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## The Most Sacred Text: The Supreme Court's Use of The Federalist Papers

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# The Most Sacred Text: The Supreme Court's Use of *The Federalist Papers*

*James G. Wilson\**

## I. INTRODUCTION

In interpreting the Constitution the Supreme Court has increasingly referred to *The Federalist* papers,<sup>1</sup> a series of essays written by Alexander Hamilton, James Madison, and John Jay<sup>2</sup> during the struggle to ratify the Constitution.<sup>3</sup> This article de-

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1. THE FEDERALIST (C. Rossiter ed. 1961). *The Federalist* brilliantly argued that the Constitution would strengthen the country without jeopardizing individual liberties or destroying state sovereignty.

Since the Supreme Court and constitutional historians have used many editions of *The Federalist*, I have changed all page citations to be consistent with the Rossiter edition, which is based on the original 1788 McLean edition.

Since LEXIS only surveys Supreme Court cases back to 1925, this article could never have been written without the efforts of Professor Pierson, who listed all the cases citing *The Federalist* as of 1924. Pierson, *The Federalist in the Supreme Court*, 33 YALE L.J. 728 (1924). Pierson made no effort to link those cases with ongoing historiography; his survey was totally factual.

2. Because Jay wrote only five of the letters (all straightforward expositions on the need for a strong central government to respond to international issues), he has never been as seriously considered by theorists as Hamilton or Madison in studies of *The Federalist*. Jay planned to write more letters but was injured during a riot in 1788. G. PELLEW, JOHN JAY 225-28 (1890). This article continues the tradition of focusing on Hamilton and Madison.

3. Increasing references to *The Federalist* can be seen in the following table:

scribes in narrative form<sup>4</sup> how the Court has incorporated *The Federalist* into its opinions,<sup>5</sup> and summarizes how constitutional historians and political scientists have evaluated *The Federalist* and the Constitution.<sup>6</sup> This format highlights the limited nature

*The Federalist*

| Decade        | Number of Decisions | Number of Times Cited |             |           |
|---------------|---------------------|-----------------------|-------------|-----------|
|               |                     | Opinion               | Concurrence | Dissent   |
| 1790-1799     | 1                   | 1                     | 0           | 0         |
| 1800-1809     | 0                   | 0                     | 0           | 0         |
| 1810-1819     | 2                   | 1                     | 0           | 1         |
| 1820-1829     | 7                   | 6                     | 1           | 1         |
| 1830-1839     | 5                   | 2                     | 1           | 3         |
| 1840-1849     | 8                   | 6                     | 0           | 7         |
| 1850-1859     | 9                   | 5                     | 1           | 5         |
| 1860-1869     | 6                   | 5                     | 0           | 1         |
| 1870-1879     | 8                   | 5                     | 1           | 4         |
| 1880-1889     | 6                   | 4                     | 0           | 2         |
| 1890-1899     | 7                   | 6                     | 0           | 1         |
| 1900-1909     | 5                   | 4                     | 0           | 1         |
| 1910-1919     | 3                   | 2                     | 0           | 1         |
| 1920-1929     | 4                   | 4                     | 0           | 1         |
| 1930-1939     | 11                  | 7                     | 1           | 3         |
| 1940-1949     | 16                  | 9                     | 1           | 6         |
| 1950-1959     | 18                  | 7                     | 2           | 11        |
| 1960-1969     | 31                  | 14                    | 6           | 14        |
| 1970-1979     | 35                  | 18                    | 3           | 21        |
| 1980-1984     | 24                  | 16                    | 5           | 14        |
| <b>TOTAL:</b> | <b>206</b>          | <b>122</b>            | <b>22</b>   | <b>97</b> |

4. The distinction between narrative and analytical form can be one of degree. Some analytical pattern lurks behind any choice of events, but many historians' primary analytical goal is to describe past events as well as they can. See, e.g., P. VEYNE, WRITING HISTORY, ESSAY ON EPISTEMOLOGY (M. Moore-Rinvoluci trans. 1984).

5. The following justices cited *The Federalist* three or more times: Douglas (24), Frankfurter (11), Black (10), Burger (10), Rehnquist (10), Harlan [the younger] (9), Powell (9), Brennan (7), Blackmun (5), Campbell (5), Field (5), Fuller (5), Marshall, T. (5), O'Connor (5), Thompson (5), Clifford (4), McReynolds (4), Stevens (4), Stewart (4), Story (4), Sutherland (4), Swayne (4), Warren (4), Woodbury (4), Catron (3), Jackson (3), McLean (3), Marshall, J. (3), Miller (3). Thirty-five justices cited *The Federalist* once or twice. Both Brandeis and Holmes cited *The Federalist* only once.

6. *The Federalist* has been admired by politicians and theorists since its initial publication. Jefferson wrote: "[A]ppeal [to *The Federalist*] is habitually made by all, and rarely declined or denied by any as evidence of the general opinion of those who framed,

of the Court's historical inquiry by demonstrating that the Court and constitutional scholars have been traveling in parallel universes. Either the Court has ignored or been unaware of the fruits of these scholars' research, thus limiting its selection of scholars to those who have admired *The Federalist*, or the Court has formulated and presented historical impressions based upon uncited sources not subject to evaluation.

The Court has followed a traditional approach in analyzing *The Federalist*. First, the Court has assumed *The Federalist's* relevance and importance.<sup>7</sup> Second, the Court has either quoted from *The Federalist*, taking statements at face value, or made brief citations to the document. The Court, when referring to *The Federalist*, has apparently presupposed that *The Federalist's* authors would have agreed with the Court's interpretation and application. However, justices have frequently disagreed over the meaning of passages in *The Federalist*—a debate made inevitable by its many ambiguities and inconsistencies—and have usually made little effort to rebut alternative interpretations.

In other words, the Court has not made a real effort to understand *The Federalist*. The Court has not answered a number of questions common to other extrinsic aids used in constitutional interpretation: Why has *The Federalist* been considered so valuable a source? Should *The Federalist* have played such a significant role in the Court's constitutional analysis? When two justices interpret *The Federalist* differently (or one justice sim-

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and of those who accepted the Constitution of the United States, on questions as to its genuine meaning." T. JEFFERSON, THE COMPLETE JEFFERSON 1112 (S. Padover ed. 1943), quoted in C. ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 52 (1964).

In 1788, Washington wrote to Hamilton:

When the transient circumstances and fugitive performances which attended this Crisis shall have disappeared, That Work will merit the Notice of Posterity; because in it are candidly and ably discussed the Principles of freedom and the topics of government, which will be always interesting to mankind so long as they shall be connected in Civil Society.

30 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 66 (Fitzpatrick ed. 1931-1944), quoted in C. ROSSITER, *supra*.

Alexis de Tocqueville frequently consulted *The Federalist* when he wrote his famous study of America. He considered it an "excellent book, which ought to be familiar to the statesmen of all countries." A. DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 121-22 n.2 (Schocken ed. 1961). Clinton Rossiter found that "*The Federalist* is the most important work in political science that has ever been written, or is likely ever to be written, in the United States." THE FEDERALIST, *supra* note 1, at vii.

7. The nineteenth-century Court praised *The Federalist* and its authors, and the twentieth-century Court summarily presumed the papers' interpretive value.

ply ignores it), whose version is more historically correct? What impact did the papers have on the ratification process? How much do we need to know about *The Federalist*'s authors and the era in which it was written? How relevant should this two-hundred-year-old document be in our modern times? The historiography of *The Federalist* and the Constitution helps answer these questions.

Throughout the nineteenth century, the "Federalist historians" agreed that the Constitution's ratification was a triumph of patriotism and reason over parochial passions. This consensus was obliterated in 1913 by Charles Beard's *An Economic Interpretation of the Constitution of the United States*.<sup>8</sup> Beard attempted to prove, based on Madison's Letter Number 10, that the Framers were consciously motivated by economic self-interest—they wanted the new government to provide them with economic protection. Subsequent constitutional historians, in the process of either attacking or defending Beard's theory, have produced a wealth of information about *The Federalist*, its authors, and the era surrounding its publication. But before one can appreciate the need for the Court to expand its historical inquiry by taking advantage of this wealth of information, one must understand the importance of history in constitutional adjudication.

## II. USE OF HISTORY IN CONSTITUTIONAL ADJUDICATION

Two issues determine the importance of history in constitutional adjudication: First, whether history is relevant to constitutional adjudication, and second, if history is relevant, how history should be used in constitutional adjudication.

### A. Relevance of History in Constitutional Adjudication

The Supreme Court has determined that history is relevant in constitutional adjudication by making consistent references to historical events, documents, and studies. Yet some scholars believe that justices should confine their constitutional analysis to the plain meaning of the words and interpret those words to advance desirable contemporary values. One such scholar is Professor Paul Brest, who called the historical enterprise to determine

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8. C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

original intentions a "misconceived quest," echoing Henry Ford's quip, "History is Bunk."<sup>9</sup> Brest concluded that "one can better protect fundamental values and the integrity of democratic processes by protecting them than by guessing how other people meant to govern a different society a hundred or more years ago."<sup>10</sup> Brest supported his conclusion by demonstrating the difficulties in determining whose intentions matter, what those intentions were, and the relevance of those intentions to novel or evolving problems. Brest also stated that to use history in constitutional analysis one must overcome the subjectivity that distorts any historical work and makes objective knowledge of the past impossible.<sup>11</sup>

Other scholars have disagreed with Brest. Professor Raoul Berger argued that total rejection of history would allow courts and legislatures to ignore all decisions and laws by claiming that they have no ability or obligation to understand, much less follow, their predecessors' views.<sup>12</sup> Philosopher John Miller wrote that law is by definition historical:

A rule without antecedents or liability to revision lacks, in the end, any relevance or meaning, since it could never be elucidated in words, which are themselves the vehicles of accumulated experience. Such a rule, purporting to be independent of history, operates only as a natural force and can be met only by force.<sup>13</sup>

Miller asserted that history is an inescapable part of identity: "One needs a past. A historical past is more than a thing of

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9. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

10. *Id.* at 238.

11. *Id.* at 221-22. Such relativism flirts with Samuel Beckett's nihilism:

Was I sleeping, while the others suffered? Am I sleeping now? Tomorrow, when I wake, or think I do, what shall I say of today? That with Estragon my friend, at this place, until the fall of night, I waited for Godot? That Pozzo passed, with his carrier, and that he spoke to us? Probably. But in all that what truth will be there?

S. BECKETT, *WAITING FOR GODOT* 58 (S. Beckett trans. 1970); see also M. MANDELBAUM, *THE ANATOMY OF HISTORICAL KNOWLEDGE* 148 (1977):

[Croce's] insistence that all history is contemporary history rested on his view that artifacts and documents, considered as objective facts, are without significance until the historian who examines them brings them to life through his imaginative re-creation of them. Thus, for him, none of the data with which historians deal are ultimately independent of the subjects by whom they are known.

12. Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 Md. L. Rev. 1 (1981).

13. J. MILLER, *THE PHILOSOPHY OF HISTORY* 180 (1981).

time; it is always the bearer of infinity, the dynamic of divine forces in time.”<sup>14</sup>

Thus, there is both support for the position that history is relevant in constitutional adjudication and for the position that it is not. In this article I assume, as the Supreme Court has, that history is relevant.

### *B. Influence of History on Constitutional Adjudication*

Even if one assumes that history is relevant in constitutional adjudication, one must still determine how much influence history should have on such adjudication. This problem can be partially resolved by determining how to use history: as rhetoric, evidence of motive or intent, an illustration of consistency, or an inquiry into the evolution of values.

Raoul Berger contended that whenever the specific beliefs of the Framers could be ascertained the Court is bound by those beliefs. Accordingly, Berger claimed that the Court erred when it held that the historical background of the fourteenth amendment supported desegregation of public schools and reapportionment of state legislatures. The Court should have deferred to the Framers’ documented opposition to such specific interpretations.<sup>15</sup>

14. *Id.* at 167; see also J. ORTEGA Y GASSET, HISTORY AS A SYSTEM AND OTHER ESSAYS TOWARD A PHILOSOPHY OF HISTORY 192 (1941), in which philosopher Jose Ortega y Gasset traced antihistorical theorizing to the Greek philosopher Parmenides, who was “searching for a fixed, static consistency, hence something that the entity *already is*, which already composes or constitutes it.” The Greeks’ acceptance of Parmenides’ views meant that the term “history” became an opponent of the term “reason.” *Id.* at 231. Ortega y Gasset attempted to resolve this conflict by engaging in “historical reason,” which “accepts nothing as mere fact: it makes every fact fluid in the *fieri* whence it comes, it sees how the fact takes place.” *Id.* at 232. Ortega y Gasset concluded that facts emerge from “ideas—interpretations—that man has manufactured at a given juncture of his life.” *Id.* at 233.

As intriguing as this ancient debate is, this article, like most other historical pieces, will not directly probe the issue of history’s applicability and feasibility. I will assume, as I believe, that despite its limitations and ambiguities history should be a part of any legal inquiry. I agree with Ralph Waldo Emerson that “there is properly no History; only Biography.” II THE COLLECTED WORKS OF RALPH WALDO EMERSON 6 (J. Slater ed. 1979). Emerson meant that one should try actively to read history as if one were reliving the events. Applying his theory to constitutional history, one compares one’s own reactions to a case with the views of those who first faced the underlying forces that generated the law. This attempt to understand one’s historical past, making history a form of political psychoanalysis, does not necessitate deifying the Framers; it only requires sufficient immersion in what we know of their lives so we can remain organically connected with our past and have the benefits of their wisdom and shortcomings.

15. See R. BERGER, GOVERNMENT BY JUDICIARY 89, 214, 293, 407-18 (1977).

On the other hand, the Framers may not have intended to bind future generations to their original conceptions. As Hamilton stated in *The Federalist*,

Nothing, therefore, can be more fallacious than to infer the extent of any power proper to be lodged in the national government from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity.<sup>16</sup>

Berger might reply as he did in *Government by Judiciary*, that "Hamilton rejected the argument that the courts were empowered 'to construe the laws according to the spirit of the Constitution.'"<sup>17</sup>

Despite his strong commitment to history, John Miller would probably oppose, as a "static rule," Berger's total deference to known contemporaneous intentions. Miller stated: "Those who propose such rules do not want anyone to act. Action is to be under the law rather than the source of law in its self-maintenance."<sup>18</sup>

The problem, then, is how the Supreme Court should balance competing forces of continuity, deference, necessity, and novelty. Just as history attempts to describe the acts of unique individuals in a specific era, legal cases present unique problems and unique situations. Justice Holmes summarized the process:

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16. THE FEDERALIST, *supra* note 1, No. 34 at 207 (A. Hamilton). Hamilton consistently advanced a broad interpretation of constitutional powers throughout his career: "[N]o construction ought to prevail calculated to defeat the express and necessary authority of the government." 8 THE WORKS OF ALEXANDER HAMILTON 380 (H.C. Lodge ed. 1904).

17. R. BERGER, *supra* note 15, at 294 (quoting THE FEDERALIST, *supra* note 1, No. 81 at 482 (A. Hamilton)). Hamilton did not think that the Supreme Court would construe its power so broadly. Rather, he thought that the Supreme Court's discretion would be no greater than the discretion of a state court to construe that state's constitution. Furthermore, judges tend to be more fit to decide cases than legislative members who always retain the ultimate sanction of impeachment for unwarranted judicial opinions. THE FEDERALIST, *supra* note 1, No. 81 at 482-85 (A. Hamilton).

18. J. MILLER, *supra* note 13, at 176. Ronald Dworkin attempted to resolve this problem by distinguishing the Framers' broad concept of basic values protected by the Constitution from their specific conceptions of how the Constitution would work. Dworkin concluded that one should primarily be concerned with the Framers' concept of government. However, there are problems with Dworkin's imagery. For example, one may agree with Hamilton's broad conception of the Commerce Clause—justifying a national bank—without accepting Hamilton's underlying commitment to the concept of constitutional monarchy. For an example of Dworkin's thesis, see Dworkin, *The Forum of Principles*, 56 N.Y.U. L. Rev. 469 (1981).

"[E]very question of construction is unique, and an argument that would prevail in one case may be inadequate in another."<sup>19</sup> Nevertheless, the historical inquiry is a useful starting point in developing perspective; an unwillingness to revert completely to eighteenth century legal values does not preclude efforts to understand the brilliant thoughts and deeds of that era. Perhaps history should be presumptively controlling, or should tip the scales in a close case.

If history is given some weight in constitutional adjudication, one must then determine what the Court is trying to verify and by what method it can achieve that verification through historical analysis. Jacobus tenBroek wrote that the Court claimed to be engaging in historical research to determine the intentions of the people who supported and voted for the Constitution, a task tenBroek found "manifestly indeterminable."<sup>20</sup> TenBroek observed that the Court's methodology, which was unequal to its articulated task, consisted primarily of relying upon convention debates and proceedings to determine the Framers' remedy for a given problem. Whenever the Court found that history presented views contrary to its planned holding, the Court rejected, ignored, or distorted that history. Consequently, the Court's historical analysis was "an instrument of persuasion."<sup>21</sup> TenBroek was not troubled by the Court's analysis since he believed the Constitution was "designed to reach beyond the scope of merely preserving order."<sup>22</sup> The Framers did not intend a "static society"; they would agree that "our contemplation cannot be only of what has been but of what may be."<sup>23</sup>

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19. *United States v. Jin Fuey Moy*, 241 U.S. 394, 402 (1916).

20. tenBroek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CALIF. L. REV. 287, 437, 453, 664 (1938). For another example of the impact of extrinsic aids on case law, see Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976). One of the finest examples of a study of the Court's use of history in specific cases is C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969); see also Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982). For examples of "left" interpretations of legal history, see Feinman, *The Role of Ideas in Legal History*, 78 MICH. L. REV. 722 (1980); Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. OF LEGAL HIST. 275 (1973).

21. tenBroek, *supra* note 20, at 308.

22. *Id.* at 680.

23. *Id.* at 680-81.

Undoubtedly, the Court has used *The Federalist* as an instrument of persuasion. Nevertheless, according to tenBroek, the authors of the papers might not have objected. Indeed, both Madison and Hamilton supported broad, flexible constructions of the new Constitution.

### III. THE SUPREME COURT'S USE OF *The Federalist*

The following cases have been divided into two groups: those decided before and after the publication of Charles Beard's controversial book. Although Beard radically altered the historiography of both *The Federalist* and the Constitution, the Court has not taken advantage of the wealth of information resulting from support of and rebuttals to Beard's theory. Rather, the Court has continued to use the same methodology employed prior to Beard's thesis.

#### A. *Pre-Charles Beard (1789-1913)*

*The Federalist* gained prestige almost from its publication. The Supreme Court continually used it as an instrument of persuasion—citing it as an authoritative source in support of a desired holding, and ignoring it or giving it little weight if it opposed the Court's desired holding.

##### 1. Early Historiography of The Federalist and the Constitution

*The Federalist* gained immediate prestige because of the early Court's frequent use of the document and lavish praise of its authors. *The Federalist*'s publication as a book in 1788, the same year as its initial newspaper publication, also aided its prestige.<sup>24</sup> Other publications relating to the ratification of the Constitution were not published until much later. Almost forty years passed before *Elliott's* (or *Elliott's*) *Debates* were published.<sup>25</sup> Madison's papers were not published until 1840,<sup>26</sup> and

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24. Only one New York newspaper, the *Independent Journal*, published *The Federalist* in its entirety. McLean issued the first bound edition in 1788. For more details, see B. MITCHELL, ALEXANDER HAMILTON, YOUTH TO Maturity 632 n.13 (1957).

25. THE DEBATES IN THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliott ed. 1836-45). This work was a collection of debates in the state ratifying conventions. The early Supreme Court frequently resorted to this source. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 54 (1849); *The Passenger Cases*, 48 U.S. (7 How.) 283, 543 (1849); *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 135 (1869); *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 621 (1871) (Clifford, J., dissenting); *Hans v. Louisi-*

*Hamilton's Works* were printed in 1851.<sup>27</sup> Farrand's *Records* did not appear until 1911.<sup>28</sup>

Many histories of the Constitution were published before Beard's work. The Court has referred to Story,<sup>29</sup> Kent,<sup>30</sup> Curtis,<sup>31</sup> Rawle,<sup>32</sup> and Cooley<sup>33</sup> in cases in which it also consulted

ana, 134 U.S. 1, 14 (1890).

C. Lee, counsel in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 304 (1803), cited Madison's Speeches at the Virginia Convention. The Virginia Debates were also consulted in *Florida v. Georgia*, 58 U.S. (17 How.) 478, 518-19 (1855). Madison's 1799 Report to the Virginia Legislature was used, along with *The Federalist*, to determine the meaning of "migration and importation" in McKinley's concurring opinion in *The Passenger Cases*, 48 U.S. at 453.

26. THE PAPERS OF JAMES MADISON (1840). Madison's delay in publishing his papers, particularly his notes on the Constitutional Convention, partially resulted from his changed political views. Robert Yates, who attended the Convention as a delegate from New York but later supported the Anti-Federalists in the ratification struggle, published his notes in 1827, showing Madison's early nationalism:

Urged in 1827 to publish [the Notes] to refute Yates, he replied that only three of the framers were still living and it would be more delicate and more useful to wait until all were gone. No personal or party views could then be imputed.

He did not explain (as he did to Jefferson in 1799) that publication would aid the opposing party.

I. BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 22 (1950).

Madison's papers were frequently consulted to explore the meaning of the Constitution, but not the meaning of *The Federalist*. See *Nelson v. Carland*, 42 U.S. (1 How.) 265, 272 (1843); *The Passenger Cases*, 48 U.S. (7 How.) 283, 396, 543 (1849) (both sides); *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 135 (1869). Madison's Notes on the Convention were used in *Jackson v. Steamboat Magnolia*, 61 U.S. (20 How.) 296, 332 (1858) (Campbell, J., dissenting). His writings were also cited in *Springer v. United States*, 102 U.S. 586, 596 (1881).

27. THE WORKS OF ALEXANDER HAMILTON (J.C. Hamilton ed. 1850-51). *Hamilton's Works* were cited in *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 348 (1875); *Springer v. United States*, 102 U.S. 586, 597 (1881); and *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, 572 (1895).

28. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1911).

29. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833). Story was cited in *The Passenger Cases*, 48 U.S. (7 How.) 283, 556 (1849); *Gordon v. United States*, 117 U.S. 697, 700 (1864); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 388 (1867); *The Justices v. Murray*, 76 U.S. (9 Wall.) 274, 277-78 (1870); *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 665 (1871) (Field, J., dissenting); and *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888).

30. J. KENT, COMMENTARIES ON AMERICAN LAW (1826). Kent was considered in *The Passenger Cases*, 48 U.S. (7 How.) 283, 555 (1849); *Gordon v. United States*, 117 U.S. 697, 700 (1864); and *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 517-18 (1898).

31. G. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES (1854-58) was included in a string citation with *The Federalist* in *Edwards v. Kearzey*, 96 U.S. 595, 606 (1878).

32. W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (1829) was referred to in *Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 445 (1869) and *McPherson v. Blacker*, 146 U.S. 1, 36 (1892).

33. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON

*The Federalist.* Additionally, some justices have turned to the First Session of Congress<sup>34</sup> and the 1789 Judiciary Act<sup>35</sup> for guidance in determining the original intentions of the Framers of the Constitution. Even though these other reference materials were available, the Court and the historians developed a consensus that *The Federalist* papers were the major source to determine the wisdom, virtue, and meaning of the Constitution.

## 2. *The Court's canonization of The Federalist through rhetoric and frequent diverse application*

From the beginning the Court, when interpreting the Constitution, frequently cited *The Federalist* and praised its authors. For example, Chief Justice Chase turned to *The Federalist* in *Calder v. Bull*<sup>36</sup> when he voided, under the Constitution's ex post facto prohibition, a state statute repealing a prior probate court decision. Chief Justice Chase believed the "author" of *The Federalist* to be superior to both Sir William Blackstone and Mr. Woodeson "for his extensive and accurate knowledge of the true principles of Government."<sup>37</sup>

THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868) appeared in *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 348 (1875).

34. The First Session of Congress, dominated by the Framers of the Constitution, has always been another major source of information on original intentions. See *The Justices v. Murray*, 76 U.S. (9 Wall.) 274, 282 (1870); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 516 (1898). *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 616-17 (1842), referred to both the 1791 and 1793 congressional sessions.

35. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821); *Clafin v. Houseman*, 93 U.S. 130, 139 (1876); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 516-18 (1898).

36. 3 U.S. (3 Dall.) 386 (1798).

37. *Id.* at 391. Chase did not use the *The Federalist*, as he could have, to justify the Court's judicial review of the unconstitutional state law.

The Court later used *The Federalist* to defend an over-expanding scope of judicial review. After quoting Number 22 on the need for supreme judicial authority to insure uniformity, Justice Wayne in *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 358 (1856), said: "Hitherto we have shown from the constitution itself that the framers of it meant to provide a jurisdiction for its final interpretation, and for the laws passed by Congress, to give them an equal operation in all of the States." Justice Wayne actually demonstrated that the Court needed *The Federalist* to find the broad scope of judicial review which did not overtly exist in the Constitution. Even Justice Campbell, who dissented in *Dodge*, later relied on Hamilton to justify broad judicial jurisdiction, particularly in admiralty cases:

The judicial power of the United States was organized to comprehend all cases that might properly arise under the Constitution, laws, and treaties of the United States, and, in addition, cases of which, from the character of the parties, the decision might involve the peace and harmony of the Union. This principle was accepted without dissent among the framers of the Constitution.

The Marshall Court also praised *The Federalist*. For example, in his concurring and dissenting opinion in *Fletcher v. Peck*<sup>38</sup> Justice Johnson stated that the "letters of Publius, which are well known to be entitled to the highest respect,"<sup>39</sup> reinforced the principle that the states are to be "restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States."<sup>40</sup> In 1819 Chief Justice Marshall interpreted *The Federalist* in *McCulloch v. Maryland*<sup>41</sup> to rebut the State of Maryland's argument that Hamilton's Number 34 allowed state taxation of the national bank (support of equal taxing powers for state and federal governments). After deifying the authors—"No tribute can be paid to them which exceeds their merit"<sup>42</sup>—Chief Justice Marshall claimed Maryland quoted *The Federalist* out of context. According to Chief Justice Marshall, Number 34 only addressed the Anti-Federalist concern that federal taxing power could swallow the states and did not affirm the power of the states to tax the federal government. Marshall claimed that the authors would have agreed with him if they had been asked about the specific issue.<sup>43</sup> Having become a states' rights advocate by the time of *McCulloch*, James Madison must have been distraught by Chief Justice Marshall's paraphrasing of the argument in Number 44 that every constitutional power has the implied means to fulfill that power.<sup>44</sup>

The Court has used *The Federalist* to support the legal use of ambiguous terms such as "piracy"<sup>45</sup> and to illuminate structural issues such as the scope of concurrent state and federal

38. 10 U.S. (6 Cranch) 87 (1810) (Johnson, J., concurring and dissenting).

39. *Id.* at 144 (Johnson, J., concurring in part and dissenting in part).

40. *Fletcher*, 10 U.S. at 139.

41. 17 U.S. (4 Wheat.) 316 (1819).

42. *Id.* at 433.

43. *Id.* at 435.

44. Madison wrote: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included." THE FEDERALIST, *supra* note 1, No. 43 at 285 (J. Madison). Marshall restated the idea in *McCulloch*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. at 421.

45. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158-59 (1820).

court jurisdiction.<sup>46</sup> When the Court found broad appellate jurisdiction over national and state systems in *Cohens v. Virginia*,<sup>47</sup> it turned to *The Federalist*: "Great weight has always been attached, and very rightly attached to contemporaneous exposition. . . . The opinion of *The Federalist* has always been considered as of great authority."<sup>48</sup>

Justice Story claimed that *The Federalist* supported broad presidential discretion in calling out the militia,<sup>49</sup> but he did not turn to Madison's Number 44, to support his rule of constitutional construction that "these powers must be so construed as to the modes of their exercise as not to defeat the great end in view."<sup>50</sup> Justice Trimble found an underlying political philosophy in *The Federalist* which affects all constitutional interpretation:

In my judgment, the language of the authors of the Federalist proves that they, at least, understood, that the protection of personal security, and of private rights, from the despotic and iniquitous operation of retrospective legislation, was, itself, and alone, the grand principle intended to be established.<sup>51</sup>

In *Cherokee Nation v. Georgia*<sup>52</sup> Justice Baldwin expressed reservation about *The Federalist*'s relevance in constitutional adjudication. The majority had made no reference to *The Federalist* when defining the term "state" for purposes of original Supreme Court jurisdiction; however, Justice Baldwin's concurring opinion raised doubts about the Court's construction of the Constitution:

We can thus expound the constitution without a reference to the definitions of a state or nation by any foreign writer, hypothetical reasoning, or the dissertations of the Federalist. This would be to substitute individual authority in place of the declared will of the sovereign power of the union, in a written fundamental law. . . . It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the

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46. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 8-9 (1820); see also *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 571 (1838).

47. 19 U.S. (6 Wheat.) 264 (1821).

48. *Id.* at 418-19.

49. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827).

50. *Id.* at 30.

51. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 331 (1827).

52. 30 U.S. (5 Pet.) 1 (1831).

words of an instrument expressly provide, shall be exempted from its operation.<sup>53</sup>

Apparently, Justice Baldwin was questioning whether *The Federalist*, or any other historical work, was relevant in constitutional adjudication. Even so, the Court continued to consult *The Federalist*.

The scope of the states' taxing powers generated the first disagreement among the justices concerning *The Federalist's* meaning. Justice Thompson, who was not sitting on the bench when *McCulloch* was decided, claimed in *Brown v. Maryland*<sup>54</sup> that Number 32 supported his decision that states could tax imports after such imports became articles of internal trade. When Justice Thompson again used Number 32 in *Weston v. City Council of Charleston*,<sup>55</sup> Chief Justice Marshall countered that the "great statesmen" would have agreed with him that the states could *not* tax stock issued by the United States for its own loans.<sup>56</sup>

The heated historical debate over the constitutionality of state taxation continued in *The Passenger Cases*,<sup>57</sup> where two justices disagreed over *The Federalist's* position on state taxation of alien passengers. Although both justices agreed on the case's merits, Justice McLean claimed to defer more to *The Federalist's* authority than to the weight of its arguments,<sup>58</sup> while Justice McKinley concluded:

The acknowledged accuracy of language and clearness of diction in the Constitution would seem to forbid the imputation of so gross an error to the distinguished authors of that instrument. . . . Were they, however, directly opposed to it, they could not, by any known rule of construction, control or modify the plain and unambiguous language of the clause in question.<sup>59</sup>

The early Court also invoked *The Federalist* in a number of other situations. For example, in *City of New York v. Miln* Justice Barbour used *The Federalist* to help define the Commerce

53. *Id.* at 40-41 (Baldwin, J., concurring).

54. 25 U.S. (12 Wheat.) 419, 456 (1827) (Thompson, J., dissenting).

55. 27 U.S. (2 Pet.) 449, 477 (1829) (Thompson, J., dissenting).

56. 27 U.S. (2 Pet.) at 469.

57. 48 U.S. (7 How.) 283 (1849).

58. *Id.* at 396.

59. *Id.* at 453.

Clause.<sup>60</sup> Justice Barbour held that the states under their police power could require ships to register and fine ships that failed to register. Since he was broadening state power, Barbour discussed Number 45:

Let us see what powers are left with the states. The Federalist, in the 45th number, speaking of this subject, says; the powers reserved to the several states, will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state.<sup>61</sup>

In *The License Cases*<sup>62</sup> Justice Catron relied on the history of *The Federalist* in upholding state power to license liquor retailers. He said that Number 32 particularly supported his interpretation

in favor of the State power. These remarks were made to quiet the fears of the people, and to clear up doubts on the meaning of the constitution, then before them for adoption by the State conventions. And it is an historical truth, never, so far as I know, denied, that these papers were received by the people of the States as the true exponents of the instrument submitted for their ratification.<sup>63</sup>

Madison's Number 43 was invoked in *Prigg v. Pennsylvania*<sup>64</sup> when Justice Story held that the national government must enforce the fugitive slave laws "to carry into effect all the rights and duties imposed upon it by the Constitution."<sup>65</sup> Chief Justice Taney also employed *The Federalist* in *Dred Scott v. Sandford*,<sup>66</sup> but only to show the historical need for national regulation of the territories.

The Court also used *The Federalist* to limit states' powers. In *Fox v. Ohio*<sup>67</sup> the Court described one of *The Federalist*'s ambiguous rules of constitutional construction:

Mr. Hamilton, in the thirty-second number of The Federalist, says there is an exclusive delegation of power by the States to the federal government in three cases:—1. Where in

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60. 36 U.S. (11 Pet.) 102 (1837).

61. *Id.* at 133.

62. 46 U.S. (5 How.) 504 (1847).

63. *Id.* at 607.

64. 41 U.S. (16 Pet.) 539 (1842).

65. *Id.* at 616.

66. 60 U.S. (19 How.) 393, 447 (1857).

67. 46 U.S. (5 How.) 410 (1847).

express terms an exclusive authority is granted; 2. Where the power granted is inhibited to the States; and 3. Where the exercise of an authority granted to the Union by a State would be "contradictory and repugnant."<sup>68</sup>

The Court then summarily concluded that congressional power to punish counterfeiters fell under the third category and thus a state could not punish the same act that a congressional act punished. Neither conclusion necessarily followed from Hamilton's formula, and the Court could have found even broader standards of national delegation in Hamilton's other works. Yet the Court did not explain why Number 45, which had been used in *Miln* to broaden states' power, did not apply.

In *Luther v. Borden*<sup>69</sup> Justice Woodbury used Hamilton's Number 77 to brilliantly analyze the relationship of the judiciary to the other two federal branches and the relationship of all three branches to the people. He first warned that a distant court may oppress the people, but said that the Court has less power because it only reacts to laws and actions initiated by the other two branches. Justice Woodbury stated that all three branches are ultimately dependent upon the people's will.

[I]f the judiciary at times seems to fill the important station of a check in the government, it is rather a check on the legislature, who may attempt to pass laws contrary to the Constitution, or on the executive, who may violate both the laws and Constitution, than on the people themselves in their primary capacity as makers and amenders of the constitutions.<sup>70</sup>

*The Federalist* was also used to support a decision extending diversity jurisdiction to corporations in *Marshall v. Baltimore & Ohio Railroad Co.*<sup>71</sup> Justice Campbell raised the classic objection to the majority's use of *The Federalist* —extrapolation from such dated evidence. Campbell concluded that *The Federalist*, by its own language, was useless in determining a corporation's right to diversity jurisdiction: "Nor were corporations within the contemplation of the framers of the Constitution when they delegated a jurisdiction over controversies between the citizens of different States."<sup>72</sup>

68. *Id.* at 439.

69. 48 U.S. (7 How.) 1 (1849).

70. *Id.* at 53 (Woodbury, J., dissenting).

71. 57 U.S. (16 How.) 314, 326 (1853).

72. *Id.* at 351 (Campbell, J., dissenting).

*Ex Parte Garland*<sup>73</sup> provided an ironic variation of *The Federalist*'s uncertain influence in constitutional adjudication. The majority voided congressional legislation requiring all attorneys—including those pardoned after the Civil War—to swear under oath that they had never taken up arms against the United States. However, the majority did not quote *The Federalist*, as they could have, to support the holding that the legislation was a bill of attainder or to reinforce their argument that congressional interference with the admission of officers of the Court violated the separation of powers doctrine. The dissent relied on *The Federalist* to support those two concepts, but nevertheless claimed that the oath was legal.<sup>74</sup>

Justices have also used *The Federalist* to justify significant reductions in police power in favor of the right to contract. Justice Strong in his dissent in the *Sinking-Fund Cases*<sup>75</sup> interpreted Hamilton's Number 84 as verification of limitations on government beyond the express limitations in the Constitution.<sup>76</sup>

Finally, Chief Justice Fuller considered *The Federalist* helpful in outlawing income taxes in *Pollock v. Farmers' Loan & Trust Co.*<sup>77</sup> "In our judgment, the construction given to the Constitution by the authors of the *Federalist* . . . should not be and cannot be disregarded . . ."<sup>78</sup>

Thus, one sees that the early Court used *The Federalist* as a means of persuasion for many different issues. Indeed *The Federalist* may be used to support many positions. The justices traditionally have strengthened their interpretation of the Constitution by invoking the authority of *The Federalist*.

### 3. *The Court's disregard of The Federalist*

When the Court took a position not supported by *The Federalist*, it faced a different situation. The response has been either to disregard *The Federalist* or to give it little weight.

The Court has consistently ignored *The Federalist*'s hostility to paper money. In *Briscoe v. Bank of Kentucky*,<sup>79</sup> which upheld the power of a state bank to issue notes, Justice Story

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73. 71 U.S. (4 Wall.) 333 (1866).

74. *Id.* at 388 (Miller, J., dissenting).

75. 99 U.S. 700 (1878).

76. *Id.* at 736-37 (Strong, J., dissenting).

77. 158 U.S. 601 (1895).

78. *Id.* at 627.

79. 36 U.S. (11 Pet.) 257 (1837).

dissented on the ground that the constitutional prohibition against bills of credit was designed to prevent the mischief of paper money: "This passage shows the clear sense of the writer, that the prohibition was aimed at a paper medium, which was intended to circulate as currency; and to that alone."<sup>80</sup> In four more cases a dissenting justice or an attorney argued that the Court was defying *The Federalist*'s opposition to paper currency; however, the majorities simply ignored any citation to *The Federalist*.<sup>81</sup>

The Supreme Court eventually concluded that *The Federalist* justified increased federal regulation of state elections despite its explicit language to the contrary. The Court first allowed federal criminal prosecution for tampering with state election ballots in *Ex Parte Clarke*.<sup>82</sup> In its opinion the majority ignored Chief Justice Field's dissenting quotation of one of Hamilton's letters:

Suppose an article had been introduced into the Constitution empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a pre-meditated engine for the destruction of the State governments?<sup>83</sup>

Justice Field's arguments later prevailed in *Newberry v. United States*,<sup>84</sup> in which the Court held that Congress could not regulate the amount of money a state candidate could spend in his nomination or election. However, later decisions followed Justice Pitney's concurrence in *Newberry*, which argued that Hamilton was only rebutting the Anti-Federalist fear that Congress might impose discriminatory standards on state elections. According to Justice Pitney, Congress must have power to regulate elections since "every government ought to contain in itself the means of its own preservation."<sup>85</sup> In five additional cases the Court ex-

80. *Id.* at 333. Story also wrote that "[n]ot a single historian" disagreed with his interpretation of "bills of credit" and of the Framers' opposition to their use. *Id.*

81. The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 608 (1871); Legal Tender Case, 110 U.S. 421, 470 (1884); Perry v. United States, 294 U.S. 330, 334 (1935); Norman v. Baltimore & O.R.R., 294 U.S. 240, 247 (1935).

82. 100 U.S. 399 (1880).

83. *Id.* at 418 (Field, C.J., dissenting).

84. 256 U.S. 232 (1921).

85. *Id.* at 283 (Pitney, J., concurring) (emphasis omitted).

panded federal power,<sup>86</sup> and disregarded citations to *The Federalist* that seemed to dictate an opposite result.

### B. Post-Charles Beard (1913-Present)

Unlike the early Court, the modern Court has seldom overtly praised *The Federalist* and its authors; however, the modern Court has presumed the papers' interpretive value. One sees continued respect for *The Federalist* in the Court's steadily increasing number of citations to that document. In fact, in discussing the evolution of constitutional principles and doctrines, the modern Court has frequently consulted *The Federalist* as its first source. Since the Court's conception of the Constitution went through a virtual revolution in the 1930's and a mild thermidor in the 1970's, it is not surprising that *The Federalist* was actively invoked by all sides during those transitional periods.

#### 1. State and federal relations

*The Federalist* has provided several potentially conflicting answers to the question of the proper relationship between the states and the federal government. In *Farmers Loan & Trust Co. v. Minnesota*<sup>87</sup> Justice McReynolds used *The Federalist* to void a state testamentary transfer tax on bonds no longer held in the state. According to Justice McReynolds, the Constitution was designed to prevent state activities that would "disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union."<sup>88</sup> Yet when the Court upheld the congressional power establishing unemployment insurance taxation, McReynolds dissented, quoting Madison's argument that the only federal powers are those specifically defined; all other powers remain with the states.<sup>89</sup>

Justice Black used Number 22 to justify Congress's regulation of an insurance company that conducted a substantial amount of business across state lines. Quoting *The Federalist* he stated: "Speaking of the need of a federal power to regulate 'commerce,' Hamilton had earlier said, 'It is, indeed, evident, on

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86. *MacDougall v. Green*, 335 U.S. 281 (1948); *Ray v. Blair*, 343 U.S. 214 (1952); *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Oregon v. Mitchell*, 400 U.S. 112 (1970).

87. 280 U.S. 204 (1930).

88. *Id.* at 209.

89. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 606 (1937) (McReynolds, J., dissenting).

the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence.' "<sup>90</sup> Justice Black, in the same case, also quoted Madison's acknowledgment in *The Federalist* of the "unavoidable inaccuracy" of the Constitution's language and of the need for time to fully define the law.<sup>91</sup>

Justice Frankfurter believed *The Federalist* supported his experimental federalism, as seen in his dissent from an application of the preemption doctrine:

Since this concurrent jurisdiction was "clearly admitted by the whole tenor" of the Constitution in Hamilton's view, "[i]t is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preexisting right of sovereignty."<sup>92</sup>

Putting great weight on Hamilton's views of the preemption doctrine, Justice Frankfurter argued that the state power had not been preempted. But when he dissented in *Baker v. Carr*,<sup>93</sup> a case concerning legislative apportionment, Justice Frankfurter gave *The Federalist* little weight. Although he conceded that *The Federalist* opposed the "most salient aspects of numerical inequality," Frankfurter replied that since the colonies had long accepted partially unequal representation, the existing state apportionment systems were constitutional.<sup>94</sup>

Justice Rehnquist has relied on *The Federalist* to argue that the power of the federal government should be limited. In

90. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 n.9 (1944) (quoting *THE FEDERALIST*, *supra* note 1, No. 22 at 143-44 (A. Hamilton)).

91. 322 U.S. at 550 n.33. Madison's arguments sound quite contemporary:

All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects and the imperfection of human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. . . . But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas.

*THE FEDERALIST*, *supra* note 1, No. 27 at 229 (J. Madison).

92. *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 546 (1959) (Frankfurter, J., dissenting) (quoting *THE FEDERALIST*, *supra* note 1, No. 32 at 200-01 (A. Hamilton)).

93. 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

94. *Id.* at 307.

his attack on a majority decision to strike down existing death penalty statutes in *Furman v. Georgia*,<sup>95</sup> he commenced by referring to Number 78 and to *Marbury v. Madison*<sup>96</sup> acknowledging the legitimacy of judicial review. Then, quoting Madison's Number 51, Justice Rehnquist stated why such review should be cautious: "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul [sic] the governed: and in the next place, oblige it to controul [sic] itself."<sup>97</sup> Justice Rehnquist stated that the judicial branch should be "at least as much" obligated to control itself as it was to control the other two federal branches.<sup>98</sup>

Chief Justice Burger later quoted the same platitude to justify the narrowing of the federal government's power: "This expresses the balancing indispensable in all governing, and the Bill of Rights is one of the checks to control overreaching by government. But it is a check to be exercised sparingly by federal authority over local expressions of choice going to essentially local concerns."<sup>99</sup>

Justice Brennan interpreted *The Federalist* differently in *National League of Cities v. Usery*.<sup>100</sup> Justice Rehnquist, writing for the majority, prohibited congressional regulation of state employees' wages as a violation of the tenth amendment. Brennan dissented. Relying on Number 31, Brennan insisted that the judiciary should be reluctant to interfere with congressional legislation over state employees under the commerce clause: "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care . . ."<sup>101</sup> Rehnquist neither quoted *The Federalist* nor overtly rejected Brennan's interpretation.

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95. 408 U.S. 238 (1972).

96. 5 U.S. (1 Cranch) 137 (1803).

97. 408 U.S. at 470 (Rehnquist, J., dissenting) (quoting THE FEDERALIST, *supra* note 1, No. 51 at 322 (J. Madison)).

98. 408 U.S. at 470 (Rehnquist, J., dissenting).

99. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 87-88 (1981) (Burger, C.J., dissenting).

100. 426 U.S. 833 (1976) (overruled by *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005 (1985)).

101. *Id.* at 857 n.1 (Brennan, J., dissenting) (quoting THE FEDERALIST, *supra* note 1, No. 31 at 194 (A. Hamilton)).

However, Justice O'Connor in her concurrence/dissent in *Federal Energy Regulatory Commission v. Mississippi*<sup>102</sup> resorted to *The Federalist* in asserting that *Usery* properly analyzed the tenth amendment. She quoted Hamilton in Numbers 15 and 16 for two propositions: (1) "the Constitution marked the 'difference between a league and a government,' because it 'extend[ed] the authority of the union to the persons of the citizens,—the only proper objects of government;'"<sup>103</sup> and (2) "the execution of the laws of the national government . . . should not require the intervention of the State Legislatures."<sup>104</sup> Hamilton might be amused to see his attack on the Articles of Confederation become a blueprint for a new form of federalism. Concerning the Articles of Confederation, Hamilton had stated "that though in theory their resolutions concerning those objects are laws constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option."<sup>105</sup> In writing Number 15, Hamilton never meant to exempt the states from federal power: "The measures of the Union have not been executed; and the delinquencies of the States have step by step matured themselves to an extreme, which has, at length, arrested all the wheels of the national government and brought them to an awful stand."<sup>106</sup>

Like Justice O'Connor, Justice Powell defended a broad interpretation of the tenth amendment in *Equal Employment Opportunity Commission v. Wyoming*,<sup>107</sup> relying on Madison's Number 45:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . The powers reserved to the several States will extend to all the objects,

102. 456 U.S. 742 (1982) (upholding congressional power affecting state owned utilities).

103. *Id.* at 792 (O'Connor, J., concurring in part and dissenting in part) (quoting THE FEDERALIST, *supra* note 1, No. 15 at 109 (A. Hamilton)).

104. 456 U.S. at 793. (O'Connor, J., concurring in part and dissenting in part) (quoting THE FEDERALIST, *supra* note 1, No. 16 at 117 (A. Hamilton)).

105. THE FEDERALIST, *supra* note 1, No. 15 at 108 (A. Hamilton).

106. *Id.* at 112.

107. 460 U.S. 226 (1983) (Justice Powell dissented from a decision upholding age discrimination suits against the states).

which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.<sup>108</sup>

Justice Powell's view of limited federal power over state activity can be contrasted with Justice Brennan's view in *Usery* that the federal government ought to be able to legislate when needed even though that legislation directly affects state activity. It is apparent that *The Federalist*'s ambiguous language can be invoked by both sides to support desired conclusions.

In *Garcia v. San Antonio Metropolitan Transit Authority*<sup>109</sup> five justices, who had whittled *Usery* down virtually to its facts in such cases as *Federal Energy Regulatory Commission v. Mississippi*, held that since so little remained of *Usery* and since that remainder was "both impractical and doctrinally barren,"<sup>110</sup> *Usery* should be overruled. Both the majority and the dissent invoked *The Federalist* to support their positions. The majority argued that the authors of *The Federalist* sought to protect state sovereignty through the Constitutional structure—primarily through equal state representation in the Senate.<sup>111</sup> The dissenters turned to several sections in *The Federalist* written to assuage Anti-Federalist fears of central government tyranny, supporting the theme that the national government was limited to "certain enumerated objects."<sup>112</sup>

Either side could have initially pointed out that *The Federalist* was written prior to the passage of the tenth amendment. But even assuming *The Federalist*'s relevance, both sides could have used it more effectively. The majority could have cited Number 44 to undercut the dissent's limited construction of the national power: "No axiom is more clearly established in law, or in reason than wherever the end is required, the means are au-

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108. *Id.* at 271 (Powell, J., dissenting) (quoting THE FEDERALIST, *supra* note 1, No. 45 at 292-93 (J. Madison)).

In another example of *The Federalist*'s use in support of state powers, Justice Stevens made a general reference to Number 32 to reinforce the proposition that "[t]he exercise of State authority in a field traditionally occupied by State law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress." *Southland Corp. v. Keating*, 104 S. Ct. 852, 862 (1984) (Stevens, J., concurring in part and dissenting in part).

109. 105 S. Ct. 1005 (1985).

110. *Id.* at 1021.

111. *Id.* at 1018.

112. *Id.* at 1028 (Powell, J., dissenting) (quoting THE FEDERALIST, *supra* note 1, No. 39 at 245 (J. Madison)).

thorized; whenever a general power to do a thing is given, every particular power necessary for doing it is included."<sup>113</sup> The majority also could have turned to *The Federalist's* discussion of the commerce clause, instead of maintaining debate on an abstract level: "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose and from which no apprehensions are entertained."<sup>114</sup>

Writing for the dissent Justice Powell began his historical discussion with quotations from Anti-Federalists, followed by extensive citation of *The Federalist*.<sup>115</sup> Since the authors of *The Federalist* frequently adopted the rhetorical technique of assuming the legitimacy of the opponent's position, it is difficult to isolate the authors' intentions: "The proposed Constitution, therefore, even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal Constitution, but a composition of both."<sup>116</sup> Nevertheless, Justice Powell demonstrated that Publius articulated a substantive division between state and federal power: "The operations of the federal government will be most extensive and important in times of war and danger; those of the State government in times of peace and security."<sup>117</sup> Justice Powell thus used *The Federalist* to refute the majority's argument that the Constitution's structure was to be the exclusive protection of state sovereignty. But Powell could have further diminished the majority's reliance on such structural protections as Senate representation by showing that Madison wrongly assumed, based upon experiences under the Articles of Confederation, that "the members of the federal legislature will be likely to attach themselves too much to local ob-

113. THE FEDERALIST, *supra* note 1, No. 44 at 285 (J. Madison). There are other sections supporting a broad grant under delegated powers: "[I]n the sources from which the ordinary powers of government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal . . ." THE FEDERALIST, *supra* note 1, No. 39 at 246 (J. Madison).

114. THE FEDERALIST, *supra* note 1, No. 45 at 293 (J. Madison). This generous reading of the commerce clause readily follows the quotation used by the dissent from Number 45, and thus undercuts any argument that *The Federalist* supported a narrow construction of that clause. See also THE FEDERALIST, *supra* note 1, No. 22 at 143-44 (A. Hamilton) ("It is indeed evident, on the most superficial view, that there is no object, either as it respects the interest of trade or finance, that more strongly demands a federal superintendence.").

115. *Garcia*, 105 S. Ct. at 1027-29.

116. THE FEDERALIST, *supra* note 1, No. 39 at 246 (J. Madison).

117. THE FEDERALIST, *supra* note 1, No. 45 at 293 (J. Madison).

jects.”<sup>118</sup> But then Powell would also have had to face Madison’s version of the “changed times” argument:

If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due  
....<sup>119</sup>

Both sides would possibility have cited *The Federalist* with less conviction had they recalled one of its more humble passages:

Not less arduous must have been the task of marking the proper line of partition between the authority of the general and that of the State governments. Every man will be sensible of this difficulty in proportion as he has been accustomed to contemplate and discriminate objects extensive and complicated in their nature.<sup>120</sup>

## 2. Executive power

The Court has frequently used *The Federalist* to define and expand executive power. In *Hines v. Davidowitz*<sup>121</sup> Justice Black referred to *The Federalist* to determine that federal alien laws could preempt state alien registration laws: “The importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in Federalist papers No. 3, 4, 5, 42, and 80.”<sup>122</sup> Justice Frankfurter also quoted *The Federalist* to uphold the Smith Act in *Dennis v. United States*:<sup>123</sup> “The right of a government to maintain its existence—self-preservation—is the most pervasive aspect of sovereignty. ‘Security against foreign danger,’ wrote Madison, ‘is one of the primitive objects of civil society.’”<sup>124</sup>

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118. THE FEDERALIST, *supra* note 1, No. 46 at 296 (J. Madison).

119. *Id.* at 295.

120. THE FEDERALIST, *supra* note 1, No. 37 at 227 (J. Madison).

121. 312 U.S. 52 (1941).

122. *Id.* at 62 n.9.

123. 341 U.S. 494 (1951).

124. *Id.* at 519 (Frankfurter, J., concurring) (quoting THE FEDERALIST, *supra* note 1, No. 41 at 256 (J. Madison)).

In *Reid v. Covert*<sup>125</sup> Justice Black held that civilian defendants could not be tried by a court martial for a capital crime. He emphasized Madison's fear of the military: "And those who adopted the Constitution embodied their profound fear and distrust of military power, as well as their determination to protect trial by jury, in the Constitution and its Amendments."<sup>126</sup> Indeed, "[t]heir fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders."<sup>127</sup>

Chief Justice Vinson dissented from a decision holding unconstitutional President Truman's seizure of steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>128</sup> He quoted from *The Federalist*—"Energy in the Executive is a leading character in the definition of good government"<sup>129</sup>—and paraphrased the argument from Hamilton's defense of Washington's Proclamation of Neutrality that "the Executive has the duty to do that which will preserve peace until Congress acts."<sup>130</sup>

Justice Harlan dissented from a decision limiting military courts-martial to service-related offenses. He also employed Hamilton's words: "[T]he government of the armed forces 'ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent & variety of the means which may be necessary to satisfy them.'"<sup>131</sup>

Justice Powell turned to *The Federalist* to justify deference to Congress in its establishment of peacetime armies. He held that Congress could condition student loans on applicants' statements that they had registered for the draft.<sup>132</sup>

Justice O'Connor recently referred to Jay's Number 64 to support the general proposition that treaties have not been abrogated unless constitutional procedures are complied with.<sup>133</sup>

125. 354 U.S. 1 (1957).

126. *Id.* at 29.

127. *Id.* at 24.

128. 343 U.S. 579 (1952).

129. *Id.* at 682 (Vinson, C.J., dissenting) (quoting THE FEDERALIST, *supra* note 1, No. 70 at 423 (A. Hamilton)).

130. 343 U.S. at 683-84.

131. *O'Callahan v. Parker*, 395 U.S. 258, 277 (1969) (Harlan, J., dissenting) (quoting THE FEDERALIST, *supra* note 1, No. 23 at 153 (A. Hamilton)).

132. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 104 S. Ct. 3348, 3360 & n.3 (1984).

133. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 104 S. Ct. 1776, 1783 (1984).

As a result, erosion of the gold standard did not terminate either the United States' obligation to comply with the Warsaw Convention gold-based liability limit or Congress's delegation of authority to the Civil Aeronautics Board to convert liability limits into dollars.

### 3. Separation of powers

The modern Court has also frequently referred to *The Federalist* in cases raising the issue of separation of powers. Containing several different conceptions of the proper distribution of federal power, *The Federalist* embraced Montesquieu's doctrine of separating governmental powers but left the precise implementation for later generations.

In his dissent in *Myers v. United States*,<sup>134</sup> Justice McReynolds cited *The Federalist*'s support of legislative supremacy over the hiring and firing of executive officials. The majority had upheld the power of the President unilaterally to dismiss a postmaster. Justice McReynolds, quoting Hamilton from Number 77 stated that "[t]he consent of [the Senate] would be necessary to displace as well as appoint."<sup>135</sup> Chief Justice Taft replied that Hamilton's later works showed that Hamilton, as Secretary of the Treasury, changed his position, believing that President Washington did not need to consult the Senate.<sup>136</sup>

In *United States v. Brown*<sup>137</sup> the Court held that Congress created a bill of attainder by passing a law that made criminal a Communist Party member's sitting on the executive board of a labor union. Chief Justice Warren cited Hamilton and *The Federalist* to show that the prohibition against bills of attainder served the goal of diffusing power by reducing the legislative temptation to "gratify momentary passions."<sup>138</sup>

Additionally, Chief Justice Warren consulted *The Federalist* and Charles Warren's *The Making of the Constitution*<sup>139</sup> to justify the narrow limits of Congress's power to expel its own members in *Powell v. McCormack*.<sup>140</sup> After citing Elliot's De-

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134. 272 U.S. 52 (1926).

135. *Id.* at 208 (McReynolds, J., dissenting) (quoting THE FEDERALIST, *supra* note 1, No. 77 at 459 (A. Hamilton)).

136. 272 U.S. at 137.

137. 381 U.S. 437 (1965).

138. *Id.* at 444.

139. C. WARREN, THE MAKING OF THE CONSTITUTION (1928).

140. 395 U.S. 486 (1969).

bates, Chief Justice Warren emphasized this quotation from *The Federalist*: "The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."<sup>141</sup>

When faced with a separation of powers argument in *Buckley v. Valeo*,<sup>142</sup> the Court held that it could appropriately decide the constitutionality of laws regulating federal elections. Justice Powell, who joined in the opinion, saw no need to refer to his previous characterization of *The Federalist* in *United States v. Richardson*:<sup>143</sup> "These holdings and declarations reflect a wise view of the need for judicial restraint if we are to preserve the Judiciary as the branch 'least dangerous to the political rights of the Constitution.'"<sup>144</sup>

President Nixon twice failed in his attempt to argue that separation of powers doctrine protected him. The Court allowed the Watergate Special Prosecutor to pursue a *subpoena duces tecum* in *United States v. Nixon*<sup>145</sup> and allowed the General Service Administration to obtain access to presidential records in *Nixon v. Administrator of General Services*.<sup>146</sup> The Court praised Madison's flexible interpretation of Montesquieu: "[W]here the *whole* power of one department is exercised by the same hands which possesses the *whole* power of another department, the fundamental principles of a free constitution, are subverted."<sup>147</sup> In his dissent, Justice Rehnquist questioned this interpretation:

As a matter of original inquiry, it might plausibly be claimed that the concerns expressed by the Framers of the Constitution during their debates, and similar expressions found in the Federalist Papers, by no means require the conclusion that the Judicial Branch is the ultimate arbiter of whether one branch has transgressed upon powers constitutionally reserved to another. It could have been plausibly maintained that the Framers

141. *Id.* at 539 (quoting THE FEDERALIST, *supra* note 1, No. 60 at 371 (A. Hamilton)) (emphasis omitted).

142. 424 U.S. 1 (1976).

143. 418 U.S. 166 (1974).

144. *Id.* at 193 (Powell, J., concurring) (quoting THE FEDERALIST, *supra* note 1, No. 78 at 465 (A. Hamilton)).

145. 418 U.S. 683 (1974).

146. 433 U.S. 425 (1977).

147. *Id.* at 442 n.5 (quoting THE FEDERALIST, *supra* note 1, No. 47 at 302-03 (J. Madison)).

thought that the Constitution itself had armed each branch with sufficient political weapons to fend off intrusions by another which would violate the principle of separation of powers, and that therefore there was neither warrant nor necessity for judicial invalidation of such intrusion. But that is not the way the law has developed in this Court.<sup>148</sup>

Nixon later prevailed when he pled presidential immunity to tort actions in *Nixon v. Fitzgerald*.<sup>149</sup> Although the prevailing opinion did not discuss *The Federalist*, Justice White noted in his dissent that Hamilton never stated whether impeachment and subsequent criminal prosecution were the only means, exclusive of tort action, to challenge presidential wrongdoing.<sup>150</sup>

In *Industrial Union Department v. American Petroleum Institute*,<sup>151</sup> Justice Rehnquist was not as squeamish about judicial restraint as he had been in *Furman v. Georgia*.<sup>152</sup> Rehnquist concluded that the OSHA provision regulating unsafe work places violated the separation of powers doctrine: "The rule against delegation of legislative power is not, however, so cardinal a principle as to allow for no exception. The Framers of the Constitution were practical statesmen, who saw that the doctrine of separation of powers was a two-sided coin."<sup>153</sup> Justice Marshall, dissenting, responded that by striking OSHA's regulation the Court was improperly making law, not interpreting the law.<sup>154</sup>

In *Immigration and Naturalization Service v. Chadha*<sup>155</sup> Chief Justice Burger referred to Hamilton's fear of legislative supremacy. The Court held that a single branch of Congress could not invalidate an administrative agency decision to deport an alien because such action would grant Congress too much power. In addition, Burger quoted *The Federalist* several times to demonstrate the broad scope of Presidential veto powers.<sup>156</sup> Justice White dissented, invoking Madison's observation that the separation of powers doctrine was violated primarily "where the whole power of one department is exercised by the same

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148. 433 U.S. at 559 n.7 (Rehnquist, J., dissenting).

149. 457 U.S. 731 (1982).

150. *Id.* at 773 (White, J., dissenting).

151. 448 U.S. 607 (1980).

152. 408 U.S. 238 (1972).

153. 448 U.S. at 673 (Rehnquist, J., concurring).

154. 448 U.S. at 688 (Marshall, J., dissenting).

155. 103 S. Ct. 2764 (1983).

156. *Id.* at 2782-83.

hands which possess the whole power of another department."<sup>157</sup> Thus, according to Justice White, the one-house legislative veto of administrative actions did not violate separation of powers doctrine.

#### 4. Civil rights

The nineteenth century Court resorted to *The Federalist* primarily to protect property rights—to help apply the bill of attainder, ex post facto, and impairment of contract clauses. But these sections also protected other civil rights, such as the practice of law by ex-confederate lawyers in *Ex Parte Garland*.<sup>158</sup> The modern Court thus had precedent to void a congressional law prohibiting the compensation of named government employees except under narrow circumstances.<sup>159</sup>

Further, in *Weaver v. Graham*<sup>160</sup> the Court used the ex post facto clause to strike down a Florida statute repealing "good time" sentence reductions that prisoners had previously received. The Court stated: "Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."<sup>161</sup>

In *Bute v. Illinois*<sup>162</sup> a man convicted of several sexual offenses argued that he had a right to counsel. Justice Burton replied:

One of the major contributions to the science of government that was made by the Constitution of the United States was its division of powers between the states and the Federal Government. The compromise between state rights and those of a central government was *fully considered* in securing the ratification of the Constitution in 1787 and 1788.<sup>163</sup>

Justice Burton concluded that the Framers would have opposed federal regulation of state criminal procedures.

Dissenting from a decision upholding a search and seizure based upon a reliable informant's tip, Justice Douglas quoted

157. *Id.* at 2809 n.25 (White, J., dissenting) (quoting THE FEDERALIST, *supra* note 1, No. 47 at 302-03 (J. Madison)).

158. 71 U.S. (4 Wall.) 333 (1867).

159. *United States v. Lovett*, 328 U.S. 303 (1946).

160. 450 U.S. 24 (1981).

161. *Id.* at 28-29.

162. 333 U.S. 640 (1948).

163. *Id.* at 650 (emphasis added).

*The Federalist* in *Draper v. United States*:<sup>164</sup> "Hamilton wrote about 'the practice of arbitrary imprisonments' which he denounced as 'the favorite and most formidable instruments of tyranny.'"<sup>165</sup>

Even though it opposed a Bill of Rights,<sup>166</sup> *The Federalist* was used several times to broadly interpret the first amendment. Justice Black in *Talley v. California*<sup>167</sup> held unconstitutional a state ordinance that required every handbill to include the name and address of anyone who prepared, distributed, or sponsored it. He observed, "Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes."<sup>168</sup> But Justice O'Connor made a passing reference to Madison's Letter Number 10 in *Minnesota State Board for Community Colleges v. Knight*<sup>169</sup> to support her decision that a state statute could limit opportunities by university employees to be heard by allowing only collective bargaining representatives to discuss nonmandatory bargaining issues. Her apparent conclusion that Madison assumed that public participation must be limited in republican forms of government is tenuous since Madison was contrasting the safety of larger republics to the dangers of smaller republics. Thus, Madison might have disagreed with O'Connor's conclusion that the state law in *Knight* did not violate the first amendment.<sup>170</sup>

In his concurring opinion in *School District of Abington Township v. Schempp*,<sup>171</sup> Justice Brennan stressed Madison's sensitivity to the relationship between freedom of religion and other civil liberties: "Madison suggested in the Fifty-first Feder-

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164. 358 U.S. 307 (1959).

165. *Id.* at 317 (Douglas, J., dissenting) (quoting THE FEDERALIST, *supra* note 1, No. 84 at 512 (A. Hamilton)). Since no justices would claim to uphold "arbitrary imprisonments," Hamilton's quotation also could have been used by the majority.

166. Justice Stevens argued that this original hostility to the Bill of Rights supports a broad interpretation of the ninth amendment since it was based upon a fear that only enumerated rights would be protected. *Massachusetts v. Upton*, 104 S. Ct. 2085, 2090 (1984) (Stevens, J., concurring).

167. 362 U.S. 60 (1960).

168. *Id.* at 65.

169. 104 S. Ct. 1058, 1066 (1984).

170. Madison argued in Number 10 that even state republican governments are too small to be safe since we cannot be assured of good leaders and there will not be sufficient obstacles to factions (such as a union). THE FEDERALIST, *supra* note 1, No. 10 at 82 (J. Madison); see also D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 108-09 (1984).

171. 374 U.S. 203 (1963) (outlawing school prayer).

alist that the religious diversity which existed at the time of the Constitutional Convention constituted a source of strength for religious freedom, much as the multiplicity of economic and political interests enhanced the security of other civil rights."<sup>172</sup>

In one of the rare instances when a justice turned to *The Federalist* to explore more abstract questions of political science, Justice Brennan quoted Madison in *Brown v. Hartlage*.<sup>173</sup> He explained how the public good emerged from private interests in a democratic system: "In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good."<sup>174</sup> Justice Brennan then remarked that the first amendment enhanced this process by allowing candidates great latitude in appealing to the voter's self-interest. Therefore, a state court could not construe a state law, which prohibited material benefits to voters, to void an election in which a candidate promised to reduce his salary below that "fixed by law."<sup>175</sup>

Justice Goldberg used *The Federalist* to help interpret the ninth amendment in *Griswold v. Connecticut*.<sup>176</sup> Justice Goldberg first pointed out that the amendment was offered to assuage fears that no specific bill of rights could cover all essential rights. He then quoted *The Federalist* in a footnote: "Madison himself had previously pointed out the dangers of inaccuracy resulting from the fact that 'no language is so copious as to supply words and phrases for every complex idea.'"<sup>177</sup>

Justice Blackmun consulted *The Federalist* in an opinion concerning the privileges and immunities clause. He dissented from a decision outlawing a municipal ordinance requiring forty percent of all employees of contractors working on city construction projects to be local residents. He invoked *The Federalist* to

172. *Id.* at 240 n.8 (Brennan, J., concurring).

173. 456 U.S. 45 (1982).

174. *Id.* at 56 n.7 (quoting THE FEDERALIST, *supra* note 1, No. 51 at 325 (J. Madison)). Brennan also referred to Madison's Number 10. 456 U.S. at 56 n.7. This letter, which Charles Beard made famous, was only cited in three other cases. See *Storer v. Brown*, 415 U.S. 724, 736 (1974); *Anderson v. Celebrezze*, 460 U.S. 780, 813 (1983) (Rehnquist, J., dissenting); *Minnesota State Bd.*, 104 S. Ct. at 1066 (1984).

175. 456 U.S. at 55-58.

176. 381 U.S. 479 (1965).

177. *Id.* at 488 n.3 (Goldberg, J., concurring) (quoting THE FEDERALIST, *supra* note 1, No. 37 at 229 (J. Madison)).

support his thesis that the privileges and immunities clause was intended to regulate interstate, not intrastate, discrimination.<sup>178</sup>

##### 5. "Changed times" argument

While several justices have used *The Federalist* to support their theories of constitutional interpretation, justices with competing theories have invoked the "changed times" argument to diminish *The Federalist*'s influence. Chief Justice Hughes openly rejected *The Federalist* when he held in *Home Building & Loan Association v. Blaisdell*<sup>179</sup> that the prohibition against impairment of contracts did not prevent Minnesota from passing a statute that temporarily extended the time for redeeming real property from foreclosure. In his bitterly argued dissent, Justice Sutherland quoted Madison's Number 44:

[O]ne legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.<sup>180</sup>

Justice Douglas believed that the fourteenth amendment altered the Framer's original definition of equality. Hamilton's fearful conception of voting equality was set forth in Number 68: "Talents for low intrigue and the little arts of popularity may alone suffice to elevate a man to the first honors in a single state . . . ."<sup>181</sup> Douglas believed such a fear "belongs to a bygone day, and should not be considered in determining what the Equal Protection Clause of the Fourteenth Amendment requires in statewide elections."<sup>182</sup>

Writing for a unanimous Court in *Singer v. United States*,<sup>183</sup> Chief Justice Warren held that a defendant did not have a right to demand a bench trial. Warren noted that *The Federalist*'s argument reflected colonial legal practices: "[B]ut,

178. *United Bldg. & Const. Trades Council v. Mayor of Camden*, 104 S. Ct. 1020, 1031 (1984) (Blackmun, J., dissenting).

179. 290 U.S. 398, 427-29 (1934).

180. *Id.* at 464 (Sutherland, J., dissenting) (quoting THE FEDERALIST, *supra* note 1, No. 44 at 283 (J. Madison)).

181. THE FEDERALIST, *supra* note 1, No. 68 at 414 (A. Hamilton).

182. *Gray v. Sanders*, 372 U.S. 368, 377 n.8 (1963).

183. 380 U.S. 24 (1965).

since the practice of permitting defendants a choice as to the mode of trial was not widespread, it is not surprising that some of the framers apparently believed that the Constitution designated trial by jury as the exclusive method of determining guilt . . .”<sup>184</sup>

In his opinion in *United States v. Brewster*<sup>185</sup> Chief Justice Burger held that a former senator could be prosecuted despite the speech and debate clause. He defended his opinion by minimizing the argument that a ruthless prosecutor could attack the legislature by calling campaign contributions bribes. Noting that each branch of government potentially has the power to abuse the others, Chief Justice Burger quoted Hamilton to show that congressional control of the budget was the basis for the Framers’ fear of legislative tyranny. Rejecting both Justice White’s fear of an abusive executive and *The Federalist*’s concerns of abusive branches of government, Chief Justice Burger stated, “The check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose.”<sup>186</sup>

In *Parden v. Terminal Railway*<sup>187</sup> Justice Brennan faced a state sovereign immunity defense based on the eleventh amendment. The defense was supported by *The Federalist*’s strong endorsement of sovereign immunity, and cases using *The Federalist* to justify a sovereign immunity defense. Rather than reject the immunity defense based on the changed times argument, Justice Brennan concluded that *The Federalist*’s discussion of sovereign immunity only concerned state debt obligations.<sup>188</sup> He concluded that a state could not assert the immunity after waiv-

184. *Id.* at 31.

185. 408 U.S. 501 (1972).

186. *Id.* at 523. Burger did not revive this analysis, as he could have, when he dramatically limited legislative power in the more recent *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983).

187. 377 U.S. 184 (1964).

188. Hamilton’s argument certainly did not seem to be limited to immediate concerns:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal.

THE FEDERALIST, *supra* note 1, No. 81 at 487-88 (A. Hamilton).

ing it by operating a common carrier covered by the Federal Employers' Liability Act.

### C. The Court's Current Methodology

The primary impression one gets from this long and arid survey of almost two hundred cases is that the Court has never significantly altered its techniques for using *The Federalist* in constitutional adjudication. Passages have been cited (although frequently out of context), ignored (although *The Federalist* had been shown to support an opposing argument), or even rejected (when the changed times argument dictated a different result), depending on the position a justice wanted to advance. Rarely has the Court gone beyond the immediate passages of *The Federalist* to determine its meaning or significance. Indeed, *The Federalist* has been relied on mostly as a means of persuasion.

Relying only on the Court's limited historical inquiry, one has little idea of the actual beliefs of *The Federalist*'s authors. Nor does one have much sense of the authors themselves or of the times in which they lived. Furthermore, no justice has explained where historical inquiry should begin—with colonial times, the Constitutional Convention, the writing of *The Federalist*, the articulation of and response to Anti-Federalist arguments, the ratification debates, or postratification actions. Furthermore, the justices have not considered the position of the Anti-Federalists or the positions of voters at state ratification conventions. In fact, the Court's frequent reliance on *The Federalist* to determine the meaning of the Constitution arguably conflicts with the Framers' intentions. Madison said: "If we were to look, therefore, for the meaning of [the Constitution] beyond the face of the instrument, we must look for it, not in the General Convention which proposed, but in the State Conventions which accepted and ratified it."<sup>189</sup> Indeed, the state ratifying conventions, which included a broad cross section of representatives, could reveal more about the intentions and motives of the average voter than could *The Federalist*.

Of course, neither the justices nor practicing constitutional lawyers can be expected to study all primary and secondary sources that discuss the creation of the Constitution.<sup>190</sup> How-

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189. C. WARREN, *supra* note 139, at 794.

190. Forrest McDonald spent twenty thousand hours researching his books on the creation of the Constitution. D. ADAIR, *Fame and the Founding Fathers*, in FAME AND

ever, relying on only a few sources to determine the intentions of the Framers results in courts and lawyers receiving no benefit from the extensive research of constitutional historians. Historians have organized and edited numerous primary materials and have proposed a fascinating variety of theories explaining why the Constitution was created and accepted. One could reach different solutions to several current constitutional questions—particularly pertaining to the proper relationship between the states and the federal government—depending on which of many historical interpretations one accepts or which era one emphasizes. Thus one plunges into the historiography of *The Federalist* and the Constitution, learning from both extensive research and competing theories.

#### IV. THE HISTORIANS' VIEW OF *The Federalist* AND THE CONSTITUTION

Virtually all nineteenth century constitutional historians agreed that the Constitution's ratification was a political triumph of patriotism and rationality over parochialism. However, Beard's thesis that the Constitution was a triumph of economic self-interest destroyed that consensus about the Framers' motives. Understandably, Beard's work provoked many responses—both for and against his thesis. A glance at each of these segments of the study of constitutional history—the Federalist historians, Beard's interpretation, and responses to Beard—illuminates the struggle to ratify the Constitution.

##### A. *The Federalist* Historians

The view that the Constitution's ratification was a political triumph of patriotism and rationality over parochialism was welcomed by a Supreme Court dominated by Chief Justice Marshall, who had written a glowing biography of George Washington between 1804 and 1807.<sup>191</sup> Additionally, Chief Justice Story, who wrote his *Commentaries on the Constitution of the United States*<sup>192</sup> in 1833, maintained a Federalist perspective after he reached the bench. Story praised *The Federalist* as "a cele-

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THE FOUNDING FATHERS 22 (1974).

191. J. MARSHALL, THE LIFE OF GEORGE WASHINGTON (1926 ed. Fredericksburg, Va.) (1st ed. Philadelphia 1804-1807).

192. J. STORY, *supra* note 29.

brated commentary.”<sup>193</sup> A typical section of Story’s *Commentaries* frequently referred to Kent’s *Commentaries*, Rawle’s works, *Elliot’s Debates*, and *The Federalist*. For example, while studying the commerce clause, Story cited *The Federalist* fourteen times, Rawle’s works twice, and Kent’s works five times.<sup>194</sup> Story extolled Kent’s work: “I gladly avail myself to this, as well as of all other occasions, to recommend his learned labors to those who seek to study the law, the Constitution, with a liberal and enlightened spirit.”<sup>195</sup>

While Story frequently referred to Kent in his works, Kent also cited Story and *The Federalist* in his *Commentaries*. Kent acclaimed: “I know not, indeed, of any work on the principles of free government that is to be compared, in instruction and intrinsic value, to this small and unpretending volume of the *Federalist*; not even if we resort to Aristotle, Cicero, Machiavel, Montesquieu, Milton, Locke, or Burke.”<sup>196</sup>

Historian George Curtis found that *The Federalist* was really Hamilton’s triumph:

He was very ably assisted in the *Federalist* by Madison and Jay; but it was from him that the *Federalist* derived the weight and the power which commanded the careful attention of the country, and carried conviction to the great body of intelligent men in all parts of the Union.<sup>197</sup>

As Douglass Adair pointed out in 1944, historians who support a strong central government have preferred Hamilton to Madison, while historians who support a limited central government have preferred Madison to Hamilton.<sup>198</sup> Historians’ conclusions about which statesman authored which letters were apparently dictated by their political assessments of Hamilton and Madison.

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193. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158 (1820).

194. 2 J. STORY, *supra* note 29, at 1-44.

195. *Id.* at 14 n.5.

196. 1 J. KENT, *supra* note 30, at 241 n.b. Kent, an admirer of Hamilton, wrote in 1787, before *The Federalist* was even completed: “You may praise whom you please, and I will presume to say that I think ‘Publius’ is a more admirable writer and wields the sword of party dispute with justice, energy, and inconceivable dexterity. The author must be Alexander Hamilton, who . . . in genius and political research, is not inferior to Gibbon, Hume, and Montesquieu.” B. MITCHELL, *supra* note 24, at 630 n.2.

197. 1 G. CURTIS, *supra* note 31, at 417.

198. D. ADAIR, *The Authorship of the Disputed Federalist Papers*, in *FAME AND THE FOUNDING FATHERS* 27 (1974).

In 1888 John Fiske wrote the influential *The Critical Period of American History, 1783-1789*.<sup>199</sup> As the title implies, Fiske stated that the political and economic problems under the Articles of Confederation had reached a critical stage. Only a strong central government under the new Constitution could save the new Republic. Fiske sought to confirm Hamilton's allegations in Numbers 15-22 that the Articles of Confederation were fatally weak.

This deferential political history, which Charles Beard later labeled "juristic" history,<sup>200</sup> never totally prevailed. Many of the justices and the historians were also aware of economic influence. After all, Madison had acknowledged in Letter Number 10 that economics is a major cause of faction.<sup>201</sup> Madison apparently had been influenced by the eighteenth century British theorist Harrington. Harrington wrote in *Oceana* that "empire follows the balance of property,"<sup>202</sup> and that a bicameral legislature and a written constitution were needed to create political stability between the natural aristocracy and the masses.<sup>203</sup> In his biography of Washington, Chief Justice Marshall described the conflict between indulgent creditors and strict creditors as a crucial dividing line in the constitutional debate.<sup>204</sup> In 1853 the historian Hildreth asked: "The clergy, the nobles, the kings, the burghers have all had their turn. Is there never to be an *Age of the People*—of the working classes?"<sup>205</sup>

Before the turn of the century, Frederick Jackson Turner revolutionized American historical analysis by adapting Italian economist Achille Loria's theory of the primacy of land.<sup>206</sup> In addition, in 1907 J. Allen Smith described the antidemocratic aspects of the Constitution in *The Spirit of American Government*.<sup>207</sup> Other historians, such as Libby and Seligman, also emphasized economic factors influencing the creation of the

199. J. FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789 (1888).

200. "In fact, the juristic theory of the origin and nature of the Constitution is marked by the same lack of analysis of determining forces which characterized older historical writing in general." C. BEARD, *supra* note 8, at 10.

201. "[T]he most common and durable source of factions has been the various [sic] and unequal distribution of property." THE FEDERALIST, *supra* note 1, No. 10 at 79 (J. Madison).

202. See 1 V.L. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 269 (1927).

203. *Id.*

204. 4 J. MARSHALL, *supra* note 191, at 193-95.

205. R. HILDRETH, THEORY OF POLITICS 267 (1854 & photo. reprint 1971).

206. See, e.g., L. BENSON, TURNER AND BEARD 1-40 (1960).

207. J.A. SMITH, THE SPIRIT OF AMERICAN GOVERNMENT (1907 & photo. reprint 1965).

Constitution.<sup>208</sup> Later, Charles Beard relied heavily upon secondary sources to present his thesis. In fact, Beard acknowledged the work of Turner, Libby, Ambler, and Schaper in his Preface to *An Economic Interpretation of the Constitution of the United States*.<sup>209</sup>

### B. Beard's Economic Interpretation of the Constitution

Beard's thesis that the Constitution was a triumph of dynamic capital interests (which he called personality) over indebted realty interests<sup>210</sup> destroyed the already deteriorating historical consensus about the Framers' motives. According to Beard, the delegates' positions show that this economic division existed at the Constitutional Convention and during the subsequent ratification process. Beard added spice to his argument by revealing that many delegates who supported the Constitution owned depreciated government securities that would increase in value if a strong central government with coercive taxing power were created.<sup>211</sup> Although he never claimed that the Framers were solely interested in immediate profit, Beard evidently thought that this information deflated the juristic historians' belief that patriotism and reason had triumphed.

In the first paragraph of his book, Beard distinguished his work from that of Bancroft, who interpreted the ratification process as "the movement of the divine power which gives unity to the universe, and order and connection to events."<sup>212</sup> According to Beard, *The Federalist* proved that the Framers were sensitive

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208. E. SELIGMAN, THE ECONOMIC INTERPRETATION OF HISTORY (2d ed. 3d printing 1917); Libby, *The Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution, 1787-8*, 1 BULL. U. WIS. 1 (1894). Beard quoted Seligman's work:

The existence of man depends upon his ability to sustain himself; the economic life is therefore the fundamental condition of all life. Since human life, however, is the life of man in society, individual existence moves within the framework of the social structure and is modified by it. What the conditions of maintenance are to the individual, the similar relations of production and consumption are to the community. To economic causes, therefore, must be traced in the last instance those transformations in the structure of society which themselves condition the relations of social classes and the various manifestations of social life.

C. BEARD, *supra* note 8, at 15 (quoting E. SELIGMAN, *supra*, at 3).

209. C. BEARD, *supra* note 8, at xix.

210. *Id.* at 324-35.

211. *Id.* at 149-50.

212. *Id.* at 1 (quoting 2 G. BANCROFT, THE HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 284 (1882)).

to economic forces. Referring to *The Federalist* he said: "This wonderful piece of argumentation . . . is in fact the finest study in the economic interpretation of politics which exists in any language; and whoever would understand the Constitution as an economic document need hardly go beyond it."<sup>213</sup>

By highlighting Madison's theory of faction in Letter Number 10, Beard revived Madison's reputation, which had previously diminished in comparison to that of his colleague Hamilton.<sup>214</sup> But Beard's Madison was no angel; Madison created several restraints to the power of democracy: "And the crowning counterweight to 'an interested and over-bearing majority,' as Madison phrased it, was secured in the peculiar position assigned to the judiciary, and the use of the sanctity and mystery of the law as a foil to democratic attacks."<sup>215</sup>

Beard consistently denied the allegation that his book was conceived to support the Progressive Movement by showing that the current conservative reliance on the Framers reflected not simple patriotism, but economic motives.<sup>216</sup> Critics such as Rich-

213. C. BEARD, *supra* note 8, at 153.

214. D. ADAIR, *The Tenth Federalist Revisited*, in FAME AND THE FOUNDING FATHERS 75 (1974).

215. C. BEARD, *supra* note 8, at 161. Beard's legal mystification argument is an obvious antecedent to the current critical legal jurisprudence movement. See Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983); see generally THE POLITICS OF LAW (D. Kairys ed. 1982). Indeed, Beard frequently used the adjective "critical" to distinguish his form of analysis from the more traditional schools: "Nor has England advanced far beyond us in the *critical interpretation* of legal evolution—its explanation in terms of, or in relation to, the shifting economic processes and methods in which the law is tangled." C. BEARD, *supra* note 8, at 7-8 (emphasis added).

Beard also sought to improve upon the work of historians such as Bancroft, who argued that the Constitution resulted from divine guidance. Richard Hofstadter later replied that Bancroft was not as mystical as Beard claimed. R. HOFSTADTER, THE PROGRESSIVE HISTORIANS 20 (1968). Beard also rejected the "Teutonic Historians," who saw the Constitution as additional proof of Anglo-Saxon racial superiority. Finally, Beard wanted to distinguish his truly scientific work from the scientific historians who claimed to present only data, not ideas: "Such historical writing, however, bears somewhat the same relation to scientific history which systematic botany bears to ecology; that is, it classifies and orders phenomena, but does not explain their proximate or remote causes and relations." C. BEARD, *supra* note 8, at 4. One can maintain a more benign view of judicial review:

[T]he *Federalist* broadened the orthodox concept of federalism by maintaining that federalism was a means not only to achieve peace and security, but also to guarantee the protection of the individual from the government. To insure that protection in a democratic society even further, the *Federalist* introduced the doctrine of judicial review.

G. DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT 336-37 (1960).

216. C. BEARD, *supra* note 8, at vi. Pope McCorkle has argued that Beard consist-

ard Hofstadter remained unconvinced with Beard's denial; Hofstadter stated that Beard had studied the Convention to show that the Framers were concerned with private gain through appreciation of their securities and to demonstrate the superiority of economic and sociological realism over existing political history.<sup>217</sup>

Beard's theory was then enlarged by V. L. Parrington, a progressive historian, who observed that in actuality there were two debates: (1) a private debate at the secret Constitutional Convention that determined whether there should be any democracy at all, and, if so, how much; and (2) a subsequent public debate that discussed the allegedly severe problems under the Articles of Confederation, the need for checks on factions, and the way a large territory could remain republican.<sup>218</sup> Parrington claimed that Hamilton led the aristocratic forces; to Hamilton, democracy was nothing more than mob rule.<sup>219</sup> Influenced by Hume's cynicism and Hobbe's acceptance of the necessity of power, Hamilton was a "High Tory" who supported moneyed interests and a central government at the expense of the states. Hamilton recommended a large national debt to ensure sufficient taxation, which would require the public's continued hard work. He also thought women and children should work.<sup>220</sup> Parrington's views typified the immediate reaction of professional historians to Beard's work.

### C. Beard's Work Reevaluated

Beard's book provoked some predictably primitive reactions. The *Marion Star* headlined its story: "SCAVENGERS, HYENA-LIKE, DESECRATE THE GRAVES OF THE DEAD PATRIOTS WE REVERE."<sup>221</sup> The New York Bar Association

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ently favored the pro-Constitution Federalists, including Hamilton, over the Jeffersonians, who also were economically motivated. Beard continued this pro-Federalist view with a commitment to Progressive reforms. For example, in 1915 Beard praised Hamilton as "among the great statesmen of all time." C. BEARD, THE ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY 195 (1915), quoted in McCorkle, *The Historian as Intellectual: Charles Beard and the Constitution*, 27 AM. J. LEGAL HIST. 314, 327 (1984). Consistent defense of property rights was one example of Beard's mix of Hamiltonian conservatism with reform. *Id.* at 352.

217. R. HOFSTADTER, *supra* note 215, at 216-18.

218. 1 V.L. PARRINGTON, *supra* note 202, at 281.

219. *Id.* at 275.

220. *Id.* at 305-06.

221. R. HOFSTADTER, *supra* note 215, at 212.

held Beard in contempt for failing to appear before a special committee.<sup>222</sup> And, although he acknowledged Beard's "pains-taking investigation," Oliver Wendell Holmes wrote that "[b]elittling arguments always have a force of their own, but . . . I believe that high-mindedness is not impossible to man."<sup>223</sup>

In 1928 attorney Charles Warren launched the first serious counterattack to Beard's thesis.<sup>224</sup> Although he considered Beard an "able historian,"<sup>225</sup> Warren believed that economics was not as driving a force as the patriotic desire to save and strengthen the country: "It was not the product of a class or of a section, and no single influence led either to its inception or to its adoption . . ."<sup>226</sup> Far more influential were such events as Shay's Rebellion, Indian attacks in states such as Georgia, and the fight in 1786 over Jay's Treaty, which relinquished British rights to the Mississippi River. The Framers were afraid that the country might divide into three or even four separate confederacies.<sup>227</sup> Moreover, the Constitution was designed to generate "an increase of economic prosperity for all classes in the community."<sup>228</sup>

Warren found Beard's personality/realty distinction simplistic. Many farmers and middle class citizens, who held no securities, supported the Constitution; people from the same class held different views on the Constitution.<sup>229</sup> According to Warren, the controversies at the Convention were not over the prohibition of paper money or taxation, but over the relative power of big and small states and the relationship of the North and the

222. *Id.*

223. *Id.* at 212-13. Howard Laski replied to a letter he received from Holmes: "I found the book dull, and the considerations a little thin, but I liked his honesty and his serious attention to the documents. And it was a relief to get away from the revelation granted by God to Alexander Hamilton early in 1787." *Id.* at 213. Gary Wills noted that Laski had his own interpretation of *The Federalist*:

But the pluralists, led by Harold Laski, did not see in this a design to protect a single minority. They assumed that Madison wanted to leave the field open for other agencies to participate—voluntary, corporate, benevolent, or whatever. Limited government promotes a wide range of social activities; its citizens do not conceive social life as narrowly *political* in all aspects.

G. WILLS, EXPLAINING AMERICA: THE FEDERALIST xvi (1981) (emphasis in original).

224. C. WARREN, *supra* note 139.

225. *Id.* at 550.

226. *Id.* at iii.

227. *Id.* at 30.

228. *Id.* at 54.

229. *Id.* at 69-81.

South.<sup>230</sup> Furthermore, Warren believed that the economic debate was not as heated as Beard thought. The Anti-Federalists rarely attacked the Constitution's financial provisions; they were more concerned about the lack of a Bill of Rights and the possibility of a takeover by a political aristocracy.<sup>231</sup>

Warren's daily study of the Convention also demonstrated that major roles were played by Washington, Pinckney, Randolph, Madison, and Wilson. Hamilton, whose New York colleagues were Anti-Federalist, paid little attention to the proceedings, except when he made a long and passionate speech favoring adoption of a monarchy government similar to the British system. According to Hamilton, "the British Government was the best in the world and . . . he doubted much whether anything short of it would do in America."<sup>232</sup> One of Hamilton's best friends, Governor Morris, summarized Hamilton's initial reactions to the proposed Constitution:

[He] had little share in forming the Constitution; he believed the republican government to be radically defective. . . . Hamilton hated republican government, because he confounded it with democratical government; and he detested the latter, because he believed it would end in despotism and be in the meantime destructive to public morality.<sup>233</sup>

Madison, the major leader at the Convention, was a constant supporter of increased federal power. He supported such proposals as a federal veto over state legislatures, national judicial review of state legislation under the standard that the Court "may adjudge such law to be void, if found contrary to the principles of equity and justice,"<sup>234</sup> and unequal representation in the Senate. Madison seemed to agree with James Wilson's rhetorical question: "Can we forget for whom we are forming a Government? . . . Is it for men, or for the imaginary beings called States."<sup>235</sup>

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230. *Id.* at 397.

231. *Id.* at 747-80.

232. *Id.* at 228.

233. *Id.* at 493-94 (quoting 2 DIARY AND LETTERS OF GOUVERNEUR MORRIS 523, 531 (1889)).

234. C. WARREN, *supra* note 139, at 311 (quoting 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 437 (1905)).

235. C. WARREN, *supra* note 139, at 256. Jefferson, who was in Paris, could not effectively implement his views: "My general plan would be to make the States one as to everything connected with foreign nations, and several as to everything purely domestic." *Id.* at 382.

Warren also found that Beard may have relied excessively on *The Federalist*; the document did not have much impact on the thinking of most of the Constitution's supporters or on the ratification debates.<sup>236</sup> As one Federalist politician observed about Publius's letters: "He is certainly a judicious and ingenious writer, though not well calculated for the common people."<sup>237</sup> Nevertheless, the document's prestige steadily increased after ratification, while contemporaneous sources such as Pinckney's *Observations on the Plan of Government*<sup>238</sup> and Adam's *A Defence of the Constitutions of Government*<sup>239</sup> were virtually forgotten.

In *Politics and the Constitution*<sup>240</sup> William Crosskey stated that subsequent deference to *The Federalist* was the result of political efforts by the Jeffersonians, who claimed that the document actively supported states' rights.<sup>241</sup> According to Crosskey, *The Federalist* was sophistically designed to underestimate the degree of power given to the central government under the actual wording of the Constitution. Later, when Hamilton and Madison disagreed over the degree of national power under the Constitution, the Jeffersonians used this distortion to argue that the nationalist Hamilton was being deceptive, while the states' rights advocate Madison was being consistent. But Crosskey believed that Madison consistently and deliberately confused the objects

236. In his biography of Hamilton, Forrest McDonald concluded that, although *The Federalist* may have been admired for its rhetorical power, the New York conventioners were far more influenced by Virginia's ratification and by the Federalists' threat that the city of New York would secede from the state if it did not join the new Union. F. McDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 114-15 (1979).

237. C. WARREN, *supra* note 139, at 767 (quoting 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 219 (1858)).

238. C. PINCKNEY, OBSERVATIONS ON THE PLAN OF GOVERNMENT, submitted to the Federal Convention in Philadelphia, on the 28th Day of May, 1787, delivered at different times in the course of discussions.

239. J. ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1797). V.L. Parrington did not forget Adam's influence on the formation of the Constitution. See 1 V.L. PARRINGTON, *supra* note 202, at 310-20. Charles Warren also discussed Adam's influence on the Convention. C. WARREN, *supra* note 139, at 155-57, 815-18. Madison did not like Adam's book, while Jay did. *Id.* at 815.

240. W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953). Crosskey's books received few favorable reviews. See, e.g., Corbin, Book Review, 62 YALE L.J. 1137 (1953); Sharp, Book Review, 54 COLUM. L. REV. 439 (1954); Sholley, Book Review, 49 Nw. U.L. REV. 114 (1954). Most critics questioned Crosskey's methodology and assumptions. See, e.g., Brown, Book Review, 67 HARV. L. REV. 1439 (1954); Goebel, Book Review, 54 COLUM. L. REV. 450 (1954); Hart, Book Review, 67 HARV. L. REV. 1456 (1954).

241. W. CROSSKEY, *supra* note 240, at 10-11.

of the Constitution with its powers. Madison first was trying to gain ratification in Anti-Federalist New York and later was opposing the Federalists' attempts to expand the national government.<sup>242</sup> Crosskey also observed that Madison's notes on the Convention were unreliable, finding "that Madison's motives were partly petty, personal, and political; and partly, as Madison eventually came to view the matter, patriotic."<sup>243</sup>

Despite periodic attacks that Beard's book was Marxist, his views continued to prevail among the historians until the 1950's.<sup>244</sup> Nevertheless, Beard apparently deemphasized economic influences in his 1935 Introduction: "I have never been able to discover all-pervading determinism in history."<sup>245</sup> By then Beard had been influenced by Philosopher Croce's relativistic and aesthetic philosophy of history. For Beard, history had taken on dreamlike qualities:

Beyond doubt scholars of competence can agree on many particular truths and large bodies of established facts. . . . The historian is bound by his craft to recognize the nature and limitations of the scientific method and to dispel the illusion that it can produce a science of history embracing the fullness of history, or any large phase, as past actuality.<sup>246</sup>

Beard's retreat from economic determinism intrigued Henry Commager. According to Commager, by the 1930's Beard considered history as an "act of faith"<sup>247</sup> but did not know how to proceed from such relativism.

Beard's theories and data were carefully scrutinized in the 1950's. Historian Robert E. Brown wrote a scathing attack scrutinizing Beard's work page by page.<sup>248</sup> Brown concluded that there was no personality/realty split: "If the conflict over ratification had been between substantial personality interests on the one hand and small farmers and debtors on the other, there would not have been a constitution."<sup>249</sup> Nor was there a coup, since both the Continental Congress and the Articles of Confed-

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242. *Id.* at 509 n.\*.

243. *Id.* at 13.

244. C. BEARD, *supra* note 8, at ix.

245. *Id.* at xvi.

246. Beard, *That Noble Dream*, 40 AM. HIST. REV. 74, 76 (1935); see also Beard, *Written History as an Act of Faith*, 39 AM. HIST. REV. 219 (1934); Smith, *The Writing of American History in America from 1884 to 1934*, 40 AM. HIST. REV. 439 (1935).

247. H. COMMAGER, *THE AMERICAN MIND* 314 (Bantam Matrix ed. 1970).

248. R. BROWN, *CHARLES BEARD AND THE CONSTITUTION* (1956).

249. *Id.* at 199.

eration had been started by conventions, and most of the white males could vote on the new Constitution.<sup>250</sup> Beard had exaggerated the degree of controversy; many people did not vote because they were indifferent.<sup>251</sup> Beard had also misinterpreted *The Federalist*; in Number 10 Madison stated that economics was only the "most common and durable"<sup>252</sup> of many potential sources of faction:

A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power . . . have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.<sup>253</sup>

According to Brown, *The Federalist* was designed to appeal to all property interests, not just to personality interests.<sup>254</sup> Furthermore, Beard never showed why Madison's Number 10 was more important than the other eighty-four letters.<sup>255</sup> Brown apparently felt that unless Madison's Number 10 was the most important, Beard's economic analysis was hopelessly flawed.

Another historian, Forrest McDonald, concluded that Beard correctly considered economics an important influence, but that economic considerations varied from state to state. In states such as Georgia, which was constantly threatened by Indians, and New Jersey, which wanted to escape taxation by New York, economic considerations helped unify the state conventions. "[T]he great majority of their inhabitants saw that definite, immediate, and substantial advantages would accrue to the states as such, as well as to themselves as individuals."<sup>256</sup>

McDonald preferred to divide the conflict based on the relative strength of the states. Weak states wanted a national government while strong states were more resistant to a strong national government.<sup>257</sup> Unlike Beard, McDonald found that the Constitutional Convention was not denominated by identity of

250. *Id.* at 138-41.

251. *Id.* at 198.

252. THE FEDERALIST, *supra* note 1, No. 10 at 79 (J. Madison).

253. *Id.*

254. R. BROWN, *supra* note 248, at 94.

255. *Id.* at 97.

256. F. McDONALD, WE THE PEOPLE 162 (1958).

257. *Id.* at 114-15.

interests but rather by farmowners.<sup>258</sup> Indeed, even opponents to the Constitution held personality and supported hard money policies.

We may never know if Beard was correct in claiming that the Federalists held most of the public securities, or if McDonald was correct in claiming that the securities were more evenly distributed, since neither has made any effort "to establish ownership of securities as early as 1787."<sup>259</sup> The data is based on property ownership in the 1790's, after the ratification of the Constitution and after Hamilton's decision to fund the debt. Nevertheless, creditors would obviously have benefited from a strong government that could enforce taxation, even if more important political forces predominated.<sup>260</sup>

Jackson Turner Main defended Beard. Main conceded that Beard improperly dramatized the role of personality, but he did not challenge Beard's central thesis that the Constitution reflected the economic interests of large property holders. The ratification was a triumph of mercantilism over a diverse coalition consisting of debtors, democrats, men afraid of central government's broad and ambiguous powers, and men preferring the status quo.<sup>261</sup> Furthermore, the Federalists were aided by control of the newspapers.<sup>262</sup> In New York the initial Anti-Federalist majority disintegrated primarily because ten states had already accepted the Constitution, thus forming a new Union, and because New York City had threatened to secede if New York did not join the Union.<sup>263</sup> *The Federalist* had little impact except as

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258. *Id.* at 92.

259. E.J. FERGUSON, THE POWER OF THE PURSE 339 (1961).

260. *Id.* at 341.

261. J.T. MAIN, THE ANTIFEDÉRALISTS 280-81 (1961). Main concluded that Beard's economic analysis was imperfect, but that Beard was on the correct path to understanding why the Constitution was ratified: "In all parts of the country, therefore, the commercial interest with its ramifications, including those who depended primarily and directly upon commerce, were Federal, and the 'non-navigating' folk were Antifederal." *Id.* at 274.

Cecilia Kenyon had studied the Anti-Federalists and found them "Men of little faith." The main issue, a political question, was the amount of power that should be entrusted to inherently unreliable men. The Anti-Federalists were afraid of legislative tyranny: "The Anti-Federalists were not latter-day democrats. Least of all were they majoritarians with respect to the national government. . . . Above all, they consistently refused to accept legislative majorities as expressive either of justice or of the people's will." Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 42 (3d series 1955).

262. J.T. MAIN, *supra* note 261, at 221.

263. *Id.* at 238-39. Hamilton did not significantly influence the New York Conven-

a reference. According to Main, McDonald's point that many of the Anti-Federalist leaders were wealthy did not refute Beard's basic theme of economic conflict: "Popular parties typically derive their leadership from men of large property . . ."<sup>264</sup> Finding McDonald's work filled with distortions, Main argued that "men of means are made to appear quite the opposite."<sup>265</sup> McDonald replied that his study of property holdings of individual delegates in states such as South Carolina had been distorted by Main: "Mr. Main demonstrates that he is no better at arithmetic than he is at reading."<sup>266</sup>

Lee Benson found the controversy about the property holdings of delegates misleading. According to Benson, Beard used the wrong technique to answer the question he was asking. Benson argued that one cannot determine why voters voted as they did by analyzing only the property holdings of their leaders at the Convention. Instead, one must test the validity of the correlation between voting behavior and the forms of property holdings by correlating voting behavior with other variables (such as ethnic background) to determine if other factors were actually more important.<sup>267</sup> Since such a study had not, and probably could not have been done, Beard's thesis was neither proven nor disproven.

An interesting verification of Benson's methodological point was provided by Stanley Elkins and Eric McKittrick, who wrote that the debate over the Constitution can best be understood as a generational conflict.<sup>268</sup> Older men feared any change that might create a tyranny similar to the British Government, while younger Constitutionalists wanted to participate in a growing society. Elkins and McKittrick reviewed Forrest McDonald's list of Federalist and Anti-Federalist leaders and found that the Federalists were, on the average, ten to twelve years younger than the

tion; his promonarchy speech made him vulnerable. *Id.* at 238.

264. Main, *Charles A. Beard and the Constitution: A Critical Review of Forrest McDonald's We the People*, 17 W.M. & MARY Q. 86, 94 (3d series 1960).

265. *Id.* at 90.

266. McDonald, *Forrest McDonald's Rebuttal*, 17 W.M. & MARY Q. 102, 107 (3d series 1960). The debate between Main and McDonald is peppered with such biting attacks as: "Similarly, I am unhappy with Mr. Main's practice of building logical conclusions upon self-contradictory assumptions, and changing his assumptions to suit his convenience." *Id.* at 103.

267. L. BENSON, *supra* note 206, at 151-74.

268. Elkins & McKittrick, *The Founding Fathers: Young Men of the Revolution*, 76 POL. SCI. Q. 181 (1961).

Anti-Federalists.<sup>269</sup> “[T]he Young Men of the Revolution might at last imagine, after a dozen years of anxiety, that *their* Revolution had been a success.”<sup>270</sup> Benson would probably reply that this thesis should be tested by correlating age differentials to voting behavior and then by contrasting the correlation of property holdings and voting behavior. Only then could one determine which thesis better explained the creation and ratification of the Constitution.

When Richard Hofstadter reviewed this evolving body of literature, he concluded that the constitutional debate could best be described as a struggle between “divided state elites.”<sup>271</sup> Although there was an aristocratic tone to the Constitution and the Convention, the document was relatively democratic, particularly when compared to existing state or European constitutions.<sup>272</sup> But since both sides were not very democratic and agreed on many issues such as hard money, Beard erred in characterizing the conflict as a rich-poor struggle.<sup>273</sup>

Even if one turns from theories that attempt to explain acceptance of the Constitution to more broadly based histories of the era, we find controversy. Merrill Jensen wrote in *The New Nation*<sup>274</sup> that the economy and society were not in as hopeless a condition as Fiske and Hamilton had stated: “The ‘critical period’ idea was the result of an uncritical acceptance of the arguments of the victorious party in a long political battle . . . .”<sup>275</sup> Jensen concluded that many of the Anti-Federalists were not narrow and provincial:

[T]he best of them agreed that the central government needed more power, but they wanted that power given so as not to alter the basic character of the Articles of Confederation. Here is where they were in fundamental disagreement with the na-

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269. *Id.* at 203. Main rejects this thesis, which Charles Warren first implied in his book. C. WARREN, *supra* note 139, at 759. Main studied each of the ratifying Conventions: “All told, the Federalists were about two years younger than their antagonists. It is hard to see how this could have made any difference.” J.T. MAIN, *supra* note 261, at 259. Once again one sees how historical conclusions can vary greatly depending upon the group chosen for study.

270. Elkins & McKittrick, *supra* note 268, at 216 (emphasis in original).

271. R. HOFSTADTER, *supra* note 215, at 240.

272. *Id.* at 268-69.

273. *Id.* at 238-39.

274. M. JENSEN, *THE NEW NATION* (1950).

275. *Id.* at 422.

tionalists who wanted to remove the central government from the control of the state legislatures."<sup>276</sup>

Unfortunately, present historical awareness remains incomplete because, as Robert Shalhope observed, there are no excellent social histories of the era to give us an impression of the lives of the average citizens.<sup>277</sup>

#### *D. Use of Biographies*

In addition to studying historians' various theories of the proper meanings to attach to *The Federalist* and the Constitution, one can also learn about the Framers' intentions by reading their biographies. This technique forces one to consider the difficult problems of changing attitudes and political posturing. For example, are Hamilton's views of the Constitution best captured in his 1783 initial proposal for a strong central government, his speech at the Convention favoring monarchy, his arguments in *The Federalist*, his actions as Secretary of the Treasury under Washington, or his final despairing efforts to "prop the frail and worthless fabric"?<sup>278</sup>

Furthermore, just as monographs on constitutional motivations arguably suffered from poor methodology, unreliable data, and questionable inferences, biographies are frequently generous to their subjects. For instance, neither Broadus Mitchell nor Clinton Rossiter mentioned that New York City's threat of secession pressured many of the Anti-Federalists to switch sides. Instead, both biographers preferred to emphasize Hamilton's brilliant parliamentary skills as a major reason for the Federalists' victory in New York. Despite analytical weaknesses in relying on biographies of the Framers, a justice or a lawyer can learn

276. *Id.* at 424-25. In his study of public finance from 1776 to 1790, James Ferguson showed that nationalists found the war debt vital to their cause: "In the years after the war, the task of paying the debt was the chief function of a central government which otherwise lacked compelling reasons for existence." E.J. FERGUSON, *supra* note 259, at 335. Meeting this severe need required a fundamental change in political perspective; no longer would liberty be equated with popular control over taxation: "Individual rights and local privileges were no longer regarded as standing against the authority of the government; they were to be advanced by soliciting its aid and patronage." *Id.* at 334.

277. Shalhope, *Douglass Adair and the Historiography of Republicanism*, cited in D. ADAIR, *supra* note 190, at xxxiv. Gordon Wood wrote a fascinating study of the evolution of American political theory during this era. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969).

278. B. MITCHELL, *supra* note 24, at 34.

a great deal about the Framers' intention by undertaking such a study.

### 1. *Hamilton's consistent rationalism*

Hamilton always supported the national government and individual rights over the "artificial beings" called states.<sup>279</sup> His early experiences reinforced his beliefs in a strong government. And as Washington's chief aide-de-camp for four years, he witnessed the need for and the use of emergency war powers. In 1778 Hamilton complained to George Clinton about the decline in the quality of congressional representatives, saying that the best men, out of "local attachment, falsely operating," had returned to state government. According to Hamilton, the Union would be destroyed if this "pernicious mistake" were not corrected.<sup>280</sup> He later oversaw the federal collection of taxes in New York and became frustrated when Rhode Island's veto destroyed the effort to create a national duty impost.<sup>281</sup> While a member of the feeble Continental Congress in 1783, Hamilton proposed radical changes to the Articles of Confederation,<sup>282</sup> his draft first presented many of the powers contained in the future Constitution. He also helped to start the Bank of New York in 1784. When the New York Legislature debated the future status of Vermont, then a rebellious part of New York, Hamilton claimed that the New York Constitution's silence meant that the state had the implied power to relinquish a section of itself. As his biographer Broadus Mitchell put it, "[p]olicy dictated what the Constitution permitted."<sup>283</sup> Hamilton supported Vermont's independence as long as Vermont joined the Union. Indeed, Hamilton's minimal participation in the Constitutional Convention may have partially been a result of his indifference to the form of national government organization so long as it arrogated as much power as possible from the states.<sup>284</sup>

Although both Broadus Mitchell and Clinton Rossiter emphasized *The Federalist's* historical significance, Clinton Ros-

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279. C. ROSSITER, *supra* note 6, at 47.

280. F. McDONALD, *supra* note 236, at 19. McDonald elaborated: "That line of thinking—a belief that attachment to the interests of states, rather than to the nation, would undermine the American cause—would grow in Hamilton's mind." *Id.*

281. B. MITCHELL, *supra* note 24, at 284-85.

282. *Id.* at 323.

283. *Id.* at 376.

284. F. McDONALD, *supra* note 236, at 96.

siter concluded, after surveying additional publications of *The Federalist*: "It should be plain to see that the letters of Publius were not snapped up eagerly by editors in other parts of the country [outside New York state], that those who set out to reprint the series grew weary and wary in fairly short order . . ."<sup>285</sup> Rossiter claimed that the *The Federalist* probably did not influence the first eight states that ratified the Constitution, for "[t]he chief usefulness of *The Federalist* in 1787-1789 was as a kind of debater's handbook in Virginia and New York. Fifty-two copies of the collected edition were rushed to Richmond at Hamilton's direction and used by advocates of the Constitution in the climactic debate over ratification . . ."<sup>286</sup>

Hamilton initially did not think *The Federalist* was one of his best works, perhaps because it did not express his full views, as Broadus Mitchell explained:

The constitutional contest was a sham battle; victory or defeat would come on a different field. . . . The mental construct was preliminary only. . . .

This was Hamilton's Federalist within *The Federalist*. . . . But his secret thoughts, betrayed now and then in *The Federalist* papers, were what soon animated his role in the Treasury.<sup>287</sup>

And Hamilton's activities in the Treasury were dazzling—assuming and funding the Revolutionary debts, levying federal taxes, creating a viable hard currency, starting the Bank of the United States, administering the new agency, and constantly advising Washington to increase executive power.

When Hamilton defended the constitutionality of a national bank in his 1791 memorandum to Washington, he argued that there was "no parsimony of power" in Article I, section 8.<sup>288</sup> With a few exceptions, such as the bill of attainder prohibition, Congress apparently had the "power to pass all laws whatsoever."<sup>289</sup> Thus, according to Hamilton, the central government

285. C. ROSSITER, *supra* note 6, at 55 n.16 (citing BLACK, THE PROPOSED AMENDMENT OF ARTICLE V: A THREATENED DISASTER 957 (1963)).

286. *Id.* at 56.

287. B. MITCHELL, *supra* note 24, at 424-25.

288. C. ROSSITER, *supra* note 6, at 208. Hamilton's opinion on the constitutionality of the bank could have been used far more often by those Justices wishing to expand national powers at the expense of the states: "It is not denied that there are *implied*, as well as *express powers*, and that the *former* are as effectually delegated as the *latter*." 3 THE WORKS OF ALEXANDER HAMILTON, *supra* note 16, at 449 (emphasis in original).

289. C. ROSSITER, *supra* note 6, at 208.

must be strong: "A weak and embarrassed government never fails to be unpopular. It attaches to itself the disrespect incident to weakness, and, unable to promote the public happiness, its impotencies are its crimes."<sup>290</sup>

## 2. *Madison's changing views*

Irving Brant's biography of Madison revealed how Madison's early career made him nationalistic. Madison believed the currency collapse in 1781 was caused by the states.<sup>291</sup> Madison criticized Jay's 1786 treaty defending western territories and the right to use the Mississippi River. In addition Madison supported the use of public monies to sustain state banks.<sup>292</sup> Madison was a member of a Continental Congress that broadly interpreted the general welfare provision in the Articles of Confederation by authorizing such activities as a continental ferry, government-owned tanyards, a private printing office, and the education of Indian children at Dartmouth and Princeton.<sup>293</sup> However, in 1784 Madison helped to defeat bills that would have required a general tax to support religion and the episcopal clergy.<sup>294</sup>

Thus, when Madison came to the Constitutional Convention to help draft the Constitution, he was firmly committed to a limited, but supreme, national government. His ally Rufus King wrote to a mutual friend:

Mr. Madison of Virginia has been here for some time past . . . . He will attend the convention. He does not discover or propose any other plan than that of investing Congress with full powers for the regulation of commerce foreign and domestic. But this power will run deep into the authorities of the individual states, and can never be well exercised without a federal judiciary. The reform must necessarily be extensive.<sup>295</sup>

When Madison wrote his letters in *The Federalist*, he determined the best structure for the new government by consulting

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290. *Id.* at 172 (quoting 9 THE WORKS OF ALEXANDER HAMILTON, *supra* note 16, at 31).

291. I. BRANT, JAMES MADISON: THE NATIONALIST 1780-1787, at 28 (1948).

292. *Id.* at 129.

293. *Id.* Rhode Island's veto of the tax adversely affected Madison. While inflation was virulent, "Madison collected not one penny of salary during his first three years in Congress." *Id.* at 209-10.

294. *Id.* at 322.

295. *Id.* at 383.

his studies of ancient republics and his own notes on the Constitution.

Madison was unsure of the appropriate relationship between Congress and the Supreme Court; however, he consistently supported judicial review of state actions and opposed state rights to secede after joining the new government.<sup>296</sup> Madison, of course, later became a champion of states' rights, revising his notes to diminish his earlier nationalistic perspectives.<sup>297</sup>

Madison believed that the major tension at the Convention existed between the North and the South. However, the most heated debates resulted from the small states' attempts to take over the new government in order to control distribution of the western lands.<sup>298</sup> Committed to a strong national government that could even "absorb the state governments," Madison helped to prevent the Convention's dissolution. However, several of his proposals were defeated: a national veto of all state laws that the national legislature believed contravened the Articles of Union,<sup>299</sup> and a presidential term lasting for either seven years or as long as the President acted in good behavior.<sup>300</sup>

Brant agreed with Beard that Madison thought economics was the primary source of faction. However, Madison did not believe in the supremacy of property. Not only did Madison believe that certain personal rights, such as voting rights, were more important than property rights, but he also concluded that government had a duty to ensure that certain forms of property did not dominate other forms of property. Indeed, the government was obligated to prevent excessive disparity in wealth and oppression of the poor by the rich.<sup>301</sup> These beliefs were probably the source of Madison's bitter conflicts with Hamilton; these conflicts began when Hamilton, as Secretary of the Treasury, paid off the holders of government securities in full. Madison believed that the original holders should only receive the difference between the existing market value and the face value of the notes.<sup>302</sup> By 1791 Hamilton concluded "that Mr. Madison, coop-

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296. I. BRANT, *supra* note 26, at 110-11.

297. *Id.* at 86, 89.

298. *Id.* at 50-52.

299. C. WARREN, *supra* note 139, at 164-71.

300. I. BRANT, *supra* note 26, at 105-06.

301. *Id.* at 119, 174-75.

302. *Id.* at 294.

erating with Mr. Jefferson, is at the head of a faction decidedly hostile to me and my administration; and actuated by views in my judgment subversive of the principles of good government and dangerous to the union, peace and happiness of the country.”<sup>303</sup>

Obviously, the views of the Framers cannot be rigidly categorized. The Court should study biographies to determine the views of these men and to determine how they would have interpreted the Constitution in particular situations. Although one may conclude that Hamilton and Madison might have interpreted the Constitution differently at various times in their careers, one would gain insight into not only what they believed at the time of ratification, but also into deeper views on the proper relationship between the individual and the state.

#### E. The Federalist as Political Theory

An additional technique to determine the Framers’ motives and intent is to analyze their works (such as *The Federalist*) for its intellectual content and political theory. One may discover that these great thinkers articulated premises now readily assumed or that some of their views now seem outdated. Douglass Adair challenged Beard’s economic determinism by demonstrating that the Framers, particularly Madison, were motivated by ideas as well as by money. Madison held sincere moral beliefs, and made important contributions to political science (particularly in *The Federalist*). Furthermore, any attempt to understand the motives and intent of the Framers must include an awareness of the European writers who influenced the Founding Fathers; complete research must therefore include history that preceded the Revolution.

Adair found that the Scottish Enlightenment inspired Madison; the Scots used “reason to discover the immutable laws of human nature.”<sup>304</sup> The writers of the Scottish Enlightenment supported a democratic form of government. On the other hand, Hamilton believed in a system of class government but could not

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303. *Id.* at 351. Brant stated that Hamilton’s jealousy of Jefferson resulted from their competition for the presidency. Even though he altered one of Jefferson’s official letters to make Jefferson appear a swindler, Hamilton felt no guilt in insinuating that Madison may have fabricated letters showing that Jefferson had always supported the Constitution. *Id.* at 361-63.

304. D. ADAIR, *James Madison*, in FAME AND THE FOUNDING FATHERS 128 (1974).

convince the Constitutional Convention to adopt a system similar to the British constitutional monarchy.

Since Hamilton's political theory was rejected, and the proposal to establish a republic was accepted, the only admissible issue in the later ratification struggle was how to have a strong republic.<sup>305</sup> According to Adair, *The Federalist's* brilliance was not in creating a new set of premises upon which to build a government, but rather in designing a working system based upon accepted values. Hamilton adopted Madison's argument that a large republican state was actually stronger than a smaller republican state. Hamilton, however, did not strongly believe in the Constitution he was defending or in the arguments made in its defense. He wanted to change the Constitution and even proposed a legislative coup d'état in 1798 while at the peak of his power.<sup>306</sup>

Madison's government allowed the people direct access only through the House and indirect influence through the other branches. This was not a pure mixed government with distinct powers allocated to a monarchy, an aristocracy, and a majority through democracy, such as had been proposed by Hamilton and Adams, but rather a quasi-mixed government, with a bias toward democracy.<sup>307</sup> Beard and the other Progressives thus erred in claiming that the Constitution was a totally reactionary, antidemocratic system.<sup>308</sup> Indeed, Adair wrote that the Framers' commitment to fame motivated many of them to transcend their immediate self-interest. Aware that they were creating the first republican government, they wanted to be remembered for their deeds. The economic theorists, from Beard to McDonald, relied upon an overly restrictive definition of self-interest.<sup>309</sup>

*The Federalist's* sophisticated political theory and its exploration into human behavior also intrigued political scientist Robert Dahl. Dahl found Madison's terminology hopelessly ambiguous, questioning what Madison meant by "natural rights"

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305. See D. ADAIR, *The Federalist Papers*, in FAME AND THE FOUNDING FATHERS 254 (1974).

306. D. ADAIR, *Was Alexander Hamilton a Christian Statesman?*, in FAME AND THE FOUNDING FATHERS 152 (1974).

307. D. ADAIR, "Experience Must Be Our Only Guide": *History, Democratic Theory, and the United States Constitution*, in FAME AND THE FOUNDING FATHERS 123 (1974).

308. D. ADAIR, *The Tenth Federalist Revisited*, in FAME AND THE FOUNDING FATHERS 81-92 (1974).

309. D. ADAIR, *supra* note 190, at 4.

and "majority tyranny."<sup>310</sup> Because Madison expressed fears concerning majorities oppressing minorities abstractly, virtually any minority could claim to be Madisonian when obstructing a majority decision.<sup>311</sup> Since Madison's original terms were so vague, his solutions of government structure did not necessarily provide the compromise sought between the competing goals of providing an egalitarian voting republic and protecting certain minority rights.

Gary Wills sought to rehabilitate Madison from Dahl's critique by showing that Madison never expected structural reforms to be adequate protection from tyranny: "But it is clear from the text that Madison expected a great deal from the people, from central power, and from their rulers."<sup>312</sup> And although Madison was a poor prophet,<sup>313</sup> his predictions reflected the optimism of his era of the American Enlightenment. Moreover, unanticipated changes demonstrate how the Constitution can tolerate alterations that the authors of *The Federalist* probably would have opposed; *The Federalist* cannot be seen as a more complete version of the Constitution.<sup>314</sup>

David Epstein revealed the political assumptions behind *The Federalist*'s argument that a large republican government can best advance the goals of justice (individual rights) and of the public good (aggregate interests).<sup>315</sup> Republican structures, according to Epstein, appeal to and moderate the underlying political psychology of man: a mixture of passion, interest, ambi-

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310. R. DAHL, A PREFACE TO DEMOCRATIC THEORY 7, 30 (1956).

311. *Id.* at 30.

312. G. WILLS, *supra* note 223, at 265.

313. Madison failed to foresee how the Constitution would evolve and tolerate party politics, a strong executive, and the expansion of direct democracy, particularly in the Senate.

314. G. Wills, *supra* note 223, at 267. Indeed, the authors of *The Federalist* expressed some of their reservations about the new Constitution. See C. ROSSITER, *supra* note 6, at 282 n.101.

315. D. EPSTEIN, *supra* note 170, at 83, 102, 108. The primary goal of government is safety because without security neither justice nor the public good are achievable. *Id.* at 163.

Epstein's claim that he presented distinctions concerning in *The Federalist* that were insufficiently analyzed by previous scholars is somewhat difficult to evaluate since he rarely made specific references. He mentioned Adair twice, Mason four times, Beard once and never discussed Dahl or Wills. When he observed that Number 10 does not even endorse federalism but actually contains an "implicit indictment of the states," we find in a footnote that this observation was first made by Mason. *Id.* at 213 n.108 and accompanying text.

tion, honor, and patriotism.<sup>316</sup> The desire for a large republican government was premised on a mixed view of mankind.

## V. HISTORIOGRAPHY OF THE MODERN COURT

Now we can compare the Supreme Court's use of *The Federalist* papers in constitutional adjudication with the wealth of information provided by historians' debates. Such a comparison will dramatize the Court's peculiar historiography, a historical methodology virtually unchanged since the nineteenth century.

The Court has referred to Beard's *Economic Interpretation* only three times. In *Home Building & Loan Association v. Blaisdell*<sup>317</sup> Justice Sutherland cynically utilized Beard's thesis that the Constitution was a conservative document; Sutherland argued that the Framers wanted to protect property and would have opposed the decision upholding a statutory mortgage moratorium.<sup>318</sup> Justice Powell referred to Beard's book in *Reeves, Inc. v. Stake*<sup>319</sup> to show that the Annapolis Convention, called before the Constitutional Convention, had failed.<sup>320</sup> Justice Powell also emphasized Hamilton's Federalist vision of a broad federal commerce clause but made no further reference to Beard. Finally, in *Bell v. Maryland*<sup>321</sup> Justice Douglas maintained that any conception of private property that could exclude Negroes from business would give impetus to Beard's theory that the Constitution was "an economic document drawn with superb skill by men whose property interests were immediately at stake."<sup>322</sup>

Virtually all of Beard's critics have been ignored,<sup>323</sup> although the Court has referred to several pro-Beardian scholars' works. However, cases including pro-Beardian references did not

316. D. EPSTEIN, *supra* note 170. Epstein explained the difference between these five motives: (a) passion is more volatile, based upon such emotional faces as religious differences, *id.* at 71; (b) interest refers to the relatively steady urge to advance economically, *id.* at 75-76; (c) ambition is the desire to have power, *id.* at 185; (d) honor is the legitimate wish to control one's destiny, *id.* at 119; and (e) patriotism is the desire to see the country flourish, *id.* at 94-95.

317. 290 U.S. 398 (1934).

318. *Id.* at 458 n.3, 463-64 (Sutherland, J., dissenting).

319. 447 U.S. 429 (1980).

320. *Id.* at 447 (Powell, J., dissenting).

321. 378 U.S. 226 (1964).

322. *Id.* at 253 (Douglas, J., concurring).

323. The Court has never resorted to Lee Benson, Robert E. Brown, James Ferguson, Alpheus Mason, Broadus Mitchell, William Crosskey, Benjamin Wright, Jackson Turner Main, Cecilia Kenyon, Forrest McDonald, John Roche, Stanley Elkins, Merrill Jensen, Douglass Adair, Gottfried Dertz, or Gary Wills.

consider *The Federalist*. For example, Irving Brant's biographies of Madison have been cited eleven times.<sup>324</sup> Four of Henry Commager's works were considered in eleven cases.<sup>325</sup> The Court also made two citations to Dahl's *A Preface to Democratic Theory*,<sup>326</sup> and, V.L. Parrington was acknowledged in three cases.<sup>327</sup>

Naturally, other post-Beardian historical works have been included in cases referring to *The Federalist*, but the justices did not consult those works to better understand *The Federalist*. Examples are Bailyn's *Ideological Origins of the American Revolution*,<sup>328</sup> Hofstadter's *The Age of Reform*,<sup>329</sup> Clinton Rossiter's *Constitutional Dictatorship*,<sup>330</sup> *The Grand Convention*,<sup>331</sup> Duniway's *Freedom of the Press in Massachusetts*,<sup>332</sup> and Randall's *Constitutional Problems Under Lincoln*.<sup>333</sup>

The Court has continued its practice of making multiple citations to the Federalist historians of the nineteenth century to

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324. *Everson v. Board of Educ.*, 330 U.S. 1, 34 n.11 (1947) (Rutledge, J., dissenting); *Knapp v. Schweitzer*, 357 U.S. 371, 377 n.3 (1958); *McGowan v. Maryland*, 366 U.S. 420, 438 n.14 (1961); *Scales v. United States*, 367 U.S. 203, 271 (1961) (Douglas, J., dissenting); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 778 n.4 (1961) (Douglas, J., concurring); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 237 n.6 (1963) (Brennan, J., concurring); *City of Greenwood v. Peacock*, 384 U.S. 808, 840 n.2 (1966) (Douglas, J., dissenting); *Holmes v. United States*, 391 U.S. 936, 939 (1968) (Douglas, J., dissenting); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 n.28 (1973); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 n.31 (1977); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794 n.34 (1978).

325. *Everson v. Board of Educ.*, 330 U.S. 1, 13 n.14 (1947); *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 556 n.16 (1949) (Frankfurter, J., concurring); *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957); *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 140 n.22 (1960) (Black, J., dissenting); *Monroe v. Pape*, 365 U.S. 167, 225 n.35 (1961) (Frankfurter, J., dissenting); *Bell v. Maryland*, 378 U.S. 226, 247 n.3 (1964) (Douglas, J., concurring); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 n.34 (1968); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting); *Miller v. California*, 413 U.S. 15, 35 n.16 (1973); *DeFunis v. Odegaard*, 416 U.S. 312, 334 (1974) (Douglas, J., dissenting); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 n.5 (1978).

326. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 748 n.10 (1964) (Stewart, J., dissenting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 n.38 (1978).

327. *Engel v. Vitale*, 370 U.S. 421, 427 n.9 (1962); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 473 n.54 (1968) (Harlan, J., dissenting); *Miller v. California*, 413 U.S. 15, 35 n.6 (1973).

328. *Nevada v. Hall*, 440 U.S. 410, 415 n.8 (1979); *Larson v. Valente*, 456 U.S. 228, 244 n.18 (1982).

329. *Reeves, Inc. v. Stake*, 447 U.S. 429, 431 n.1 (1980).

330. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 651 n.20 (1952).

331. *Duncan v. Louisiana*, 391 U.S. 145, 173 n.3 (1968) (Harlan, J., dissenting).

332. *Dennis v. United States*, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring).

333. *Oregon v. Mitchell*, 400 U.S. 112, 210-11 (1970) (Harlan, J., concurring in part and dissenting in part).

understand better *The Federalist* papers. *The Federalist* was cited in twenty-seven of the seventy-seven cases in which justices referred to Story's *Commentaries*. Kent's *Commentaries* were cited thirty-eight times and *The Federalist* was included in six of those cases. The Court mentioned Rawle's works four times using *The Federalist* in two of those four opinions. Fiske's *The Critical Period in American History* appeared in four cases, including one case that also discussed *The Federalist*. Cooley's *Constitutional Limitations* was referred to in forty-three cases, seven of which included *The Federalist*. And in four of the six cases that cited Curtis' work, *The Federalist* was also used.<sup>334</sup>

Of course, several primary sources have been cited along with *The Federalist*. *Elliot's Debates* were cited fifty-eight times; in twenty-five of those cases, *The Federalist* was also considered. Farrand's *Records* were cited sixty-two times, including forty times with *The Federalist*. *Hamilton's Works* appeared in eight cases, five with *The Federalist*. The Court also considered Madison's papers three times, two times with *The Federalist*.<sup>335</sup>

Charles Warren has been the only relevant post-Beardian scholar to be frequently cited for an understanding of *The Federalist* and the Constitution's meaning. In seven of eighteen cases citing Warren's *The Supreme Court in United States History*, *The Federalist* was included. The Court also referred to *The Making of the Constitution* thirteen times, invoking *The Federalist* ten of those times. In none of these citations, however, did the Court consider Warren's discussion of Beard or of *The Federalist* itself.<sup>336</sup>

Fortunately, justices were sometimes aware of historical controversies. In *Wesberry v. Sanders*<sup>337</sup> Justice Black stated in a footnote that controversy existed over the authorship of certain papers in *The Federalist*.<sup>338</sup> In *Powell v. McCormack*<sup>339</sup> Chief Justice Warren relied heavily on Charles Warren's analysis

334. The cases that cite Story's *Commentaries*, Kent's *Commentaries*, Rawle's works, Fiske's *The Critical Period in American History* and Cooley's *Constitutional Limitations* and Curtis' work along with *The Federalist* are listed in Appendix A.

335. The cases that cite *Elliot's Debates*, Farrand's *Records*, *Hamilton's Works* and Madison's papers along with *The Federalist* are listed in Appendix A.

336. The cases that cite Warren's *The Supreme Court in United States History* and Warren's *The Making of the Constitution* along with *The Federalist* are listed in Appendix A.

337. 376 U.S. 1 (1964).

338. *Id.* at 15 n.40.

339. 395 U.S. 486 (1969).

of the Constitutional Convention to prove that Congress had limited powers in regulating its own membership.<sup>340</sup> In a footnote the Chief Justice cited Farrand and Story, who agreed with Charles Warren's interpretation that "[s]uch action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress . . . the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself."<sup>341</sup> The Chief Justice also noted Professor Chafee's position that Warren's theory was "the soundest policy,"<sup>342</sup> although Chafee had argued the theory was unsupported by congressional precedent.

## VI. CONCLUSION

Although the Court has not taken advantage of the abundant research and theories of post-Beardian scholars,<sup>343</sup> one wonders whether use of such information would have altered the outcome of any of the Court decisions.<sup>344</sup> A legal realist such as tenBroek may conclude that since the Court uses history primarily for persuasive or rhetorical purposes, a deeper historical survey would only produce more conflicting and ambiguous data to be manipulated by justices who still would decide cases by relying primarily on their own values.

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340. *Id.* at 532-41.

341. *Id.* at 536-37 n.69 (quoting C. WARREN, *supra* note 139, at 421).

342. 395 U.S. at 537 n.69.

343. I would like to bury two caveats in this footnote. First, the Supreme Court's constitutional history has not been as superficial as its history of *The Federalist*, even though the Court's failure to consider Beardian issues demonstrates a lack of depth in the historical analysis of both documents. For as this article has shown, the Court has frequently used other primary sources to define the constitutional language. There have been discussions of the Framers' actions after the Constitution. For instance, in *Equal Employment Opportunity Comm'n v. Wyoming*, 460 U.S. 226 (1983), Justice Powell noted in dissent that Madison opposed the Alien and Sedition Act based on a theory of limited delegation of state powers to the federal government. *Id.* at 271-72 (Powell, J., dissenting). Such history has resulted in indirect analysis of *The Federalist* passages.

Second, the Court's emphasis on early historians can partially be explained by the nature of judicial inquiry. The Court usually has been trying to interpret one clause; the early historians, especially Story, studied the Constitution line by line. Later historians, frequently engaging in broader studies, often did not provide this focused perspective. Nevertheless, my basic thesis remains valid: the Court has never scrutinized *The Federalist* itself with any intensity.

344. A thorough normative evaluation of the Court's peculiar history would necessitate writing a section that would dwarf the empirical data already presented. One would first have to explain what the Court ought and ought not to be attempting to verify historically. A model of good history would have to be presented to contrast it with the Court's techniques.

A legal formalist<sup>345</sup> may not concede that the Court adjudicates based on the values of individual justices; he could say the Court has appropriately restricted its analysis to the plain meaning of language in extrinsic aids to determine the original intentions of the Framers. Accordingly, the Court has properly excluded most historical works that emphasize motivation. Further, he may assert that *The Federalist* has been appropriately influential since it discusses in depth many of the Constitution's most important sections.

Some members of the critical legal studies movement may conclude that the motives for the Court's limited historical inquiry have been to glorify the Constitution and its Framers and to obfuscate the economic and political forces that helped create the Constitution. The justices believed that merely citing Hamilton, Madison, and *The Federalist* instilled sufficient awe to preclude further historical analysis. The Court's continued preference for the nineteenth century Federalist historians over the post-Beardian scholars exemplified the Court's attempts to divorce law from politics by emphasizing doctrine at the expense of political motives, economic factors, and hidden intentions.

Such an indictment is similar to Beard's implied thesis that since many of the Constitutional delegates held depreciated governmental debts, they created the Constitution to profit from appreciation in those securities. Beard later explicitly rejected any such theory; he believed that the Framers' motives, though varied, were primarily patriotic. Similarly, the justices' mode of historical analysis has not been motivated solely by ignorance or deceit. I am wary of inferring purely venal motives from a limited set of facts applying to many people over a long period of history. For instance, no one could accuse Justice Holmes, who only cited *The Federalist* once, of being hostile to historical inquiry. Some justices may agree with Holmes that history plays a minor role in constitutional adjudication, or they may have been

345. Grant Gilmore has humorously described the periodic dominance of legal formalism:

All generalizations are oversimplifications. It is not true that, during a given fifty-year period, all the lawyers and all the judges are lighthearted innovators, joyful anarchists, and adepts of Llewellyn's Grand Style—only to be converted en masse during the next fifty-year period to formalism or conceptualism. There are formalists during innovative periods and innovators during formalistic periods . . . .

G. GILMORE, THE AGES OF AMERICAN LAW 16 (1977). Gilmore's arch-villian formalist was C. Langdell, Harvard Law School's creator of the case method. *Id.* at 42-43.

sincerely engaging in an American form of hagiolatry, agreeing with the historian Clinton Rossiter that *The Federalist* is one of American's "sacred texts."<sup>346</sup> But whatever their motivations, virtually all the justices have engaged in the juristic history condemned by Beard.

Even assuming history should not be a major source of constitutional guidance, a close historical inquiry challenges the validity of many substantive decisions. If Alexander Hamilton and to a lesser degree, James Madison, were told that the Constitution strongly protected civil rights but no longer gave much protection to property rights, they would probably claim that their intentions had been subverted. The Constitution was clearly designed to protect property rights from majority tyranny,<sup>347</sup> to strip the Constitution of its ability to vigorously protect property rights threatens the original concept of the Constitution. Additionally, if Hamilton and Madison were told that some justices have interpreted *The Federalist* to support an expansion of state power under the tenth amendment, they would probably be equally surprised. Their actions throughout the ratification struggle indicated a preference for federal government at the expense of the "artificial beings" called states.

Assuming these two projections are justifiable, or correct, a contemporary justice faces a dilemma since history appears to conflict with existing constitutional theories. If, in the above two situations, a justice were to defer to historical views such as Hamilton's and Madison's, he or she may be forced to reject the doctrines established in footnote four of *Carolene Products*<sup>348</sup> and in *National League of Cities v. Usery*.<sup>349</sup> Conversely, a justice's acceptance of *Carolene Products'* constitutional hierarchy of values—placing personal liberties above property rights—forces the justice to partially reject Madison's theories of the Constitution.

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346. C. ROSSITER, *supra* note 6, at 52.

347. "National power was for Hamilton by no means an end in itself, but was a mere means for securing the happiness of the individual, of which the protection of property constituted a prominent part." G. DIETZE, *supra* note 215, at 341. Dietze's interpretation of *The Federalist* probably would have resurrected substantive due process in cases involving economic rights.

348. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). For a vigorous application and extension of this footnote, see J. ELY, *DEMOCRACY AND DISTRUST* 75-77 (1980).

349. 426 U.S. 833 (1976) (overruled by *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005 (1985)).

Why, then, do we even continue to study and learn about these men's views and lives in analyzing the Constitution and the arguments made in its defense? Many reasons exist aside from the direct impact history should have on specific legal cases. Evaluating *The Federalist's* origins and its arguments forces us to reconsider our own basic values. *The Federalist's* authors astutely commented on issues obviously relevant to constitutional interpretation; to ignore their arguments would be provincial. Additionally, we can understand how our own views are formed by intellectually and historically studying their origins,<sup>350</sup> and can appreciate why and how changes in ideas have taken place and how we are bound by history. We must be careful not to dismiss the past. Complete disregard for the past means that lawyers cannot significantly influence the future, and the very process of law is threatened. By learning more about Hamilton and Madison and by discovering their motivations, we can understand their way of thinking. As Albert Furtwangler recently observed, *The Federalist's* greatest value may lie in its civil tone.<sup>351</sup> With this perspective, we may be able to continue Hamilton and Madison's tradition of thoughtfully trying to protect both society and the individual.<sup>352</sup>

350. Oliver Wendell Holmes was well versed in legal history, but wrote that "the present has a right to govern itself so far as it can." O.W. HOLMES, *COLLECTED LEGAL PAPERS* 139 (1920). Even without being consciously incorporated into the law, history inevitably binds us: "The past gives us our vocabulary and fixes the limits of our imagination . . ." *Id.* Thus, history "sets us free and enables us to make up our own minds dispassionately" about prior laws by destroying "inflated explanations." *Id.* at 225. See, e.g., J. MILLER, *supra* note 13, at 189-201.

Oscar Handlin stated that the historians' duty is to record and preserve the truth as best they can. O. HANDLIN, *TRUTH IN HISTORY* 414-15 (1979).

351. A. FURTWANGLER, *THE AUTHORITY OF PUBLIUS* 148 (1984).

352. We cannot and should not ignore motivations when engaging in historical analysis. Even assuming its feasibility, the motive/intent distinction leads to distorted history. Although he was criticizing the theories of history which only present factual sequences or analyze economic motivations, philosopher Alfred Whitehead made the following general observation:

Such history confines itself to abstract mythology. The variety of motives is excluded. You cannot write the history of religious development without estimate of the motive-power of religious belief. The history of the Papacy is not a mere sequence of behaviours. It illustrates a mode of causation, which is derived from a mode of thought.

A.N. WHITEHEAD, *MODES OF THOUGHT* 24-25 (1938).

David Potter traced most historical disagreements back to competing theories of human motivations and causation:

When such writers give their various interpretation, they are in part disagreeing about their immediate subject, but perhaps to a greater degree they are merely applying to it their disagreement about the nature of human motivations.

## Appendix A

This appendix lists cases that cite the following historical works: a) Story's *Commentaries*; b) Kent's *Commentaries*; c) Rawle's works; d) Fiske's *The Critical Period in American History*; e) Cooley's *Constitutional Limitations*; f) Curtis' work; g) *Elliot's Debates*; h) Farrand's *Records*; i) *Hamilton's Works*; j) Madison's Papers; k) Warren's *The Supreme Court in United States History*; l) Warren's *The Making of the Constitution*. These citations were obtained through a LEXIS search and thus extend from 1925 through 1984. The time required to find further citations from works prior to 1925 would not be justified by the benefit of such a search.

### A. Story's Commentaries

Cases citing both *The Federalist* and Story's *Commentaries*: Myers v. United States, 272 U.S. 52, 150 (1926); *id.* at 208 (McReynolds, J., dissenting); O'Donoghue v. United States, 289 U.S. 516, 531 (1933); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 n.7, 429 (1934); Principality of Monaco v. Mississippi, 292 U.S. 313, 323, 324 n.3 (1934); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935); Humphrey's Ex'r v. United States, 295 U.S. 602, 630 (1935); South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 186 (1938); United States v. Lovett, 328 U.S. 303, 314 (1946); *id.* at 322 (Frankfurter, J., concurring); Ray v. Blair, 343 U.S. 214, 228 n.15 (1952); *id.* at 232 n.\* (Jackson, J., dissenting); District of Columbia v. John R. Thompson Co., 346 U.S. 100, 109 (1953); Green v. United States, 356 U.S. 165, 209, 215 n.32 (1958) (Black, J., dissenting); Romero v. International Terminal Operating Co., 358 U.S. 354, 361 n.8, 362 n.12 (1959); United States v. Brown, 381 U.S. 437, 441 n.9, 443 n.16 (1965); Griswold v. Connecticut, 381 U.S. 479, 488 n.3 (1965) (Goldberg, J., concurring); *id.* at 520 n.15 (Black, J., dissenting); United States v. Johnson, 383 U.S. 169, 178 (1966); Duncan v. Louisiana, 391 U.S. 145, 154 n.21 (1968); *id.* at 173 n.3 (Harlan, J., dissenting); Powell v. McCormack, 395 U.S. 486, 537 n.69, 540 n.74 (1969); Oregon v. Mitchell, 400 U.S. 112, 119 n.2 (1970); *id.* at 290 (Stewart, J., concurring in part and dissenting in part); Furman v. Georgia, 408 U.S. 238, 317 n.9 (1972) (Marshall, J., concurring); *id.* at 470 (Rehnquist, J., dissenting); Michelin Tire Corp. v. Wages, Tax Comm'r, 423 U.S. 276, 285 n.4, 293 n.12 (1976); National League of Cities v. Usery, 426 U.S. 833, 857 n.1, 863 n.5 (1976) (Brennan, J., dissenting); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 442 n.5 (1977); United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 462 n.11, 463 n.14 (1978); Exxon Corp. v. Governor of Md., 437 U.S. 117, 142 (1978) (Blackmun, J., concurring in part and dissenting in part); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579, 579 n.15 (1980); Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982); *id.* at 772

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If I may use my definition still further, the practice of historians in treating certain developments as resulting from prior circumstances or events means that, as Carr has said, the study of history is inescapably the study of causes.

D. POTTER, HISTORY AND AMERICAN SOCIETY 18-19 (D. Fehrenbacher ed. 1973).

There is a vast amount of legal scholarship discussing motivation and intent. One should begin with Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

n.12 (White, J., dissenting); *Immigration & Naturalization Serv. v. Chadha*, 103 S. Ct. 2764, 2782, 2782 n.14 (1983).

Cases citing Story's *Commentaries* without *The Federalist*: *Frick v. Pennsylvania*, 268 U.S. 473, 499 (1925); *Gitlow v. People of N.Y.*, 268 U.S. 652, 666 n.9 (1925); *Patton v. United States*, 281 U.S. 276, 297 (1930); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 655 (1930); *Graham v. Good-Cell*, 282 U.S. 409, 430 n.17 (1931); *United States v. Sprague*, 282 U.S. 716, 732 (1931); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714 (1931); *Powell v. Alabama*, 287 U.S. 45, 70 (1932); *Board of Trustees v. United States*, 289 U.S. 48, 58 (1933); *Williams v. United States*, 289 U.S. 553, 573 (1933); *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935); *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry.*, 294 U.S. 648, 668 (1935); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 587 n.17 (1935); *United States v. Butler*, 297 U.S. 1, 64 n.11 (1936); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 331 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238, 326 (1936) (Cardozo, J., dissenting in part and concurring in part); *Ashton v. Cameron County Water Improvement Dist. No. One.*, 298 U.S. 513, 537 (1936) (Cardozo, J., dissenting); *United States v. Wood*, 299 U.S. 123, 137 (1936); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 n.1 (1936); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937); *James v. Dravo Contracting Co.*, 302 U.S. 134, 147 (1937); *Mulford v. Smith*, 307 U.S. 38, 48 n.19 (1939); *United States v. Miller*, 307 U.S. 174, 182 n.3 (1939); *United States v. Darby*, 312 U.S. 100, 124 (1941); *Williams v. North Carolina*, 325 U.S. 226, 228 n.3 (1945); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 58 (1946) (Reed, J., dissenting); *Adamson v. California*, 332 U.S. 46, 116 (1947) (Black, J., dissenting—Appendix); *Caldarola v. Eckert*, 332 U.S. 155, 157 (1947); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949); *Carlson v. Landon*, 342 U.S. 524, 558 (1952) (Black, J., dissenting); *Mazer v. Stein*, 347 U.S. 201, 207 n.5 (1954); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 n.22 (1955); *Green v. United States*, 355 U.S. 184, 203 (1957) (Frankfurter, J., dissenting); *Crooker v. California*, 357 U.S. 433, 439 (1958); *McGowan v. Maryland*, 366 U.S. 420, 441 (1961); *Culombe v. Connecticut*, 367 U.S. 568, 582 n.24 (1961); *Washington v. Texas*, 388 U.S. 14, 19 n.12 (1967); *Chandler v. Judicial Council*, 398 U.S. 74, 96 (1970) (Harlan, J., concurring); *Johnson v. Louisiana*, 406 U.S. 356, 371 n.7 (1972) (Powell, J., concurring); *Apodaca v. Oregon*, 406 U.S. 404, 415 (1972) (Stewart, J. dissenting); *Colgrove v. Battin*, 413 U.S. 149, 155 n.9 (1973); *Monell v. Department of Social Servs.*, 436 U.S. 658, 687 n.46 (1978); *Crist v. Bretz*, 437 U.S. 28, 33 (1978); *Leo Sheep Co. v. United States*, 440 U.S. 668, 672 n.4 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 128 n.13 (1979); *Gannett Co. v. Depasquale*, 443 U.S. 368, 427 (1979) (Blackmun, J., concurring in part and dissenting in part); *Brown v. Glines*, 444 U.S. 348, 363 (1980) (Brennan, J., dissenting); *United States v. Ptasynski*, 42 U.S. 74, 81 (1983); *Marsh v. Chambers*, 103 S. Ct. 3330, 3348 n.33 (1983) (Brennan, J., dissenting); *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361 (1984).

## B. Kent's Commentaries

Cases citing *The Federalist* and Kent's *Commentaries*: *Myers v. United States*, 272 U.S. 52, 136-37, 149 (1926); *O'Malley v. Woodrough*, 307 U.S. 277, 285-86 (1939) (Butler, J., dissenting); *Reid v. Covert*, 354 U.S. 1, 10 n.13 (1957); *Oregon v. Mitchell*, 400 U.S. 112, 164 n.15 (1970); *id.* at 290 (Stewart, J., dissenting); *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 nn.11-12 (1978); *United States v. Will*, 449 U.S. 200, 218, 221 (1980).

Cases citing Kent's *Commentaries* without *The Federalist*: *McGrain v. Daugherty*, 273 U.S. 135, 161 n.14 (1927); *Maul v. United States*, 274 U.S. 501, 511 (1927); *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 530 (1928); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 657 (1930); *Graham v. Good-Cell*, 282 U.S. 409, 430 n.17 (1931); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 735 (1931) (Butler, J., dissenting); *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933); *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 42 (1934); *Hamilton v. Regents of the Univ. of*

Cal., 293 U.S. 245, 261 (1934); Nye v. United States, 313 U.S. 33, 48 (1941); C.J. Hendry Co. v. Moore, 318 U.S. 133, 152 (1943); Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 651-52 (1943); United States v. Causby, 328 U.S. 256, 261 n.5 (1946); Colgrove v. Green, 328 U.S. 549, 553 (1946); Cleveland v. United States, 329 U.S. 14, 18 (1946); United States v. California, 332 U.S. 19, 33 n.16 (1947); Sherrer v. Sherrer, 334 U.S. 343, 361 (1948) (Frankfurter, J., dissenting); Standard Oil Co. v. United States, 340 U.S. 54, 58 n.6 (1950); United States v. Caltex, Inc., 344 U.S. 149, 154 n.6 (1952); Garner v. Teamsters Local 776, 346 U.S. 485, 496 n.19 (1953); Armstrong v. Armstrong, 350 U.S. 568, 579 n.3 (1956) (Black, J., concurring); Kossick v. United Fruit Co., 365 U.S. 731, 735 n.4 (1961); Montana v. Kennedy, 366 U.S. 308, 312 (1961); Zschernig v. Miller, 389 U.S. 429, 453 n.16 (1968) (Harlan, J., concurring); Labine v. Vincent, 401 U.S. 532, 554 n.20 (1971) (Brennan, J., dissenting); Juidice v. Vail, 430 U.S. 327, 335 n.11 (1977); Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 279 n.13 (1977); Monell v. Department of Social Servs., 436 U.S. 658, 689 n.51 (1978); Parham v. J.R., 442 U.S. 584, 602 (1979); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 678 n.23 (1979); Rogers v. Lodge, 458 U.S. 613, 638 n.16 (1982) (Stevens, J., dissenting); Idaho *ex rel.* Evans v. Oregon, 103 S. Ct. 2817, 2826 (1983) (O'Connor, J., dissenting).

### C. Rawle's Works

Cases citing *The Federalist* and Rawle's works: O'Donoghue v. United States, 289 U.S. 516, 531, 532 (1933); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 240 n.8, 253 n.17 (1963) (Brennan, J., concurring).

Cases citing Rawle's works without *The Federalist*: Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 734 n.2 (1931) (Butler, J., dissenting); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 284 n.3 (1960).

### D. Fiske's The Critical Period in American History

*The Federalist* and Fiske were cited in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 n.7 (1934). Cases citing Fiske's *The Critical Period in American History* without *The Federalist*: Independent Warehouses, Inc. v. Scheele, 331 U.S. 70, 94 (1947) (Jackson, J., dissenting); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949); Engel v. Vitale, 370 U.S. 421, 429 n.11 (1962).

### E. Cooley's Constitutional Limitations

Cases citing *The Federalist* and Cooley's *Constitutional Limitations*: Myers v. United States, 272 U.S. 52, 183-84, 218 (1926) (McReynolds, J., dissenting); Home Bldg. & Loan Ass'n, 290 U.S. 398, 427 n.7 (1934); *id.* at 452-53 (Sutherland, J., dissenting); United States v. Lovett, 328 U.S. 303, 314 (1946); *id.* at 322 (Frankfurter, J., concurring); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 240 n.8, 259 n.24 (1963) (Brennan, J., concurring); United States v. Brown, 381 U.S. 437, 443 n.16, 446 n.19 (1965); Oregon v. Mitchell, 400 U.S. 112, 210-11 (1970) (Harlan, J., dissenting); *id.* at 266-67 (Brennan, J., dissenting); Furman v. Georgia, 408 U.S. 238, 383 n.5 (1972) (Burger, C.J., dissenting); *id.* at 470 (Rehnquist, J., dissenting).

Cases citing Cooley's *Constitutional Limitations* without *The Federalist*: McGrain v. Daugherty, 273 U.S. 135, 161 n.15 (1927); Tumey v. Ohio, 273 U.S. 510, 522 (1927); Williams v. Standard Oil Co., 278 U.S. 235, 242 (1928); Posados v. Warner, Barnes & Co., 279 U.S. 340, 344 (1929); United States v. Sprague, 282 U.S. 716, 732 (1931); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 734 n.2 (1931) (Butler, J., dissenting); Nathanson v. United States, 290 U.S. 41, 46 (1931); Grosjean v. American Press Co., 297 U.S. 233, 249-50 (1936); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345 (1936) (Brandeis, J., concurring); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting); United States v. Miller, 307 U.S. 174, 182 n.3 (1939); Paramino Lumber Co.

v. Marshall, 309 U.S. 370, 380 n.23 (1940); Goldman v. United States, 316 U.S. 129, 140 n.7 (1942) (Murphy, J., dissenting); Murdock v. Pennsylvania, 319 U.S. 105, 127 n.13 (1943) (Reed, J., dissenting); Ashcraft v. Tennessee, 322 U.S. 143, 155 n.10 (1944); NLRB v. A.J. Tower Co., 329 U.S. 324, 331-32 (1946); Everson v. Board of Educ., 330 U.S. 1, 14 n.16 (1947); *In re Oliver*, 333 U.S. 257, 270 n.25 (1948); Armstrong v. Armstrong, 350 U.S. 568, 579 n.4 (1956) (Black, J., concurring); United States v. UAW-CIO, 352 U.S. 567, 590 n.4 (1957); Hanson v. Denckla, 357 U.S. 235, 249 n.21 (1958); Crooker v. California, 357 U.S. 433, 439 (1958); Monroe v. Pape, 365 U.S. 167, 210 n.12 (1961) (Frankfurter, J., dissenting); Ferguson v. Georgia, 365 U.S. 570, 580 (1961); Culombe v. Connecticut, 367 U.S. 568, 582 n.24 (1961); Wood v. Georgia, 370 U.S. 375, 392 (1962); New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964); Estes v. Texas, 381 U.S. 532, 542 (1965); Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323, 381 (1974) (White, J., dissenting); Bigelow v. Virginia, 421 U.S. 809, 829 (1975); Elrod v. Burns, 427 U.S. 347, 374 n.29 (1976); Monell v. Department of Social Servs., 436 U.S. 658, 679 n.39 (1978); Crist v. Bretz, 437 U.S. 28, 46 n.10 (1978) (Powell, J., dissenting); Gannett Co. v. Depasquale, 443 U.S. 368, 382 n.9 (1979); Payton v. New York, 445 U.S. 573, 598 n.45 (1980).

#### *F. Curtis' Work*

Cases citing *The Federalist* and Curtis' work: Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 n.7 (1934); *id.* at 457 n.2 (Sutherland, J., dissenting); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935); South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 186 (1938); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 374 (1964).

Cases citing Curtis' work without *The Federalist*: The Pocket Veto Case, 279 U.S. 655, 683 (1929); Williams v. Florida, 399 U.S. 78, 96 n.42 (1970).

#### *G. Elliot's Debates*

Cases citing *The Federalist* and Elliot's Debates: Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 nn.6-7 (1934); Principality of Monaco v. Mississippi, 292 U.S. 313, 323, 324 (1934); Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 76 n.3 (1946); National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 632 n.9, 635 (1949) (Vinson, C.J., dissenting); District of Columbia, v. John R. Thompson Co., 346 U.S. 100, 109, 110 (1953); Reid v. Covert, 354 U.S. 1, 9 n.12, 10 n.13 (1957); Draper v. United States, 358 U.S. 307, 317, 320 (1959) (Douglas, J., dissenting); Romero v. International Terminal Operating Co., 358 U.S. 354, 361 n.8 (1959); *id.* at 394 n.5 (Brennan, J., dissenting in part and concurring in part); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 268 nn.16 & 18 (1960) (Whittaker, J., concurring in part and dissenting in part); Baker v. Carr, 369 U.S. 186, 303 n.38, 308 n.72 (1962) (Frankfurter, J., dissenting); Wesberry v. Sanders, 376 U.S. 1, 15 n. 39 (1964); *id.* at 38 n.31 (Harlan, J., dissenting); Singer v. United States, 380 U.S. 24, 31 (1965); United States v. Johnson, 383 U.S. 169, 177, 178 (1966); O'Callahan v. Parker, 395 U.S. 258, 277, 277 n.2 (1969) (Harlan, J., dissenting); Powell v. McCormack, 395 U.S. 486, 502 n.19, 540 n.74 (1969); Oregon v. Mitchell, 400 U.S. 112, 120 n.2 (1970); *id.* at 210 (Harlan, J., dissenting); Furman v. Georgia, 408 U.S. 238, 259 (1972) (Brennan, J., concurring); *id.* at 466 (Rehnquist, J., dissenting); Edelman v. Jordan, 415 U.S. 651, 661 n.9 (1974); United States v. Richardson, 418 U.S. 166, 178 n.11 (1976); *id.* at 193 (Powell, J., concurring); National League of Cities v. Usery, 426 U.S. 833, 857 n.1, 863 n.5 (1976) (Brennan, J., dissenting); Nevada v. Hall, 440 U.S. 410, 419 n.16 (1979); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 784 n.13, 792 (1982) (O'Connor, J., concurring in part and dissenting in part); Nixon v. Fitzgerald, 457 U.S. 731, 772 n.12, 774 n.15 (1982) (White, J., dissenting); Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 249 n.8 (1983) (Stevens,

J., concurring); *id.* at 268 n.3 (Powell, J., dissenting); Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764, 2783 (1983); *id.* at 2800 n.17 (White, J., dissenting).

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### J. Madison's Papers

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