

# Annotation Summary

9 annotations on 3 pages by alexburger



## There Less Here Than Meets the Eye?

~~Melvyn R. Durbin~~

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<sup>3</sup> *Printz*, 521 U.S. at 905.

<sup>4</sup> *Id.* at 910–15.

<sup>5</sup> *Id.* at 971–76 (Souter, J., dissenting).

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WILLIAM & MARY BILL OF RIGHTS JOURNAL

[Vol. 14:243]

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# William & Mary Bill of Rights Journal

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Volume 14 | Issue 1

Article 9

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### Repository Citation

Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 Wm. & Mary Bill Rts. J. 243 (2005), <http://scholarship.law.wm.edu/wmboj/vol14/iss1/9>

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

Melvyn R. Durchslag\*

## INTRODUCTION

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

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

<sup>1</sup> 521 U.S. 898 (1997).

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

<sup>3</sup> *Printz*, 521 U.S. at 905.

<sup>4</sup> *Id.* at 910–15.

<sup>5</sup> *Id.* at 971–76 (Souter, J., dissenting).

Hamilton and James Madison. Certainly for Justice Souter, if not Justice Scalia,<sup>6</sup> what Madison and Hamilton may or may not have suggested about the federal government's authority to impress state officers in the service of national law was determinative not only of the original understanding but, more importantly, the outcome of the case. "In deciding these cases . . . it is *The Federalist* that finally determines my position. I believe that the most straightforward reading of No. 27 is authority for the Government's position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45."<sup>7</sup> Because of the extraordinary and, as this paper will demonstrate, rarely seen reliance upon *The Federalist*, some illustration (in less than twelve pages) is required. First, Justice Souter:

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

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

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

<sup>7</sup> *Printz*, 521 U.S. at 971 (Souter, J., dissenting).

. . . In No. 45, Hamilton says that if a State is not given (or declines to exercise) an option to supply its citizens' share of a federal tax, the "eventual collection [of the federal tax] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States." And in No. 36, he explains that the National Government would more readily "employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments."<sup>8</sup>

Justice Scalia, for the majority, replies:

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

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

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

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

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<sup>8</sup> *Id.* at 971–75 (first and third alterations in original) (citations omitted).

Constitution.” If the dissent’s reading of *The Federalist* No. 27 were correct . . . , one would surely have expected that “essential agency” of state executive officers (if described further) to be described as their responsibility to execute the laws enacted under the Constitution. Instead . . . *Federalist* No. 44 continues

“The election of the President and Senate will depend, in all cases, on the legislatures of the several States. And the election of the House of Representatives will equally depend on the same authority in the first instance; and will, probably, forever *be conducted by the officers* and according to the laws of the States.”

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

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

Interest in the Court’s use of *The Federalist* is not new. Professor Charles Pierson did an extensive study on the subject in 1924.<sup>11</sup> Professor James Wilson did the same in 1985.<sup>12</sup> And in 1998 Professor Ira Lupu, in response to a provocative article by Professor William Eskridge<sup>13</sup> did a decade-by-decade study of the number

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

<sup>10</sup> See *United States v. Lopez*, 514 U.S. 549, 586 (1995) (Thomas, J., concurring).

<sup>11</sup> Charles W. Pierson, *The Federalist in the Supreme Court*, 33 YALE L.J. 728 (1924).

<sup>12</sup> James G. Wilson, *The Most Sacred Text: The Supreme Court’s Use of The Federalist Papers*, 1985 BYUL REV. 65 (1985).

<sup>13</sup> William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998) (arguing that courts should reject legislative history in interpreting contemporary statutes but should rely on the views of the framers in interpreting the Constitution).

of times *The Federalist* was cited by the Supreme Court from 1790 through 1998.<sup>14</sup> Professor Lupu's findings demonstrate that from 1980 to 1998, *The Federalist* was cited more often by the Supreme Court than in the combined period from 1890 to 1979.<sup>15</sup> These, and other efforts, are invaluable contributions to any discussion of the reliance on history to interpret constitutional text.<sup>16</sup>

This study expands upon the work of Professor Lupu and others,<sup>17</sup> but it is different in several ways. First, while largely quantitative, this study is qualitative as well. That is, it is an attempt to determine not only the number of cases in which *The Federalist* was cited<sup>18</sup> or the theoretical reason why it was cited,<sup>19</sup> but more significantly, the importance that *The Federalist* played, both in the analysis of the Justices citing it and in the outcome reached by those Justices.<sup>20</sup>

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<sup>14</sup> Ira C. Lupu, *Time, the Supreme Court, and The Federalist*, 66 GEO. WASH. L. REV. 1324 (1998) [hereinafter *The Supreme Court and The Federalist*]. In the same year, he published a study of the most frequently cited *The Federalist Papers*. Ira C. Lupu, *The Most Cited Federalist Papers*, 15 CONST. COMMENT. 403 (1998); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1498 n.285 (1987) (arguing that the Supreme Court early on accorded *The Federalist* a special status).

<sup>15</sup> *The Supreme Court and The Federalist*, *supra* note 14, at 1328.

<sup>16</sup> Professor Peter Smith's recent study of "originalism" in the current Court concludes that "originalism's advantage over other approaches to constitutional interpretation with respect to its ability to constrain judicial discretion is marginal." Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 284 (2004) [hereinafter *Sources of Federalism*]. More specifically, Professor Smith's comparison between the federalism majority and the federalism dissenters reveals that their respective use of historical materials depends on how much weight each gives to the views of anti-Federalists. *Id.* at 257. The majority tends to read *The Federalist*, for example, to suggest that the Constitution *accommodates* the views of the anti-Federalists, whereas the dissenters read *The Federalist Papers* to suggest that the Constitution *rejected* those concerns. *Id.* For an illuminating and useful, albeit abbreviated, history of originalist analysis by the Supreme Court, see Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 11–33 (1998).

<sup>17</sup> Jack N. Rakove, *Early Uses of The Federalist*, in *SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING* 234–49 (Charles R. Kesler ed., 1987); Seth Barrett Tillman, *The Federalist Papers as a Reliable Source for Constitutional Interpretation*, 105 W. VA. L. REV. 601 (2003); John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337 (1998); David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755 (2001).

<sup>18</sup> *The Supreme Court and The Federalist*, *supra* note 14, at 1328; Wilson, *supra* note 12, at 66.

<sup>19</sup> McGowan, *supra* note 17.

<sup>20</sup> Importance in analysis and importance in outcome are obviously related. However, as this study demonstrates, frequency of citation does not necessarily translate into importance, either in analysis or outcome, a conclusion which is hardly new. See Rakove, *supra* note 17, at 248. Consequently, my conclusions differ from those of Professor Wilson, who appears at points to equate frequency of citation to analytical importance. See, e.g., Wilson, *supra*

The concentration of this article on the importance of *The Federalist* to the opinion's analysis and eventual outcome is differently focused than Professor Manning's study, which analyzed whether or not *The Federalist* was cited as "authoritative" evidence of . . . intent.<sup>21</sup> Sometimes the two are the same, but not inevitably so. *The Federalist* can be read as authoritative on the question of original understanding, but original understanding may be largely unimportant to a Justice's analysis. In that event, this study would conclude that *The Federalist Papers* cited were an insignificant influence on the Justice's analysis and/or conclusion. Conversely, it may be that original understanding was a significant aspect of analysis and/or result but *The Federalist Papers* cited were unimportant, either generally or relatively, to determining what that understanding was. In that case, this analysis, and that of Professor Manning, would converge. *The Federalist* would be both insignificant (no matter how many times it was cited) and not "authoritative."

This study, unlike that of Professor McGowan, is not an attempt to determine the reasons or the purposes for citations to *The Federalist*.<sup>22</sup> Nor does this paper reach any normative judgments about which reasons are defensible. Nevertheless, Professor McGowan's work may well shed light on some of the conclusions this paper reaches regarding the significance of *The Federalist* to the opinion's outcome. For example, McGowan concludes that for much of the 18th and 19th centuries, the Court used *The Federalist Papers* "as a source of wisdom that might enlighten [it] on how to interpret the Constitution in a particular case. On this view, *The Federalist* would be the rough equivalent of Blackstone, Coke, or Kent."<sup>23</sup> Citing *The Federalist* as a source of wisdom aids in establishing the Court's "ethos" as an institution wedded to a method of judging that transcends the parties to the litigation and the politics that generated the dispute.<sup>24</sup> *The Federalist*, in other words, is cited less for its authoritativeness in interpreting Constitutional text than for establishing the Court as an objective and trustworthy arbitrator.<sup>25</sup> Indeed, if McGowan is correct, the reasons for mentioning *The Federalist* may have little to do either with the analysis or the outcome reached by the citing Justice.

This might well explain, for example, why a decidedly originalist Taney Court, while mentioning *The Federalist* frequently, seemingly placed no more reliance (and often less) on *The Federalist Papers* than on a number of other interpretative sources.<sup>26</sup> It may also explain why Justice Thomas's historical analysis sometimes

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

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

<sup>22</sup> McGowan, *supra* note 17, at 755.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 822–25.

<sup>25</sup> *Id.* at 824.

<sup>26</sup> See *infra* note 67 and accompanying text.

eschews reliance on *The Federalist* in favor of other historical evidence,<sup>27</sup> or why Justice Scalia's frequent citations to *The Federalist* seem, at times, to be innocuous.<sup>28</sup> Finally, Professor McGowan's "ethos" explanation might shed light on the frequency of *The Federalist* citations by Justices not ordinarily thought of as originalists: Justices Brennan and Douglas, for example.

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

As the title of this paper suggests, the quantitative measure of increasing citations to *The Federalist Papers*, whether measured in absolute terms, the rate of citation per case decided,<sup>29</sup> or in the percentage increase from one era to another, do not match my conclusions regarding the importance of *The Federalist Papers* to Constitutional interpretation.

## I. CONSTRUCTION OF THE STUDY

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

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<sup>27</sup> See, e.g., U.S. Term Limits v. Thornton, 514 U.S. 779, 846 n.1, 847 (1995) (Thomas, J., dissenting). But see United States v. Lopez, 514 U.S. 549, 585–87 (Thomas, J., concurring). The inconsistency, however, might lead a cynic to conclude the reliance on *The Federalist* is simply strategic or opportunistic.

<sup>28</sup> See *infra* notes 458–60, 479–82 and accompanying text.

<sup>29</sup> See *The Supreme Court and The Federalist*, *supra* note 14, at 1328 n.2.

Several things may have occurred to the reader even at this early juncture. First, why were the periods selected as they were, particularly in light of the decade-by-decade data already accumulated? Second, which is prompted by the first, aren't the temporal divisions both arbitrary and inconsistent? Four of the nine periods are defined by who was serving as Chief Justice while five span the stewardship of at least two and, in several cases, three Chief Justices. Why not either define all "eras" by decades, by the presiding Chief Justice, or some other way? Admittedly, the lines drawn here are, like most lines, arbitrary in the sense that one can think of different, even arguably better, dividing points. Moreover, the lines, particularly those that define the "era" by the Chief Justice, are overly simplistic — they fail to account for a variety of factors that influence what prompts Justices to decide as they do and how shifts occur during those periods of stewardship.<sup>30</sup> If those are the criteria, the plea is guilty. On the other hand, there are good reasons to temporalize as I did.

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

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

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<sup>30</sup> See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 569–70 (2003) (noting that the Rehnquist Court saw a dramatic shift in the nature of cases decided, the number of cases decided, and the doctrinal import of the cases decided after 1994).

"social welfare" cases.<sup>31</sup> The Rehnquist Court has left a distinct legacy, particularly, although not exclusively, in federalism cases.<sup>32</sup>

Finally, and most importantly, the periods chosen largely, although not entirely, correspond to temporal categories used by leading legal historians. For example, Lawrence Baum splits his 1985 study of the Supreme Court into the pre-Marshall, Marshall and Taney Courts, the period between 1865 and 1935, and the period from 1937 to 1985, which he subdivides into the Warren and Burger Courts.<sup>33</sup> Robert McCloskey's latest work, as revised by Sanford Levinson, is divided into six time periods: 1789 to 1810 (the pre-Marshall years), 1810 to 1835 (the Marshall Court), 1836 to 1864 (The Taney Court), 1865 to 1900 (the "Gilded Age"), 1900 to 1937 (the "Judiciary and the Regulatory State"), and 1937 to 1959 (the "Modern Court").<sup>34</sup>

The horizontal axis is self-explanatory. The first two categories (from left to right) are the name of the case and its citation. The third category notes *The Federalist Papers* cited. This category may, however, be under-inclusive. For example, both *Calder v. Bull*<sup>35</sup> and *Fletcher v. Peck*<sup>36</sup> cited generally to *The Federalist* but mentioned no one paper in particular. Sections of *Marbury v. Madison*<sup>37</sup> read like *The Federalist No. 78*<sup>38</sup> without any attribution at all. And much of the analysis in *M'Culloch v. Maryland*<sup>39</sup> reads like *The Federalist Nos. 33*<sup>40</sup> and 44,<sup>41</sup> again without specific attribution.<sup>42</sup> Consequently there might be some

<sup>31</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970). Significant advances were, however, achieved in expanding the Due Process Clause to include "family" rights not previously recognized. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>32</sup> See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

<sup>33</sup> LAWRENCE BAUM, THE SUPREME COURT 18–24 (2d ed. 1985).

<sup>34</sup> ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (revised by Sanford Levinson, 3d ed. 2000). Professor Levinson added Chapters Eight and Nine, the former analyzing civil rights and civil liberties cases and the latter exploring judicial monitoring of the new welfare state. These two chapters are not organized according to time periods.

<sup>35</sup> 3 U.S. (3 Dall.) 386, 391 (1798).

<sup>36</sup> 10 U.S. (6 Cranch) 87, 122 (1810).

<sup>37</sup> 5 U.S. (1 Cranch) 137, 174–80 (1803).

<sup>38</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>39</sup> 17 U.S. (4 Wheat.) 316, 433–37 (1819).

<sup>40</sup> THE FEDERALIST NO. 33 (Alexander Hamilton).

<sup>41</sup> THE FEDERALIST NO. 44 (James Madison).

<sup>42</sup> The reason for this has nothing to do with the unavailability of *The Federalist Papers* during these early years. *The Federalist Papers* were first published, in hard-bound form, in 1788, a year after the Constitution was ratified. Moreover, *The Federalist Papers* were frequently referred to in Congressional debates starting in the summer of 1789. Rakove, *supra* note 17, at 235–40.

inaccuracy, the amount of which is difficult to tell, in findings about the extent to which various opinions and various Courts relied on *The Federalist Papers* and the degree of that reliance. The remaining categories concern whether *The Federalist* was cited in a majority, concurring, or dissenting opinion, and which Justices cited it.

The most important category, the importance that the citing Justice attached to *The Federalist Papers* cited, does not appear on the horizontal axis at all. This is assessed in the text. The range of importance can vary from unimportant, to useful as support for a textual or structural argument, to being important as explanatory of ambiguous text, to determinative of a particular constitutional position, to every nuanced degree of those possibilities.<sup>43</sup> Sometimes it is easy to determine into which category the citation falls, as it was in Justice Souter's dissenting opinion in *Printz*.<sup>44</sup> That, however, is the exception. Take, for example, Chief Justice Marshall's nearly wholesale use of Publius's arguments in *Marbury* to establish the principle of judicial review.<sup>45</sup> One might say that *The Federalist* was not at all important to the decision since it was not cited.<sup>46</sup> It was merely "coincidental" in the sense that both Marshall and Hamilton were Federalists and agreed that judicial review was necessary both to protect the rule of law and to ensure the supremacy of federal law. That is, the same result would have obtained even if *The Federalist No. 78* had not been written.<sup>47</sup> On the other hand, it is certainly possible, probably likely, that *The Federalist No. 78* significantly influenced Marshall's views on the role of the Court and that those views led to the Court's unanimous decision that both legislative and executive acts were subject to judicial oversight.<sup>48</sup> Similarly, it is difficult to determine the "true" importance of *The Federalist* to Justice Scalia's majority opinion in *Printz*.<sup>49</sup> Was it the contemporaneous congressional history that decided the "original understanding" issue, making his extended citation of *The*

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

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

<sup>45</sup> Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–79 (1803), with THE FEDERALIST PAPERS NO. 78 at 505–08 (Alexander Hamilton).

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

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

<sup>48</sup> *Marbury*, 5 U.S. (1 Cranch) at 178.

<sup>49</sup> See *Printz*, 521 U.S. at 910–15, 918–24.

*Federalist* superfluous?<sup>50</sup> Were the two more or less equal in their importance? Or, was Justice Scalia's extended recitation of *The Federalist* meant more to respond to Justice Souter's dissent than to support the majority's arguments?<sup>51</sup>

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

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

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

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<sup>50</sup> *Id.* at 909–10.

<sup>51</sup> *Id.* at 911–15 & nn.7–9.

<sup>52</sup> I thank my colleague Jessie Hill for reminding me of this important caveat.

provide the basic information for those who wish to supplement the text. From the Warren Court forward, analyzing every Justice who cited *The Federalist* proved problematic. Some cited *The Federalist Papers* often; others cited them very infrequently. Those in the latter group will not be discussed individually, although their opinions were checked in order to ensure that an opinion that relied significantly on *The Federalist* was not overlooked.

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

## II. THE FACTUAL ANALYSIS

### A. *The Pre-Marshall and Marshall Years: 1789–1835*<sup>53</sup>

The first forty-six years of United States Supreme Court jurisprudence reveals that references to *The Federalist Papers* appeared in twelve cases. Only one of those cases, *Calder v. Bull*,<sup>54</sup> was decided prior to 1800, when John Marshall became the Chief Justice. At the end of an exhaustive effort to define an *ex post facto* law,<sup>55</sup> Justice Chase noted that Blackstone defined *ex post facto* laws as Chase himself did and that “[Blackstone’s] opinion is confirmed . . . by the author of *The Federalist*.<sup>56</sup> It is impossible to tell the degree to which Justice Chase relied upon *The Federalist* rather than his own understanding.

During the Marshall years, *The Federalist Papers* were noted in eleven cases and thirteen opinions.<sup>57</sup> Not all of these opinions mentioned *The Federalist Papers* by number. For example, Justice Johnson’s dissenting opinion in *Fletcher v. Peck* referred generally to “letters of Publius.”<sup>58</sup> In *Cohens v. Virginia*,<sup>59</sup> Chief Justice Marshall similarly referred to *The Federalist Papers* only in general language.<sup>60</sup>

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<sup>53</sup> The Pre-Marshall and Marshall years have been combined because only one case in the eleven years before John Marshall was appointed Chief Justice mentioned *The Federalist Papers*.

<sup>54</sup> 3 U.S. (3 Dall.) 386, 391 (1798).

<sup>55</sup> See U.S. CONST. art. I, § 9 cl. 3.

<sup>56</sup> *Calder*, 3 U.S. (3 Dall.) at 390.

<sup>57</sup> This does not include cases, such as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which the Court’s reasoning resembles or is an exact replica of that used by “Publius.” See *supra* note 45 and accompanying text.

<sup>58</sup> 10 U.S. (6 Cranch) 87, 144 (1810) (Johnson, J., dissenting).

<sup>59</sup> 19 U.S. (6 Wheat.) 264, 418–420 (1821).

<sup>60</sup> *Id.* at 418–20. Marshall referred to *The Federalist* in only two other cases, *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431–33 (1819), and *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 469 (1829). Like his citation in *Cohens*, these cases referred to *The Federalist* generally and not by specific number. Moreover, in neither of the cases were *The Federalist Papers* cited in any way that could conceivably be characterized as crucial to the decision. Indeed in both *M’Culloch* and *Weston*, the only reason for citing *The*

References to specific *Papers* appeared in only three majority opinions: *The Federalist No. 82* in Justice Washington's opinion in *Houston v. Moore*,<sup>61</sup> Justice Story's mention of *The Federalist No. 42* in *United States v. Smith*,<sup>62</sup> and his footnote reference to *The Federalist No. 29* in *Martin v. Mott*.<sup>63</sup>

Dissenters made far greater use of *The Federalist Papers* during this period than did those who authored majority opinions, and when *The Federalist Papers* were cited, they were specifically referenced. *The Federalist* appeared in seven dissenting opinions, 54 percent of the opinions that mentioned *The Federalist* during that time period. Of those 71 percent (five of seven) were authored by one Justice, Smith Thompson.<sup>64</sup>

Conclusions are difficult to come by with only fourteen opinions so much as mentioning *The Federalist Papers* and only three being majority opinions. One thing is clear, however. If viewed from what the Court and/or various Justices said, *The Federalist Papers* played little role in the outcome of the cases. Citations in majority opinions were little more than asides, if that.<sup>65</sup> Even the dissenters did not seem to give *The Federalist* any significant weight.<sup>66</sup> Rather, they were used to

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

<sup>61</sup> 18 U.S. (5 Wheat.) 1, 25–26 & n.a (1820) (raising the issue of congressional power to punish).

<sup>62</sup> 18 U.S. (5 Wheat.) 153, 158–59 & n.a (1820). The question in *Smith* was whether the United States could impose the death penalty for crimes committed on the high seas. Justice Story's reference to *The Federalist No. 42* concerned whether the laws of nations could be used to define crimes on the high seas. *Id.* at 157–58 & n.a.

<sup>63</sup> 25 U.S. (12 Wheat.) 19, 31 n.1 (1827).

<sup>64</sup> Justice Thompson is not exactly a household name. He was a Republican from New York appointed by President Monroe in 1823. He died in office twenty years later in 1843. Donald Malcolm Roper completed a biography of Justice Thompson in 1963 in partial satisfaction of the requirements for a Ph.D. See Donald Malcolm Roper, *Mr. Justice Thompson and the Constitution*, in AMERICAN LEGAL AND CONSTITUTIONAL HISTORY: A GARLAND SERIES OF OUTSTANDING DISSERTATIONS (Harold Human & Stuart Bruchey eds., 1987). Included in this biography is an analysis of Thompson's disagreements with Marshall on the scope of state powers to regulate commerce, state powers to tax items in commerce, and government power to impinge on private property. Not coincidentally, these disagreements are captured in the specific *Federalist Papers* cited, Nos. 32, 42, 43 and 44. See *id.* at 121–205. The other two Justices who mentioned *The Federalist* were Justice Johnson, in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 144 (1810) (Johnson, J., dissenting), and Justice Trimble (also not a household name) in *Ogden v. Saunders*, 25 U.S. (12 Wheat) 213, 329 (1827) (Trimble, J., dissenting).

<sup>65</sup> As noted above, two of the three citations of *The Federalist* by Justice Marshall occurred only because they were briefed and argued by the party who, incidentally, ended up losing the case. See *supra* note 60.

<sup>66</sup> See, e.g., *Fletcher*, 10 U.S. (6 Cranch) at 144 (Johnson, J., dissenting) (citing only to the "letters of Publius").

confirm the conclusions reached by more normative structural principles or by reference to such common law giants as Blackstone.<sup>67</sup> There was certainly nothing remotely resembling the debate between Justices Scalia and Souter in *Printz*.<sup>68</sup>

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

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

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

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<sup>67</sup> As Professor McGowan argued, *The Federalist Papers* may well have been important for another reason: to establish a judicial "ethos." See McGowan, *supra* note 17, at 757–58.

<sup>68</sup> See *supra* notes 3–9 and accompanying text.

<sup>69</sup> Justice Taney, maybe rightfully so, will undoubtedly be forever remembered for his ill-advised and unsuccessful attempt to save the Union from the bench. *Dred Scott v. Sandford*, 60 U.S. (9 How.) 393 (1856); see also note 105 and accompanying text.

<sup>70</sup> 36 U.S. (11 Pet.) 102 (1837).

<sup>71</sup> 48 U.S. (7 How.) 1 (1849).

<sup>72</sup> 53 U.S. (12 How.) 299 (1851).

<sup>73</sup> 48 U.S. (7 How.) 283 (1849).

<sup>74</sup> 41 U.S. (16 Pet.) 539 (1842).

<sup>75</sup> 60 U.S. (19 How.) 393 (1856).

<sup>76</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>77</sup> *Gillman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865); *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1852); *Cooley*, 53 U.S. (12 How.) 99; *The Passenger Cases*, 48 U.S. (7 How.)

*Federalist Papers* were cited covered the waterfront, from states allegedly impairing the obligation of contracts,<sup>78</sup> to the jurisdiction of federal courts,<sup>79</sup> to the President's removal power.<sup>80</sup> All of the cases mentioned involved issues that were to one degree or another discussed in Philadelphia during the summer of 1787 and in the state ratification conventions thereafter, the very issues to which *The Federalist Papers* were devoted. It might be thought, then, that *The Federalist Papers* were influential in deciding these disputes and that the Justices who cited them relied upon them in some significant way. Not so.

Justice Woodbury cited *The Federalist Papers* in the greatest number of opinions, four. Justice Campbell claimed three, and Justices McLean, Story, Curtis, Daniel, Catron, and Chief Justice Taney cited *The Federalist* in two opinions each. However, none of the Justices who cited *The Federalist* relied on it to make their points. The closest that one can come to even suggesting that *The Federalist Papers* played a significant part in a Justice's analysis was Justice Daniel's dissenting opinion in the *Passenger Cases*.<sup>81</sup> Citing *The Federalist No. 32*, Justice Daniels argued that the Constitution, as understood by those who ratified it, retained the states' taxing power as it was prior to 1789.<sup>82</sup> With respect to the more general issue of the Congress's exclusive authority to regulate alien migration to the United States, Justice Daniel cited *The Federalist No. 42*<sup>83</sup> to refute the claim that the Constitution gave Congress the exclusive authority to regulate immigration after 1808.<sup>84</sup> Yet despite his apparent reliance on *The Federalist Papers*, he devoted only

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283; *Thurlow v. Massachusetts*, 46 U.S.(5 How.) 504 (1847); *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847); *Fox v. Ohio*, 46 U.S. (5 Howard) 410 (1847); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257 (1837); *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

<sup>78</sup> *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855); *Planters' Bank v. Sharp*, 47 U.S. (6 How.) 301 (1848).

<sup>79</sup> *Jackson v. Steamboat Magnolia*, 61 U.S. (20 How.) 296 (1857); *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

<sup>80</sup> *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284 (1854).

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

<sup>82</sup> *Id.* at 503–04.

<sup>83</sup> *The Federalist No. 42* discusses the power of the federal government to control "the intercourse with foreign nations", including Article I, Section 2 cl. 1, prohibiting Congress from interfering with the importation of slaves until 1808. *THE FEDERALIST NO. 42*, 270, 272–73 (James Madison).

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

about a page and a half of a twenty-three-page opinion to a discussion of *The Federalist*.<sup>85</sup>

The references by the other Justices were far more cursory, citing *The Federalist* almost as an afterthought. Justice Woodbury who cited *The Federalist Papers* in more opinions (four) than any other Justice is an example. In *Waring v. Clarke*,<sup>86</sup> a case questioning whether federal admiralty jurisdiction extended to waters beyond "the high seas,"<sup>87</sup> Justice Woodbury cited *The Federalist Nos. 80* and *83* but devotes only a sentence to each, even though his opinion was thirty-four pages long.<sup>88</sup> Similarly in *Planters' Bank v. Sharp*,<sup>89</sup> a Contract Clause<sup>90</sup> case, he devoted about one sentence of a sixteen page opinion to demonstrate the point that to pass a law impairing the obligation of contracts not only violated the Constitution, but also would be "contrary to the first principles of the social compact."<sup>91</sup> His forty-eight-page dissenting opinion in *Luther v. Borden*<sup>92</sup> referred to several of *The Federalist Papers*: Nos. 77,<sup>93</sup> 44,<sup>94</sup> and 29,<sup>95</sup> but these references were hardly central to his arguments. Rather, they appear in a form equivalent to the modern day string of citations. The same is true of Justice Woodbury's citations to *The Federalist* in his dissenting opinion in the *Passenger Cases*.<sup>96</sup> Indeed, only one of those citations<sup>97</sup> mentions a particular paper, No. 82, and that was contained in parentheses along with the citation of a case, *Holmes v. Jennison*.<sup>98</sup> Admittedly there is no necessary, conclusive, or direct relationship between the space devoted to a discussion of *The Federalist* (when compared to the larger analysis) and its impact on the case, but at the very least the burden would shift to those who would assert that relatively scant attention to *The Federalist Papers* says little about their importance to the analysis or the outcome.

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<sup>85</sup> *Id.* at 503–04, 511.

<sup>86</sup> 46 U.S. (6 How.) 441 (1847).

<sup>87</sup> *Id.* at 488.

<sup>88</sup> *Id.* at 488, 493.

<sup>89</sup> 47 U.S. (6 How.) 301 (1848).

<sup>90</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>91</sup> *Planters' Bank*, 47 U.S. (6. How.) at 319.

<sup>92</sup> 48 U.S. (7 How.) 1, 48–88 (1849) (Woodbury, J., dissenting).

<sup>93</sup> *Id.* at 53 (supporting the Courts' role as the intermediary between the people and the legislature).

<sup>94</sup> *Id.* at 70 (arguing that martial law, even more than a bill of attainder, violates the social compact).

<sup>95</sup> *Id.* at 77 (arguing that the President, not the organs of state government, is the judge of the force necessary to suppress an insurrection).

<sup>96</sup> 48 U.S. (7 How.) 283, 554–55 (Woodbury, J., dissenting).

<sup>97</sup> *Id.* at 554.

<sup>98</sup> 39 U.S. (14 Pet.) 540 (1840).

I will mention only two other Justices, Chief Justice Taney and Justice Daniels.<sup>99</sup> Taney cited *The Federalist No. 38* in *Dred Scott* for the proposition (referring to the validity of the Missouri Compromise) that “the acquisition of the Northwestern Territory by the confederated States [was] . . . dangerous to the liberties of the people.”<sup>100</sup> Of course the Chief Justice followed this with “[w]e do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States . . . is plainly given.”<sup>101</sup> Hardly a dispositive cite.

Chief Justice Taney’s dissenting opinion in the *Passenger Cases* cites to *The Federalist No. 32*, 42, and generally to “several of the preceding numbers” (those preceding *No. 32*).<sup>102</sup> He cited these *Papers* for precisely the same points that Justice Daniels cited them in his dissenting opinion, to establish that Congress did not have exclusive authority to regulate the immigration of aliens into the country and that the states did not lose any of their pre-constitutional authority to levy taxes. Unlike Justice Daniels, however, the Chief Justice did not devote nearly the time that Justice Daniels did, especially to *The Federalist No. 32*.<sup>103</sup> True, Justice Taney delved more deeply into *The Federalist No. 42* and the question of whether the states gave up any of their authority to tax by reason of federal authority over immigration, an element of foreign affairs powers.<sup>104</sup> Indeed, it might be argued that Taney, much like Daniels, relied quite heavily on *The Federalist No. 46* in order to make his constitutional point. It is a close call.

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

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

<sup>100</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 447 (1857).

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

<sup>102</sup> *Smith v. Turner*, 48 U.S. (7 How.) 283, 479 (1849) (Taney, C.J., dissenting).

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

<sup>104</sup> *Id.* at 474–75 (Taney, C.J., dissenting).

This is not to say that what we today describe as originalism was unimportant during this period. Quite the opposite is true. As Chief Justice Taney said in his majority opinion in *Dred Scott*:

No one . . . supposes that any change in public opinion . . . should induce the court to give to the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted. . . . [I]t speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people . . . Any other . . . construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created . . . for such purposes.<sup>105</sup>

A brief scan of the opinions of the Court in this era bore out that the Court, to a Justice, believed what Taney said about the importance of adhering to what the Framers understood to be the meaning of the words they used. The “living Constitution” was as foreign a concept to the Justices in this era as the justification for treating those of African descent as non-persons is to us today. Nevertheless, in determining what the Framers meant by the words they used, *The Federalist Papers* played little role.<sup>106</sup> Far more important were the common law and practice, both here and in England and in the Colonies and States during the Confederation, and judicial precedent.<sup>107</sup> Except as just another scholarly opinion,<sup>108</sup> *The Federalist Papers* hardly appeared on the radar screen.

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

In the thirty-five years between 1865 and 1900, the Court had three Chief Justices: Salmon P. Chase, Morrison R. Waite, and Melville W. Fuller.<sup>109</sup> It was during this

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

<sup>106</sup> See McGowan, *supra* note 17, at 756, 827–32.

<sup>107</sup> *Id.*

<sup>108</sup> See *id.* at 755, 840.

<sup>109</sup> Chief Justice Chase was appointed in 1864 to fill the vacancy created by Chief Justice Taney’s death in that year and served for ten years until 1874 when he too died while in office. Chase was succeeded by Morrison Waite, who served until 1888. Both Justices were sitting at the time of their appointment. Chase also died in office, replaced by Melville Fuller. Fuller was to follow the pattern of his two predecessors, dying in office in 1910. Unlike the previous periods, none of the three Chief Justices, whatever their administrative or legal

period that the Court had to grapple with the breadth of federal authority, both judicial and legislative, created by the newly enacted Thirteenth, Fourteenth and Fifteenth Amendments.<sup>110</sup> It was also during this period that the Court decided *Hans v. Louisiana*,<sup>111</sup> the case that laid the groundwork for the Court's current Eleventh Amendment jurisprudence.<sup>112</sup> Furthermore, the Court in 1895 struck down the first federal attempt to tax income,<sup>113</sup> paving the way for the Sixteenth Amendment.<sup>114</sup> This was the period that set the stage for the now discredited "Lochner era."<sup>115</sup>

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

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

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

<sup>110</sup> See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883) (congressional power); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) (substantive scope of section 1 of the Fourteenth Amendment).

<sup>111</sup> 134 U.S. 1 (1890).

<sup>112</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that the Eleventh Amendment prevents Congress from creating rights to private claims against states).

<sup>113</sup> *Pollack v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *aff'd on rehearing*, 158 U.S. 601 (1895).

<sup>114</sup> U.S. CONST. amend. XVI.

<sup>115</sup> Court decisions toward the end of this period foreshadow the rebuke of state powers that characterizes the *Lochner* era. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (striking down state law prohibiting writing property insurance by out-of-state corporation on liberty of contract grounds); *Chi., Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418 (1890) (holding unconstitutional a state statute authorizing the setting of rail rates).

as well, despite the precipitous decline in the number of the Justices who thought that *The Federalist* provided guidance. This assumption will be tested below. Another statistical indicator of the significance of *The Federalist Papers* to the outcome might be the specificity of the citation, that is, whether the reference was generally to “*The Federalist Papers*” or to a specific paper. Twenty-four of the twenty-eight opinions (86 percent) referred to specific *Papers*.<sup>116</sup>

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

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

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

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<sup>116</sup> Four opinions contained both a general reference to *The Federalist* and a citation to specific *Papers*. For purposes of the statistics cited in the text, these cases are included in the specific citation group because specific references more strongly suggest *The Federalist Papers* themselves, rather than some more generalized description of original understanding, influenced the outcome of a given case.

<sup>117</sup> I also looked briefly at the other opinions to ensure that they substantiate my conclusions.

<sup>118</sup> Chief Justice Chase and Justice Bradley each cited *The Federalist Papers* twice, while Justices Strong, Brown, Harlan, and Nelson cited *The Federalist Papers* once each.

<sup>119</sup> *Pac. Ins. Co. v. Soule*, 74 U.S. 433, 445 n.\* (1868); *Gilman v. Philadelphia*, 70 U.S. 713, 730 n.\* (1865).

<sup>120</sup> *Edwards v. Kearzey*, 96 U.S. 595, 606 (1877).

<sup>121</sup> *Springer v. United States*, 102 U.S. 586, 596–97 (1880).

<sup>122</sup> 158 U.S. 601 (1895) (holding the federal income tax unconstitutional, which prompted the proposal and final ratification of the Sixteenth Amendment).

power to tax individual income and his position in some of his later writings.<sup>123</sup> He resolved the conflict in favor of *The Federalist*.<sup>124</sup> On the other hand, Fuller's reliance on *The Federalist* occupied at most three paragraphs of an extensive, twenty-page assessment of the original understanding of the scope of the federal taxing power.<sup>125</sup> Indeed, in the first *Pollock* opinion,<sup>126</sup> the Chief Justice cited *The Federalist* on four pages of the thirty-two page opinion,<sup>127</sup> but he cites it for two unexceptional propositions: (1) that the states did not lose their power to tax by reason of the grant of taxing authority to the federal government;<sup>128</sup> and (2) elucidating the reasons for the proportional tax requirement of Article I, Section 9, Clause 4 of the Constitution.<sup>129</sup> Chief Justice Fuller's references to *The Federalist* in the two other cases in which he referred to it were merely window dressing.<sup>130</sup>

There were only two other Justices, Clifford and Bradley, for whom *The Federalist* seemed to hold any significant substantive weight, but these too were limited to one case. In his majority opinion in *Scholey v. Rew*,<sup>131</sup> Clifford appeared influenced by *The Federalist No. 36*, despite the fact that the discussion of *The Federalist* occupied only one paragraph.<sup>132</sup> However, there is no consistency to Justice Clifford's reliance on *The Federalist*. In an extensive, twenty-seven-page concurring opinion in *Hall v. DeCuir*,<sup>133</sup> Clifford mentioned *The Federalist* only once, on the next to last page.<sup>134</sup> Furthermore, in his majority opinion in *Transportation Company v. Wheeling*<sup>135</sup> there was a reference to *The Federalist No. 32* but it was preceded by the phrase "[s]upport to that view is also derived from."<sup>136</sup> The importance of this citation is questionable and, in any event, hardly decisive.

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<sup>123</sup> *Id.* at 624–26.

<sup>124</sup> *Id.* at 627.

<sup>125</sup> *Id.* at 622–27.

<sup>126</sup> 157 U.S. 429 (1895).

<sup>127</sup> *Id.* at 558–59, 560–62, 564.

<sup>128</sup> *Id.* at 558–59. The Court had already decided this proposition in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

<sup>129</sup> *Id.* at 560, 564.

<sup>130</sup> *McPherson v. Blacker*, 146 U.S. 1, 36 (1892) (citing *The Federalist No. 68* in a string of other citations); *Leisy v. Hardin*, 135 U.S. 100, 108 (1890).

<sup>131</sup> 90 U.S. 331 (1874).

<sup>132</sup> *Id.* at 348 (questioning whether a succession [estate] tax on property was a direct tax and thus denied to the federal government).

<sup>133</sup> 95 U.S. 485, 491–517 (1877) (Clifford, J., concurring). In *Hall*, the Court struck down a Louisiana statute that prohibited racial discrimination on public carriers operating out of Louisiana, even those like the plaintiff's that operated in interstate commerce, because the statute violated the Commerce Clause.

<sup>134</sup> *Id.* at 516.

<sup>135</sup> 99 U.S. 273 (1878).

<sup>136</sup> *Id.* at 280.

The same can be said of the second Justice, Justice Bradley. In the now famous case of *Hans v. Louisiana*,<sup>137</sup> Bradley relied upon Hamilton's *The Federalist No. 81* to bolster his argument that the Framers never intended that federal jurisdiction extend to suits against a state where the state had not consented thereto.<sup>138</sup> Was *The Federalist No. 81* decisive, i.e., necessary to his decision? Probably not. Bradley also relied on Justice Iredell's dissent in *Chisholm v. Georgia*,<sup>139</sup> on the rapid and vociferous reaction to *Chisholm*,<sup>140</sup> on the counterfactual assumption that the Constitution would never have been ratified had it been clear that citizens could sue the states without the states' consent,<sup>141</sup> and on the anomaly that in-state citizens could sue their own state in federal court but out-of-state citizens could not.<sup>142</sup> Nevertheless, the citation to *The Federalist No. 81* was the only bit of solid, documentary historical evidence that Justice Bradley cited. As such, one can only assume that it played an influential role in the *Hans* decision.<sup>143</sup> Like Chief Justice Fuller and Justice Clifford, however, Justice Bradley gave no indication in the only other opinion in which he cited *The Federalist* that it held any particular interpretative prominence.<sup>144</sup> The other Justices who cited *The Federalist Papers* seemed even less influenced by them.<sup>145</sup>

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

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<sup>137</sup> 134 U.S. 1 (1890).

<sup>138</sup> *Id.* at 12–14.

<sup>139</sup> *Id.* at 12 (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

<sup>140</sup> *Id.* at 12.

<sup>141</sup> *Id.* at 10–11.

<sup>142</sup> *Id.* at 10.

<sup>143</sup> Professor McGowan argues that it should not have because it is contrary to Hamilton's general philosophy on Federalism. McGowan, *supra* note 17, at 758.

<sup>144</sup> *Claflin v. Houseman*, 93 U.S. 130, 138 (1876) (using *The Federalist* as one of several parts of the historical record, including the Judiciary Act and prior cases that bore on the question of whether federal courts had exclusive jurisdiction over bankruptcy claims).

<sup>145</sup> See, e.g., *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 135 (1868) (Miller, J.) (citing *Federalist No. 42* for additional support); *Ex parte Clarke*, 100 U.S. (10 Otto.) 399, 412 (1879) (Field, J.) (citing *Federalist No. 42* in addition to direct case support); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888) (Gray, J.) (citing *Federalist No. 80* in a string of citations).

*D. The Era of “Judicial Deregulation”: 1900–1937<sup>146</sup>*

The period between 1900 and 1937, the year in which President Franklin Roosevelt appointed his first Supreme Court justice,<sup>147</sup> is often referred to as the *Lochner*<sup>148</sup> era, a period when the Court struck down numerous state and federal regulations because they interfered with contractual and property rights.<sup>149</sup> It was also a time in which the Court frustrated congressional attempts to regulate the national economy under the Commerce Clause.<sup>150</sup> *The Federalist Papers* played a surprisingly, maybe shockingly, minor role in the outcome of the cases during this era, less so than in the previous period of time.

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

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

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<sup>146</sup> The description is largely mine although Professor Baum describes this period as one dealing largely with issues of economic regulation. Baum, *supra* note 33, at 20–22.

<sup>147</sup> That appointee was Hugo L. Black, who served on the Court from 1937 until his retirement in 1971 at age 85.

<sup>148</sup> *Lochner v. New York*, 198 U.S. 45 (1905) (holding unconstitutional a state regulation of employment in bakeries).

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

<sup>150</sup> U.S. CONST. art. I, § 8, cl. 3. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918). But see *Houston E. & W. Tex. Ry. Co. v. United States* (The Shreveport Rate Case), 234 U.S. 342 (1914); *Hoke v. United States*, 227 U.S. 308 (1913); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911); *Champion v. Ames* (The Lottery Case), 188 U.S. 321 (1903).

<sup>151</sup> 272 U.S. 52, 186, 203, 208, 229, 235 (1926) (McReynolds, J., dissenting). Justice McReynolds cited five *Papers* in his dissent.

One might conclude, based on the above statistics alone, that, as a qualitative as well as quantitative matter, the importance of *The Federalist Papers* to decisions in this era was less than in any period other than the first period studied. To test that, I reviewed all of the opinions citing *The Federalist Papers* during this era. Textual discussion, however, will be limited only to those Justices who cited *The Federalist Papers* two or more times. These were Chief Justices Fuller (two citations)<sup>152</sup> and Hughes (three) and Justices Sutherland (five) and McReynolds (three).<sup>153</sup> In addition, particular attention is devoted to Myers because it is the case in which Justice Sutherland cited to five different *Federalist Papers*, because of Myers' importance to separation of powers jurisprudence even today,<sup>154</sup> and because of the extensive analysis given to original understanding by all of the opinions in the case.

Chief Justice Fuller, who served for ten of the thirty-seven year period, cited *The Federalist Papers* twice. This is not in itself terribly significant. When combined with the four times he cited them in the previous period it might seem that *The Federalist Papers* were important to his interpretation of original understanding, but that is not true. In his dissent in *Dooley v. United States*,<sup>155</sup> a case testing the constitutionality of congressional legislation, he cited *The Federalist* to demonstrate that states can't levy import or export duties.<sup>156</sup> And in *Hanover National Bank v. Moyses*,<sup>157</sup> *The Federalist No. 42* was mentioned in a string of other citations.<sup>158</sup> The same conclusion holds for Justices McReynolds and Chief Justice Hughes, each having cited *The Federalist Papers* in three of their opinions. Leaving aside for the moment McReynolds's dissent in Myers, his citations to *The Federalist* in *Newberry v. United States*,<sup>159</sup> as part of a string of citations,<sup>160</sup> and in *Farmers Loan & Trust Co. v. Minnesota*<sup>161</sup> give no indication that *The Federalist* in any way was important to establishing his position.

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

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

<sup>154</sup> See generally Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175 (1990).

<sup>155</sup> 183 U.S. 151 (1901).

<sup>156</sup> *Id.* at 169–70 (Fuller, C.J., dissenting).

<sup>157</sup> 186 U.S. 181 (1902).

<sup>158</sup> *Id.* at 187.

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

<sup>160</sup> *Id.* at 248.

<sup>161</sup> 280 U.S. 204, 209 (1930).

Evaluating the citations of Chief Justice Hughes is somewhat more complicated, but only because of one case, *Principality of Monaco v. Mississippi*.<sup>162</sup> The other two cases, however, suggest that Hughes attached no particular importance to *The Federalist Papers*. *Burnet v. Brooks*<sup>163</sup> refers to *The Federalist No. 7* because Justice McReynolds cited it in *Farmers Loan & Trust*.<sup>164</sup> Even in *Home Building & Loan Ass'n v. Blaisdell*,<sup>165</sup> Hughes cited *The Federalist No. 7* in a footnote, as part of a string of citations,<sup>166</sup> and cited *The Federalist No. 44* only to illustrate the state abuses that led to the enactment of the Contract Clause.<sup>167</sup> I do not, although one certainly might, reach a different conclusion with regard to Hughes's citation of *The Federalist No. 81*,<sup>168</sup> if not *The Federalist No. 80*,<sup>169</sup> in *Monaco*. Hughes cited *The Federalist No. 81* twice to refute the argument that the states had waived sovereign immunity by joining the union,<sup>170</sup> the so-called "Plan Waiver" exception to the Eleventh Amendment.<sup>171</sup> The reason I am unconvinced that *The Federalist* was particularly important to the decision in *Monaco* is that Hughes spent the largest share of his opinion arguing that *Hans v. Louisiana* decided this case.<sup>172</sup> This includes the reliance that *Hans* placed on the "profound shock theory" to explain why states did not waive their sovereign immunity.<sup>173</sup> Certainly Hughes thought that *Hans* was correctly decided, but it is unclear the extent to which *Hans* relied upon *The Federalist* to buttress its conclusion.

Finally, there is Justice Sutherland, who cited *The Federalist Papers* in more opinions than any other Justice who served during this period. Is that an indication that he believed *The Federalist Papers* to be influential in interpreting the history of the Constitution? Hardly. In two of his opinions, Sutherland cited *The Federalist Papers* as one authority in a string of citations,<sup>174</sup> and in two cases he noted *The*

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<sup>162</sup> 292 U.S. 313 (1934).

<sup>163</sup> 288 U.S. 378 (1933).

<sup>164</sup> *Id.* at 401.

<sup>165</sup> 290 U.S. 398 (1934).

<sup>166</sup> *Id.* at 427.

<sup>167</sup> *Id.* at 427 & n.7.

<sup>168</sup> *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–25 (1934).

<sup>169</sup> *Id.* at 328. *The Federalist No. 80* was one of two citations that Hughes made without any analysis as supporting the preceding textual statement concerning jurisdiction of the federal courts in controversies between states. *Id.*

<sup>170</sup> *Id.* at 322–23, 324.

<sup>171</sup> See generally MELVYN R. DURCHSLAG, STATE SOVEREIGN IMMUNITY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 99–103 (2002).

<sup>172</sup> 292 U.S. at 325–30. For a discussion of the importance of *The Federalist Papers* to the *Hans* decision, see *supra* notes 137–45 and accompanying text.

<sup>173</sup> Explaining the "profound shock theory" in sufficient detail to be meaningful would be distracting. For an explanation, see 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96–98 (1923).

<sup>174</sup> *Ex parte Gruber*, 269 U.S. 302, 304 (1925); *Massachusetts v. Mellon*, 262 U.S. 447, 481 (1923).

*Federalist No. 48* only because it appeared in a portion of a Treatise by Justice Story that he quoted.<sup>175</sup> In his dissent in *Blaisdell*, Sutherland quoted *The Federalist Nos.* 7 and 44 for precisely the same point as did the majority, background of state abuses that led to the Contract Clause.<sup>176</sup> Finally, while Justice Sutherland's citation of *The Federalist Nos.* 78 and 79 in *O'Donoghue*<sup>177</sup> has some importance in establishing that the Founders believed that power over subsistence equates to power over will, the deciding factor in Sutherland's judgment that Congress could not reduce a sitting or retired federal judge's salary was the pattern and practice of Congress itself.<sup>178</sup>

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

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<sup>175</sup> *Humphrey's Executor v. United States*, 295 U.S. 602, 630 (1935); *see also* *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933) (same). Justice Story made extensive use of *The Federalist Papers* in his 1833 constitutional treatise. *See, e.g.*, 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ch. 7, 1–44 (1833) (discussing separation of powers and legislative structure). *See generally* Rakove, *supra* note 17, at 245–47.

<sup>176</sup> 290 U.S. at 463–64.

<sup>177</sup> 289 U.S. 516, 531 (1933). The issue in *O'Donoghue* was congressional power to reduce the compensation of federal judges.

<sup>178</sup> *Id.* at 548.

<sup>179</sup> 272 U.S. 52 (1926).

<sup>180</sup> *See generally* U.S. CONST. art. II, § 2, cl. 2.

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

<sup>182</sup> *Myers*, 272 U.S. at 136–37.

<sup>183</sup> *Id.* at 137–39.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 293 (Brandeis, J., dissenting).

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

#### E. The "Roosevelt Court": 1937–1954<sup>192</sup>

The citations to *The Federalist Papers* increased significantly during the "Roosevelt Court" years despite the fact that this period covered twenty fewer years than the previous period.<sup>193</sup> *The Federalist Papers* appeared, in one way or another,

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<sup>186</sup> *Id.* at 186.

<sup>187</sup> *Id.* at 203.

<sup>188</sup> *Myers*, 272 U.S. at 235.

<sup>189</sup> *Id.* at 229.

<sup>190</sup> *Id.* at 237.

<sup>191</sup> *Id.* at 208. Although No. 76 does contain language that would support Senate concurrence with a removal, it does not suggest that such concurrence need be formal consent, as with an appointment. THE FEDERALIST NO. 76 (Alexander Hamilton).

<sup>192</sup> It is certainly not improper to characterize the Court during these years as the "Roosevelt Court." Franklin Delano Roosevelt served as President for over three terms, in which he appointed an unsurpassed *nine* Justices to the Supreme Court. When he died in 1945, eight of the nine sitting Justices were his appointees. Only Justice Roberts was appointed prior to 1937.

<sup>193</sup> The statistical relevance of this fact is questionable. For purposes of this paper, I did

in twenty-six cases, a 53 percent increase. They also appeared in twenty-eight opinions, a 40 percent increase. Somewhat surprising is that only twelve of the twenty-eight opinions (43 percent) were majority opinions. Four were concurring opinions and eleven (39 percent) were dissents. In the previous period (1900–1937), 75 percent were majority opinions, as well as 75 percent in the period previous to that (1865–1900). At first blush, one might find the increased use of *The Federalist Papers* during this period unexceptional, as the Court moved from a restrictive interpretation of federal authority under the Commerce Clause to one that gave Congress significantly more leeway to manage a national economy.<sup>194</sup> Historical justifications might then seem appropriate both for those who found greater regulatory authority and those who preferred the status quo, but only three of the dissenting opinions fit that explanation.<sup>195</sup> Only one other case raising the scope of Congress's economic regulatory authority cited *The Federalist*, and that was by Justice Black in a majority opinion.<sup>196</sup> As it turns out, *The Federalist Papers* were cited most often by Justices Douglas (six opinions), Black (five opinions), and Frankfurter (four opinions). Justice Black's five opinions cite seventeen different *Federalist Papers*, more than any other Justice who had cited *The Federalist Papers* up to 1953.<sup>197</sup> Justice Douglas was not far behind, with eleven different *Federalist Papers* cited in the five opinions noted.

A review of the cases reveals, however, that the frequency of citations to *The Federalist Papers* or the number of papers cited in any one opinion is not necessarily an indication of the significance of *The Federalist Papers* either to the Justice's analysis or to the Court's ultimate disposition. The analysis begins with Justice Douglas, since he cited *The Federalist* in more opinions than any other Justice during this period. Next Justice Black's citations will be examined. Particular attention will be devoted to his majority opinion in *South-Eastern Underwriters*, in which he cited seven different *Papers*.<sup>198</sup> This section will

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

<sup>194</sup> Compare *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), with *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>195</sup> *O'Malley v. Woodrough*, 307 U.S. 277, 283–99 (1939) (Butler, J., dissenting); *Helvering v. Davis*, 301 U.S. 619, 646 (1937) (McReynolds, J. dissenting); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 599–609 (1937) (McReynolds, J., dissenting).

<sup>196</sup> *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). *South-Eastern Underwriters* is discussed in more detail below. See *infra* note 214 and accompanying text.

<sup>197</sup> So much for intuition based on stereotype. Justice Black's judicial philosophy was decidedly positivist. His interpretive methodology was one of strict adherence to text. HOWARD BALL, THE VISION AND THE DREAM OF JUSTICE HUGO L. BLACK: AN EXAMINATION OF A JUDICIAL PHILOSOPHY 10 (1975).

<sup>198</sup> See *infra* note 214.

conclude with an examination of Justice Frankfurter's opinions because he had the next most citations with four.<sup>199</sup>

Of the six cases in which Justice Douglas cited *The Federalist Papers*, only three were majority opinions: *District of Columbia v. John R. Thompson Co.*,<sup>200</sup> *Richfield Oil Corp. v. State Board of Equalization*,<sup>201</sup> and *United States v. Pink*.<sup>202</sup> In none of these opinions did *The Federalist Papers* cited appear to have any particular importance to the analysis. In *Pink*, Douglas cited *The Federalist No. 64* only to bolster the argument that executive authority was equal in status to that of the Congress and judiciary.<sup>203</sup> The citation to *The Federalist No. 42* in *Richfield Oil* was even less significant; it was an "and see" citation following a quoted statement by Madison in the Virginia Ratification Convention.<sup>204</sup> Finally, in *John R. Thompson*, *The Federalist No. 43* was part of a string of citations.<sup>205</sup> To the extent history was significant at all to Justice Douglas's opinion, it was significant as a statement by Madison at the Virginia Ratification Convention, not as *The Federalist*. Looking at the cases in which Justice Douglas cited *The Federalist Papers* in his dissenting opinions<sup>206</sup> reaffirms that *The Federalist Papers* were largely add-ons for Justice Douglas despite the number of times he cited them.

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

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<sup>199</sup> Justices McReynolds, Burton, Reed, and Chief Justice Vinson each cited *The Federalist Papers* in two opinions. Justices Murphy, Stone, Butler, and Rutledge cited *The Federalist* in only one of their opinions.

<sup>200</sup> 346 U.S. 100, 109–10 (1953).

<sup>201</sup> 329 U.S. 69, 76 n.3 (1946).

<sup>202</sup> 315 U.S. 203, 230 (1942).

<sup>203</sup> *Id.*

<sup>204</sup> 329 U.S. at 76, n.3.

<sup>205</sup> 346 U.S. at 109.

<sup>206</sup> *MacDougall v. Green*, 335 U.S. 281, 289, n.1 (1948) (Douglas, J., dissenting); *New York v. United States*, 326 U.S. 572, 596–97 (1946) (Douglas, J., dissenting); *Cramer v. United States*, 325 U.S. 1, 75–76 (1945) (cited in an appendix to the dissenting opinion).

<sup>207</sup> In all, he cites *The Federalist Nos. 3, 4, 5, 22, 23, 30, 32, 36, 40, 41, 42, 43, 78, 80, 81*, and *83*.

<sup>208</sup> 312 U.S. 52 (1941).

<sup>209</sup> *Id.* at 62 n.9, 63 n.11, 64 n.12, 68 n.21, 73 n.35 (1941).

<sup>210</sup> 341 U.S. 123, 144 n.2 (1951) (Black, J., concurring).

<sup>211</sup> *United States v. Lovett*, 328 U.S. 303, 314 (1946) (citing *The Federalist No. 78* only to make clear the Court's power of judicial review); *Galloway v. United States*, 319 U.S.

*South-Eastern Underwriters* is perhaps the most interesting case study of the importance of *The Federalist Papers* during this period. As noted above, Justice Black cited to seven different *Federalist Papers*, none of which made it out of the footnotes.<sup>212</sup> Even conceding that footnotes are sometimes at least as, if not more, significant than the opinion “in chief,”<sup>213</sup> Justice Black’s numerous footnote references (and that is all they are) do not rise to that level. There is no indication in the *South-Eastern Underwriters* opinion that had *The Federalist* never been written, the decision would have come out any differently. Justice Black was not the only opinion writer in *South-Eastern Underwriters* who cited *The Federalist* as little more than the equivalent of a “*see also*” reference. And Justice Frankfurter’s two page historical analysis did not so much as mention *The Federalist Papers*.<sup>214</sup>

When Justice Frankfurter did mention *The Federalist Papers*, which he did on four occasions, he certainly put no reliance upon them. The only majority opinion he wrote where *The Federalist Papers* are noted was *Tenney v. Brandhove*,<sup>215</sup> where the issue was whether legislators were subject to liability under the Civil Rights Act of 1871.<sup>216</sup> Despite his citation to *The Federalist No. 48* to demonstrate that the Framers feared legislative hegemony,<sup>217</sup> he and his colleagues in the majority held that legislators are immune from liability for acts committed in their legislative capacity.<sup>218</sup> In the only concurring opinion in which Frankfurter cited *The Federalist Papers*, *Dennis v. United States*,<sup>219</sup> he cited *The Federalist No. 41* for the proposition that protection against foreign dangers is “one of the primitive objects of civil society.”<sup>220</sup> Certainly germane to the issue in *Dennis*,<sup>221</sup> but hardly of great significance. His dissents reflect the same. In *Miles v. Illinois Central Railroad Co.*,<sup>222</sup> he cites *The Federalist No. 82* only as a way of collateral support for previous case

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

<sup>212</sup> *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 539 n.9 (No. 22); *id.* at 550 n.33 (No. 36); *id.* at 551 n.36 (Nos. 40 and 41); *id.* at 551 n.35 (No. 30); *id.* at 552 n.37 (No. 23); *id.* at 552 n.38 (No. 43).

<sup>213</sup> See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989); *United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1938).

<sup>214</sup> *South-Eastern Underwriters*, 322 U.S. at 583 (Vinson, C.J., dissenting).

<sup>215</sup> 341 U.S. 367, 375 (1951).

<sup>216</sup> 8 U.S.C. §§ 43, 47(3) (1871) (current version at 42 U.S.C. §§ 1981, 1983 (2000)).

<sup>217</sup> *Tenney*, 341 U.S. at 375.

<sup>218</sup> *Id.* at 379.

<sup>219</sup> 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring).

<sup>220</sup> *Id.* (quoting THE FEDERALIST NO. 41 (James Madison)).

<sup>221</sup> Dennis was convicted of violating the Smith Act, 18 U.S.C. § 2385 (2000), which prohibited advocating, abetting, or conspiring to advocate, the violent overthrow of the United States government. Dennis was a leader of the American Communist Party. *Dennis*, 341 U.S. at 497.

<sup>222</sup> 315 U.S. 698 (1942).

holdings.<sup>223</sup> The same can be said of his opinion in the first *Dennis* case,<sup>224</sup> decided the year before its more notorious successor.

The period immediately preceding the Warren Court was thus like all periods that came before. No matter how many times *The Federalist Papers* were cited, the number of *Papers* mentioned in any one opinion, and how many Justices cited them, the conclusion is the same: *The Federalist Papers* appear to have had little influence either on judicial outcomes or on the analysis of individual Justices, on whichever side of the result they happened to fall. Moreover, as *National Mutual Insurance Co. v. Tidewater Transfer Co.* demonstrates, the reason is not that the Court dismissed original understanding as unimportant to contemporary textual interpretation.<sup>225</sup> *The Federalist Papers* simply played little role in that historical exegesis.

#### F. The Warren Years: 1953–1969

The Warren Court will be forever known for judicially spearheading the “rights revolution.” *Brown v. Board of Education*<sup>226</sup> began the long battle that eventually dismantled Jim Crow. *Baker v. Carr*<sup>227</sup> established the principle that the Equal Protection Clause<sup>228</sup> demanded that legislatures be apportioned according to population,<sup>229</sup> leading to the demise of rural-dominated legislatures in states with large urban populations<sup>230</sup> and to the reapportionment of the United States House of Representatives.<sup>231</sup> Furthermore, legislative bodies no longer had *carte blanche* to exclude those with whom they disagreed<sup>232</sup> or whose conduct was reprehensible.<sup>233</sup> Devotional Bible reading in public schools was declared to be unconstitutional,<sup>234</sup> as was state-imposed prayer in the public schools.<sup>235</sup> The exclusionary rule, prohibiting illegally seized evidence in a criminal trial, was extended to the states,<sup>236</sup>

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<sup>223</sup> *Id.* at 713–14.

<sup>224</sup> *Dennis v. United States*, 339 U.S. 162, 182 (1950). This case involved the question of whether the defendant could challenge for cause jurors who were employees of the federal government. *See generally id.*

<sup>225</sup> *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 621 n.16 (1949) (Rutledge, J., concurring); *id.* at 635–36 (Vinson, C.J., dissenting).

<sup>226</sup> 347 U.S. 483 (1954).

<sup>227</sup> 369 U.S. 186 (1962).

<sup>228</sup> U.S. CONST. amend. XIV § 1.

<sup>229</sup> *Baker*, 369 U.S. 186.

<sup>230</sup> *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>231</sup> *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1 (1964).

<sup>232</sup> *Bond v. Floyd*, 385 U.S. 116 (1966).

<sup>233</sup> *Powell v. McCormack*, 395 U.S. 486 (1969).

<sup>234</sup> *Sch. Dist. of Abingdon v. Schempp*, 374 U.S. 203 (1963).

<sup>235</sup> *Engle v. Vitale*, 370 U.S. 421 (1962).

<sup>236</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

and those accused of crimes could no longer be interrogated without being advised of their rights to counsel.<sup>237</sup> The Warren Court reinvigorated “substantive due process,” holding that a married couple had the right to decide whether to use contraception,<sup>238</sup> which paved the way for the Burger Court holdings that an individual had the same right.<sup>239</sup> Those cases led to the decision that a woman had the right to terminate her pregnancy,<sup>240</sup> as well as the Rehnquist Court’s decision, limited though it may be, that an individual has the right to terminate life support systems.<sup>241</sup> Those merely mark some of the highlights.

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

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

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<sup>237</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>238</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>239</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972). While this case was ostensibly decided on equal protection grounds, given the nature of the right in *Griswold*, (*marital* privacy), it is hard to understand the ruling without reference to the nature of the underlying substantive right.

<sup>240</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>241</sup> *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990).

<sup>242</sup> GEOFFREY STONE ET AL., CONSTITUTIONAL LAW xc–xcviii (4th ed. 2001).

Years than during the previous period.<sup>243</sup> However, as demonstrated below, when one shifts from a quantitative to a qualitative analysis, the conclusion is different. The number of citations, the frequency of those citations, and the percentage of Justices who cited *The Federalist Papers* prove to be unreliable indicators of the importance of *The Federalist Papers* to that Justice's or the Court's analysis.

Consistent with previous analytic patterns, this section will concentrate on those Justices who most frequently cited *The Federalist Papers*. Justice Harlan cited *The Federalist Papers* in seven opinions, followed by Justice Frankfurter with six opinions. Only two of Justice Frankfurter's *The Federalist* citations appeared in majority opinions; four were in dissenting opinions. Justice Harlan's citations show a similar pattern, appearing in two majority opinions, four dissents and one concurring opinion. Both Justices Harlan and Frankfurter generally objected to the Court's more expansive interpretation of the Bill of Rights and the Fourteenth Amendment.<sup>244</sup> Justice Black, consistent with his citations during the previous period, had the next most opinions in which *The Federalist Papers* were cited, with five.

Unlike Frankfurter and Harlan, four of Justice Black's *Federalist* citations appeared in majority opinions and only one in a dissenting opinion. Justice Douglas and, maybe surprisingly, Chief Justice Warren were next in the frequent citation line, with four opinions each.<sup>245</sup> All of Warren's citations were in majority opinions while only one of Justice Douglas's opinions was a majority. Two were dissents and one was a concurring opinion.

The two majority opinions in which Justice Harlan cited *The Federalist Papers*, *Glidden Company v. Zadonk*<sup>246</sup> and *United States v. Johnson*,<sup>247</sup> noted five different papers, four in *Glidden* and one in *Johnson*. None of these papers appeared at all significant to his analysis or the Court's ultimate holding. Harlan cited *The Federalist No. 81* twice in *Glidden*, once as part of a string of citations regarding congressional discretion to establish lower federal courts<sup>248</sup> and again to establish that sovereign immunity was not surrendered, which was only mentioned to refute argument by counsel.<sup>249</sup> Nos. 80 and 22 were cited for propositions equally unimportant to the disposition of the matter at hand.<sup>250</sup> In *Johnson*, *The Federalist No. 48* is not only

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

<sup>244</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 504–26 (1966) (Harlan, J., dissenting); *Dennis v. United States*, 341 U.S. 494, 517–61 (1951) (Frankfurter, J., concurring).

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

<sup>246</sup> 370 U.S. 530 (1962).

<sup>247</sup> 383 U.S. 169 (1966).

<sup>248</sup> 370 U.S. at 551.

<sup>249</sup> *Id.* at 563–64.

<sup>250</sup> *Id.* at 557–58. *The Federalist No. 80* was cited for the idea that federal judicial power

cited, it is quoted.<sup>251</sup> However, the quotation only notes, in a general way, the reasons for separation of powers.<sup>252</sup> It does not relate directly to the Speech and Debate Clause<sup>253</sup> or to its meaning, which was the issue in *Johnson*.<sup>254</sup>

Justice Harlan's concurring and dissenting opinions largely follow the same pattern. His citation to *The Federalist No. 68* in *Williams v. Rhodes*<sup>255</sup> was one of a number of citations in a footnote.<sup>256</sup> In *Flast v. Cohen*,<sup>257</sup> Harlan quoted twelve words from *The Federalist No. 80* only to establish the principle of judicial review, which he then argues, is limited.<sup>258</sup> Similarly, in *Duncan v. Louisiana*,<sup>259</sup> Harlan's citations to *The Federalist Nos. 51*<sup>260</sup> and *84*<sup>261</sup> only demonstrate the Framers' belief that the structure of the federal government was sufficient to protect individual rights.

Justice Harlan's use of *The Federalist* in his dissent in *Wesberry v. Sanders*<sup>262</sup> is somewhat more mixed than in his previous opinions. The first several citations follow his previous pattern of *The Federalist* citations.<sup>263</sup> However, Harlan's later quotations from *The Federalist Nos. 54* and *59* do support his main point that apportionment of Congress is a matter for the states and the Congress, not the courts.<sup>264</sup> Finally, in *O'Callahan v. Parker*,<sup>265</sup> a case involving the jurisdiction of military courts, Harlan's citation of *The Federalist No. 23* to demonstrate Congress's unlimited authority "[t]o make Rules for the Government and Regulation of the land and naval Forces"<sup>266</sup> was important to his argument that military courts have jurisdiction over military

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and legislative power must be coextensive, *Id.* at 557, while *The Federalist No. 22* was used to note that law is a dead letter without courts. *Id.* at 558. While both are concepts central to the role of the judiciary in ensuring that ours is a "government of laws, and not of men," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), neither are directly pertinent to the question of whether it is a violation of due process for an Article I judge to sit on an Article III court, the issue in *Glidden*. 370 U.S. 530.

<sup>251</sup> 383 U.S. at 178–79.

<sup>252</sup> *Id.*

<sup>253</sup> U.S. CONST. art. I, § 6, cl. 1.

<sup>254</sup> 383 U.S. 169.

<sup>255</sup> 393 U.S. 23 (1968) (Harlan, J., concurring).

<sup>256</sup> *Id.* at 44 n.3.

<sup>257</sup> 392 U.S. 83 (1968).

<sup>258</sup> *Id.* at 130–31 & n.20 (Harlan, J., dissenting).

<sup>259</sup> 391 U.S. 145 (1968).

<sup>260</sup> *Id.* at 173 n.3 (Harlan, J., dissenting).

<sup>261</sup> *Id.* at n.4.

<sup>262</sup> 376 U.S. 1 (1964).

<sup>263</sup> See *id.* at 27 n.8 (cf. citation to No. 54); *id.* at 28 n.10 (No. 54); *id.* at 39 (No. 57 to refute Justice Black's reading); *id.* at 30–40 (No. 54 for the same purpose).

<sup>264</sup> *Id.* at 39–41.

<sup>265</sup> 395 U.S. 258 (1969).

<sup>266</sup> U.S. CONST. art. I, § 8, cl. 14.

personnel who commit crimes outside a military base and on free time.<sup>267</sup> On the other hand, his reference to *The Federalist Papers* is only one sentence of a five-page discussion of the history of military courts. Consequently, what one gets from reading Justice Harlan's opinions is that on occasion a *Federalist Paper* may have some significance to his analysis, but not often. And even when *The Federalist Papers* appear to be important to his analysis, they are no more important than other historical insights.<sup>268</sup>

In his majority opinion in *Communist Party of the United States v. Subversive Activities Control Board*,<sup>269</sup> Justice Frankfurter cites five different *Papers*.<sup>270</sup> He mentions *The Federalist No. 41* for precisely the same point as he did in *Dennis*, that protection against foreign dangers is "one of the primitive objects of civil society,"<sup>271</sup> and his citation to *The Federalist Nos. 2–5* is a "see also" citation.<sup>272</sup> While certainly pertinent to the issue in the case, *The Federalist* citations are only one small part of a 112-page, history-laden opinion. Much the same can be said of Frankfurter's citation to *The Federalist No. 80* in *Romero v. International Terminal Operating Co.*<sup>273</sup> Cited in a footnote<sup>274</sup> along with Farrand's *The Records of the Federal Convention of 1787*,<sup>275</sup> *The Federalist No. 80* is mentioned only to make the point that the need to establish federal jurisdiction over maritime issues was one of the major reasons for permitting Congress to establish lower federal courts,<sup>276</sup> a proposition not particularly pertinent to the facts in *Romero*.<sup>277</sup>

The same can be said of three of Justice Frankfurter's four dissents. In *Trop v. Dulles*,<sup>278</sup> Frankfurter cited *The Federalist No. 48* for the unexceptional proposition that all power is encroaching.<sup>279</sup> His dissenting opinion in *Youngstown Sheet & Tube Co. v. Bowers*<sup>280</sup> cited four different *Papers* — Nos. 12, 67, 44, and 32.<sup>281</sup>

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<sup>267</sup> *O'Callahan*, 395 U.S. at 277 (Harlan, J., dissenting).

<sup>268</sup> This does not imply that *The Federalist Papers* are less important than other historical evidence.

<sup>269</sup> 367 U.S. 1 (1961).

<sup>270</sup> *Id.* at 95. *The Federalist Papers* cited are Nos. 41, 2, 3, 4, and 5. The latter four, however, were simply cited as "Nos. 2–5." *Id.*

<sup>271</sup> *Id.* at 95 (quoting THE FEDERALIST NO. 41 (James Madison)). For a discussion of *Dennis*, see *supra* note 224 and accompanying text.

<sup>272</sup> *Communist Party*, 367 U.S. at 95.

<sup>273</sup> 358 U.S. 354 (1959).

<sup>274</sup> *Id.* at 361 n.8.

<sup>275</sup> 1 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., 1911).

<sup>276</sup> *Romero*, 358 U.S. at 361 n.8.

<sup>277</sup> See generally *Romero*, 358 U.S. 354.

<sup>278</sup> 356 U.S. 86 (1958).

<sup>279</sup> *Id.* at 119 (Frankfurter, J., dissenting).

<sup>280</sup> 358 U.S. 534 (1959).

<sup>281</sup> *Id.* at 556 nn.2–3, 574 n.18 (Frankfurter, J., dissenting).

None bore directly on his analysis. Nos. 12, 67, and 44 were footnote citations that only provided some general historical background<sup>282</sup> and No. 32 was a “*see also*” footnote citation.<sup>283</sup> Even Frankfurter’s powerful structural and historical analysis in *Baker v. Carr*<sup>284</sup> hardly relied on *The Federalist Papers* despite his having cited four of them, Nos. 54, 56, 58, and 62.<sup>285</sup> All were footnote citations and merely provided some general historical background.<sup>286</sup> Only in *Farmers’ Educational & Cooperative Union of America v. WDAY, Inc.*<sup>287</sup> did Frankfurter’s citation to a *Federalist Paper* seem more than marginally important to his analysis. Justice Frankfurter cited *The Federalist No. 32* as support for his argument that there must be a plain inconsistency between a federal and state statute for the state statute to be superseded by federal law.<sup>288</sup> Preemption could not be implied from some possibility of a policy difference between federal and state regulatory schemes.<sup>289</sup> When combined with his citations to *The Federalist* when serving on the Roosevelt Court, about the best one can say with respect to Justice Frankfurter is that in only one of the ten opinions in which he cited *The Federalist Papers* was the citation at all important to his analysis.<sup>290</sup>

It would stand to reason that Justice Black’s citations to *The Federalist Papers* during the Warren years would carry no more import than in the previous period. That proved to be true. *Wesberry v. Sanders*<sup>291</sup> is perhaps the most significant case during this period in terms of historical/originalist discourse. Indeed it was the only case in which one Justice (Harlan) openly disagreed with another Justice’s (Black’s) interpretation of *The Federalist*.<sup>292</sup> One might wonder, however, why Justice Harlan bothered. Justice Black’s citation of *The Federalist* Nos. 54 and 57 constituted approximately one paragraph out of an eleven-page historical analysis.<sup>293</sup> *The Federalist No. 57* was cited only to say that the House of Representatives would be elected by ““the great body of the people.””<sup>294</sup> Only eight words were quoted from *The Federalist 54*:

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<sup>282</sup> *Id.* at 556 nn.2–3.

<sup>283</sup> *Id.* at 574 n.8.

<sup>284</sup> 369 U.S. 186, 297–324 (1962) (Frankfurter, J., dissenting).

<sup>285</sup> *See infra* note 286.

<sup>286</sup> *Baker*, 369 U.S. at 303 & n.38 (citing *The Federalist No. 58*, which referred to the British House of Commons); *id.* at 307 & n.62 (citing *The Federalist No. 56* for general historical experience, while Nos. 62, *id.* at 308 n.74, and 54, *id.* at 308 n.75, referred to apportionment of the United States Congress, not the state legislatures).

<sup>287</sup> 360 U.S. 525 (1959).

<sup>288</sup> *Id.* at 545–46 (Frankfurter, J., dissenting).

<sup>289</sup> *Id.* at 546.

<sup>290</sup> *Id.* at 545–46.

<sup>291</sup> 376 U.S. 1 (1964).

<sup>292</sup> Compare *id.* at 15 & nn.39–40, 18, with *id.* at 39–40 (Harlan, J., dissenting).

<sup>293</sup> 376 U.S. at 15, 18.

<sup>294</sup> *Id.* at 18 (quoting THE FEDERALIST NO. 57 (James Madison)).

“[N]umbers . . . are the only proper scale of representation.”<sup>295</sup> Pertinent, yes. But hardly supportive of a strict one person/one vote apportionment. More revealing is Justice Black’s majority opinion in *Reid v. Covert*,<sup>296</sup> a case contesting the jurisdiction of military courts over civilians who commit crimes on military bases.<sup>297</sup> Black cites six *Federalist Papers*, Nos. 26, 27, 28, 41, 78, and 83.<sup>298</sup> The citations, however, were much ado about nothing. All were simply footnote citations, and four were just string-cited.<sup>299</sup> The same conclusion applies to the other opinions in which Black cites *The Federalist Papers*.<sup>300</sup> Justice Douglas, too, followed the pattern of the previous period in citing *The Federalist Papers*. They are largely space-filling references.<sup>301</sup>

Chief Justice Warren did not cite *The Federalist Papers* until 1965, the eleventh year of his fifteen-year tenure. The first case in which he cited *The Federalist Papers* was *Singer v. United States*.<sup>302</sup> And there he cited *The Federalist No. 83* as part of a string of citations.<sup>303</sup> In the same year, however he cited six *Papers*, Nos. 47, 48, 49, 51, 78, and 44, in *United States v. Brown*.<sup>304</sup> *Brown* raised the question whether the Labor-Management Reporting and Disclosure Act of 1959,<sup>305</sup> which makes it a crime for Communists to serve as executive board members of a labor union, was a violation of the Bill of Attainder Clause.<sup>306</sup> Warren’s citations are interesting not only because they are numerous but because they are logically ordered to make a single point. But the point is too general to be described as significant to the outcome. *No. 47* is quoted to demonstrate that the Framers feared all government power.<sup>307</sup> *No. 48* is then quoted to establish that barriers had to be erected to contain legislative power,<sup>308</sup> followed by a cite to *No. 44* to confirm that

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<sup>295</sup> *Id.* at 15 (quoting THE FEDERALIST NO. 54 (James Madison)).

<sup>296</sup> 354 U.S. 1 (1957).

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 10 n.13 (*No. 83*); *id.* at 24 n.43 (*No. 24*).

<sup>299</sup> *Id.* at 29 n.54 (*Nos. 26, 27, 28, and 41*).

<sup>300</sup> See *Talley v. California*, 362 U.S. 60, 65 (1960) (*The Federalist Papers* mentioned only to demonstrate that they were published under pseudonyms); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 228 (1964) (citing *No. 43* only to point out reasons for giving Congress exclusive power to enact patent laws); *City of El Paso v. Simmons*, 379 U.S. 497, 533 (1965) (Black, J., dissenting) (citing *No. 44* in first sentence of a two sentence conclusion).

<sup>301</sup> See *Mora v. McNamara*, 389 U.S. 934, 937 n.7 (1967) (Douglas, J., dissenting from denial of certiorari); *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 574 n.10 (1963) (Douglas, J., concurring); *Gray v. Sanders*, 372 U.S. 368, 373–77 n.8 (1963).

<sup>302</sup> 380 U.S. 24, 31 (1965).

<sup>303</sup> *Id.*

<sup>304</sup> 381 U.S. 437, 444–445 nn.17–18 (1965).

<sup>305</sup> 29 U.S.C. § 504(a) (2000).

<sup>306</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>307</sup> *Brown*, 381 U.S. at 443.

<sup>308</sup> *Id.* at 444 n.17. Note 17 then string cites *Nos. 47, 48, 49, 51, and 78*.

prohibitions against bills of attainder are one of those constraints.<sup>309</sup> Finally, *The Federalist No.* 78 is quoted to show that the Framers believed that the judiciary was the means by which the Bill of Attainder Clause would be enforced.<sup>310</sup> All of these propositions were either self-evident or had long since been established. Moreover, the dissent did not question the Chief Justice's very general historical premises; the question was one of application. Consequently, it is hard to argue that Warren used *The Federalist Papers* in *Brown* as anything more than historical background, which was arguably unnecessary to repeat.

One year later, Chief Justice Warren cited *The Federalist No.* 60 in *Bond v. Floyd*,<sup>311</sup> a case in which the Court held that the First Amendment prohibited the Georgia legislature from refusing to seat Julian Bond for certain anti-war statements he had made.<sup>312</sup> The citation to *The Federalist No.* 60, which is attributed to Hamilton, confirmed earlier statements by Madison regarding the dangers of congressional power to determine the qualifications of legislators.<sup>313</sup>

Finally, the Chief Justice cited *The Federalist Nos.* 52 and 60, but this time in a suit that raised the question whether the United States House of Representatives could fail to seat a duly-elected representative for conduct it deemed to be unbecoming a House member.<sup>314</sup> The citations to *The Federalist Nos.* 60<sup>315</sup> and 52,<sup>316</sup> while more to the point in this case than in *Bond*, nevertheless constituted only about one page of a nineteen-page discussion of constitutional history.

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

#### G. The Burger Court: 1969–1986

The approximately sixteen years during which Warren Burger was the Chief Justice has been characterized as a period of retrenchment from the Warren years.<sup>317</sup>

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<sup>309</sup> *Id.* at 444 n.18.

<sup>310</sup> *Id.* at 462.

<sup>311</sup> 385 U.S. 116 (1966).

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 135 n.13.

<sup>314</sup> *Powell v. McCormack*, 395 U.S. 486 (1969).

<sup>315</sup> *Id.* at 539.

<sup>316</sup> *Id.* at 540 n.74.

<sup>317</sup> A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309, 354 (2003) (stating that "the Warren Court's enlargement of the federal habeas corpus writ

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

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

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experienced retrenchment during the tenures of Chief Justices Warren Burger and William Rehnquist."); Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 2 (2002) (stating that "the Burger Court had begun to use reinvigorated waiver doctrines to chip away at the Warren Court's habeas jurisprudence."); Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 LAW & SOC. INQUIRY 127, 151 (2004) (describing "the Supreme Court's retrenchment of many Warren Court liberties during the Burger and Rehnquist Courts").

<sup>318</sup> *A Professional for the High Court*, TIME, May 30, 1969, at 16.

<sup>319</sup> See, e.g., U.S. v. Leon, 468 U.S. 897 (1984); Nix v. Williams, 467 U.S. 431 (1984); United States v. Havens, 446 U.S. 620 (1980); Smith v. Maryland, 442 U.S. 735 (1979); Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338 (1974).

<sup>320</sup> See, e.g., Harris v. McRae, 448 U.S. 297 (1980); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970). But see Plyler v. Doe, 457 U.S. 202 (1982) (striking down Texas law prohibiting tuition-free primary and secondary education to undocumented children).

<sup>321</sup> 404 U.S. 71, 76 (1971).

<sup>322</sup> 429 U.S. 190, 197–200 (1976); see also Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

<sup>323</sup> Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 214 (1973); see also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

<sup>324</sup> Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

<sup>325</sup> 410 U.S. 113 (1973); see also Roberts v. United States Jaycees, 468 U.S. 609 (1984) (recognizing, albeit in dictum, the right of intimate association beyond the family context); Zablocki v. Redhail, 434 U.S. 374 (1978) (recognizing the right to marry as a fundamental right, at least when asserted in the context of an equal protection claim); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (recognizing as fundamental the right to live with

The Burger Court also decided a number of cases dealing with difficult structural issues, cases in which the constitutional design, and thus *The Federalist Papers*, might naturally play an important role in the outcome. In addition to what, by 1969, had become “run of the mill” Commerce Clause cases testing both the scope of federal<sup>326</sup> and state authority,<sup>327</sup> the Court decided six significant separation of powers cases<sup>328</sup> and four equally important Eleventh Amendment sovereign immunity cases.<sup>329</sup> Yet this, in and of itself, does not explain the extraordinary number of citations to *The Federalist Papers* during Chief Justice Burger’s tenure.

Twelve Justices served during the approximately sixteen years of Burger stewardship, five less than served over the same number of years during the previous era.<sup>330</sup> Every Justice who served during this period cited *The Federalist Papers*, as contrasted with 64 percent of those who served during the Warren years. More significantly, *The Federalist Papers* were cited in sixty-nine cases, a 97 percent increase over the previous sixteen years. In addition, seventy-eight different opinions cited *The Federalist Papers*, contrasted with thirty-six opinions during the Warren Court years, a 117 percent increase. Of those, forty (51 percent) were majority opinions (an 8 percent increase), thirty-two (41 percent) were dissents (an insignificant decrease), and six (or 8 percent, compared with 11 percent during the previous period) were concurring opinions. Six Justices, 50 percent of those who served during this period, accounted for 60 percent of the opinions in which *The Federalist Papers* were cited. Chief Justice Burger mentioned *The Federalist* most frequently (thirteen opinions), followed by Justices Powell (twelve), Brennan (eleven), Rehnquist and

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extended family).

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

<sup>327</sup> See, e.g., *Ne. Bancorp v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159 (1985); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978).

<sup>328</sup> *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977); *Schick v. Reed*, 419 U.S. 256 (1974); *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>329</sup> *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Nevada v. Hall*, 440 U.S. 410 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees of Dep’t of Pub. Health & Welfare v. Dep’t. of Pub. Health & Welfare*, 411 U.S. 279 (1973).

<sup>330</sup> STONE, *supra* note 242, at xc–xcviii.

Douglas (eight each), and O'Connor (six).<sup>331</sup> The pertinent question is whether the astonishing increase in the frequency with which *The Federalist Papers* were cited during this period translates into an increased importance of *The Federalist Papers* to the Justices' analyses or the Court's ultimate resolution of the constitutional issues.

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

### 1. Chief Justice Burger

Because he cited *The Federalist Papers* most frequently, the qualitative analysis begins with Chief Justice Burger. Unlike Justice Harlan, who cited *The Federalist Papers* in only two majority opinions, Chief Justice Burger's citations to *The Federalist* appeared in only two dissents.<sup>332</sup> The eleven other references (85 percent) appeared in majority opinions. Were the citations to *The Federalist Papers* instrumental or even significant to Chief Justice Burger's (or the Court's, in the case of majority opinions) historical analysis, much less to the result in the case? One would be hard pressed to make that claim. In nine of the thirteen cases in which *The Federalist Papers* were cited, they played no apparent role, significant or otherwise, in the decision.<sup>333</sup> The citations to *The Federalist Papers* in the other four cases deserve greater attention.

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

<sup>332</sup> *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 87–88 (1981) (Burger, C.J., dissenting); *Nixon v. Adm'r. of Gen. Servs.*, 433 U.S. 425, 507 n.2 (1977) (Burger, C.J., dissenting).

<sup>333</sup> *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (No. 47); *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981) ("the *Federalist Papers*"); *Haig v. Agee*, 453 U.S. 280, 294 n.24 (1981) (No. 64); *United States v. Will*, 449 U.S. 200, 218 (1980) (No. 79); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980) (No. 84); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 507 n.2 (Burger, C.J., dissenting) (No. 48); *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 672 (1976) (No. 39); *United States v. Nixon*, 418 U.S. 683, 704, 708 n.17 (1974) (Nos. 47 and 64); *United States v. Brewster*, 408 U.S. 501, 522–23 (1972) (No. 73).

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

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

Chief Justice Burger's citation to *The Federalist No. 51* in his dissent in *Schad v. Borough of Mount Ephraim*<sup>348</sup> is somewhat more difficult to assess. *Schad* was

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<sup>334</sup> 412 U.S. 546 (1973).

<sup>335</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>336</sup> 412 U.S. at 555–56 & n.11.

<sup>337</sup> *Id.* at 559.

<sup>338</sup> 419 U.S. 256 (1974).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 263 (discussing the President's "prerogative" to issue pardons).

<sup>341</sup> *Id.*, n.6 (expounding the same issue).

<sup>342</sup> 462 U.S. 919 (1983).

<sup>343</sup> *Id.* at 947–48.

<sup>344</sup> *Id.* at 950.

<sup>345</sup> *Id.* at 949.

<sup>346</sup> *Id.* at 956, n.21.

<sup>347</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>348</sup> 452 U.S. 61, 87–88 (1981) (Burger, C.J., dissenting).

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

## 2. Justice Powell

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

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<sup>349</sup> *Schad*, 452 U.S. 61.

<sup>350</sup> *Id.* at 87–88 (Burger, C.J., dissenting).

<sup>351</sup> “To invoke the First Amendment . . . in this case trivializes and demeans that great Amendment.” *Id.* at 88.

<sup>352</sup> I do not mean to paper over the impact of federalism values on how broadly rights are defined. See generally Melvyn R. Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723 (1979). But Chief Justice Burger did not seem to be headed in that direction. Neither is this paper.

<sup>353</sup> 469 U.S. 528 (1985).

<sup>354</sup> *Id.* at 570–72 (Powell, J., dissenting). He also cited *The Federalist Nos. 17 and 46* five pages later, *id.* at 575 n.18, but those citations are contained in a simple “e.g.” reference.

<sup>355</sup> *Id.* at 568–77. This is not to suggest that *The Federalist Papers* were insignificant to Justice Powell. It is only to point out that the historical evidence he marshaled in support of his argument is persuasive even without mention of *The Federalist*. He did not rely exclusively, or even largely, on it.

in terms of their nexus to his analysis. In *Reeves, Inc. v. Stake*,<sup>356</sup> a Dormant Commerce Clause case, he cited *The Federalist Nos. 11* and *42* for the proposition that the Framers thought that the Constitution contemplated a regime of unrestrained trade.<sup>357</sup> But, like his opinion in *Garcia*, *The Federalist* was only one of several historical documents, four in this instance, that supported his argument.<sup>358</sup>

His reference to *The Federalist No. 81* in *Patsy v. Board of Regents*<sup>359</sup> is the most difficult to assess. First, the citation is not mentioned in the text — it is confined to a footnote. Second, the footnote does not independently cite to *No. 81*; it refers to the reliance on *No. 81* by the Court in *Hans v. Louisiana*.<sup>360</sup> But Powell, unlike the majority, perceived the issue in *Patsy* to be a straightforward question of state sovereignty under the Eleventh Amendment.<sup>361</sup> And *Hans* was the seminal Eleventh Amendment case, setting the stage for the Court's current sovereign immunity jurisprudence. So Justice Powell may have thought that there was no reason to rehash settled doctrine to make his point.

Justice Powell's references to *The Federalist Papers* in the other nine cases unquestionably did not reach the level of importance of the three noted above. And that includes three cases in which one might have thought that *The Federalist*, because of the issues involved, would have been more important to Justice Powell: *Atascadero State Hospital v. Scanlon*,<sup>362</sup> *INS v. Chadha*,<sup>363</sup> and *EEOC v. Wyoming*.<sup>364</sup> In *Atascadero*, Powell cited four *Federalist Papers*, *Nos. 17, 46, 39*, and *45*, but did so only in a footnote, and even then by way of two “see, e.g.” cites.<sup>365</sup> By contrast, in *Chadha* Powell cited *Nos. 47* and *48* in the text, but only for background on matters that needed little citation.<sup>366</sup> Finally, in *EEOC v. Wyoming*, Justice Powell's dissent referred to three *Papers*, *Nos. 41, 45*, and *84*. *Nos. 41* and *84* were footnote references,<sup>367</sup> and while *No. 45* was noted in the opinion's text,<sup>368</sup> it may as well

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<sup>356</sup> 447 U.S. 429 (1980).

<sup>357</sup> *Id.* at 448 (Powell, J., dissenting).

<sup>358</sup> *Id.* at 447–48 (including *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

<sup>359</sup> 457 U.S. 496, 527 n.12 (1982) (Powell, J., dissenting).

<sup>360</sup> 134 U.S. 1, 12–13 (1890).

<sup>361</sup> *Patsy*, 457 U.S. at 519–536 (Powell, J., dissenting). The majority characterized the issue as whether exhaustion of remedies was a prerequisite to an action under Section 1983 of the Civil Rights Act, 42 U.S.C. § 1983 (2000). *Patsy*, 457 U.S. 496.

<sup>362</sup> 473 U.S. 234 (1985) (state sovereign immunity).

<sup>363</sup> 462 U.S. 919 (1983) (one-house legislative veto of Executive immigration decisions).

<sup>364</sup> 460 U.S. 226 (1983) (application of Age Discrimination in Employment Act to state and local governments).

<sup>365</sup> 473 U.S. at 238 n.2.

<sup>366</sup> 462 U.S. at 960–61 (Powell, J., concurring). *The Federalist No. 47* was mentioned for the proposition that concentration of power produces tyranny, and *No. 48* followed a quote from Jefferson regarding the dangers of the legislature exercising judicial powers. *Id.*

<sup>367</sup> *EEOC*, 460 U.S. at 268 n.3 (Powell, J., dissenting) (*No. 41*); *id.* at 270 n.6 (*No. 84*).

<sup>368</sup> *Id.* at 270–71.

have been a string of citations with *No. 84* since the position of the text in which the citation appears merely described non-debatable, general principles of federalism.<sup>369</sup> Citations in the other six cases contributed little if anything to either the outcome or the analysis.<sup>370</sup>

### 3. Justice Brennan

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

*Northern Pipeline* presented an issue similar to that of *Schor*: whether conferring broad judicial power on bankruptcy judges violated Article III.<sup>376</sup> Here

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<sup>369</sup> *Id.*

<sup>370</sup> *Wayte v. United States*, 470 U.S. 598, 612 (1985) (*Nos. 4, 24, and 25*); *County of Oneida v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 234 n.4 (1985) (*No. 42*); *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 861 n.3 (1984) (Powell, J., concurring) (*Nos. 4, 25, and 24*); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (*No. 82*); *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 461 n.11 (1978) (*No. 44*); *United States v. Richardson*, 418 U.S. 166, 193 (1974) (Powell, J., concurring) (*No. 78*).

<sup>371</sup> *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 859–67 (Brennan, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247–302 (1985) (Brennan, J., dissenting); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52–89 (1982) (plurality).

<sup>372</sup> *Schor*, 478 U.S. 833.

<sup>373</sup> *Id.* at 859–60 (Brennan, J., dissenting).

<sup>374</sup> *Id.* at 860–61. The quotation from *No. 46* seems less important to his analysis only because it affirms the proposition that secondary students learn (or ought to learn) in Civics: that concentration of power in one branch of government leads to tyranny. *Id.* at 859–60.

<sup>375</sup> *Id.* at 860–61.

<sup>376</sup> *N. Pipeline*, 458 U.S. at 50.

Brennan quoted from *The Federalist Nos. 47*<sup>377</sup> and *78*<sup>378</sup> and cited *No. 79* to demonstrate the Framers' reason for including the provision in Article III regarding Congress's inability to diminish the salary of federal judges.<sup>379</sup> This was important to the plurality's outcome.

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

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<sup>377</sup> *Id.* at 57.

<sup>378</sup> *Id.* at 58. *No. 78* is also mentioned on the next page of the opinion. *Id.* at 59 n.10.

<sup>379</sup> *Id.* at 60.

<sup>380</sup> *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 275–78, 277 n.25, 278 n.27 (1985) (Brennan, J., dissenting).

<sup>381</sup> *Id.* at 277 & n.25.

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

<sup>383</sup> *Id.*

<sup>384</sup> *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594–95 (1985) (Brennan, J., concurring) (*Nos. 47 and 79*); *Larson v. Valente*, 456 U.S. 228, 245 & n.22 (1982) (*No. 51*); *Brown v. Hartlage*, 456 U.S. 45, 56 & n.7 (1982) (*Nos. 10 and 51*); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 442 & n.5 (1977) (*No. 47*); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 857 n.1, 876, 877 (1976) (Brennan, J., dissenting) (*No. 46*); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 625 (1976) (Brennan, J., concurring) (no specific paper cited); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 nn.4–5 (1976) (*Nos. 11, 12, 42 and 44*); *id.* at 291 n.12 (*No. 12, 30, 32, 35, and 36*) (all but one of the *Michelin* citations were either string, "see," or "see also" cites.); *Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 317 (1973) (Brennan, J., dissenting) (*No. 81*).

#### 4. Justices Douglas and Rehnquist

Justice Douglas cited *The Federalist Papers* in seven cases,<sup>385</sup> while then-Justice Rehnquist cited them in eight cases.<sup>386</sup> Justice Douglas continued the pattern he set in the previous two periods, citing a relatively large number of papers with no particular importance placed on those citations.<sup>387</sup> Next to Justice Brennan, Justice Rehnquist perhaps provides the most interesting case study. One would think not only that he would be a frequent user of *The Federalist Papers* in his opinions, but also that he would place some significant reliance upon them. The first was true, although not to the degree that might have been expected, given that he served for fourteen of the sixteen years of the Burger Court.<sup>388</sup> The second, however, was simply not the case, at least during this period.<sup>389</sup>

The nature of the cases in which he cited *The Federalist Papers* provides little explanation. Two of the cases in which he cited *The Federalist* were death penalty cases, *Furman v. Georgia*<sup>390</sup> and *Coleman v. Balkcom*.<sup>391</sup> In *Furman*, Rehnquist cited *The Federalist No. 78* for the now obvious proposition that courts were established to keep government in check, and *No. 51* for the somewhat contrary proposition that courts ought to exercise restraint in asserting their judicial review powers.<sup>392</sup> In *Coleman*, Rehnquist again cited *No. 51* simply to suggest that the Court might have devoted too much attention to controlling the government and not enough to allowing government to control the governed.<sup>393</sup> In neither case did he make a big point of the Court's having strayed too far from the moorings the Framers had laid. And in both cases Rehnquist's main complaint was with the substance of the Court's actions, as his citation in *Furman* to *The Federalist No. 78* attests.<sup>394</sup>

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

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<sup>385</sup> Justice Douglas's seven cases are as follows: *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 232 (1974) (Douglas, J., dissenting) (*No. 76*); *Goldstein v. California*, 412 U.S. 546, 572 & n.1 (1973) (Douglas, J., dissenting) (*No. 43*); *Palmore v. United States*, 411 U.S. 389, 417–18 (1973) (Douglas, J., dissenting) (*No. 79*); *Laird v. Tatum*, 408 U.S. 1, 21 & n.6, 22 (1972) (*No. 41*); *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) (*No. 80*); *Lee v. Runge*, 404 U.S. 887, 888 (1971) (Douglas, J., dissenting from denial of certiorari) (*No. 43*); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 178 n.1 (1970) (Douglas, J., dissenting in part) (*No. 15*).

<sup>386</sup> See *infra* notes 392–409 and accompanying text.

<sup>387</sup> See *supra* notes 200–06 and accompanying text.

<sup>388</sup> STONE, *supra* note 242, at xc–xcviii.

<sup>389</sup> But see *infra* notes 523–29 and accompanying text.

<sup>390</sup> 408 U.S. 238 (1972).

<sup>391</sup> 451 U.S. 949 (1981).

<sup>392</sup> 408 U.S. at 466 (Rehnquist, J., dissenting) (*No. 78*); *id.* at 469–70 (*No. 51*).

<sup>393</sup> 451 U.S. at 962 (Rehnquist, J., dissenting from denial of certiorari) (*No. 51*).

<sup>394</sup> 408 U.S. at 466 (Rehnquist, J., dissenting).

concerns over the judiciary's role. On the other hand, he wrote opinions in three cases in which *The Federalist Papers* would seem to provide fertile ground for mining the Framers' understanding: *Dames & Moore v. Regan*,<sup>395</sup> *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,<sup>396</sup> and *Edelman v. Jordan*.<sup>397</sup> In *Dames & Moore*, the citation generically referred to "The Federalist Papers"<sup>398</sup> and in *Northeast Bancorp*, Nos. 7 and 22 were part of a string of citations regarding the Framers' desire to prevent economic "Balkanization."<sup>399</sup> Perhaps most surprising is *Edelman*, given the critical importance that original understanding has played in the Rehnquist Court's sovereign immunity jurisprudence.<sup>400</sup> *The Federalist No. 81*, so crucial to original understanding both before and after *Edelman*, is cited in a footnote, and then only because Rehnquist quoted from a previous case which had cited to that Paper.<sup>401</sup> Moreover, *The Federalist No. 81* was not the only source cited; the footnote also contains quotes from James Madison and John Marshall from the Virginia Ratification Convention.<sup>402</sup> This is not to suggest that *The Federalist No. 81* is not germane to determining the scope of Eleventh Amendment sovereign immunity; it plainly is.<sup>403</sup> It is only to point out that Justice Rehnquist did not give it the prominence that later decisions did. *The Federalist No. 81* seems at best to be a bit player in Rehnquist's analysis.

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

<sup>395</sup> 453 U.S. 654 (1981) (addressing the presidential power to waive claims against foreign governments).

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

<sup>397</sup> 415 U.S. 651 (1974) (discussing waiver of Eleventh Amendment sovereign immunity).

<sup>398</sup> 453 U.S. at 659.

<sup>399</sup> 472 U.S. at 174.

<sup>400</sup> See *infra* notes 437–42 and accompanying text for a discussion of the Rehnquist Court's Eleventh Amendment sovereign immunity cases.

<sup>401</sup> 415 U.S. at 661 n.9 (quoting *Principality of Monaco v. Miss.*, 292 U.S. 313 (1934)).

<sup>402</sup> *Id.*

<sup>403</sup> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." THE FEDERALIST NO. 81 (Alexander Hamilton).

<sup>404</sup> 430 U.S. 519 (1977).

<sup>405</sup> *Id.* at 545 (Rehnquist, J., concurring in part, dissenting in part) (quoting *Goldstein v. California*, 412 U.S. 546, 554–55 (1973) (quoting THE FEDERALIST NO. 32, at 243 (Alexander Hamilton) (B. Wright ed., 1961))); see also *Anderson v. Celebrezze*, 460 U.S. 780, 813–14 (1983) (Rehnquist, J., dissenting) (quoting *Storer v. Brown*, 415 U.S. 724, 735–36 (1974) (citing THE FEDERALIST NO. 10 (James Madison))).

<sup>406</sup> 455 U.S. 457 (1982).

Clause.<sup>407</sup> Arguably, *The Federalist No. 42* provided, at least in part, support for a broad reading of Congress's power under the Bankruptcy Clause by analogizing the scope of the bankruptcy power to that of the commerce power.<sup>408</sup> However, and admittedly this conclusion like others is a judgment call, *The Federalist No. 42* was not crucial to Justice Rehnquist's argument, nor did he attempt to make it so.<sup>409</sup>

### 5. Justice O'Connor

Justice O'Connor cited *The Federalist Papers* in only six of her opinions. However, she served for a relatively short time during this period, five years, and was the junior Justice during those years.<sup>410</sup> In addition, Justice O'Connor has been one of the primary architects of the "new federalism" which more than anything defined the succeeding period, the Rehnquist Court.<sup>411</sup> This "new federalism" is a jurisprudence that has sought to define a sphere of state authority protected from federal preemption.<sup>412</sup> It has been the structural understandings of the Framers, at least as understood by Justice O'Connor and later Justices Scalia and Kennedy, that has been the benchmark of the states' sphere of influence.<sup>413</sup> Consequently, despite her citation to *The Federalist* in only six cases, it is important to look closely at the use of *The Federalist Papers* in those cases, not only for what they reveal about the extent to which *The Federalist Papers* were useful to the Burger Court's search for original understanding, but also in order to compare *The Federalist Papers'* significance in the preceding periods and the even more extensive use of *The Federalist Papers* in the years of the Rehnquist Court.

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<sup>407</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>408</sup> *Gibbons*, 455 U.S. at 465–66.

<sup>409</sup> The Court declared a statute (the Rock Island Transition and Employee Assistance Act) designed to protect employees of the Rock Island Railroad (then in bankruptcy reorganization) unconstitutional because it exceeded Congress's powers under the uniformity requirement of the Bankruptcy Clause. *Gibbons*, 455 U.S. 457. In reaching this conclusion, then-Justice Rehnquist argued that it was important to distinguish Congress's bankruptcy powers from its commerce powers. *Id.* at 465. *The Federalist No. 42* was cited for the proposition that doing so "is admittedly not an easy task, for the two Clauses are closely related." *Id.* The reason why *The Federalist* ultimately did not influence the decision was that the Court eventually did distinguish between the two clauses despite Madison's belief that it was difficult to do so.

<sup>410</sup> STONE, *supra* note 242, at xc–xcviii.

<sup>411</sup> David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1198 (2004); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 12 (2003).

<sup>412</sup> THE COMPLETE ANTIFEDERALIST 24–37 (Herbert J. Storing ed., 1981), cited in H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 655 (1979).

<sup>413</sup> H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 657 (1979).

Two of the cases in which Justice O'Connor cited *The Federalist Papers* were precursors to what became the current Court's doctrine of state immunity from direct federal regulation.<sup>414</sup> In both cases Justice O'Connor dissented from decisions in which the Court upheld the right of the federal government to regulate the "states qua states" under the Commerce Clause. The first was *Federal Energy Regulatory Commission v. Mississippi*.<sup>415</sup> Justice O'Connor cited three *Federalist Papers*, Nos. 15, 16, and 45.<sup>416</sup> Her citations to Nos. 15<sup>417</sup> and 16<sup>418</sup> seem innocuous at first blush, mere background historical information regarding the difficulties encountered under the Articles of Confederation by the federal government's inability to act directly with respect to individuals. The same can be said of her mention of No. 45 in a footnote.<sup>419</sup> However, what appeared to be little more than background information regarding the shift from the Articles to the Constitution became the foundation supporting the decision fifteen years later in *Printz*. It is thus not so easy to dismiss O'Connor's *Federalist* citations as mere window-dressing. Not so with the second case, *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>420</sup> Of the ten *Papers* cited in *Garcia*, Justice O'Connor accounted for three, Nos. 17, 45, and 51.<sup>421</sup> Here they were mentioned only by way of general background regarding the Framers' view that it was important to create a system in which governmental power was diffusely parceled out,<sup>422</sup> a fundamental proposition known to most who paid the least bit of attention in their high school civics classes.

In the other four cases, *The Federalist Papers* had little impact on either Justice O'Connor's analysis or the outcome of the decision, nor were they relevant to the development of some broader structural principle. *Heath v. Alabama*<sup>423</sup> was a double jeopardy case in which O'Connor mentioned *The Federalist* No. 9 for the well-known proposition that states have certain important attributes of sovereignty.<sup>424</sup> In *Trans World Airlines v. Franklin Mint Corp.*,<sup>425</sup> she cited *The Federalist* No. 64 as supporting the notion that the Court should not impute an intent to abrogate a treaty.<sup>426</sup> *Minnesota State Board for Community Colleges v. Knight*<sup>427</sup> posed a first amendment freedom of association issue in which Justice O'Connor cited *The*

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<sup>414</sup> See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

<sup>415</sup> 456 U.S. 742 (1982).

<sup>416</sup> *Id.* at 791–93, 796 n.35 (O'Connor, J., concurring in part, dissenting in part).

<sup>417</sup> *Id.* at 791–92.

<sup>418</sup> *Id.* at 792–93.

<sup>419</sup> *Id.* at 796 n.35.

<sup>420</sup> 469 U.S. 528 (1985) (O'Connor, J., dissenting).

<sup>421</sup> *Id.* at 582.

<sup>422</sup> *Id.*

<sup>423</sup> 474 U.S. 82 (1985).

<sup>424</sup> *Id.* at 93.

<sup>425</sup> 466 U.S. 243 (1984).

<sup>426</sup> *Id.* at 253.

<sup>427</sup> 465 U.S. 271 (1984).

*Federalist No. 10* simply to add extra weight to her more generalized point about the limited opportunity for direct participation in republican forms of government.<sup>428</sup> Finally in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,<sup>429</sup> another First Amendment case, *The Federalist No. 84* was only a "cf." citation.<sup>430</sup> In sum, of the six cases in which Justice O'Connor mentioned *The Federalist Papers*, in only one could it be fairly argued that they played any significant role in the decision. And even in that case the significance of *The Federalist Papers* did not become apparent for another decade and a half when they reappeared to form the basis of a much broader understanding of federalism.

During the sixteen years of the Burger Court, the remarkable increase in the number of opinions in which *The Federalist* appeared and in the number of Justices who cited them is not matched by the significance of *The Federalist Papers* to the Court or to the individual Justices who made use of them. Certainly some Justices, most particularly Powell, O'Connor, and Brennan, relied in a qualitative sense on *The Federalist Papers* more than others like Chief Justice Burger and then-Judge Rehnquist. But there was no consistency even among Justices Powell, O'Connor, and Brennan. Moreover, the analysis of the Burger years does not support certain intuitions that I had going into this study. First, it is difficult to match the significance of *The Federalist* to the nature of the issue raised by the case, as the contrast between Justice O'Connor's citation of *The Federalist Papers* in *Federal Energy Regulatory Commission* and *Garcia* demonstrates.<sup>431</sup> And second, as the comparative analysis of Justice Brennan's use of *The Federalist Papers* contrasted with that of Chief Justice Burger and Justice Powell establishes popular perceptions of a Justice's "political" bent, at least during this period, are not a terribly accurate predictor of the significance of *The Federalist Papers* to the Justice citing them.

#### H. The Rehnquist Court: 1986–2002<sup>432</sup>

Even more so than the Burger Court, the Rehnquist Court has, to date, profoundly reshaped the structural norms upon which our governmental institutions are based.<sup>433</sup> Congressional power to regulate commerce has been restricted,

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<sup>428</sup> *Id.* at 285. The same can be said for her concurring opinion in *South Carolina v. Regan*, 465 U.S. 367, 397 (1984) (O'Connor, J., concurring) (No. 81).

<sup>429</sup> 460 U.S. 575 (1983).

<sup>430</sup> *Id.* at 584.

<sup>431</sup> See *supra* notes 415, 422 and accompanying text.

<sup>432</sup> The analysis ends with 2002 only because the sixteen-year span between 1986 and 2002 is the same number of years the Court was under the stewardship of Chief Justice Burger. While many factors other than the number of years compared may account for a difference in the number of cases and opinions in which *The Federalist* is cited (e.g., the nature of the cases accepted for review, the interpretative views of the Justices, etc.), by ending the study with 2002, at least one variable is eliminated.

<sup>433</sup> As Professor Merrill reminds us, the Rehnquist Court's "structural revolutions" did not begin until after 1994. Merrill, *supra* note 30, at 569–70. The first eight years were

particularly when it is exercised with respect to activities that themselves cannot be fairly denominated as commercial.<sup>434</sup> Similarly, Justice O'Connor's dissent in *Federal Energy Regulatory Commission v. Mississippi* became the majority opinion in *New York v. United States*.<sup>435</sup> Congress may neither commandeer a state's legislative agenda nor require its executive personnel to enforce federal law.<sup>436</sup> State sovereign immunity embodied in the once obscure Eleventh Amendment is no longer simply a jurisdictional provision preventing states from being sued, *eo nomine*, in a United States court,<sup>437</sup> but rather has been interpreted to be an essential element of the Framers' federalist design, protecting states from individual suits in state courts<sup>438</sup> and federal administrative adjudicatory proceedings.<sup>439</sup> Moreover, the immunity extends even to those matters over which the federal government has exclusive regulatory authority.<sup>440</sup> Finally, Congress's powers under section 5 of the Fourteenth Amendment have been significantly limited, sometimes with a little help from the Eleventh Amendment,<sup>441</sup> sometimes not.<sup>442</sup>

This study does not calculate the number of constitutional cases in which fundamental structural issues were raised, but whatever the total number, the importance of the cases, certainly over the near term, cannot be underestimated. In addition to those mentioned above dealing with federalism issues, a number of important separation of powers cases were also decided during the sixteen-year period studied, some more familiar than others. *Morrison v. Olson*<sup>443</sup> upheld the independent counsel legislation, *Clinton v. Jones*<sup>444</sup> permitted civil suits against a sitting president, and in *Clinton v. City of New York*,<sup>445</sup> the Court struck down the Line Item Veto Act. Perhaps less well known, but still significant, are *Loving v.*

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dominated by "social issues" cases. *Id.*

<sup>434</sup> See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>435</sup> 505 U.S. 144 (1992).

<sup>436</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>437</sup> See, e.g., *Hans v. Louisiana*, 134 U.S. 1 (1890). See generally Melvin Durchslag, *Symposium, State Sovereign Immunity and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 817 (2000).

<sup>438</sup> See *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>439</sup> See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

<sup>440</sup> See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Edu. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Edu. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>441</sup> See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001).

<sup>442</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>443</sup> 487 U.S. 654 (1988).

<sup>444</sup> 520 U.S. 681 (1997).

<sup>445</sup> 524 U.S. 417 (1998).

*United States*,<sup>446</sup> *Plaut v. Spendthrift Farms, Inc.*,<sup>447</sup> and *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*<sup>448</sup> Indeed, even in *Printz*, best known for its federalism principle of commandeering state executive officers, Justice Scalia opined that the attempt to delegate the enforcement of federal law to state officials violated the President's powers to faithfully execute the laws under Article II, Section 3.<sup>449</sup> Others are explored in greater depth below.

The point is that with the number of federalism and separation of powers cases that the Court decided during this period<sup>450</sup> and the seeming importance of these cases to our understanding of constitutional structure, to say nothing of the appointment of several self-described originalists, it should come as no surprise that *The Federalist Papers* were cited with such frequency and in such numbers. *The Federalist* was cited in ninety-eight cases, compared with sixty-nine in the previous sixteen-year period, a 42 percent increase. That is not quite as remarkable as the 97 percent increase during the Burger years from the previous period, but that too should be no surprise given the base from which the percentages are calculated. The same conclusion is reached when the number of opinions in which *The Federalist Papers* are cited is compared to the previous period, 117 as compared to seventy-eight during the Burger years, a 62.8 percent increase.<sup>451</sup> And like the previous period, all thirteen Justices who served from 1986 to 2002 cited *The Federalist*.<sup>452</sup>

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

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<sup>446</sup> 517 U.S. 748 (1996) (holding that Congress, not the President, has power to determine whether the death penalty may be imposed on individuals in uniform).

<sup>447</sup> 514 U.S. 211 (1995) (holding unconstitutional Congress's attempt to reopen judgments rendered by courts in Section 10(b)(5) actions when those judgments were rendered under a previous statute of limitations).

<sup>448</sup> 501 U.S. 252 (1991) (holding unconstitutional an attempt by Congress to appoint a board of its own members to run Ronald Reagan National Airport).

<sup>449</sup> *Printz v. United States*, 521 U.S. 898, 922–23 (1997).

<sup>450</sup> This is not to suggest that the Court during this sixteen-year period was not busy in other areas of importance as well. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Adarand Constructors v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>451</sup> Again the percentage increase is smaller than that of the Burger years when compared to the previous period (also sixteen years), but that is because *The Federalist Papers* were cited in only thirty-six opinions during the Warren Court period.

<sup>452</sup> Fifty-one of the opinions (44 percent) were majority opinions, forty-one (35 percent) were dissents, and twenty-two (21 percent) were concurrences. This is a shift from the Burger years when the percentages of majority, dissenting and concurring opinions were 52 percent, 42 percent and 6 percent respectively.

<sup>453</sup> See *supra* notes 6–7 and accompanying text.

*Federalist*, six (60 percent) were dissents and one (10 percent) was a concurrence. Justice Stevens cited *The Federalist Papers* in twenty-three cases, *one more than Justice Scalia*. Of those, twelve were dissenting opinions (43 percent) and only one (4 percent) was a concurrence. Fifty percent of Justices Souter's (six of twelve) and Blackmun's (two of four) paper citations appeared in dissenting opinions, while 67 percent of citations to *The Federalist Papers* by Justice White (two of three) were in majority opinions. Moreover, "the *Federalist* five,"<sup>454</sup> Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and White (and now Justice Thomas), accounted for 53 percent of the opinions in which *The Federalist Papers* were cited (sixty-seven of 127). It may well be that the way in which the Court discusses constitutional issues has changed, but that depends upon an assessment of the importance of *The Federalist Papers* to the citing Justices.

Analysis of the Rehnquist Court will proceed as previously, with a separate look at each Justice who cited *The Federalist Papers*. Those Justices whose use of *The Federalist Papers* was insignificant either in numbers or importance, or whose citations have been previously analyzed because they were holdovers from the Burger or Warren Courts, will not be separately discussed, although their opinions are noted in the Appendix.<sup>455</sup> Similarly, the analysis of each Justice will proceed as before, starting with the Justice who most often cited *The Federalist Papers* and working down in order of frequency. However, rather than starting with Justice Stevens (twenty-three) and then proceeding to Justices Scalia (twenty-two), Kennedy (twelve), and so on, the analysis will begin with those most commonly thought to be formalists and originalists, Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas, the Court's current so-called conservative majority. The significance of *The Federalist Papers* to these Justices will then be compared to those who often find themselves in the minority, not only in structural cases but in other high-profile cases as well.<sup>456</sup>

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<sup>454</sup> See Ann Althouse, *The Federalist Five*, 76 ABA J. 46 (1990).

<sup>455</sup> These include Justices Powell (one citation), Ginsburg (two citations), White, and Marshall (three each). Justices Brennan and Blackmun, with four citations each, were only two shy of the six citations by Justice O'Connor. But they, unlike O'Connor, are not separately analyzed because a look at the importance of *The Federalist* to them during the Rehnquist years did not differ from that in previous periods. Moreover, as will be seen below, an analysis of Justice O'Connor's use of *The Federalist Papers* gives far greater insight into the importance or lack of importance of *The Federalist Papers* to the Court's analysis. The analytical focus of this section will thus be on only eight of the thirteen Justices who served during this period, Chief Justice Rehnquist and Justices Scalia, Thomas, Souter, O'Connor, Breyer, Stevens, and Kennedy.

<sup>456</sup> Like all such generalizations, how the Justices come out is not always predictable. See, e.g., Romer v. Evans, 517 U.S. 620 (1996) (Justice Kennedy, writing for a majority that also included Justice O'Connor, striking down Colorado constitutional amendment restricting rights of gays and lesbians); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (Justice Kennedy joining Justice Stevens's majority opinion striking down state-imposed

## 1. Justice Scalia

As noted previously, Justice Scalia cited *The Federalist* in twenty-two opinions. Many, if not most, of these opinions cited multiple *Federalist Papers*. To put Justice Scalia's use of *The Federalist* in perspective, he accounted for 19 percent of the opinions in which *The Federalist Papers* were cited.<sup>457</sup> Of Scalia's twenty-two opinions, 41 percent were dissents and 27 percent were concurrences. Put another way, more than two-thirds of Justice Scalia's opinions which cited *The Federalist*, either disagreed with the Court's result or had a different theory of or approach to the case than the majority.

In terms of the importance of *The Federalist Papers* either to Justice Scalia's analysis or to his desired outcome, surprisingly few cases fit into the important or significant category. Twelve (54.5 percent) of Justice Scalia's opinions contained citations that were entirely unimportant — the opinions could have done just as well without mentioning *The Federalist Papers*.<sup>458</sup> In four of the opinions (18 percent), some of the citations had analytical significance while others were unimportant. In only six of Justice Scalia's opinions (27 percent) were the citations to *The Federalist Papers* uniformly a significant element of his analysis. *Printz v. United States*<sup>459</sup> has been previously discussed, making separate analysis here unnecessary,<sup>460</sup> except to say Justice Scalia cited *The Federalist* a remarkable twenty-two times. In the other

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term limits for United States congresspersons); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Justices O'Connor and Kennedy joining Justices Blackmun, Souter, and Stevens to reaffirm, albeit in a more restricted way, *Roe v. Wade*, 410 U.S. 113 (1973)).

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

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

<sup>459</sup> 521 U.S. 898 (1997).

<sup>460</sup> See *supra* notes 1–9 and accompanying text.

four cases,<sup>461</sup> while the *Papers* were not cited as often as in *Printz*, they played an equally important role. In *Tafflin*, the issue was whether Congress could abolish the concurrent jurisdiction of state and federal courts without being explicit about it. Justice Scalia cited *Federalist No. 78* as conclusive proof that Congress could not.<sup>462</sup> *Plaut* involved an old issue about the sanctity of judicial decisions and judgments.<sup>463</sup> Nevertheless, Justice Scalia found that *The Federalist* demonstrated that the Framers did not contemplate legislative interference with judicial decisions — the exercise of “legislative equity” as the Court described it.<sup>464</sup> In *Hatter*, Justice Scalia believed that *Federalist No. 79* was crucial to determining the Framers’ belief that the absence of taxation was not part of a judge’s compensation within the meaning of the Compensation Clause.<sup>465</sup> Only in *Mistretta* might there be some question about the importance of *The Federalist* to the analysis. On one hand, Justice Scalia’s dissent from the Court’s decision to uphold the sentencing guidelines established by the Sentencing Commission devoted a whole (albeit short) section of his opinion to *Federalist No. 47*.<sup>466</sup> It is difficult to tell, however, whether he did so because he believed the majority misunderstood James Madison or because he believed that *Federalist No. 47* affirmatively supported his view (not shared by any other member of the Court) that separation of powers principles prevented Congress from delegating its powers to an independent commission.<sup>467</sup>

Four cases present a “mixed bag,” containing some citations that are essential to Justice Scalia’s reasoning and some that are not.<sup>468</sup> Two require some explanation. Justice Scalia’s citation to *The Federalist No. 10* in *Croson*<sup>469</sup> is arguably important

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<sup>461</sup> *United States v. Hatter*, 532 U.S. 557, 583–84 (2001) (Scalia, J., concurring in part and dissenting in part) (*No. 79*); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221–23 (1995) (*Nos. 48, 81, and 78*); *Tafflin v. Levitt*, 493 U.S. 455, 470 (1990) (Scalia, J., concurring) (citing *No. 78*); *Mistretta v. United States*, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting), *cert. denied*, 490 U.S. 1073 (1989) (*No. 47*).

<sup>462</sup> *Tafflin*, 493 U.S. at 470.

<sup>463</sup> See, e.g., *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) (striking down a congressional statute that precluded a court from entering judgment in favor of individuals pardoned for support of the Confederacy).

<sup>464</sup> *Plaut*, 514 U.S. at 221–22.

<sup>465</sup> 532 U.S. at 583–84 (Scalia, J., concurring in part and dissenting in part).

<sup>466</sup> *Mistretta*, 488 U.S. at 426 (Scalia, J., dissenting).

<sup>467</sup> *Id.* at 427.

<sup>468</sup> *Freytag v. Comm'r*, 501 U.S. 868, 903 (1991) (Scalia, J., concurring in part and dissenting in part) (*No. 78*); *id.* at 904 n.4 (*No. 48*); *id.* at 905 (*No. 76*); *id.* at 906 (*Nos. 48 and 49*); *id.* at 907 (*Nos. 73, 51, 78, and 79*); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring in judgment) (*No. 10*); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (*No. 47*); *id.* at 698 (*Nos. 73 and 51*); *id.* at 699 (*No. 51*); *id.* at 704 (*No. 51*); *id.* at 705 (*No. 49*); *id.* at 711 (*No. 78*); *id.* at 720 (*No. 81*); *id.* at 726 (*No. 51*); *id.* at 729 (*No. 70*); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 818, 824 (1987) (Scalia, J. concurring in judgment) (*No. 78*).

<sup>469</sup> 488 U.S. at 523 (Scalia, J., concurring in judgment).

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

Justice Scalia’s use of *The Federalist Papers* in *Morrison v. Olsen*<sup>473</sup> is also somewhat baffling. The nature of the issue in *Morrison*, whether the act creating the independent counsel was a violation of the Appointments Clause<sup>474</sup> (a constitutional separation of powers issue),<sup>475</sup> calls out for mining original understanding. Consequently, Justice Scalia cites six different *Federalist Papers* on nine different pages.<sup>476</sup> The first five *Federalist* citations support Scalia’s assertion that Congress’s creating the Office of the Independent Counsel violated Article II.<sup>477</sup> Nevertheless, most of his argument was precedent-based, not historical in the documentary sense. In other words, Scalia’s reasoning did not rest to any significant degree on original understanding. Regardless of the classifications of *Morrison* and *Croson*, however, the percentage of the cases in which *The Federalist* played a substantial role in Justice Scalia’s opinions remains well under half of the opinions in which he cited *The Federalist Papers* (36 percent).

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

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<sup>470</sup> See generally *id.* at 520–29.

<sup>471</sup> 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment) (“In my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.” (citing *J.A. Croson Co.*, 488 U.S. at 520 (Scalia, J., concurring in judgment))).

<sup>472</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>473</sup> 487 U.S. 654 (1988).

<sup>474</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>475</sup> *Morrison*, 487 U.S. 654.

<sup>476</sup> See *supra* note 468.

<sup>477</sup> See *Morrison*, 481 U.S. at 698–99, 704–05 (Scalia, J., dissenting).

<sup>478</sup> *City of Chicago v. Morales*, 527 U.S. 41, 84 (1999) (Scalia, J., dissenting) (Nos. 6 and 11).

no support,<sup>479</sup> to a gratuitous observation,<sup>480</sup> to repeating what previous cases, in reliance on *The Federalist*, had already determined.<sup>481</sup> In terms of the opinions in which it was cited, Justice Scalia used *The Federalist* as what seems to be little more than window-dressing.

## 2. Justice Kennedy

Justice Kennedy cited *The Federalist Papers* in significantly fewer opinions (fourteen) than did Justice Scalia (nineteen). Of those, half were either dissents (7 percent) or concurrences (43 percent).<sup>482</sup> In terms of the importance that *The Federalist* played in Justice Kennedy's opinions, his track record is significantly worse than that of Justice Scalia. In only three of his opinions (25 percent) can his use of *The Federalist Papers* be characterized as an essential element of his reasoning.<sup>483</sup> *The Federalist Papers* played the most significant role in *Alden*,<sup>484</sup> where *The Federalist No. 81* was key to the Court's conclusion that immunity from lawsuits founded upon federal law was essential to maintaining state sovereignty, even where the suit was filed in state rather than federal court.<sup>485</sup> This is contrasted

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<sup>479</sup> See, e.g., *Neder v. United States*, 527 U.S. 1, 31 (1999) (Scalia, J., concurring in part and dissenting in part) (citing *No. 83* in regards to the importance of jury trial); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 393–94 (1997) (Scalia, J., concurring in part and dissenting in part) (pointing out that the judiciary possesses neither “force nor will” (citing THE FEDERALIST NO. 78, at 396 (Alexander Hamilton) (M. Beloff ed., 1987))); *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560 (1992) (*No. 48* regarding Madison’s view that judicial prerogatives are uncertain).

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

<sup>481</sup> *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 780 n.1 (1991) (*No. 81*).

<sup>482</sup> Two (17 percent) were dissents while five (42 percent) were concurrences.

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

<sup>484</sup> 527 U.S. 706 (1999).

<sup>485</sup> Citations to *The Federalist Nos. 39, 20, and 15*, were clearly important to building the historical case for sovereign immunity in a case where the suit was filed in state court. *Id.* at 714–15. But these citations were not as central as the references to *No. 81*. *Id.* at 716–17, 729, 730. As previously noted, Professor McGowan singles out the Court’s citation of *The Federalist No. 81* in its sovereign immunity cases as particularly inappropriate. See McGowan, *supra* note 17, at 827–28.

with the other Eleventh Amendment case in which Justice Kennedy wrote an opinion: *Idaho v. Coeur d'Alene Tribe of Idaho*.<sup>486</sup> The principle of sovereign immunity from federal law claims asserted in federal courts had long since been established.<sup>487</sup> The only question was whether there was something about the claim itself that might except it from the proscription of the Eleventh Amendment.<sup>488</sup> Precedent thus played a far more important role than did historical understanding. *Alden*, on the other hand, broke new ground, thus requiring independent constitutional support.

*Public Citizen*<sup>489</sup> was the third case in which *The Federalist Papers* were an essential element of Justice Kennedy's reasoning. The question was whether the Federal Advisory Committee Act could be used to secure the names of potential nominees to the federal bench from the committee established by the American Bar Association to screen such nominees.<sup>490</sup> Justice Kennedy, while concurring in the judgment, disagreed with the majority's determination that Congress never intended the Act to reach this committee.<sup>491</sup> He preferred instead to invoke the Appointments Clause of Article II.<sup>492</sup> *The Federalist* was the centerpiece of his assertion that access to the ABA committee's deliberations would violate the President's appointment powers.<sup>493</sup>

In terms of his use of *The Federalist*, the most surprising of Justice Kennedy's opinions was his concurring opinion in *Lopez v. United States*.<sup>494</sup> While it is true that *The Federalist* was not at all important to Justice Rehnquist's majority opinion,<sup>495</sup> Justice Kennedy's opinion was focused on a somewhat different issue, the intersection of congressional and judicial authority.<sup>496</sup> As the analysis of Justice Scalia's opinions demonstrates, one might have predicted that Justice Kennedy would also have seen *The Federalist Papers* as determinative of judicial/congressional separation of powers concerns. That, however, was not the case. Kennedy cited *Federalist No. 51* for the obvious principle that each branch will help control the other,<sup>497</sup> and *The Federalist No. 46* was cited only to suggest a proposition that Justice Kennedy

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<sup>486</sup> 521 U.S. 261, 267 (1997) (*No. 81*); *id.* at 271 (*No. 80*).

<sup>487</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>488</sup> See *Idaho*, 521 U.S. at 261.

<sup>489</sup> *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989).

<sup>490</sup> *Id.*

<sup>491</sup> *Id.* at 470 (Kennedy, J., concurring in judgment) ("Although I believe the Court's result is quite sensible, I cannot go along with the unhealthy process of amending the statute by judicial interpretation.").

<sup>492</sup> *Id.* at 482.

<sup>493</sup> *Id.* at 483 & n.4.

<sup>494</sup> 514 U.S. 549, 567–83 (1995) (Kennedy, J., concurring).

<sup>495</sup> See *infra* note 529 and accompanying text.

<sup>496</sup> *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).

<sup>497</sup> *Id.* at 576.

ultimately rejects, that federalism values were designed to be protected politically, not judicially.<sup>498</sup>

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

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

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<sup>498</sup> *Id.* at 577.

<sup>499</sup> 517 U.S. 748, 756 (1996) (No. 47); *id.* at 757 (No. 47); *id.* at 767 (No. 23).

<sup>500</sup> *Id.* at 756–57.

<sup>501</sup> *Id.* at 767.

<sup>502</sup> *Id.* at 768–69.

<sup>503</sup> *Crawford-El v. Britton*, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring) (No. 49); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (citing *Federalist* No. 78 with regards to racial harassment); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 710 (1990) (Kennedy, J., dissenting) (citing *Federalist* No. 10 in a First Amendment case).

<sup>504</sup> But see the discussion, *supra* note 483, of *Missouri v. Jenkins*, 495 U.S. 33, 65, 69, 81 (1990) (Kennedy, J., concurring in part and concurring in the judgment), for a case in which Justice Kennedy makes important use of the *Papers*.

<sup>505</sup> *Am. Dredging Co. v. Miller*, 510 U.S. 443, 446 (1994) (Kennedy, J., dissenting) (Nos. 22 and 80).

<sup>506</sup> *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

<sup>507</sup> 531 U.S. 510 (2001).

<sup>508</sup> *Id.* at 528 (Kennedy, J., concurring) (first alteration and second omission in original) (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 842 (1995) (Kennedy, J., concurring)).

### 3. Justice Thomas

Justice Thomas cited *The Federalist Papers* in ten of his opinions.<sup>509</sup> Of those ten opinions, four were dissents and four were concurrences. And in only two of the ten (20 percent) were his references to *The Federalist Papers* an important element in either his analysis or in the result he reached. In *United States v. Lopez*,<sup>510</sup> Justice Thomas, while agreeing with the result, urged the Court to reconsider the “substantial effects” test for determining the scope of Congress’s commerce powers.<sup>511</sup> Why? Because, according to Thomas, the Framers meant commerce to include only buying, selling, and transporting.<sup>512</sup> *The Federalist* was central to sustaining this position. Indeed, Justice Thomas cited fifteen different *Federalist Papers* in his concurring opinion.<sup>513</sup> While it is possible to question whether any individual citation is central to his thesis, unquestionably the package of *Federalist* references are a significant part of his analysis. Finally, Justice Thomas’s opinion for the Court in *Federal Maritime Commission v. South Carolina State Ports Authority*,<sup>514</sup> while citing only two *Papers*, relied on *The Federalist No. 81* to conclude that adjudicative actions by federal administrative agencies are the equivalent of a civil action.<sup>515</sup> Consequently, such actions run afoul of the Eleventh Amendment.<sup>516</sup>

The most surprising use of *The Federalist Papers* in any of Justice Thomas’s opinions is in *U.S. Term Limits, Inc. v. Thornton*.<sup>517</sup> *Thornton* relies very strongly on originalist analysis, more than any other case decided by the Rehnquist Court except *Printz*. All the major arguments, both by Justice Stevens in his majority opinion and by Justice Thomas in his dissent, focus on whether the Framers

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

<sup>510</sup> 514 U.S. 549 (1995).

<sup>511</sup> *Id.* at 584–85 (Thomas, J., concurring).

<sup>512</sup> *Id.* at 585–86.

<sup>513</sup> *Id.* at 584–603.

<sup>514</sup> 535 U.S. 743 (2002).

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

<sup>516</sup> *Fed. Maritime Comm’n*, 535 U.S. 743.

<sup>517</sup> 514 U.S. 779 (1995).

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

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

#### 4. Chief Justice Rehnquist

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

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<sup>518</sup> *Id.*

<sup>519</sup> *Id.* at 869 n.11 (Thomas, J., dissenting) (*No. 56*); *id.* at 872 n.13 (*No. 32*); *id.* at 880 (*No. 52*); *id.* at 885 n.18 (*No. 18*); *id.* at 890 n.20 (*No. 52*); *id.* at 898 n.22 (*No. 52*); *id.* at 900–01 (*No. 52*); *id.* at 902 (*No. 52*); *id.* at 902 n.28 (*No. 57*); *id.* at 913 n.37 (*No. 56*).

<sup>520</sup> A cynic might suggest that *The Federalist Papers* were not essential to Thomas's argument because they provided no support for his conclusion. *The Federalist Papers* also were of no importance in the four other cases in which Thomas cited them. See *Utah v. Evans*, 536 U.S. 452, 501 (2002) (Thomas, J., concurring in part and dissenting in part) (*No. 54*); *id.* (*No. 36*); *Camps Newfoundland, Inc. v. Town of Harrison*, 520 U.S. 564, 612–13 (1997) (Thomas, J., dissenting) (*No. 32*); *id.* at 613 n.6 (*No. 32*). Like Justice Thomas's opinion in *Thornton*, his opinion in *Camps Newfoundland* contains an extensive historical analysis, covering some twenty pages. *Id.* at 621–40. *The Federalist* does not figure prominently in that analysis, however. See also *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 414 (2000) (Thomas, J., dissenting) (*No. 35*); *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994) (*No. 42*).

<sup>521</sup> See *supra* Part II.G.4.

<sup>522</sup> 506 U.S. 224 (1993).

to try impeachment decisions.<sup>523</sup> Chief Justice Rehnquist relied largely on an historical analysis, referring to six different *Federalist Papers*.<sup>524</sup> While it is hard to describe all of *The Federalist* citations as important parts of his analysis, some were independently important and collectively they clearly helped to bolster his conclusion. The other possible exception is *Solorio v. United States*,<sup>525</sup> in which the Court faced the question whether Congress could permit the military to try military personnel for crimes having nothing to do with an individual's military service.<sup>526</sup> While the Chief Justice only cited once to one *Paper*,<sup>527</sup> it was the starting point for a long historical discussion of the issue presented by the case, and also supported his conclusion that Article I, Section 8, Clause 14, giving Congress the power to "make Rules for the Government and Regulation of the [armed] forces," should be interpreted according to its plain meaning.<sup>528</sup>

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

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<sup>523</sup> *Id.*

<sup>524</sup> *Id.* at 233 (No. 78); *id.* at 233–34 (No. 65); *id.* at 235 (Nos. 79 and 81); *id.* at 236 (No. 66); *id.* at 237 (No. 60).

<sup>525</sup> 483 U.S. 435 (1987).

<sup>526</sup> *Id.* ("[T]here is no evidence in the debates over the adoption of the Constitution that the Framers intended the language of Clause 14 to be accorded anything other than its plain meaning.").

<sup>527</sup> *Id.* at 441 (No. 23).

<sup>528</sup> *Id.*

<sup>529</sup> *United States v. Lopez*, 514 U.S. 549, 552 (1995).

<sup>530</sup> 517 U.S. 44, 54, 69, 70 n.13 (1996).

<sup>531</sup> 527 U.S. 627, 634 (1999).

<sup>532</sup> See *Hans v. Louisiana*, 134 U.S. 1, 12–13 (1890).

<sup>533</sup> 517 U.S. at 54 (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (C. Rossiter ed., 1961))).

<sup>534</sup> 527 U.S. at 634 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996)).

<sup>535</sup> *Raines v. Byrd*, 521 U.S. 811, 821 (1997) (No. 62); *Herrera v. Collins*, 506 U.S. 390, 413–14 (1993) (No. 74); *Collins v. Youngblood*, 497 U.S. 37, 43 (1990) (No. 43); *United*

## 5. Justice O'Connor

One of the strongest advocates for judicial maintenance of a federalist balance, Justice O'Connor cited *The Federalist Papers* in ten of her opinions, eight of which were majority opinions; one was a concurrence, and the other a dissent. The citations in four of those opinions were unimportant; throwaways might be a more accurate description. Two of the cases, *Boos v. Berry*<sup>536</sup> and *Lyng v. Northwest Indian Cemetery Protective Ass'n*,<sup>537</sup> did not involve structural issues at all, but were First Amendment cases. In both cases, *The Federalist* was mentioned only by way of a "cf." reference.<sup>538</sup>

Two federalism cases in which O'Connor penned the majority opinions would, at first blush, cry out for *Federalist* citations. In *Gregory v. Ashcroft*,<sup>539</sup> Justice O'Connor cited three *Federalist Papers*: Nos. 45, 28, and 51;<sup>540</sup> however, *Federalist No. 45* is mentioned only for the most general of propositions, that the federal government has "few and defined powers" while states have "numerous and undefined powers."<sup>541</sup> Furthermore, Nos. 28 and 51 only established that one government will check the abuses of others,<sup>542</sup> a common and rarely-denied notion.

Most curious is how she used *The Federalist Papers* in *New York v. United States*,<sup>543</sup> Justice O'Connor's ground-breaking opinion on federal commandeering of state legislative processes.<sup>544</sup> In *New York v. United States*, she cited to seven different *Federalist Papers*, along with one general reference, on eight separate occasions.<sup>545</sup> The first six citations, including the general reference to *The Federalist Papers*,

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States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) (No. 84).

<sup>536</sup> 485 U.S. 312 (1988).

<sup>537</sup> 485 U.S. 439 (1988).

<sup>538</sup> *Boos*, 485 U.S. at 323 (No. 43); *Lyng*, 485 U.S. at 452 (No. 10); *see also Tafflin v. Levitt*, 493 U.S. 455, 459 (1989) (No. 82 listed as part of string of citations); *Gutierrez de Martinez v. Lamango*, 515 U.S. 417, 438 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (citing the majority's reference to *The Federalist No. 10* earlier in the decision).

<sup>539</sup> 501 U.S. 452 (1991).

<sup>540</sup> *Id.* at 458 (No. 45); *id.* at 459 (Nos. 28 and 51). It is true that *Gregory* was decided on statutory grounds, but the reason the Court did not interpret the Age Discrimination in Employment Act to apply to Missouri's mandatory retirement for judges was because the retirement decision "is a decision of the most fundamental sort for a sovereign entity." *Id.* at 460.

<sup>541</sup> *Id.* at 458 (quoting THE FEDERALIST NO. 45, at 292–93 (James Madison) (C. Rossiter ed., 1961)).

<sup>542</sup> *Id.* at 459.

<sup>543</sup> 505 U.S. 144 (1992).

<sup>544</sup> Justice O'Connor previewed her anti-commandeering theory in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 775–97 (1982) (O'Connor, J., concurring in part and in the judgment and dissenting in part).

<sup>545</sup> 505 U.S. at 155 (No. 82); *id.* at 158 (No. 42); *id.* at 163 (Nos. 15 and 16); *id.* at 180 (general reference and Nos. 42 and 20); *id.* at 182 (No. 51); *id.* at 188 (No. 39).

served little function except to illustrate well-known and very general principles. *The Federalist No. 20* was somewhat more important; it was cited in support of a theory of dual federalism: “‘sovereignty over sovereigns . . . is a solecism in theory, so in practice it is subversive of the order and ends of civil polity.’”<sup>546</sup> *The Federalist No. 51* only appeared in a quoted portion of *Gregory v. Ashcroft*, in which it played no role at all in the Court’s analysis.<sup>547</sup> *Federalist No. 39* was cited in a very general way to demonstrate that the Constitution leaves the states with a residual sovereignty.<sup>548</sup> One could have equally cited the Tenth Amendment or randomly picked almost any Commerce Clause case decided in the past sixty years. This is not a criticism of Justice O’Connor’s historicism; that is well beyond the scope of this paper. It is only to say that both during the current and previous periods<sup>549</sup> Justice O’Connor’s relatively frequent use of *The Federalist Papers* mask their lack of probative value to her analyses.

## 6. Justice Stevens

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

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

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

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

<sup>548</sup> *Id.* at 188.

<sup>549</sup> See *supra* Part II.G.5.

<sup>550</sup> *Nevada v. Hall*, 440 U.S. 410, 419 & n.16 (1979) (No. 81).

<sup>551</sup> One possible explanation, of course, is that Justice Stevens had an epiphany at some point after 1986. More likely explanations, however, may include the changing nature of the constitutional conversation among the Justices prompted by Justice Scalia and, to a somewhat lesser degree, Justice Thomas; the nature of the issues presented in cases in which he wrote opinions; and the kinds of cases the Court chose to hear in one era as opposed to the other.

*Federalist Papers* undeniably important either to Justice Stevens's analysis or his conclusion.<sup>552</sup> And in only three others (and more likely only two) could a colorable argument be made that *The Federalist Papers* played anything more than a ceremonial function.<sup>553</sup> The vast majority of Justice Stevens's opinions (78 percent) mentioned *The Federalist Papers* for reasons unrelated, at least substantively, to their effect on his reasoning or analysis.<sup>554</sup>

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<sup>552</sup> See *Printz v. United States*, 521 U.S. 898, 939–70 (1997) (Stevens, J., dissenting); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

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

<sup>554</sup> In some of these seventeen cases the nature of the issue might suggest that *The Federalist Papers* would not play a determinative role. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 251 (1995) (Stevens, J., dissenting) (No. 10) (race discrimination); *Hubbard v. United States*, 514 U.S. 695, 711 (1995) (No. 78) (statutory construction); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) (general reference) (First Amendment political speech); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267 n.20 (1994) (No. 44) (Title VII sexual harassment); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1072 n.7 (1992) (Stevens, J., dissenting) (No. 10) (Takings Clause); *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 389 (1991) (Stevens, J., dissenting) (No. 10) (anti-trust exemption); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 83 (1990) (Stevens, J., concurring) (general reference) (First Amendment); *Sullivan v. Everhart*, 494 U.S. 83, 106 n.1 (1990) (Stevens, J., dissenting) (No. 37) (interpretation of Social Security Act). In other cases the issue might have lent itself to a *Federalist Papers* analysis, but Justice Stevens chose not to place reliance upon them. See, e.g., *Carmell v. Texas*, 529 U.S. 513, 521 nn. 6–7 (2000) (Nos. 44 and 84) (ex post facto laws); *id.* at 532 (No. 84) (ex post facto laws); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 93 (2000) (Stevens, J., dissenting) (No. 78) (Eleventh Amendment and Section 5 powers); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 650 (1999) (Stevens, J., dissenting) (No. 43) (Eleventh Amendment); *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (No. 51) (presidential immunity from civil law suits); *id.* at 703 (No. 47) (presidential immunity from civil law suits); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 92–93 (1996) (Stevens, J., dissenting) (No. 81) (Eleventh Amendment); *Calif. Dep't of Corr. v. Morales*, 514 U.S. 499, 515 (1995) (Stevens, J., dissenting) (Nos. 44 and 84) (ex post facto laws); *Quill v. North Dakota*, 504 U.S. 298, 312 (1992) (Nos. 7 and 11) (Dormant Commerce Clause); *Howlett v. Rose*, 496 U.S. 356, 368–69 (1990) (No. 82) (concurrent jurisdiction of federal and state courts); *Perpitch v. Dept. of Def.*, 496 U.S. 334, 340 n.6 (1990) (No. 25) (presidential control of state National Guard Units); *id.* at 354 n.28 (No. 23) (presidential control of state national guard units).

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

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

## 7. Justice Souter

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

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<sup>555</sup> U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

<sup>556</sup> 521 U.S. at 970–76 (Souter, J., dissenting).

<sup>557</sup> Justice Stevens cited seven separate *Papers* — Nos. 60, 52, 32, 57, 59, 36, and 15. *U.S. Term Limits*, 514 U.S. at 792, 794, 801, 806, 808 & n.18, 809, 819, 820 n.30, 821, 822 n.32, 833.

<sup>558</sup> See *supra* notes 520-21 and accompanying text.

<sup>559</sup> *Printz*, 521 U.S. at 943 & n.3, 945, 947, 948 & n.7, 959 (Stevens, J., dissenting).

<sup>560</sup> *Id.* at 945, 947–48 & n.7.

<sup>561</sup> *Id.* at 943 & n.3 (No. 44); *id.* at 945 (No. 15).

<sup>562</sup> *Id.* at 959.

<sup>563</sup> *Id.* at 971 (Souter, J., dissenting) ("[I]t is *The Federalist* that finally determines my position."). Justice Souter cited six different *Papers* on eleven different occasions in a seven-page opinion. *Id.* at 970–76.

<sup>564</sup> 510 U.S. 163 (1994) (Souter, J., concurring).

<sup>565</sup> *Id.*

<sup>566</sup> *Id.* at 188.

<sup>567</sup> *Id.* at 185 & n.1.

nevertheless part and parcel of Justice Souter's original understanding argument. Indeed, as in *Printz*, *The Federalist* was authoritative for Souter on the Framers' understanding.<sup>568</sup>

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

## 8. Justice Breyer

To devote a separate subsection to Justice Breyer is probably not justified except for the fact that he cited *The Federalist Papers* in ten of his opinions during this period, equal to Justices O'Connor and Thomas, and only one shy of Justice Souter.<sup>577</sup>

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

<sup>569</sup> 529 U.S. 598 (2000).

<sup>570</sup> 527 U.S. 706 (1999).

<sup>571</sup> 517 U.S. 44 (1996).

<sup>572</sup> 529 U.S. at 638 (Souter, J., dissenting) (No. 45); *id.* at 638 n.11 (No. 84); *id.* at 648 (No. 46); *id.* at 650 (No. 62).

<sup>573</sup> 527 U.S. at 763, 773 (Souter, J., dissenting).

<sup>574</sup> 517 U.S. at 144–48 (Souter, J., dissenting).

<sup>575</sup> *Id.* Souter mentioned one other Paper, *The Federalist No. 82*, but that, too, was not central to his analysis. *Id.* at 149 n.42.

<sup>576</sup> *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 382 n.16 (2000) (No. 80); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 449 (1995) (Souter, J., dissenting) (No. 10); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995) (Nos. 7, 42, and 11); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 546 n.6 (1995) (No. 80). Interestingly, in *Gutierrez*, 515 U.S. 417 (1995), *Federalist No. 10* was cited in each of the opinions written: Justice Ginsburg's majority, *id.* at 428, Justice O'Connor's concurrence, *id.* at 438, and Justice Souter's dissent. *Id.* at 448. In no opinion did *The Federalist* play any particular role in either the analysis or the result.

<sup>577</sup> Just by way of comparison, three cases in which he mentioned *The Federalist* were majority opinions, six were dissents, and one was a concurrence.

Yet when his ten opinions are closely studied, in none of them was *The Federalist* anything more than a bit player. Some of this is explicable on grounds having relatively little to do with where Justice Breyer places *The Federalist* on his ladder of importance. His dissenting opinion in *Printz* mentioned *Federalist No. 20* only once by way of a "cf." citation.<sup>578</sup> But his dissent was based upon what we can learn from other federal systems.<sup>579</sup> In *Foster v. Florida*,<sup>580</sup> he mentioned *The Federalist No. 63*, but that opinion was a dissent from the denial of a writ of certiorari, not the place that one would ordinarily expect an extensive analysis of the issue posed.

His other opinions, however, do not indicate that Justice Breyer relied upon *The Federalist* in adjudicating contemporary constitutional disputes. Just by way of example, in *Plaut v. Spendthrift Farm, Inc.*,<sup>581</sup> his citations to *The Federalist Nos. 47* and *48* were only to say that he agreed that Justice Scalia had made a persuasive historical case that Congress had no authority to reopen and revise final judgments.<sup>582</sup> In *United States v. Hatter*,<sup>583</sup> Breyer's majority opinion cites three different *Federalist Papers* on four occasions,<sup>584</sup> but the first three were only to establish that federal judges should not be beholden to another branch for their compensation, a proposition fairly obvious at this point and in any event far too general to have much bearing on the specific issue of whether the social security tax as applied to federal judges violated the compensation clause of Article III. His later citation to *Federalist No. 79* was not particularly persuasive on the question of whether subsequent raises for federal judges cured the previous unconstitutional reductions.<sup>585</sup> Admittedly, one might argue these conclusions. But if Justice Breyer's *Federalist* citations and in particular his citations to *The Federalist No. 79* are compared to Justice Scalia's use of the *Papers* in his concurring opinion,<sup>586</sup> the difference is hard to ignore. In any event, there can be no dispute about his use of *The Federalist* in the other five cases.<sup>587</sup>

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

<sup>579</sup> *Id.* at 976–78.

<sup>580</sup> 537 U.S. 990, 993 (2002) (Breyer, J., dissenting from denial of certiorari).

<sup>581</sup> 514 U.S. 211 (1995) (Breyer, J., concurring in judgment).

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

<sup>583</sup> 532 U.S. 557 (2001).

<sup>584</sup> *Id.* at 567 (*No. 78*); *id.* at 568 (*Nos. 79 and 48*); *id.* at 579 (*No. 79*).

<sup>585</sup> *Id.* at 579.

<sup>586</sup> See *supra* note 466 and accompanying text.

<sup>587</sup> *Utah v. Evans*, 536 U.S. 452, 477 (2002) (*Nos. 54, 55, and 58*) (string of citations); *Clinton v. City of N.Y.*, 524 U.S. 417, 482 (1998) (Breyer, J., dissenting) (*No. 51*); *Kansas v. Hendricks*, 521 U.S. 346, 396 (1997) (Breyer, J., dissenting) (*No. 78*); *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment) (*No. 70*); *id.* at 713 (*No. 71*); *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) (*No. 78*).

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

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

## CONCLUSION

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

<sup>588</sup> LUPU, *The Supreme Court and The Federalist*, *supra* note 14, at 1328; BUCKNER F. MELTON, JR., *The Supreme Court and The Federalist: A Citation List and Analysis, 1789–1996*, 85 KY. L.J. 243, 339 (1997).

<sup>589</sup> See, e.g., LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 27 (1988) (noting that Madison relied on *The Federalist* in a late-in-life essay about the constitutionality of protective tariffs); RAKOVE, *supra* note 17. But see KRAMER, *PUTTING THE POLITICS BACK INTO THE POLITICAL SAFEGUARDS OF FEDERALISM*, *supra* note 47.

<sup>590</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 615

and understanding that revolutionary political theory. Nothing said in this paper disputes that, nor was there any intention to do so. The only question this paper hoped to clarify was whether *The Federalist Papers* had an influence on the development of constitutional outcomes that matched their rhetorical use. Despite the fact that some scholarship either explicitly or implicitly assumes that the answer is yes, my reading of the cases does not support that conclusion. So cliché though it might be, the answer to whether there is less here than meets the eye depends upon how you look at it.

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

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

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(1969).

<sup>591</sup> See generally JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 347–63 (1996); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998); Lupu, *The Supreme Court and The Federalist*, *supra* note 14.

Nevertheless, the remarkable increase in *Federalist* citations since 1969, whether measured numerically or percentage-wise, indicates not simply that the Court has become more conservative both in terms of the results reached and the analyses used to reach those results,<sup>592</sup> but more importantly that the interpretative conversation has shifted from the Roosevelt and Warren Courts. The opinions of Justices Scalia,<sup>593</sup> Kennedy,<sup>594</sup> and Thomas<sup>595</sup> certainly support that conclusion, as does the fact that 50 percent of Justice Souter's citations to *The Federalist* were in dissenting opinions.<sup>596</sup> The change in the nature of the interpretative conversation may also explain why, of the 127 cases in which *The Federalist Papers* appeared during the Rehnquist years, only sixty-four (50.4 percent) were in opinions written by Justices who are commonly thought of as conservatives.<sup>597</sup> Originalist arguments must be met with originalist arguments.<sup>598</sup> On the other hand, there is remarkably little consistency from one case to the next, even among those Justices who hew to the originalist line, suggesting either that *The Federalist Papers* might sometimes be cited for strategic or opportunistic reasons having little to do with their interpretative value.<sup>599</sup>

Finally, and most obviously, whether *The Federalist* is cited at all and the significance of the citation to the analytic structure of a Justice's argument ultimately depends upon the individual Justice herself and the desire to attach precedential value to an opinion.<sup>600</sup> Justices who served from 1834 to 1900 were as originalist in their views of how the Constitution ought to be interpreted as those who served on the Rehnquist Court. But the former largely chose to rely on other historical documents.<sup>601</sup> Justices on the Burger and the Rehnquist Courts have cited *The Federalist* with far more frequency than their 19th century counterparts, but *The*

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<sup>592</sup> But cf. William P. Marshall, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355, 356 (2004) (describing the "conservative" Rehnquist Court as "activist").

<sup>593</sup> See *supra* Part II.H.1.

<sup>594</sup> See *supra* Part II.H.2.

<sup>595</sup> See *supra* Part II.H.3.

<sup>596</sup> See *supra* Part II.H.7.

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

<sup>598</sup> E.g., *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>599</sup> See, e.g., H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 669 (1987) (arguing that "[t]he originalist's use of history is goal-directed.").

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

<sup>601</sup> See *supra* Parts II.B-C.

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

Nonetheless, one cannot dismiss citations to *The Federalist* as window-dressing even when they might appear to be so. Professor McGowan gives us one reason — *The Federalist* might lend credibility to the Court, to the particular opinion, or to the author of a particular opinion.<sup>602</sup> But that reason may somewhat underestimate why Justices cite *The Federalist Papers* (or any historical source for that matter) even if the opinion would do just as well without the reference. Citing “the Framers” generally and *The Federalist Papers* particularly is the secular equivalent to citing the Bible. It is an appeal to a higher and more revered authority. It not only establishes an ethos of objectivity but the perception of infallibility.<sup>603</sup>

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<sup>602</sup> See McGowan, *supra* note 17, at 820–24.

<sup>603</sup> SANFORD LEVINSON, CONSTITUTIONAL FAITH 11 (1988) (describing that the “‘veneration’ of the Constitution has become a central, even if sometimes challenged, aspect of the American political tradition”); see also Christopher E. Smith, *Imagery, Politics, and Jury Reform*, 28 AKRON L. REV. 77, 78 (1994) (describing how, over time, “the Constitution gained the image and aura of a sacred text.”); Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall’s Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 497 (1994) (describing how “American legal ideology is premised on a ‘Sacred Text’ — the Constitution.”).

## APPENDIX

<b>Time Period</b>	<b>Parties</b>	<b>Case Year</b>	<b>Case Citation</b>	<b>Paper(s) Cited</b>	<b>Opin-ion</b>	<b>Cited By</b>
The Marshall and Pre-Marshall Years 1789–1835	Calder v. Bull	1789	3 U.S. 386	No number	M	Chase
	Fletcher v. Peck	1810	10 U.S. 87	No number/ "Letters of Publius"	D	Johnson
	McCull-och v. Maryland	1819	17 U.S. 316	No number/ Federalist	M	Marshall
	Houston v. Moore	1820	18 U.S. 1	82	M	Washington
	United States v. Smith	1820	18 U.S. 153	42	M	Story
	Cohens v. Virginia	1821	19 U.S. 264	No number	M	Marshall
	Martin v. Mott	1827	25 U.S. 19	29	M	Story
	Ogden v. Saunders	1827	25 U.S. 213	44 44	D D	Thompson Trimble
	Brown v. Maryland	1827	25 U.S. 419	32	D	Thompson
	Weston v. Charles-ton	1829	27 U.S. 449	No number 32	M D	Marshall Thompson
	Cherokee Nation v. Georgia	1831	30 U.S. 1	42	D	Thompson
	Wheaton v. Peters	1834	33 U.S. 591	43	D	Thompson

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
The Pre-Civil War to the End of the Civil War 1835–1865	Mayor of N.Y. v. Miln	1837	36 U.S. 102	45	M	Barbour
	Briscoe v. Bank of Ky.	1837	36 U.S. 257	44	D	Story
	Kendall v. Stokes	1838	37 U.S. 524	82	D	Barbour
	Prigg v. Pennsylvania	1842	41 U.S. 539	43	M	Story
	Fox v. Ohio	1847	46 U.S. 410	32	D	McLean
	Waring v. Clarke	1847	46 U.S. 441	80, 83	D	Woodbury
	Thurlow v. Massachusetts	1847	46 U.S. 504	32	M	Catron
	Planters' Bank v. Sharp	1848	47 U.S. 301	44	M	Woodbury
	Luther v. Borden	1849	48 U.S. 1	29, 44, 77	D	Woodbury
	The Passenger Cases (Smith v. Turner)	1849	48 U.S. 283	"certain numbers" 32, 42 32, 42 32, 42, 82	C D D D	McKinley Taney Daniel Woodbury

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
The Pre-Civil War to the End of the Civil War 1835–1865	Cooley v. Bd. of Wardens	1851	53 U.S. 299	32	M	Curtis
	Veazie v. Moore	1852	55 U.S. 568	7, 11	D	Daniel
	Marshall v. Balt. & Ohio R.R.	1853	57 U.S. 314	80	M	Grier
	Piqua Bank v. Knoop	1853	57 U.S. 369	30	D	Catron
	United States v. Guthrie	1854	58 U.S. 284	No number; cites to Federalist	D	McLean
	Florida v. Georgia	1854	58 U.S. 478	81	D	Campbell
	Dodge v. Woolsey	1855	59 U.S. 331	22, 43	M	Wayne
	Dred Scott v. Sandford	1856	60 U.S. 393	38 38 42, 43	M C D	Taney Campbell Curtis
	Jackson v. Steamboat Magnolia	1857	61 U.S. 296	No number	D	Campbell

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
Reconstruction to the Turn of the Century 1865–1900	Gilman v. Philadelphia	1865	70 U.S. 713	32	M	Swayne
	<i>Ex parte</i> Garland	1865	71 U.S. 333	78	D	Miller
	Pac. Ins. Co. v. Soule	1868	74 U.S. 433	34	M	Swayne
	Lane County v. Oregon	1868	74 U.S. 71	“papers”	M	Chase
	Woodruff v. Parham	1868	75 U.S. 123	32, 42	M	Miller
	Justices v. Murray	1869	76 U.S. 274	81, 82	M	Nelson
	Legal Tender Cases	1870	79 U.S. 457	42, 43, 44, 84, “papers”	D	Chase
	Scholey v. Rew	1874	90 U.S. 331	36, “papers”	M	Clifford
	Claflin v. House-man	1876	93 U.S. 130	82	M	Bradley
	Hall v. De Cuir	1877	95 U.S. 485	31	C	Clifford
	Edwards v. Kearzey	1877	96 U.S. 595	7, 44	M	Swayne
	Transp. Co. v. Wheeling	1878	99 U.S. 273	32, “papers”	M	Clifford

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
	Sinking-Fund Cases	1878	99 U.S. 700	84, "papers"	D	Strong
	<i>Ex parte Clarke</i>	1879	100 U.S. 399	42, "papers"	D	Field
	Springer v. United States	1880	102 U.S. 586	21	M	Swayne
	Kring v. Missouri	1882	107 U.S. 221	84	M	Miller
	Legal Tender Case	1884	110 U.S. 421	"writings"	M	Gray
Reconstruction to the Turn of the Century 1865–1900	Ft. Leavenworth R.R. Co. v. Lowe	1885	114 U.S. 525	"papers"	M	Field
	Wisconsin v. Pelican Ins. Co.	1888	127 U.S. 265	80	M	Gray
	Hans v. Louisiana	1890	134 U.S. 1	81	M	Bradley
	Leisy v. Hardin	1890	135 U.S. 100	32	M	Fuller
	McAllister v. United States	1891	141 U.S. 174	78	D	Field
	McPherson v. Blacker	1892	146 U.S. 1	68	M	Fuller

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
	Covington & Cincinnati Bridge Co. v. Kentucky	1894	154 U.S. 204	32	M	Brown
	Pollock v. Farmers' Loan & Trust Co.	1895	157 U.S. 429	36, 54	M	Fuller
	Pollock v. Farmers' Loan & Trust Co.	1895	158 U.S. 601 rehearing	30, 34, 36	M	Fuller
	Plaque-mines Tropical Fruit Co. v. Henderson	1898	170 U.S. 511	82	M	Harlan
	Capital Traction Co. v. Hof	1899	174 U.S. 1	81	M	Gray
The Era of Judicial Deregulation 1900–1937	Dooley v. United States	1901	183 U.S. 151	32	D	Fuller
	Hanover Nat'l Bank v. Moyses	1902	186 U.S. 181	42	M	Fuller
	United States v. Gradwell	1917	243 U.S. 476	59	M	Clarke

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
	S. Pac. Co. v. Jensen	1917	244 U.S. 205	80-83	D	Pitney
	Virginia v. West Virginia	1918	246 U.S. 565	81	M	White
	Evans v. Gore	1920	253 U.S. 245	78, 79	M	Van Devanter
	Newberry v. United States	1921	256 U.S. 232	44, 58, 59 60, 51	M	McReynolds
	Massachusetts v. Mellon	1923	262 U.S. 447	80	M	Sutherland
	<i>Ex parte Gruber</i>	1925	269 U.S. 302	80	M	Sutherland
	Myers v. United States	1926	272 U.S. 52	77 77 64, 66, 68, 74, 76	M D D	Taft Brandeis McReynolds
	Farmers Loan & Trust Co. v. Minnesota	1930	280 U.S. 204	7	M	McReynolds
	Burnet v. Brooks	1933	288 U.S. 378	7	M	Hughes

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
The Era of Judicial Deregulation 1900–1937	O'Donoghue v. United States	1933	289 U.S. 516	48, 78, 79	M	Sutherland
	Home Building & Loan Ass'n v. Blaisdell	1934	290 U.S. 398	7, 44 7, 44	M D	Hughes Sutherland
	Principality of Monaco v. Mississippi	1934	292 U.S. 313	80, 81	M	Hughes
	Lynch v. U.S.	1934	292 U.S. 571	81	M	Brandeis
	Baldwin v. G.A.F. Seelig, Inc.	1935	294 U.S. 511	62	M	Cardozo
	Humphrey's Ex'r v. United States	1935	295 U.S. 602	48	M	Sutherland
The Roosevelt Court 1937–1954	Steward Mach. Co. v. Davis	1937	301 U.S. 548	33, 36	D	McReynolds
	Helvering v. Davis	1937	301 U.S. 619	21	D	McReynolds
	S.C. State Highway Dep't v. Barnwell Bros., Inc.	1938	303 U.S. 177	62	M	Stone

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
	O'Malley v. Woodrough	1939	307 U.S. 277	78, 79	D	Butler
	Hines v. Davidowitz	1941	312 U.S. 52	3, 4, 5, 32, 42, 80	M	Black
	United States v. Pink	1942	315 U.S. 203	64	M	Douglas
	Miles v. Ill. Cent. R.R. Co.	1942	315 U.S. 698	82	D	Frankfurter
	Galloway v. United States	1943	319 U.S. 372	81, 83	D	Black
	United States v. South-Eastern Underwriters Ass'n	1944	322 U.S. 533	22, 23, 30, 36, 60, 61, 63	M	Black
	Cramer v. United States	1945	325 U.S. 1	63	D	Douglas
	New York v. United States	1946	326 U.S. 572	30-36	D	Douglas
	Duncan v. Kahana-moku	1946	327 U.S. 304	83	C	Murphy
	United States v. Lovett	1946	328 U.S. 303	78	M	Black

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
	Richfield Oil Corp. v. State Bd. of Equalization	1946	329 U.S. 69	42	M	Douglas
	Bute v. Illinois	1948	333 U.S. 640	64, 65, 66	M	Burton
	Lichter v. United States	1948	334 U.S. 742	23, 61	M	Burton
	Mac-Dougall v. Green	1948	335 U.S. 281	62	D	Douglas
The Roosevelt Court 1937–1954	Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.	1949	337 U.S. 582	83 80, 81, 82	C D	Rutledge Vinson
	Dennis v. U.S.	1950	339 U.S. 162	41	D	Frankfurter
	Joint Anti-Fascist Refugee Comm. v. McGrath	1951	341 U.S. 123	42	C	Black
	Tenney v. Brandhove	1951	341 U.S. 367	48	M	Frankfurter
	Dennis v. U.S.	1951	341 U.S. 494	41	C	Frankfurter
	Ray v. Blair	1952	343 U.S. 214	68	M	Reed

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	Youngs-town Sheet & Tube Co. v. Sawyer	1952	343 U.S. 579	58, 70	D	Vinson
	Brown v. Allen	1953	344 U.S. 443	82	M	Reed
	District of Columbia v. John R. Thompson Co.	1953	346 U.S. 100	43	M	Douglas
The Warren Years 1953–1969	Pennsylvania v. Nelson	1956	350 U.S. 497	32	D	Reed
	Reid v. Covert	1957	354 U.S. 1	26, 27, 28, 41, 78, 83	M	Black
	Trop v. Dulles	1958	356 U.S. 86	48	D	Frankfurter
	Draper v. United States	1959	358 U.S. 307	84	D	Douglas
	Romero v. Int'l Terminal Operating Co.	1959	358 U.S. 354	80	M	Frankfurter
	Youngs-town Sheet & Tube Co. v. Bowers	1959	358 U.S. 534	12, 32, 44, 67	D	Frankfurter

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	Farmers Educ. & Coop. Union v. WDAY, Inc.	1959	360 U.S. 525	32	D	Frankfurter
	Kinsella v. United States	1960	361 U.S. 234	23, 51	D	Wittaker
	Talley v. California	1960	362 U.S. 60	"papers"	M	Black
	Konigsberg v. State Bar of Cal.	1961	366 U.S. 36	"papers"	D	Brennan
	Communist Party of U.S. v. Subversive Activities Control Bd.	1961	367 U.S. 1	2-5, 41	M	Frankfurter
The Warren Years 1953–1969	Charles Dowd Box Co. v. Courtney	1961	368 U.S. 502	82	M	Stewart
	Baker v. Carr	1962	369 U.S. 186	54, 56, 58, 62	D	Frankfurter
	Glidden Co. v. Zadonk	1962	370 U.S. 530	22, 79, 80, 81	M	Harlan

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
	Gray v. Sanders	1963	372 U.S. 368	68	M	Douglas
	Gibson v. Florida Legislative Investigation Comm.	1963	372 U.S. 539	51	C	Douglas
	Sch. Dist. v. Schempp	1963	374 U.S. 203	51	C	Brennan
	Polar Ice Cream & Creamery Co. v. Andrews	1964	375 U.S. 361	62	M	White
	Wesberry v. Sanders	1964	376 U.S. 1	54, 57 59	M D	Black Harlan
	Sears, Roebuck & Co. v. Stiffel Co.	1964	376 U.S. 225	43	M	Black
	Banco Nacional de Cuba v. Sabbatino	1964	376 U.S. 398	3, 42, 82	D	White
	Parden v. Terminal Ry. of Ala. State Docks Dep't.	1964	377 U.S. 184	81	M	Brennan
	El Paso v. Simmons	1965	379 U.S. 497	44	D	Black

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
	Singer v. United States	1965	380 U.S. 24	83	M	Warren
	United States v. Brown	1965	381 U.S. 437	44, 47, 48, 49, 51, 78	M	Warren
	Griswold v. Connecticut	1965	381 U.S. 479	37, 84	C	Goldberg
	United States v. Johnson	1966	383 U.S. 169	48	M	Harlan
	Bond v. Floyd	1966	385 U.S. 116	52, 60	M	Warren
	United States v. Robel	1967	389 U.S. 258	41	D	White
	Mora v. McNamara	1967	389 U.S. 934	69	D	Douglas
	Duncan v. Louisiana	1968	391 U.S. 145	51, 84	D	Harlan
	Flast v. Cohen	1968	392 U.S. 83	80	D	Harlan
	Williams v. Rhodes	1968	393 U.S. 23	68	C	Harlan
	O'Callahan v. Parker	1969	395 U.S. 258	23	D	Harlan

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The Warren Years 1953–1969	Powell v. McCormack	1969	395 U.S. 486	52, 60	M	Warren
The Burger Court 1969–1986	Adickes v. S.H. Kress & Co.	1970	398 U.S. 144	15	D	Douglas
	Oregon v. Mitchell	1970	400 U.S. 112	52, 60	D	Harlan
	Perez v. United States	1971	402 U.S. 146	Federalist	M	Douglas
	Lee v. Runge	1971	404 U.S. 887	43	D	Douglas
	Illinois v. Milwaukee	1972	406 U.S. 91	80	M	Douglas
	Laird v. Tatum	1972	408 U.S. 1	41	D	Douglas
	Furman v. Georgia	1972	408 U.S. 238	51, 78	D	Rehnquist
	United States v. Brewster	1972	408 U.S. 501	73	M	Burger
	Branzburg v. Hayes	1972	408 U.S. 665	“papers”	D	Brennan
	Goldstein v. California	1972	412 U.S. 546	32, 42, 43 43	M D	Burger Douglas

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
	Employees v. Dep't of Pub. Health & Welfare	1973	411 U.S. 279	81	D	Brennan
	Palmore v. United States	1973	411 U.S. 389	79	D	Douglas
	Edelman v. Jordan	1974	415 U.S. 651	81	M	Rehnquist
	Storer v. Brown	1974	415 U.S. 724	10	M	White
	United States v. Richardson	1974	418 U.S. 166	78	C	Powell
	Schlesinger v. Reservists Comm. to Stop the War	1974	418 U.S. 208	76	D	Douglas
	United States v. Nixon	1974	418 U.S. 683	47, 64	M	Burger
	Schick v. Reed	1974	419 U.S. 256	47, 69, 74 47	M D	Burger Marshall
	Michelin Tire Corp. v. Wages	1976	423 U.S. 276	11, 12, 30, 32, 35, 36, 42, 44	M	Brennan

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
The Burger Court 1969–1986	Buckley v. Valeo	1976	424 U.S. 1	47, 48, 51, 71, 73	M	per curiam
	Hynes v. Oradell	1976	425 U.S. 610	“papers”	C	Brennan
	Eastlake v. Forest City Enters., Inc.	1976	426 U.S. 668	39	M	Burger
	National League of Cities v. Usery	1976	426 U.S. 833	31, 45, 46	D	Stevens
	Jones v. Rath Packing Co.	1977	430 U.S. 519	32	D	Rehnquist
	Nixon v. Adm'r of Gen. Servs.	1977	433 U.S. 425	47 48	M D	Brennan Burger
	U.S. Steel Corp. v. Multistate Tax Comm'n	1978	434 U.S. 452	44	M	Powell
	Dep't of Revenue v. Ass'n of Washington Stevedoring Cos.	1978	435 U.S. 734	7, 11, 12, 42	M	Blackmun

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin-ion	Cited By
	Exxon Corp. v. Governor of Md.	1979	437 U.S. 117	7, 11, 12, 42	D	Blackmun
	Nevada v. Hall	1979	440 U.S. 410	81	M D	Stevens Blackmun
	California v. Arizona	1979	440 U.S. 59	81	M	Stewart
	Japan Line, Ltd. v. County of Los Angeles	1979	441 U.S. 434	42	M	Blackmun
	Reeves, Inc. v. Stake	1980	447 U.S. 429	11, 42	D	Powell
	United States v. Raddatz	1980	447 U.S. 667	78, 79	O	Marshall
	Richmond Newspapers, Inc. v. Virginia	1980	448 U.S. 555	84	M	Burger
	Indus. Union Dep't v. Am. Petroleum Inst.	1980	448 U.S. 607	48	D	Marshall
	United States v. Will	1980	449 U.S. 200	79	M	Burger
	Weaver v. Graham	1981	450 U.S. 24	44, 84	M	Marshall

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The Burger Court 1969–1986	Coleman v. Balkcom	1981	451 U.S. 949	51	D	Rehnquist
	Schad v. Mt. Ephraim	1981	452 U.S. 61	51	D	Burger
	Haig v. Agee	1981	453 U.S. 280	64	M	Burger
	Gulf Offshore Co. v. Mobil Oil Corp.	1981	453 U.S. 473	82	M	Powell
The Burger Court 1969–1986	Dames & Moore v. Regan	1981	453 U.S. 654	“papers”	M	Rehnquist
	Citizens Against Rent Control v. Berkeley	1981	454 U.S. 290	“papers”	M	Burger
	Ry. Labor Executives' Ass'n v. Gibbons	1982	455 U.S. 457	42	M	Rehnquist
	Larson v. Valente	1982	456 U.S. 228	51	M	Brennan
	Brown v. Hartlage	1982	456 U.S. 45	10, 51	M	Brennan
	FERC v. Mississippi	1982	456 U.S. 742	15, 16, 45	D	O'Connor

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	Patsy v. Bd. of Regents	1982	457 U.S. 496	81	D	Powell
	Nixon v. Fitzgerald	1982	457 U.S. 731	65, 77	D	White
	N. Pipeline Constr. v. Marathon Pipe Line Co.	1982	458 U.S. 50	47, 78, 79	M	Brennan
	EEOC v. Wyoming	1983	460 U.S. 226	41, 45, 84	D	Powell
	Minn. Star & Tribune Co. v. Minn. Comm'r of Revenue	1983	460 U.S. 575	84	M	O'Connor
	Anderson v. Celebrezze	1983	460 U.S. 780	10	D	Rehnquist
	INS v. Chadha	1983	462 U.S. 919	22, 51, 62, 64, 66, 73 47, 48, 73 47, 48, 50, 73	M C D	Burger Powell White
	United Building & Constr. Trades Council v. Camden	1984	465 U.S. 208	80	D	Blackmun

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	Minn. State Bd. for Cmty. Colls. v. Knight	1984	465 U.S. 271	10	M	O'Connor
	South Carolina v. Regan	1984	465 U.S. 367	81	D	Stevens
The Burger Court 1969–1986	Trans World Airlines, Inc. v. Franklin Mint Corp.	1984	466 U.S. 243	64	M	O'Connor
	Massachusetts v. Upton	1984	466 U.S. 727	84	M	per curiam
	Selective Serv. Sys. v. Minnesota Pub. Interest Research Group	1984	468 U.S. 841	4, 24, 25	C	Powell
	Garcia v. San Antonio Metro. Transit Auth.	1985	469 U.S. 528	39, 43, 46, 62 17, 39, 45, 46 17, 45, 51	M D D	Blackmun Powell O'Connor
	County of Oneida v. Oneida Indian Nation	1985	470 U.S. 226	42	M	Powell

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	Wayte v. United States	1985	470 U.S. 598	4, 24, 25	M	Powell
	Ne Bancorp v. Bd. of Governors of Fed. Reserve Sys.	1985	472 U.S. 159	7, 22	M	Rehnquist
	Atascadero State Hosp. v. Scanlon	1985	473 U.S. 234	17, 39, 45, 46 32, 80, 81	M D	Powell Brennan
	Thomas v. Union Carbide Agric. Prods. Co.	1985	473 U.S. 568	47, 79	C	Brennan
	Heath v. Alabama	1986	474 U.S. 82	9	M	O'Connor
	Bowsher v. Synar	1986	478 U.S. 714	47	M	Burger
	Commodity Futures Trading Comm'n v. Schor	1986	478 U.S. 833	46, 78	D	Brennan
The Rehnquist Court	Tashjian v. Republican Party	1986	479 U.S. 208	52 52	M D	Marshall Stevens
1986–2002	Johnson v. Transp. Agency	1987	480 U.S. 616	62	D	Scalia

Time Period	Parties	Case Year	Case Citation	Paper(s) Cited	Opin -ion	Cited By
	McCleskey v. Kemp	1987	481 U.S. 279	83	M	Powell
	Young v. United States	1987	481 U.S. 787	78	M	Brennan
The Rehnquist Court 1986–2002	Tyler Pipe Indus. v. Wash. State Dep’t of Revenue	1987	483 U.S. 232	7, 45	M	Stevens
	Welch v. Tex. Dep’t of Highways & Pub. Transp.	1987	483 U.S. 486	81 80	M D	Powell Brennan
	Solorio v. United States	1988	483 U.S. 435	23	M	Rehnquist
	Boos v. Barry	1988	485 U.S. 312	3	M	O’Connor
	Lyng v. Nw. Indian Cemetery Protective Ass’n.	1988	485 U.S. 439	10	M	O’Connor
	Morrison v. Olsen	1988	487 U.S. 654	47, 49, 51, 70, 73, 78	D	Scalia
	Mistretta v. United States	1989	488 U.S. 361	47, 48, 51 47	M D	Blackmun Scalia

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	Richmond v. J.A. Croson Co.	1989	488 U.S. 469	10	C	Scalia
	Bonito Boats, Inc. v. Thunder Craft Boats, Inc.	1989	489 U.S. 141	43	M	O'Connor
	Pennsylvania v. Union Gas Co.	1989	491 U.S. 1	81	M	Brennan
	Patterson v. McLean Credit Union	1989	491 U.S. 164	78	M	Kennedy
	Public Citizen v. U.S. Dep't of Justice	1989	491 U.S. 440	47-51, 76, 78	C	Kennedy
	Hoffman v. Conn. Dep't of Income Maintenance	1989	492 U.S. 96	42	M	White
	Tafflin v. Levitt	1989	493 U.S. 455	82 78	M C	O'Connor Scalia

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The Rehnquist Court 1986–2002	United States v. Verdugo-Urquidez	1989	494 U.S. 259	84	M	Rehnquist
	Austin v. Michigan State Chamber of Commerce	1989	494 U.S. 652	10	M	Marshall
	Sullivan v. Everhart	1989	494 U.S. 83	37	M	Scalia
	Port Auth. Trans-Hudson Corp. v. Feeney	1990	495 U.S. 299	81	M	O'Connor
	Missouri v. Jenkins	1990	495 U.S. 33	48, 51, 78	C	Kennedy
	United States v. Munoz-Flores	1990	495 U.S. 385	58, 63, 64	M	Marshall
	McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco	1990	496 U.S. 18	82	M	Brennan
	Perich v. Dep't of Def.	1990	496 U.S. 334	23, 25	M	Stevens
	Howlett v. Rose	1990	496 U.S. 356	82	M	Stevens

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	Collins v. Young-blood	1990	497 U.S. 37	44	M	Rehnquist
	Rutan v. Republican Party	1990	497 U.S. 62	"papers"	C	Stevens
	Dennis v. Higgins	1991	498 U.S. 439	7, 11, 22, 42, 43	M	White
	City of Columbia v. Omni Outdoor Adver.	1991	499 U.S. 365	10	D	Stevens
	Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise	1991	501 U.S. 252	48, 51, 73	M	Stevens
	Gregory v. Ashcroft	1991	501 U.S. 452	28, 45, 51	M	O'Connor
	Coleman v. Thompson	1991	501 U.S. 772	44, 51	M	O'Connor
	Blatchford v. Native Village of Noatak	1991	501 U.S. 775	81	M	Scalia
	Payne v. Tennessee	1991	501 U.S. 808	78	M	Rehnquist

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The Rehnquist Court 1986–2002	Freytag v. Commiss-ioner	1991	501 U.S. 868	48, 73, 76, 78, 79 47	D	Scalia
	Harmelin v. Michigan	1991	501 U.S. 957	24	M	Blackmun
	Norman v. Reed	1992	502 U.S. 279	10	M	Souter
	Quill Corp. v. North Dakota	1992	504 U.S. 298	7	M	Stevens
	Lujan v. Defenders of Wildlife	1992	504 U.S. 555	48	M	Scalia
	Lucas v. S.C. Coastal Council	1992	505 U.S. 1003	10	D	Stevens
	New York v. United States	1992	505 U.S. 144	15, 16, 20, 39, 42, 51, 82	M	O'Connor
	Nixon v. United States	1993	506 U.S. 224	60, 65, 66, 78, 79, 81 65, 66	M	Rehnquist
	Herrera v. Collins	1993	506 U.S. 390	74	C	White
	Weiss v. United States	1994	510 U.S. 163	48, 76, 77	M	Rehnquist
	American Dredging v. Miller	1994	510 U.S. 443	22, 80	C	Souter
					D	Kennedy

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	Landgraf v. USI Film Prods.	1994	511 U.S. 244	44	M	Stevens
	C & A Carbone v. Town of Clarkson	1994	511 U.S. 383	22	M	Kennedy
	Oregon Waste Sys. v. Dep't of Envtl Quality	1994	511 U.S. 93	42	M	Thomas
	Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.	1995	513 U.S. 527	80	M	Souter
	Oklahoma Tax Comm'n v. Jefferson Lines, Inc.	1995	514 U.S. 175	42	M	Souter
	Plaut v. Spend-thrift Farms	1995	514 U.S. 211	47, 48, 78, 81	M	Scalia
	McIntyre v. Ohio Elections Comm'n	1995	514 U.S. 334	"Publius" Federalist Papers "Publius"	M C D	Stevens Thomas Scalia

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	Cal. Dep't of Corr. v. Morales	1995	514 U.S. 499	44	D	Stevens
	United States v. Lopez	1995	514 U.S. 549	45, 51 46, 51 4, 7, 12, 17, 21, 24, 33, 34, 35, 36, 40, 42, 44, 45, 78 4, 17, 21, 34, 35, 36, 42, 44, 45, 46, 51	M C C  D	Rehnquist Kennedy Thomas  Breyer
	Hubbard V. United States	1995	514 U.S. 695	78	M	Stevens
	U.S. Term Limits, Inc. v. Thornton	1995	514 U.S. 779	2, 32, 36 39, 52, 56, 57, 59, 60	M D	Stevens Thomas
The Rehnquist Court 1986—2002	Adarand Constructors v. Pena	1995	515 U.S. 200	10	D	Stevens
	Gutierrez de Martinez v. Lamagno	1995	515 U.S. 417	10 10 10	M C D	Ginsberg O'Connor Souter
	Missouri v. Jenkins	1995	515 U.S. 70	78, 83	C	Thomas

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	Lonchar v. Thomas	1996	517 U.S. 314	78	M	Breyer
	Seminole Tribe v. Florida	1996	517 U.S. 44	81 22, 32, 46, 80, 81, 82 Federalist Papers, 81	M D  D	Rehnquist Souter  Stevens
	Loving v. United States	1996	517 U.S. 748	23, 47 Federalist Papers	M C	Kennedy Thomas
	Schenck v. ProChoice Network	1997	519 U.S. 357	78	D	Souter
	Timmons v. Twin Cities Area New Party	1997	520 U.S. 351	10	M	Rehnquist
	Camps Newfound Owatonna v. Town of Harrison	1997	520 U.S. 564	12, 32	D	Thomas
	Edmond v. United States	1997	520 U.S. 651	76, 77	M	Scalia
	Clinton v. Jones	1997	520 U.S. 681	47, 51 70, 71	M C	Stevens Breyer
	Kansas v. Hendricks	1997	521 U.S. 346	78	D	Breyer

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The Rehnquist Court 1986–2002	Idaho v. Coeur d'Alene Indian Tribe	1997	521 U.S. 261	80, 81	M	Kennedy
	City of Boerne v. Flores	1997	521 U.S. 597	45 84	M D	Kennedy O'Connor
	Raines v. Byrd	1997	521 U.S. 811	62	M	Rehnquist
	Printz v. United States	1997	521 U.S. 898	15, 20, 27, 28, 33, 36, 39, 44, 45, 51, 70 15, 27, 36, 44, 45 27, 36, 45, 46	M  D  D	Scalia,  Souter  Stevens
	Crawford-El v. Britton	1998	523 U.S. 574	49	C	Kennedy
	Clinton v. City of New York	1998	524 U.S. 417	47, 84 51	C D	Kennedy Breyer
	Neder v. United States	1999	527 U.S. 1	83	D	Scalia
	City of Chicago v. Morales	1999	527 U.S. 41	6	D	Scalia

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	Florida Prepaid Post Secondary Educ. Expense Bd. v. College Sav. Bank	1999	527 U.S. 627	81 43	M D	Rehnquist Stevens
	College Sav. Bank v. Fla. Prepaid Post Secondary Educ. Expense Bd.	1999	527 U.S. 666	81	D	Breyer
	Alden v. Maine	1999	527 U.S. 706	15, 20, 33, 39, 81 15, 39, 81	M D	Kennedy Souter
	Nixon v. Shrink Mo. Gov't PAC	2000	528 U.S. 377	10, 35	D	Thomas
	Kimel v. Fla. Bd. of Regents	2000	528 U.S. 62	45	D	Stevens
	Carmell v. Texas	2000	529 U.S. 513	44, 84	M	Stevens
	United States v. Morrison	2000	529 U.S. 598	45, 46, 62	D	Souter
	United States v. Locke	2000	529 U.S. 89	"papers," 12, 44, 64	M	Kennedy

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	Crosby v. Nat'l Foreign Trade Counsel	2000	530 U.S. 363	80	M	Souter
	Cal. Democratic Party v. Jones	2000	530 U.S. 567	10	D	Stevens
	Bush v. Gore	2000	531 U.S. 98	39, 78	D	Ginsberg
	Cook v. Gralike	2001	531 U.S. 510	"papers"	C	Kennedy
	Rogers v. Tennessee	2001	532 U.S. 451	44, 78	D	Stevens
	United States v. Hatter	2001	532 U.S. 557	48, 78, 79 79	M D	Breyer Scalia
	Nevada v. Hicks	2001	533 U.S. 353	82	M	Scalia
	Williams v. United States	2002	535 U.S. 911	78	D	Breyer
The Rehnquist Court 1986–2002	JP Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.	2002	536 U.S. 88	80	M	Souter

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	Utah v. Evans	2002	536 U.S. 452	54, 55, 58 36, 54	M D	Breyer Thomas
	Fed. Mar. Comm'n v. S.C. Ports Auth.	2002	536 U.S. 743	39, 81	M	Thomas
	Republi-can Party v. White	2002	536 U.S. 765	78, 79	D	Stevens
	Foster v. Florida	2002	537 U.S. 990	63	D	Breyer