2005Durchslag\_Notes

* How important are the Federalist in the opinions?
  + P.258 – focuses on how much of the opinion is focused on the Federalist as a fraction of the entire opinion
  + “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”

Good claim against *Originalism*, p. 260:

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. °5

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.) [*See* Mcgowan, *supra* note **17,** at 756, **827-32.]** 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.0 7 Except as just another scholarly opinion,' °8 *The Federalist Papers* hardly appeared on the radar screen.

**1865- 1900**

* 13,14,15 amendments
* 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.