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The Federalist and the Fourteenth Amendment– Publius in Antebellum Public Debate, 1788-1860

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*Kurt T. Lash**

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INTRODUCTION

The Federalist Papers occupy a unique place among historical discussions of the federal Constitution. Internationally famous as a work of political science,¹ the essays of “Publius” have particular importance to American constitutional theorists who seek to

* E Claiborne Robins Distinguished Professor of Law, University of Richmond Law School. My thanks to Jeremy Baily, Jud Campbell, Benjamin Kleinerman, Phillip Muñoz, and Kevin Walsh for their comments and suggestions. Thanks also to the participants at the 2021 American Political Science Association Conference panel on The Federalist Papers for their helpful feedback on an initial draft of this essay.

1. See GOTTFRIED DIETZE, *THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT* 7–16 (1960) (describing The Federalist Papers as “universally recognized as being relevant for problems of constitutional government,” and noting their particular historical importance in Latin America, France, Germany, Italy and Great Britain). There are various collections of essays devoted to analyzing The Federalist Papers. See, e.g., *THE CAMBRIDGE COMPANION TO THE FEDERALIST* (Jack N. Rakove & Colleen A. Sheehan eds., 2020); *SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING* (Charles R. Kesler ed., 1987).

understand the historical meaning of the federal Constitution.² The Supreme Court has cited *The Federalist Papers* in hundreds of cases,³ and for more than two hundred years every generation of constitutional scholars has debated and discussed the essays in countless books and articles.⁴

Despite their fame, modern scholars often question whether *The Federalist Papers* are reliable guides to the original understanding of the Constitution. William Crosskey, for example, argued that *The Federalist Papers* “contain much of sophistry; much that is merely distractive; and some things . . . which come perilously near to falsehood.”⁵ Publius displayed an “utter confusion” over the first principles of American government and “*The Federalist’s* sophistries, its inconsistencies, distractions, and other tricks, are obvious today.”⁶ James Ducayet similarly claims

2. See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS xv (“Nothing equals [The Federalist Papers] in analytical breadth and conceptual power.”); HANS JOACHIM MORGENTHAU, TRUTH AND POWER: ESSAYS OF A DECADE, 1960–70, at 28 (1970) (“*The Federalist* is . . . an unsurpassed compendium of political truth.”); THE FEDERALIST PAPERS vii (Clinton Rossiter ed., 1961) (“[The Federalist is] the most important work in political science that has ever been written, or is likely ever to be written in the United States. It is, indeed, the one product of the American mind that is rightly counted among the classics of political theory.” “[A]mong the sacred writings of American political history,” “[i]t would not be stretching the truth more than a few inches to say that *The Federalist* stands third only to the Declaration of Independence and the Constitution itself.”); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 662 (2009) (“[The Federalist is] surely the most important work of political theory in American history.”).

3. The earliest example is *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (Chase, J.) (describing “Publius” as an author he “esteem[ed] superior” even to Blackstone “for his extensive and accurate knowledge of the true principles of Government”). More recently, *The Federalist Papers* played a key role in the opinions of Justice Souter and Justice Scalia in *Printz v. United States*, 521 U.S. 898, 910–15 (1997) (Scalia, J.); *id.* at 971–76 (Souter, J., dissenting). For an analysis of the modern Supreme Court’s reliance on *The Federalist Papers*, see Ira C. Lupu, *The Most-Cited Federalist Papers*, 15 CONST. COMMENT. 403 (1998).

4. See CHARLES A. BEARD, THE ENDURING FEDERALIST 10 (1948) (claiming *The Federalist* was not merely “the most instructive work on political science ever written in the United States,” but “owing to its practical character, it ranks first in the world’s literature of political science”); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 615 (1969) (arguing that *The Federalist* propounded a “political theory worthy of a prominent place in the history of Western thought”). In 2007, historian Gregory Maggs wrote, “My own computer searches have revealed that more than 9700 law review articles and more than 1700 cases have referred to the essays.” Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 802 (2007).

5. 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 8–10 (1953).

6. *Id.* at 9–10.

that there is no “general consensus on why *The Federalist* ought to be regarded as an authoritative guide to the proper interpretation of the constitutional system.”⁷ According to Linda De Pauw, the Federalist essays “had little value as propaganda,” while the effect of the first bound volume on the election of delegates to the New York ratifying convention, “if any, was minuscule . . .”⁸ Historian Pauline Maier insisted that “the Federalist was probably no more effective among the people of rural New York than Mercy Warren’s *Columbian Patriot*.”⁹ Federalist Papers editor Clinton Rossiter concluded that “[t]he chief usefulness of *The Federalist* in the events of 1788 was” not in swaying the electorate, but “as a kind of debater’s handbook in Virginia and New York.”¹⁰ In short, the degree to which *The Federalist Papers* informed the framing and public understanding of the original Constitution remains a matter of significant scholarly debate.¹¹

What scholars have not previously addressed is the potential impact of *The Federalist Papers* on *later* constitutional development, in particular the framing and ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments. The omission is surprising. Constitutional historians commonly explore the influence of

7. James W. Ducayet, Note, *Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation*, 68 N.Y.U. L. Rev. 821, 840 (1993).

8. Linda Grant De Pauw, *THE ELEVENTH PILLAR: NEW YORK STATE AND THE FEDERAL CONSTITUTION* 112, 114 (1966).

9. PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 336 (2010).

10. Clinton Rossiter, *Introduction to THE FEDERALIST PAPERS* xi (Clinton Rossiter ed., 1961).

11. In addition to sources cited above, see William Baude & Jud Campbell, *Early American Constitutional History: A Source Guide 7* (Mar. 13, 2023) (unpublished manuscript), <http://dx.doi.org/10.2139/ssrn.2718777> (Although “notable mainly for their thoroughness and the brilliance of their authors,” the essays’ “significance in the ratification debates and their representativeness of founding-era views tends to be overstated . . .”); Maggs, *supra* note 4, at 822 (“[T]here is substantial reason to doubt that many of the ratifiers actually read the Federalist Papers.”); John F. Manning, *Textualism and the Role of the Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1354 (1998) (“As a piece of advocacy—and an anonymous one at that—*The Federalist* lacks similar usefulness as a window into the reasonable ratifier’s likely understanding.”); Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 665 (1999) (“[T]he *Federalist Paper*’s circulation was far too small to influence the debate, and this meager exposure, together with an excessively dry and academic style of writing, led even contemporary commentators to conclude that Publius had little effect on the outcome of ratification.”).

pre-Founding essayists like Montesquieu, Locke, and Paine.¹² It would be equally relevant to explore the influence of pre-Reconstruction essayists like Publius on the framing and ratification of the three Reconstruction Amendments. Moreover, modern constitutional scholarship is increasingly attentive to the period between the Founding and the Civil War as a source for understanding the development of constitutional law.¹³ Yet, to date, no prior scholarly work has considered the degree to which the federalism principles of The Federalist Papers informed the constitutional commitments of either the framers or ratifiers of the Reconstruction Amendments.

This Article takes the first step towards remedying this omission. The first of a two-part investigation of the role of The Federalist Papers in Constitutional Reconstruction, this essay investigates the presence of The Federalist Papers in antebellum and early Reconstruction public discussion and debate. The second essay will explore the specific use of The Federalist Papers in the debates over the framing and ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments.

In brief, the data indicates the public quickly embraced The Federalist Papers as an authoritative and reliable guide to understanding the meaning of the federal Constitution. What began as a modest stream of pre-1800 newspaper references soon swelled into a flood of essays and reported speeches in which both sides of every major constitutional dispute quoted the essays of Publius in support of their argument. Newspapers in every decade between 1820 and 1870 contain hundreds of such examples. Far and away the most commonly-cited papers were Madison's essays on federalism in Nos. 39–46. By the time of Reconstruction, these essays were the best known, and most studied, by lawyers, jurists, politicians, and newspaper-reading members of the general public.

12. See, e.g., MICHAEL P. ZUCKERT, *LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY* (2002) (discussing the influence of Locke on the American Founding); EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988); WOOD, *supra* note 4 (discussing the influence of, among others, Montesquieu, Locke, and Paine).

13. See, e.g., MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015); MARTHA S. JONES, *BIRTHRIGHT CITIZENSHIP: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018); ALISON LACROIX, *THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY FROM THE LONG FOUNDING MOMENT TO THE CIVIL WAR* (forthcoming 2024).

Despite their broad appeal, the data also reveals a significant school of “Federalist-dissenters.” Radical states-rights theorists who supported theories of nullification and secession rejected the balanced federalism articulated in essays like Federalist No. 39. By the time of the Civil War, secessionists like John C. Calhoun openly rejected *The Federalist* and the idea that the Constitution was both “partly national and partly federal.” Theorists of the new Republican Party, on the other hand, embraced both federalism and *The Federalist* as simultaneously justifying northern state resistance to slavery and explaining the indissoluble nature of the Union.

No prior scholarship has recognized, much less explored, the role of *The Federalist* in Republican constitutional theory. The data in this article suggests that doing so would illuminate both the constitutional choices of the Reconstruction Congress and deepen our understanding of the public debates that accompanied the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. That specific effort will be the focus of a second article.

Part I of this essay provides a short introduction to the origins and content of *The Federalist Papers* and the early disputes over individual authorship. Part II presents a decade-by-decade empirical investigation of antebellum and Reconstruction-era newspaper references to *The Federalist Papers* in the period 1788 to 1870. Part III discusses the results of the investigation and presents some tentative conclusions regarding its significance for understanding the role of *The Federalist* in Reconstruction constitutional debate.

I. ORIGIN AND AUTHORSHIP

The Federalist Papers are a collection of eighty-five essays written under the pseudonym “Publius,” which explained and supported the proposed federal Constitution. Individually authored by John Jay, Alexander Hamilton, and James Madison, the essays were originally published in New York newspapers between October 1787 and April 1788. After more than a century of dispute, most scholars today attribute five essays to Jay (Nos. 2–5 and 64), twenty-nine to Madison (Nos. 10, 14, 18–20, 37–58, and

62-63), and fifty-one to Hamilton (Nos. 1, 6-9, 11-13, 15-17, 21-36, 59-61, and 65-85).¹⁴

The essays' primary topics involve (1) the need for a stronger central government (Nos. 2-14); (2) the problems with the Articles of Confederation (15-22); (3) the proposed Constitution's conformity to the principles of republican government, including a limited "federalist" delegation of national power (37-50); and (4) the balancing of delegated power between the three branches of the national government (51-85).

On March 22, 1788, the New York publishing firm J. & A. McLean published THE FEDERALIST VOLUME 1, by "a citizen of New York," containing essays Nos. 1-36.¹⁵ A second bound volume containing essays 37-77 appeared that May.¹⁶ The first complete bound volume of The Federalist was published in 1792 in France,¹⁷ itself a signal that the essays would outlive the particular American debate that prompted their writing.

By 1818, there were at least nine separate editions of The Federalist.¹⁸ In 1802, George Hopkins published the first complete American edition containing all 85 essays.¹⁹ Although Hopkins named Madison, Hamilton, and Jay as the collective author "Publius," he did not attach a name to individual essays.²⁰ In 1810, William & Whiting's "Works of Alexander Hamilton" included two volumes containing the complete Federalist Papers²¹ with an authorship list supposedly prepared by Alexander Hamilton himself.²²

14. Today, historians generally agree with the authorship assignments established by the research of Douglass Adair. See Douglass Adair, *The Authorship of the Disputed Federalist Papers (I & II)*, 1 WM. & MARY Q. 97, 235 (1944); see also Jack N. Rakove & Colleen A. Sheehan, *Introduction to THE CAMBRIDGE COMPANION TO THE FEDERALIST*, *supra* note 1, at 2.

15. The first set of essays were advertised in New York newspapers as early as February 1788. See, e.g., THE N.Y. PACKET, Feb. 8, 1788, at 1 ("In the Press and Speedily will be Published, The Federalist, A collection of Essays, written in favor of the new Constitution, By a Citizen of New York. Corrected by the Author with additions and alterations."), <https://bit.ly/3or4Nvj>.

16. See, Henry Cabot Lodge, *Introduction to 11 THE WORKS OF ALEXANDER HAMILTON* xv (Henry Cabot Lodge ed., 1904), <https://oll.libertyfund.org/page/hamilton-the-federalist>.

17. See DIETZE, *supra* note 1, at 10.

18. See the account in Lodge, *supra* note 16. See also DIETZE, *supra* note 1, at 7.

19. Douglass Adair, *The Authorship of the Disputed Federalist Papers (I)*, 1 WM. & MARY Q. 97, 99 (1944) [hereinafter, "Adair I"].

20. *Id.* at 99-100.

21. 3 THE WORKS OF ALEXANDER HAMILTON (1810), <https://babel.hathitrust.org/cgi/pt?id=nyp.33433081736708&view=1up&seq=11>.

22. See Adair I, *supra* note 19, at 102.

In this list, Hamilton credited himself with writing two-thirds of *The Federalist* all by himself (63 of 85), with Madison authoring only 14.²³

James Madison's views about authorship were not made public until after he retired from the Presidency. In 1818, Jacob Gideon published a new edition of *The Federalist* which contained Madison's own account of each essay's authorship.²⁴ Madison credited himself with writing approximately forty percent of the essays, including Nos. 49–58, 62–63 (of which Hamilton had claimed authorship), and Nos. 18–20 (which Hamilton had claimed as coauthor).²⁵

Gideon's account seems to have been generally persuasive, at least until the time of the Civil War. Of the editions of *The Federalist* published between 1818 and 1857, all of them followed Gideon's attribution of authorship.²⁶ During the Civil War, Hamilton's son published a new edition of *The Federalist Papers*, this one arguing in favor of Benson's original pro-Hamilton list.²⁷ The question of authorship thus remained a matter of somewhat differing opinions, and members of the Reconstruction Congress occasionally referenced the dispute.²⁸ As we shall see, however, nothing about the

23. *See id.* at 103–04.

24. *See* THE FEDERALIST (Jacob Gideon ed., Liberty Fund 2001) (1818), <https://oll.libertyfund.org/title/jay-the-federalist-gideon-ed>. *See also* Adair I, *supra* note 19, at 104. Madison had given Gideon his personal copy of *The Federalist* with the names of the authors written at the head of each essay. *Id.*

25. Adair I, *supra* note 19, at 104.

26. *Id.* at 105.

27. The controversy was somewhat revived with the back-to-back publication of new editions of *The Federalist* by Henry B. Dawson (1863) and J.C. Hamilton (1864), with Dawson accepting Gideon's pro-Madison list and John C. Hamilton (Hamilton's son) accepting the pro-Hamilton Benson list and claiming that "the great body of the work, is Hamilton's." *See* John C. Hamilton, *Historical Notice*, in 1 THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES cxxxiii, cxxxiv (John C. Hamilton ed., 1865) [hereinafter THE FEDERALIST: A COMMENTARY]. Dawson's edition of *The Federalist* prompted the publication of two indignant letters by John Jay's grandson accusing Dawson of slighting the character of their ancestor. *See* John Jay, *Dawson's Federalist: Letter from Mr. Jay*, N.Y. EVENING POST, Feb. 16, 1864, *reprinted in* HENRY B. DAWSON, CURRENT FICTIONS TESTED BY UNCURRENT FACTS: A SERIES OF TRACTS, PERSONAL, POLITICAL AND HISTORICAL; DECLARATORY, ARGUMENTATIVE AND DOCUMENTARY 1–10 (1864), <https://catalog.hathitrust.org/Record/011632529>. For an extended discussion of the various nineteenth century editions of *The Federalist Papers*, see Henry Cabot Lodge's introduction to *The Federalist Papers* in his notes for the multivolume *Works of Alexander Hamilton* (1904). Lodge, *supra* note 16.

28. *See, e.g.,* *Speech of Ind. Rep. Mr. Kerr*, DAILY CONST. UNION, Jan. 31, 1866, at 1, <https://bit.ly/3hxAOgI>.

lingering question of specific authorship affected the widespread high regard for *The Federalist* as a source of constitutional meaning. Nor did remaining disagreement involve the most widely cited papers such as Madison's writings on constitutional federalism in Papers 39–46.

II. AN EMPIRICAL INVESTIGATION OF ANTEBELLUM NEWSPAPER REFERENCES TO THE FEDERALIST

This Part presents an empirical investigation of references to *The Federalist* Papers in antebellum and Reconstruction-era newspapers. The data is collected from the Readex collection of historical newspapers, a subscription-based collection containing thousands of newspapers, including ethnic publications, from 1690 to 1922.²⁹ Although this is only one of a number of historical newspaper databases, I believe Readex is sufficiently robust to allow reasonable, if tentative, conclusions about the presence of *The Federalist* Papers in antebellum public debate and the comparative popularity of each of the 85 essays. As one can imagine, running a variety of searches in a database containing thousands of newspapers for a historical period lasting about seventy years is a painstaking process.³⁰ I am therefore deeply indebted to my research assistant, Julia Bergamini, and her invaluable assistance throughout the many months it took to complete the basic research.

Overall, a search of the Readex historical newspaper database from 1788–1870 yields at least one reference to eighty-four of the eighty-five essays in *The Federalist* Papers (there were no discovered references to essay No. 13). There were approximately 2,000 discovered references to *The Federalist* in one form or another (e.g., “*Letters of Publius*”), with about 1,400 involving references to specific essays. Of the five most cited essays, four contained Madison's discussion of federalism in Nos. 39, 42–44, with the fifth

29. *See America's Historical Newspapers*, READEX, <https://www.readex.com/products/americas-historical-newspapers#expand-collapse-0> (last visited Mar. 16, 2023).

30. In order to accurately identify references to *The Federalist* Papers, a variety of search strategies were employed. Simply searching for “*the Federalist*” yields too many results since for several decades this was the name of a prominent political party. Making research even more complicated was the fact that sometimes writers referred to “*The Federalist*, No. [45],” other times to “*Fed. No. [45]*,” “*Fed. [45]*,” “*the forty-fifth number*,” and “*Fed. XLV.*” In early decades, writers tended to refer to “*the letters of Publius*” or just “*Publius.*”

containing Hamilton's discussion of presidential selection in No. 68. The most cited essay was Madison's No. 43.³¹

The sections that follow present the results on a decade-by-decade basis and include a general discussion of how and when the essays were used in public debate.

A. 1788–1800

From the time of their initial publication until 1800, roughly the first decade, we found about thirty separate articles referring to the essays of Publius (either generally, to a specific essay, or both). About half of these references were to specific papers. References during this period most often referred to the "the Letters of Publius" or just "Publius." One finds occasional references to "the Federalist," but this title does not seem to have become prevalent until the next decade.

As previously noted, the identity of Publius remained relatively unknown for the first few years after initial publication. One early advertisement, for example, claimed the essays were written by "a citizen of New York."³² Alexander Hamilton's name was occasionally mentioned as at least one of the authors.³³ By 1800, however, one finds repeated references to Hamilton, Madison, and Jay as joint authors, with one reference adding William Duer as a *fourth* author of *The Federalist*.³⁴

31. See *infra* Conclusion and Appendix. The Federalist No. 43 (James Madison) discusses, among other subjects, the Republican Guarantee Clause, the possibility of the enslaved joining a side in cases of "civil violence," and the amendment process in Article V.

32. See, e.g., *Advertisement*, THE N.Y. PACKET, Feb. 8, 1877, at 1 ("The Federalist, A collection of Essays, written in favor of the new Constitution, By a Citizen of New York. Corrected by the Author with additions and alterations."), <https://bit.ly/3or4Nvj>.

33. See, e.g., *Extract From a Late German Publication*, THE SPECTATOR (London), Sept. 5, 1798, at 3 ("Alexander Hamilton has, as Secretary of the treasury of the United States, written several essays on the finances . . . [H]e has a principal part in the *Federalist* published in New York in 1788 and translated to French at Paris in 1789.").

34. See, CENTINEL OF LIBERTY (D.C.), Aug. 29, 1800, at 4 ("I will refer you to the 68th number of the Federalist, which was published soon after the constitution was projected. These papers, it has been generally believed were written by the learned and truly patriotic Mr. Madison, in conjunction with Mr. Hamilton, Mr. Jay, and Mr. Duer."). Alexander Hamilton had in fact invited Duer to join the authorship team, but his contributed essays failed to make the cut. Duer published his essays separately as "Philo-Publius." See THE FEDERALIST: A COMMENTARY, *supra* note 27, at lxxxv. Duer's essays, signed "Philo-Publius," are published at the end of the second volume of J. C. Hamilton's edition of *The Federalist*.

Politicians, judges, and scholars quickly embraced *The Federalist* as an important source of constitutional meaning and theory. In a 1788 letter to James Madison, Thomas Jefferson described *The Federalist Papers* as containing “the best commentary on the principles of government which was ever written.”³⁵ That same year, George Washington wrote Alexander Hamilton and predicted that *The Federalist* would “merit the [n]otice of Posterity”³⁶ In the 1798 case, *Calder v. Bull*, Justice Samuel Chase described “Publius” as an author he “esteem[ed] superior” even to Blackstone “for his extensive and accurate knowledge of the true principles of Government.”³⁷ Similarly, an 1800 article in the *Times and District of Columbia Advertiser* cites Hamilton’s *Federalist* No. 68 as a proper guide to the “real meaning” of the Constitution:

Among the most celebrated, are the arguments of *Publius*, from the pen of Mr. Madison, General Hamilton (some have said) with Mr. Jay. These numbers were the boasts of the *Federalist*, and were acknowledged by them to contain the very best explanation of the Constitution: we have therefore with this view, published in this day’s *Examiner*, the LXVIII number of *Publius*, which will prove addition to the real meaning of the clause in the constitution which prescribes the mode of choosing electors.³⁸

The praise was not unanimous, of course. In the First Congress, for example, Elbridge Gerry suggested that the essays were written in the heat of the ratification battle and that “[u]nder such circumstances the opinions of great men ought not to be considered as authorities”³⁹ Such criticism, however, was rare. More common was effusive praise, sometimes to the point of poetry: “Oh, had I Pope’s bless’d Muse; I’d sing of Publius,—and the Constitution!, . . . Heaven interpos’d;—Conven’d our patriot men: Illum’d their minds;—and guided Publius’ pen.”⁴⁰

35. Letter from Thomas Jefferson to James Madison, in 14 *THE PAPERS OF THOMAS JEFFERSON* 187, 188 (Julian P. Boyd et al. eds., 1958).

36. Letter from George Washington to Alexander Hamilton, in 30 *THE WRITINGS OF GEORGE WASHINGTON* 65, 66 (John C. Fitzpatrick ed., 1939).

37. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798).

38. 5 *TIMES & D.C. ADVERTISER*, No. 1022, at 2 (Alexandria, Va., 1800).

39. See *Mr. Gerry’s Speech of February 7*, *GAZETTE OF THE U.S.* (N.Y.C., N.Y.), Apr. 13, 1791, at 814.

40. *A poem paying respect to the Federalist*, *MASS. CENTINEL*, Mar. 21, 1789, at 8.

It is worth noting that this first decade ended with emergence of opposing political parties, with the Federalist Party of Alexander Hamilton and John Adams aligned against the Democratic Republican Party of James Madison and Thomas Jefferson. The dispute over the Adams' administration's Alien and Sedition Acts prompted Jefferson and Madison in 1798 to draft the Kentucky and Virginia Resolutions—two of the most important political documents of the antebellum period.⁴¹ In the coming decades, a debate would emerge regarding whether the “principles of ‘98” or the essays of Publius best represented the true meaning of the original Constitution.

B. 1801–1810

There is a substantial increase in identified newspaper references in the first decade of the Nineteenth Century, 1801 to 1810. Where the first twelve years yielded about thirty total references, the next ten years produced seventy-six, with roughly half involving references to specific papers.⁴² The rise of newspaper publishing likely accounts for much of this increase (in this and in every decade of the antebellum period). Whatever the cause, newspapers were printing a constant stream of articles referring to *The Federalist*. A number of discovered references involve eulogies following the death of Alexander Hamilton in 1804.⁴³ The majority of references, however, involve substantive use of the essays and indicate a general appreciation of their value in constitutional debate.

The two most cited essays were No. 78 (seven specific references⁴⁴) and No. 46 (five). Others cited more than once included Nos. 17 (2), 44 (2), 48 (2), 54 (2), and 68 (2). Compared to the previous decade, writers increasingly used the name “*The Federalist*,” in addition to “*Publius*” or the “*Letters of Publius*.” By the end of this decade, it appears the names of the three authors were generally known, along with the fact that the bulk of the

41. For texts of the Alien and Seditions Acts and the Kentucky and Virginia Resolutions, see 1 *THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS* 35–39 (Kurt T. Lash ed., 2021) [hereinafter *RECONSTRUCTION AMENDMENTS*].

42. For identified references to specific papers, see *infra* Appendix.

43. See, e.g., *Eulogy on Hamilton*, VA. ARGUS, Aug. 25, 1804, at 2 (“His letters of Publius are a manual for future statesmen.”).

44. A congressional speech containing a specific reference to one of *The Federalist* essays is counted as *one* specific reference, even if reprinted in multiple newspapers.

essays were drafted by Madison and Hamilton.⁴⁵ This knowledge allowed political critics to accuse authors of having departed from their previously published views in *The Federalist*.⁴⁶

The *Federalist* itself was widely popular. Members of Congress frequently cited the essays, with one member declaring that “[a]mong those publications which were written for the purpose of explaining and recommending this Constitution, the most celebrated are those pieces over the signature of ‘Publius’”⁴⁷ The status of *The Federalist* in the public’s mind as an authoritative guide to constitutional meaning was further bolstered by the Supreme Court’s reliance on the “letters of Publius” in *Fletcher v. Peck*⁴⁸ (an opinion published in national newspapers),⁴⁹ and by St. George Tucker’s ubiquitous reliance on *The Federalist Papers* in his 1803 constitutional treatise, *A View of the Constitution*.⁵⁰ Lawyers were aware of the arguments in *The Federalist* and, in

45. See, e.g., *A Brief Review of the Public Life and Writings of General Hamilton*, ALBANY CENTINEL, Aug. 11, 1804, at 2 (Jay wrote “but a very inconsiderable share of the work”).

46. See, e.g., Letter to the Editor, THE REPUBLICAN (Balt., Md.), Sept. 28, 1803, at 2 (“It is true that Mr. Madison has since associated himself with the enemies of the constitution, although in the convention he was a strenuous federalist. See his letters in the *Federalist*.”). See also *View of the Parties in the United States; Horatius*, PORTSMOUTH ORACLE (N.H.) Nov. 26, 1808, at 1 (“Quantum mutatus, ab illo Caesare.” “How changed from that Madison, who in conjunction with Hamilton, so powerfully supported the principles of the constitution, so ably refuted the objections urged by its enemies, and so eloquently advocated its adoption!”); *To the American Tories*, THE STRENGTH OF THE PEOPLE (Charleston, S.C.), Nov. 1, 1809, at 2 (“Colonel Hamilton having failed in his attempt to impose on the people of the United States a monarchical form of government, had the sagacity to turn about and deceitfully advocate the Constitution”); 2 ANNALS OF CONG. 1977 (1791) (debate on the Bank bill) (“[A]n honorable gentleman . . . brought forward the observations of the author of the *Federalist*, vol. 2, p. 72, 73, and 74, to show a different contemporaneous exposition of the Constitution, and charged the author, who he alleged was said to be also the author of the present plan before the House, with a change of sentiment.”) (an apparent reference to Hamilton).

47. 11 ANNALS OF CONG. 577 (1802) (speech of Rep. Stanley).

48. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 144 (1810) (“There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures.”).

49. *Supreme Court of the United States. Fletcher v. Peck, Johnson, Judge*, THE STAR (Raleigh, N.C.), Apr. 12, 1810, at 60.

50. The citations are ubiquitous throughout Tucker’s work. See, e.g., 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 141, 143, 147–50, 152–53, 176, 185, 186, 191, 194, 196, 209, 229, 237–38, 240, 254–255, 277, 286, 336, 360, 369–370 (1803).

Marbury v. Madison, put them to use in their arguments before the Supreme Court.⁵¹

The Federalist also received praise as a remarkable work of political science. A writer in the *Salem Gazette*, for example, declared that “he who wishes to be acquainted with the science of government should read the papers called the *Federalist*, written chiefly, and all reviewed, by the immortal Hamilton. There will be little necessity to read any other book.”⁵² Similarly, an essay in the *Weekly Inspector* praised “the Federalist [as] a work which ought to be read with assiduity by those who would comprehend the political interests of united America.”⁵³ Just as often, writers praised The Federalist as a reliable guide to the meaning of constitutional text,⁵⁴ which had helped secure ratification of the Constitution.⁵⁵

By the end of the decade, one finds essays assuming that the public is *already* familiar with the basic arguments in The Federalist. For example, in an 1809 essay against federal control of the press, the writer notes that the existence of such power was “ably refuted by the authors of the Federalist, by showing this was one of our unalienable rights, that it did not require the affirmative or positive protection of the Constitution, because it never could be violated by Congress without an infringement of the rights of the Citizen.”⁵⁶ The writer here is referencing Hamilton’s defense of the omission

51. See Maggs, *supra* note 4, at 819. See also *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 304 (1803) (argument of C. Lee for plaintiff in error) (“That this was the principle intended to be guarded by the constitution is evident from the contemporaneous exposition of that instrument, published under the title of *The Federalist*, and written, as we all know, by men high in the esteem of their country. Federalist, vol. 2. No. 78.”).

52. *The Federalist*, SALEM GAZETTE (Mass.), Dec. 1, 1807, at 3.

53. WKLY. INSPECTOR (N.Y.C., N.Y.), Aug. 30, 1806, at 7.

54. *For the Citizens*, REPUBLICAN WATCH-TOWER (N.Y.C., N.Y.), Oct. 11, 1808, at 3 ([Federalist No. 68] contains “the spirit and expounds the letter of the Constitution.”).

55. VA. ARGUS, Mar. 25, 1808, at 2 (“It is sufficient for us to say that Publius had a prodigious effect in securing the adoption of the Constitution, and by its *friends* is universally esteemed as containing generally a correct exposition of the meaning of its several clauses, as well as an admirable vindication of the whole collectively.”); *Farmer – No. VI.*, NAT’L INTELLIGENCER, (D.C.), July 13, 1808, at 3 (“It might, perhaps, be saying too much to affirm that the federal government would not have been adopted but for these writings; but it is indisputable that they were the ablest offered in its defence, and did more than any other to insure its adoption.”).

56. *Constitutional Inquiries*, THE REPERTORY (Bos., Mass.), Jan. 13, 1809, at 1.

of a federal Bill of Rights in Federalist No. 84,⁵⁷ even though the specific essay is never named. The writer simply presumes that the reader is familiar with the arguments and their source.

C. 1811–1820

References to The Federalist from 1811 to 1820 more than doubled over the prior decade, from 76 to 169. The most frequently cited essays were Nos. 44 (10), 68 (10), 46 (10), 41 (8), and 42 (9). Debates over internal improvements and national power prompted a number of references to Nos. 44, 45, and 46,⁵⁸ while arguments over “Mr. Madison’s Embargo” prompted references to Nos. 41 and 42.⁵⁹ Continued disputes over the caucus system prompted references to No. 68.⁶⁰ Finally, the War of 1812 and issues relating to the militia raised issues discussed in Hamilton’s No. 29.⁶¹

Speakers and writers also increasingly invoked “The Federalist” without quoting a particular passage or number. The name alone carried sufficient authority.⁶² Unlike postadoption commentary, The Federalist was a “work contemporaneous with the adoption of the constitution”⁶³ Accordingly, the Federalist

57. See THE FEDERALIST NO. 84 (Alexander Hamilton) (“For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”).

58. See *Debate in the House of Representatives on Internal Improvement*, ALEXANDRIA GAZETTE (Va.), Sept. 17, 1818, at 2 (Mr. Mercer’s speech of March 12 continued), <https://bit.ly/3gOsUyB>.

59. *Unconstitutionality of the Embargo!*, DEDHAM GAZETTE (Mass.), Feb. 11, 1814, at 1 (“In the forty-second number of the Federalist, Mr. Madison says, that the power of regulating commerce among the several states, was given to the General Government.”), <https://bit.ly/2Gn2GH3>.

60. See *Caucus Nomination*, THE COLUMBIAN (N.Y.C., N.Y.), Jan. 30, 1816, at 2.

61. See *The Militia*, DAILY NAT’L INTELLIGENCER (D.C.), June 7, 1813, at 2.

62. See, e.g., *General King’s Speech*, DAILY NAT’L INTELLIGENCER (D.C.), June 8, 1819, at 2 (“I hold a work of great authority in my hand, sir, it is the Federalist itself.”); *House of Representatives*, ALEXANDRIA HERALD (Va.), Nov. 27, 1818, at 2 (“He could not put his hand on the page, or on the letter, but he believed it would be found that in one of the pages of the Federalist, the authority of which he presumed at least the gentleman from New-York would respect.”).

63. *The Freeholders of Loudon to the Freeholders of Virginia*, ALEXANDRIA GAZETTE (Va.), Sept. 5, 1812, at 2 (“In a work contemporaneous with the adoption of the constitution, and written in conjunction by three of the most distinguished citizens of the United States, two of whom assisted in forming the constitution, and one of whom is now President of the

was “received in all our Courts of law, and studied by all of our statesmen, as the best expounder of the terms of the compact,”⁶⁴ and “a work . . . now acknowledged by all to be a clear and a just exposition of the constitution”⁶⁵

Judges disagreeing with the opinions of Publius found themselves having to justify their departure from what was becoming a canonical text. In 1815, for example, the Virginia Judge Spencer Roane dismissed *The Federalist* as “a mere newspaper publication.” According to Roane in his soon to be reversed opinion *Hunter v. Martin*:

With respect to the work styled “the Federalist,” while it’s general ability is not denied, it is liable to the objection, of having been a mere newspaper publication, written in the heat and hurry of the battle, (if I may so express myself,) before the constitution was adopted, and with a view to ensure its ratification. It’s principal reputed author was, an active partizan of the constitution, and a supposed favourer of a consolidated government Whatever weight may be attached to contemporaneous exposition, in other cases, little credit is certainly due to the construction of those, who were parties to the conflict⁶⁶

Chief Justice John Marshall also pushed back against the authority of *The Federalist*, though Marshall did so with a bit more finesse than Judge Roane. In *McCulloch v. Maryland*, Marshall gently cautioned against making *The Federalist* the final word in constitutional interpretation:

United States, we have the following exposition of their views”). See also *Debate on the Missouri Bill*, DAILY NAT’L INTELLIGENCER (D.C.), June 21, 1820, at 2 (“What construction was given this article by contemporaneous expositions? In that most able commentary on the Constitution of the United States, called the Federalist, which is known to be the joint production of Mr. Madison, General Hamilton, and ‘that great civilian Mr. Jay,’ we have a construction which will be found in No. 42 of that work.”); *Washington*, DAILY NAT’L INTELLIGENCER (D.C.), Oct. 28, 1820, at 3 (“Look at the numbers of the Federalist, the contemporaneous expositions of the Constitution by its framers—a work whose authority the editor of the Gazette would be among the last to reject”); *Legal Opposition*, N. WHIG (Hudson, N.Y.), Feb. 15, 1814, at 2 (noting *The Federalist* is “the best expounder of the terms of the compact,” and is “entitled to the highest respect as a contemporaneous exposition of the instrument by its authors”).

64. *Legal Opposition*, *supra* note 63, at 2.

65. *A Friend of the Constitution – No. VI.*, GAZETTE AND ALEXANDRIA DAILY ADVERTISER (Va.), July 6, 1819, at 2.

66. See *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 27–28 (1815), *rev’d by Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

In the course of the argument, the *Federalist* has been quoted; and the opinion expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed.⁶⁷

However much judges might have resented the growing reputation of Publius as a guide to constitutional interpretation, the well-known status of *The Federalist* guaranteed its use in arguments before courts of law.⁶⁸ Not surprisingly, the Supreme Court cited the arguments of Publius when they supported its judgment. Only a year after Marshall's opinion in *McCulloch v. Maryland*, Justice Bushrod Washington cited *The Federalist* in support of the majority's decision in *Houston v. Moore*.⁶⁹

In general, one finds references to *The Federalist* in every major constitutional debate of the decade, including federal power over the militia during the War of 1812,⁷⁰ President Madison's embargo,⁷¹ the question of internal improvements,⁷² the constitutionality of the Bank of the United States,⁷³ the Supreme Court's ruling in *McCulloch v. Maryland*,⁷⁴ the admission of Missouri,⁷⁵ and slavery.⁷⁶

John Marshall himself found occasion to rely on *The Federalist*, if only anonymously. In his anonymous newspaper essays defending his opinion in *McCulloch v. Maryland*, Marshall insisted that his opinion was completely consistent with the balanced federalism

67. *McCulloch v. Maryland*, WASH. GAZETTE (D.C.), Nov. 15, 1819, at 2.

68. See *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 9 n.a (arguments of Mr. C. J. Ingersoll and Mr. Rogers) (citing "Letters of Publius, or the Federalist, Nos. 27. 32").

69. See *id.* at 26, n.a (citing "Letters of Publius, or the Federalist. No. 82").

70. See *Debates in the House of Representatives*, EVENING POST (N.Y.C., N.Y.), Jan. 23, 1812, at 2.

71. *Unconstitutionality of the Embargo!*, DEDHAM GAZETTE, Feb. 11, 1814, at 1.

72. *Debate. In the House of Representatives, on Internal Improvement*, ALEXANDRIA GAZETTE AND DAILY ADVERTISER, Sept. 17, 1818, at 2.

73. *About Mr. Madison's Speech Opposing the Establishment of a National Bank*, VA. PATRIOT (Richmond), May 18, 1816, at 2.

74. *The Chief Justice's Holding in M'ulloch v. Maryland*, NASHVILLE GAZETTE, June 2, 1819, at 1.

75. *Mr. Lowndes' Report*, WASH. GAZETTE (D.C.), Dec. 9, 1820, at 3.

76. *The Slave Question*, WKLY. AURORA (Phila., Pa.), Jan. 10, 1820, at 374.

theories of Madison's Federalist No. 39.⁷⁷ Wrote Marshall, "in a work now acknowledged by all to be a clear and just exposition of the constitution, we are told, that, according to the definitions of those terms given by its opponents, 'it is neither a national, nor a federal constitution; but a composition of both.'"⁷⁸ Marshall presumes his audience will recognize his reference to Federalist No. 39 without his naming either the source or the number. Marshall's use of *The Federalist* against more radically states' rights-oriented theories of the Constitution was a harbinger of things to come.

D. 1821–1830

References to *The Federalist* in the years 1821 to 1830 roughly tripled for a total of 447. The five most frequently referenced essays during this decade were Hamilton's No. 68 (35), Madison's No. 42 (22), Madison's No. 54 (18), Hamilton's No. 77 (16), and Madison's No. 39 (16).

Lawyers and politicians in this decade had matured in a political and legal culture in which *The Federalist* was well known. In *Cohens v. Virginia*, Chief Justice Marshall conceded that "[t]he opinion of the Federalist has always been considered of great authority,"⁷⁹ and in *McCulloch*, asserted that "[n]o tribute can be paid to [the papers] which exceeds their merit."⁸⁰ Writers commonly praised *The Federalist* and referred to the essays as a "textbook" for

77. See, e.g., John Marshall, *A Friend of the Constitution*, in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 155, 194 (Gerald Gunther trans., 1969). Criticism of Marshall's opinion in *McCulloch* triggered a lively debate in national newspapers between critics of the opinion and Marshall's defense under the pseudonym "A Friend to the Union," with all sides citing *The Federalist Papers* in support of their position. See, Hampden, *The Rights of "The States,"* Nashville Gazette, July 3, 1819, at 1; *A Friend of the Constitution*, No. VI, Alexandria Gazette (Va.), July 6, 1819, at 2. For an account of the newspaper debate, see Marshall, *supra* note 77, at 1. See also, R. Kent Newmyer, *John Marshall, McCulloch v. Maryland, and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875 (2000).

78. Marshall, *supra* note 77 at 194.

79. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821).

80. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 433 (1819). See also *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 25–26 & n.j (1820) (Justice Bushrod Washington discussing *The Federalist* No. 82); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158–59 & n.c (1820) (Justice Story mentioning *The Federalist* No. 42); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 n.a (1827) (Justice Story discussing *The Federalist* No. 29).

understanding the American Constitution.⁸¹ As had writers in the prior decade, a significant number of essays stressed the value of *The Federalist* as a reliable *contemporaneous* account of the Federal Constitution.⁸² The *Federalist* presented the understanding of “the

81. See, e.g., *To the People of Maine*, AM. ADVOC. (Hallowell, Me.), July 4, 1829, at 2 (“It is well known that the numbers of ‘Publius’ published in ‘THE FEDERALIST,’ written before the adoption of the Constitution were the production of Madison, Jay, and Hamilton, and are considered a text book.”); *Speech of Honorable George Robertson*, FRANKFORT ARGUS Ky., Mar. 17, 1824, at 1-2 (“These numbers were then, and are still considered the best exposition of the Constitution that ever was published, and are now appealed to as a text-book.”); CONN. MIRROR, May 23, 1829, at 3 (“In connexion with Gen. Hamilton and Mr. Madison, he prepared and published a series of essays under the title of the *Federalist*, which are familiar to every citizen of the United States. These essays form together the ablest exposition of the principles of our constitution which has yet been written. They may be considered as the text book of that instrument, and of our republican institutions, and of themselves would entitle the authors to imperishable fame.”); COLUMBIAN CENTINEL (Bos., Mass.), Oct. 10, 1827 (“that great political Text-Book, ‘The *Federalist*’”); *Power of Impeachment*, N.Y. EVENING POST, Sept. 25, 1821, at 2 (“Such were the enlightened opinions of the great statesmen who were the authors of the *Federalist*, the text book of American politics”); *The Judiciary*, N.Y. EVENING POST, July 7, 1821, at 2 (“On turning to the 78th number of the *Federalist*, our text book of political wisdom”); *Americus Plato*, REPUBLICAN STAR & GEN. ADVERTISER (Easton, Md.), Dec. 29, 1829, at 1-2 (“The ‘*Federalist*’ is a work, which, upon all constitutional questions, is consulted as a kind of Text-book and for this plain reason, that immediately after the formation of the Constitution”).

82. See, e.g., NORWICH CARRIER (Conn.), Mar. 31, 1830, at 2-3 (“The celebrated letters of Publius, or the *Federalist*, which forms the best contemporary exposition of the constitution, adopted the same views of the powers of the judiciary.”); Sydney, *Sydney on Retrocession*, U.S. TEL. & COM. HERALD (D.C.), Jan. 27, 1827, at 2 (“[W]e find in the 48th number of a series of papers under the signature of ‘Publius,’ written with great ability in defence of the Constitution, and of a contemporaneous date with it”); *Congressional*, DAILY NAT’L ADVERTISER (D.C.), Mar. 16, 1826, at 2 (“[T]his assertion is proved by the contemporaneous opinions and expositions of some of the most illustrious advocates of the Constitution, who promoted its adoption and participated in its formation. My allusions are to the *Federalist*, the composition of Mr. Jay, of Gen. Hamilton, and of Mr. Madison”); NAT’L GAZETTE (Phila., Pa.), Mar. 6, 1830, at 1 (“This theory nullifies the Constitution itself. It virtually places the Federal compact and National government at the mercy of each of the States. The contemporary exposition of our system, by the writers of the *Federalist*, is widely different.”); RICHMOND ENQUIRER (Va.), Apr. 19, 1825, at 3 (“Before he answers this question, we advise him to look especially to the ‘*Federalist*’ and other documents for the contemporary exposition of these words in the constitution.”); *Constitutional Question*, WASH. GAZETTE (D.C.), July 13, 1821, at 2-3 (“Let us hear what is said on this subject by the *Federalist*, that commentary written, as the court observes, in answer to objections founded, entirely on the extent of the powers of the constitution, and on its diminution of state sovereignty, while the constitution was before the nation for adoption or rejection—of course, a contemporaneous exposition, of its principles, ‘appealed to,’ says the court, ‘by all parties, on the questions, to which that instrument has given birth,’”); *Speech of Mr. Barton*, NORWICH COURIER Conn., May 5, 1830, at 1-2 (“Let us now hear the contemporaneous expositors of the Constitution, to learn if such arbitrary and unexaminable discretion

people who adopted this constitution, and that too, at the time at which they did adopt it.”⁸³ Therefore, one could safely rely on *The Federalist* in order to “ascertain the *true* meaning, affixed by the people to their own words in their written constitution.”⁸⁴

Although a distinct minority, a strain of criticism in this decade emerges from those calling for a more states'-rights-oriented interpretation of the federal Constitution.⁸⁵ In his posthumously published *New Views of the Constitution of the United States*, John Taylor of Caroline devoted almost one hundred pages of criticism to *The Federalist*.⁸⁶ By the end of the decade, southern newspapers such as *The Richmond Whig* were publishing essays rejecting the

was contemplated. Mr. Hamilton, one of the framers of the constitution, in the 77th number of the *Federalist*, says”); *RICHMOND ENQUIRER*, Apr. 25, 1826, at 3 (“It is a specified grant of limited powers: so says its very theory—so says its whole history—so says its contemporary Expositors—the Debates in the State Conventions; the writings of the *Federalist*.”); *Nullification*, AM. MERCURY (Hartford, Conn.), Sept. 8, 1821, at 3 (“The best exposition of any law, much more of the supreme law, is supposed to be contemporaneous construction, or that interpretation which its authors and others acquainted with its introduction put upon it. The framers of a law must necessarily know the design of it, and, on that account, are better qualified, after its meaning has become obscured, to give it a true construction. Madison, Hamilton, and Jay, two of whom were in the convention, and set their names to the constitution, have written very extensively upon it, and discussed it in all its bearings.”); *The General Welfare*, VT. J., Nov. 21, 1825, at 2 (“We appeal to its contemporary expositions to the *Federalist* . . . for indisputable proof, that these very words ‘the general welfare’ were intended to confer no new power upon the government of the union.”); *Splendid Government*, BOS. DAILY AM. STATESMAN, Dec. 25, 1825, at 2 (“The time has come when we should look back upon the work of our forefathers; upon their contemporaneous expositions of the constitution, upon the pages of the *Federalist*”); *Congressional*, DAILY NAT’L INTELLIGENCER (D.C.), Mar. 28, 1828, at 2 (“Very different was the meaning then given to it, as will be seen by recurrence to that contemporaneous exposition of it, the *Federalist*. In the 41st number of that work, page 224, are the following observations”); *Letters*, NORWICH COURIER (Conn.), Mar. 31, 1830, at 2–3 (“The celebrated letters of Publius, or the *Federalist*, which forms the best contemporary exposition of the constitution, adopted the same views of the power of the judiciary.”); *Speech of Mr. McDuffie*, DAILY NAT’L INTELLIGENCER (D.C.), Jan. 29, 1824, at 2 (“The intention of the Convention, on this subject, is so conclusively shewn, as to supersede argument, by a contemporary exposition of the Constitution, written by three of the most distinguished members of that illustrious body. The *Federalist*”); *The Tarriff*, KNOXVILLE REG., June 10, 1829, at 1–2 (“Nor does this important conclusion stand on the deduction of reason alone, as it is sustained by the highest contemporary authority. — Mr. Hamilton in the number of the *Federalist* already cited.”).

83. Roane, *Cotemporaneous Exposition*, *RICHMOND ENQUIRER* (Va.), Dec. 22, 1825, at 4.

84. *Id.*

85. See, e.g., Powhatan, Letter to the Editor, *RICHMOND ENQUIRER* (Va.), July 23, 1833, at 3, <https://chroniclingamerica.loc.gov/lccn/sn84024735/1833-07-23/ed-1/seq-3/> (criticism from radical states’ rights perspective).

86. See, JOHN TAYLOR, *NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES* 75–169 (1823).

importance of “contemporary exposition” such as that presented in *The Federalist*.⁸⁷

E. 1831–1840

Discovered references to *The Federalist* this decade totaled 388. Among the most cited essays during this decade were Madison’s Nos. 39 (14), 42 (13), 43 (15), 44 (20), and Hamilton’s No. 73 (13). The Nullification Crisis prompted numerous references to Madison’s essays on federalism (including critical references from southern newspapers)⁸⁸. As would increasingly be the case, the national debate over slavery prompted numerous references to *The Federalist*. Petitions opposing slavery in the District of Columbia (petitions that would be *gagged* in 1836),⁸⁹ for example, prompted a number of references to Madison’s discussion of the federal district in essay No. 43.⁹⁰

References to the papers as “Publius” or “Letters of Publius” became increasingly rare by this point, as the title “*The Federalist*” became nearly universal. The death of James Madison in 1836 prompted a new round of debate over the authorship of specific essays.⁹¹ Nothing about these lingering questions of authorship, however, affected the general public’s embrace of *The Federalist*. The essays remain a “high authority on all constitutional questions,” and “entitled greater weight in fixing the true construction of the Constitution than any other commentary whatever.”⁹² Academic institutions like the University of Virginia made *The Federalist*

87. *Constitutional Doctrine*, DAILY NAT’L INTELLIGENCER (D.C.), June 26, 1829, at 2 (reprinting an essay from the Richmond Whig) (“I shall not therefore trouble myself to notice any argument founded on what is called contemporaneous exposition. . . . The pages of the *Federalist* are filled with a series of antagonising constructions.”).

88. See, e.g., Mutius, Letter to the Editor, RICHMOND ENQUIRER (Va.), July 23, 1833, at 3 (stating that “[w]hile the profound ability [of *The Federalist*] is acknowledged, the republicans of Virginia have never regarded it as the textbook of democracy,” calling it a “mere newspaper publication”), <https://bit.ly/34VmlXd>.

89. See *US House of Representatives The “Gag” Rules May 26, 1836*, in RECONSTRUCTION AMENDMENTS, *supra* note 41, at 216.

90. See, e.g., *Slavery in the District*, ALEXANDRIA GAZETTE (Va.), Dec. 17, 1831, at 2; *Speech of Mr. Slade on the Subject of Abolition Petitions*, DAILY NAT’L INTELLIGENCER (D.C.), Mar. 7, 1840, at 2.

91. See, e.g., SALEM GAZETTE (Mass.), July 26, 1836, at 2.

92. *Speech of Mr. Rives*, ALBANY ARGUS, Mar. 22, 1833, at 1.

required reading,⁹³ and the essays were ubiquitous in congressional speeches⁹⁴ and newspaper editorials.⁹⁵

When Joseph Story published what would become the most influential constitutional treatise of the nineteenth century, *Commentaries on the United States Constitution*, he declared that the work sought to “embody . . . the whole substance of the Federalist,” which he considered an “incomparable commentary of three of the greatest statesmen of the age”⁹⁶ In the third edition of his *Commentaries on American Law*, Chancellor James Kent praised Story for “making the Federalist the basis of his Commentary”⁹⁷ “There is no work on the subject of the constitution,” wrote Kent, “that deserves to be more thoroughly studied. . . . No constitution of government ever received a more masterly and successful vindication.”⁹⁸ When Alexander de Tocqueville published *Democracy in America* in 1833 he noted, “I shall often have occasion to quote The Federalist in this work. . . . The Federalist is an excellent book, which ought to be familiar to the statesmen of all countries, although it especially concerns America.”⁹⁹ Tocqueville includes a dozen citations and quotes from Publius in Chapter VIII alone.¹⁰⁰

Its prominence in works like James Kent’s *Commentaries* and Joseph Story’s *Commentaries* cemented the antebellum status of *The Federalist* as the preeminent work on the proper understanding of the American Constitution. As the Virginian Senator W. C. Rives explained in 1833 at the height of the Nullification crisis:

93. S., *University of Virginia*, ALEXANDRIA GAZETTE (Va.), Aug. 23, 1832, at 3 (discussing *The Federalist* as an assigned book in the “law school”).

94. *The Judiciary Bill: Speech of Mr. Bibb, of Kentucky*, U.S. TEL. (D.C.), Feb. 4, 1833, at 2 (citing *Federalist* 45, 46, and 42 and praising the “Letters of Publius” as “explaining the principles of the Constitution”).

95. See, e.g., Editorial, NAT’L GAZETTE & LITERARY REG. (Phila., Pa.), Oct. 9, 1832, at 1 (“Some days ago, we quoted the Federalist to shew that it would appear to have been the intention of the framers of the federal Constitution that the electors of the President should be at liberty to select the individual. . . . Whoever shall read the 68th number of the Federalist, will be satisfied that Hamilton, Madison, and Jay took this view of the case.”).

96. Letter from Joseph Story to James Kent (June 24, 1831), quoted in R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 421–22 n.133 (1985).

97. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 241 n.a (3d ed. 1836).

98. *Id.*

99. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 118 n.‡ (Henry Reeve, trans., 4th. ed. 1841) (1838).

100. *Id.* at 91, 93, 94, 95, 99, 100, 104, 118, & 133 (see footnotes on these pages for references).

[T]he papers of the Federalist are entitled to a greater weight in fixing the true construction of the Constitution than any other commentary whatever; for it was in reference to the explanations given by it of the new system of government proposed, that the public mind throughout the United States formed its judgment in the final adoption of the Constitution.¹⁰¹

The Nullification Crisis itself might help explain why nationalist-inclined judges and scholars like Joseph Story promoted *The Federalist* as a guide to constitutional interpretation. The *contemporaneous* essays of Publius could be put forward as having a greater link to the original understanding of the Constitution than the later more radically states'-rights-oriented Virginia and Kentucky Resolutions. Madison's argument in Federalist No. 39 that the Constitution was neither wholly federal nor wholly national was a pointed rejoinder to the nullifier's claim of the absolute sovereignty of the states.¹⁰² Not surprisingly, Nullifiers like John C. Calhoun increasingly criticized *The Federalist*. According to Calhoun, although *The Federalist* was "the fullest and, in many respects, the best work on the principles of American government," it nevertheless "takes many false views and by no means goes to the bottom of the system."¹⁰³ Southern newspapers often repeated similar criticisms.¹⁰⁴

Judges continued to occasionally push back against the presumed authority of *The Federalist*. Justice Henry Baldwin in his

101. *Speech of W.C. Rives*, CHARLESTON COURIER (S.C.), Mar. 14, 1833, at 2 [hereinafter *W.C. Rives*].

102. See, e.g., *Massachusetts Legislative Report on the Annexation of Texas*, THE LIBERATOR (Bos., Mass.), Mar. 16, 1838, at 41 (citing in support of their argument against national power to annex Texas, Madison's statement that "the Constitution is in strictness neither a national nor a federal constitution, but a composition of both"). See also, *W.C. Rives*, *supra* note 101, at 2 ("[O]n this subject I will only refer gentlemen to a well known number of the Federalist, [the 39th] written by Mr. Madison . . . where it is clearly shown that [the government] is neither wholly federal or wholly national, but a composition of both."); "To the People of South Carolina," WINYAW INTELLIGENCER (Georgetown, S.C.), Jan. 18, 1832, at 1 (objecting to the national tariff, and citing *The Federalist* No. 39's discussion of the "federal" (state protective) nature of limited national power, and stressing Virginia's "celebrated resolutions" of 1798 in support of the rights of "interposition").

103. Letter from John C. Calhoun to A. D. Wallace (Dec. 17, 1840), in 15 THE PAPERS OF JOHN C. CALHOUN, 1839-1841, at 389 (Clyde N. Wilson ed., 1983).

104. See, e.g., Letter to the Editor, RICHMOND ENQUIRER (Va.), July 23, 1833, at 3 (criticizing Madison's writings in *The Federalist* and elsewhere as "fluctuating" and biased in favor of national power, and repeating Judge Roane's criticism of *The Federalist*).

concurring opinion in *Cherokee Nation v. Georgia* (1831),¹⁰⁵ for example, insisted that the Court could interpret the Constitution without aid of the “dissertation of the Federalist,” because to do otherwise “would be to substitute individual authority in place of the declared will of the sovereign power of the union, in a written fundamental law.”¹⁰⁶

F. 1841–1850

Among the 309 references to *The Federalist* from 1841 to 1850, the top cited essays were Hamilton’s No. 73 (33), Madison’s No. 43 (21), Madison’s No. 14 (22), Madison’s No. 44 (16), and Hamilton’s No. 78 (8).

The authority of *The Federalist* on constitutional matters largely went unquestioned, with the essays described as “the best exponent of the views entertained by the Framers of the Constitution.”¹⁰⁷ *The Federalist*, was “an able and unanswerable commentary of the Federal Constitution[,]” which was “almost universally received as the standard of political orthodoxy.”¹⁰⁸

Whatever one’s politics, by this decade *The Federalist* was a “well-known work,¹⁰⁹” “a text book”¹¹⁰ that “every school boy ought to know.”¹¹¹ The University of Virginia continued to assign *The Federalist* and its “distinctive principles of the government,” stating that it is “an authority to which appeal is habitually made by all, and rarely declined or denied by any, as evidence of the general opinion of those who formed, and those who accepted the Constitution of the United States, on questions as to its genuine meaning.”¹¹² An announcement/advertisement from William and Mary College also referred to *The Federalist*, referring to it as a “text book[] used on constitutional law[,]” stating that they “should be received as the best evidence of the true intent and meaning of the Constitution” and “[a]s these letters had operated to a great

105. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

106. *Id.* at 41.

107. *The Veto Power*, PEOPLE’S ADVOC. (New London, Conn.), Aug. 11, 1841, at 3.

108. *Mr. McDuffie’s Richmond Speech*, CHARLESTON COURIER (S.C.), July 10, 1844, at 2.

109. *The “Evil of the Day” Less Alarming, Yet Still Serious*, DAILY NAT’L INTELLIGENCER (D.C.), Mar. 11, 1850, at 2.

110. ALEXANDRIA GAZETTE (Va.), Sept. 15, 1845, at 2, <https://bit.ly/3noyV8U>.

111. BERKSHIRE CNTY. WHIG (Pittsfield, Mass.), Mar. 11, 1847, at 2.

112. *University of Virginia*, RICHMOND ENQUIRER (Va.), Aug. 1, 1845, at 2.

extent in effecting a ratification of the Constitution, they should be considered as an endorsement made upon the contract at the time of its execution, and therefore form a part of the instrument, shewing the true intent and meaning of the contracting parties.”¹¹³

President Tyler’s veto of the Bank Bill ensured repeated references to Federalist No. 73.¹¹⁴ The increasingly divisive question of slavery prompted multiple references to essays like Madison’s No. 38,¹¹⁵ No. 42,¹¹⁶ No. 43,¹¹⁷ and No. 54.¹¹⁸ Joseph Story relied on Madison’s argument in No. 43 that “a right . . . implies a remedy” in *Prigg v. Pennsylvania*, 41 U.S. 549 (1842).¹¹⁹ Once again, a minority of radical states’ rights advocates criticized portions of The Federalist, preferring Madison’s defense of states’ rights in his Virginia Resolutions and Report of 1800,¹²⁰ over his “partly federal and partly national” argument in Federalist No. 39.¹²¹

113. *William and Mary College*, THE MADISONIAN (D.C.), Mar. 31, 1842, at 1.

114. *See, e.g., President Tyler and the Veto Power*, CHARLESTON COURIER (S.C.), Sept. 30, 1841; *The Veto Power*, *supra* note 108, at 3.

115. *See, e.g., Mr. Van Buren*, THE UNION (D.C.), July 1, 1848, at 4.

116. *See, e.g., Is It “Needful” that Congress Should Enact A “Rule and Regulation” Excluding Slavery from the Territories of the United States?*, EVENING POST (N.Y.C., N.Y.), July 8, 1848, at 1 [hereinafter *Is It Needful*]. *See also*, G.W.F. MELLEEN, AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY 134 (1841) (quoting THE FEDERALIST NO. 42 (James Madison)).

117. *See, e.g., MELLEEN*, *supra* note 117, at 132–33; *Is it Needful*, *supra* note 116, at 1 (“Speaking of this provision of the constitution, he [Madison] says in No. 42 of the Federalist: ‘it ought to be considered as a great point gained in favor of humanity that a period of twenty years may terminate forever within these states, a traffic which has so long and so loudly braided the barbarism of modern policy’”).

118. *See, e.g., The Mississippi Address*, DAILY NAT’L INTELLIGENCER (D.C.) Apr. 27, 1850, at 2–3 (citing THE FEDERALIST NO. 43 (James Madison)); *Speech of the Hon. W.H. Seward in the Senate of the United States on the Admission of California*, MILWAUKEE CENTINEL, Mar. 28, 1850, at 2 (quoting THE FEDERALIST NO. 54 (James Madison) (erroneously attributing it to John Jay)); *Mr. Clay’s Compromise Resolutions. Speech of Mr. Houston, of Texas, in the Senate of the United States*, DAILY GLOBE (D.C.), Feb. 16, 1850, at 1–2 (“I will read from the ‘Federalist’ an extract from the writings of Mr. Madison . . .”).

119. 1 RECONSTRUCTION AMENDMENTS, *supra* note 41, at 220.

120. *See, e.g., President Polk; Mr. Madison; Federalists*, BERKSHIRE CNTY. WHIG (Pittsfield, Mass.), Aug. 27, 1846 (distinguishing the “rule of construction” “laid down by the same great civilian when he was writing with the mind of a jurist, (as in the forty-fourth number of the Federalist) but laid down in the Virginia and Kentucky Resolutions of ‘98 and ‘99, when the greatest party spirit prevailed”), <https://bit.ly/2Ubf1Aq>.

121. In his 1851 *Disquisition on Government*, John C. Calhoun expressly rejected Madison’s argument in The Federalist No. 39 that the Constitution was “partly federal and partly national.” *See* John C. Calhoun, *A Disquisition on Government and a Discourse on the Constitution and Government of the United States* (1851) in 1 THE RECONSTRUCTION AMENDMENTS, *supra* note 41, at 142.

G. 1851–1860

In the decade prior to the Civil War, references to *The Federalist* dipped a bit to 223, perhaps reflecting southern disaffection regarding the writings of Publius. Still, the essays retained their almost universal status north and south as a canonical guide to the proper understanding of the Constitution and the principles of constitutional republican government (though questions of authorship remained).¹²² Among the most highly cited essays were Nos. 38 (13), 42 (12), 43 (10), and 54 (9).

The *Federalist* remained the “great text-book of the principles of Republican Government.”¹²³ It was a “reliable authority”¹²⁴ that provided “the true construction of the Constitution.”¹²⁵ “[T]he original theory and design of the Federal Constitution, may be seen by referring to the contemporaneous exposition in *The Federalist* of the true meaning of the Constitution by its most distinguished architects.”¹²⁶ The essays of *The Federalist* were “written after the Constitution was made and before it was ratified by the states and with a view of securing its ratification,” therefore “the people of the several states when they ratified the Constitution” knew the construction that the text “was intended to bear.”¹²⁷

Common usage did not always equal common agreement. Both those who interpreted the Constitution as a pro-slavery document and those who did the opposite claimed support in Madison’s essay No. 54.¹²⁸ Similarly, both the majority and

122. See, e.g., *The Author of the Federalist*, DAILY MO. REPUBLICAN, Apr. 26, 1852, at 1.

123. *The Future*, DAILY NAT’L INTELLIGENCER (D.C.), Feb. 1, 1851, at 3.

124. *The Governor’s Veto Message*, FLORIDAN & J., Jan. 23, 1853, at 2 (citing THE FEDERALIST NO. 25 (Alexander Hamilton)).

125. *Speech of Stephen A. Douglas*, THE PRESS (Phila., Pa.), Jan. 24, 1860, at 2 (citing The Federalist No. 43 on the power of the government to protect the states from invasion).

126. *Address of Ex-Gov. Hunt*, N.Y. TIMES, Aug. 29, 1860, at 1; *Address of Gov. Hunt*, N.Y. DAILY TRIBUNE, Aug. 29, 1860, at 8. See also *Debates in the House, Mr. Smith*, DAILY GLOBE (D.C.), May 7, 1858, at 1–3 (“I desire now to call attention to what is said in the *Federalist* upon the subject, because it was a contemporaneous exposition of the Constitution; it was designed to present the Constitution in such a light to the American people as to secure its adoption.”).

127. *Speech of Stephen A. Douglas*, *supra* note 126, at 2 (citing The Federalist No. 43 on the power of the government to protect the states from invasion).

128. *Compare*, Wendell Phillip, *Mr. Sumner – The Constitution*, THE LIBERATOR (Bos., Mass.), Oct. 26, 1860, at 172 (citing The Federalist No. 54 as evidence that the Constitution recognizes slaves as property), *with Downing on Taney*, PORTLAND ADVERTISER (Me.), Mar. 31, 1857, at 1 (citing The Federalist No. 54 as evidence that the enslaved are persons with rights suppressed by slavery).

dissenting opinions in *Dred Scott* relied on The Federalist Papers, though in different ways.¹²⁹ Chief Justice Taney briefly mentioned Madison's Federalist No. 38 as indicating limited federal power over the territories prior to the adoption of the Constitution.¹³⁰ Justice Curtis's dissent, on the other hand, cited Federalist No. 42 in support of state power to grant national citizenship to Americans regardless of color (and thus establish Dred Scott's right to invoke the jurisdiction of the federal courts).¹³¹ Most powerfully, dissenting Justice McClean insisted that the writings of Publius were a far more reliable guide interpreting the federal Constitution than Taney's reliance on the *dark* history of the slave trade. Wrote McClean:

We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country. This system was imposed upon our colonial settlements by the mother country, and it is due to truth to say that the commercial colonies and States were chiefly engaged in the traffic. But we know as a historical fact, that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man.

I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations.¹³²

129. See, *The Dred Scott Case. Opinion of Justice Taney*, DAILY NAT'L INTELLIGENCER (D.C.), June 1, 1857, at 2 (quoting Taney's reference to The Federalist No. 3); *Dissenting Opinion of Mr. Justice Curtis*, DAILY NAT'L INTELLIGENCER (D.C.), June 18, 1857, at 2 (noting Curtis referenced The Federalist No. 42); *The Case of Dred Scott*, JACKSON CITIZEN (Mich.), Mar. 26, 1857, at 2 (reporting on dissenting Justice McClean's use of The Federalist).

130. See, *Dred Scott v. Sanford*, 60 U.S. 393, 447 (1857) ("And in the Federalist, (No. 38,) written by Mr. Madison, he speaks of the acquisition of the Northwestern Territory by the confederated States, by the cession from Virginia, and the establishment of a Government there, as an exercise of power not warranted by the Articles of Confederation, and dangerous to the liberties of the people."). Justice Campbell also cited The Federalist No. 38 for the same purpose. See *id.* at 503. ("Mr. Madison said, in a writing nearly contemporary, but before the confirmatory act of Virginia, 'Congress have proceeded to form new States, to erect temporary Governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy; all this has been done, and done without the least color of constitutional authority.' (Federalist, No. 38.)").

131. *Id.* at 578 (citing THE FEDERALIST NO. 42 (James Madison)).

132. *Id.* at 537.

As the above indicates, and had been increasingly the case in prior decades, the debates over slavery generated a great many references to *The Federalist*, particularly in the aftermath of *Dred Scott*.¹³³ The issue of slavery was inextricably related to issues of federal power in the territories and the reserved rights of the states, all of which generated their share of citations to *The Federalist*.¹³⁴

The most controversial theory of states' rights, of course, involved the claimed right to secede. The decade opened with both pro- and anti-secessionists invoking *The Federalist* in support of their views.¹³⁵ As noted above, proponents of the right of secession increasingly distanced themselves from the theory of balanced state and national sovereignty articulated in *The Federalist*. By the 1850s, distance had evolved into rejection. In his posthumously published "Disquisition on Government," John C. Calhoun mocked Madison's argument about a government "partly federal and partly national." Declared the ghost of Calhoun:

How strange, after all these admissions, is the conclusion that the government is partly federal and partly national! It is the constitution which determines the character of the government. It is impossible to conceive how the constitution can be *exclusively* federal, (as it is admitted, and has been clearly proved to be,) and the government *partly* federal and *partly* national. It would be just as easy to conceive how a constitution can be exclusively monarchical, and the government partly monarchical, and partly aristocratic or popular; and vice versa. . . . What can be more contradictory? This, of itself, is sufficient to destroy the authority of the work on this point,—as celebrated as it is,—without showing, as might be done, that the admissions it makes

133. See, *Downing on Taney*, *supra* note 129, at 1 (citing *The Federalist* No. 54 as evidence against Taney's opinion in *Dred Scott*).

134. Citations on this account are ubiquitous, particularly given the daily reporting of congressional speeches. See, e.g., *Debates in Congress*, DAILY GLOBE (D.C.), Mar. 2, 1855, at 4 (Mr. Gillette arguing that Madison's *Federalist* No. 43 establishes congressional power to ban slavery in "the Federal District").

135. Compare *The Constitutional Right of Secession*, MISS. FREE TRADER (Natchez, Miss.), June 18, 1851, at 2 (referring to "Mr. Hamilton, in one of his papers in *The Federalist*" as supporting rights of states to leave the Union), with *The Right of Secession*, CHARLESTON COURIER (S.C.), Apr. 9, 1857, at 1 (citing *The Federalist* No. 39 against the right of secession).

throughout, are, in like manner, in direct contradiction to the conclusions, to which it comes.¹³⁶

Calhoun now insisted that the writings of Publius contained “radical and dangerous” errors, which had “contributed, more than all others combined, to cast a mist over our system of government, and confound and lead astray the minds of the community as to a true conception of its real character.”¹³⁷ Following Calhoun’s lead, secessionist-minded Democrats promoted Madison’s “Principles of ‘98” over his writings in *The Federalist*.¹³⁸ The 1852 Platform of the Democratic Party actually condemned “federalism” and resolved that “the democratic party will faithfully abide by and uphold the principles laid down in the Kentucky and Virginia [R]esolutions of 1798, and in the report of Mr. Madison to the Virginia legislature in 1799.”¹³⁹

South Carolina’s secession marked the moment when two theories of the Constitution officially, and violently, diverged, with northern Republicans retaining their faith in *The Federalist* while Southern Democrats embraced the anti-Federalist theories of the nullifiers and John C. Calhoun.

H. 1861–1870

“All Americans know the *Federalist*. It should always have the same shelf with the Constitution of the United States. . . . It is the best existing commentary on the Constitution, and it should be the best, because it was written by the framers of the Constitution.”

- Book Review, *The Boston Post* (1863)¹⁴⁰

136. JOHN C. CALHOUN, *DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES* 152 (1851). See also John C. Calhoun, *supra* note 122, at 142.

137. CALHOUN, *supra* note 137, at 161.

138. See, e.g., ‘Justinian’ on the Sovereign Rights of the States, *THE UNION* (D.C.), Sept. 22, 1860, at 6 (supporting state sovereignty arguments with quotes from “Madison, in the Virginias Resolutions of ‘98”); Letter to the Editor, *Can the General Government Coerce Seceding States?*, N.Y. *HERALD*, Oct. 28, 1860, at 1 (additional essays by “Justinian” relying on the Virginia and Kentucky Resolutions of 1798 and 1799 in support of the right to secede); *The Constitutional Right of Secession*, *MISS. FREE TRADER*, June 18, 1851, at 2 (referring to “memorable resolutions of 1798” in support of secession).

139. See 1852 *Democratic Party Platform*, AM. PRESIDENCY PROJECT (June 1, 1851), <https://www.presidency.ucsb.edu/documents/1852-democratic-party-platform>.

140. *New Publications*, *BOS. POST*, Dec. 31, 1863, at 1 (reviewing a new edition edited by Henry B. Dawson).

During this decade, references to *The Federalist* increased somewhat to 295, despite the South's rejection of Madisonian federalism and its (violent) embrace of Calhounian secessionism. Among the highest cited essays were Nos. 39 (18), 43 (22), 44 (14), 46 (10), and 77 (10).

Civil War debates over conscription and the Enrollment Act prompted references to Madison's No. 46.¹⁴¹ The issue of recruiting Black Americans into the Union army prompted a number of references to Madison's discussion in No. 43 about the enslaved joining one side or the other in times of civil unrest.¹⁴² Madison's No. 39 was called into play on everything from discussions of the Fourteenth Amendment and the question of Black suffrage,¹⁴³ to Johnson's impeachment for abuse of the removal power.¹⁴⁴ The constitutionality of the Enrollment Act prompted quotations from Madison's No. 44 and his discussion of the "necessary and proper clause" (and its omission of the word "expressly").¹⁴⁵ The question of the President's removal power and the impeachment proceedings against Andrew Johnson for violating the Tenure in Office Act prompted a great many references to *The Federalist*, including Hamilton's No. 77, which could be read as requiring Senate approval for presidential removals¹⁴⁶ (a position Hamilton

141. *The Conscription. Encroachments of the Federal Government*, THE PATRIOT (Harrisburg, Pa.), Mar. 19, 1863, at 1.

142. See, e.g., *The Enlistment of Slaves*, THE CONST. (Middletown, Conn.), Sept. 30, 1863, at 2; *The Employment of Negroes as Soldiers*, S.F. BULL., Aug. 29, 1862, at 3.

143. *A Free Talk with a Radical*, NORWICH AURORA (Conn.), Nov. 25, 1868, at 1.

144. *Tenure in Office*, CHI. REPUBLICAN, Mar. 8, 1867, at 4.

145. *Constitutionality of the Enrolment Act*, THE PRESS (Phila., Pa.), Jan. 1, 1864, at 1 ("The forty-fourth paper of the Federalist may be regarded as one of the most valuable of the entire series, and it might now be profitably republished throughout the land.").

146. *The Question of Removals*, REPUBLICAN J. (Belfast, Me.), Sept. 21, 1866, at 2; *Appointments to and Removals from Office*, TROY WKLY. TIMES (N.Y.), Feb. 29, 1868, at 2 ("This was the intent of the framers of the constitution. Alexander Hamilton in the *Federalist* . . . has always been regarded as authority in such matters . . ."); *The Tenure of Office Law and its Repeal*, QUINCY WHIG (Ill.), Mar. 3, 1869, at 2 (citing both *The Federalist* No. 39 (James Madison) and *The Federalist* No. 77 (Alexander Hamilton)) ("Alexander Hamilton and James Madison, whose writings contributed more than all others to secure the ratification of the Constitution, and whose exposition concerning that document are universally recognized as authoritative, took this view of the subject.").

himself later declaimed¹⁴⁷), and No. 78, which declared that “no legislative act contrary to the Constitution can be valid.”¹⁴⁸

By the time of the Civil War, *The Federalist* was culturally entrenched as the leading commentary on the American Constitution. Democrats and Republicans regularly relied on *The Federalist*'s essays in congressional debates, knowing that both their colleagues and the listening public accepted Publius as an authoritative contemporaneous expositor of the Constitution.¹⁴⁹ Indeed, politicians and statesmen of the age *grew up* reading *The Federalist*.¹⁵⁰ *The Federalist* had been “adopted as a text-book” in “our institutions of learning, of wide influence, viz: the College at Williamstown and the University of New York,”¹⁵¹ since “[t]he

147. See Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 HARV. J.L. & PUB. POL'Y 149, 163 (2010).

148. See *Impeachment: Twenty-Fifth Day*, DAILY E. ARGUS (Portland, Me.), May 2, 1868, at 2; *Impeachment Proceedings*, THE CRISIS (Columbus, Ohio), May 6, 1868, at 113.

149. See, e.g., *The Bill to Force Negro Suffrage—Mr. Beck's Speech*, DAILY NAT'L INTELLIGENCER (D.C.), Feb. 8, 1869, at 2 (“[T]he true meaning of [a republican form of government] clause is apparent from the *Federalist* and the contemporaneous exposition applied by the text of the constitution of the very States which adopted the Constitution.”). See also *The Historian Motley's Impeachment of Secessionists*, NAT'L AM. (Bel Air, Md.), June 21, 1861, at 1 (The *Federalist* provides “contemporary evidence” of the original understanding of the Constitution.); *Supreme Court of Pennsylvania, Kneeder v. Lane*, THE CRISIS (Columbus, Ohio), Dec. 2, 1863, at 354 (“There is nothing in the history of the Constitution nor in those excellent contemporaneous papers, called the *Federalist*, to justify the opinion that this vast power lies wrapped up in the few plain words of the 13th clause, whilst the subsequent clauses, concerning the militia, absolutely forbid it.”); *The End of the Trial*, ANAMOSIA EUREKA (Iowa), May 14, 1868, at 1 (“[H]is reasoning upon the constitutional point of the senatorial advice as necessary to removal as to appointment was peculiarly good and strictly harmonious with the seventy-sixth Number of the *Federalist*, in which the question is fully discussed contemporaneously with the formation of the Constitution.”).

150. *Dawson's Federalist. To the Editors of the National Intelligencer*, DAILY NAT'L INTELLIGENCER (D.C.), July 12, 1865, at 2 (“[T]he letters of Publius (the *Federalist*) ‘will long remain a monument of the strength and acuteness of the human understanding. [It was] one of the very first books put into my hands in the season of youth, with earnest exhortations to study and comprehend it.”). Henry B. Dawson's introduction to his edition of *The Federalist* attracted significant commentary attention with critics objecting to his characterization of union as a “loose” confederacy of states. See *Mr. Jay's Second Letter on Mr. Dawson's "Introduction,"* EVENING POST (N.Y.C., N.Y.), Apr. 26, 1864, at 1. The introduction prompted a descendent of John Jay (also named John Jay) to publish letters disputing Dawson's introduction. *Id.* This then led to Dawson filing two actions for libel against Jay. See *Personal*, LOWELL DAILY CITIZEN & NEWS (Mass.), Oct. 17, 1865, at 2.

151. Letter to the Editor, DAILY NAT'L INTELLIGENCER (D.C.), July 12, 1865, at 2, <http://bit.ly/3sp49zS>.

Constitution cannot be thoroughly understood unless the Federalist is read and understood.”¹⁵²

This legal and cultural authority was grounded on the fact that The Federalist was written by the Constitution’s “framers” and had played a key role in securing its ratification.¹⁵³ As Chief Justice Salmon P. Chase declared in his widely published letter to the Senate regarding impeachment procedures, “The Federalist is regarded as the highest *contemporary authority* on the construction of the Constitution.”¹⁵⁴

III. ANALYSIS AND TENTATIVE CONCLUSIONS

The above data does not represent an exhaustive investigation of public discussion and debate between the Founding and the Civil War. Such an effort would require searching through thousands of additional documents across numerous historical collections. Nevertheless, the results seem robust enough to support a number of tentative conclusions.

First, The Federalist seems to have played a consistent role in public constitutional debate almost from the moment of the essays’ initial publication.¹⁵⁵ Searching this single database produced roughly two thousand references appearing in regard to every

152. Charles Scribner, Book Review, *BOS. POST*, Dec. 31, 1863, at 1 (reviewing 1 HENRY B. DAWSON, *THE FEDERALIST: A COLLECTION OF ESSAYS WRITTEN IN FAVOR OF THE NEW CONSTITUTION* (1864), <http://bit.ly/3nNjySA>).

153. *Speech of Mr. Pitts, in the House of Delegates, June 20*, *THE SOUTH* (Balt., Md.), June 24, 1861, at 1 (“Under these circumstances the source from whence we are most likely to derive a correct knowledge of the motives and the objects of the framers of the Government is the Federalist, written by men who eminently aided in its formation, and but for whose vigorous defence the Constitution of 1788 would never have been adopted.”); *Ewing on the Appointment Power*, *CINCINNATI DAILY GAZETTE*, Apr. 13, 1868, at 2 (“[The Federalist presents] [t]he opinion which the framers of the Constitution held, and which they promulgated to the people, to induce them to sanction that instrument.”).

154. *Impeachment, The Rules and Mode of Procedure, Chief Justice Chase’s Letter*, *RICHMOND WHIG*, Mar. 6, 1868, at 2 (emphasis added). See the same in *THE CRISIS* (Columbus, Ohio), Mar. 11, 1868, at 54; *THE SUN* (Balt., Md.), Mar. 5, 1868, at 2; *ALEXANDRIA GAZETTE* (Va.), Mar. 5, 1868, at 2; *SPRINGFIELD WKLY. REPUBLICAN* (Mass.), Mar. 7, 1868, at 1; and *PUBLIC LEDGER* (Phila., Pa.), Mar. 5, 1868, at 1.

155. Some scholars suggest that early Supreme Court use of The Federalist helped establish the work’s reputation. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1498 n.285 (1987) (noting that early Supreme Court accorded The Federalist a special status). In fact, the evidence can be read to suggest the opposite. The reputation of Publius appears to have developed independently of judicial citation and seems to have been driven by factors independent of the early Supreme Court’s imprimatur.

major public constitutional dispute from 1800 to 1870. Tracking antebellum newspaper references to *The Federalist* results in a kind of *greatest hits* of antebellum public debate, with the essays appearing in disputes over the Bank of the United States, presidential elections, the War of 1812, federal internal improvements, the Missouri Compromise, the slave trade, slavery in the Territories, the Nullification Crisis, presidential removal power, the presidential veto, the congressional “gag rules,” the *Dred Scott* decision, and secession.

Second, by the time of Reconstruction, the American public had broadly embraced *The Federalist Papers* as a canonical guide to interpreting the American Constitution. For northern constitutional theorists, the “contemporaneous”¹⁵⁶ aspect of *The Federalist* gave it a cultural and theoretical edge over the Virginia and Kentucky Resolutions and Madison’s Report of 1800—the preferred interpretive guides of southern radical states’ rights theorists.¹⁵⁷ Indeed, those preferring a more nationalist interpretation may have embraced the balanced federalism of *The Federalist* more enthusiastically than they might have otherwise *in order* to create a counter interpretive narrative to the “principles of ‘98.” When it was no longer plausible to reconcile *The Federalist Papers* with increasingly radical states’ rights constitutionalism, southern theorists abandoned both *The Federalist* and the supposed value of “contemporaneous” explication.

The antebellum debates which elevated the status of *The Federalist* in the North guaranteed that the Republicans who framed and debated the Reconstruction Amendments would both know and appreciate the essays that had played such a high-profile

156. The phrase seems most likely derived from what was then a common maxim of interpretation, “*contemporanea expositio est optima et fortissima in lege*” (“contemporaneous exposition is the best and strongest in the law”). See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 933 (2017) (discussing the origins of the maxim and its use in early American law). See also James Madison, *Speech in Congress Opposing the National Bank*, in MADISON: WRITINGS 482 (Jack Rakove ed., 1999) (noting “[c]ontemporary and concurrent expositions” of the Constitution were “reasonable evidence of the meaning of the parties”); Vasan Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1165 (2003) (discussing the relationship between the maxim and originalist interpretation).

157. This is not to say that southern nullifiers presented an accurate reading of the Virginia Resolutions or James Madison’s Report of 1800. Not only did Madison reject a pro-nullifiers reading of his work, so did more moderate Republicans in Madison’s home state of Virginia. See *Speech of Mr. Moore of Rockbridge in the Virginia Legislature*, RICHMOND ENQUIRER (Va.), Jan. 3, 1833, at 1, <https://bit.ly/3DhiVNU>.

role in antebellum anti-slavery debate. Reconstruction lawyers, judges, and politicians would have studied *The Federalist* from their youth. The reading (and voting) public, meanwhile, also would have grown up reading passages from *The Federalist* published in countless newspaper essays, articles, and reports of congressional speeches.

Third, some *Federalist* essays and arguments would have been more familiar than others. The data suggests the newspaper-reading public read significantly more references to Madison's federalism essays, No. 39–46, and Hamilton's essays on the removal power (No. 77), presidential elections (No. 68), and the presidential veto (No. 73) than other less known essays in *The Federalist*. Of course, given that federalism and questions about national power and state sovereignty were among the most consistently (and hotly) disputed issues in antebellum America, it was inevitable that Madison's essays relating to this subject would appear again and again in antebellum public discussion and debate.¹⁵⁸

In conclusion, the public that debated the framing and ratification of the three Reconstruction Amendments were well aware of *The Federalist*—and especially aware that it had been the *South* that had rejected Madisonian federalism in its decision to secede from the Union and trigger a war that cost over 600,000 lives. The Republicans who advanced the constitutional agenda of the Thirty-Eighth, Thirty-Ninth, and Fortieth Congresses not only would have been familiar with *The Federalist*, but most of them were members of a generation that viewed those essays as communicating the correct understanding of the Federal Constitution. What remains to be explored is whether those who participated in the framing and ratification of the Reconstruction Amendments viewed their own constitutional creativity as departing from, or as grounded upon, the essays of Publius. This will be the subject of Part II of this investigation, "*The Federalist and the Fourteenth Amendment – Publius in the Reconstruction Congress, 1860–1870*" (forthcoming).

158. It is interesting to compare the most cited essays during the antebellum period with those most cited by the Supreme Court in the modern period. See, Lupu, *supra* note 3. Scholars and courts today are far more focused on essays like *The Federalist* Nos. 10 and 51 than was the public in the years between the Founding and Reconstruction. See, e.g., Kramer, *supra* note 11, at 611 (exploring the impact, or lack thereof, of *The Federalist* No. 10 on the original drafting of the Constitution).

APPENDIX

Figure #1: Color Coded Graph of Total Number of References to Specific Essays

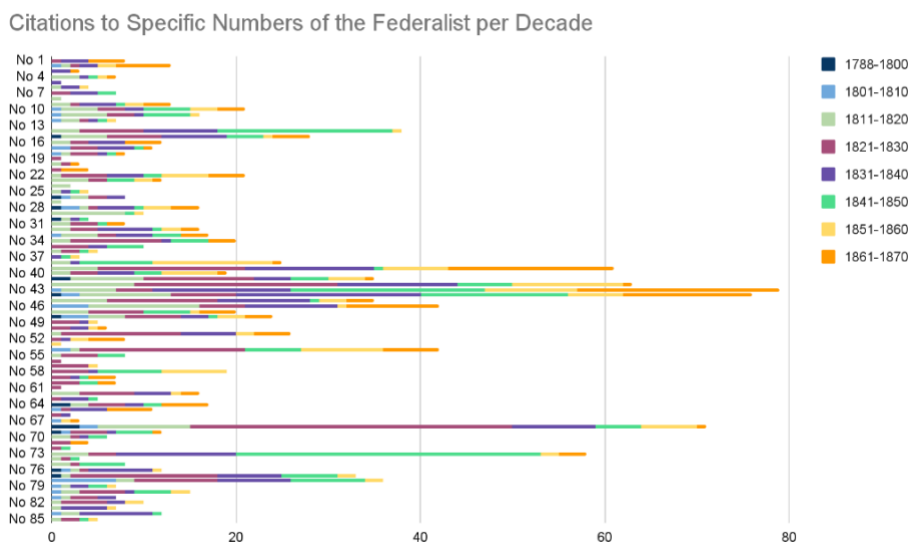


Figure #2: Number of References to Specific Essays by Decade

	1789-1800	1801-1810	1811-1820	1821-1830	1831-1840	1841-1850	1851-1860	1861-1870	TOTAL
No. 1	/	/	/	1	3	/	/	4	8
No. 2	/	1	1	1	2	/	2	6	13
No. 3	/	/	/	/	2	/	/	1	3
No. 4	/	/	3	/	1	1	1	1	7
No. 5	/	/	/	/	1	/	/	/	1
No. 6	/	/	1	/	2	/	1	/	4
No. 7	/	/	/	2	3	2	/	/	7

No. 8	/	/	1	/	/	/	/	/	1
No. 9	/	/	2	1	4	1	2	3	13
No. 10	/	1	4	3	2	5	3	3	21
No. 11	/	1	5	3	1	5	1	/	16
No. 12	/	1	2	1	1	1	1	/	7
No. 13	/	/	/	/	/	/	/	/	0
No. 14	/	/	3	7	8	19	1	/	38
No. 15	1	/	5	6	7	4	1	4	28
No. 16	/	/	2	2	4	/	/	4	12
No. 17	/	2	/	3	4	1	/	1	11
No. 18	/	1	1	3	1	1	/	1	8
No. 19	/	/	/	1	/	/	/	/	1
No. 20	/	/	1	1	/	/	/	1	3
No. 21	/	/	/	1	/	/	/	3	4
No. 22	/	/	1	5	4	2	5	4	21
No. 23	/	/	4	2	/	3	2	1	12
No. 24	/	/	2	/	/	/	/	/	2
No. 25	/	/	1	/	1	1	1	/	4
No. 26	1	1	2	2	2	/	/	/	8
No. 27	/	/	1	/	/	/	/	/	1
No. 28	1	2	1	1	4	1	3	3	16
No. 29	/	/	8	/	/	1	1	/	10

No. 30	1	/	1	/	1	1	/	/	4
No. 31	/	/	2	3	/	1	/	2	8
No. 32	/	/	2	3	6	1	2	2	16
No. 33	/	1	4	2	4	3	/	3	17
No. 34	/	/	2	10	1	4	/	3	20
No. 35	/	/	/	4	2	4	/	/	10
No. 36	/	/	1	2	/	1	1	/	5
No. 37	/	/	/	/	1	1	1	/	3
No. 38	/	/	2	/	1	8	13	1	25
No. 39	/	/	5	16	14	1	7	18	61
No. 40	/	/	2	3	4	3	6	1	19
No. 41	2	/	8	12	4	4	4	1	35
No. 42	/	/	9	22	13	6	12	1	63
No. 43	/	1	6	4	15	21	10	22	79
No. 44	1	2	10	7	20	16	6	14	76
No. 45	/	/	6	12	10	1	3	3	35
No. 46	/	4	12	5	10	/	1	10	42
No. 47	/	/	4	6	/	5	1	4	20
No. 48	1	3	4	6	3	1	3	3	24
No. 49	/	/	/	3	1	/	1	/	5
No. 50	/	/	/	2	2	/	1	1	6
No. 51	/	/	1	13	6	/	2	4	26

No. 52	/	/	/	1	1	/	2	4	8
No. 53	/	/	/	/	/	/	1	/	1
No. 54	/	2	1	18	/	6	9	6	42
No. 55	/	/	1	4	/	3	/	/	8
No. 56	/	/	/	1	/	/	/	/	1
No. 57	/	/	/	4	/	/	1	/	5
No. 58	/	/	/	4	1	7	7	/	19
No. 59	/	/	/	2	1	1	/	3	7
No. 60	/	/	/	3	/	2	/	2	7
No. 61	/	/	/	1	/	/	/	/	1
No. 62	/	/	3	6	4	/	1	2	16
No. 63	/	/	/	1	3	1	/	/	5
No. 64	2	/	2	4	2	2	/	5	17
No. 65	/	1	/	1	4	/	/	5	11
No. 66	/	/	/	1	1	/	/	/	2
No. 67	/	1	/	/	/	/	1	1	3
No. 68	3	2	10	35	9	5	6	1	71
No. 69	1	1	/	4	1	4	/	1	12
No. 70	/	/	2	1	1	2	/	/	6
No. 71	/	/	/	2	/	/	/	2	4
No. 72	/	/	/	1	/	1	/	/	2
No. 73	/	/	4	3	13	33	2	3	58

No. 74	/	/	1	1	/	1	/	4	7
No. 75	/	/	2	1	/	5	/	2	10
No. 76	1	1	1	1	7	/	1	5	17
No. 77	1	/	1	16	7	6	2	10	43
No. 78	/	7	2	9	8	8	2	11	47
No. 79	/	1	1	/	2	2	1	1	8
No. 80	/	1	2	5	1	4	2	4	19
No. 81	/	1	1	3	2	/	/	2	9
No. 82	/	/	1	5	2	/	2	2	12
No. 83	/	/	1	/	5	/	1	1	8
No. 84	/	1	2	/	8	1	/	1	13
No. 85	/	/	1	2	/	1	1	4	9
TOTAL	16	40	171	321	258	225	141	215	1387