specifically referenced. The Federalist appeared in seven dissenting opinions, 54 percent of the opinions that mentioned The Federalist during that time period. Of those 71 percent (five of seven) were authored by one Justice, Smith Thompson.

Conclusions are difficult to come by with only fourteen opinions so much as mentioning The Federalist Papers and only three being majority opinions. One thing is clear, however. If viewed from what the Court and/or various Justices said, The Federalist Papers played little role in the outcome of the cases. Citations in majority opinions were little more than asides, if that. Even the dissenters did not seem to give The Federalist any significant weight. Rather, they were used to

Federalist at all was that it had been cited by one of the parties to support their arguments. M'Culloch, 17 U.S. (4 Wheat.) at 433–35; Weston, 27 U.S. (2 Pet.) at 468–69.

18 U.S. (5 Wheat.) 1, 25–26 & n.a (1820) (raising the issue of congressional power to punish).

18 U.S. (5 Wheat.) 153, 158–59 & n.a (1820). The question in Smith was whether the United States could impose the death penalty for crimes committed on the high seas. Justice Story's reference to The Federalist No. 42 concerned whether the laws of nations could be used to define crimes on the high seas. Id. at 157–58 & n.a.


Justice Thompson is not exactly a household name. He was a Republican from New York appointed by President Monroe in 1823. He died in office twenty years later in 1843. Donald Malcolm Roper completed a biography of Justice Thompson in 1963 in partial satisfaction of the requirements for a Ph.D. See Donald Malcolm Roper, Mr. Justice Thompson and the Constitution, in AMERICAN LEGAL AND CONSTITUTIONAL HISTORY: A GARLAND SERIES OF OUTSTANDING DISSERTATIONS (Harold Human & Stuart Bruchey eds., 1987). Included in this biography is an analysis of Thompson's disagreements with Marshall on the scope of state powers to regulate commerce, state powers to tax items in commerce, and government power to impinge on private property. Not coincidentally, these disagreements are captured in the specific Federalist Papers cited, Nos. 32, 42, 43 and 44. See id. at 121–205. The other two Justices who mentioned The Federalist were Justice Johnson, in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 144 (1810) (Johnson, J., dissenting), and Justice Trimble (also not a household name) in Ogden v. Saunders, 25 U.S. (12 Wheat) 213, 329 (1827) (Trimble, J., dissenting).

As noted above, two of the three citations of The Federalist by Justice Marshall occurred only because they were briefed and argued by the party who, incidentally, ended up losing the case. See supra note 60.

See, e.g., Fletcher, 10 U.S. (6 Cranch) at 144 (Johnson, J., dissenting) (citing only to the "letters of Publius").
confirm the conclusions reached by more normative structural principles or by reference to such common law giants as Blackstone.67 There was certainly nothing remotely resembling the debate between Justices Scalia and Souter in Printz.68

B. The Pre-Civil War Period to the End of the Civil War: 1835–1865

For all but the last year of this period, Roger B. Taney was the Chief Justice.69 During his tenure, references to The Federalist Papers nearly doubled, from twelve cases in the forty-six years that made up the Marshall and pre-Marshall years to nineteen in the thirty-year period from 1835 to 1865. And the number of opinions in which The Federalist appeared also increased by fifty-eight percent, going from thirteen in the previous period to twenty-four in this period. Moreover the specificity of the citations also increased. In only three of the twenty-four opinions (12.5 percent) were The Federalist Papers referred to without specific reference; all the other opinions mentioned particular Papers. In contrast to the Marshall years, eight of the twenty-four opinions (33 percent) were majority opinions and three were concurring opinions. In other words, 46 percent of the references supported or purportedly supported the Court’s disposition. Finally, of the twenty-one Justices who served during this period, thirteen (62 percent) at one time or another cited The Federalist. This contrasts with the preceding period during which only seven of the seventeen justices (41 percent) even made mention of The Federalist Papers.

The Federalist appeared in some notable cases during this period: Mayor of New York v. Miln,70 Luther v. Borden,71 Cooley v. Board of Wardens,72 The Passenger Cases,73 Prigg v. Pennsylvania,74 and Dred Scott v. Sandford,75 to name a few. Ten of the twenty-one cases in which The Federalist Papers were cited (48 percent) involved the question raised, but left open, in Gibbons v. Ogden:76 whether powers granted to the federal government by Article I, Section 8 are exclusive or can they be shared concurrently by the states.77 The remaining eleven cases in which The

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67 As Professor McGowan argued, The Federalist Papers may well have been important for another reason: to establish a judicial “ethos.” See McGowan, supra note 17, at 757–58.
68 See supra notes 3–9 and accompanying text.
69 Justice Taney, maybe rightfully so, will undoubtedly be forever remembered for his ill-advised and unsuccessful attempt to save the Union from the bench. Dred Scott v. Sandford, 60 U.S. (9 How.) 393 (1856); see also note 105 and accompanying text.
70 36 U.S. (11 Pet.) 102 (1837).
72 53 U.S. (12 How.) 299 (1851).
73 48 U.S. (7 How.) 283 (1849).
74 41 U.S. (16 Pet.) 539 (1842).
75 60 U.S. (19 How.) 393 (1856).
76 22 U.S. (9 Wheat.) 1 (1824).
Federalist Papers were cited covered the waterfront, from states allegedly impairing the obligation of contracts, to the jurisdiction of federal courts, to the President’s removal power. All of the cases mentioned involved issues that were to one degree or another discussed in Philadelphia during the summer of 1787 and in the state ratification conventions thereafter, the very issues to which The Federalist Papers were devoted. It might be thought, then, that The Federalist Papers were influential in deciding these disputes and that the Justices who cited them relied upon them in some significant way. Not so.

Justice Woodbury cited The Federalist Papers in the greatest number of opinions, four. Justice Campbell claimed three, and Justices McLean, Story, Curtis, Daniel, Catron, and Chief Justice Taney cited The Federalist in two opinions each. However, none of the Justices who cited The Federalist relied on it to make their points. The closest that one can come to even suggesting that The Federalist Papers played a significant part in a Justice’s analysis was Justice Daniel’s dissenting opinion in the Passenger Cases. Citing The Federalist No. 32, Justice Daniels argued that the Constitution, as understood by those who ratified it, retained the states’ taxing power as it was prior to 1789. With respect to the more general issue of the Congress’s exclusive authority to regulate alien migration to the United States, Justice Daniel cited The Federalist No. 42 to refute the claim that the Constitution gave Congress the exclusive authority to regulate immigration after 1808. Yet despite his apparent reliance on The Federalist Papers, he devoted only


81 48 U.S. (7 How.) 283, 494–518 (1849) (Daniel, J., dissenting). These cases (one from New York and the other from Massachusetts) involved the ability of the states to restrict, by per capita taxation or outright exclusion, the entry of aliens into the country.

82 Id. at 503–04.

83 The Federalist No. 42 discusses the power of the federal government to control “the intercourse with foreign nations”, including Article I, Section 2 cl. 1, prohibiting Congress from interfering with the importation of slaves until 1808. The Federalist No. 42, 270, 272–73 (James Madison).

84 The Passenger Cases, 48 U.S. (7 How.) at 511–14 (Daniel, J., dissenting). Justice Daniel’s argument, simply stated, was that one could not imply from the prohibition in Article I, Section 9 the exclusive power of the federal government to regulate alien immigration. Who could enter a state was, before 1808, a matter for the states to determine and that did not change after that year.
about a page and a half of a twenty-three-page opinion to a discussion of *The Federalist.*

The references by the other Justices were far more cursory, citing *The Federalist* almost as an afterthought. Justice Woodbury who cited *The Federalist Papers* in more opinions (four) than any other Justice is an example. In *Waring v. Clarke,* Justice Woodbury cited *The Federalist Nos. 80 and 83* but devotes only a sentence to each, even though his opinion was thirty-four pages long. Similarly in *Planters' Bank v. Sharp,* a Contract Clause case, he devoted about one sentence of a sixteen page opinion to demonstrate the point that to pass a law impairing the obligation of contracts not only violated the Constitution, but also would be "contrary to the first principles of the social compact." His forty-eight-page dissenting opinion in *Luther v. Borden* referred to several of *The Federalist Papers: Nos. 77, 93, 44, 94* and 29, but these references were hardly central to his arguments. Rather, they appear in a form equivalent to the modern day string of citations. The same is true of Justice Woodbury's citations to *The Federalist* in his dissenting opinion in the *Passenger Cases.* Indeed, only one of those citations mentions a particular paper, *No. 82,* and that was contained in parentheses along with the citation of a case, *Holmes v. Jennison.* Admittedly there is no necessary, conclusive, or direct relationship between the space devoted to a discussion of *The Federalist* (when compared to the larger analysis) and its impact on the case, but at the very least the burden would shift to those who would assert that relatively scant attention to *The Federalist Papers* says little about their importance to the analysis or the outcome.

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85 *Id.* at 503–04, 511.
86 46 U.S. (6 How.) 441 (1847).
87 *Id.* at 488.
88 *Id.* at 488, 493.
89 47 U.S. (6 How.) 301 (1848).
90 U.S. CONST. art. I, § 10, cl. 1.
93 *Id.* at 53 (supporting the Courts' role as the intermediary between the people and the legislature).
94 *Id.* at 70 (arguing that martial law, even more than a bill of attainder, violates the social compact).
95 *Id.* at 77 (arguing that the President, not the organs of state government, is the judge of the force necessary to suppress an insurrection).
97 *Id.* at 554.
I will mention only two other Justices, Chief Justice Taney and Justice Daniels. Taney cited *The Federalist No. 38* in *Dred Scott* for the proposition (referring to the validity of the Missouri Compromise) that "the acquisition of the Northwestern Territory by the confederated States [was] . . . dangerous to the liberties of the people." Of course the Chief Justice followed this with "[w]e do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States . . . is plainly given." Hardly a dispositive cite.

Chief Justice Taney's dissenting opinion in the *Passenger Cases* cites to *The Federalist No. 32, 42*, and generally to "several of the preceding numbers" (those preceding No. 32). He cited these *Papers* for precisely the same points that Justice Daniels cited them in his dissenting opinion, to establish that Congress did not have exclusive authority to regulate the immigration of aliens into the country and that the states did not lose any of their pre-constitutional authority to levy taxes. Unlike Justice Daniels, however, the Chief Justice did not devote nearly the time that Justice Daniels did, especially to *The Federalist No. 32*. True, Justice Taney delved more deeply into *The Federalist No. 42* and the question of whether the states gave up any of their authority to tax by reason of federal authority over immigration, an element of foreign affairs powers. Indeed, it might be argued that Taney, much like Daniels, relied quite heavily on *The Federalist No. 46* in order to make his constitutional point. It is a close call.

Be that as it may, the general conclusion that *The Federalist Papers* played a marginal role at best in either determining the outcome of any case in which they were mentioned or even played a significant role in how the Justices reached their conclusions during this period still stands. Even accepting that Justice Daniels and Chief Justice Taney relied on *The Federalist Papers* to a significant degree, that represents only two of the twenty-five opinions (eight percent) in which *The Federalist Papers* were cited.

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99 To analyze each Justice who cited *The Federalist* during this period would be useful only to insomniacs, not only because it would be tedious but also because the conclusion about the importance of *The Federalist* to the Justices' analysis would not change. The appendix lists the other cases and the Justices who cited *The Federalist*. It is important, however, to look at these particular Justices. Chief Justice Taney was selected largely because he was the Chief Justice and he was decidedly "originalist" (to use a modern term) in his interpretative methodology. Justice Daniels is mentioned because his dissenting opinion in the *Passenger Cases* complements that of the Chief Justice.


101 Id. Chief Justice Taney then went on to say that while the federal government has the right to acquire new territory and determine when it is ready for statehood, the judiciary must determine the rights of individuals to their property according to "the provisions and principles of the Constitution." Id.


103 *Compare id.* at 471, 479 (Taney, C.J., dissenting), *with id.* at 503–04 (Daniels, J., dissenting).

104 Id. at 474–75 (Taney, C.J., dissenting).
This is not to say that what we today describe as originalism was unimportant during this period. Quite the opposite is true. As Chief Justice Taney said in his majority opinion in *Dred Scott*:

No one . . . supposes that any change in public opinion . . . should induce the court to give to the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted. . . . [I]t speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people . . . Any other . . . construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created . . . for such purposes.  

A brief scan of the opinions of the Court in this era bore out that the Court, to a Justice, believed what Taney said about the importance of adhering to what the Framers understood to be the meaning of the words they used. The "living Constitution" was as foreign a concept to the Justices in this era as the justification for treating those of African descent as non-persons is to us today. Nevertheless, in determining what the Framers meant by the words they used, *The Federalist Papers* played little role.  

Far more important were the common law and practice, both here and in England and in the Colonies and States during the Confederation, and judicial precedent.  

Except as just another scholarly opinion, *The Federalist Papers* hardly appeared on the radar screen.

C. Reconstruction to the Turn of the Century: 1865–1900

In the thirty-five years between 1865 and 1900, the Court had three Chief Justices: Salmon P. Chase, Morrison R. Waite, and Melville W. Fuller.  

It was during this

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105 *Dred Scott*, 60 U.S. at 426. *See also Sources of Federalism*, supra note 16. Originalism was the "principal . . . mode of constitutional interpretation" from 1789 through the middle of the nineteenth century. *Id.* at 233.

106 *See* McGowan, *supra* note 17, at 756, 827–32.

107 *Id.*

108 *See* id. at 755, 840.

109 Chief Justice Chase was appointed in 1864 to fill the vacancy created by Chief Justice Taney's death in that year and served for ten years until 1874 when he too died while in office. Chase was succeeded by Morrison Waite, who served until 1888. Both Justices were sitting at the time of their appointment. Chase also died in office, replaced by Melville Fuller. Fuller was to follow the pattern of his two predecessors, dying in office in 1910. Unlike the previous periods, none of the three Chief Justices, whatever their administrative or legal
period that the Court had to grapple with the breadth of federal authority, both judicial and legislative, created by the newly enacted Thirteenth, Fourteenth and Fifteenth Amendments. It was also during this period that the Court decided *Hans v. Louisiana,* the case that laid the groundwork for the Court's current Eleventh Amendment jurisprudence. Furthermore, the Court in 1895 struck down the first federal attempt to tax income, paving the way for the Sixteenth Amendment. This was the period that set the stage for the now discredited "Lochner era." 

Statistically, the number of cases in which Justices cited *The Federalist Papers* increased during this period, going from twenty-one cases in the previous thirty-five years to twenty-six over the same number of years. While numerically negligible, that represents a 24 percent increase. The number of opinions, as opposed to cases, citing *The Federalist Papers* also increased in this period compared to the previous era, going from twenty-five to twenty-eight, a 12 percent increase. But of the twenty-six Justices who served during this period, only twelve (46 percent) cited *The Federalist Papers.* That compares to 62 percent (thirteen of twenty-one) of the Justices who served during the previous period and 41 percent during the period from 1787 to 1835.

Comparing the more qualitative aspects of the statistics, citations appeared in twenty-one majority opinions (78 percent of the opinions), five dissenting opinions (18 percent) and one concurring opinion (approximately 4 percent). The percentage of citations in majority opinions represents a substantial increase from the previous period when *The Federalist* appeared in majority opinions only 34.6 percent of the time. One might conclude from this not only that the raw number of citations increased but that the influence of *The Federalist* on the Court's decisions increased

skills, had the same defining influence during their tenure as did Chief Justices Marshall or Taney. Put another way, the period between 1865 and 1900 is not defined by the Chief Justice as were the two previous periods and subsequent periods such as the "Warren Court" or the "Rehnquist Court." This difference prompts a temporal division based on social history rather than the tenure of a Chief Justice. See McClosky, supra note 34.

10 See, e.g., The Civil Rights Cases, 109 U.S. 3 (1883) (congressional power); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) (substantive scope of section 1 of the Fourteenth Amendment).


13 U.S. CONST. amend. XVI.

14 Court decisions toward the end of this period foreshadow the rebuke of state powers that characterizes the *Lochner* era. See, e.g., Allgeyer v. Louisiana, 165 U.S. 578 (1897) (striking down state law prohibiting writing property insurance by out-of-state corporation on liberty of contract grounds); Chi., Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418 (1890) (holding unconstitutional a state statute authorizing the setting of rail rates).
as well, despite the precipitous decline in the number of the Justices who thought that *The Federalist* provided guidance. This assumption will be tested below. Another statistical indicator of the significance of *The Federalist Papers* to the outcome might be the specificity of the citation, that is, whether the reference was generally to "*The Federalist Papers*" or to a specific paper. Twenty-four of the twenty-eight opinions (86 percent) referred to specific *Papers*.116

To assess the importance of *The Federalist* to the outcomes of the cases in which it was cited, only those opinions in which the references appeared in the majority opinions were reviewed. Because these references comprised 75 percent of the opinions, this gives a pretty good gauge of the Court's use of *The Federalist Papers* during this period.117 In addition, the analysis focuses on those Justices who cited *The Federalist Papers* in three or more opinions. They were Chief Justice Fuller and Justice Swayne (four citations each), and Justices Clifford, Field, Gray, and Miller (three each).118 The statistics, however, belie the insignificant role that *The Federalist Papers* played, even in the opinions of those Justices most prone to cite them. With the exception of three cases, *The Federalist Papers* played a role that ranged from inconsequential to marginal.

Oddly enough, those Justices who cited *The Federalist* most often in majority opinions, Chief Justice Fuller and Justice Swayne, seemed the least influenced either by its content or its persuasive authority. This was particularly true of Justice Swayne. In two of the cases, Swayne cited *The Federalist Papers* in footnotes;119 in a third case he noted *The Federalist Papers* in a "see also" cite;120 another citation simply demonstrated that *The Federalist Papers* gave no aid in distinguishing a direct tax from an indirect tax.121

*The Federalist* seems to have had somewhat more significance to Chief Justice Fuller, but barely, as even that appears to be limited to one case. In the opinion after rehearing in *Pollock v. Farmers' Loan & Trust Co.*,122 the Chief Justice noted some conflict between Hamilton's position in *The Federalist Nos. 30* and 36 on the federal

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116 Four opinions contained both a general reference to *The Federalist* and a citation to specific *Papers*. For purposes of the statistics cited in the text, these cases are included in the specific citation group because specific references more strongly suggest *The Federalist Papers* themselves, rather than some more generalized description of original understanding, influenced the outcome of a given case.
117 I also looked briefly at the other opinions to ensure that they substantiate my conclusions.
122 158 U.S. 601 (1895) (holding the federal income tax unconstitutional, which prompted the proposal and final ratification of the Sixteenth Amendment).
power to tax individual income and his position in some of his later writings. He resolved the conflict in favor of *The Federalist.* On the other hand, Fuller's reliance on *The Federalist* occupied at most three paragraphs of an extensive, twenty-page assessment of the original understanding of the scope of the federal taxing power. Indeed, in the first *Pollock* opinion, the Chief Justice cited *The Federalist* on four pages of the thirty-two page opinion, but he cites it for two unexceptional propositions: (1) that the states did not lose their power to tax by reason of the grant of taxing authority to the federal government, and (2) elucidating the reasons for the proportional tax requirement of Article I, Section 9, Clause 4 of the Constitution. Chief Justice Fuller's references to *The Federalist* in the two other cases in which he referred to it were merely window dressing.

There were only two other Justices, Clifford and Bradley, for whom *The Federalist* seemed to hold any significant substantive weight, but these two were limited to one case. In his majority opinion in *Scholey v. Rew,* Clifford appeared influenced by *The Federalist No. 36,* despite the fact that the discussion of *The Federalist* occupied only one paragraph. However, there is no consistency to Justice Clifford's reliance on *The Federalist.* In an extensive, twenty-seven-page concurring opinion in *Hall v. DeCuir,* Clifford mentioned *The Federalist* only once, on the next to last page. Furthermore, in his majority opinion in *Transportation Company v. Wheeling,* there was a reference to *The Federalist No. 32* but it was preceded by the phrase "[s]upport to that view is also derived from." The importance of this citation is questionable and, in any event, hardly decisive.

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123 Id. at 624–26.  
124 Id. at 627.  
125 Id. at 622–27.  
126 157 U.S. 429 (1895).  
127 Id. at 558–59, 560–62, 564.  
128 Id. at 558–59. The Court had already decided this proposition in *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819).  
129 Id. at 560, 564.  
131 90 U.S. 331 (1874).  
132 Id. at 348 (questioning whether a succession [estate] tax on property was a direct tax and thus denied to the federal government).  
133 95 U.S. 485, 491–517 (1877) (Clifford, J., concurring). In *Hall,* the Court struck down a Louisiana statute that prohibited racial discrimination on public carriers operating out of Louisiana, even those like the plaintiff's that operated in interstate commerce, because the statute violated the Commerce Clause.  
134 Id. at 516.  
136 Id. at 280.
The same can be said of the second Justice, Justice Bradley. In the now famous case of *Hans v. Louisiana*, Bradley relied upon Hamilton’s *The Federalist No. 81* to bolster his argument that the Framers never intended that federal jurisdiction extend to suits against a state where the state had not consented thereto. Was *The Federalist No. 81* decisive, i.e., necessary to his decision? Probably not. Bradley also relied on Justice Iredell’s dissent in *Chisholm v. Georgia,* on the rapid and vociferous reaction to *Chisholm,* on the counterfactual assumption that the Constitution would never have been ratified had it been clear that citizens could sue the states without the states’ consent, and on the anomaly that in-state citizens could sue their own state in federal court but out-of-state citizens could not. Nevertheless, the citation to *The Federalist No. 81* was the only bit of solid, documentary historical evidence that Justice Bradley cited. As such, one can only assume that it played an influential role in the *Hans* decision. Like Chief Justice Fuller and Justice Clifford, however, Justice Bradley gave no indication in the only other opinion in which he cited *The Federalist* that it held any particular interpretative prominence.

Does one conclude then that original understanding was unimportant either to the Justices who cited *The Federalist* or, more generally, to the Court of this era? Not at all. Like the previous period, in all of the cases in which Justices cited *The Federalist* some understanding of what the Framers meant by the language used was utmost in the Justices’ minds. In reaching such an understanding, however, *The Federalist Papers* were apparently not deemed particularly helpful.

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134 U.S. 1 (1890).
138 *Id.* at 12–14.
139 *Id.* at 12 (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).
140 *Id.* at 12.
141 *Id.* at 10–11.
142 *Id.* at 10.
143 Professor McGowan argues that it should not have because it is contrary to Hamilton’s general philosophy on Federalism. McGowan, *supra* note 17, at 758.
144 Claflin v. Houseman, 93 U.S. 130, 138 (1876) (using *The Federalist* as one of several parts of the historical record, including the Judiciary Act and prior cases that bore on the question of whether federal courts had exclusive jurisdiction over bankruptcy claims).
145 See, e.g., Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 135 (1868) (Miller, J.) (citing *Federalist No. 42* for additional support); *Ex parte Clarke*, 100 U.S. (10 Otto.) 399, 412 (1879) (Field, J.) (citing *Federalist No. 42* in addition to direct case support); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888) (Gray, J.) (citing *Federalist No. 80* in a string of citations).
The period between 1900 and 1937, the year in which President Franklin Roosevelt appointed his first Supreme Court justice, is often referred to as the *Lochner* era, a period when the Court struck down numerous state and federal regulations because they interfered with contractual and property rights. It was also a time in which the Court frustrated congressional attempts to regulate the national economy under the Commerce Clause. *The Federalist Papers* played a surprisingly, maybe shockingly, minor role in the outcome of the cases during this era, less so than in the previous period of time.

This period includes two more years than the previous two periods, thirty-seven as opposed to thirty-five. Yet the number of cases in which *The Federalist Papers* were cited decreased from twenty-eight in the previous years to seventeen during these years, a 37 percent decrease. Obviously, the number of opinions in which Justices cited *The Federalist Papers* also decreased significantly, going from thirty in the previous era to twenty during this period, a 33 percent decrease. Finally, only seven of the twenty-five Justices (a mere 28 percent) cited *The Federalist* compared to sixteen during the previous period, a 56 percent decrease.

Of the twenty opinions that cited *The Federalist Papers*, fifteen (75 percent) were majority opinions and five (25 percent) were dissenting opinions. No concurring opinions cited *The Federalist Papers*. Moreover, every opinion that cited *The Federalist* did so specifically; there were no general references to "Publius," the "*The Federalist Papers*," etc. Finally, seven of the twenty opinions (35 percent) contained multiple citations to specific *Federalist Papers*, the most being in Justice McReynolds's dissent in *Myers v. United States*.\(^{151}\)

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\(^{146}\) The description is largely mine although Professor Baum describes this period as one dealing largely with issues of economic regulation. Baum, *supra* note 33, at 20–22.

\(^{147}\) That appointee was Hugo L. Black, who served on the Court from 1937 until his retirement in 1971 at age 85.


\(^{149}\) Like all generalizations, this is not universally true. See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (upholding Minnesota's mortgage foreclosure moratorium against a Contract Clause and Fourteenth Amendment challenge).


One might conclude, based on the above statistics alone, that, as a qualitative as well as quantitative matter, the importance of *The Federalist Papers* to decisions in this era was less than in any period other than the first period studied. To test that, I reviewed all of the opinions citing *The Federalist Papers* during this era. Textual discussion, however, will be limited only to those Justices who cited *The Federalist Papers* two or more times. These were Chief Justices Fuller (two citations) and Hughes (three) and Justices Sutherland (five) and McReynolds (three). In addition, particular attention is devoted to *Myers* because it is the case in which Justice Sutherland cited to five different *Federalist Papers*, because of *Myers*’ importance to separation of powers jurisprudence even today, and because of the extensive analysis given to original understanding by all of the opinions in the case.

Chief Justice Fuller, who served for ten of the thirty-seven year period, cited *The Federalist Papers* twice. This is not in itself terribly significant. When combined with the four times he cited them in the previous period it might seem that *The Federalist Papers* were important to his interpretation of original understanding, but that is not true. In his dissent in *Dooley v. United States*, a case testing the constitutionality of congressional legislation, he cited *The Federalist* to demonstrate that states can’t levy import or export duties. And in *Hanover National Bank v. Moyses*, *The Federalist No. 42* was mentioned in a string of other citations. The same conclusion holds for Justices McReynolds and Chief Justice Hughes, each having cited *The Federalist Papers* in three of their opinions. Leaving aside for the moment McReynolds’s dissent in *Myers*, his citations to *The Federalist* in *Newberry v. United States*, as part of a string of citations, and in *Farmers Loan & Trust Co. v. Minnesota* give no indication that *The Federalist* in any way was important to establishing his position.

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152 Although Chief Justice Fuller only cited *The Federalist Papers* twice in the ten years he served during this period, when combined with his citations in the previous period it is apparent that he found *The Federalist Papers* of some importance in explaining our constitutional structure.

153 The other two members of the “four horsemen,” Justices Van Devanter and Butler, never cited *The Federalist Papers* in any of the opinions they wrote during this period. Given their position on federalism issues, one might find this somewhat surprising.


155 183 U.S. 151 (1901).

156 *Id.* at 169–70 (Fuller, C.J., dissenting).

157 186 U.S. 181 (1902).

158 *Id.* at 187.

159 256 U.S. 232 (1921). *Newberry* involved the question of whether two states could impose an inheritance tax on the same corpus.

160 *Id.* at 248.

161 280 U.S. 204, 209 (1930).
Evaluating the citations of Chief Justice Hughes is somewhat more complicated, but only because of one case, *Principality of Monaco v. Mississippi*. The other two cases, however, suggest that Hughes attached no particular importance to *The Federalist Papers*. *Burnet v. Brooks* refers to *The Federalist No. 7* because Justice McReynolds cited it in *Farmers Loan & Trust*. Even in *Home Building & Loan Ass'n v. Blaisdell*, Hughes cited *The Federalist No. 7* in a footnote, as part of a string of citations, and cited *The Federalist No. 44* only to illustrate the state abuses that led to the enactment of the Contract Clause. I do not, although one certainly might, reach a different conclusion with regard to Hughes's citation of *The Federalist No. 81*, if not *The Federalist No. 80*, in *Monaco*. Hughes cited *The Federalist No. 81* twice to refute the argument that the states had waived sovereign immunity by joining the union, the so-called "Plan Waiver" exception to the Eleventh Amendment. The reason I am unconvinced that *The Federalist* was particularly important to the decision in *Monaco* is that Hughes spent the largest share of his opinion arguing that *Hans v. Louisiana* decided this case. This includes the reliance that *Hans* placed on the "profound shock theory" to explain why states did not waive their sovereign immunity. Certainly Hughes thought that *Hans* was correctly decided, but it is unclear the extent to which *Hans* relied upon *The Federalist* to buttress its conclusion.

Finally, there is Justice Sutherland, who cited *The Federalist Papers* in more opinions than any other Justice who served during this period. Is that an indication that he believed *The Federalist Papers* to be influential in interpreting the history of the Constitution? Hardly. In two of his opinions, Sutherland cited *The Federalist Papers* as one authority in a string of citations, and in two cases he noted *The Federalist Papers* and *The Federalist No. 7*.
Federalist No. 48 only because it appeared in a portion of a Treatise by Justice Story that he quoted.\textsuperscript{175} In his dissent in Blaisdell, Sutherland quoted The Federalist Nos. 7 and 44 for precisely the same point as did the majority, background of state abuses that led to the Contract Clause.\textsuperscript{176} Finally, while Justice Sutherland’s citation of The Federalist Nos. 78 and 79 in O’Donoghue\textsuperscript{177} has some importance in establishing that the Founders believed that power over subsistence equates to power over will, the deciding factor in Sutherland’s judgment that Congress could not reduce a sitting or retired federal judge’s salary was the pattern and practice of Congress itself.\textsuperscript{178}

Turning to the broader question of how the Court during this period viewed the significance of The Federalist Papers to constitutional interpretation, Myers v. United States\textsuperscript{179} may provide the best clue. In analyzing whether the President could remove executive officers who had been appointed with the advice and consent of the Senate\textsuperscript{180} without the concurrence of the Senate, Myers, in its various opinions, occupies two hundred forty-four pages of the United States Reports, most of these pages exploring original understanding. Chief Justice Taft, consistent with his approach one year earlier in Ex parte Grossman,\textsuperscript{181} cited The Federalist Papers only once in a seventy-seven-page opinion.\textsuperscript{182} Immediately after citing The Federalist No. 77, Taft expressly disclaimed any reliance upon it because Hamilton, its author, had, in the Chief Justice’s judgment, changed his mind.\textsuperscript{183} For this he cited Hamilton’s writings after The Federalist No. 77.\textsuperscript{184} Justice Brandeis cited The Federalist No. 77 as supporting the necessity of Senate consent to remove the officer in question,\textsuperscript{185} but it was only one phrase, not even a sentence, out of a fifty-five-page opinion devoted entirely to historical understanding and practice.


\textsuperscript{176} 290 U.S. at 463–64.

\textsuperscript{177} 289 U.S. 516, 531 (1933). The issue in O’Donoghue was congressional power to reduce the compensation of federal judges.

\textsuperscript{178} Id. at 548.

\textsuperscript{179} 272 U.S. 52 (1926).

\textsuperscript{180} See generally U.S. Const. art. II, § 2, cl. 2.

\textsuperscript{181} 267 U.S. 87 (1925). Grossman involved the question of whether the President could grant reprieves to those convicted of criminal contempt of court. Id. In an extensive opinion devoted almost entirely to determining what the Framers thought about this question, Chief Justice Taft made no mention of The Federalist Papers.

\textsuperscript{182} Myers, 272 U.S. at 136–37.

\textsuperscript{183} Id. at 137–39.

\textsuperscript{184} Id.

\textsuperscript{185} Id. at 293 (Brandeis, J., dissenting).
Justice McReynolds wrote a sixty-one-page dissent which, like the other opinions, focused on historical understanding. Although he cited five different Federalist Papers, no citation seemed to be of much consequence. His citation to The Federalist No. 74\(^{186}\) seems almost an afterthought. His general citation to The Federalist\(^{187}\) appears only because he quotes from Chancellor Kent who refers to The Federalist. And he cited The Federalist No. 68 because it referred to a document drafted by Jefferson, from which McReynolds quoted.\(^{188}\) Similarly, McReynolds cited to The Federalist No. 64 for the unexceptional proposition that federal power is limited\(^{189}\) and his citation to The Federalist No. 66 appears only because he claimed, without much analysis, that it supported a quoted argument by a Congressman Stone during a 1787 congressional debate.\(^{190}\) Only his citation to The Federalist No. 76 seems to directly support his substantive argument.\(^{191}\) But to say that McReynolds relied upon The Federalist No. 76, much less to argue that it was a significant spoke in his analytical wheel, is a stretch, to say the least. Even if The Federalist No. 76 was important to Justice McReynolds' determination in Myers that Senate approval was needed before the President could remove an officer once confirmed by that body, given his other citations and their lack of importance to his outcomes in Myers and his other opinions, it is hard to argue that The Federalist Papers held much significance to him. Indeed, what stands out about the Court's use of The Federalist during this period is that its importance paled in comparison to that of other evidence of the Framers' understanding of the Constitution's language and structure, most particularly the debates and actions of the First Congress and the course of conduct of subsequent Congresses and Presidents.

E. The "Roosevelt Court": 1937–1954\(^{192}\)

The citations to The Federalist Papers increased significantly during the "Roosevelt Court" years despite the fact that this period covered twenty fewer years than the previous period.\(^{193}\) The Federalist Papers appeared, in one way or another,
in twenty-six cases, a 53 percent increase. They also appeared in twenty-eight opinions, a 40 percent increase. Somewhat surprising is that only twelve of the twenty-eight opinions (43 percent) were majority opinions. Four were concurring opinions and eleven (39 percent) were dissents. In the previous period (1900–1937), 75 percent were majority opinions, as well as 75 percent in the period previous to that (1865–1900). At first blush, one might find the increased use of *The Federalist Papers* during this period unexceptional, as the Court moved from a restrictive interpretation of federal authority under the Commerce Clause to one that gave Congress significantly more leeway to manage a national economy. Historical justifications might then seem appropriate both for those who found greater regulatory authority and those who preferred the status quo, but only three of the dissenting opinions fit that explanation. Only one other case raising the scope of Congress’s economic regulatory authority cited *The Federalist*, and that was by Justice Black in a majority opinion. As it turns out, *The Federalist Papers* were cited most often by Justices Douglas (six opinions), Black (five opinions), and Frankfurter (four opinions). Justice Black’s five opinions cite seventeen different *Federalist Papers*, more than any other Justice who had cited *The Federalist Papers* up to 1953. Justice Douglas was not far behind, with eleven different *Federalist Papers* cited in the five opinions noted.

A review of the cases reveals, however, that the frequency of citations to *The Federalist Papers* or the number of papers cited in any one opinion is not necessarily an indication of the significance of *The Federalist Papers* either to the Justice’s analysis or to the Court’s ultimate disposition. The analysis begins with Justice Douglas, since he cited *The Federalist* in more opinions than any other Justice during this period. Next Justice Black’s citations will be examined. Particular attention will be devoted to his majority opinion in *South-Eastern Underwriters*, in which he cited seven different *Papers*. This section will

not think it necessary to compare the number of written opinions during the two periods (or any two periods for that matter) or to compare the number of cases in each period in which the meaning of the unamended 1787 Constitution might have been an issue and thus citations to *The Federalist* might be expected. That comparison is better left to another day and to others more skilled in quantitative analysis.

196 United States v. South-Eastern Underwriters Ass’n, 322 U.S. 533 (1944). *South-Eastern Underwriters* is discussed in more detail below. See infra note 214 and accompanying text.
197 So much for intuition based on stereotype. Justice Black’s judicial philosophy was decidedly positivist. His interpretive methodology was one of strict adherence to text. Howard Ball, *The Vision and the Dream of Justice Hugo L. Black: An Examination of a Judicial Philosophy* 10 (1975).
198 See infra note 214.
conclude with an examination of Justice Frankfurter's opinions because he had the next most citations with four.199

Of the six cases in which Justice Douglas cited The Federalist Papers, only three were majority opinions: District of Columbia v. John R. Thompson Co.,200 Richfield Oil Corp. v. State Board of Equalization,201 and United States v. Pink.202 In none of these opinions did The Federalist Papers cited appear to have any particular importance to the analysis. In Pink, Douglas cited The Federalist No. 64 only to bolster the argument that executive authority was equal in status to that of the Congress and judiciary.203 The citation to The Federalist No. 42 in Richfield Oil was even less significant; it was an "and see" citation following a quoted statement by Madison in the Virginia Ratification Convention.204 Finally, in John R. Thompson, The Federalist No. 43 was part of a string of citations.205 To the extent history was significant at all to Justice Douglas's opinion, it was significant as a statement by Madison at the Virginia Ratification Convention, not as The Federalist. Looking at the cases in which Justice Douglas cited The Federalist Papers in his dissenting opinions206 reaffirms that The Federalist Papers were largely add-ons for Justice Douglas despite the number of times he cited them.

One would think that The Federalist Papers held some special significance to Justice Black, since he cited sixteen separate Papers in five opinions.207 Reading his opinions, however, contradicts that characterization. In Hines v. Davidowitz,208 a case questioning state power to burden interstate commerce, Justice Black cited to six separate Federalist Papers, all in footnotes.209 A footnote citation is all that appears in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath.210 Even when cited in the text, Justice Black's citations to The Federalist carry no particular weight.211

199 Justices McReynolds, Burton, Reed, and Chief Justice Vinson each cited The Federalist Papers in two opinions. Justices Murphy, Stone, Butler, and Rutledge cited The Federalist in only one of their opinions.
201 329 U.S. 69, 76 n.3 (1946).
203 Id.
204 329 U.S. at 76, n.3.
205 346 U.S. at 109.
207 In all, he cites The Federalist Nos. 3, 4, 5, 22, 23, 30, 32, 36, 40, 41, 42, 43, 78, 80, 81, and 83.
208 312 U.S. 52 (1941).
209 Id. at 62 n.9, 63 n.11, 64 n.12, 68 n.21, 73 n.35 (1941).
210 341 U.S. 123, 144 n.2 (1951) (Black, J., concurring).
211 United States v. Lovett, 328 U.S. 303, 314 (1946) (citing The Federalist No. 78 only to make clear the Court's power of judicial review); Galloway v. United States, 319 U.S. 341 U.S. at 62 n.9, 63 n.11, 64 n.12, 68 n.21, 73 n.35 (1941).
South-Eastern Underwriters is perhaps the most interesting case study of the importance of The Federalist Papers during this period. As noted above, Justice Black cited to seven different Federalist Papers, none of which made it out of the footnotes.\(^2\) Even conceding that footnotes are sometimes at least as, if not more, significant than the opinion "in chief,"\(^2\) Justice Black's numerous footnote references (and that is all they are) do not rise to that level. There is no indication in the South-Eastern Underwriters opinion that had The Federalist never been written, the decision would have come out any differently. Justice Black was not the only opinion writer in South-Eastern Underwriters who cited The Federalist as little more than the equivalent of a "see also" reference. And Justice Frankfurter's two page historical analysis did not so much as mention The Federalist Papers.\(^2\)

When Justice Frankfurter did mention The Federalist Papers, which he did on four occasions, he certainly put no reliance upon them. The only majority opinion he wrote where The Federalist Papers are noted was Tenney v. Brandhove,\(^2\) where the issue was whether legislators were subject to liability under the Civil Rights Act of 1871.\(^2\) Despite his citation to The Federalist No. 48 to demonstrate that the Framers feared legislative hegemony,\(^2\) he and his colleagues in the majority held that legislators are immune from liability for acts committed in their legislative capacity.\(^2\) In the only concurring opinion in which Frankfurter cited The Federalist Papers, Dennis v. United States,\(^2\) he cited The Federalist No. 41 for the proposition that protection against foreign dangers is "'one of the primitive objects of civil society.'"\(^2\) Certainly germane to the issue in Dennis,\(^2\) but hardly of great significance. His dissents reflect the same. In Miles v. Illinois Central Railroad Co.,\(^2\) he cites The Federalist No. 82 only as a way of collateral support for previous case

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372, 397–98 & n.2 (1943) (Black, J., dissenting) (citing Nos. 81 and 83 only to demonstrate importance of jury trials).

\(^2\) United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 539 n.9 (No. 22); id. at 550 n.33 (No. 36); id. at 551 n.36 (Nos. 40 and 41); id. at 551 n.35 (No. 30); id. at 552 n.37 (No. 23); id. at 552 n.38 (No. 43).


\(^2\) South-Eastern Underwriters, 322 U.S. at 583 (Vinson, C.J., dissenting).

\(^2\) 341 U.S. 367, 375 (1951).


\(^2\) Tenney, 341 U.S. at 375.

\(^2\) Id. at 379.

\(^2\) 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring).

\(^2\) Id. (quoting THE FEDERALIST NO. 41 (James Madison)).

\(^2\) Dennis was convicted of violating the Smith Act, 18 U.S.C. § 2385 (2000), which prohibited advocating, abetting, or conspiring to advocate, the violent overthrow of the United States government. Dennis was a leader of the American Communist Party. Dennis, 341 U.S. at 497.

\(^2\) 315 U.S. 698 (1942).
holdings. The same can be said of his opinion in the first Dennis case, decided the year before its more notorious successor.

The period immediately preceding the Warren Court was thus like all periods that came before. No matter how many times The Federalist Papers were cited, the number of Papers mentioned in any one opinion, and how many Justices cited them, the conclusion is the same: The Federalist Papers appear to have had little influence either on judicial outcomes or on the analysis of individual Justices, on whichever side of the result they happened to fall. Moreover, as National Mutual Insurance Co. v. Tidewater Transfer Co. demonstrates, the reason is not that the Court dismissed original understanding as unimportant to contemporary textual exegesis.

F. The Warren Years: 1953–1969

The Warren Court will be forever known for judicially spearheading the “rights revolution.” Brown v. Board of Education began the long battle that eventually dismantled Jim Crow. Baker v. Carr established the principle that the Equal Protection Clause demanded that legislatures be apportioned according to population, leading to the demise of rural-dominated legislatures in states with large urban populations and to the reapportionment of the United States House of Representatives. Furthermore, legislative bodies no longer had carte blanche to exclude those with whom they disagreed or whose conduct was reprehensible. Devotional Bible reading in public schools was declared to be unconstitutional, as was state-imposed prayer in the public schools. The exclusionary rule, prohibiting illegally seized evidence in a criminal trial, was extended to the states.

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223 Id. at 713–14.
224 Dennis v. United States, 339 U.S. 162, 182 (1950). This case involved the question of whether the defendant could challenge for cause jurors who were employees of the federal government. See generally id.
228 U.S. CONST. amend. XIV § 1.
229 Baker, 369 U.S. 186.
and those accused of crimes could no longer be interrogated without being advised of their rights to counsel.\textsuperscript{237} The Warren Court reinvigorated “substantive due process,” holding that a married couple had the right to decide whether to use contraception,\textsuperscript{238} which paved the way for the Burger Court holdings that an individual had the same right.\textsuperscript{239} Those cases led to the decision that a woman had the right to terminate her pregnancy,\textsuperscript{240} as well as the Rehnquist Court’s decision, limited though it may be, that an individual has the right to terminate life support systems.\textsuperscript{241} Those merely mark some of the highlights.

Given the Warren Court’s attention to the scope of individual liberties rather than the Constitution’s structural provisions, which is the focus of The Federalist Papers, one might intuitively think that The Federalist Papers would be cited less than in the previous period, when much of the Court’s attention was devoted to the conflict between federal authority and state autonomy. Surprisingly, the numbers do not support this. Quite the contrary. The previous period and this one are comparable in terms of the years covered (sixteen years of the Roosevelt Court and fifteen years of the Warren Court). Nevertheless, The Federalist Papers were cited in thirty-five cases by various Justices who sat during the Warren years, a 35 percent increase over the previous period. Likewise, The Federalist Papers appeared in thirty-six opinions during the Warren Years, a 29 percent increase over the previous period. They were cited in sixteen majority opinions, an equal number of dissenting opinions, and four concurrences. Percentage-wise, this translates into 44 percent, 44 percent, and approximately 11 percent respectively. That is roughly the same percentage of majority opinions as during the Roosevelt Court years and only a slight increase (three percentage points) in the percentage of dissenting opinions. For all intents and purposes the breakdown was the same. More telling than the statistics of the number of times and the number of opinions in which The Federalist Papers were cited is the percentage of Justices serving during the Warren years who cited The Federalist Papers.

Twenty-one Justices served during the Roosevelt Court years,\textsuperscript{242} and of those, eleven, or 52 percent, cited The Federalist Papers. During the Warren years, seventeen Justices served, four fewer than in the previous period. Eleven Justices (64 percent) cited The Federalist Papers, a 12 percent increase. The figures might indicate that The Federalist Papers were more important to the outcome of cases during the Warren

\begin{footnotesize}
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\item \textsuperscript{237} Miranda v. Arizona, 384 U.S. 436 (1966).
\item \textsuperscript{238} Griswold v. Connecticut, 381 U.S. 479 (1965).
\item \textsuperscript{239} Eisenstadt v. Baird, 405 U.S. 438 (1972). While this case was ostensibly decided on equal protection grounds, given the nature of the right in Griswold, (marital privacy), it is hard to understand the ruling without reference to the nature of the underlying substantive right.
\item \textsuperscript{240} Roe v. Wade, 410 U.S. 113 (1973).
\item \textsuperscript{241} Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261 (1990).
\item \textsuperscript{242} GEOFFREY STONE ET AL., CONSTITUTIONAL LAW xc–xcviii (4th ed. 2001).
\end{itemize}
\end{footnotesize}
Years than during the previous period. However, as demonstrated below, when one shifts from a quantitative to a qualitative analysis, the conclusion is different. The number of citations, the frequency of those citations, and the percentage of Justices who cited *The Federalist Papers* prove to be unreliable indicators of the importance of *The Federalist Papers* to that Justice’s or the Court’s analysis.

Consistent with previous analytic patterns, this section will concentrate on those Justices who most frequently cited *The Federalist Papers*. Justice Harlan cited *The Federalist Papers* in seven opinions, followed by Justice Frankfurter with six opinions. Only two of Justice Frankfurter’s *The Federalist* citations appeared in majority opinions; four were in dissenting opinions. Justice Harlan’s citations show a similar pattern, appearing in two majority opinions, four dissents and one concurring opinion. Both Justices Harlan and Frankfurter generally objected to the Court’s more expansive interpretation of the Bill of Rights and the Fourteenth Amendment. Justice Black, consistent with his citations during the previous period, had the next most opinions in which *The Federalist Papers* were cited, with five.

Unlike Frankfurter and Harlan, four of Justice Black’s *Federalist* citations appeared in majority opinions and only one in a dissenting opinion. Justice Douglas and, maybe surprisingly, Chief Justice Warren were next in the frequent citation line, with four opinions each. All of Warren’s citations were in majority opinions while only one of Justice Douglas’s opinions was a majority. Two were dissents and one was a concurring opinion.

The two majority opinions in which Justice Harlan cited *The Federalist Papers*, *Glidden Company v. Zadonk* and *United States v. Johnson*, noted five different papers, four in *Glidden* and one in *Johnson*. None of these papers appeared at all significant to his analysis or the Court’s ultimate holding. Harlan cited *The Federalist No. 81* twice in *Glidden*, once as part of a string of citations regarding congressional discretion to establish lower federal courts and again to establish that sovereign immunity was not surrendered, which was only mentioned to refute argument by counsel. *Nos. 80 and 22* were cited for propositions equally unimportant to the disposition of the matter at hand. In *Johnson*, *The Federalist No. 48* is not only

243 See Friedman & Smith, supra note 16, at 22–33 (establishing that the Warren Court relied upon originalist analysis “when it suited the Court’s needs”).


245 Justice Douglas is not separately discussed in this section, whereas Chief Justice Warren is. The reason is that *The Federalist Papers* held no more importance to Justice Douglas during this period than they held during the previous period.


248 370 U.S. at 551.

249 Id. at 563–64.

250 Id. at 557–58. *The Federalist No. 80* was cited for the idea that federal judicial power
cited, it is quoted. However, the quotation only notes, in a general way, the reasons for separation of powers. It does not relate directly to the Speech and Debate Clause or to its meaning, which was the issue in Johnson.

Justice Harlan’s concurring and dissenting opinions largely follow the same pattern. His citation to The Federalist No. 68 in Williams v. Rhodes was a one of a number of citations in a footnote. In Flast v. Cohen, Harlan quoted twelve words from The Federalist No. 80 only to establish the principle of judicial review, which he then argues, is limited. Similarly, in Duncan v. Louisiana, Harlan’s citations to The Federalist Nos. 51 and 84 only demonstrate the Framers’ belief that the structure of the federal government was sufficient to protect individual rights.

Justice Harlan’s use of The Federalist in his dissent in Wesberry v. Sanders is somewhat more mixed than in his previous opinions. The first several citations follow his previous pattern of The Federalist citations. However, Harlan’s later quotations from The Federalist Nos. 54 and 59 do support his main point that apportionment of Congress is a matter for the states and the Congress, not the courts. Finally, in O’Callahan v. Parker, a case involving the jurisdiction of military courts, Harlan’s citation of The Federalist No. 23 to demonstrate Congress’s unlimited authority “[t]o make Rules for the Government and Regulation of the land and naval Forces” was important to his argument that military courts have jurisdiction over military and legislative power must be coextensive, Id. at 557, while The Federalist No. 22 was used to note that law is a dead letter without courts. Id. at 558. While both are concepts central to the role of the judiciary in ensuring that ours is a “government of laws, and not of men,” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), neither are directly pertinent to the question of whether it is a violation of due process for an Article I judge to sit on an Article III court, the issue in Glidden.

251 383 U.S. at 178–79.
252 Id.
253 U.S. Const. art. I, § 6, cl. 1.
254 383 U.S. 169.
255 393 U.S. 23 (1968) (Harlan, J., concurring).
256 Id. at 44 n.3.
257 392 U.S. 83 (1968).
258 Id. at 130–31 & n.20 (Harlan, J., dissenting).
260 Id. at 173 n.3 (Harlan, J., dissenting).
261 Id. at n.4.
263 See id. at 27 n.8 (cf. citation to No. 54); id. at 28 n.10 (No. 54); id. at 39 (No. 57 to refute Justice Black’s reading); id. at 30–40 (No. 54 for the same purpose).
264 Id. at 39–41.
personnel who commit crimes outside a military base and on free time. On the other hand, his reference to The Federalist Papers is only one sentence of a five-page discussion of the history of military courts. Consequently, what one gets from reading Justice Harlan's opinions is that on occasion a Federalist Paper may have some significance to his analysis, but not often. And even when The Federalist Papers appear to be important to his analysis, they are no more important than other historical insights.

In his majority opinion in Communist Party of the United States v. Subversive Activities Control Board, Justice Frankfurter cites five different Papers. He mentions The Federalist No. 41 for precisely the same point as he did in Dennis, that protection against foreign dangers is "one of the primitive objects of civil society," and his citation to The Federalist Nos. 2-5 is a "see also" citation. While certainly pertinent to the issue in the case, The Federalist citations are only one small part of a 112-page, history-laden opinion. Much the same can be said of Frankfurter's citation to The Federalist No. 80 in Romero v. International Terminal Operating Co. Cited in a footnote along with Farrand's The Records of the Federal Convention of 1787, The Federalist No. 80 is mentioned only to make the point that the need to establish federal jurisdiction over maritime issues was one of the major reasons for permitting Congress to establish lower federal courts, a proposition not particularly pertinent to the facts in Romero.

The same can be said of three of Justice Frankfurter's four dissents. In Trop v. Dulles, Frankfurter cited The Federalist No. 48 for the unexceptional proposition that all power is encroaching. His dissenting opinion in Youngstown Sheet & Tube Co. v. Bowers cited four different Papers — Nos. 12, 67, 44, and 32.

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267 O'Callahan, 395 U.S. at 277 (Harlan, J., dissenting).
268 This does not imply that The Federalist Papers are less important than other historical evidence.
270 Id. at 95. The Federalist Papers cited are Nos. 41, 2, 3, 4, and 5. The latter four, however, were simply cited as "Nos. 2-5." Id.
271 Id. at 95 (quoting The Federalist No. 41 (James Madison)). For a discussion of Dennis, see supra note 224 and accompanying text.
272 Communist Party, 367 U.S. at 95.
274 Id. at 361 n.8.
275 1 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., 1911).
276 Romero, 358 U.S. at 361 n.8.
277 See generally Romero, 358 U.S. 354.
279 Id. at 119 (Frankfurter, J., dissenting).
281 Id. at 556 nn.2-3, 574 n.18 (Frankfurter, J., dissenting).
None bore directly on his analysis. Nos. 12, 67, and 44 were footnote citations that only provided some general historical background and No. 32 was a "see also" footnote citation. Even Frankfurter's powerful structural and historical analysis in *Baker v. Carr* hardly relied on *The Federalist Papers* despite his having cited four of them, Nos. 54, 56, 58, and 62. All were footnote citations and merely provided some general historical background. Only in *Farmers' Educational & Cooperative Union of America v. WDAY, Inc.* did Frankfurter's citation to a *Federalist Paper* seem more than marginally important to his analysis. Justice Frankfurter cited *The Federalist No. 32* as support for his argument that there must be a plain inconsistency between a federal and state statute for the state statute to be superseded by federal law. Preemption could not be implied from some possibility of a policy difference between federal and state regulatory schemes. When combined with his citations to *The Federalist* when serving on the Roosevelt Court, about the best one can say with respect to Justice Frankfurter is that in only one of the ten opinions in which he cited *The Federalist Papers* was the citation at all important to his analysis.

It would stand to reason that Justice Black's citations to *The Federalist Papers* during the Warren years would carry no more import than in the previous period. That proved to be true. *Wesberry v. Sanders* is perhaps the most significant case during this period in terms of historical/originalist discourse. Indeed it was the only case in which one Justice (Harlan) openly disagreed with another Justice's (Black's) interpretation of *The Federalist*. One might wonder, however, why Justice Harlan bothered. Justice Black's citation of *The Federalist Nos. 54 and 57* constituted approximately one paragraph out of an eleven-page historical analysis. *The Federalist No. 57* was cited only to say that the House of Representatives would be elected by "the great body of the people." Only eight words were quoted from *The Federalist 54:

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282 *Id.* at 556 nn.2–3.
283 *Id.* at 574 n.8.
285 See infra note 286.
286 *Baker*, 369 U.S. at 303 & n.38 (citing *The Federalist No. 58*, which referred to the British House of Commons); *id.* at 307 & n.62 (citing *The Federalist No. 56* for general historical experience, while *Nos. 62, id.* at 308 n.74, and 54, *id.* at 308 n.75, referred to apportionment of the United States Congress, not the state legislatures).
288 *Id.* at 545–46 (Frankfurter, J., dissenting).
289 *Id.* at 546.
290 *Id.* at 545–46.
292 Compare *id.* at 15 & nn.39–40, 18, with *id.* at 39–40 (Harlan, J, dissenting).
293 376 U.S. at 15, 18.
294 *Id.* at 18 (quoting *THE FEDERALIST No. 57* (James Madison)).
“[N]umbers . . . are the only proper scale of representation.” Pertinent, yes. But hardly supportive of a strict one person/one vote apportionment. More revealing is Justice Black’s majority opinion in *Reid v. Covert*, a case contesting the jurisdiction of military courts over civilians who commit crimes on military bases. Black cites six *Federalist Papers*, Nos. 26, 27, 28, 41, 78, and 83. The citations, however, were much ado about nothing. All were simply footnote citations, and four were just string-cited. The same conclusion applies to the other opinions in which Black cites *The Federalist Papers*. Justice Douglas, too, followed the pattern of the previous period in citing *The Federalist Papers*. They are largely space-filling references.

Chief Justice Warren did not cite *The Federalist Papers* until 1965, the eleventh year of his fifteen-year tenure. The first case in which he cited *The Federalist Papers* was *Singer v. United States*. And there he cited *The Federalist* No. 83 as part of a string of citations. In the same year, however he cited six *Papers*, Nos. 47, 48, 49, 51, 78, and 44, in *United States v. Brown*. Brown raised the question whether the Labor-Management Reporting and Disclosure Act of 1959, which makes it a crime for Communists to serve as executive board members of a labor union, was a violation of the Bill of Attainder Clause. Warren’s citations are interesting not only because they are numerous but because they are logically ordered to make a single point. But the point is too general to be described as significant to the outcome. No. 47 is quoted to demonstrate that the Framers feared all government power. No. 48 is then quoted to establish that barriers had to be erected to contain legislative power, followed by a cite to No. 44 to confirm that

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295 *Id.* at 15 (quoting THE FEDERALIST NO. 54 (James Madison)).
297 *Id.*
298 *Id.* at 10 n.13 (No. 83); *id.* at 24 n.43 (No. 24).
299 *Id.* at 29 n.54 (Nos. 26, 27, 28, and 41).
300 See *Talley v. California*, 362 U.S. 60, 65 (1960) (*The Federalist Papers* mentioned only to demonstrate that they were published under pseudonyms); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 228 (1964) (citing No. 43 only to point out reasons for giving Congress exclusive power to enact patent laws); *City of El Paso v. Simmons*, 379 U.S. 497, 533 (1965) (Black, J., dissenting) (citing No. 44 in first sentence of a two sentence conclusion).
303 *Id.*
306 U.S. CONST. art. I, § 9, cl. 3.
307 *Brown*, 381 U.S. at 443.
308 *Id.* at 444 n.17. Note 17 then string cites Nos. 47, 48, 49, 51, and 78.
prohibitions against bills of attainder are one of those constraints. Finally, The Federalist No. 78 is quoted to show that the Framers believed that the judiciary was the means by which the Bill of Attainder Clause would be enforced. All of these propositions were either self-evident or had long since been established. Moreover, the dissent did not question the Chief Justice's very general historical premises; the question was one of application. Consequently, it is hard to argue that Warren used The Federalist Papers in Brown as anything more than historical background, which was arguably unnecessary to repeat.

One year later, Chief Justice Warren cited The Federalist No. 60 in Bond v. Floyd, a case in which the Court held that the First Amendment prohibited the Georgia legislature from refusing to seat Julian Bond for certain anti-war statements he had made. The citation to The Federalist No. 60, which is attributed to Hamilton, confirmed earlier statements by Madison regarding the dangers of congressional power to determine the qualifications of legislators.

Finally, the Chief Justice cited The Federalist Nos. 52 and 60, but this time in a suit that raised the question whether the United States House of Representatives could fail to seat a duly-elected representative for conduct it deemed to be unbecoming a House member. The citations to The Federalist Nos. 60 and 52, while more to the point in this case than in Bond, nevertheless constituted only about one page of a nineteen-page discussion of constitutional history.

The Warren Court period thus resembles the other periods analyzed. While there are a few isolated opinions in which The Federalist Papers seemed to be of some importance to the authors' analysis, these cases are a small minority of those in which The Federalist Papers are cited. And even in those cases where one can conclude that The Federalist Papers are of some importance to the analyses, they do not dominate the historical discussion. They are only a building block, a small piece of a much larger body of historical evidence.

G. The Burger Court: 1969–1986

The approximately sixteen years during which Warren Burger was the Chief Justice has been characterized as a period of retrenchment from the Warren years.
Warren Burger was appointed by President Richard Nixon in part because of his conservative views, particularly regarding constitutional protections for those accused of crimes.\textsuperscript{318} Warren Burger earned a reputation for just that while serving on the Court of Appeals for the District of Columbia. During his tenure as Chief Justice the Court did retrench somewhat, particularly with respect to the rights of criminal defendants.\textsuperscript{319} The Court also halted the expansion of the Equal Protection Clause that marked the Warren years, refusing to expand equality principles into the area of state and federal social welfare programs, including education.\textsuperscript{320}

But there were some marked exceptions as well. First, the Burger Court made significant advances in achieving gender equality, moving from the Chief Justice’s rational basis standard in \textit{Reed v. Reed}\textsuperscript{321} to a higher level of scrutiny (often described as “mid-level”) five years later in \textit{Craig v. Boren}.\textsuperscript{322} Second, the Burger Court explicitly approved what were then considered far-reaching remedial powers to enforce school desegregation decrees.\textsuperscript{323} It stopped only when interdistrict remedies were sought, except in very narrow circumstances.\textsuperscript{324} Finally, substantive due process flourished during the Burger Court era, marked by what many consider the most controversial decision of the modern era — \textit{Roe v. Wade}.\textsuperscript{325}


\textsuperscript{318} A Professional for the High Court, \textit{Time}, May 30, 1969, at 16.


\textsuperscript{321} 404 U.S. 71, 76 (1971).

\textsuperscript{322} 429 U.S. 190, 197–200 (1976); \textit{see also} Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).


\textsuperscript{325} 410 U.S. 113 (1973); \textit{see also} Roberts v. United States Jaycees, 468 U.S. 609 (1984) (recognizing, albeit in dictum, the right of intimate association beyond the family context); Zablocki v. Redhail, 434 U.S. 374 (1978) (recognizing the right to marry as a fundamental right, at least when asserted in the context of an equal protection claim); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (recognizing as fundamental the right to live with
The Burger Court also decided a number of cases dealing with difficult structural issues, cases in which the constitutional design, and thus *The Federalist Papers*, might naturally play an important role in the outcome. In addition to what, by 1969, had become “run of the mill” Commerce Clause cases testing both the scope of federal and state authority, the Court decided six significant separation of powers cases and four equally important Eleventh Amendment sovereign immunity cases. Yet this, in and of itself, does not explain the extraordinary number of citations to *The Federalist Papers* during Chief Justice Burger’s tenure.

Twelve Justices served during the approximately sixteen years of Burger stewardship, five less than served over the same number of years during the previous era. Every Justice who served during this period cited *The Federalist Papers*, as contrasted with 64 percent of those who served during the Warren years. More significantly, *The Federalist Papers* were cited in sixty-nine cases, a 97 percent increase over the previous sixteen years. In addition, seventy-eight different opinions cited *The Federalist Papers*, contrasted with thirty-six opinions during the Warren Court years, a 117 percent increase. Of those, forty (51 percent) were majority opinions (an 8 percent increase), thirty-two (41 percent) were dissents (an insignificant decrease), and six (or 8 percent, compared with 11 percent during the previous period) were concurring opinions. Six Justices, 50 percent of those who served during this period, accounted for 60 percent of the opinions in which *The Federalist Papers* were cited. Chief Justice Burger mentioned *The Federalist* most frequently (thirteen opinions), followed by Justices Powell (twelve), Brennan (eleven), Rehnquist and extended family).

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326 *See*, e.g., Fed. Energy Reg. Comm’n v. Mississippi, 456 U.S. 742 (1982); Jones v. Rath Packing Co., 430 U.S. 519 (1977); Perez v. United States, 402 U.S. 146 (1971). Not included in the “run of the mill” list are *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *National League of Cities v. Usery*, 426 U.S. 833 (1976). These cases, the contours of which are still being debated by the Court today, such as in *New York v. United States*, 505 U.S. 144 (1992), appear to fall somewhere between the “old-fashioned cases” like *Perez*, in which the question was the power of the federal government to regulate private actors, and the Eleventh Amendment sovereign immunity cases, in which private litigants enlist the judicial arm of the federal and state governments to enforce federal rights against the states. *See infra* note 329


330 *STONE*, *supra* note 242, at xc–xcviii.
Douglas (eight each), and O'Connor (six). The pertinent question is whether the astonishing increase in the frequency with which The Federalist Papers were cited during this period translates into an increased importance of The Federalist Papers to the Justices' analyses or the Court's ultimate resolution of the constitutional issues.

Because of the number of opinions in which The Federalist Papers are referenced and the frequency of those references by individual Justices, each Justice citing The Federalist Papers will be considered in a separate subsection. In addition, no Justice who cited The Federalist fewer than six times will be considered. Their opinions are noted in the Appendix, however. Indeed, the only reasons for including Justice O'Connor despite the fact that she cited The Federalist Papers half or fewer as many times as three of her colleagues are that she did so in the short span of five years and she has been one of the Court’s most articulate defenders of state autonomy, an issue that has recently been dominated by discussions of original understanding.

1. Chief Justice Burger

Because he cited The Federalist Papers most frequently, the qualitative analysis begins with Chief Justice Burger. Unlike Justice Harlan, who cited The Federalist Papers in only two majority opinions, Chief Justice Burger's citations to The Federalist appeared in only two dissents. The eleven other references (85 percent) appeared in majority opinions. Were the citations to The Federalist Papers instrumental or even significant to Chief Justice Burger's (or the Court's, in the case of majority opinions) historical analysis, much less to the result in the case? One would be hard pressed to make that claim. In nine of the thirteen cases in which The Federalist Papers were cited, they played no apparent role, significant or otherwise, in the decision. The citations to The Federalist Papers in the other four cases deserve greater attention.

331 Justice O'Connor served for only five of the sixteen years of the Burger Court. By contrast, Justice Harlan, who cited The Federalist so frequently during the Warren years, cited it seven times during the fourteen years he served on the Burger Court.


In Goldstein v. California\(^{334}\) the issue was whether California’s prosecution of the defendant for pirating music was inconsistent with the Copyright Clause of the Constitution.\(^{335}\) Chief Justice Burger’s majority opinion cited The Federalist No. 43 only to explain the purpose of the Copyright Clause\(^{336}\) and No. 42 to point out the difference between this case and a state’s imposition of a tariff.\(^{337}\) As in Goldstein, the Chief Justice cited two Papers in Schick v. Reed,\(^{338}\) a case questioning whether the President’s pardon power included the right to commute a sentence.\(^{339}\) The Federalist Nos. 69\(^{340}\) and 74\(^{341}\) may have played a somewhat more important part in the decision than in Goldstein, but not significantly so. Both were cited generally (one in a footnote) and, while certainly not out of place, could have been excised from the opinion without giving the reader the impression that the Court somehow missed an analytical beat.

Chief Justice Burger’s other majority opinion, INS v. Chadha,\(^{342}\) cited seven separate Federalist Papers. But the number of papers cited appears to have had little relationship to the importance of The Federalist Papers to the ultimate outcome. No. 73 and 51 were quoted simply to illustrate that the President had some role in the lawmaking process, his veto power.\(^{343}\) The citation to Nos. 51 and 62 demonstrated the historical point that the Framers’ fear was not the Executive but the Congress.\(^{344}\) The Federalist No. 22 was used only to buttress the reasons why the Framers established a bi-cameral legislature,\(^{345}\) and Nos. 64, 66, and 75 were string-cited in a footnote without elaboration or explanation.\(^{346}\) It is hard to know what to make of the extensive citation list. No doubt they supported the claims the Court was making, but the claims were hardly new. The most apt analogy would be a modern court’s citation to Marbury v. Madison\(^{347}\) to prove that the Supreme Court has the power of judicial review. Correct, certainly, but hardly necessary or, in this day and age, even helpful.

Chief Justice Burger’s citation to The Federalist No. 51 in his dissent in Schad v. Borough of Mount Ephraim\(^{348}\) is somewhat more difficult to assess. Schad was


\(^{335}\) U.S. CONST. art. I, § 8, cl. 8.

\(^{336}\) 412 U.S. at 555–56 & n.11.

\(^{337}\) Id. at 559.


\(^{339}\) Id.

\(^{340}\) Id. at 263 (discussing the President’s “prerogative” to issue pardons).

\(^{341}\) Id., n.6 (expounding the same issue).


\(^{343}\) Id. at 947–48.

\(^{344}\) Id. at 950.

\(^{345}\) Id. at 949.

\(^{346}\) Id. at 956, n.21.

\(^{347}\) 5 U.S. (1 Cranch) 137 (1803).

a First Amendment challenge to a zoning ordinance that prohibited live entertainment in the Borough.\textsuperscript{349} In a short, three-page opinion, Burger cited \textit{The Federalist No. 51} to emphasize that the Court should exercise judicial restraint when confronted with a challenge to legislation with such a local impact as regulating local land uses.\textsuperscript{350} One might argue that the citation to \textit{The Federalist No. 51}, while not absolutely essential to that argument, was certainly helpful. On the other hand, judicial restraint appeared not to be the focus of Burger's disagreement with the majority. Rather, he disagreed that the subject of the prohibition, in this case nude dancing, was entitled to any First Amendment protection.\textsuperscript{351} Whatever one may say about \textit{The Federalist No. 51} and judicial restraint when it comes to matters of peculiarly local concern, it is somewhat out of place in a First Amendment case. If the First Amendment protects the activity prohibited, judicial restraint is not appropriate.\textsuperscript{352} And if it does not protect live nude dancing, then judicial restraint is applied as a matter of course under the rubric of rational basis due process. Therefore, it is hard to conclude that \textit{The Federalist No. 51} is much more than window dressing.

2. Justice Powell

Of the twelve opinions in which Justice Powell cited \textit{The Federalist Papers}, in only one does the reference seem important to his analysis. It was not, however, the lynchpin. In \textit{Garcia v. San Antonio Metropolitan Transit Authority},\textsuperscript{353} Powell mentions four \textit{Federalist Papers} — Nos. 39, 45, 17, and 46 — in his historical analysis. The first mention of these is an important piece of his argument regarding the constitutional necessity of retaining the sovereignty of the separate states.\textsuperscript{354} On the other hand, his quotations from \textit{The Federalist Papers} covered only two pages of a ten-page historical analysis.\textsuperscript{355} His references in two other cases are ambiguous

\textsuperscript{349} \textit{Schad}, 452 U.S. 61.
\textsuperscript{350} \textit{Id.} at 87–88 (Burger, C.J., dissenting).
\textsuperscript{351} "To invoke the First Amendment . . . in this case trivializes and demeans that great Amendment." \textit{Id.} at 88.
\textsuperscript{352} I do not mean to paper over the impact of federalism values on how broadly rights are defined. See generally Melvyn R. Durchslag, \textit{Federalism and Constitutional Liberties: Varying the Remedy to Save the Right}, 54 N.Y.U. L. Rev. 723 (1979). But Chief Justice Burger did not seem to be headed in that direction. Neither is this paper.
\textsuperscript{353} 469 U.S. 528 (1985).
\textsuperscript{354} \textit{Id.} at 570–72 (Powell, J., dissenting). He also cited \textit{The Federalist Nos. 17 and 46} five pages later, \textit{id.} at 575 n.18, but those citations are contained in a simple "\textit{e.g.}" reference.
\textsuperscript{355} \textit{Id.} at 568–77. This is not to suggest that \textit{The Federalist Papers} were insignificant to Justice Powell. It is only to point out that the historical evidence he marshaled in support of his argument is persuasive even without mention of \textit{The Federalist}. He did not rely exclusively, or even largely, on it.
in terms of their nexus to his analysis. In *Reeves, Inc. v. Stake*, a Dormant Commerce Clause case, he cited *The Federalist Nos. 11 and 42* for the proposition that the Framers thought that the Constitution contemplated a regime of unrestrained trade. But, like his opinion in *Garcia, The Federalist* was only one of several historical documents, four in this instance, that supported his argument.

His reference to *The Federalist No. 81* in *Patsy v. Board of Regents* is the most difficult to assess. First, the citation is not mentioned in the text — it is confined to a footnote. Second, the footnote does not independently cite to *No. 81*; it refers to the reliance on *No. 81* by the Court in *Hans v. Louisiana*. But Powell, unlike the majority, perceived the issue in *Patsy* to be a straightforward question of state sovereignty under the Eleventh Amendment. And *Hans* was the seminal Eleventh Amendment case, setting the stage for the Court’s current sovereign immunity jurisprudence. So Justice Powell may have thought that there was no reason to rehash settled doctrine to make his point.

Justice Powell’s references to *The Federalist Papers* in the other nine cases unquestionably did not reach the level of importance of the three noted above. And that includes three cases in which one might have thought that *The Federalist*, because of the issues involved, would have been more important to Justice Powell: *Atascadero State Hospital v. Scanlon*, *INS v. Chadha*, and *EEOC v. Wyoming*. In *Atascadero*, Powell cited four Federalist Papers, Nos. 17, 46, 39, and 45, but did so only in a footnote, and even then by way of two “see, e.g.” cites. By contrast, in *Chadha* Powell cited Nos. 47 and 48 in the text, but only for background on matters that needed little citation. Finally, in *EEOC v. Wyoming*, Justice Powell’s dissent referred to three Papers, Nos. 41, 45, and 84. Nos. 41 and 84 were footnote references, and while *No. 45* was noted in the opinion’s text, it may as well

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357 *Id.* at 448 (Powell, J., dissenting).
358 *Id.* at 447–48 (including *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).
360 134 U.S. 1, 12–13 (1890).
365 473 U.S. at 238 n.2.
366 462 U.S. at 960–61 (Powell, J., concurring). *The Federalist No. 47* was mentioned for the proposition that concentration of power produces tyranny, and *No. 48* followed a quote from Jefferson regarding the dangers of the legislature exercising judicial powers. *Id.*
367 *EEOC*, 460 U.S. at 268 n.3 (Powell, J., dissenting) (*No. 41*); *id.* at 270 n.6 (*No. 84*).
368 *Id.* at 270–71.
have been a string of citations with No. 84 since the position of the text in which the
citation appears merely described non-debatable, general principles of federalism.\textsuperscript{369}
Citations in the other six cases contributed little if anything to either the outcome or
the analysis.\textsuperscript{370}

3. Justice Brennan

Justice Brennan cited The Federalist Papers in twelve opinions, the same
number as Justice Powell and only one fewer than the Chief Justice. Moreover, and
maybe even more surprising, The Federalist Papers carried at least as much weight
in the opinions in which Brennan cited them as they did in the opinions of his two
more “conservative” colleagues. The Federalist Papers seemed to play something
more than an insignificant, but certainly a less than crucial, role in three of his
opinions,\textsuperscript{371} the same number (and a marginally higher percentage) as both the Chief
Justice and Justice Powell. In Schor, Justice Brennan dissented from the Court’s
ruling that the CFTC could hear state law counterclaims in reparation proceedings
before the Commission.\textsuperscript{372} At first blush, Justice Brennan’s quotations from The
Federalist Nos. 46\textsuperscript{373} and 78\textsuperscript{374} seem to be little more than background — citations
to prove the obvious. But certainly his citation to No. 78 was important, if not
essential, to his argument that legislative convenience cannot override the Framers’
concern that matters within the jurisdiction of the federal judiciary be resolved by
independent, Article III judges.\textsuperscript{375}

Northern Pipeline presented an issue similar to that of Schor: whether
confering broad judicial power on bankruptcy judges violated Article III.\textsuperscript{376} Here

\textsuperscript{369} Id.
\textsuperscript{370} Wayte v. United States, 470 U.S. 598, 612 (1985) (Nos. 4, 24, and 25); County of Oneida
concurring) (Nos. 4, 25, and 24); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478
(1981) (No. 82); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 461 n.11 (1978)
(No. 44); United States v. Richardson, 418 U.S. 166, 193 (1974) (Powell, J., concurring) (No.
78).
\textsuperscript{371} Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 859–67 (Brennan, J.,
dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247–302 (1985) (Brennan, J.,
(plurality).
\textsuperscript{372} Schor, 478 U.S. 833.
\textsuperscript{373} Id. at 859–60 (Brennan, J., dissenting).
\textsuperscript{374} Id. at 860–61. The quotation from No. 46 seems less important to his analysis only
because it affirms the proposition that secondary students learn (or ought to learn) in Civics:
that concentration of power in one branch of government leads to tyranny. Id. at 859–60.
\textsuperscript{375} Id. at 860–61.
\textsuperscript{376} N. Pipeline, 458 U.S. at 50.
Brennan quoted from *The Federalist* Nos. 47\(^{377}\) and 78\(^{378}\) and cited No. 79 to demonstrate the Framers’ reason for including the provision in Article III regarding Congress’s inability to diminish the salary of federal judges.\(^{379}\) This was important to the plurality’s outcome.

Justice Brennan’s dissent in *Atascadero* leaves no doubt about the significance of *The Federalist Papers* to his view of Eleventh Amendment sovereign immunity. Indeed, *The Federalist Papers* were far more important to the analysis in Justice Brennan’s dissent than they were to Justice Powell’s majority opinion. Consequently, one cannot explain Brennan’s citations solely by the issue in the case — the Eleventh Amendment — and the historical debate that has, since day one, surrounded that jurisprudence. Justice Brennan cites three *The Federalist Papers* — Nos. 81, 32, and 80.\(^{380}\) *Federalist No. 32* seems relatively unimportant to Justice Brennan’s analysis, appearing in two places\(^{381}\) but never quoted in the main text of the opinion. The other two *Federalist Papers*, however, are quoted in the text of his opinion, and No. 81 is quoted extensively.\(^{382}\) *The Federalist Nos. 80 and 81* were central to Justice Brennan’s conclusion that the “plan of the convention” abrogated state sovereign immunity with respect to matters over which Congress was given legislative authority.\(^{383}\) The same, however, cannot be said of the other eight cases in which he cited *The Federalist Papers*.\(^{384}\)

\(^{377}\) *Id.* at 57.

\(^{378}\) *Id.* at 58. No. 78 is also mentioned on the next page of the opinion. *Id.* at 59 n.10.

\(^{379}\) *Id.* at 60.


\(^{381}\) *Id.* at 277 & n.25.

\(^{382}\) *Id.* at 275–76 (No. 81); *id.* at 277 n.25, 278 n.27 (No. 80). Brennan not only cited extensively from *The Federalist No. 81*, but also explained how it and other of Hamilton’s *The Federalist* writings supported his view that where the federal government was given substantive legislative authority, the “‘plan of the convention’” abrogated state sovereign immunity. *Id.* at 277–78.

\(^{383}\) *Id.*

4. Justices Douglas and Rehnquist

Justice Douglas cited The Federalist Papers in seven cases, while then-Justice Rehnquist cited them in eight cases. Justice Douglas continued the pattern he set in the previous two periods, citing a relatively large number of papers with no particular importance placed on those citations. Next to Justice Brennan, Justice Rehnquist perhaps provides the most interesting case study. One would think not only that he would be a frequent user of The Federalist Papers in his opinions, but also that he would place some significant reliance upon them. The first was true, although not to the degree that might have been expected, given that he served for fourteen of the sixteen years of the Burger Court. The second, however, was simply not the case, at least during this period.

The nature of the cases in which he cited The Federalist Papers provides little explanation. Two of the cases in which he cited The Federalist were death penalty cases, Furman v. Georgia and Coleman v. Balkcom. In Furman, Rehnquist cited The Federalist No. 78 for the now obvious proposition that courts were established to keep government in check, and No. 51 for the somewhat contrary proposition that courts ought to exercise restraint in asserting their judicial review powers. In Coleman, Rehnquist again cited No. 51 simply to suggest that the Court might have devoted too much attention to controlling the government and not enough to allowing government to control the governed. In neither case did he make a big point of the Court’s having strayed too far from the moorings the Framers had laid. And in both cases Rehnquist’s main complaint was with the substance of the Court’s actions, as his citation in Furman to The Federalist No. 78 attests.

One might argue that death penalty cases seem particularly unsuited for the application of The Federalist Papers because the major issue is individual rights rather than structural concerns, although Rehnquist’s citations related to structural

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386 See infra notes 392-409 and accompanying text.
387 See supra notes 200-06 and accompanying text.
388 STONE, supra note 242, at xc-xcviii.
389 But see infra notes 523-29 and accompanying text.
390 408 U.S. 238 (1972).
392 408 U.S. at 466 (Rehnquist, J., dissenting) (No. 78); id. at 469-70 (No. 51).
393 451 U.S. at 962 (Rehnquist, J., dissenting from denial of certiorari) (No. 51).
394 408 U.S. at 466 (Rehnquist, J., dissenting).
concerns over the judiciary’s role. On the other hand, he wrote opinions in three cases in which *The Federalist Papers* would seem to provide fertile ground for mining the Framers’ understanding: *Dames & Moore v. Regan*,\(^{395}\) *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,\(^{396}\) and *Edelman v. Jordan*.\(^{397}\) In *Dames & Moore*, the citation generically referred to “The Federalist Papers”\(^{398}\) and in *Northeast Bancorp*, Nos. 7 and 22 were part of a string of citations regarding the Framers’ desire to prevent economic “‘Balkanization.’”\(^{399}\) Perhaps most surprising is *Edelman*, given the critical importance that original understanding has played in the Rehnquist Court’s sovereign immunity jurisprudence.\(^{400}\) *The Federalist No. 81*, so crucial to original understanding both before and after *Edelman*, is cited in a footnote, and then only because Rehnquist quoted from a previous case which had cited to that Paper.\(^{401}\) Moreover, *The Federalist No. 81* was not the only source cited; the footnote also contains quotes from James Madison and John Marshall from the Virginia Ratification Convention.\(^{402}\) This is not to suggest that *The Federalist No. 81* is not germane to determining the scope of Eleventh Amendment sovereign immunity; it plainly is.\(^{403}\) It is only to point out that Justice Rehnquist did not give it the prominence that later decisions did. *The Federalist No. 81* seems at best to be a bit player in Rehnquist’s analysis.

In two of the other three cases in which Rehnquist mentioned *The Federalist Papers*, they were, if anything, of even less significance. In *Jones v. Rath Packing Co.*,\(^{404}\) *The Federalist No. 32* appeared only because it was contained in a quote from *Goldstein v. California*.\(^{405}\) In only one of the eight cases did Rehnquist’s mention of *The Federalist Papers* even raise a serious question as to importance: *Railway Labor Executives’ Ass’n v. Gibbons*,\(^{406}\) a case interpreting the Bankruptcy

\(^{395}\) 453 U.S. 654 (1981) (addressing the presidential power to waive claims against foreign governments).

\(^{396}\) 472 U.S. 159 (1985) (analyzing constitutionality under the Dormant Commerce Clause of state statutes which allegedly discriminated against non-New England bank holding companies with respect to acquisition of New England banks).


\(^{398}\) 453 U.S. at 659.

\(^{399}\) 472 U.S. at 174.

\(^{400}\) *See infra* notes 437–42 and accompanying text for a discussion of the Rehnquist Court’s Eleventh Amendment sovereign immunity cases.

\(^{401}\) 415 U.S. at 661 n.9 (quoting Principality of Monaco v. Miss., 292 U.S. 313 (1934)).

\(^{402}\) *Id.*

\(^{403}\) “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*” *The Federalist No. 81* (Alexander Hamilton).


\(^{406}\) 455 U.S. 457 (1982).
Arguably, The Federalist No. 42 provided, at least in part, support for a broad reading of Congress’s power under the Bankruptcy Clause by analogizing the scope of the bankruptcy power to that of the commerce power. However, and admittedly this conclusion like others is a judgment call, The Federalist No. 42 was not crucial to Justice Rehnquist’s argument, nor did he attempt to make it so.

5. Justice O’Connor

Justice O’Connor cited The Federalist Papers in only six of her opinions. However, she served for a relatively short time during this period, five years, and was the junior Justice during those years. In addition, Justice O’Connor has been one of the primary architects of the “new federalism” which more than anything defined the succeeding period, the Rehnquist Court. This “new federalism” is a jurisprudence that has sought to define a sphere of state authority protected from federal preemption. It has been the structural understandings of the Framers, at least as understood by Justice O’Connor and later Justices Scalia and Kennedy, that has been the benchmark of the states’ sphere of influence. Consequently, despite her citation to The Federalist in only six cases, it is important to look closely at the use of The Federalist Papers in those cases, not only for what they reveal about the extent to which The Federalist Papers were useful to the Burger Court’s search for original understanding, but also in order to compare The Federalist Papers’ significance in the preceding periods and the even more extensive use of The Federalist Papers in the years of the Rehnquist Court.

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407 U.S. CONST. art. I, § 8, cl. 4.
409 The Court declared a statute (the Rock Island Transition and Employee Assistance Act) designed to protect employees of the Rock Island Railroad (then in bankruptcy reorganization) unconstitutional because it exceeded Congress’s powers under the uniformity requirement of the Bankruptcy Clause. Gibbons, 455 U.S. 457. In reaching this conclusion, then-Justice Rehnquist argued that it was important to distinguish Congress’s bankruptcy powers from its commerce powers. Id. at 465. The Federalist No. 42 was cited for the proposition that doing so “is admittedly not an easy task, for the two Clauses are closely related.” Id. The reason why The Federalist ultimately did not influence the decision was that the Court eventually did distinguish between the two clauses despite Madison’s belief that it was difficult to do so.
410 STONE, supra note 242, at xc–xcviii.
Two of the cases in which Justice O'Connor cited The Federalist Papers were precursors to what became the current Court's doctrine of state immunity from direct federal regulation. In both cases Justice O'Connor dissented from decisions in which the Court upheld the right of the federal government to regulate the "states qua states" under the Commerce Clause. The first was Federal Energy Regulatory Commission v. Mississippi. Justice O'Connor cited three Federalist Papers, Nos. 15, 16, and 45. Her citations to Nos. 15 and 16 seem innocuous at first blush, mere background historical information regarding the difficulties encountered under the Articles of Confederation by the federal government's inability to act directly with respect to individuals. The same can be said of her mention of No. 45 in a footnote. However, what appeared to be little more than background information regarding the shift from the Articles to the Constitution became the foundation supporting the decision fifteen years later in Printz. It is thus not so easy to dismiss O'Connor's Federalist citations as mere window-dressing. Not so with the second case, Garcia v. San Antonio Metropolitan Transit Authority. Of the ten Papers cited in Garcia, Justice O'Connor accounted for three, Nos. 17, 45, and 51. Here they were mentioned only by way of general background regarding the Framers' view that it was important to create a system in which governmental power was diffusely parcelled out, a fundamental proposition known to most who paid the least bit of attention in their high school civics classes.

In the other four cases, The Federalist Papers had little impact on either Justice O'Connor's analysis or the outcome of the decision, nor were they relevant to the development of some broader structural principle. Heath v. Alabama was a double jeopardy case in which O'Connor mentioned The Federalist No. 9 for the well-known proposition that states have certain important attributes of sovereignty. In Trans World Airlines v. Franklin Mint Corp., she cited The Federalist No. 64 as supporting the notion that the Court should not impute an intent to abrogate a treaty. Minnesota State Board for Community Colleges v. Knight posed a first amendment freedom of association issue in which Justice O'Connor cited The

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416 Id. at 791–93, 796 n.35 (O'Connor, J., concurring in part, dissenting in part).
417 Id. at 791–92.
418 Id. at 792–93.
419 Id. at 796 n.35.
421 Id. at 582.
422 Id.
424 Id. at 93..
426 Id. at 253.
**Federalist No. 10** simply to add extra weight to her more generalized point about the limited opportunity for direct participation in republican forms of government. Finally in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* another First Amendment case, *The Federalist No. 84* was only a “cf.” citation. In sum, of the six cases in which Justice O’Connor mentioned *The Federalist Papers,* in only one could it be fairly argued that they played any significant role in the decision. And even in that case the significance of *The Federalist Papers* did not become apparent for another decade and a half when they reappeared to form the basis of a much broader understanding of federalism.

During the sixteen years of the Burger Court, the remarkable increase in the number of opinions in which *The Federalist* appeared and in the number of Justices who cited them is not matched by the significance of *The Federalist Papers* to the Court or to the individual Justices who made use of them. Certainly some Justices, most particularly Powell, O’Connor, and Brennan, relied in a qualitative sense on *The Federalist Papers* more than others like Chief Justice Burger and then-Justice Rehnquist. But there was no consistency even among Justices Powell, O’Connor, and Brennan. Moreover, the analysis of the Burger years does not support certain intuitions that I had going into this study. First, it is difficult to match the significance of *The Federalist* to the nature of the issue raised by the case, as the contrast between Justice O’Connor’s citation of *The Federalist Papers* in *Federal Energy Regulatory Commission* and *Garcia* demonstrates. And second, as the comparative analysis of Justice Brennan’s use of *The Federalist Papers* contrasted with that of Chief Justice Burger and Justice Powell establishes popular perceptions of a Justice’s “political” bent, at least during this period, are not a terribly accurate predictor of the significance of *The Federalist Papers* to the Justice citing them.

**H. The Rehnquist Court: 1986–2002**

Even more so than the Burger Court, the Rehnquist Court has, to date, profoundly reshaped the structural norms upon which our governmental institutions are based. Congressional power to regulate commerce has been restricted,

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428 Id. at 285. The same can be said for her concurring opinion in *South Carolina v. Regan,* 465 U.S. 367, 397 (1984) (O’Conner, J., concurring) (No. 81).
430 Id. at 584.
431 See supra notes 415, 422 and accompanying text.
432 The analysis ends with 2002 only because the sixteen-year span between 1986 and 2002 is the same number of years the Court was under the stewardship of Chief Justice Burger. While many factors other than the number of years compared may account for a difference in the number of cases and opinions in which *The Federalist* is cited (e.g., the nature of the cases accepted for review, the interpretative views of the Justices, etc.), by ending the study with 2002, at least one variable is eliminated.
433 As Professor Merrill reminds us, the Rehnquist Court’s “structural revolutions” did not begin until after 1994. Merrill, supra note 30, at 569–70. The first eight years were
particularly when it is exercised with respect to activities that themselves cannot be fairly denominated as commercial. Similarly, Justice O’Connor’s dissent in *Federal Energy Regulatory Commission v. Mississippi* became the majority opinion in *New York v. United States*. Congress may neither commandeer a state’s legislative agenda nor require its executive personnel to enforce federal law. State sovereign immunity embodied in the once obscure Eleventh Amendment is no longer simply a jurisdictional provision preventing states from being sued, *eo nomine*, in a United States court, but rather has been interpreted to be an essential element of the Framers’ federalist design, protecting states from individual suits in state courts and federal administrative adjudicatory proceedings. Moreover, the immunity extends even to those matters over which the federal government has exclusive regulatory authority. Finally, Congress’s powers under section 5 of the Fourteenth Amendment have been significantly limited, sometimes with a little help from the Eleventh Amendment, sometimes not.

This study does not calculate the number of constitutional cases in which fundamental structural issues were raised, but whatever the total number, the importance of the cases, certainly over the near term, cannot be underestimated. In addition to those mentioned above dealing with federalism issues, a number of important separation of powers cases were also decided during the sixteen-year period studied, some more familiar than others. *Morrison v. Olson* upheld the independent counsel legislation, *Clinton v. Jones* permitted civil suits against a sitting president, and in *Clinton v. City of New York*, the Court struck down the Line Item Veto Act. Perhaps less well known, but still significant, are *Loving v.*
United States,446 Plaut v. Spendthrift Farms, Inc.,447 and Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.448 Indeed, even in Printz, best known for its federalism principle of commandeering state executive officers, Justice Scalia opined that the attempt to delegate the enforcement of federal law to state officials violated the President’s powers to faithfully execute the laws under Article II, Section 3.449 Others are explored in greater depth below.

The point is that with the number of federalism and separation of powers cases that the Court decided during this period450 and the seeming importance of these cases to our understanding of constitutional structure, to say nothing of the appointment of several self-described originalists, it should come as no surprise that The Federalist Papers were cited with such frequency and in such numbers. The Federalist was cited in ninety-eight cases, compared with sixty-nine in the previous sixteen-year period, a 42 percent increase. That is not quite as remarkable as the 97 percent increase during the Burger years from the previous period, but that too should be no surprise given the base from which the percentages are calculated. The same conclusion is reached when the number of opinions in which The Federalist Papers are cited is compared to the previous period, 117 as compared to seventy-eight during the Burger years, a 62.8 percent increase.451 And like the previous period, all thirteen Justices who served from 1986 to 2002 cited The Federalist.452

Interestingly, during this period The Federalist was cited extensively by those whom one might not think would do so, including Justices Breyer, Stevens, Blackmun, White, and Souter, whose opinion in Printz is as originalist an opinion as one can imagine.453 Of the ten opinions in which Justice Breyer cited The

446 517 U.S. 748 (1996) (holding that Congress, not the President, has power to determine whether the death penalty may be imposed on individuals in uniform).
447 514 U.S. 211 (1995) (holding unconstitutional Congress’s attempt to reopen judgments rendered by courts in Section 10(b)(5) actions when those judgments were rendered under a previous statute of limitations).
450 This is not to suggest that the Court during this sixteen-year period was not busy in other areas of importance as well. See, e.g., Romer v. Evans, 517 U.S. 620 (1996); Adarand Constructors v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
451 Again the percentage increase is smaller than that of the Burger years when compared to the previous period (also sixteen years), but that is because The Federalist Papers were cited in only thirty-six opinions during the Warren Court period.
452 Fifty-one of the opinions (44 percent) were majority opinions, forty-one (35 percent) were dissents, and twenty-two (21 percent) were concurrences. This is a shift from the Burger years when the percentages of majority, dissenting and concurring opinions were 52 percent, 42 percent and 6 percent respectively.
453 See supra notes 6–7 and accompanying text.
Federalist, six (60 percent) were dissents and one (10 percent) was a concurrence. Justice Stevens cited The Federalist Papers in twenty-three cases, one more than Justice Scalia. Of those, twelve were dissenting opinions (43 percent) and only one (4 percent) was a concurrence. Fifty percent of Justices Souter's (six of twelve) and Blackmun's (two of four) paper citations appeared in dissenting opinions, while 67 percent of citations to The Federalist Papers by Justice White (two of three) were in majority opinions. Moreover, "the Federalist five," Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and White (and now Justice Thomas), accounted for 53 percent of the opinions in which The Federalist Papers were cited (sixty-seven of 127). It may well be that the way in which the Court discusses constitutional issues has changed, but that depends upon an assessment of the importance of The Federalist Papers to the citing Justices.

Analysis of the Rehnquist Court will proceed as previously, with a separate look at each Justice who cited The Federalist Papers. Those Justices whose use of The Federalist Papers was insignificant either in numbers or importance, or whose citations have been previously analyzed because they were holdovers from the Burger or Warren Courts, will not be separately discussed, although their opinions are noted in the Appendix. Similarly, the analysis of each Justice will proceed as before, starting with the Justice who most often cited The Federalist Papers and working down in order of frequency. However, rather than starting with Justice Stevens (twenty-three) and then proceeding to Justices Scalia (twenty-two), Kennedy (twelve), and so on, the analysis will begin with those most commonly thought to be formalists and originalists, Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas, the Court's current so-called conservative majority. The significance of The Federalist Papers to these Justices will then be compared to those who often find themselves in the minority, not only in structural cases but in other high-profile cases as well.

455 These include Justices Powell (one citation), Ginsburg (two citations), White, and Marshall (three each). Justices Brennan and Blackmun, with four citations each, were only two shy of the six citations by Justice O'Connor. But they, unlike O'Connor, are not separately analyzed because a look at the importance of The Federalist to them during the Rehnquist years did not differ from that in previous periods. Moreover, as will be seen below, an analysis of Justice O'Connor's use of The Federalist Papers gives far greater insight into the importance or lack of importance of The Federalist Papers to the Court's analysis. The analytical focus of this section will thus be on only eight of the thirteen Justices who served during this period, Chief Justice Rehnquist and Justices Scalia, Thomas, Souter, O'Connor, Breyer, Stevens, and Kennedy.
456 Like all such generalizations, how the Justices come out is not always predictable. See, e.g., Romer v. Evans, 517 U.S. 620 (1996) (Justice Kennedy, writing for a majority that also included Justice O'Connor, striking down Colorado constitutional amendment restricting rights of gays and lesbians); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (Justice Kennedy joining Justice Stevens's majority opinion striking down state-imposed
1. Justice Scalia

As noted previously, Justice Scalia cited *The Federalist* in twenty-two opinions. Many, if not most, of these opinions cited multiple *Federalist Papers*. To put Justice Scalia’s use of *The Federalist* in perspective, he accounted for 19 percent of the opinions in which *The Federalist Papers* were cited. Of Scalia’s twenty-two opinions, 41 percent were dissents and 27 percent were concurrences. Put another way, more than two-thirds of Justice Scalia’s opinions which cited *The Federalist*, either disagreed with the Court’s result or had a different theory of or approach to the case than the majority.

In terms of the importance of *The Federalist Papers* either to Justice Scalia’s analysis or to his desired outcome, surprisingly few cases fit into the important or significant category. Twelve (54.5 percent) of Justice Scalia’s opinions contained citations that were entirely unimportant — the opinions could have done just as well without mentioning *The Federalist Papers*. In four of the opinions (18 percent), some of the citations had analytical significance while others were unimportant. In only six of Justice Scalia’s opinions (27 percent) were the citations to *The Federalist Papers* uniformly a significant element of his analysis. *Printz v. United States* has been previously discussed, making separate analysis here unnecessary, except to say Justice Scalia cited *The Federalist* a remarkable twenty-two times. In the other

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457 What makes this figure all the more remarkable is that, when Justice Scalia’s total is added to Justice Stevens’s (twenty-three), two Justices, one “liberal” and the other “conservative,” accounted for 39 percent of the opinions in which *The Federalist Papers* were cited.

458 This is not to suggest that Justice Scalia (or any other Justice with respect to whom this observation might be made) did not personally believe the citations were important. It may be important to an originalist judge, particularly one who is proselytizing an originalist methodology of constitutional interpretation, that *The Federalist* be cited at every juncture where such a citation might have even the most remote connection to the issue in the case. See, e.g., *Norman v. Reed*, 502 U.S. 279, 299–300 (1992) (Scalia, J., dissenting) (citing in a First Amendment political association case *Federalist No. 10* only to make the point that Madison may have been the first to point out that the dangers of factionalism decreases as the size of the governmental unit grows); *Harmelin v. Michigan*, 501 U.S. 957, 977 & n.7 (1991) (citing *The Federalist Nos. 24* and 47 in an Eighth amendment case only to underscore the obvious proposition that Framers must have been familiar with state constitutions). I make no judgment on such “strategic” citations. The only question this paper seeks to determine is the objective importance of the citation either to the opinion’s favored result, the analysis that lead to that result, or both.


460 See *supra* notes 1–9 and accompanying text.
four cases, while the Papers were not cited as often as in Printz, they played an equally important role. In Tafflin, the issue was whether Congress could abolish the concurrent jurisdiction of state and federal courts without being explicit about it. Justice Scalia cited Federalist No. 78 as conclusive proof that Congress could not. Plaut involved an old issue about the sanctity of judicial decisions and judgments. Nevertheless, Justice Scalia found that The Federalist demonstrated that the Framers did not contemplate legislative interference with judicial decisions — the exercise of “legislative equity” as the Court described it. In Hatter, Justice Scalia believed that Federalist No. 79 was crucial to determining the Framers’ belief that the absence of taxation was not part of a judge’s compensation within the meaning of the Compensation Clause. Only in Mistretta might there be some question about the importance of The Federalist to the analysis. On one hand, Justice Scalia’s dissent from the Court’s decision to uphold the sentencing guidelines established by the Sentencing Commission devoted a whole (albeit short) section of his opinion to Federalist No. 47. It is difficult to tell, however, whether he did so because he believed the majority misunderstood James Madison or because he believed that Federalist No. 47 affirmatively supported his view (not shared by any other member of the Court) that separation of powers principles prevented Congress from delegating its powers to an independent commission.

Four cases present a “mixed bag,” containing some citations that are essential to Justice Scalia’s reasoning and some that are not. Two require some explanation. Justice Scalia’s citation to The Federalist No. 10 in Croson is arguably important

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Tafflin, 493 U.S. at 470.

See, e.g., United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (striking down a congressional statute that precluded a court from entering judgment in favor of individuals pardoned for support of the Confederacy).

Plaut, 514 U.S. at 221–22.

532 U.S. at 583–84 (Scalia, J., concurring in part and dissenting in part).

Mistretta, 488 U.S. at 426 (Scalia, J., dissenting).

Id. at 427.

Freytag v. Comm’r, 501 U.S. 868, 903 (1991) (Scalia, J., concurring in part and dissenting in part) (No. 78); id. at 904 n.4 (No. 48); id. at 905 (No. 76); id. at 906 (Nos. 48 and 49); id. at 907 (Nos. 73, 51, 78, and 79); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 523 (1989) (Scalia, J., concurring in judgment) (No. 10); Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (No. 47); id. at 698 (Nos. 73 and 51); id. at 699 (No. 51); id. at 704 (No. 51); id. at 705 (No. 49); id. at 711 (No. 78); id. at 720 (No. 81); id. at 726 (No. 51); id. at 729 (No. 70); Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 818, 824 (1987) (Scalia, J. concurring in judgment) (No. 78).

488 U.S. at 523 (Scalia, J., concurring in judgment).
to the distinction that he drew between congressionally-drawn racial classifications and those promulgated by state and local governments.470 The difficulty lies with his rejection of that distinction six years later in Adarand Constructors, Inc. v. Pena.471 It is possible that he changed his mind between Croson and Adarand, in which case Croson should be classified as "important" and included with the six cases noted above. On the other hand, it is also possible that the citation to Federalist No. 10 was only strategic, i.e., one that would allow him to distinguish the only previous precedent — a case allowing a set-aside for minority contractors.472 If the latter is the case, then the mention of Federalist No. 10 is not particularly important to his opinion; it is merely a convenient way to dispose of an argument that, for totally different reasons, he does not accept. The decision to include Croson in this "mixed bag" category simply splits the difference.

Justice Scalia’s use of The Federalist Papers in Morrison v. Olsen473 is also somewhat baffling. The nature of the issue in Morrison, whether the act creating the independent counsel was a violation of the Appointments Clause474 (a constitutional separation of powers issue),475 calls out for mining original understanding. Consequently, Justice Scalia cites six different Federalist Papers on nine different pages.476 The first five Federalist citations support Scalia’s assertion that Congress’s creating the Office of the Independent Counsel violated Article II.477 Nevertheless, most of his argument was precedent-based, not historical in the documentary sense. In other words, Scalia’s reasoning did not rest to any significant degree on original understanding. Regardless of the classifications of Morrison and Croson, however, the percentage of the cases in which The Federalist played a substantial role in Justice Scalia’s opinions remains well under half of the opinions in which he cited The Federalist Papers (36 percent).

The twelve opinions in which The Federalist citations were unimportant or immaterial will not be separately analyzed. These citations run the gamut from what can be described as sarcasm,478 to supporting well-understood principles that need

470 See generally id. at 520–29.
471 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment) ("In my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction."
(citing J.A. Croson Co., 488 U.S. at 520 (Scalia, J., concurring in judgment))).
474 U.S. CONST. art. II, § 2, cl. 2.
475 Morrison, 487 U.S. 654.
476 See supra note 468.
477 See Morrison, 481 U.S. at 698–99, 704–05 (Scalia, J., dissenting).
no support, to a gratuitous observation, to repeating what previous cases, in reliance on *The Federalist*, had already determined. In terms of the opinions in which it was cited, Justice Scalia used *The Federalist* as what seems to be little more than window-dressing.

2. Justice Kennedy

Justice Kennedy cited *The Federalist Papers* in significantly fewer opinions (fourteen) than did Justice Scalia (nineteen). Of those, half were either dissents (7 percent) or concurrences (43 percent). In terms of the importance that *The Federalist* played in Justice Kennedy's opinions, his track record is significantly worse than that of Justice Scalia. In only three of his opinions (25 percent) can his use of *The Federalist Papers* be characterized as an essential element of his reasoning. *The Federalist Papers* played the most significant role in *Alden*, where *The Federalist No. 81* was key to the Court's conclusion that immunity from lawsuits founded upon federal law was essential to maintaining state sovereignty, even where the suit was filed in state rather than federal court. This is contrasted

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480 Nevada v. Hicks, 533 U.S. 353, 366 (2001) (citing Federalist No. 82 in the denial of Tribal Court’s jurisdiction to hear Section 1983 claims).


482 Two (17 percent) were dissents while five (42 percent) were concurrences.

483 *Alden v. Maine*, 527 U.S. 706, 714 (1999) (Nos. 39, 20, 15); id. at 715 (No. 39); id. at 716–17 (No. 81); id. at 729 (No. 81); id. at 730 (No. 81); Missouri v. Jenkins, 495 U.S. 33, 65 (1990) (Kennedy, J., concurring in part and concurring in judgment) (No. 78); id. at 69 (No. 48); id. at 81 (No. 51); Pub. Citizen v. U.S. Dep’t of Justice, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment) (Nos. 47–51); id. at 471 (No. 78); id. at 483 & n.4 (Nos. 76 and 66). A rhetorical flourish was provided by *The Federalist No. 51 in Jenkins*, 495 U.S. at 81 (Kennedy, J., concurring in part and concurring in judgment); however, Kennedy’s references to *The Federalist Nos. 78 and 48* were central to his contention that the federal judiciary has no power to levy a tax. *Id.* at 65, 69.


485 Citations to *The Federalist Nos. 39, 20, and 15*, were clearly important to building the historical case for sovereign immunity in a case where the suit was filed in state court. *Id.* at 714–15. But these citations were not as central as the references to No. 81. *Id.* at 716–17, 729, 730. As previously noted, Professor McGowan singles out the Court’s citation of *The Federalist No. 81* in its sovereign immunity cases as particularly inappropriate. See McGowan, *supra* note 17, at 827–28.
with the other Eleventh Amendment case in which Justice Kennedy wrote an opinion: \textit{Idaho v. Coeur d'Alene Tribe of Idaho}.\footnote{521 U.S. 261, 267 (1997) (No. 81); \textit{id.} at 271 (No. 80).} The principle of sovereign immunity from federal law claims asserted in federal courts had long since been established.\footnote{Hans v. Louisiana, 134 U.S. 1 (1890).} The only question was whether there was something about the claim itself that might except it from the proscription of the Eleventh Amendment.\footnote{\textit{See Idaho}, 521 U.S. at 261.} Precedent thus played a far more important role than did historical understanding. \textit{Alden}, on the other hand, broke new ground, thus requiring independent constitutional support.

\textit{Public Citizen}\footnote{Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989).} was the third case in which \textit{The Federalist Papers} were an essential element of Justice Kennedy's reasoning. The question was whether the Federal Advisory Committee Act could be used to secure the names of potential nominees to the federal bench from the committee established by the American Bar Association to screen such nominees.\footnote{\textit{Id.}} Justice Kennedy, while concurring in the judgment, disagreed with the majority's determination that Congress never intended the Act to reach this committee.\footnote{\textit{Id.} at 470 (Kennedy, J., concurring in judgment) ("Although I believe the Court's result is quite sensible, I cannot go along with the unhealthy process of amending the statute by judicial interpretation.").} He preferred instead to invoke the Appointments Clause of Article II.\footnote{\textit{Id.} at 482.} \textit{The Federalist} was the centerpiece of his assertion that access to the ABA committee's deliberations would violate the President's appointment powers.\footnote{\textit{Id.} at 483 & n.4.}

In terms of his use of \textit{The Federalist}, the most surprising of Justice Kennedy's opinions was his concurring opinion in \textit{Lopez v. United States}.\footnote{514 U.S. 549, 567–83 (1995) (Kennedy, J., concurring).} While it is true that \textit{The Federalist} was not at all important to Justice Rehnquist's majority opinion,\footnote{\textit{See infra} note 529 and accompanying text.} Justice Kennedy's opinion was focused on a somewhat different issue, the intersection of congressional and judicial authority.\footnote{\textit{Lopez}, 514 U.S. at 575 (Kennedy, J., concurring).} As the analysis of Justice Scalia's opinions demonstrates, one might have predicted that Justice Kennedy would also have seen \textit{The Federalist Papers} as determinative of judicial/congressional separation of powers concerns. That, however, was not the case. Kennedy cited \textit{Federalist No. 51} for the obvious principle that each branch will help control the other,\footnote{\textit{Id.} at 576.} and \textit{The Federalist No. 46} was cited only to suggest a proposition that Justice Kennedy...
ultimately rejects, that federalism values were designed to be protected politically, not judicially.\textsuperscript{498}

The only other case in which it might be argued that at least one of Justice Kennedy's \textit{Federalist} citations was significant to either his analysis or outcome was \textit{Loving v. United States}.\textsuperscript{499} The two citations to No. 47 only demonstrated that separation of powers enhances individual liberty.\textsuperscript{500} The mention of No. 23, however, is an important piece of Kennedy's conclusion that Congress, not the Executive, has the ultimate power to impose punishment on military personnel.\textsuperscript{501} The difficulty in ascertaining his reliance on \textit{The Federalist Papers} is that Justice Kennedy concludes that Congress delegated its authority to the Executive with certain provisions of the Uniform Code of Military Justice.\textsuperscript{502} Because it must be that either Congress or the Executive has authority to impose penalties on military personnel, Justice Kennedy's reliance on \textit{The Federalist No. 23} to establish that Congress has that power was academic and had no impact on the final decision.

Citations to \textit{The Federalist} were unimportant in the remainder of Justice Kennedy's opinions. Three of the cases were civil rights or individual liberties cases\textsuperscript{503} in which the importance of \textit{The Federalist Papers} might be questioned.\textsuperscript{504} One was a statutory preemption case in which two \textit{Federalist Papers} were mentioned only for historical background purposes.\textsuperscript{505} One was a Dormant Commerce Clause matter in which \textit{The Federalist No. 22} is cited, again, only for historical background.\textsuperscript{506} Finally, in \textit{Cook v. Gralike},\textsuperscript{507} Justice Kennedy only referenced \textit{The Federalist Papers} generally and then only to suggest that "nothing in . . . The Federalist Papers . . . supports [the claim]."\textsuperscript{508} Indeed, one might plausibly argue that such a general reference, used as it was, should be eliminated from the count altogether.

\begin{itemize}
  \item \textsuperscript{498} \textit{Id.} at 577.
  \item \textsuperscript{499} \textit{517 U.S. 748, 756 (1996) (No. 47); id. at 757 (No. 47); id. at 767 (No. 23).}
  \item \textsuperscript{500} \textit{Id.} at 756-57.
  \item \textsuperscript{501} \textit{Id.} at 767.
  \item \textsuperscript{502} \textit{Id.} at 768-69.
  \item \textsuperscript{504} But see the discussion, \textit{supra note 483, of Missouri v. Jenkins, 495 U.S. 33, 65, 69, 81 (1990) (Kennedy, J., concurring in part and concurring in the judgment), for a case in which Justice Kennedy makes important use of the Papers.}
  \item \textsuperscript{505} \textit{Am. Dredging Co. v. Miller, 510 U.S. 443, 446 (1994) (Kennedy, J., dissenting) (Nos. 22 and 80).}
  \item \textsuperscript{506} \textit{C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994).}
  \item \textsuperscript{507} \textit{531 U.S. 510 (2001).}
  \item \textsuperscript{508} \textit{Id. at 528 (Kennedy, J., concurring) (first alteration and second omission in original) (quoting U.S. Term Limits v. Thornton, 514 U.S. 779, 842 (1995) (Kennedy, J., concurring)).}
\end{itemize}
3. Justice Thomas

Justice Thomas cited *The Federalist Papers* in ten of his opinions. Of those ten opinions, four were dissents and four were concurrences. And in only two of the ten (20 percent) were his references to *The Federalist Papers* an important element in either his analysis or in the result he reached. In *United States v. Lopez*, Justice Thomas, while agreeing with the result, urged the Court to reconsider the "substantial effects" test for determining the scope of Congress's commerce powers. Why? Because, according to Thomas, the Framers meant commerce to include only buying, selling, and transporting. *The Federalist* was central to sustaining this position. Indeed, Justice Thomas cited fifteen different *Federalist Papers* in his concurring opinion. While it is possible to question whether any individual citation is central to his thesis, unquestionably the package of Federalist references are a significant part of his analysis. Finally, Justice Thomas's opinion for the Court in *Federal Maritime Commission v. South Carolina State Ports Authority*, while citing only two Papers, relied on *The Federalist No. 81* to conclude that adjudicative actions by federal administrative agencies are the equivalent of a civil action. Consequently, such actions run afoul of the Eleventh Amendment.

The most surprising use of *The Federalist Papers* in any of Justice Thomas's opinions is in *U.S. Term Limits, Inc. v. Thornton*. *Thornton* relies very strongly on originalist analysis, more than any other case decided by the Rehnquist Court except *Printz*. All the major arguments, both by Justice Stevens in his majority opinion and by Justice Thomas in his dissent, focus on whether the Framers

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509 The count includes two cases in which the mention of *The Federalist Papers* was so marginal and tangential to the discussion that I considered removing them from Justice Thomas's ledger. *Loving v. United States*, 517 U.S. 748, 779 (1996) (Thomas, J., concurring in the judgment) (referencing generally to *The Federalist* in a statement that faults the majority for failing to find anything in the historical record, including *The Federalist*, that suggests that the Framers intended to adopt the English system of shared military authority). In *McIntyre v. Ohio Elections Committee*, 514 U.S. 334 (1995), *The Federalist Papers* are mentioned, in the first instance as an example of anonymously published political pamphlets, *id.* at 360, and in the second, only to say they exist. *Id.* at 370. Despite this, I decided to include these cases only because a LEXIS search revealed the citations and other studies may have, as a result, included them in their count.


511 *Id.* at 584–85 (Thomas, J., concurring).

512 *Id.* at 585–86.

513 *Id.* at 584–603.


515 *Id.* at 752 (quoting *THE FEDERALIST NO. 81*, at 487–88 (James Madison) (C. Rossiter ed., 1961)). Thomas's other citation, to *Federalist No. 39*, is far less important. *Id.* at 751.


contemplated that states could impose qualifications on federal congresspersons in addition to those imposed by Article I.\textsuperscript{518} The Federalist is heavily relied upon by Justice Stevens, and Justice Thomas’s dissent cites six different Papers on eleven different occasions.\textsuperscript{519} Eight of those are in footnotes, however, not the text. Furthermore, half of the citations are to The Federalist No. 52. In none of those latter references does Thomas analyze what The Federalist No. 52 says regarding his position. He cites that Paper only to rebut what he argues is Justice Stevens’s misreading of its message. Nowhere does Justice Thomas cite The Federalist to demonstrate that the states were assumed to have the authority to attach a term limit qualification to federal legislators. This is not to say that his opinion has nothing to say about the Framers’ understanding. It does say, however, that The Federalist was a very minor part of Justice Thomas’s historical analysis.\textsuperscript{520}

In sum, Justice Thomas’s analysis of original understanding neither begins nor ends with The Federalist Papers. Where pertinent, he will cite them, but often only in aid of other historical materials that point in the same direction. Thus, upon reflection, it is not particularly surprising how little he relied on The Federalist.

4. Chief Justice Rehnquist

The Chief Justice mentioned The Federalist in nine cases, all of which were in majority opinions. The importance of The Federalist Papers to his analysis followed the pattern during the Burger Court era before he became Chief Justice.\textsuperscript{521} With only two possible exceptions, the Chief Justice’s citations were of only marginal value in supporting his arguments. The clear exception is Nixon v. United States,\textsuperscript{522} in which the issue was whether the judiciary could review the process adopted by the Senate

\textsuperscript{518} Id.
\textsuperscript{519} Id. at 869 n.11 (Thomas, J., dissenting) (No. 56); id. at 872 n.13 (No. 32); id. at 880 (No. 52); id. at 885 n.18 (No. 18); id. at 890 n.20 (No. 52); id. at 898 n.22 (No. 52); id. at 900–01 (No. 52); id. at 902 (No. 52); id. at 902 n.28 (No. 57); id. at 913 n.37 (No. 56).
\textsuperscript{520} A cynic might suggest that The Federalist Papers were not essential to Thomas’s argument because they provided no support for his conclusion. The Federalist Papers also were of no importance in the four other cases in which Thomas cited them. See Utah v. Evans, 536 U.S. 452, 501 (2002) (Thomas, J., concurring in part and dissenting in part) (No. 54); id. (No. 36); Camps Newfoundland/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 612–13 (1997) (Thomas, J., dissenting) (No. 32); id. at 613 n.6 (No. 32). Like Justice Thomas’s opinion in Thornton, his opinion in Camps Newfoundland contains an extensive historical analysis, covering some twenty pages. Id. at 621–40. The Federalist does not figure prominently in that analysis, however. See also Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 414 (2000) (Thomas, J., dissenting) (No. 35); Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality, 511 U.S. 93, 98 (1994) (No. 42).
\textsuperscript{521} See supra Part II.G.4.
\textsuperscript{522} 506 U.S. 224 (1993).
to try impeachment decisions.\textsuperscript{523} Chief Justice Rehnquist relied largely on an historical analysis, referring to six different \textit{Federalist Papers}.\textsuperscript{524} While it is hard to describe all of \textit{The Federalist} citations as important parts of his analysis, some were independently important and collectively they clearly helped to bolster his conclusion. The other possible exception is \textit{Solorio v. United States},\textsuperscript{525} in which the Court faced the question whether Congress could permit the military to try military personnel for crimes having nothing to do with an individual's military service.\textsuperscript{526} While the Chief Justice only cited once to one \textit{Paper},\textsuperscript{527} it was the starting point for a long historical discussion of the issue presented by the case, and also supported his conclusion that Article I, Section 8, Clause 14, giving Congress the power to "make Rules for the Government and Regulation of the [armed] forces," should be interpreted according to its plain meaning.\textsuperscript{528}

Chief Justice Rehnquist's citations to \textit{The Federalist Papers} in certain cases are also surprising. His one citation to \textit{The Federalist No. 45} in \textit{Lopez}\textsuperscript{529} adds nothing to either his analysis or the result. The same is true with respect to his mention of \textit{The Federalist No. 81} in two of the significant Eleventh Amendment cases decided during this period, \textit{Seminole Tribe of Florida v. Florida}\textsuperscript{530} and \textit{Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank}.\textsuperscript{531} Maybe the importance of \textit{Federalist No. 81} was old hat by 1996, having first been prominently cited in 1890.\textsuperscript{532} This might explain the first citation in \textit{Seminole Tribe}, which was nothing more than a quote from \textit{Hans} that itself quoted \textit{Federalist No. 81},\textsuperscript{533} and the one mention of that \textit{Paper} in \textit{Florida Prepaid} which likewise appeared from a quote from \textit{Seminole Tribe}.\textsuperscript{534} Be that as it may, precedent, not \textit{The Federalist}, was the support for the results. In the other four cases it is clear that the citations to \textit{The Federalist Papers} were little more than a formality.\textsuperscript{535}

\textsuperscript{523} \textit{Id.}
\textsuperscript{524} \textit{Id.} at 233 (No. 78); \textit{Id.} at 233–34 (No. 65); \textit{Id.} at 235 (Nos. 79 and 81); \textit{Id.} at 236 (No. 66); \textit{Id.} at 237 (No. 60).
\textsuperscript{525} 483 U.S. 435 (1987).
\textsuperscript{526} \textit{Id.} ("[T]here is no evidence in the debates over the adoption of the Constitution that the Framers intended the language of Clause 14 to be accorded anything other than its plain meaning.").
\textsuperscript{527} \textit{Id.} at 441 (No. 23).
\textsuperscript{528} \textit{Id.}
\textsuperscript{530} 517 U.S. 44, 54, 69, 70 n.13 (1996).
\textsuperscript{531} 527 U.S. 627, 634 (1999).
\textsuperscript{532} See \textit{Hans v. Louisiana}, 134 U.S. 1, 12–13 (1890).
\textsuperscript{533} 517 U.S. at 54 (quoting \textit{Hans v. Louisiana}, 134 U.S. 1, 13 (1890) (quoting \textit{The Federalist No. 81}, at 487 (Alexander Hamilton) (C. Rossiter ed., 1961))).
\textsuperscript{534} 527 U.S. at 634 (quoting \textit{Seminole Tribe of Fla. v. Florida}, 517 U.S. 44, 54 (1996)).
5. Justice O'Connor

One of the strongest advocates for judicial maintenance of a federalist balance, Justice O'Connor cited *The Federalist Papers* in ten of her opinions, eight of which were majority opinions; one was a concurrence, and the other a dissent. The citations in four of those opinions were unimportant; throwaways might be a more accurate description. Two of the cases, *Boos v. Berry* and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, did not involve structural issues at all, but were First Amendment cases. In both cases, *The Federalist* was mentioned only by way of a "cf." reference.

Two federalism cases in which O'Connor penned the majority opinions would, at first blush, cry out for *Federalist* citations. In *Gregory v. Ashcroft*, Justice O'Connor cited three *Federalist Papers*: Nos. 45, 28, and 51; however, *Federalist No. 45* is mentioned only for the most general of propositions, that the federal government has ""few and defined powers'' while states have ""numerous and undefined powers."" Furthermore, Nos. 28 and 51 only established that one government will check the abuses of others, a common and rarely-denied notion.

Most curious is how she used *The Federalist Papers* in *New York v. United States*, Justice O'Connor's ground-breaking opinion on federal commandeering of state legislative processes. In *New York v. United States*, she cited to seven different *Federalist Papers*, along with one general reference, on eight separate occasions. The first six citations, including the general reference to *The Federalist Papers*,

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538 *Boos*, 485 U.S. at 323 (No. 43); *Lyng*, 485 U.S. at 452 (No. 10); see also *Tafflin v. Levitt*, 493 U.S. 455, 459 (1989) (No. 82 listed as part of string of citations); *Gutierrez de Martinez v. Lamango*, 515 U.S. 417, 438 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (citing the majority's reference to *The Federalist No. 10* earlier in the decision).
540 *Id.* at 458 (No. 45); *id.* at 459 (Nos. 28 and 51). It is true that *Gregory* was decided on statutory grounds, but the reason the Court did not interpret the Age Discrimination in Employment Act to apply to Missouri's mandatory retirement for judges was because the retirement decision "is a decision of the most fundamental sort for a sovereign entity." *Id.* at 460.
541 *Id.* at 458 (quoting *The Federalist No. 45*, at 292–93 (James Madison) (C. Rossiter ed., 1961)).
542 *Id.* at 459.
545 505 U.S. at 155 (No. 82); *id.* at 158 (No. 42); *id.* at 163 (Nos. 15 and 16); *id.* at 180 (general reference and Nos. 42 and 20); *id.* at 182 (No. 51); *id.* at 188 (No. 39).
served little function except to illustrate well-known and very general principles. *The Federalist No. 20* was somewhat more important; it was cited in support of a theory of dual federalism: "'sovereignty over sovereigns... is a solecism in theory, so in practice it is subversive of the order and ends of civil polity.'"546 *The Federalist No. 51* only appeared in a quoted portion of *Gregory v. Ashcroft*, in which it played no role at all in the Court's analysis.547 *Federalist No. 39* was cited in a very general way to demonstrate that the Constitution leaves the states with a residual sovereignty.548 One could have equally cited the Tenth Amendment or randomly picked almost any Commerce Clause case decided in the past sixty years. This is not a criticism of Justice O'Connor's historicism; that is well beyond the scope of this paper. It is only to say that both during the current and previous periods549 Justice O'Connor's relatively frequent use of *The Federalist Papers* mask their lack of probative value to her analyses.

6. Justice Stevens

Justice Stevens cited *The Federalist* in twenty-four opinions, five more than Justice Scalia. Of those, twelve (50 percent) were dissents and one (4 percent) was a concurrence. Nearly half of the citations appeared in majority opinions. Compare that to Justice Stevens's record during the Burger Court era, where he cited *The Federalist* in only one opinion.550 Even discounting the fact that he served for only ten of the sixteen years of the Burger period, the difference is nothing short of remarkable.551

The one thing that did not change, however, is the importance that Justice Stevens apparently attached to *The Federalist Papers*. In only two cases were *The

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546 Id. at 180 (quoting *The Federalist No. 20*, at 138 (James Madison and Alexander Hamilton) (C. Rossiter ed., 1961)). But that says very little about the nature and scope of a state's "sovereignty," much less something about why the federal government cannot require the states to regulate according to federal standards in an area of federal competence. Justice O'Connor's arguments on that issue have nothing to do with *The Federalist*. See id. at 168–69.

547 Id. at 181–82 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

548 Id. at 188.

549 See supra Part II.G.5.


551 One possible explanation, of course, is that Justice Stevens had an epiphany at some point after 1986. More likely explanations, however, may include the changing nature of the constitutional conversation among the Justices prompted by Justice Scalia and, to a somewhat lesser degree, Justice Thomas; the nature of the issues presented in cases in which he wrote opinions; and the kinds of cases the Court chose to hear in one era as opposed to the other.
Federalist Papers undeniably important either to Justice Stevens’s analysis or his conclusion.\textsuperscript{552} And in only three others (and more likely only two) could a colorable argument be made that The Federalist Papers played anything more than a ceremonial function.\textsuperscript{553} The vast majority of Justice Stevens’s opinions (78 percent) mentioned The Federalist Papers for reasons unrelated, at least substantively, to their effect on his reasoning or analysis.\textsuperscript{554}


\textsuperscript{553} The two cases where The Federalist arguably played an important role were Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252, 274, 277 (1991) (No. 48), and Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 234 (1986) (Stevens, J., dissenting) (No. 52). The third case, United States v. Munoz-Flores, 495 U.S. 385, 403 (1990) (Stevens, J., concurring in the judgment) (No. 58), is included only because Justice Stevens cited a portion of Justice Marshall’s majority opinion in which The Federalist was cited and that citation was important to Marshall’s opinion. Id. (citing Munoz-Flores, 495 U.S. at 395 (majority opinion) (quoting THE FEDERALIST PAPERS No. 58, at 359 (C. Rossiter ed., 1961))). That may be enough to make the argument colorable, although it does not necessarily persuade me.

The two opinions in which The Federalist Papers did play a decisive role in Justice Stevens’s analysis and result were, not surprisingly, Printz and Thornton, where both majority and dissenting Justices focused almost exclusively on original understanding. Justice Stevens’s majority opinion in Thornton\textsuperscript{555} is, like Justice Souter’s dissenting opinion in Printz,\textsuperscript{556} founded almost exclusively upon The Federalist Papers, particularly Federalist No. 52.\textsuperscript{557} Indeed, Justice Thomas’s citation of The Federalist is largely limited to his attempts to demonstrate that Stevens read too much into The Federalist No. 52.\textsuperscript{558}

The centrality of The Federalist Papers to Justice Scalia’s majority opinion and Justice Souter’s dissent in Printz has been previously noted. The Federalist Papers were equally important to Justice Stevens’s analysis. He cited them on six occasions.\textsuperscript{559} Half were to The Federalist No. 27,\textsuperscript{560} the same Paper that determined the issue for Justice Souter. Two of the other references were also important to Stevens’s analysis.\textsuperscript{561} Only his citation to The Federalist No. 36 was insignificant.\textsuperscript{562}

7. Justice Souter

Justice Souter cited The Federalist in twelve opinions, two more than Justice Thomas and only one more than Chief Justice Rehnquist. Six (50 percent) were dissenting opinions and one was a concurrence. In only two of those cases did The Federalist Papers contribute importantly to Justice Souter’s analysis or the result he reached. First and foremost was Printz. The Federalist determined his position that Congress could “commandeer” state officers to enforce federal law.\textsuperscript{563} The other, and far more obscure, case was Weiss v. United States,\textsuperscript{564} in which the question was whether a military officer whose commission had been approved by the Senate had to be confirmed again if he was appointed to serve as a judge on a military tribunal.\textsuperscript{565} The Federalist Nos. 48,\textsuperscript{566} 76 and 77,\textsuperscript{567} while not “determinative” as in Printz, were

\textsuperscript{556} 521 U.S. at 970–76 (Souter, J., dissenting).
\textsuperscript{557} Justice Stevens cited seven separate Papers — Nos. 60, 52, 32, 57, 59, 36, and 15. U.S. Term Limits, 514 U.S. at 792, 794, 801, 806, 808 & n.18, 809, 819, 820 n.30, 821, 822 n.32, 833.
\textsuperscript{558} See supra notes 520-21 and accompanying text.
\textsuperscript{559} Printz, 521 U.S. at 943 & n.3, 945, 947, 948 & n.7, 959 (Stevens, J., dissenting).
\textsuperscript{560} Id. at 945, 947–48 & n.7.
\textsuperscript{561} Id. at 945 & n.3 (No. 44); id. at 945 (No. 15).
\textsuperscript{562} Id. at 959.
\textsuperscript{563} Id. at 971 (Souter, J., dissenting) ("[I]t is The Federalist that finally determines my position."). Justice Souter cited six different Papers on eleven different occasions in a seven-page opinion. Id. at 970–76.
\textsuperscript{564} 510 U.S. 163 (1994) (Souter, J., concurring).
\textsuperscript{565} Id.
\textsuperscript{566} Id. at 188.
\textsuperscript{567} Id. at 185 & n.1.
nevertheless part and parcel of Justice Souter’s original understanding argument. Indeed, as in Printz, The Federalist was authoritative for Souter on the Framers’ understanding.\textsuperscript{568}

In the other eight cases, The Federalist played little more than a supporting role, if that. Three of those cases were federalism cases that were at least, if not more, significant than Printz: United States v. Morrison,\textsuperscript{569} Alden v. Maine,\textsuperscript{570} and Seminole Tribe of Florida v. Florida.\textsuperscript{571} In Morrison, Justice Souter cited four different Federalist Papers, yet none of these references had any particular significance.\textsuperscript{572} Justice Souter mentioned The Federalist No. 81 twice in Alden,\textsuperscript{573} but only to refute the majority’s reliance on it; it did not form an essential component of Justice Souter’s argument in chief. Similarly, in Seminole Tribe, Justice Souter mentioned Federalist Nos. 81 and 32 numerous times, but only to disagree with the majority’s interpretation of them.\textsuperscript{574} They were not cited to demonstrate his claim that the states relinquished sovereign immunity with respect to the exercise of Congress’s commerce powers.\textsuperscript{575} The Federalist citations in his other four opinions follow this pattern.\textsuperscript{576}

8. Justice Breyer

To devote a separate subsection to Justice Breyer is probably not justified except for the fact that he cited The Federalist Papers in ten of his opinions during this period, equal to Justices O’Connor and Thomas, and only one shy of Justice Souter.\textsuperscript{577}

\textsuperscript{568} As noted previously, the authoritativeness of The Federalist to original understanding is a separate question from the authoritativeness of The Federalist Papers to the analysis or outcome of the case. See supra note 5 and accompanying text. This paper analyzes only the latter.

\textsuperscript{569} 529 U.S. 598 (2000).

\textsuperscript{570} 527 U.S. 706 (1999).

\textsuperscript{571} 517 U.S. 44 (1996).

\textsuperscript{572} 529 U.S. at 638 (Souter, J., dissenting) (No. 45); id. at 638 n.11 (No. 84); id. at 648 (No. 46); id. at 650 (No. 62).

\textsuperscript{573} 527 U.S. at 763, 773 (Souter, J., dissenting).

\textsuperscript{574} 517 U.S. at 144–48 (Souter, J., dissenting).

\textsuperscript{575} Id. Souter mentioned one other Paper, The Federalist No. 82, but that, too, was not central to his analysis. Id. at 149 n.42.


\textsuperscript{577} Just by way of comparison, three cases in which he mentioned The Federalist were majority opinions, six were dissents, and one was a concurrence.
Yet when his ten opinions are closely studied, in none of them was *The Federalist* anything more than a bit player. Some of this is explicable on grounds having relatively little to do with where Justice Breyer places *The Federalist* on his ladder of importance. His dissenting opinion in *Printz* mentioned *Federalist No. 20* only once by way of a "cf." citation. But his dissent was based upon what we can learn from other federal systems. In *Foster v. Florida*, he mentioned *The Federalist No. 63*, but that opinion was a dissent from the denial of a writ of certiorari, not the place that one would ordinarily expect an extensive analysis of the issue posed.

His other opinions, however, do not indicate that Justice Breyer relied upon *The Federalist* in adjudicating contemporary constitutional disputes. Just by way of example, in *Plaut v. Spendthrift Farm, Inc.*, his citations to *The Federalist Nos. 47 and 48* were only to say that he agreed that Justice Scalia had made a persuasive historical case that Congress had no authority to reopen and revise final judgments. In *United States v. Hatter*, Breyer’s majority opinion cites three different *Federalist Papers* on four occasions, but the first three were only to establish that federal judges should not be beholden to another branch for their compensation, a proposition fairly obvious at this point and in any event far too general to have much bearing on the specific issue of whether the social security tax as applied to federal judges violated the compensation clause of Article III. His later citation to *Federalist No. 79* was not particularly persuasive on the question of whether subsequent raises for federal judges cured the previous unconstitutional reductions. Admittedly, one might argue these conclusions. But if Justice Breyer’s *Federalist* citations and in particular his citations to *The Federalist No. 79* are compared to Justice Scalia’s use of the *Papers* in his concurring opinion, the difference is hard to ignore. In any event, there can be no dispute about his use of *The Federalist* in the other five cases.

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578 Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). Justice Breyer, however, joined the opinion of Justice Stevens, where *The Federalist* was of some significance.

579 Id. at 976–78.


582 Id. at 241 (Breyer, J., concurring). He also mentioned *The Federalist No. 48* again, but that was part of a “see” citation. Id. at 245.


584 Id. at 567 (No. 78); id. at 568 (Nos. 79 and 48); id. at 579 (No. 79).

585 Id. at 579.

586 See supra note 466 and accompanying text.

What does this tell us about the Rehnquist Court in the sixteen years from 1986 through 2002? Certainly, as others have established,\(^{588}\) there has been a dramatic increase in *Federalist Papers* "activity" compared with the previous sixteen years of the Burger Court. However, measured by the number of opinions in which *The Federalist* was cited, the increase was not nearly as dramatic as was that during the Burger years over the Warren Court, a nearly identical period of time. Given the smaller base-line established in the Warren years, that is understandable. Nevertheless, an increased use of *The Federalist Papers* began in 1969. The Rehnquist Court has continued that pattern, albeit at a somewhat decreased rate.

The pattern that does not seem to have changed very much is the importance (or lack thereof) of *The Federalist Papers* to the analyses and outcomes of the opinions that made use of them. There are obvious exceptions, *Printz* and *Thornton* being the prime examples. But exceptions do not establish rules. Moreover, other than Justice Scalia, there is no discernable pattern to any particular Justice's use of *The Federalist Papers*. Justice Stevens based his *Thornton* opinion on them, as did Justice Souter in his *Printz* dissent. Justice Thomas did not rely to any significant extent on *The Federalist Papers* to support his reasoning in *Thornton* but did in *Lopez* and *Jenkins*. The same can be said of Justice Kennedy — in some cases *The Federalist Papers* carried the day, in others they were only thrown in for good measure. Justice O'Connor relied upon them neither during the Rehnquist nor Burger years. Even Justice Scalia, who showed the most consistent use of *The Federalist Papers* to make his point, did so in well less than half of the opinions in which he referred to them. Consequently, as in the previous eras, the numbers do not tell the whole story of the importance of *The Federalist Papers* to our jurisprudence.

**CONCLUSION**

Can one then reach the more general conclusion, as the title to this paper suggests, that the influence of *The Federalist* has been less than meets the eye? *The Federalist Papers* were advocacy, which today might resemble sophisticated "op-ed" pieces or essays in the magazines of the *intelligentsia*. But their importance, both then\(^{589}\) and today, is far more significant. As Gordon Wood put it, the Constitution embodied a "political theory worthy of a prominent place in the history of Western thought."\(^{590}\) *The Federalist Papers* play a prominent role in explicating

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\(^{589}\) See, e.g., LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 27 (1988) (noting that Madison relied on *The Federalist* in a late-in-life essay about the constitutionality of protective tariffs); Rakove, supra note 17. But see Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, supra note 47.

\(^{590}\) GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 615
and understanding that revolutionary political theory. Nothing said in this paper disputes that, nor was there any intention to do so. The only question this paper hoped to clarify was whether The Federalist Papers had an influence on the development of constitutional outcomes that matched their rhetorical use. Despite the fact that some scholarship either explicitly or implicitly assumes that the answer is yes, my reading of the cases does not support that conclusion. So cliché though it might be, the answer to whether there is less here than meets the eye depends upon how you look at it.

Even accepting that no qualitative analysis is wholly objective, there are, nevertheless, certain conclusions that should be rather obvious. First, it is hard to come up with more than a small handful of cases where The Federalist even arguably played a decisive role in the Court’s decision. Printz and Thornton, both decided during the Rehnquist years, lead the pack. From there the drop-off is significant. Maybe The Passenger Cases decided by the Taney Court, Pollock v. Farmers’ Loan & Trust Co. decided in 1895, and Hans v. Louisiana decided five years earlier, can be placed in the “Federalist Papers played a determinative role in the decision” category, but that is about it.

The numbers do not increase greatly when concurring and dissenting opinions are added to the mix, and the question is changed from the importance of The Federalist Papers to the outcome of a decision to their impact on an individual Justice’s analysis. For example, in Myers v. United States and Dred Scott, original understanding determined how each Justice ultimately resolved the issues. But no Justice relied on The Federalist to any appreciable degree. That conclusion is even more obvious in the overwhelming majority of opinions during and since the Roosevelt Court. On the whole, then, it is difficult to assert that the apparent influence of The Federalist Papers has matched their rhetorical use. At best, The Federalist has been of equal importance to other historical sources.591 Certainly the degree of disproportionality between the frequency of citation of The Federalist and its importance may have lessened somewhat in the Rehnquist years. But even during this period, The Federalist Papers’ substantive role is nowhere near what the numbers would suggest. One therefore has to be very circumspect about drawing conclusions about the doctrinal importance of The Federalist simply from the number of times it has been cited.

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Nevertheless, the remarkable increase in *Federalist* citations since 1969, whether measured numerically or percentage-wise, indicates not simply that the Court has become more conservative both in terms of the results reached and the analyses used to reach those results, but more importantly that the interpretative conversation has shifted from the Roosevelt and Warren Courts. The opinions of Justices Scalia, Kennedy, and Thomas certainly support that conclusion, as does the fact that 50 percent of Justice Souter’s citations to *The Federalist* were in dissenting opinions. The change in the nature of the interpretative conversation may also explain why, of the 127 cases in which *The Federalist Papers* appeared during the Rehnquist years, only sixty-four (50.4 percent) were in opinions written by Justices who are commonly thought of as conservatives. Originalist arguments must be met with originalist arguments. On the other hand, there is remarkably little consistency from one case to the next, even among those Justices who hew to the originalist line, suggesting either that *The Federalist Papers* might sometimes be cited for strategic or opportunistic reasons having little to do with their interpretative value.

Finally, and most obviously, whether *The Federalist* is cited at all and the significance of the citation to the analytic structure of a Justice’s argument ultimately depends upon the individual Justice herself and the desire to attach precedential value to an opinion. Justices who served from 1834 to 1900 were as originalist in their views of how the Constitution ought to be interpreted as those who served on the Rehnquist Court. But the former largely chose to rely on other historical documents. Justices on the Burger and the Rehnquist Courts have cited *The Federalist* with far more frequency than their 19th century counterparts, but *The


593 See supra Part II.H.1.

594 See supra Part II.H.2.

595 See supra Part II.H.3.

596 See supra Part II.H.7.

597 It will be recalled that Justice Stevens cited *The Federalist* five more times than Justice Scalia. See supra Part II.H.1 and Part II.H.6.


600 One school of thought by political scientists posits that Justices decide the way they do in part, if not largely, because of the need to cobble a five-Justice majority. See Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1274–75 (2004); Merrill, supra note 30, at 572–73, 601–20 (describing what the author calls “the internal strategic actor hypothesis”).

601 See supra Parts II.B–C.
Federalist Papers are relatively unimportant to all but a select few Justices. The personal preference factor may help explain why a significant percentage of Justices Kennedy's and Thomas's opinions in which The Federalist Papers appear are concurring opinions, 43 percent and 40 percent respectively. These Justices agreed with the result but as an analytical matter apparently preferred greater reliance on original understanding.

Nonetheless, one cannot dismiss citations to The Federalist as window-dressing even when they might appear to be so. Professor McGowan gives us one reason — The Federalist might lend credibility to the Court, to the particular opinion, or to the author of a particular opinion. But that reason may somewhat understate why Justices cite The Federalist Papers (or any historical source for that matter) even if the opinion would do just as well without the reference. Citing "the Framers" generally and The Federalist Papers particularly is the secular equivalent to citing the Bible. It is an appeal to a higher and more revered authority. It not only establishes an ethos of objectivity but the perception of infallibility.

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602 See McGowan, supra note 17, at 820–24.
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