

Articles

THE MOST-CITED FEDERALIST PAPERS

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In early 1998, the George Washington Law Review held a Symposium on "Textualism and the Constitution." At that event, Professor William Eskridge presented a paper entitled "Should the Supreme Court Read the Federalist Papers But Not Statutory Legislative History?"¹ The editors of that Review kindly invited me to prepare a response to Professor Eskridge's piece. In the course of research in preparation of that response, I unearthed a variety of heretofore unpublished data concerning patterns of citation to The Federalist Papers in the Supreme Court Reports. Much of that data—in particular, those portions which reveal the direction and rate of change in such citation practices over time—is published in that piece.² One aspect of the data unaddressed there, however, pertains to which of the Papers have received the most attention from the Justices.

This brief essay attempts to remedy that omission. In what follows, I list in ascending order the five Federalist Papers most frequently cited in opinions of the Supreme Court. Readers will no doubt have their own judgments as to which Papers are most deserving of citation, and their own predictions as to which are

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1. 66 Geo. Wash. L. Rev. (forthcoming 1998).

2. Ira C. Lupu, *Time, the Supreme Court, and The Federalist*, 66 Geo. Wash. L. Rev. (forthcoming 1998). The most striking feature of the data is the rate at which such citations have increased in recent years. The citation rate started very low, held constant for over 100 years (1820-1929), doubled in the 1930's, doubled again by the 1960's, and then doubled once more in the 1980's. *Id.* The rate in the 1990's is the highest ever, and appreciably so when looked at in light of the total number of decisions rendered, which have dropped precipitously from the 1980's to the 1990's. *Id.* More than half of all Supreme Court citations to the Federalist Papers have occurred since 1970.

actually in the Top Five. I suspect that Federalist No. 10 (Madison) on the role of factions in the proposed regime and Federalist No. 78 (Hamilton) on judicial review are likely to make many of these reader-generated lists. Those who make these two guesses about the contents of the Top Five list will be half-right.

Before disclosing the winners, I offer a few preliminary words. First, as to methodology, I have chosen to treat one or more citations to a particular Paper in a given decision as singular for counting purposes. That is, repeated citations to a Paper within a given opinion do not change the count, and citations to the same Paper in other opinions in the same case do not change the count. The first of these moves seems easy to defend; that a given Justice cites a Paper five times rather than once within an opinion may well say more about the idiosyncracies of citation style than it does about the Paper's substantive influence. The limitation on multiple counting if other opinions in the same case also cite the Paper is based on the possibility that a citation from one Justice may provoke others to cite and discuss it as well. This distorting potential seems greatest in the case of Papers cited in non-unanimous (that is, internally controversial) decisions. My choice of a count simplifier is obviously open to question, and different choices might well produce a different outcome for the Top Five.

Second, it is worth reflecting on the significance of the data. A count of this sort may reinforce or counter received wisdom on which Papers have been most influential, at least among the Justices. The count may cast light on which Federalist Paper author has been most influential. In addition, the data serve to highlight historical trends in constitutional adjudication; issues which dominated in the nineteenth century have receded, others have come to rather recent prominence, and some are always with us.

The envelopes, please. In reverse order (that is, presented from fifth to first), the five most heavily cited Federalist Papers in the history of Supreme Court adjudication are:

FIFTH. Federalist No. 32 (Hamilton)³—cited in twenty-five decisions of the Supreme Court.⁴ Federalist No. 32 is concerned

3. Federalist 32 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers* 197 (Mentor Books, 1961).

4. The decisions, in reverse chronological order, are as follows: *Camps New-found/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1616 & n.6, 1626 (1997) (Thomas, J., dissenting); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 144-46, 149 (1996) (Souter, J., dissenting); *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779,

with the power of state taxation. In the essay, one of a series on the subject, Publius analyzes concurrent state and federal power to tax. He makes efforts to reassure the States that their taxing powers are unimpaired by the proposed Constitution, except for its qualified prohibition in Article I, Section 10 on state-created "Imposts or Duties on Imports or Exports."⁵ Federalist No. 32 led all Papers in citations at the end of the nineteenth century, having appeared in eleven decisions by 1894; no other Paper had more than seven at the century's close. Perhaps the most famous citation to Federalist No. 32 is the first—Chief Justice Marshall, in *M'Culloch v. Maryland*,⁶ rejects Maryland's reliance on Federalist No. 32 as authority for the state's power to tax the notes of the Bank of the United States. In the twentieth century, Federalist No. 32 has been cited in but fourteen decisions, and only five of these have occurred in the past twenty years. On the other hand, the Paper has had a recent resurgence, with three citations within the past three years. Accordingly, it is hard to predict whether Federalist No. 32 will fall from the Top Five in the not-too-distant future.

FOURTH. Federalist No. 51 (Madison)⁷—cited in twenty-six decisions of the Supreme Court.⁸ Federalist No. 51 is the

801 (1995); *id.* at 873 n.14 (Thomas, J., dissenting); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 277 n.25 (1985) (Brennan, J., dissenting); *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984); *Jones v. Rath Packing Co.*, 430 U.S. 519, 545 (1977) (Rehnquist, J., dissenting); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293 n.12 (1976); *Goldstein v. California*, 412 U.S. 546, 552-53 (1973); *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 545-46 (1959) (Frankfurter, J. dissenting); *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 558 n.5 (1959) (Frankfurter, J., dissenting); *Pennsylvania v. Nelson*, 350 U.S. 497, 512 n.1 (1956) (Reed, J., dissenting); *New York v. United States*, 326 U.S. 572, 596 (1946) (Douglas, J., dissenting); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941); *Dooley v. United States*, 183 U.S. 151, 169 (1901) (Fuller, J., dissenting); *Covington & Cincinnati Co. v. Kentucky*, 154 U.S. 204, 212 (1894) (quoting from *Cooley v. Board of Wardens*, 53 U.S. 299, 318 (1851)); *Leisy v. Hardin*, 135 U.S. 100, 109 (1890); *Transportation Co. v. Wheeling*, 99 U.S. 273, 280 (1878); *Gilman v. Philadelphia*, 70 U.S. 713, 730 n.28 (1865); *Cooley v. Board of Wardens*, 53 U.S. 299, 318 (1851); *Smith v. Turner*, 48 U.S. 283, 352, 369, 374, 396 (1849); *id.* at 471, 479 (Taney, C.J., dissenting); *id.* at 503-04 (Daniel, J., dissenting); *id.* at 533 (Woodbury, J., dissenting); *Fox v. Ohio*, 46 U.S. 410, 411, 418, 439 (1847) (McLean, J., dissenting); *Thurlow v. Massachusetts*, 46 U.S. 504, 606 (1847) (Catron, J., dissenting); *Brown v. Maryland*, 25 U.S. 419, 430, 432, 456 (1827) (Thompson, J., dissenting); *Houston v. Moore*, 18 U.S. 1, 9 n.a, n.b, 49 (1820) (Story, J., dissenting); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 433-35 (1819). Note that the six earliest decisions which include citations to Federalist No. 32 are all prior to 1850, and that these early citations were predominately in dissenting opinions.

5. U.S. Const., Art. I, § 10. The prohibition permits Congress to authorize such impost or duties, and further permits the imposition of such duties as "may be absolutely necessary for executing its inspection Laws." *Id.*

6. 17 U.S. (4 Wheat.) 316, 433-35 (1819).

7. Rossiter, *The Federalist Papers* at 320 (cited in note 3).

8. *Clinton v. New York*, 118 S. Ct. 2091, 2124 (1998) (Breyer, J., dissenting); *Printz*

justly famous essay on checks and balances among the branches of the federal government. Its fourth paragraph, which begins, "But the great security against gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others," and continues through reflections on human nature and the need to design a government that can control itself, is one for which Publius remains well-known to students of American government.⁹ The most striking feature of the citation pattern for Federalist No. 51 is the relative recency of its popularity with the Court. There are no nineteenth century citations to Federalist No. 51, and only one of the twenty-six citations occurred prior to 1960. Questions of separation of powers in the federal government have been matters of concern to the United States from the beginning of the Republic, but they have been the stuff of frequent adjudication for a much briefer period.

THIRD. Federalist No. 81 (Hamilton)¹⁰—cited in twenty-seven decisions of the Supreme Court.¹¹ Federalist No. 81 is a

v. United States, 117 S. Ct. 2365, 2378 (1997); *Clinton v. Jones*, 117 S. Ct. 1636, 1647 n.30 (1997); *id.* at 1658-59 (Breyer, J., concurring); *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring); *New York v. United States*, 505 U.S. 144, 182 (1992); *Freytag v. Comm'r*, 501 U.S. 868, 907 (1991) (Scalia, J., concurring); *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting); *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991); *Washington Airports Authority v. Noise Abatement Citizens*, 501 U.S. 252, 285 (1991) (White, J., dissenting); *Missouri v. Jenkins*, 495 U.S. 33, 81 (1990) (Kennedy, J., concurring); *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring); *Mistretta v. United States*, 488 U.S. 361, 381, 382 n.12 (1989); *Morrison v. Olson*, 487 U.S. 654, 698-99 (1988) (Scalia, J., dissenting); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 582 (1985) (O'Connor, J., dissenting); *INS v. Chadha*, 462 U.S. 919, 947, 950 (1983); *Larson v. Valente*, 456 U.S. 228, 245 n.22 (1982); *Brown v. Harilage*, 456 U.S. 45, 56 (1982); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 87-88 (1981) (Burger, C.J., dissenting); *Coleman v. Balkcom*, 451 U.S. 949, 962 (1981) (Rehnquist, J., dissenting); *Buckley v. Valeo*, 424 U.S. 1, 122-23 (1976); *Furman v. Georgia*, 408 U.S. 238, 470 (1972) (Rehnquist, J., dissenting); *Duncan v. Louisiana*, 391 U.S. 145, 173, n.3 (1968) (Harlan, J., dissenting); *United States v. Brown*, 381 U.S. 437, 444 n.17 (1965); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 240 n.8 (1963); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 574 (1962) (Douglas, J., concurring); *Newberry v. United States*, 256 U.S. 232, 255-56 (1921). Note that the first citation to No. 51 did not occur until 1921, and the second occurred in 1962. In the era beginning with the appointment of Earl Warren as Chief Justice, No. 51 is at the top of the citation list, two ahead of No. 78. See note 13.

9. Rossiter, *The Federalist Papers* at 321-22 (cited in note 3).

10. *Id.* at 481.

11. *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2033 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54, 69, 70 n.13 (1996); *id.* at 92, 144-45 (Stevens, J., dissenting); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222, 225 (1995); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780-81 & n.81 (1991); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 310 n.4 (1990) (Brennan, J., concurring); *Morrison v. Olson*, 487 U.S. 654, 720 (1988) (Scalia, J., dissenting); *Welch v. Texas Dept. of Hwys. &*

lengthy paper, one of a series by Hamilton on the subject of the federal judicial power. It begins by explaining why the British model of a legislative branch (the House of Lords) serving as a high court of law is unwise; proceeds through a discussion of the jurisdiction of the federal courts; analyzes potential relationships among the Supreme Court, whatever inferior federal courts Congress might establish, and the state courts; defends state sovereign immunity from compulsory federal jurisdiction; and concludes by refuting an argument that the structure of federal jurisdiction would tend to abolish trial by jury. The Paper's arguments concerning state sovereign immunity are of course particularly relevant to recent Supreme Court controversies, but the citation pattern for Federalist No. 81 (like the two Papers which finished ahead of it) includes a handful of nineteenth century decisions as well.

SECOND. Federalist No. 78 (Hamilton)¹²—cited in thirty decisions of the Supreme Court.¹³ I suspect that Federalist No. 78

Pub. Transp., 483 U.S. 468, 480 n.10 (1987); *id.* at 505, 511 (Brennan, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 275-76, 277 n.25 (1985) (Brennan, J., dissenting); *South Carolina v. Regan*, 465 U.S. 367, 397 (1984) (O'Connor, J., concurring); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.39 (1982); *id.* at 113 (White, J., dissenting); *Patsy v. Board of Regents*, 457 U.S. 496, 527 n.12 (1982) (Powell, J., dissenting); *Nevada v. Hall*, 440 U.S. 410, 419 & n.16 (1979); *id.* at 436, 440 (Rehnquist, J., dissenting); *California v. Arizona*, 440 U.S. 59, 66 (1979); *Edelman v. Jordan*, 415 U.S. 651, 660 n.9 (1974); *Employees of Dept. of Pub. Health & Welfare of Missouri v. Department of Pub. Health & Welfare of Missouri*, 411 U.S. 279, 292 n.7 (1973) (Marshall, J., concurring); *id.* at 317 (Brennan, J., dissenting); *Parden v. Terminal Ry.*, 377 U.S. 184, 187 n.4, 191 n.9 (1964); *Glidden Co. v. Zdanok*, 370 U.S. 530, 551, 563 (1962); *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 641 n.21 (1949) (Vinson, C.J., dissenting); *Galloway v. United States*, 319 U.S. 372, 398 (1943); *Lynch v. United States*, 292 U.S. 571, 581 (1934); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-24 (1934); *Virginia v. West Virginia*, 246 U.S. 565, 606 n.7 (1918); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 228 (1917) (Pitney, J., dissenting); *Capital Traction Co. v. Hof*, 174 U.S. 1, 6 (1899); *Hans v. Louisiana*, 134 U.S. 1, 12 (1890); *Florida v. Georgia*, 58 U.S. 478, 518 (1854) (Campbell, J., dissenting); *Waring v. Clarke*, 46 U.S. 441, 481 (1847) (Woodbury, J., dissenting). As is the case with Federalist No. 32, see note 4, many of the earliest citations to No. 81 are in dissenting opinions.

12. Rossiter, *The Federalist Papers* at 464 (cited in note 3).

13. *Kansas v. Hendricks*, 117 S. Ct. 2072, 2098 (1997) (Breyer, J., dissenting); *Schenck v. Pro-Choice Network of Western New York*, 117 S. Ct. 855, 875 (1997) (Scalia, J., dissenting); *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996); *Missouri v. Jenkins*, 515 U.S. 70, 129, 133 (1995) (Thomas, J., concurring); *Hubbard v. United States*, 514 U.S. 695, 711 (1995); *id.* at 716 (Scalia, J., concurring); *id.* at 719 (Rehnquist, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 601 n.9 (1995); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222-23 (1995); *Nixon v. United States*, 506 U.S. 224, 233 (1993); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting); *Payne v. Tennessee*, 501 U.S. 808, 849 (1991) (Marshall, J., dissenting); *Freytag v. Comm'r*, 501 U.S. 868, 903, 907 (1991) (Scalia, J., concurring); *Missouri v. Jenkins*, 495 U.S. 33, 65 (1990) (Kennedy, J., concurring); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring); *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481

was the most common guess for first place among the readers of this essay; indeed, Federalist No. 78 is the twentieth century leader, with citations in twenty-eight decisions of the Supreme Court. Federalist No. 78, the first in the series of Hamilton's essays on the federal judicial power, addresses the subject of the independence of the federal judiciary, and (in relation to that independence) the argument in support of judicial review of the constitutionality of the acts of the other branches. The argument in Federalist No. 78 for judicial review, identifying the judges as the agents of the people in enforcing the Constitution against *ultra vires* acts of other branches, is at the heart of Chief Justice Marshall's reasoning in *Marbury v. Madison*,¹⁴ accordingly, Federalist No. 78 is probably better known among American law students, legal academics, judges, and lawyers than any other single paper.

And the winner is:

FIRST. Federalist No. 42 (Madison)¹⁵—cited in thirty-three decisions of the Supreme Court.¹⁶ No. 42 is the second in a series

U.S. 787, 818, 824 (1987) (Scalia, J., concurring); *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 861 (1986) (Brennan, J., dissenting); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58, 59 n.10, 86 n.39 (1982); *id.* at 113 (White, J., dissenting); *United States v. Raddatz*, 447 U.S. 667, 704, 712 n.10 (1980) (Marshall, J., dissenting); *United States v. Richardson*, 418 U.S. 166, 193 (1974) (Powell, J., concurring); *Furman v. Georgia*, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting); *United States v. Brown*, 381 U.S. 437, 444 n.17, 462 (1965); *Reid v. Covert*, 354 U.S. 1, 36 n.66 (1957); *Dennis v. United States*, 339 U.S. 162, 182 (1950) (Frankfurter, J., dissenting); *United States v. Lovett*, 328 U.S. 303, 314 (1946); *O'Malley v. Woodbrough*, 307 U.S. 277, 285 (1939) (Butler, J., dissenting); *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933); *Evans v. Gore*, 253 U.S. 245, 249 (1920); *McAllister v. United States*, 141 U.S. 174, 197 (1891) (Field, J., dissenting); *Ex Parte Garland*, 71 U.S. 333, 388 (1866) (Miller, J., dissenting). Note that only two of the citations to No. 78 are from the nineteenth century, and both are in dissenting opinions.

14. 5 U.S. (1 Cranch) 137 (1803).

15. Rossiter, *The Federalist Papers* at 264 (cited in note 3).

16. *Printz v. United States*, 117 S. Ct. 2365, 2405 (1997) (Breyer, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 592 (1995) (Thomas, J., concurring); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995); *Oregon Waste Systems v. Environmental Dept.*, 511 U.S. 93, 98 (1994); *New York v. United States*, 505 U.S. 144, 158, 180 (1992); *Dennis v. Higgins*, 498 U.S. 439, 453 (1991) (Kennedy, J., dissenting); *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 111 (1989) (Marshall, J., dissenting); *Tyler Pipe Indus. v. Washington State Dept. of Revenue*, 483 U.S. 232, 264 (1987) (Scalia, J., dissenting); *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 234 n.4 (1985); *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982); *Reeves, Inc. v. Stake*, 447 U.S. 429, 448 (1980) (Powell, J., dissenting); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 n.12 (1979); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 142, 151 n.16 (1978) (Blackmun, J., dissenting); *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 754 n.19 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 n.4 (1976); *Goldstein v. California*, 412 U.S. 546, 559 n.14 (1973); *Banco Nacional de Cuba v. Sab-*

of Papers on the scope of federal power generally. The first, No. 41, is chiefly concerned with congressional power to protect the security of the nation against foreign dangers (e.g., by declaring war, raising armies, calling the militia, and taxing and spending for defense). No. 42 moves on, initially, to the subject of “[t]he *second* class of powers lodged in the general government . . . which regulate the intercourse with foreign nations, to wit: to make treaties; to send and receive [representatives of foreign nations]; to define and punish piracies and [other] . . . offenses against the law of nations; to regulate foreign commerce [including special limitations on regulation of the slave trade].”¹⁷ After some intriguing remarks on the issue of the slave trade,¹⁸ the paper moves on to the subjects for which it is more widely known—“powers included in the *third* class . . . which provide for the harmony and proper intercourse among the States.”¹⁹ Publius describes the rest of this Paper as a “cursory review”²⁰ (which it is) of the remaining powers, including most prominently the power “to regulate commerce among the several States and the Indian tribes.”²¹ Cursory or not, the Paper is the leader in Supreme Court citations, having been cited in seven decisions in the nineteenth century (placing it second behind No. 32 in that time period) and in twenty-six decisions in the twentieth century (placing it second behind No. 78 in this period). The wide range of subjects canvassed in the Paper may well have contributed to the high citation rate. In the period from 1970 to date, however, in which the rate of Supreme Court citations has

batino, 376 U.S. 398, 451 n.12 (1964) (White, J., dissenting); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 374 (1964); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 144 n.2 (1951) (Black, J., concurring); *Joseph v. Carter and Weekes Stevedoring*, 330 U.S. 422, 428 n.8 (1947); *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 76 n.3 (1946); *Hines v. Davidowitz*, 312 U.S. 52, 62 n.9, 73 n.35 (1941); *South Carolina State Hwy. Dept. v. Barnwell Bros.*, 303 U.S. 177, 186 (1938); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935); *Employers' Liability Cases*, 207 U.S. 463, 519 (1908) (Moody, J., dissenting); *Hanover National Bank v. Moyses*, 186 U.S. 181, 187 (1902); *Ex Parte Clarke*, 100 U.S. 399, 412 (1879) (Field, J., dissenting); *Legal Tender Cases*, 79 U.S. 457, 608 n.169 (1870) (Clifford, J., dissenting); *Woodruff v. Parham*, 75 U.S. 123, 135 (1868); *Scott v. Sandford*, 60 U.S. 393, 578 (1856) (Curtis, J., dissenting); *Smith v. Turner*, 48 U.S. 283, 474 (1849) (Taney, C.J., dissenting); *id.* at 511 (Daniel, J., dissenting); *id.* at 526, 534, 543 (Woodbury, J., dissenting); *Cherokee Nation v. Georgia*, 30 U.S. 1, 64 (1831) (Thompson, J., dissenting); *United States v. Smith*, 18 U.S. 153, 159 n.a (1820). Note that, as with others in the top Five, the bulk of nineteenth century citations are in dissenting opinions.

17. Rossiter, *The Federalist Papers* at 264 (cited in note 3).

18. *Id.* at 266-67.

19. *Id.* at 267.

20. *Id.*

21. *Id.*

exploded,²² Federalist No. 42 ranks third behind Nos. 51 and 78. This suggests that, despite the staying power of No. 42, the rankings are in the process of change.

The list deserves several footnotes on the Papers that didn't make it. Nos. 48 (Madison) and 80 (Hamilton) tied for sixth, cited in twenty decisions each, and No. 44 (Madison) was eighth, cited in eighteen decisions. The most intriguing omission from the list is No. 10, Madison's incisive essay on the role of shifting factions in the protection of liberty in a large republic. The attraction to No. 10, at least among judges, is a creature of late twentieth century thought; No. 10 was first cited in the Supreme Court in 1974,²³ and has been cited in twelve decisions (all after 1980) since then.²⁴

Finally, it seems fair to conclude that Papers by Hamilton and Madison are of roughly equal stature among the Justices; each has four among the top eight. (Unsurprisingly, none of the Papers authored by John Jay, of which there are only five,²⁵ made the list.) But Hamilton authored twice as many Papers as Madison,²⁶ suggesting that the Justices, like so many others, treat "Madison's contribution . . . [as] far more important for the present reputation of Publius than its modest size would indicate."²⁷

22. See Lupu, 66 Geo. Wash. L. Rev. (cited in note 2).

23. *Storer v. Brown*, 415 U.S. 724, 736 (1974).

24. *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1374 (1997); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 428 (1995); *id.* at 438 (O'Connor, J., concurring); *id.* at 449 (Souter, J., dissenting); *Adarand Constructors, Inc. v. Peña, Secretary of Trans.*, 515 U.S. 200, 251 (1995) (Stevens, J., dissenting); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1072 n.7 (1992) (Stevens, J., dissenting); *Norman v. Reed*, 502 U.S. 279, 299 (1992) (Scalia, J., dissenting); *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 389 (1991) (Stevens, J., dissenting); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 710 (1990) (Kennedy, J., dissenting); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988); *Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271, 285 (1984); *Anderson v. Celebrezze*, 460 U.S. 780, 813 (1983) (Rehnquist, J., dissenting); *Brown v. Hartlage*, 456 U.S. 45, 56 n.7 (1982). Note that seven of the twelve citations are in separate opinions, rather than in an opinion for the Court.

25. Rossiter, *The Federalist Papers* at xi (cited in note 3).

26. *Id.* (citing Douglass Adair's scholarship for the conclusions that Jay wrote five Papers, Madison wrote twenty-six, Hamilton wrote fifty-one, and Hamilton and Madison co-authored three).

27. *Id.*