

# Dueling Federalists: Supreme Court Decisions with Multiple Opinions Citing *The Federalist*, 1986–2007

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## I. INTRODUCTION

This Article examines the use of history in legal interpretation through an empirical analysis of one of the most prominent examples of historical evidence in law: citations to *The Federalist* in Supreme Court Justices' published opinions.<sup>1</sup> In particular, the Article examines a phenomenon that has occurred frequently over the last two decades, but has thus far been virtually ignored: the citation by different Justices to the same historical source (such as *The Federalist*) to support divergent or opposing historical interpretations of legal meaning. Although the use of historical evidence in constitutional interpretation is itself much debated, *The Federalist* continues to be cited as binding or persuasive authority by scholars and judges.<sup>2</sup> While reliance on history has often been associated with conservative or originalist jurisprudential theories,<sup>3</sup> historical

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1. The collection of essays known as *The Federalist* is also commonly referred to as "The Federalist Papers." See, e.g., 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, 243 (2005); Shlomo Slonim, *The Federalist Papers and the Bill of Rights*, 20 CONST. COMMENT. 151, 151 (2003); Seth Barrett Tillman, *The Federalist Papers as Reliable Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 601 (2003).

2. See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780, 2822–23, 2830 (2006) (citing *Federalist* Nos. 28, 47, and 70).

3. See, e.g., Edwin Meese III, *Interpreting the Constitution* (1985), reprinted in JACK N. RAKOVE ED., *INTERPRETING THE CONSTITUTION* 13–21 (Jack N. Rakove Ed., 1990); William Brennan, *A Living Constitution*, reprinted in RAKOVE ED., *INTERPRETING THE CONSTITUTION* 23–34

evidence has increasingly been used to support legal arguments from across the political spectrum.<sup>4</sup> This phenomenon among legal scholars has received attention as it has arisen,<sup>5</sup> but it has not yet been analyzed as applied to the courts.

One might think that history is used predominantly by one side of a given legal controversy while the other side grounds its argument in other areas such as contemporary policy implications; this is especially true given the common association made between the jurisprudential theory of originalism and conservative or libertarian outcomes. But, in fact, at times history is used by both sides in a given controversy to support opposing interpretations.

A particularly striking example of this phenomenon occurred in the U.S. Supreme Court's 1997 decision in *Printz v. United States*.<sup>6</sup> In his majority opinion striking down statutory provisions requiring state officials to enforce the federal Brady Handgun Violence Prevention Act, the conservative Justice Scalia made numerous references to various essays of *The Federalist*, presumably as evidence of the original understanding of federalism and dual sovereignty at the time of the Constitution's ratification.<sup>7</sup> Justice Scalia, however, was not alone. In their dissenting opinions, the more liberal Justices Stevens and Souter also made dozens of references to that same source, *The Federalist*, to support their opposing views on the outcome of the case.<sup>8</sup> When one reads the opinion, it seems that the entire case, and each opinion expressed by the writing Justices, depends on different interpretations of the same historical source, *The Federalist*. Indeed, Justice Souter explicitly stated that "it is *The Federalist* that finally determines my position."<sup>9</sup> From *Printz* it would appear that the appeal of history transcends ideological lines.

This Article examines the use of history as support for competing arguments in the courts by studying the deployment of historical support from *The Federalist* in opinions issued by the U.S. Supreme Court. It demonstrates that in a significant number of cases where the majority opinion cites *The Federalist*, a dissenting or concurring opinion also cites *The Federalist*. These results provide support for the claim that history

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(critiquing originalism as a hidebound conservative practice and offering instead a progressive theory of a "living Constitution" adaptable to evolving societal imperatives).

4. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996) (examining the "turn to history" among liberal legal scholars in the 1980s and 1990s, partly as a response to the assertion of conservative originalism as an interpretive methodology reliant on history). *Id.* at 139-43.

5. See *id.*

6. 521 U.S. 898 (1997).

7. *Id.* at 910-24 (citing *The Federalist*).

8. *Id.* at 939-70 (Stevens, J., dissenting); *id.* at 970-78 (Souter, J., dissenting).

9. *Id.* at 971 (Souter, J., dissenting).

can be—and, in fact, is—used to support different sides of many legal arguments. While others have argued that such a situation undermines the notion that *The Federalist* is a reliable source for historical understandings of the Constitution,<sup>10</sup> I suggest that the rise in citations to *The Federalist* shows at a minimum the increasing importance and appeal of historical authority as a source of legitimacy and persuasiveness in legal argument today.

*The Federalist* may be the most frequently-cited historical source used as evidence of the original meaning of the Constitution.<sup>11</sup> It has been particularly popular among Supreme Court Justices since the beginning of the Rehnquist Court in 1986.<sup>12</sup> *The Federalist* is used frequently to support arguments regarding the political theory, meaning, or intent of the Framers specifically, or of the founding generation more generally.<sup>13</sup> Previous empirical studies have indicated a substantial increase in frequency of citations to *The Federalist* by the Supreme Court in the last two decades.<sup>14</sup> In this Article, I hypothesize that because of the legitimizing effect of history and the indeterminacy of evidence from *The Federalist*, a substantial percentage of Supreme Court decisions citing *The Federalist* will be accompanied by a dissenting opinion also citing *The Federalist*.

I test this hypothesis by examining all the Rehnquist Court decisions citing *The Federalist* and comparing the number that also have additional opinions, including dissents, citing to *The Federalist*.<sup>15</sup> The analysis demonstrates that while the absolute number of cases with multiple opinions citing *The Federalist* may seem modest at first glance,

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10. See Durschlag, *supra* note 1; Tillman, *supra* note 1.

11. Pamela C. Corley, Robert M. Howard, & David C. Nixon, *The Supreme Court and Opinion Content: The Use of The Federalist Papers*, 58 POL. RES. Q. 329, 330 (2005) (“Arguably the Federalist Papers are the most cited and most important source of original authority.”); see also *id.* at tbl. 1 (showing that from 1953-1984 citations to *The Federalist* comprised over one-third of all Supreme Court citations to historical sources purporting to show evidence of original meaning, far outpacing in frequency all other sources cited).

12. See Durschlag, *supra* note 1, at 295 (finding a substantial increase in frequency of citations to *The Federalist* during the Rehnquist Court years (through 2002) as compared to previous periods).

13. See Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 612–13 (1999).

14. Corley et al., *supra* note 11, at 332; Ira C. Lupu, *Time, the Supreme Court, and The Federalist*, 66 GEO. WASH. L. REV. 1324, 1330 (1998) (“[T]he most recent two decades have been positively riotous with citations to *The Federalist* . . . .”); Buckner F. Melton, Jr., *The Supreme Court and The Federalist: A Citation List and Analysis, 1789–1996*, 85 KY. L.J. 243 (1997); see Durschlag, *supra* note 1 (arguing that *The Federalist* has been less central to the reasoning and the holding of Supreme Court opinions where the essays are cited, but nonetheless acknowledging that citations to *The Federalist* have increased dramatically over the past several decades).

15. *Infra* Part IV. Only one other academic study of which the author is aware has addressed the question of comparing citations to *The Federalist* in multiple opinions in the same case. See Corley et al., *supra* note 11, at 335 (political science study hypothesizing, inter alia, a “dueling citations” pattern in cases with multiple citations to *The Federalist*).

such cases in fact comprise over eighteen percent of the total number of cases citing *The Federalist*. Multiple opinions occur most often in high-profile cases dealing with structural constitutional questions, such as separation of powers and federalism.<sup>16</sup> The Justices continue to frequently deploy the writings of Madison, Hamilton, and Jay's pseudonymous author Publius as a source of historical support, and the frequency with which opposing sides in the same case cite this same source of historical evidence is significant.

In Part II of this Article, I first examine the background controversy over the use of history in law, focusing particularly on *The Federalist* as perhaps the most significant historical source cited in modern legal argument for the purpose of illuminating the original meaning of the Constitution to the framing generation. Part III provides a survey of prior empirical literature examining the citation of *The Federalist* in U.S. Supreme Court opinions. Part VI explains the Article's empirical research design and methodology for studying the question of how often *The Federalist* is cited both in majority and separate opinions, while Part V provides the results of the research. In Part VI, I will briefly discuss these results and the questions that remain for future research, before concluding with Part V.

These results are noteworthy in light of the continuing debate over the use of history in law. They suggest two conclusions: first, that the use of history to support legal arguments is not a tactic of any one side or ideology but is increasingly popular among jurists and legal scholars of varied jurisprudential persuasions; and second, that in addition to studying the normative question of whether history should be used in the law, perhaps it would be helpful to examine how history and law interact from a methodological perspective.

## II. *THE FEDERALIST* AND HISTORY IN CONSTITUTIONAL INTERPRETATION

### A. *The Federalist as Historical Evidence from the Founding Era*

The delegates to the Convention in Philadelphia produced their draft Constitution for the United States government in September 1787.<sup>17</sup> The Convention itself followed a period of much debate over what form of government the new nation should have and what type of charter could best effectuate such a government.<sup>18</sup> Since the formal end of the Revolutionary War in 1783, the Articles of Confederation that had

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16. *Infra* Part VI; see also Durschlag, *supra* note 1, at 296.

17. EDWARD J. LARSON & MICHAEL P. WINSHIP, *THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES MADISON* 152–56 (2005).

18. *Id.* at 5–10.

served as the authority for the Continental Congress since 1775 had increasingly come to be acknowledged as too weak and inefficient to give the national government sufficient power.<sup>19</sup> Many Americans are familiar with the story of how the delegates of the thirteen states met in Philadelphia; engaged in fascinating, high-level debates about law and the nature of government; made a series of compromises about representation, sectional interests, and other issues; and produced a Constitution that was ratified and still stands today as the oldest written Constitution in the world.<sup>20</sup>

What is easier to forget, given its subsequent history, is that the ratification of the Constitution by the states was by no means a sure thing.<sup>21</sup> The opponents of ratification, known to history as the “anti-federalists,”<sup>22</sup> had numerous objections, ranging from the legal authority (or lack thereof) of the Convention in the first place, to its compromises between sectional interests, to its transfer of some power and sovereignty from the states to the national government.<sup>23</sup> Opposition was not confined to any particular region or to the larger or smaller states; in several states such as Rhode Island, Virginia, and New York, the issue was in serious doubt.<sup>24</sup>

The Constitution’s supporters saw New York’s ratification as critical to the success of the Constitution, and indeed to the whole American project.<sup>25</sup> As one of the largest states, with an emerging power in trade and economy, and because of its central geographic position, many be-

19. *Id.* at 5–6.

20. *Id.*; Steven G. Calabresi, “A Shining City on a Hill”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 BOSTON U. L. REV. 1335, 1391 (noting that the U.S. has the world’s oldest written national constitution).

21. Dan T. Coenen, *A Rhetoric for Ratification: The Argument of The Federalist and its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469, 486 (2006) (“A modern observer might well suppose that ratification of the Constitution was a sure bet under the difficult conditions of late 1787.”).

22. See generally JACKSON TURNER MAIN, *THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788* (1961) (providing the history of the Antifederalists); see also SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA, 1788–1828* (1999) (linking Anti-federalism with a broader tradition of dissent in the early republic era); RALPH KETCHAM ED., *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* (Ralph Ketcham ed., 1986) (collecting Anti-federalist essays from the period of the ratification debates).

23. LARSON & WINSHIP, *supra* note 17, at 157–58; CORNELL, *supra* note 22, at 61–8 (opposition to federal consolidation).

24. *Id.*; CORNELL, *supra* note 22, at 23 (map showing voting patterns on ratification within the states). In Virginia, for example, even the weight of political luminaries such as James Madison (the “father of the Constitution”) and George Washington (the president of the Philadelphia convention) was countered by the prominence and the arguments of anti-federalists such as George Mason, Richard Henry Lee, and Patrick Henry. *Id.* at 53.

25. LARSON & WINSHIP, *supra* note 17, at 158.

lieved that New York's participation was crucial to the national government's success, including James Madison and Alexander Hamilton.<sup>26</sup> But there was substantial opposition to the Constitution within New York, led by the state's governor, the powerful and influential George Clinton.<sup>27</sup> Indeed, halfway through the Philadelphia Convention itself, two out of New York's three delegates left, believing the Convention lacked proper authority to draft a new charter of government.<sup>28</sup> Alexander Hamilton remained in Philadelphia to participate but was unable to vote without a quorum from his state.<sup>29</sup>

Hamilton took it upon himself in the fall of 1787 to make the case for the Constitution in the New York newspapers.<sup>30</sup> Engaging first John Jay, a leading lawyer and politician, and then James Madison, one of the architects of the Constitution then serving in Congress in New York, Hamilton's project produced a series of eighty-five essays addressed to the people of New York urging ratification of the document.<sup>31</sup> These essays appeared in the New York media over a period from October 1787 through the following spring.<sup>32</sup> The three authors wrote under the *nom de guerre* "Publius," adopting the custom of the day of using classical-sounding pseudonyms (in part to invoke the tradition of Roman republicanism).<sup>33</sup> These essays were soon republished as a collection and have long been known to history as *The Federalist*.<sup>34</sup>

Since the Constitution's ratification in 1789, *The Federalist* has been one of the most famous and most cited sources of historical information from the founding era.<sup>35</sup> Among scholars, politicians, and the American public at large, references to *The Federalist* have long been used to explain the meaning of the Constitution or American political theory.<sup>36</sup> Citations to *The Federalist* reflect several different purposes, from an originalist attempt to invoke historical authority for interpreting

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26. *Id.*; Coenen, *supra* note 21, at 475-76.

27. CORNELL, *supra* note 22, at 82, 84.

28. Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 78 B.U. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=969675>.

29. *Id.*

30. Coenen, *supra* note 21, at 477.

31. *Id.* at 480 (noting that 77 essays were printed in the New York papers and eight more were included in the book version that was printed in 1788).

32. *Id.* at 479-80.

33. Louis J. Sirico, Jr., *The Federalist and the Lessons of Rome*, 75 MISS. L.J. 431, 434 (2006) (noting that the Publius pseudonym was a reference to the Roman Publius Valerius, also known as "Publicola," meaning "lover of the people.").

34. LARSON & WINSHIP, *supra* note 17, at 158.

35. Coenen, *supra* note 21, at 471; Maggs, *supra* note 28, at 2-3.

36. Coenen, *supra* note 21, at 471.

the Constitution to a more generalized appeal to the republican constitutional theory laid out in the substance of the essays.<sup>37</sup>

The actual influence of Publius's essays on the ratification debate in New York has long been assumed, but more recently questioned;<sup>38</sup> at a minimum, however, it is fair to say that *The Federalist* is perhaps the best source for encapsulating and communicating many of the most theoretical and philosophical arguments for the Constitution. As such, it has proved to be perhaps the most significant source of historical evidence to which Americans look when seeking to understand and explain the Constitution.<sup>39</sup> For the purposes of this Article, therefore, *The Federalist* fulfills the role of a measurable indicator of a popular source of contemporaneous historical information about the Constitution that the Justices of the Supreme Court may consult.

### B. Using History (and *The Federalist*) to Interpret the Constitution

The appeal to history as authority for constitutional interpretation is commonly associated with contemporary advocates of originalism because of its controversial prominence in the policy of the Reagan administration,<sup>40</sup> and its place in the jurisprudence of currently sitting Justices Scalia and Thomas.<sup>41</sup> It may also be thought that there is a natural affinity, in the philosophical or temperamental sense, between respect for history and conservatism.<sup>42</sup> Melvyn Durschlag makes this assumption in his trenchant analysis of *The Federalist*, noting at several points that one would "expect" the more conservative Justices to cite *The Federalist* as historical evidence.<sup>43</sup> However, a critical view of the Supreme Court's use of history is not new, nor have the subjects always been conservative Justices; historian Alfred Kelly's influential 1965 article *Clio and the*

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37. *Id.*

38. See generally Kramer, *supra* note 13.

39. *Id.*; see also Corley et al., *supra* note 11, at 330.

40. See generally Meese, *supra* note 3, at 13–21; see also RAKOVE, *supra* note 3 (noting that Meese's essay became a touchstone of the conservative call for a jurisprudence of original intention); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION, 377–85 (1988) (critiquing the calls for "a jurisprudence of original intention" by Edwin Meese, Robert Bork, and Chief Justice Rehnquist).

41. See ANTONIN M. SCALIA, A MATTER OF INTERPRETATION (1997); see also, e.g., Gene R. Nichol, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, 956 (1999) ("Scalia, as is well known, is also the nation's leading 'originalist.'").

42. See Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 623 (1993) (arguing that modern originalism is not in fact true to the classical conservative respect for tradition).

43. Durschlag, *supra* note 1, at 298; see also Corley et al., *supra* note 11, at 333 (finding among Supreme Court Justices a correlation between conservative ideology and frequency of citation to *The Federalist*).

*Court: An Illicit Love Affair* accused the liberal Warren Court of practicing “law office history” in a strikingly similar tone to that heard from modern critics of the originalists on the Rehnquist and Roberts Courts.<sup>44</sup> Likewise, in the legal academy, scholars of all political stripes frequently appeal to history to bolster the legitimacy of their arguments.<sup>45</sup> The turn to history has been especially pronounced in legal scholarship, as liberal legal scholars have offered their own historical arguments for understanding the law.<sup>46</sup> Legal scholars who write in this vein often focus (as did the conservative proponents of originalism in the 1980s) on interpretive accounts of the founding era and contemporary sources in order to reconstruct the original meaning or understanding of constitutional law.<sup>47</sup> The inquiry I conduct in this Article proceeds from the observation that no single constitutional theory, or political persuasion, owns a monopoly on the use of history—nearly everyone seems to be using history these days.<sup>48</sup>

But since the prevailing critique of originalism as an interpretive methodology has been the use of history by judges in deciding cases, we should inquire as to whether this academic trend toward using history to support both conservative and liberal arguments also exists in the judiciary. Despite several studies analyzing the use of leading historical

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44. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119. For an updated evaluation of the Kelly thesis, see Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J. L. & POL. 809 (1997).

45. See generally KALMAN, *supra* note 4 (examining the “turn to history” in legal scholarship). Kalman’s primary example of liberal academics attempting to capture historical arguments is in the “republican revival” of the 1980s, where law professors seized on the historiography of Bernard Baylin, Gordon Wood, and J.G.A. Pocock to assert that the Constitution was intended to enshrine republican values of civic virtue and the public good. KALMAN, *supra* note 4, at 143–60.

46. See KALMAN, *supra* note 4, at 140–43. Since Kalman published her definitive account of the turn to history in the legal academy, leading scholars have continued to publish historically-based legal analyses, especially in the field of constitutional theory. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005).

47. While liberal legal scholars and proponents of originalism as an interpretive methodology both use historical sources, there are key differences between these schools, with perhaps the most important being the distinction between looking to the original *intent* of the Framers, as originalists such as Meese have advocated, and seeking a broader picture of the original *meaning* of the Constitution to the members of the ratifying generation. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996). However, this distinction is no longer as salient as it once was, as many leading proponents of originalism have stressed that they also focus on original public meaning rather than intent. See SCALIA, *supra* note 41; RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89 (2004) (“The version of originalism I shall defend will be based on ‘original meaning’ as distinct from ‘original intent.’”).

48. Or, as Larry Kramer intoned, “[W]e are all originalists, we are all non-originalists.” Kramer, *supra* note 13, at 677.

sources such as *The Federalist*,<sup>49</sup> there is on the whole a dearth of scholarship investigating the extent to which judges cite historical evidence in their judicial opinions.<sup>50</sup> To continue the analogy to legal scholarship, where it has been noted that scholars now frequently engage in legal debates that use history on both sides, we should ask whether this same phenomenon also occurs on the bench.

One way to investigate whether this phenomenon occurs is to examine judicial opinions from multi-judge panels, and determine whether judges who disagree on the outcome or the reasoning nonetheless both make competing historical claims. How then, for example, might Justices on the U.S. Supreme Court, the highest court charged with constitutional interpretation, deploy historical evidence against each other when they disagree in their interpretations? My research question asks how often Justices invoke historical evidence in multiple opinions within the same decision.

To operationalize this inquiry, I examine *The Federalist*. It is by no means the only source of historical evidence that Justices use when interpreting the Constitution, but it is likely the single historical source most often cited in Court opinions.<sup>51</sup> Perhaps the Justices so frequently refer to *The Federalist* for the same reasons I choose it as an indicator: it is well known, easily accessible, and, as the most famous group of essays expounding the Constitution during the ratification period, often thought to hold an exalted status in understanding constitutional meaning, serving as “a kind of secular scripture.”<sup>52</sup> Indeed, the very fact that the Court has so frequently cited it in the past has contributed further to the status of *The Federalist* as influential historical evidence.<sup>53</sup> The authority and tradition associated with *The Federalist* in turn lends it an even greater aura of legitimacy for the Justices’ purposes, and hence, greater incentive

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49. Durschlag, *supra* note 1; Melton, *supra* note 14; Lupu, *supra* note 14.

50. For example, there is a much higher frequency of studies that analyze the normative issues surrounding the courts’ use of history than the empirical issue of to what extent courts actually in fact do rely on historical sources. See, e.g., Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 UCLA L. REV. 217 (2004) (reviewing the “vast body of primary historical materials . . . that support a spectrum of constitutional meaning” and the accordingly futile project of constraining judicial interpretation with originalist principles). *Id.* at 287.

51. Maggs, *supra* note 28, at 2 (“In the aggregate, academic writers and jurists have cited the *Federalist Papers* as evidence of the original meaning of the Constitution more than any other historical source except the text of the Constitution itself . . . . The Supreme Court takes the essays especially seriously.”).

52. Daniel W. Howe, *The Political Psychology of The Federalist*, 44 WM. & MARY Q. 485, 485 (1987); see also Kramer, *supra* note 13, at 611.

53. Lupu, *supra* note 14, at 1328–30; Melton, *supra* note 1410, at 251–54.

to cite to the papers' pseudonymous author, Publius.<sup>54</sup> Therefore, this study will use *The Federalist* as a measurable, if rough, indicator for appeal to historical arguments in Supreme Court opinions.

There are several theoretical bases that could explain the Justices' use of *The Federalist*. The most controversial basis involves explicit or implicit reliance on the texts as an authoritative source of original intent or meaning.<sup>55</sup> Beyond their usefulness for originalist interpretation per se, the texts' popularity is also grounded in the substance of the essays. There is a long tradition, perhaps dating back to the early national period, of prominent jurists such as Chancellor Kent and Justice Story utilizing *The Federalist* not so much as an authoritative explanation of the framers' specific intent regarding particular constitutional provisions, but more as a learned commentary on the general meaning of the Constitution.<sup>56</sup> It is in this vein, Melvyn Durschlag contends, that *The Federalist* was primarily used by courts in the nineteenth century: Professor Durschlag shows that the Supreme Court tended to cite generally to *The Federalist* without reference to either specific numbered papers or to specific constitutional provisions.<sup>57</sup>

Modern authors have analyzed *The Federalist* in this generalized approach as well, exploring the philosophical underpinnings of Madison's and Hamilton's essays or examining the relation of the essays to American political theory.<sup>58</sup> Garry Wills argues that the essays reflect the influence of Hume and other figures of the Scottish Enlightenment.<sup>59</sup> Larry Kramer's article *Madison's Audience* suggests in part that *The Federalist* has proved more important in retrospect, serving as "the ur-text of American political theory" more than the essays did at the time of the ratification controversy that they were supposed to influence.<sup>60</sup> Most recently, Dan Coenen suggests that *The Federalist* is useful as an inter-

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54. See Kramer, *supra* note 13; Lupu, *supra* note 14; see also Corley et al., *supra* note 11, at 329 (arguing that "references to the Federalist Papers in the crafting of the opinions provide a veneer of authority that can insulate the Court, and the justice, from criticism and controversy.").

55. Durschlag, *supra* note 1.

56. See Durschlag, *supra* note 1, at 255, 269 (citing the Commentaries of Chancellor James Kent and Joseph Story).

57. Durschlag, *supra* note 1, at 256.

58. Durschlag, *supra* note 1, at 256; David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 755 (2001) (*The Federalist* as "learned commentary"); MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* (1987) (evaluating the political philosophy of *The Federalist*); GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981).

59. WILLS, *supra* note 58, at 16.

60. Kramer, *supra* note 13, at 611.

pretive aid because of its quality as a coherent argument for ratification of the Constitution.<sup>61</sup>

It is when judges and scholars cite to *The Federalist* as a form of originalist reliance on historical authority that has drawn the most attention in recent years. Originalism has been one of the most controversial topics in constitutional law and politics over the past generation. It entered the public discourse when Reagan Administration Attorney General Edwin Meese called for a “return” to “a jurisprudence of original intention,”<sup>62</sup> and debates over originalist theory played a prominent role in the nomination and defeat of Supreme Court nominee Robert Bork.<sup>63</sup> For these reasons, originalism has generally been associated over the last two decades with conservative politics. Indeed, Republican politicians continue to advocate the nomination of judges who would profess to be faithful to the Constitution as written by the framers.<sup>64</sup>

However, in recent years originalism has made something of a comeback as a matter of debate in the legal academy. During the late 1980s and especially the 1990s, many liberal law professors also began to “turn to history” to offer alternative explanations of constitutional meaning that were nonetheless grounded in historical evidence and authority.<sup>65</sup> Even more recently, scholars have offered new analyses of originalism that go beyond the “original intent” versus “living constitution” framework that characterized the debates of the 1980s.<sup>66</sup> Yet the longstanding association of originalist jurisprudence with political conservatism lingers, which is perhaps in part why Professor Durschlag would “expect” *The Federalist* to be more often cited by conservative Justices such as Chief Justice Rehnquist.<sup>67</sup> It is this commonly held as-

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61. Coenen, *supra* note 21, at 470 (arguing that the collection of essays taken as a whole forms a structured, rational, and comprehensive argument for ratification).

62. Edwin Meese, *Interpreting the Constitution: A Jurisprudence of Original Intent* (1986), reprinted in JACK N. RAKOVE ED., *INTERPRETING THE CONSTITUTION*, *supra* note 3, at 19.

63. ROBERT BORK, *THE TEMPTING OF AMERICA* 271-93 (1990).

64. See, e.g., Bob Lewis, *Giuliani Praises Conservative Judges*, ABC NEWS, Feb. 17, 2007, <http://www.abcnews.go.com/Politics/wireStory?id=2882966>.

65. See generally KALMAN, *supra* note 4 (chronicling the “turn to history” by liberal law professors); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 487-93 (2002).

66. See Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006); John O. McGinnis & Michael Rappaport, *Original Interpretative Principles as the Core of Originalism*, (San Diego Legal Stud. Paper No. 07-82, 2007), available at <http://ssrn.com/abstract=962142>; McGinnis & Rappaport, *A Pragmatic Defense of Originalism*, 101 NW U. L. REV. COLLOQUY 68 (2007); William Michael Treanor, *Original Understanding and the Whether, Why, and How of Judicial Review*, 116 YALE L.J. POCKET PART 218 (2007); Balkin, Jack M., “*Abortion and Original Meaning*” (Yale Law Sch., Pub. Law Working Paper No. 119, 2006), available at: <http://ssrn.com/abstract=925558>.

67. Durschlag, *supra* note 1, at 289.

sumption that prompts this Article's inquiry into *which* Justices ("conservative" or "liberal") on the Rehnquist Court cited *The Federalist*, and whether Justices from both sides might be citing *The Federalist* to reach opposing conclusions in the same cases.

Even if one assumes that reliance on *The Federalist* might derive from one's favoring originalism as an interpretive approach, there are several different approaches to originalism that prevail today. As constitutional historian Jack Rakove has elucidated, the relation between history and interpretation depends on whether one is alluding to original intent, original meaning, or original understanding.<sup>68</sup> The first variant of originalism, and one that is correctly associated with originalism, is the theory that *The Federalist* definitively explains the Constitution's original *intent*, in large part because of the status of Madison and Hamilton as official Framers—that is, as participants in the drafting of the Constitution at the Convention in Philadelphia.<sup>69</sup> Another form of originalist use of *The Federalist* is based on the supposition that the published essays played an influential role in the actual ratification of the Constitution and thus explain the original *understanding* of the ratifiers.<sup>70</sup> Alternatively, it can serve as evidence of the *meaning* of the text of the Constitution at the time of its adoption.<sup>71</sup> "Original-meaning" originalism, in fact, is the variant of originalism that leading proponents such as Randy Barnett advocate (as opposed to the reliance on original intent much caricatured in the 1980s and 1990s).<sup>72</sup> Whether serving as evidence of original intent, original understanding, or original meaning, this range of purposes is manifest in the fact that *The Federalist* is cited to some degree by all of the current Justices.<sup>73</sup>

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68. RAKOVE, *supra* note 47.

69. Madison and Hamilton both attended the Constitutional Convention, each making different contributions: Madison is justly famous for his leading role in the debates and for his copious notes, which since published have been adverted to as an authoritative source of original intent. See generally LARSON & WINSHIP, *supra* note 17. Hamilton served as the lone representative for New York. See *supra* text at notes 27–28. Hamilton's participation later enabled him to lead the efforts for ratification in New York—including the production of *The Federalist* essays. See Coenen, *supra* note 21, at 476–79; LARSON & WINSHIP, *supra* note 17, at 158.

70. See, e.g., Kramer, *Madison's Audience*, *supra* note 13, at 611 (noting the use of *Federalist* No. 10 in this manner); see also McGowan, *supra* note 58, at 756 (explaining the theory of the essays' influence on ratification as one of "reliance based contract theory").

71. McGowan, *supra* note 58, at 756–57. As noted, this is the theory that Justice Scalia uses in defending his practice of consulting of *The Federalist*. See SCALIA, *supra* note 41, at 38 (explaining that he looks to *The Federalist* "not because [Madison and Hamilton] were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.").

72. BARNETT, *supra* note 41, at 89–93.

73. For a discussion of the differences between the concepts of original intent, original meaning, and original understanding, see RAKOVE, *supra* note 47, at 8–11.

Criticism of using *The Federalist* in judicial constitutional exegesis falls into two categories. The first is normative: that *The Federalist* is not legitimate as a source of authority, either because Justices should not use history generally, or because *The Federalist* in particular should not be accorded any exalted status as a statement of original intent or meaning. For example, Dean Kramer argues that, despite the insightfulness of its authors and the quality of the essays, *The Federalist* in fact had a very limited actual readership among the ratifying population, and it is thus problematic to regard it as a source purportedly speaking to original understanding.<sup>74</sup> H. Jefferson Powell has written that the authors themselves did not intend for *The Federalist* to be used as interpretive authority.<sup>75</sup> William Eskridge contends that it is fundamentally inconsistent for the Justices to refuse to consider legislative history, as Justice Scalia famously does, while at the same time copiously citing *The Federalist* (as Justice Scalia did in *Printz*), because the essays are themselves analogous to a legislative history of the Constitution.<sup>76</sup> Others have even attempted to argue from a postmodernist perspective against using *The Federalist* as an authoritative text.<sup>77</sup> These arguments attempt to cast doubt on the

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74. Kramer, *supra* note 13, at 613–14. Kramer argues in particular that because *The Federalist* was not widely read, the ideas of James Madison, especially those articulated in *Federalist* No. 10 regarding the political theory of competing interests and factions in a republic, should not be accorded the “commanding position” they occupy in constitutional debate; they were not, as is often asserted, “decisive in shaping the Constitution.” *Id.*

75. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 936 (1985) (Arguing that Madison himself “cautioned . . . against an uncritical use of *The Federalist*, because it is fair to keep in mind that the authors might be sometimes influenced by the zeal of advocates.” (quoting Letter from James Madison to Edward Livingston (Apr. 17, 1824), *reprinted* in LETTERS AND OTHER WRITINGS OF JAMES MADISON (1865))).

76. LETTERS AND OTHER WRITINGS OF JAMES MADISON (1865).

76. William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1302 (1998). Justice Scalia is said to be fond of quoting Harold Leventhal’s line that “using legislative history is like looking over the heads of the guests at a cocktail party until you spot your friends.” David Franklin, *Judge Dread: Antonin Scalia Explains why we Should Fear Men in Robes*, SLATE, Jan. 22, 1997, <http://www.slate.com/id/2960>. In fact, it even can be argued that *The Federalist* papers are less authoritative than ordinary legislative history. Eskridge, *supra*, at 1309. Madison’s famous notes from the Convention can be said to be more like legislative history, while *The Federalist* can perhaps be better analogized to an advocacy document such as a newspaper editorial. See Durchslag, *supra* note 1, at 312 (“*The Federalist Papers* were advocacy, which today might resemble sophisticated ‘op-ed’ pieces or essays in the magazines of the intelligentsia.”); Coenen, *supra* note 21, at 472.

77. See J. Michael Martinez & William D. Richardson, *The Federalist Papers and Legal Interpretation*, 45 S.D. L. REV. 307, 309 (2000) (“[W]e examine *The Federalist Papers*, primarily because this is a source that is afforded great weight in the American regime and because the essays have been cited many times in legal cases. We hope to demonstrate that, despite the text’s revered place within the American political system, it cannot serve as a means of interpreting legal rules. *The Federalist Papers* undoubtedly lends historic, and perhaps philosophical, context to many constitutional provisions, but that is far different than serving as a precedent for applying specific rules in the context of legal cases and controversies.”).

utility of *The Federalist*, and provide the background question informing my inquiry.

But the bottom line is that both scholars and judges continue to invoke Publius to support or explain their legal reasoning. This leads to the second line of criticism, which is a methodological one: that using *The Federalist* is problematic, because the historical evidence that can be gleaned from it is indeterminate. Given its nature as a piece of advocacy, as well as its having multiple authors, scholars have questioned whether *The Federalist* can even be said to embody a coherent political theory at all. Evidence can be found in its pages to support arguments in direct conflict with one another.<sup>78</sup> Practitioners of “law office history” are prone to the charge that they simply canvass the eighty-five essays to find, and cite, snippets from these “Framers” to support their position of advocacy, as quotations can be mined from the papers to support nearly any position.<sup>79</sup>

Not surprisingly, the uses to which *The Federalist* is put—the substantive issues for which the papers are examined as historical evidence—tend to be structural constitutional issues. Legal scholars have invoked the authority of Publius, often in taking diametrically opposed views, to explain the “correct” understanding of separation of powers,<sup>80</sup> the role of the judiciary,<sup>81</sup> and the general political theory of the Consti-

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78. *But see* Coenen, *supra* note 21 (arguing that the essays taken as a whole present a coherent argument).

79. *See* Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 554 (1995). This critique alludes to the very “cocktail party” complaint that Justice Scalia so often asserts against the use of legislative history. *See* Franklin, *supra* note 76.

80. *See* Joseph M. Lynch, *The Federalists and The Federalist: A Forgotten History*, 31 SETON HALL L. REV. 18, 19–24 (2000) (charging that Hamilton and the early Federalist party acted in direct contradiction to the separation of powers theory set forth in Hamilton’s *Federalist* papers); Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 449–50, 497–505 (1996) (arguing that a revisionist reading of *The Federalist* provides a “narrative of power” more concerned with political relationships, as opposed to the traditional reading emphasizing functional separation through “checks and balances,” and noting that “[i]n the past decade, no major Supreme Court opinion or law review article on the separation of powers has failed to enlist Madison or Madison’s *Federalist* in the contemporary battle . . . .”); Price Marshall, “No Political Truth”: *The Federalist and Justice Scalia on the Separation of Powers*, 12 U. ARK. LITTLE ROCK L. J. 245, 248 (1990) (contending that Justice Scalia is “the rightful heir of the Publian approach to the separation of powers”).

81. *See* Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View From The Federalist Papers*, 61 S. CAL. L. REV. 1669 (1988) (arguing that the Supreme Court has fundamentally misinterpreted the theory of *The Federalist*); Anita L. Allen, *The Federalist’s Plain Meaning: Reply to Tushnet*, 61 S. CAL. L. REV. 1701 (1988), (arguing that *The Federalist* embodies no singular interpretive theory); Sotirios A. Barber, *Judicial Review and The Federalist*, 55 U. CHI. L. REV. 836, 836 (1988) (“[T]he general theory of constitutional government in *The Federalist* favors judicial activism.”).

tution.<sup>82</sup> *The Federalist* is cited both by politically conservative originalists and by politically liberal nonoriginalists and proponents of more progressive interpretive theories.<sup>83</sup> Others have argued that those who offer rival understandings of *The Federalist* are getting it wrong by failing to appreciate the larger historical context.<sup>84</sup> It is this methodological line of criticism that provides the point of departure for my inquiry: If evidence from *The Federalist* is indeterminate, or can be used to support either side of an argument, to what extent do Supreme Court Justices invoke its authority on opposite sides of the same case?

### III. PRIOR EMPIRICAL RESEARCH ON *THE FEDERALIST*

The large majority of scholarship on the Supreme Court and *The Federalist* deals with the content of the essays, the theories they allegedly embody, or the specific issues for which they are cited. Garry Wills's study, for example, lends insight into the political philosophy that animated the authors of the essays,<sup>85</sup> Dean Kramer's work illuminates the extent (or lack) of actual influence that the papers had during the ratification debates;<sup>86</sup> Professor Coenen's work assesses the coherence and consistency of the overall argument of *The Federalist*.<sup>87</sup> Several authors have noted the high frequency of Supreme Court citations to the *Federalist*, however, and have conducted more empirical studies quantitatively measuring how the Court actually uses *The Federalist* (this Article in-

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82. See McGowan, *supra* note 58; Tushnet, *supra* note 81; see also ALAN BRINKLEY, NELSON W. POLSBY, & KATHLEEN M. SULLIVAN, *THE NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION* (1997) (attempting to replay the role of Publius in defending the Constitution and its evolution from contemporary criticisms). *The Federalist* has been given great weight by professional scholars in explaining the Framers' political philosophy at least since the Progressive school of historians. See CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 152-188* (The Free Press 1986) (1913) (relying to a great extent on *The Federalist* to explain his interpretation of the Framers' economic theory).

83. See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539, 1558-59 (1988) (using Madison's *Federalist* No. 10 to reflect on Madison's version of republican theory); Frank Michelman, *Law's Republic*, 97 YALE L. J. 1493, 1509 (1988) (examining *Federalist* No. 78). It is probably fair to generalize, however, that originalist scholars might be more likely to see *The Federalist* as an authoritative textual source, while progressives or civic republicans may be more likely to examine *The Federalist* in light of contextual sources such as classic republican political theorists and Enlightenment philosophy. See McGowan, *supra* note 58, at 755-57 (distinguishing between different theoretical bases for citing *The Federalist*, including a theory based on original public meaning, one based on contract reliance, and one based more broadly on the essays as a potential source of wisdom).

84. See McGowan, *supra* note 58; Lynch, *supra* note 80; Eskridge, *supra* note 76; Nourse, *supra* note 80.

85. See generally, WILLS, *supra* note 58.

86. Kramer, *Madison's Audience*, *supra* note 13.

87. DAN COENEN, *THE STORY OF "THE FEDERALIST": HOW HAMILTON AND MADISON RECONCEIVED AMERICA* (2007).

creases that short list). Buckner F. Melton, Jr. has assembled an extensive compilation of data on Supreme Court citations to *The Federalist* through 2006.<sup>88</sup> Melton's compilation provides lists of every Supreme Court case citing *The Federalist* organized by case name, subject, and *Federalist* number, along with statistical summaries for frequency of citations, citations per Justice, by author, and type of opinion.<sup>89</sup>

Ira C. Lupu, in a symposium response to Professor Eskridge's normative critique, researched the patterns of citation to *The Federalist* over time, and documented the trend in frequency by decade.<sup>90</sup> Professor Lupu determined that there was an extremely low frequency of citations to *The Federalist* from the beginning of the Court through the early twentieth century, and then a rapid increase—a series of doublings approximately every twenty to thirty years, leading to the current situation of relatively rampant use of *The Federalist* by the Justices during the Rehnquist Court years.<sup>91</sup> In the first decade of the twentieth century, for example, there were only three citations to *The Federalist*, but by the 1980s there were fifty-six.<sup>92</sup> This exponential increase in citations over the decades of the twentieth century has occurred alongside a decline in the absolute number of cases the Court decides annually, meaning that as a percentage of total cases, those which cite *The Federalist* comprise an even larger proportion of the Court's work.<sup>93</sup> Lupu followed up this research with a separate article listing and commenting upon the essays cited most often by the Court.<sup>94</sup>

Melvyn Durchslag's recent study likewise notes that Supreme Court citations to *The Federalist* have increased in number in recent years, especially in prominent examples such as the *Printz* case.<sup>95</sup> Professor Durchslag indicates, however, that the uptick in citations may

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88. Buckner F. Melton, Jr. & Carol Wilcox Melton, *The Supreme Court and The Federalist: A Supplement, 2001–2006*, 95 KY. L.J. 749 (2007); Buckner F. Melton, Jr. & Jennifer J. Miller, *The Supreme Court and The Federalist: An Update, 1997–2001*, 90 KY. L.J. 415 (2002); Melton, *supra* note 14.

89. Melton, Jr. & Melton, *The Supreme Court and The Federalist: A Supplement, 2001–2006*, *supra* note 88.

90. Lupu, *supra* note 14.

91. *Id.* at 1328–30. According to Lupu's research, the early decades of the republic saw only a handful of citations to *The Federalist*; beginning in the 1930s the frequency of citations roughly doubled each generation; in the 1980s there were fifty-six such cases, and from 1990–98 there were sixty. *Id.* at 1328 tbl. Lupu notes: "More than half of all the Supreme Court decisions in which one or more citations to *The Federalist* appear have been rendered since 1970." *Id.* at 1328–1330.

92. *Id.* at 1328.

93. *Id.* at n.22; see also Kenneth W. Starr, *The Legacy of Chief Justice Taft and the Court's Shrinking Docket*, 90 MINN. L. REV. 1363, 1368 (2006).

94. Ira C. Lupu, *The Most-Cited Federalist Papers*, 15 CONST. COMMENT. 403, 404–10 (1998).

95. Durschlag, *supra* note 1, at 246–47.

mean “less than meets the eye.”<sup>96</sup> His research concentrates not only on the number of citations, but on an analysis of their “importance” to the authoring Justice’s opinion and to the eventual outcome of the case.<sup>97</sup> Professor Durchslag concludes that despite the number of citations to *The Federalist*, their overall influence on the Court’s decisions has been insignificant.<sup>98</sup> I would argue that regardless of its centrality to an opinion, the mere fact of a citation itself is important as a significant indicator of a Justice’s attempt to support her opinion with the persuasive, legitimizing effect of historical evidence from the founding era—or as Durchslag himself acknowledges, “[i]t is an appeal to a higher and more revered authority.”<sup>99</sup>

While these studies are extremely illuminating on many questions about the Supreme Court’s use of *The Federalist*, none of them measure or even address the phenomenon of cases in which different Justices who disagree on the decision nevertheless each cite to *The Federalist* in their respective opinions. In fact, Lupu explicitly notes that his methodology treats a decision with multiple citations in different opinions to *The Federalist* as a single case for the purposes of his research.<sup>100</sup> Melton, while noting the existence of cases where more than one opinion cites *The Federalist*, makes no distinction between majority opinions, concurrences, and dissents.<sup>101</sup> My inquiry is based precisely on that question, because I seek to explore the empirical implications of the arguments that (1) *The Federalist* is a source favored primarily by conservatives or by those who advocate an originalist jurisprudence; or (2) that *The Federalist* is indeterminate as a form of historical evidence.

If the words of Publius can be marshaled by either side, or in support of virtually any argument on any constitutional question, how often does a citation to *The Federalist* appear in both a majority opinion (or concurrence in the judgment) and a dissenting (or concurring) opinion?

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96. *Id.* at 312.

97. *Id.* at 248.

98. *Id.*

99. *Id.* at 315 (citing SANFORD LEVINSON, CONSTITUTIONAL FAITH 11 (1998)).

100. Lupu, *supra* note 94, at 404. One group of political scientists has looked into the circumstance of multiple opinions citing *The Federalist* in the same case. See Corley et al., *supra* note 11, at 335. Corley et al. examine cases from 1953 to 1995 and measure, among other things, the frequency of “dueling citations.” They find that during those years the presence of multiple opinions citing *The Federalist* in the same case is a result of attitudinal or strategic behavior: the separate opinion utilizes *The Federalist* to respond to the majority opinion. *Id.* at 336–37. Although this study looks at the range of Terms in the Rehnquist Court era, and focuses more on the implications for arguments about originalism, ideology, and the use of historical analysis in law, the Corley study’s findings are consistent with those of this Article.

101. Melton, *The Supreme Court and The Federalist: A Citation List and Analysis, 1789–1996*, *supra* note 14, at 254–56.

Given the anecdotal evidence that Justices across the ideological spectrum will cite *The Federalist*, and that as an evidentiary source it can provide support to competing opinions, accounting for the findings of the previous research, I hypothesize that the results will show that in the decisions of the Rehnquist Court from 1986-2005 (1) both liberal and conservative Justices cite to *The Federalist*, and (2) the opinions with citations to *The Federalist* will often be accompanied by multiple, conflicting opinions that also cite *The Federalist* with significant frequency. These results will be helpful in explaining the true influence of originalism on the Rehnquist Court, and in helping us understand the Court's approach toward historical evidence as it proceeds under Chief Justice Roberts.

#### IV. RESEARCH DESIGN AND METHODS

The purpose of this research is to provide an empirical basis for understanding how the Supreme Court can use similar historical evidence to support different sides of the same issue. This Article asks the question: how often does the Court use similar historical evidence in both majority and dissenting opinions within the same decision? Prior research identifies *The Federalist* as perhaps the single historical source most commonly cited by Supreme Court Justices.<sup>102</sup> Based on the normative and methodological issues discussed in the preceding sections, I hypothesize that we can expect to find a positive, covariational relationship between the number of Rehnquist Court decisions citing to *The Federalist* and the number of decisions where more than one opinion, including a dissent or a concurrence, cites *The Federalist*.

To conduct this inquiry, I proceed on several assumptions. First, I assume that a citation to *The Federalist* indicates an attempt on the part of a Justice to appeal to historical evidence in support of her opinion. Some Justices may do so for more explicitly "originalist" purposes, such as invoking as interpretive authority the original intent of framers Madison, Hamilton, and Jay, or the original meaning of the words used in the Constitution in 1787-89.<sup>103</sup> Others may cite the papers for more of a general allusion to American political theory or tradition.<sup>104</sup> Either way,

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102. See Corley et al., *supra* note 11, at 330.

103. See, e.g., *Printz*, 521 U.S. at 911-15 (discussion in Justice Scalia's majority opinion analyzing various essays from *The Federalist* as evidence of the authors' (particularly Hamilton's) constitutional understandings); *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality*, 511 U.S. 93, 98 (1994) (citation to *Federalist* No. 42 to interpret the meaning of the Commerce Clause, in Justice Thomas's majority opinion).

104. See, e.g., *United States v. Booker*, 543 U.S. 220, 238-39 (2005) (citing *Federalist* No. 38 in Justice Stevens's opinion of the court as evidence of the Framers' understanding of "the ideals our constitutional tradition assimilated from the common law").

I believe that a citation to *The Federalist* represents a deliberate decision to offer some form of historical support for the Justice's opinion, and therefore to seek the legitimizing effect of historical authority.<sup>105</sup> Second, I assume that an opinion with any citation to *The Federalist* indicates an attempt to use historical evidence as support no matter how many or few citations there are within that opinion. My study will treat all opinions citing *The Federalist* the same, regardless of how many times a Justice invokes Publius.<sup>106</sup> Third, I assume that the decisions of the Rehnquist Court represent a sample population with analytical relevance. I confine the study to the Rehnquist Court in part because it has often been closely identified with originalism.<sup>107</sup> While the Roberts Court may or may not prove to continue these trends (and I have included a limited amount of data from its first two Terms for purposes of comparison), the recent completion of the two-decade tenure of the late Chief Justice Rehnquist provides a relatively complete sample of Terms for analysis.

Fourth, I assume that based on the observations discussed above, all Justices regardless of interpretive theory or political persuasion will cite *The Federalist* to some extent.<sup>108</sup> That is, both the conservatives and the liberals on the Court will cite to *The Federalist* with some frequency. It is in this assumption that I counter the prevailing wisdom associating the use of historical evidence as a tactic primarily of conservative originalists. Fifth, I treat dissents and concurrences equally as "disagreeing"

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105. *But see* Durschlag, *supra* note 1 (arguing that many of the Justices' citations to *The Federalist* are not central to the reasoning of the Justices' opinions). While I accept Professor Durschlag's characterizations of the citations, I respectfully disagree with the conclusion that this somehow renders the citations unimportant. Regardless of the centrality of any citation to the reasoning of a given Justice's opinion, I contend that as a historical source clearly and closely identified with the founding era as a "rhetoric for ratification" (*see* Coenen, *supra* note 21), any citation to *The Federalist* stands for an attempt, however modest, to cloak the Justice's opinion with the aura of historical legitimacy.

106. Professor Lupu, to the contrary, explicitly considered any decision with one or more citations to *The Federalist* to be the same for the purposes of his study, even a case with as many citations as *Printz*. Lupu, *supra* note 14, at 1328 (citing *Printz v. United States*, 521 U.S. 598 (1997)).

107. *See* LEVY, *supra* note 40, at 377–80; Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1046 (2006); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitutionalism*, 75 FORDHAM L. REV. 545, 545 (2006) ("To whatever extent the Rehnquist Court actually executed a counterrevolution, surely a good deal of its inspiration came from 'originalism.'").

108. In fact, all nine of the Justices serving together for the last decade of the Rehnquist Court have authored opinions citing to *The Federalist* within the scope of this study. *See infra* Table 2. Interestingly, the only two current Justices who have not cited to *The Federalist* are the two newest, and conservative, members of the Court: Chief Justice Roberts and Justice Alito. *See also* Melton & Melton, *supra* note 88, at 749–50 nn.6–7 (noting that neither Chief Justice Roberts nor Justice Alito has ever cited *The Federalist* during their respective judicial careers on both the Circuit Courts of Appeal and the Supreme Court).

opinions because while concurrences agree with at least part of the judgment of the Court, the concurring Justice is presumably writing the separate opinion (and citing *The Federalist*) because he or she disagrees with some portion of the majority's holding or at least part of the majority's rationale. Finally, because my intent is to explore situations where the author of a separate opinion disagrees with the judgment of the Court, I consider majority opinions, opinions of the Court, and per curiam opinions to be categorically the same for these purposes.

I will use a quasi-experimental design with two variables, using a time series analysis of Rehnquist Court decisions by year from 1986-2005. The independent variable is the absolute number of decisions per year with any citation to *The Federalist*. This is essentially the same data that Lupu compiled in his 1998 study,<sup>109</sup> but it will expand the results through 2005. The dependent variable is the number of decisions per year that have multiple opinions citing *The Federalist*, including dissenting opinions. To refine the hypothesis, I predict a positive, covariational relationship between the independent and dependent variables: the greater the frequency of decisions citing *The Federalist*, the greater will be the frequency of decisions with multiple, and dissenting, opinions citing *The Federalist*.

To translate these variables into measurable indicators, I conducted the research in the Westlaw database. For both variables, I confined the searches to decisions between September 26, 1986 (the date William Rehnquist was sworn in as Chief Justice) and September 3, 2005 (the date of the Chief Justice's death). To measure the independent variable, I searched for all decisions that contain any citation to *The Federalist*.<sup>110</sup> I used search terms equivalent to those used by Lupu, in order to maintain the comparability of our findings.<sup>111</sup> To measure the dependent variable, I searched for all opinions citing *The Federalist*, adding a term querying for cases that include a dissenting or concurring opinion.<sup>112</sup> This produced a list of cases that cite to *The Federalist* and also include a dis-

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109. Lupu, *supra* note 14, at 1328.

110. To find all cases citing *The Federalist* the research utilized the search term (PUBLIUS) (FEDERALIST W/10 NO. NUMBER NOS. PAPER!) (FEDERALIST W/P MADISON JAY HAMILTON) & DA (AFT SEPTEMBER 26 1986).

111. Lupu conducted his research in the LEXIS database, so my Westlaw research modified his terms slightly, in order to measure the same results given the differences in search terms between the two databases. See Lupu, *supra* note 14, at 1327 n.19 (listing his LEXIS search terms).

112. To account for separate opinions, the research utilized the search term (PUBLIUS) (FEDERALIST W/10 NO. NUMBER NOS. PAPER!) (FEDERALIST W/P MADISON JAY HAMILTON) & (DISSENTING CONCURRING) & DA (AFT SEPTEMBER 26, 1986).

senting or concurring opinion,<sup>113</sup> not necessarily those where both a majority and a dissenting opinion make a measurable citation. I then screened the results case by case, excluding decisions that included a dissent or concurrence but did not include multiple, disagreeing opinions each citing *The Federalist*. The remaining list only includes cases that indicate the dependent variable.

The results are presented in tabular form, listing for each year of the Rehnquist Court how many decisions meet the requirements of the independent variable and how many meet the requirements of the dependent variable. The data listed to indicate the independent variable is the direct number of cases produced by the Westlaw query. The dependent variable will be measured by the list of results I obtained after screening the database query. To the extent that any trends can be induced from the results, they are summarized as appropriate. The presentation of the results as a time series should allow for predictions of frequency to *The Federalist* in the immediate future (taking into account the change in Court personnel). This is an important issue given the questions about the Court's future direction that have arisen since Chief Justice Roberts and Justice Alito have joined the Court.<sup>114</sup>

This research design does not provide a perfect measure of the Court's use of history in competing arguments, but I believe that it is both feasible and appropriate in providing an illustration of one prominent way that the Court uses historical evidence. While I do not necessarily assert a causal relationship between the variables, the existence of a covariational relationship at minimum will confirm the internal validity of the design, and will suggest that a majority opinion with many references to *The Federalist* might be a factor encouraging separate authors also to cite *The Federalist*. The design is externally valid, with a caveat: it can not be generalized to the extent that it does not account for either the quality or degree of reliance on *The Federalist* in any particular case, or for a Justice's reliance on historical sources other than *The Federalist*. These questions can be measured with additional research beyond the scope of this Article. Finally, the operational design of the indicators is reliable; searches in the comprehensive Westlaw database can be replicated with ease.

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113. In fact, it does not even necessarily limit the results to these cases, because given the query, it could potentially include cases simply using the words "federalist" and "dissenting" in the text. However, the subsequent screening process eliminates these potential cases, along with the more common decisions that cite *The Federalist* and include a dissenting opinion, but where either the majority/concurring opinions or the dissent do not cite *The Federalist*.

114. See Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 DEPAUL L. REV. 1 (2006).

V. RESULTS: *THE FEDERALIST* IS FREQUENTLY  
CITED BY MULTIPLE JUSTICES IN THE SAME CASES

The results from the primary research question are listed below in Table 1. I will first discuss the frequency with which the opinions contained at least one citation to *The Federalist*. There were 112 total Rehnquist Court decisions that contained a citation to *The Federalist* in one or more opinion.<sup>115</sup> This means that over the nineteen-year span of the Rehnquist Court, approximately 5.9 decisions per year cited *The Federalist*. Given the average number of about 70 cases per year that the Court has decided in recent years,<sup>116</sup> this means that nearly 9% contained a *Federalist* cite. This is a significant portion of the Court's total docket.

Next, I turn to the results for the dependent variable. The total number of cases with multiple opinions citing *The Federalist*, extended over the duration of the Rehnquist Court's jurisprudence, is 21 cases in 19 years, an average of just over one per year.<sup>117</sup> In no single year were there more than three such cases. There were no such cases during the period 1992–94. While the absolute number of these cases per year may not seem great when considered as a total and as a percentage of all cases that cite *The Federalist*, the numbers are much more significant than appears at first glance. Out of 112 total cases citing *The Federalist*, 21 contained a separate opinion (dissent or concurrence) disagreeing with some portion of the majority's holding or reasoning that also cited *The Federalist* to support its contradictory argument.<sup>118</sup> There is a much higher incidence, therefore, of cases with multiple opinions citing *The Federalist* when considered as a proportion of the cases that cite *The Federalist* at least once.

This means that out of all the decisions in which the Justice writing for the majority invokes *The Federalist* as historical evidence, over 18%

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115. *Infra*, Table 1.

116. See Starr, *supra* note 93, at 1368–69.

117. The complete list of cases in the dependent variable—cases where there were disagreeing opinions that cited *The Federalist*—is as follows: *Gonzales v. Raich*, 545 U.S. 1 (2005); *Roper v. Simmons*, 543 U.S. 551 (2005); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Utah v. Evans*, 536 U.S. 452 (2002); *United States v. Hatter*, 532 U.S. 557 (2001); *Alden v. Maine*, 527 U.S. 706 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627 (1999); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Hubbard v. United States*, 514 U.S. 695 (1995); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *United States v. Verdago-Urquidez*, 494 U.S. 259 (1990); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Welch v. Tex. Dep't of Highways and Pub. Transp.*, 483 U.S. 468 (1987); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

118. *Infra* Table 1.

(or nearly one in five) have a dissent or a concurrence that also cites *The Federalist*. As explained further below, this result supports the claims that (1) historical arguments (exemplified by reliance on *The Federalist*) are in fact used on both sides by Justices who disagree with each other on the outcomes or rationales in cases; and (2) as a source of historical evidence, *The Federalist* can be used to support such competing and contradictory arguments.

Year	Cases with at Least One Citation to <i>The Federalist</i>	Cases with Multiple Opinions with Cites to <i>The Federalist</i>	Percentage
1986	1	1	100
1987	6	1	16.6
1988	3	1	33
1989	7	2	28.6
1990	12	1	8.3
1991	9	1	11.1
1992	6	0	0
1993	2	0	0
1994	6	0	0
1995	11	3	27.3
1996	3	1	33
1997	11	2	18.2
1998	2	1	50
1999	5	2	40
2000	8	0	0
2001	4	1	25
2002	6	1	16.6
2003	2	0	0
2004	2	1	50
2005	6	2	33
<b>TOTAL</b>	<b>112</b>	<b>21</b>	<b>18.75</b>

**Table 1. Rehnquist Court Decisions with Multiple Opinions Citing *The Federalist* (1986–2005)**

The cases meeting the criteria for the dependent variable thus make up 18.75% of the number of cases in the independent variable. When the

independent variable is considered in light of Lupu's findings that citations to *The Federalist* increased significantly in the 1980s and 1990s relative to previous decades,<sup>119</sup> it is even more reasonable to infer that the incidence of Supreme Court decisions where multiple, disagreeing opinions each cite *The Federalist* currently occur more frequently than they have in the past. If we accept the conventional wisdom (supported by Lupu's empirical findings) that the Supreme Court (and especially the Rehnquist Court) has relied increasingly on *The Federalist* as a source of support for its opinions, then it is clear that a substantial percentage of those opinions are now accompanied by a dissent or concurrence that also cites the same historical source: *The Federalist*. This data supports the conclusion that the appeal of historical authority to the Justices is significant enough that in a substantial percentage of cases where one Justice cites *The Federalist* as historical authority, another Justice will invoke the same historical source to support a different outcome or a different rationale.

Moreover, the frequency of multiple citations to *The Federalist* is not linked to any one ideological persuasion, liberal or conservative, among the Justices. The results do not indicate any significant trends that can be attributed to the presence or departure of any particular Justice or Justices. To confirm this, I examined the frequency of citations to *The Federalist* by all Justices serving during or after the Rehnquist Court years, as shown in Table 2.<sup>120</sup> During the years of the Rehnquist Court from 1986–2005, seven Justices were replaced, but there were about as many decisions citing *The Federalist* in multiple opinions during the last few years of the Rehnquist Court as there were at the beginning.<sup>121</sup> It is thus unlikely that a change in Court personnel acts as an antecedent variable. Furthermore, through the 21 cases within the dependent variable, all nine of the Rehnquist Court Justices with two or more full terms completed have cited *The Federalist* at least once.<sup>122</sup> On the new Roberts Court, neither Chief Justice Roberts nor Justice Alito has yet cited

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119. These results do not show any significant increase or decline (accounting for a few outlying peak or trough years in a linear model) in the number of cases citing *The Federalist* in the decade since Lupu's study. Lupu, *supra* note 14, at 1328.

120. *Infra* Table 2.

121. Notably, the single year in which the Court issued the most decisions citing to *The Federalist* (1990, with twelve decisions) was the year before Justice Thomas joined the Court, even though he is often regarded as one of the Court's most avid consumers of historical evidence of original intent. *Supra* Table 1.

122. *Infra* Table 2.

*The Federalist*, but it is too early to tell whether or not they will contribute to the long-term trend of the modern Court towards increasing frequency of citations to *The Federalist* in particular or to historical evidence in general.<sup>123</sup>

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123. Some commentary has discussed whether the early jurisprudence of Chief Justice Roberts and Justice Alito is conservative but “minimalist,” or is seeking to adhere as closely to precedent as possible while reaching their desired results. See Jonathan H. Adler, How Conservative is this Court?, NAT’L REV. ONLINE, July 5, 2007, <http://article.nationalreview.com/?q=Y2Y3NjNkM2ZkYTcxNzQwYTBhZWZkNzEyZGYyMWExMjE=>; Posting of Cass Sunstein to the Faculty Blog, [http://uchicagolaw.typepad.com/faculty/2006/05/chief\\_justice\\_r.html](http://uchicagolaw.typepad.com/faculty/2006/05/chief_justice_r.html) (May 25, 2006 09:52 CST). This approach would seem to eschew (as their opinions have) reliance on historical sources to interpret the Constitution’s meaning. Only time will tell whether the Roberts Court proves as fond of history as has the Rehnquist Court. However, as Coenen points out, even during the two Justices’ Senate confirmation hearings, *The Federalist* was mentioned at least eleven times, indicating that even in the popular imagination the work of the Supreme Court has something to do with ideas explicated in *The Federalist*. See Coenen, *supra* note 21, at 471–72 (citing transcripts from the Roberts and Alito confirmation hearings).

Table 2. Citations to *The Federalist* by Justice, Sept. 1986–2007

Justice *Conservative(C) *Liberal (L)	First Year on the Court <sup>1</sup>	Last Year on the Court <sup>1</sup>	# of Terms on the Court <sup>1</sup>	Opinions Citing to <i>The Feder- alist</i> <sup>1</sup>	Average Citations per Term <sup>1</sup>
Alito (C)	2006	2007	1.5	0	0.0
Kennedy(C)	1988	2007	19.5	10	0.5
O'Connor (C)	1986	2005	18.5	15	0.8
Powell (C)	1986	1987	1	2	2.0
Rehnquist (C)	1986	2005	19	17	0.9
Roberts (C)	2005	2007	2	0	0.0
Scalia (C)	1986	2007	21	16	0.8
Thomas (C)	1991	2007	17	5	0.3
White (C)	1986	1993	7	3	0.4
SUB-TOTAL(C)			106.5	68	0.6
Blackmun (L)	1986	1994	8	1	0.1
Brennan (L)	1986	1990	4	5	1.3
Breyer (L)	1994	2007	13	6	0.5
Ginsburg (L)	1993	2005	12	2	0.2
Souter (L)	1990	2007	17	11	0.6
Stevens (L)	1986	2007	21	20	1.0
SUB-TOTAL (L)			75	45	0.6

Note 1: Includes only Court Terms from 1986 through 2007

One of the hypotheses presented above is that despite the common presumption that the use of history is more common among judicial conservatives, the phenomenon of dueling citations shows that even Justices who disagree on outcomes, whether conservative or liberal, will often advert to the same historical source. The results in Table 2 further confirm that neither ideological wing of the Court monopolizes citations to *The Federalist*. In the first column of Table 2, I have listed the Justices by alphabetical order and ideology. (I have included Justices Roberts and Alito for the sake of comparison to the Justices of the Rehnquist Court, and extended the analysis through 2007 in order to determine whether there are any discernable trends or predictors based on the addition of these two new Justices.)

Next to each Justice's name, I entered a coded identifier of (L) for the Justices typically considered to be liberals and (C) for the Justices typically considered to be conservatives. Although Justices O'Connor, Kennedy, and Powell have been considered to function as moderate or "swing" Justices, I placed them in the conservative group.<sup>124</sup> Of the six Justices with ten or more *Federalist* citations, two (Stevens and Souter) are liberals, and four are conservatives (Rehnquist, Scalia, O'Connor, and Kennedy). The relative frequency with which Stevens, Souter, and the other liberal Justices invoke Publius indicates that *The Federalist* is not merely the favored historical source of a group of hidebound originalists. Indeed, even the citations by the "swing" voters O'Connor and Kennedy indicate that allusion to historical sources such as *The Federalist* is not limited to strict originalists but rather can be appealing to Justices in the middle as well.

Furthermore, when the numbers are divided to show the ratio of *Federalist* citations to the number of each Justice's terms on the Court since 1986, the clear leader is the liberal lion Justice Brennan, followed closely by Justice Stevens, with just less than one citation per term.<sup>125</sup> Stevens is followed in order by the late Chief Justice Rehnquist, Justice Scalia, Justice Souter, and Justice Kennedy.<sup>126</sup> *The Federalist* has been most often cited as historical evidence by a liberal Justice, followed by

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124. See Eric Claeys, *Takings: An Appreciative Retrospective*, 15 WM. & MARY BILL RTS. J. 439 (2006). While Justices O'Connor and Kennedy have often been referred to as "swing" voters or "moderate" Justices, over their whole careers on the Court they have come down more often in the conservative bloc rather than the liberal bloc. *Id.* at 442. While this methodology has its limitations in accounting for nuances and shades of judicial ideology, my decision to place the moderates appointed by Republican presidents in the "conservative" category reduces confusion and has the advantage for the purposes of this inquiry of separating out the Justices who are almost universally regarded as the "liberal" bloc for comparison of citations.

125. *Supra* Table 2.

126. *Supra* Table 2.

two conservatives, a liberal, and a “swing” conservative. This result undermines any notion that *The Federalist* is used primarily by conservative Justices to buttress an originalist approach toward interpreting the Constitution. To be sure, it is entirely possible that liberal and conservative Justices cite *The Federalist* for different ideological or tactical reasons. But the results generally support the hypothesis of this Article that just as history is today being used by legal scholars to support legal arguments from a wide political and ideological spectrum, historical evidence (as exemplified by citations to *The Federalist*) is also being used by Supreme Court Justices from divergent ideological perspectives in constitutional decision-making.

#### VI. DISCUSSION: THE USE OF HISTORICAL EVIDENCE IN OPPOSING LEGAL ARGUMENTS

This Article’s hypothesis predicted that just as legal scholars have used history to support divergent legal arguments, judges (in particular, Supreme Court Justices) will also use historical evidence to support conflicting opinions in some cases.<sup>127</sup> The research question investigated whether a positive relationship can be shown between the overall number of cases citing *The Federalist*, and the number of cases where multiple, disagreeing opinions each cite *The Federalist*. In light of the results, it is clear that this relationship exists. The percentage of cases with at least one citation to *The Federalist* that also have disagreeing opinions citing *The Federalist* during the tenure of the Rehnquist Court is a significant 18.75%. This means that nearly one in five cases that invoke *The Federalist* essays of Madison, Hamilton, and Jay will include a separate opinion offering a different version of history.

These results are also valuable because they shed light on the normative and methodological questions asked at the outset. When viewed in terms of the frequency of cases in the dependent variable relative to cases in the independent variable, the results indeed show that first, historical argument is the province of no one ideological wing of the Court, and second, that Justices who advocate divergent holdings or rationales in constitutional decisions are often willing to offer competing historical arguments using the same evidence. Accepting Lupu’s research indicating that the more recent volumes of the United States Reports are “positively riotous” with citations to *The Federalist*,<sup>128</sup> the fact that nearly one in five of these cases contain multiple, disagreeing opinions citing *The*

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127. See *supra* Part II.

128. Lupu, *supra* note 14, at 1330.

*Federalist* indicates that the use of historical sources to support competing interpretations is indeed a noteworthy phenomenon.

Several alternative hypotheses may help fill in the blanks and indicate where future research with a greater scope may be able to more thoroughly examine the relationship between the Supreme Court and the indeterminacy of historical evidence. As noted above, we do not always know exactly why a Justice chooses to cite *The Federalist*, whether it is truly out of respect for historical authority, or from more of an attitudinal or strategic purpose. Furthermore, *The Federalist*, while possibly the most cited, is not the only historical source the Justices employ. Justices, as well as litigants, scholars, and politicians, often refer to the Declaration of Independence, the notes from the Constitutional Convention, early judicial decisions, acts of Congress, and learned commentaries such as those of Blackstone and Story.<sup>129</sup> Further research will be able to take into account a wider variety of examples of the use of history on the Court, perhaps comparing the relative uses of different sources in a multivariate analysis. However, this Article is a starting point for researchers interested in measuring how the Court uses history, and in particular how such use can often transcend any particular judicial ideology.

Additionally, the nature of the relationship between majority opinions on the one hand, and dissents and concurrences on the other, may have led Justices to minimize citations to *The Federalist* below the reported levels. It is possible that in the dynamics of speaking “for the Court,” a Justice feels less need to bolster his opinion with historical evidence and is more likely to try and portray the holding as consistent with precedent. In screening the initial results of the search on the dependent variable, there were a number of cases where the dissent or concurrence, but not the majority, cited *The Federalist*. Even given these possibilities, however, the results do demonstrate that at certain times Court members of opposing judicial ideologies and opinions in a particular case will cite the same source of historical evidence when it can be used to fortify even opposing conclusions regarding the outcome of a given case.

I offer two observations that also present questions for further study. First, a review of the twenty-one Rehnquist Court decisions with

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129. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 378 (2003) (Thomas, J., concurring in part and dissenting in part) (citing “the principle of equality embodied in the Declaration of Independence”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 717 (2003) (Souter, J.) (citing the RECORDS OF THE FEDERAL CONVENTION OF 1787, 25 (M. Farrand ed. 1911)); *City of Boerne v. Flores*, 521 U.S. 507, 538–39 (1997) (Scalia, J., concurring in part) (citing the Northwest Ordinance of 1787); *Marshall v. Marshall*, 547 U.S. 293 (2006) (Ginsburg, J.) (discussing the 1789 Judiciary Act); *Morse v. Frederick*, 127 S. Ct. 2618, 2631 (2007) (Thomas, J., concurring) (citing Blackstone’s Commentaries); *McCreary County v. Am. Civil Liberties Union*, 545 U.S. 844, 880 (2005) (O’Connor, J.) (citing Justice Story’s Commentaries).

competing interpretations of *The Federalist* reveals that they are almost all high-profile cases dealing with fundamental questions of constitutional structure such as federalism and separation of powers. In fact, the list reads like the contents of a modern constitutional law casebook. During the 1990s, when federalism issues were prominent, the Justices offered dueling versions of *The Federalist* in the landmark decisions of *Alden v. Maine*, *Clinton v. New York*, *Printz v. United States*, *City of Boerne v. Flores*, and *Seminole Tribe*, among others. In the last few years this has continued in well-known constitutional cases such as the medical marijuana decision in *Gonzales v. Raich* and the death penalty case *Roper v. Simmons*. Others, such as the 2004 decision in *Hamdi v. Rumsfeld*, have also tracked the shift from federalism concerns towards separation of powers questions in the high-profile cases that have been presented to the Court in the wake of the September 11, 2001 terrorist attacks and the War on Terror.<sup>130</sup> This trend may continue in the near future if additional cases involving the Guantanamo detainees work their way to the Supreme Court.

*Printz* in particular offers a veritable battle royale of competing *Federalist*-based arguments, where Justices Scalia, Stevens, and Souter disagree vehemently over how the essays illuminate the constitutional question before the Court. They collectively cite *The Federalist* a whopping fifty-eight times in the decision. Indeed, over the course of the opinion Justice Scalia cited *The Federalist* thirty times; Justice Stevens ten times, and Justice Souter eighteen times.<sup>131</sup> Souter's short dissent testifies to the power and the attractiveness of *The Federalist* as an interpretive guide to historical meaning: "In deciding these cases," he wrote, "it is *The Federalist* that finally determines my position."<sup>132</sup> Perhaps a Court battle over history is more likely to occur in such fundamental constitutional cases, where the stakes are high and the issue goes to the heart of the Constitution's meaning.

## VII. CONCLUSION

Finally, this study demonstrates the existence of a remarkable event: the members of the Court deploying history against one another. While it may not have cut the Gordian knot that has entangled the Court and Clio,<sup>133</sup> this Article's examination of the uses of *The Federalist* has

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130. 542 U.S. 507 (2004); see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780, 2822–23, 2830 (2006) (citing *Federalist* Nos. 28, 47, and 70 in discussing original understanding of separation of powers and the constitutional powers over military functions).

131. *Printz v. United States*, 521 U.S. 898 (1997).

132. *Id.* at 971 (Souter, J., dissenting).

133. See Richards, *supra* note 44.

highlighted some of the normative and empirical questions that must be pursued when considering how practitioners of the law employ the sources of history. It underscores the notion that, regardless of the normative arguments for or against the use of history in legal interpretation, history is widely used by courts as well as by scholars and the public in understanding American law. Perhaps the more important task before us is to focus on the more practical, methodological questions of how we can assure that when historical sources and methods are used in the law, they are used appropriately. Most of all, we should recognize that no single political or ideological persuasion can be said to have a monopoly on the use of history in law.