

ORDO IN DOMUM PUBLIUS:
THE MOST INFLUENTIAL OF THE *FEDERALIST* PAPERS

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The Constitution was to them, in the quaint language of George the Third, ‘the most perfect of human formations’; it was to them not a mere polity to be compared with the government of any other state, but, so to speak, a sacred mystery of statesmanship.

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INTRODUCTION

Chief Justice John Marshall famously described the intent of the American framers to create a constitutional system of permanent durability: “A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it.”¹ Samuel Adams was among the many pre-revolutionary figures anticipating the words of Marshall and giving voice not only to the durability and duration that inevitably attend good law, but to the related and equally enduring legal principle of consistency and continuity: “In all free states, the constitution is fixed...”² By the time the first quarter of the 19th century had passed, this idea surrounding the Constitution was well established. Justice Joseph Story echoed that the

policy of one age may ill suit the wishes or the policy of another. The Constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, today, and forever.³

The Constitutional framers and the authors of *The Federalist* executed their purpose with aplomb. As late as 1885, Woodrow Wilson would complain that “opposition to the Constitution as a constitution, and even hostile criticisms of its provisions, ceased almost immediately upon its adoption; and not only ceased, but gave place to an indiscriminating and almost blind worship of its principles.”⁴ Prof. Corwin would claim in 1928, with reference to the Civil War, that the Constitution was so revered that “even Secession posed as loyalty to the *principles* of the Constitution and a protest against their violation, and in form at least the constitution of the Southern

¹ *Cohens v. Virginia*, 19 U.S. 264, 387 (1821). Citations to U.S. Supreme Court opinions are given throughout this essay using standard legal convention.

² SAMUEL ADAMS, MASSACHUSETTS CIRCULAR LETTER (1768), *quoted in* EDWARD S. CORWIN, THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 28 (Liberty Fund 2008) (1928).

³ JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 145 (Hilliard, Gray, and Co. 1833). Story here invokes an ancient New Testament reference to immortality: “Jesus Christ is the same yesterday, today, and forever.” *Hebrews* 13:8.

⁴ WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 27 (Johns Hopkins Univ. Press 1981) (1885).

Confederacy was, with a few minor departures, a studied reproduction of the instrument of 1787.”⁵ President Reagan would invoke this reverence for the Constitution at the investiture of Chief Justice William Rehnquist and Justice Antonin Scalia in 1986, invoking Daniel Webster from 1851: “Hold on to your Constitution, for if the American Constitution shall fall there will be anarchy throughout the world.”⁶ It is no exaggeration to say of the written U.S. Constitution what Prof. Dicey said in a more reverent age of the unwritten British constitution: past generations who lived under its authority considered it not simply one form of polity to be compared with others, but a sacred mystery of statesmanship.

The Federalist was, from only a few years after ratification and at the highest levels of American government, academia, and culture, considered the authoritative commentary on and exposition of the principles of the U.S. Constitution. Its goal was to defend a Constitution the authors hoped would approach immortality as nearly as human institutions can approach it.

THE FEDERALIST

This background in American ideals of government is essential for understanding the view the American founders, including the authors of *The Federalist*, held of their task. The view the founders held of their task, in turn, is essential for understanding the language of the Constitution and *The Federalist*, the reverence in which early generations of Americans held both, and the nature of *The Federalist's* influence on American government, including which of the *Federalist* papers would eventually manifest the greatest impact.

⁵ “HIGHER LAW” BACKGROUND, at 2. Madison makes explicit in *Federalist* 42, one of the most influential of the *Federalist* papers, that the 1787 Constitution was anti-slavery in spirit even as it temporarily accommodated existing slavery to preserve the union of states. In addition, the spirit of Jeffersonian Anti-Federalism with its heightened suspicion of central power, as contrasted with the spirit of the *Federalist*, more heavily informed the Confederate Articles than the Constitution. The Confederacy hid these significant differences in spirit and function behind formal constitutional machinery and official declarations of human rights that largely mimicked the Constitution.

⁶ Ronald W. Reagan, *Address at the Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House (Sep. 26, 1986)*, in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 56 (Federalist Society 1986) (quoting Daniel Webster).

The high status held by *The Federalist* was stated repeatedly in multiple early Supreme Court of the United States (SCOTUS) opinions, in key 19th-century texts like Alexis de Tocqueville's *Democracy in America*, and in countless other speeches, essays, commentaries, letters, newspapers, and other records of the American founding and the 19th century. That high regard has continued unbroken among political and legal conservatives to the present day, even as the rise of Woodrow Wilson's brand of political progressivism, legal positivism, and "living" constitutionalism during the 20th century created new constitutional debates and disagreements over the meaning of *The Federalist*. These debates were provoked by and helped spread the view that *The Federalist*, like the Constitution, does not stand for what it had always been understood to teach. In such cases the prestige of *The Federalist*, still great enough that it is rarely opposed outright even where it is characterized as merely a conservative option in constitutional exegesis, has frequently been invoked on behalf of legal ideas and constitutional views its authors would never have countenanced.

At the same time, constitutional originalists have increasingly in recent decades invoked *The Federalist* to prove that the precise legal and political dangers Publius warned against have now become realities in American government. The result has been the increased confusion, tension, and even hostility in legal and political circles that is a hallmark of early 21st-century American law and politics, ironically leading in turn to an ever-increasing number of references to *The Federalist* in American judicial opinions and legal commentary. Corley et al, using robust statistical analysis, "demonstrate that citations [of *The Federalist* in SCOTUS opinions] have grown in tandem with the rise of dissensus on the Court, even after controlling for the increased number of pages written by justices each term...Ultimately, the disagreement indicators appear to drive the increase in citations

over time.⁷ Figure 1 shows the pattern of SCOTUS citations of *The Federalist* in its published opinions between 1789 and 2002.⁸

SCOTUS use of *The Federalist* is an excellent proxy for the influence of Publius throughout the broader legal community, since justices both are products of and by their opinions influence the legal community, and the cases and constitutional issues they consider and on which they bring *The Federalist* to bear reflect the issues and developments of their generation. The legal community, in turn, heavily influences and is a good if imperfect proxy for the broader world of politics and government.

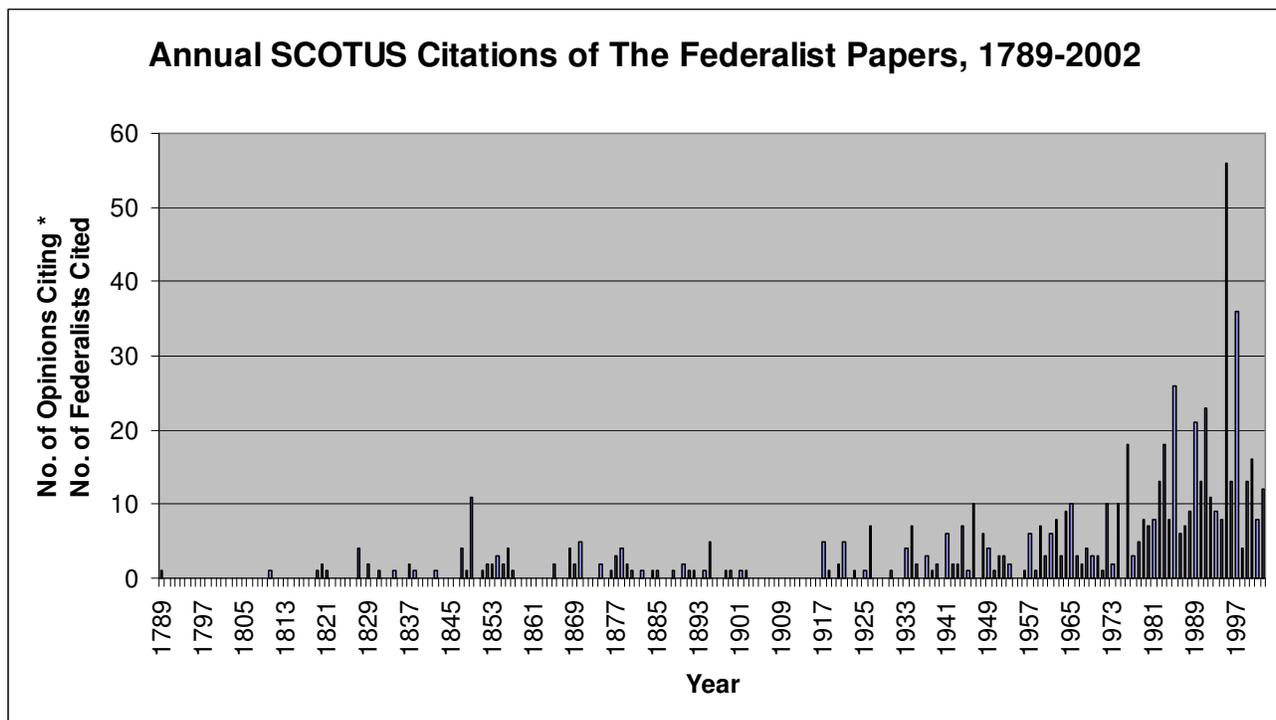


Figure 1. To capture *Federalist* influence, the number of opinions in a given case citing *The Federalist* is multiplied by the number of different *Federalist* papers cited.

⁷ Pamela Corley, Robert Howard, and David Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POLITICAL RESEARCH QUARTERLY 330, 338 (2005).

⁸ Numbers are taken from Melvyn Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243 (2005-2006). All subsequent statistics in this essay on SCOTUS use of the *Federalist* are taken from this article. Where necessary I have corrected errors and omissions in Durchslag's data.

This spiraling up in the frequency of use of *The Federalist* in national jurisprudence reflects a search for reliable legal and constitutional authority amidst the modern wreckage of “living” constitutionalism and the dissensus it has created. Understanding this trend and properly evaluating which of the *Federalist* papers exerted greatest influence along the way is the purpose of this essay.

A TWO-PART QUESTION

The question that stimulated this essay has two parts: which of the *Federalist* papers has had the greatest influence on my personal understanding of the U.S. Constitution is necessarily a separate question from which has had the most significance for our country. By the time of my own birth in 1972, *The Federalist* and the relative influence of its individual papers were close to their bicentennial. Moreover, the most prominent legal and political problems of the day, a major factor influencing which of the *Federalist* papers rise to prominence in any generation, changed considerably between the time *The Federalist* was written and the date of my birth. The *Federalist* papers to which I have been most exposed in my lifetime are thus not likely the ones I would have been most exposed to if I had lived during the 19th century.

Federalist 10, which deals mainly with the problem of social and political factions, is an excellent example. I have repeatedly encountered Number 10 over the course of my education and involvement in American politics, even apart from my personal reading of *The Federalist*, and Harvard professor and noted revolutionary historian Bernard Bailyn has called Number 10 “the most famous of the papers.” He believes Madison’s “Extend the sphere” passage in Number 10 to be Publius’ most famous.⁹ Yet Number 10 did not appear in a single SCOTUS opinion until the year

⁹ BERNARD BAILYN, *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS* 105 (Vintage Books 2003). “Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.” Madison, *Federalist* 10.

1974 (see Figure 2) and by most accounts exhibited minimal broader influence outside the legal community before that time. Jack Rakove of Stanford University has asked ironically regarding the absence of *Federalist* 10 from 19th century legal commentaries, “What more can we say, after all, of their failure to appreciate the novelty and significance of *Federalist* 10?”¹⁰ De Tocqueville mentions many *Federalist* papers in *Democracy in America*, but Number 10 is nowhere to be found. The recent rise of *Federalist* 10’s influence is due to the explosive emergence of balkanization and factionalism in American culture in the wake of the social revolution of the 1960’s. The associated collapse of the historic American consensus around major social, ethical, political, economic, and religious issues, which had preserved a broad unity and anti-factionalism in most of American culture since the Revolution, brought Number 10 quickly to prominence.

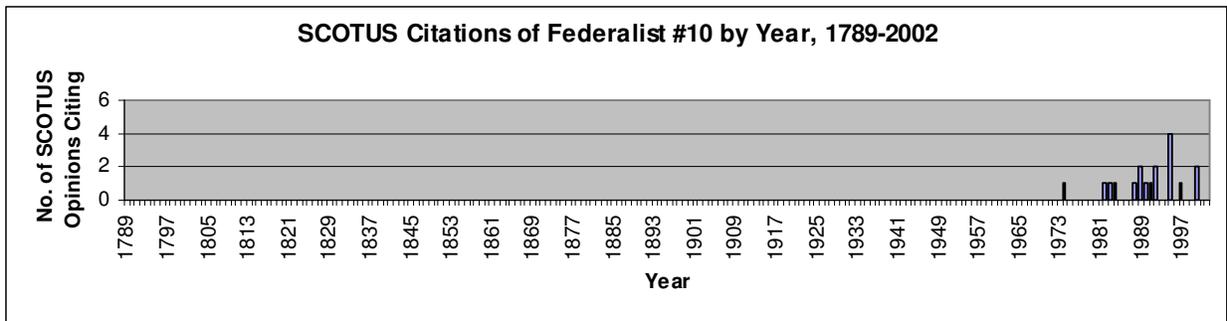


Figure 2. *Federalist* 10 and faction.

I thus will analyze the individual *Federalist* papers first for their relative American significance before turning at the end of the essay to their relative personal significance.

¹⁰ Jack Rakove, *Early Uses of The Federalist*, in *SAVING THE REVOLUTION* 248, ed. Charles Kesler (Free Press 1987).

AMERICAN SIGNIFICANCE

According to Chernow, *The Federalist* had been cited 291 times in SCOTUS decisions by the year 2000.¹¹ As shown in Figure 3, there are only six real candidates for the individual *Federalist* paper that has exhibited the greatest significance for the United States: 32, 42, 44, 51, 78, and 81. These papers have all been cited over 25 times in SCOTUS opinions between 1789 and 2002.¹² Again, while SCOTUS citation statistics represent only one proxy for total influence, they are a particularly good proxy. The more a paper is cited by SCOTUS, the more attention it is likely to receive throughout the broader legal and political communities. At the same time, influence by a *Federalist* paper on the jurisprudence of Supreme Court justices represents major significance in its own right and is easily measured by counting citations. The counts in Figure 3 match what is known about the general influence of the individual *Federalist* papers.

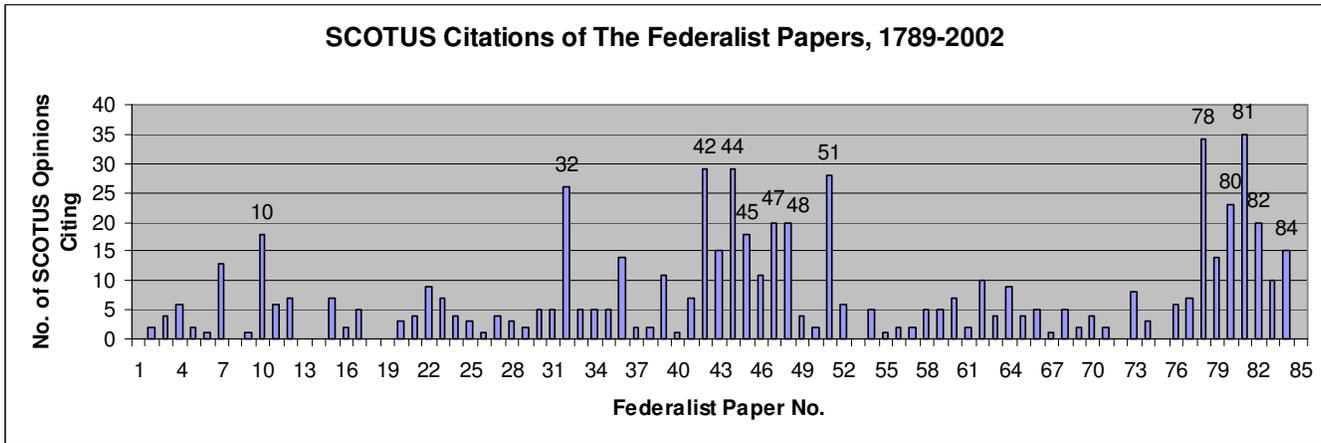


Figure 3. Numbers above a bar indicate the number of the associated *Federalist* paper, not the number of opinions citing that paper, which is given by the vertical axis. Six papers have been cited 25 times or more.

¹¹ RON CHERNOW, *ALEXANDER HAMILTON* 260 (Penguin Books 2004). Bailyn agrees with this count. Again, the count can vary slightly depending on the method followed, but all agree a super-majority of all citations came in the second half of the 20th century – more than the entire 19th century and the first half of the 20th century combined.

¹² See note 8 above. These numbers can vary slightly depending on the precise counting method followed. My method has been to count each opinion citing *The Federalist* once and only once, regardless of how many times *The Federalist* is cited in that opinion. Where there are multiple concurring or dissenting opinions that cite *The Federalist*, I have counted each group as one opinion for simplicity and to avoid artificial inflation of the counts in cases where there are “dueling citations” between justices. My numbers differ slightly from Durchslag’s because in certain cases where an opinion does not give the number of the *Federalist* paper being referenced but the number is clear from the citation, Durchslag does not provide the number. I have provided these numbers to increase completeness and precision.

Prof. Ira Lupu, using his own counting method, claimed in 1998 that the most frequently cited paper as of that date was Number 42, with 78, 81, 51, and 32 following in order.¹³ In the subsequent 4 years Numbers 78 and 81 overtook 42 as the most frequently cited. Lupu's counting method was different from my own, but his counts generally corroborate Figure 3.

Federalist 51, like 10, did not rise to prominence until relatively late. Figure 4 shows the pattern of SCOTUS citations to it. This paper deals most notably with the separation of powers, and like *Federalist* 10, rose to prominence in the late 20th century in response to a new problem: the increasing collapse of traditional power separations between the three branches of the federal government. That problem began to appear in the early years of the 20th century but escalated consistently as the century progressed and reached crisis proportions with the social and spiritual turmoil of the 1960's. Nonetheless, while Number 51 is normally considered among the top three most famous of the *Federalist* papers, Figure 4 reveals its influence has been limited almost totally to the second half of the 20th century.

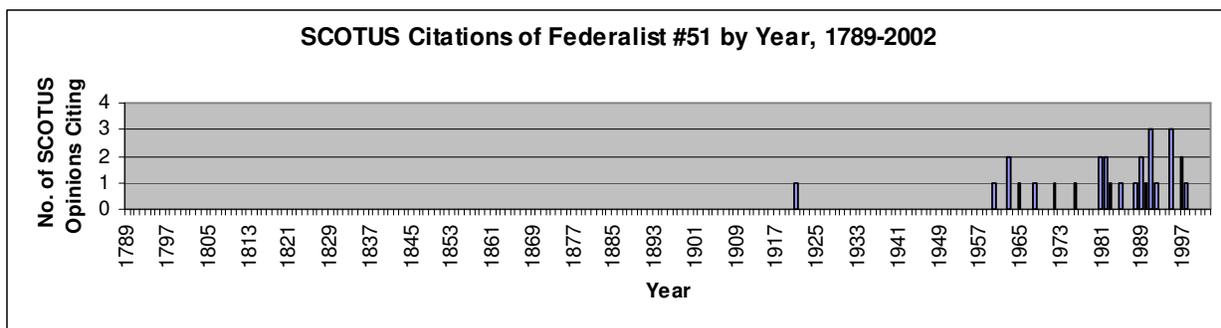


Figure 4. The first SCOTUS citation of *Federalist* 51 was in 1924 and the second in 1960.

The history of citations to papers 32, 42, and 44 is more consistent and balanced, as Figures 5-7 show. *Federalist* 32 deals with the concurrent federal and state taxing powers and associated

¹³ Ira Lupu, *The Most-Cited Federalist Papers*, 15 CONSTITUTIONAL COMMENTARY 403 (1998). Lupu's count of citations to *Federalist* 81 is low, like Durchslag's, perhaps because of multiple early cases where the SCOTUS opinion does not give the number of the paper as part of the citation but does cite the language of Number 81. Lupu may not have included these cases in his counts, but certainly these cases represent evidence of the influence of that paper.

issues of federalism, 42 with foreign and interstate commerce, and 44 with restrictions on the powers of the states and concomitant federal supremacy in these areas. All three subject areas tended to be controversial even in the early years and were regularly addressed by the courts during the 19th and 20th centuries. *Federalist* 32 was often referenced by the court in federalism cases even where taxation was not at issue. Number 42, in addition to dealing with regulation of commerce, eloquently opposes slavery, and the Court might have forever established 42 as the most famous *Federalist* paper by citing it in the notorious *Dred Scott* opinion upholding slavery. As it turns out, one of the two dissents in the *Dred Scott* case did cite Number 42, but only with regard to naturalization of foreigners, which 42 also touches. Number 42's major historical influence was thus left to depend mainly on the perennial questions surrounding the ever-expanding federal powers under the Commerce Clause.

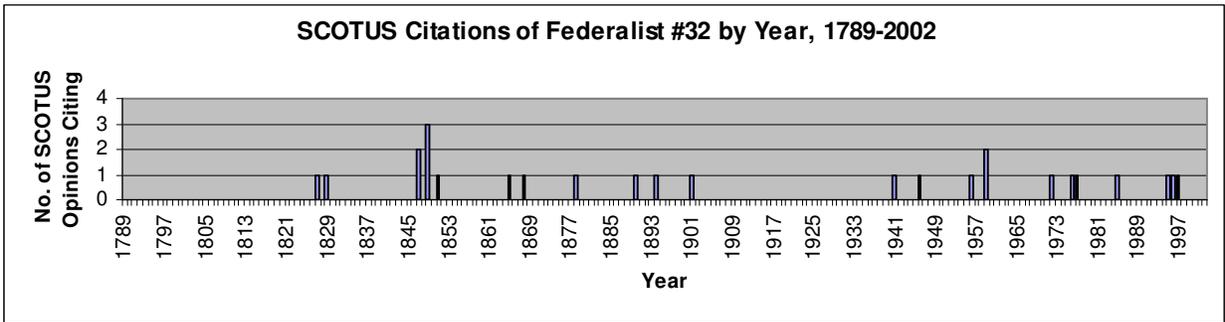


Figure 5. Federalist 32 was the most commonly cited in the 19th century.

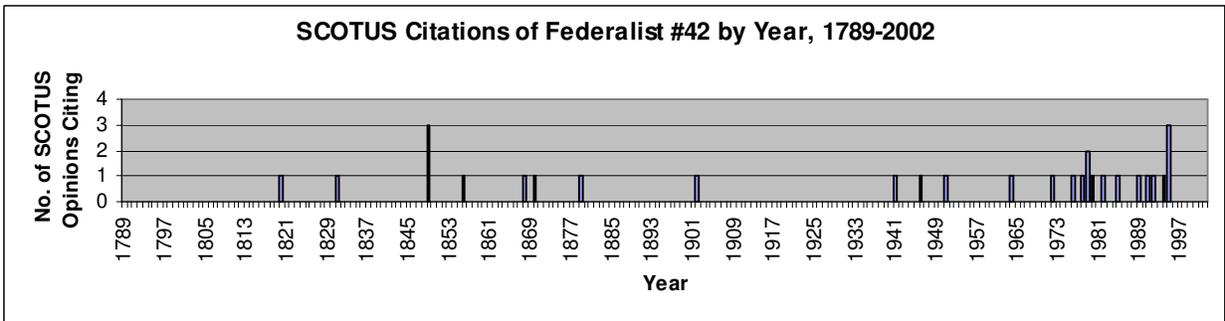


Figure 6. Federalist 42 and the commerce powers.

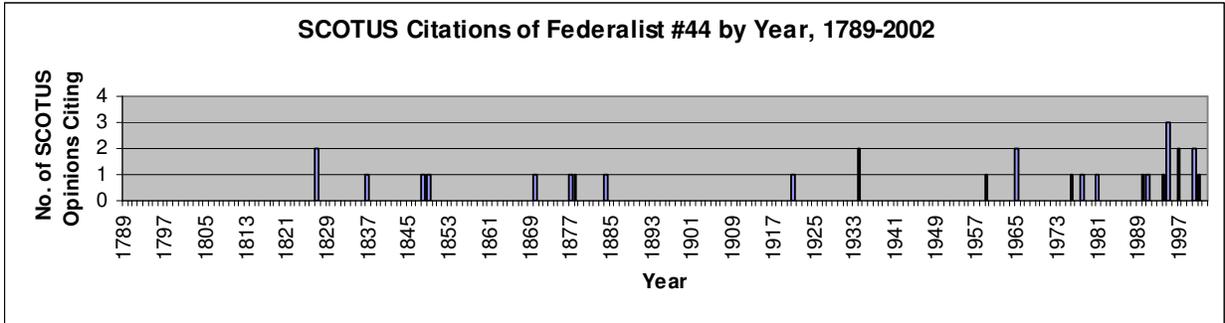


Figure 7. Federalist 44, restricted state powers, and federal supremacy.

Federalist papers 78 and 81 are both members of the set Hamilton added late to deal with the federal judiciary. While their influence on SCOTUS as revealed by opinion citations is less evenly dispersed historically than 32, 42, or 44, neither’s influence is as concentrated in the last half-century as that of Numbers 10 and 51. Number 78 deals with judicial review and independence, while 81 deals with the distribution of judicial power and the dangers of judicial activism.

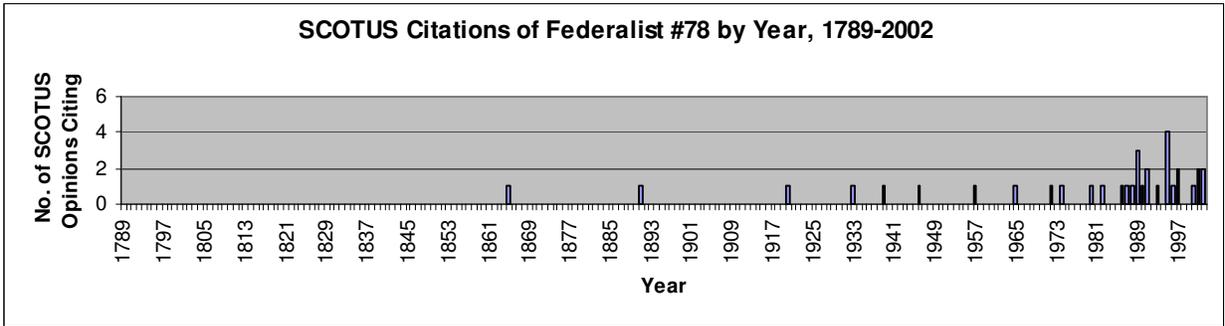


Figure 8. *Federalist* 78 and judicial review.

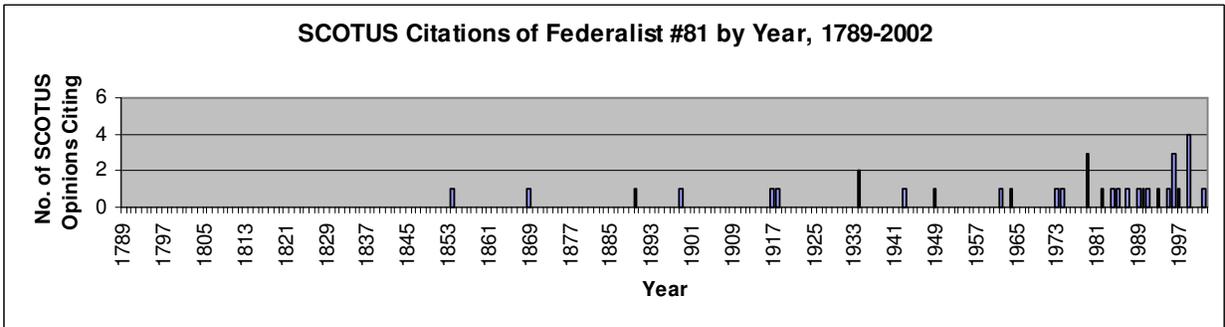


Figure 9. *Federalist* 81 and judicial activism.

Both because they are now the two most cited papers by a meaningful margin, and because their influence is less a product of modern political and social developments than of enduring issues related to the court system in a federal republic, I believe *Federalist* 78 and 81 to be the two most significant papers for the United States and the two with the most abiding influence on American government. Both were written by Hamilton in defense of the constitutional framework of the courts, especially the Supreme Court, but because it deals with the fundamental question of judicial review and the nature of judicial power itself in the American system, *Federalist* 78 edges 81, whose issues come downstream from those of 78, as the single most significant of the *Federalist* papers.

Clinton Rossiter, in his introduction to a 1961 edition of *The Federalist* that helped renew interest in the *Federalist* papers across the nation, claimed, “Publius the constitutional lawyer, in the bold person of Hamilton, reached the peak of intellectual power and of historical influence in the breathtaking assertion of judicial review in number 78.”¹⁴ This is partially a reference to the influence of Number 78 on Chief Justice Marshall’s reasoning in the landmark *Marbury v. Madison* case in 1803.¹⁵ It is well known that Marbury’s attorney cited *Federalist* 78 in his brief to the Court – demonstrating that 78’s influence dates to the Founding period – and Marshall’s famous argument for judicial review in the *Marbury* opinion follows the argument of *Federalist* 78 closely. Marshall almost certainly had refreshed his memory on 78 before writing the opinion, and thus the credit usually accorded Marshall for establishing judicial review in American government almost certainly belongs more properly to Hamilton. According to Rakove, “Certainly there is good evidence that both state and federal judges regarded Hamilton’s defense of judicial review in *Federalist* 78 as authoritative, as three cases heard outside the Supreme Court over a period of twenty-five years attest...In the third case [in 1808], federal judge John Davis...proceeded to uphold the law, using

¹⁴ Clinton Rossiter, Introduction, in ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY, THE FEDERALIST xiii (Mentor 1961).

¹⁵ *Marbury v. Madison*, 5 U.S. 137.

criteria set forth by Hamilton twenty years earlier.”¹⁶ Neither was judicial review an issue that completely divided North from South in the antebellum years, Jefferson’s suspicion of the Supreme Court notwithstanding. St. George Tucker of Virginia, in the appendix to his 1803 edition of *Blackstone’s Commentaries*, filled eight pages of his “Note on the Constitution of Virginia” with excerpts from Number 78 in support of an independent judiciary as constitutional guardian.¹⁷

Yet the influence of 78 continues to the present day. In a recent personal email exchange, University of Texas law professor and noted legal scholar Sanford Levinson, who is visiting professor at Harvard Law School this semester and is teaching a seminar on *The Federalist*, argued that “Everyone in law school is likely to come into contact with 78.”¹⁸ While this may or may not be true – in a fairly extensive online search I found few courses at American law schools on *The Federalist*, and the standard first-year law school course on constitutional law is more likely to cite *Marbury* than *The Federalist* as the source for judicial review – there is no denying the pervasive and profound influence of *Federalist 78* on American government since the Revolution.

PERSONAL INFLUENCE

As noted already, *Federalist 78* was influencing American government for almost 200 years before I was born, and growing up in late 20th-century America was more likely to expose me at a popular level and in my early education to *Federalist 10* and *51* than to any other papers. Likewise, the opening volley of *Federalist 1* – the opening volley of the opening volley – has rung in my ears since I

¹⁶ Jack Rakove, *Early Uses of The Federalist*, at 240. Rakove is a source confirming the use of *Federalist 78* by *Marbury*’s attorney, Charles Lee.

¹⁷ *Id.*, at 244.

¹⁸ Personal email correspondence on August 7, 2012. Prof. Levinson’s personal nominees for most significant *Federalist* papers are currently 40 and 41, and the list of *Federalist* papers he planned to use in the Harvard course included 10 and 51 but did not include 32, 42, 44, 78, or 81. In other words, while he recognizes the influence of 78, students at Harvard Law this semester will be treated to a course on *The Federalist* that does not address the five most historically significant papers.

first read it many years ago, simply by virtue of its boldness, unaffected simplicity, and manifest concern to appeal to selfless virtue above selfish interest.

After an equivocal experience of the inefficiency of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.¹⁹

I still find it difficult to believe there were once men of this caliber, with this sort of sober humility and trenchant insight into the nature of man and of good and evil, governing in America. Today's leaders in both political parties are sad mediocrities by comparison. Hamilton, Madison, and Jay composed, in the haste and hurry of daily life and for publication in newspapers, of all places, an epic comment on the human condition and on the nature of good government that today's political leaders, were they so inclined, could not produce in multiple lifetimes of studious serenity.

Yet despite the extensive personal exposure and influence of 1, 10, and 51 on my political and legal thinking – Number 51's famous words on the separation of powers I have heard a hundred times if I've heard them once – without question the most personally influential paper for me, not coincidentally, has come to be *Federalist* 78. The questions surrounding modern American courts and the nature of justice and judging are complex and, in many cases, ambivalent, and the politically radical judicial activism that characterizes so many judges and lawyers today tends to undermine the legitimate authority of the courts and obscure the profound justice that wise judges are capable of executing in a court system whose independence and authority to check the other two branches is well established by precedent and legal tradition. For several years in the 1930's, it was justices of the Supreme Court who were the only meaningful opponents of the unconstitutional New Deal

¹⁹ *Federalist* 1.

expansions of the federal government advocated by President Roosevelt. Roosevelt had to pressure and slander and campaign against those courageous judges before he finally after many years intimidated the Court and its new, trendier justices into acquiescing, and had judicial independence and authority not been firmly established by Hamilton in *Federalist 78*, FDR would have won and the Constitution would have lost much more quickly.

Identical dynamics occurred most recently in the decision of current Chief Justice John Roberts to acquiesce in an unconstitutional government takeover of the U.S. health care system rather than use his legitimate judicial authority, protected by lifetime tenure, to selflessly and courageously declare the takeover unconstitutional and void. This decision of Roberts epitomizes the words of Hamilton in *Federalist 78*:

From the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.²⁰

Justice Antonin Scalia, by contrast, exhibited the judicial courage Hamilton had in mind when, after voting with the minority to overturn the unconstitutional health care statute, told a television interviewer who asked if he felt any pressure to vote a certain way because of pressure from the President, “No. What can he do to me? Or to any of us? We have life tenure.”²¹ Thus while Hamilton’s wisdom could never guarantee judicial wisdom, it did implement a strong bulwark against judicial folly.

To Hamilton, then, judicial activism is not by its nature evil. Judges must act to assert legitimate judicial authority, and in this sense the nature of any judicial act as good or evil depends on the nature of the circumstance in which judicial power is exercised and the ends toward which

²⁰ *Federalist 78*.

²¹ Justice Antonin Scalia, television interview with Chris Wallace, July 29, 2012. See <http://www.politico.com/blogs/politico-live/2012/07/scalia-on-obama-what-can-he-do-to-me-130389.html>.

that power is directed. *Federalist 78* is as eloquent and effective a defense of this idea as has ever been produced, and as a mid-career law student studying the American Constitution and associated legal principles afresh in my 30's, attempting to grapple deeply with the nature of justice, judging, and the legitimacy of court power, *Federalist 78* affected me and still affects me in profound and permanent ways.