The Supreme Court and Opinion Content: The Use of the Federalist Papers

PAMELA C. CORLEY, J.D., ROBERT M. HOWARD, AND DAVID C. NIXON, GEORGIA STATE UNIVERSITY

Dr. Corley will be at Vanderbilt University effective August, 2005

Many scholars of the Supreme Court and many justices assert the importance of the Federalist Papers. They provide important evidence of original meaning and interpretation of the Constitution, and there is evidence that there is an increase in citation to the Federalist Papers in Supreme Court opinions. While some may view this increased citation use as a positive development because it demonstrates reliance on original authority in judicial decisions, we provide evidence that in a period marked by dissensus and controversy, the use of the Federalist Papers represents externally and internally oriented strategic uses by the justices to add legitimacy to constitutional interpretations, and to sway colleagues. We use a combination of descriptive and multivariate techniques to examine Federalist citations from 1953 to 1995 to demonstrate our interpretation. In deciding these cases, which I have found closer than anticipated, it is the Federalist that finally determines my position" (Justice David Souter, in his dissent in Printz v United States, 1997, 521 U.S. 898 at 971). In his dissent in Printz v United States (1997), Justice David Souter states perhaps the ultimate expression of the value of legal authority as a guide to judicial decisionmaking. Souter, of course, is not the only justice on the Supreme Court to emphasize deference to the Federalist Papers. Over the past several decades many on the Supreme Court have increasingly cited the Federalist Papers in major, concurring and dissenting opinions. The Supreme Court has cited the Federalist in many of the most controversial cases over the past several years, including the majority opinion and the dissent in the above referenced case, and in important cases such as Allen v Maine (1999), Clinton v City of New York (1998), and even Bush v Gore (2000). If enhanced use of the Federalist Papers means the Court is increasing its reliance on some standard of original authority in Constitutional interpretation, then this is a significant development. The Supreme Court justices have often been criticized for imposing their own personal policy preferences in constitutional interpretation, instead of being guided by "the text of the document and the intent of the framers" (Morse 1986: 32; see also Scalia 1997; Bork 1971). It would appear that if the Court or an individual justice uses the Federalist Papers to determine the outcome of a case, it is evidence that the Court and the justice are being guided by "the intent of the framers," and not personal policy preferences. The Federalist Papers then may act as a restraint on judicial opinions and case outcomes. In fact, two scholars recently asserted that "ideology h[as] little bearing on how often a justice appeals to the [Federalist] essays" (Melton, Jr., and Miller 2001: 417). In this manuscript we seek to build on previous literature that has systematically examined the process, but not the content, of Supreme Court opinions (see, e.g., Maltzman, Spriggs and Wahlbeck 2000 and corresponding analysis in Segal and Specht 2002: ch. 9). As Maltzman, Spriggs, and Wahlbeck (2000:154) note, the content of the opinions has to date been unexplored in any systematic, quantitative analysis. By systematically examining how the justices use originalist sources in their opinions, we provide some initial evidence that references to the sources in Supreme Court opinions are less the manifestation of originalist authority and more the expression of ideology and the use of strategy by the justices to provide originalist legitimacy. Thus, they are less a constraint than a rationale.

To accomplish this, we focus on what is often considered the most important of originalist sources, the Federalist Papers. We show that the Supreme Court has increased the use of the Federalist Papers in a period that also corresponds to a period in Supreme Court history marked by dissensus within and controversy without, as the Court moved from defending economic freedom to enlarging the freedoms of the Bill of Rights (see Walker, Epstein and Dixon 1988; Haynie 1992; O'Brien 1993; Segal and Specht 2002). Our evidence rests on an analysis of the Federalist Paper citations in U.S. Supreme Court opinions from 1953 to 1995. We argue that references to the Federalist Papers in the crafting of the opinions provide a veneer of authority that can insulate the Court, and the justice, from criticism and controversy. Thus, citations to the Federalist Papers act as an externally oriented strategy. In addition, we argue that references to the Federalists in these opinions are rooted in an internally oriented strategy: as justices use the opinion writing process to sway their colleagues on the Bench (see e.g., Maltzman, Spriggs and Wahlbeck 2000). Justice Souter's comment at the outset suggests that both approaches are potentially succ-

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Table 1
COMPARISON OF CITATIONS TO AUTHORITY BY THE SUPREME COURT 1953-1984

<table>
<thead>
<tr>
<th>Source</th>
<th>1955-1984</th>
<th>% of Total</th>
</tr>
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<tbody>
<tr>
<td>Federalist Papers</td>
<td>101</td>
<td>34</td>
</tr>
<tr>
<td>Story's Commentaries</td>
<td>36</td>
<td>12</td>
</tr>
<tr>
<td>Hamilton's Works</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Madison's Papers</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Warren, The Supreme Court in US History</td>
<td>11</td>
<td>4</td>
</tr>
<tr>
<td>Warren, The Making of the Constitution</td>
<td>11</td>
<td>4</td>
</tr>
<tr>
<td>Kent's Commentaries</td>
<td>15</td>
<td>5</td>
</tr>
<tr>
<td>Franklin's Records</td>
<td>46</td>
<td>16</td>
</tr>
<tr>
<td>Elliot's Debates</td>
<td>45</td>
<td>15</td>
</tr>
<tr>
<td>Rawle's Works</td>
<td>2</td>
<td>.7</td>
</tr>
<tr>
<td>Fisher, The Critical Period in American History</td>
<td>1</td>
<td>.3</td>
</tr>
<tr>
<td>Cooley, Constitutional Limitations</td>
<td>21</td>
<td>6</td>
</tr>
<tr>
<td>Curtis' Works</td>
<td>2</td>
<td>.7</td>
</tr>
<tr>
<td>Totals</td>
<td>296</td>
<td>100</td>
</tr>
</tbody>
</table>

We tabulate this data in Table 1, for the period between 1953 and 1984, to compare the actual number, and percentage basis, of each authority in comparison to the others. In the 30 years that we compile for Table 1, the Supreme Court cited the Federalist Papers more than twice as much as any other originalist source, and the Federalist Papers represent more than one-third of all of these important sources of authority on original meaning.

Scholars of the court have also noted the importance of the Federalist Papers for the arguments presented by the justices. As one scholar states, "When faced with issues involving constitutional interpretation, including the controversial area of original intent, the Supreme Court often cites to The Federalist" (Manz 2002: 285). In separate law review articles, Esbridge (1998) and Wilson (1987) both argue that the Court recognizes the Federalist's relevance and importance.

Court citations to the Federalist Papers are not just lifted without reflection from petitioner briefs, nor are citations accidental or incidental. For example, during a review of the October 1996 term, Manz found that "the percentage of Federalist citations appearing in the briefs that also appeared in the majority opinions is relatively low. Only 11.8 percent of the citations in petitioners' briefs, 33.3 percent in respondents' briefs, and 27.8 percent in amicus briefs were also cited by the Court." (Manz 2002: 218 and discussion: 283-86). Thus citation in a brief by a litigant is no guarantee of citation in the opinion. In our own random sample of ten opinions citing the papers, each opinion contains substantial discussions of the meaning of the paper cited and reasons the paper supports the position of the opinion writer.

Court citations to the Federalist Papers do not appear to be a simple function of increased opinion or opinion length. While it is true opinions have lengthened, with the average opinion increasing by approximately nine pages from the 1920s to the 1990s (Post 2001: 1280), there has also been a significant decrease in the total number of opinions issued since the early 1980s, even while the references to the Federalist Papers exploded in the 1980s and 1990s.

Originalism, The Federalist Papers, and Strategic Citations

Many other scholars and justices such as Herbert Wechsler (1959), Learned Hand (1958), Robert Bork (1971),

1 In arguing for this importance, O'Connor does not distinguish how the citations were used (e.g., in a footnote or in the text). We also make no such distinction in our data.

2 We listed a citation occurring only once even if the opinion cited the Federalist Papers multiple times in the same opinion. The number is far greater if we include the actual number of times the opinions cite the Federalist Papers.


4 Signed opinions reached a high of 174 for both the 1982 and 1983 terms, and are down to below 100 for the last few terms (Epstein et al. 2003).
Edwin Meese (1986) and William Brennan (1986) have debated the meaning and intent of the framers and the proper use of such meaning and intent in constitutional interpretation. Today scholars (e.g., see Whittington 1999) and justices (e.g., Scalia 1997) continue to explore the meaning and use of original intent and original meaning (see Ely 1980; Carter 1985; Symposium 1996).

Originalists are committed to the view that original intent, or original meaning, (see Scalia 1997; Ford 1971) is not only relevant but also authoritative; that we are in some sense obligated to follow the intent, or plinth meaning, of the framers. Originalists have various shades of belief about the binding effect of original text and intent and about how to even define "intent." The extreme view is that the only relevant factor is original intent, whichever side has the best historical evidence should win. A moderate originalist might well view other factors as potentially important, particularly when the evidence of intent is unclear.

Where do the Federalist Papers fit into originalism? There is enormous breadth of judicial discretion conferred by the Constitution's open-textured provisions, and constitutional history and meaning might provide a check on the exercise of policy preference based judicial decisionmaking. The Federalist might help provide a "constraint against judicial tyranny." Justices look to history to interpret the Constitution. Whether trying to understand the framers' intent or how the text of the Constitution was originally understood, the Federalist might provide these answers.

Obviously there are reasons the Federalist Papers should not be the sole primary source in interpreting the Constitution. It is not the name of Publius, but actually were the work of three men—James Madison, Alexander Hamilton and John Jay—and were a practical, political writing. Responding to criticisms of the proposed Constitution, and specifically meant to influence the ratification vote in New York State (Eskridge 1998; McGowan 2001). As important and influential as these men were, they by no means represented all or even a majority of the framers. They were meant to be commentary, which may not rise to the level of law. The Federalist Papers were "in fact, only one of several hundred salvoes in the war of words that accompanied the struggle over ratification" (Rossiter 1964: 53). Madison himself in 1824 cautioned against their uncritical use by acknowledging that, "it is far to keep in mind that the authors might be sometimes influenced by the zeal of advocates" (Madison cited in Lupu 1998: 1327 n. 18).

Nevertheless, they remain a primary and influential source of original interpretation and original meaning of the Constitution (Scalia 1997). Contemporary scholars such as Jefferson and Marshall praised the Federalist Papers (Melton Jr. 1997), while more modern scholars such as Commager (1977: 112) and Clinton Rossiter (1961: vii) respectively acclaim the Federalist Papers as the "most significant political treatise of the century, and the one with the most influence," and as the "most important work in political science that has ever been written, or is likely ever to be written, in the United States." The Federalist Papers remains a dominant source for ascertaining original intent and original meaning.

By examining citations to the Federalist in majority, dissenting and concurrence opinions, we hope to contribute to the debate as to the extent to which justices choose to follow their policy preferences, as compared to following established legal rules of decisionmaking such as using text and intent. Thus, we hope to offer evidence as to the substance of the opinions, and whether the use of some citations is sincere, strategic, or attitudinal.

Much of the current empirical work in judicial decisionmaking follows economic models of behavior in asserting that humans are utility maximizers. Though it is not necessarily the case that the goals justices will seek to maximize are policy goals, factors such as a lack of electoral accountability and a lack of ambition for higher office make it likely that policy goals will be at the forefront. Within these policy-based models, the major dispute is over whether the justices sincerely vote their unconstrained preferences (Segal and Spash 2002), or whether they engage in sophisticated behavior, such that their votes are constrained by strategic political limitations. Rational choice theorists extend the actuarial model by arguing that policy-minded justices must consider the political and social environment in which they operate (see Epstein and Knight 1998). The justices not only operate within a set of rules governing their own interaction (Epstein and Knight 1998: 112), the justices have to protect institutional legitimacy. The justices must consider the preferences and expected actions of . . . other branches of government . . . (and) . . . be attentive to the informal norms that reflect dominant societal beliefs about the rule of law in general and the role of the Supreme Court in particular" (138).

Even if one assumes the justices come to each case with set policy preferences, a judicial opinion must contain a legal rationale and appear as an attempt to sway other justices, the other institutions of government, and public opinion (Mulitman, Springs, and Walbneck 2000). Within the opinion, citations to authority are a key component of the reasoning process (see Posner 2000: 362). There has to be a legal rationale and justification for the holding expressed in the opinion. As one veteran Supreme Court observer notes "any judicial nominee foolish enough to confess fealty to an idee fixe . . . would probably not be confirmed" (Greenhouse 2002). An invocation of important authority justifies the statement of opinion (Posner 2000). Thus, using authority to justify a position and persuade others is a norm within the Court and a protection for institutional legitimacy.

Certainly, the Federalist Papers are a prestigious and important source of authority. In addition, the Federalist Papers contain broad language that the justices can use to support their desired result. For example, Garcia v. San Antonio Metropolitan Transit Authority (1985, 469 U.S. 528) involved the issue of whether the 10th Amendment: Limited Congress' power under the Commerce Clause. The majority and the dissent used various sections of the Federalist Papers to reach different conclusions. Justice Blackmun.
used Federalist Papers 43, 46, and 63 to support his conclusion that the Framers chose to protect state sovereignty interests through the structure of the federal system rather than by judicially created limitations on the power of the federal government. In her dissent, Justice O'Connor relied on Federalist Papers 31, 45, and 51 (sections written to placate fears of central government tyranny) to support her argument that the federal government's powers were to be very limited and "that the sphere of state activity was to be a significant one..." (Garcia v U.S. 528 at 382).

Another example is the debate between Justice Scalia, writing for the majority, and Justice Souter, writing for the dissent, in Printz v United States (1997). The justices disagreed over the correct interpretation of Federalist Paper 27. Specifically, they argued over whether the phrases "will be incorporated into the operations of the national government" and "will be rendered auxiliary to the enforcement of the laws." According to Justice Souter, those phrases support his position that the National Government has the authority to require state governments to take appropriate action. Justice Scalia, on the other hand, argued that those phrases merely mean that all state officials owe a duty to the National Government to enforce, and interpret state law in such fashion as not to obstruct the operation of federal law." (Printz 521 U.S. 898 at 913).

EMERGENCE OF THE FEDERALIST PAPERS AS CITED AUTHORITY

Despite the significance and importance of the Federalist Papers, up until the midpoint of the 20th century, justices rarely cited the Federalist Papers in majority, concurring, or dissenting opinions (Lipu, 1990). One law scholar notes that until 1982, the Supreme Court never cited the Federalist to support an outcome, and from then until 1940 or so, citations followed a predictable pattern of a few each term until the dramatic increase in the last few decades (Lipu, 1998; see also Lynch, 2000). Many other scholars have also noted that the justices have significantly increased references to the Federalist Papers in their written opinions, particularly in the past two decades (Melton, Jr. 1997, Melton, Jr. and Miller, 2001; Lipu 1998; see also Phelps and Gates, 1991).

Even accounting for the modern dramatic increase in the total number of opinions authored, the Court has significantly increased its use of the Federalist papers. Figure 1 illustrates Federalist citations as a percentage of opinions issued per term by the Supreme Court from 1801 through 1994. Except for a slight increase just prior to the outbreak of the Civil War, the time line is relatively stable and flat until about 1940. From that point onward, we witness a dramatic increase in the percentage of opinions citing the Federalist Papers. This has occurred, and the increase continues, despite a declining caseload and a declining number of opinions since the early 1980s. While the first measurable increase occurred under the leadership of Chief Justice Taney, it is not until the Warren era that we begin to see an almost exponential increase in citations. In raw numbers, opinions citing the Federalist Papers rose from a total of 23 under Stone and Vinson combined, to 39 under Earl Warren, to 84 under the 17-year span of Chief Justice Burger to 90 under Rehnquist through 1995. Thus, both in raw
numbers and on a percentage basis, the Court has increased its citations to the Federalist.

**Strategic Citations to the Federalist 1953-1995**

Although individual numbers are small, through an individual level analysis of opinions written from the beginning of the Warren Court era through 1995, we can determine the factors that lead a particular justice to cite the Federalist Papers. To accomplish this task, we compiled a list of every Supreme Court case in which a reference to the Federalist or to Publius appears. From that list, we assembled a dataset of observations, using information from the Spalth dataset and information from the Supreme Court Compendium. The data for our analysis consist of all majority, dissenting, and concurring opinions by individual justices, from the Warren Court of 1953 through the Rehnquist Court of 1995, based on the Spalth dataset. We included an opinion as an observation only when a justice was the named author of the majority opinion, concurrence or dissent. This reorganization of the Spalth dataset resulted in 13,152 opinions, of which 209 opinions cited the Federalist Papers. We then merged these data with individual Segal-Cover scores for the opinion author (~1 most conservative to 1 most liberal) (Segal and Cover 1989; Segal et al. 1995). For a first examination we look at citations to the Federalist Papers and their relation to judicial attitudes. We examine the correlation coefficients of Segal-Cover scores and citations to the Federalist Papers. The correlation coefficient is $-28 (p < 0.1)$, meaning the more conservative the ideology of the justice the more frequent his or her citations to the Federalist. As Figure 2 shows, there is a clear negative relationship between ideology and proclivity to reference the Federalist Papers in support of an opinion. As ideology becomes more conservative, citations to the Federalist go up. The converse, of course, is also true. As justices become more liberal, they are less likely to cite the Federalist Papers. Of course, it is possible that conservative justices write more opinions on traditional constitutional law issues such as

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1. This citation list appears in Becket & Nelson, Jr., 1997.
2. As the ideology of the opinion author is a key explanatory factor in our model, we chose to omit consensual opinions from our data. However, we investigated two alternative designs, to verify that our results are not sensitive to this choice. In the first design, we created an observation for multiple authored opinions and recorded the average Segal-Cover score of the authors as the ideology indicator for the author. In the second design, we effectively created an over sample of multiple authored opinions by creating an observation for each author of an opinion. The number of consensual opinions is relatively small, so it should not be surprising that our results are unaffected in any meaningful way by the choice among these alternative designs.

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as federalism and the respective powers of the branches of government, while liberal justices are more concerned with issues such as privacy and civil rights, and thus will author opinions more often on civil liberties and civil rights issues. Since the Federalist Papers deal with issues of power and federalism, the apparent increased use of Federalist citations by conservatives might be spurious, due to issue area.

To examine the relationship between citation and issue area, we again turn to the Speech database for this analysis. The database contains a variable that breaks down cases into several specific issue areas, including first amendment, privacy, unions, economics, and federalism. We combined these specific areas into three broad categories—Civil Liberties and Civil Rights issues, Economic issues, and Government Power issues. Present a cross-tabulation in the first part of Table 2.

Given that there are more cases involving civil liberties and civil rights issues in the period covered by Speech's dataset, it is not surprising that the Court cites the Federalist Papers in cases involving civil liberties and civil rights issues with greater frequency than in cases involving economic or governmental power issues. In the period since 1953, justices cited the Federalist Papers in civil liberties and civil rights issues areas more than twice as much (102 citations) as in cases dealing with economic matters (45 citations) or governmental power (46 citations) combined.

For any given case, however, the Court is actually less likely to cite the Federalist Papers in one of its opinions if it addresses civil rights or civil liberties. Opinions of Supreme Court justices cite the Federalist Papers in only 1.3 percent for cases involving civil rights or liberties. The Federalist citation rate is 1.6 percent for economics cases, and 2.2 percent for cases addressing government power. We also examined some measures of perceived legitimacy to see if the justices cited the Federalist Papers more when the opinions either assert judicial power or exhibit significant dissent. That is, we examined the frequency with which the justices cited the Federalist Papers when there was a minimum winning coalition vote, when the Court voted formally to alter precedent, and when the Court declared a federal, state or municipal law or action unconstitutional. To overturn existing precedents, or to exercise the power of judicial review are examples of an activist court, and perhaps the opinion author would most need to add legitimacy to the exercise of judicial review or the formal alteration of precedents by citing originalist doctrine. We present this information in the latter portions of Table 2. The data suggest significant relationships between references to the Federalist Papers and special legitimacy challenges faced by the Court. When the Court formally alters precedent, 7.8 percent of the opinions contain a Federalist citation. When the vote is a minimum winning coalition, the Federalist Papers are cited 2.1 percent of the time, as compared to 1.4 percent with greater voting majorities (p < 0.01). One can observe the greatest difference in the exercise of judicial review. When the Court votes to overturn federal law, almost 16 percent of the opinions contain a Federalist citation as compared to only 1.3 percent of opinions when there is no declaration of unconstitutionality (p < 0.001). While not quite as striking, when the Court overturns state and local law, the opinion is still more likely to contain a Federalist citation than an opinion that does not declare a law or action unconstitutional. As opinion that declares a state law unconstitutional is more than twice as likely to cite the Federalist Papers (2.8 percent as compared to 1.3 percent, p < 0.001), while an opinion declaring a local law unconstitutional is more than three times as likely to cite the Federalist Papers (4.0 percent, p < 0.001).

Multivariate Analysis

Of course, while these figures, correlations, cross tabulations and scatterplots are illuminating, they do not provide evidence of external and internal strategy in crafting majority, concurring, and dissenting opinions as compared to using authority in the opinions to decide cases, nor do they control for the relative importance of each factor influencing Federalist citations in Supreme Court opinions. Accordingly, we perform a multivariate analysis using the opinion as our unit of analysis, coding each opinion as a dichotomous dependent variable with 1 if the opinion cited the Federalist Papers, and 0 otherwise. To test our key hypotheses, we break our sample into three separate subsamples, one for majority opinions, one for concurring opinions, and one for dissenting opinions.

<table>
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<tr>
<th>Table 2</th>
<th>Federalist Citations by Case Types</th>
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<td>Civil Liberties</td>
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<td>3,034</td>
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</tbody>
</table>

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Footnotes:

8 First amendment, privacy, civil rights, due process, criminal procedure issue areas.

9 Economic activity and union issues.

10 Government power includes the issue areas of federalism, federal taxation, interstate relations, and judicial power. We omitted the small number of cases labeled by Speech as "miscellaneous" or "attorneys."
Our independent variables for all the analyses are the Segal-Cover score of the opinion author, whether the vote on the case was a minimum winning coalition (1 = minimum winning coalition, 0 otherwise), whether the vote formally and/or procedurally exceeded (1 = altered, 0 otherwise) or whether the vote overruled state, federal or municipal law (1 = overruled, 0 = otherwise). To control for the effect of issue area, we coded two dichotomous dummy variables, treating this as a fixed effects estimation. The first included dummy variable indicates opinions arising in civil liberties or civil rights issues, and the second included dummy variable indicates opinions arising in government power cases. The excluded category (opinions in economic cases) serves as the baseline for estimation and interpretation of these fixed effects.

Finally, as a key determination of strategy in using the citations, we hypothesize that references to the Federalist Papers will exhibit a duties citations pattern, as justices tacitly lay claim to the framers' intent in anticipation of the arguments of their peers on the Bench. That is, an opinion will more likely cite the Federalist Papers if another opinion in the same case also cites the Federalist Papers.

In contrast to our hypothesis, there is a non-strategic interpretation for a finding that citation behaviors are significantly correlated within cases: a unit effect may exist such that certain cases naturally lend themselves to discussion of the Federalist Papers, and citations to the Federalist thus naturally arise in written opinions of the justices, without prompting from the competing opinions in the case. However, in order for the non-strategic interpretation to obtain, the unit effect should be evident for all opinions: majority, concurrence, and dissent.

To distinguish between an innocuous unit effect and our hypothesized duties citation, we coded two distinct duties indicators. For the first duties citation factor, we coded whether an alternative opinion in the case cited the Federalist Papers and agreed with the original opinion's result. That is, for a majority opinion, did any concurring opinions cite the Federalist Papers? For a dissenting opinion, did any complementary dissenting opinions cite the Federalist Papers? The answers to these questions are coded 0-1 (no-yes) for duties citations in agreement. For the second duties citation factor, we coded whether an alternative opinion in the case cited the Federalist Papers and disagreed with the original opinion's result. That is, for a majority opinion, did any dissenting opinions cite the Federalist Papers? For a dissenting opinion, did any majority or concurring opinions cite the Federalist Papers? The answers to these questions are coded 0-1 (no-yes) for dissenting citations in disagreement. We point out that these two factors should be equally important predictors of citation behavior for any opinion type, if a simple unit effect is responsible for their significance.

Given the dichotomous dependent variable, we use a probit model, and because our dependent variable includes three different types of opinions—majority, concurring and dissenting opinions—we assume there will be some heterogeneity across these opinion types. Accordingly, we model each type of opinion separately. Finally, we use robust regression with standard errors clustered on opinion author. Thus, our results only assume citation behavior is independent across justices, not across opinions for specific justices.

Results

Our results demonstrate that both straightforward attitudinal factors and strategic factors are at work in citation behavior of Supreme Court Justices. The likelihood of a liberal justice citing the Federalist Papers in a majority or dissenting opinion is significantly lower than the likelihood of a conservative justice citing the Federalist Papers. In the post-Vinson era, conservative justices have more frequently pointed to the Federalist Papers as favoring their limited government viewpoints. We interpret these findings as indications of attitudinal behavior. However, citation of the Federalist Papers is not significantly related to ideology of the author for concurring opinions. This null finding makes sense because the motivations behind concurring opinions are almost by definition non-attitudinal. The marginal effects columns of Table 3 reinforce the statistical conclusions about the significance of ideology. Table 3 reports the relative impact on the predicted probability of citing the Federalist for plausible changes in the independent variables, when all other variables have been set to their means. Because the baseline probability is quite small, relative changes will be more sensitive to most readers. Setting all variables at their mean values, and holding all other variables constant, a one standard deviation increase in an opinion writer's Segal-Cover score is predicted to decrease the relative likelihood of citing a Federalist Paper by 37.6 percent for majority opinions and 23.6 percent for dissenting opinions. Consider the comparison between a Clarence Thomas and a Byrnes White, or an Antonin Scalia and a David Souter, or a Sandra Day O'Connor and an Earl Warren. For each pair, the first justice is approximately one standard deviation more conservative than the second justice. The difference between them is that: the more conservative justice of the pair is about 30 percent more likely to cite a Federalist Paper in their majority or dissenting opinions, and is no more or less likely to cite the Federalist Papers in their concurring opinions, all else equal.

After controlling for ideological predispositions to cite or not cite, justices clearly exhibit both internally oriented and externally oriented strategic behavior. Justices are much more likely to cite a Federalist Paper in their concurring opinions when the case is decided by a minimum winning coalition. When a case is decided by a single vote, the relative likelihood of a concurrence referring to the
Federalist Papers is 155 percent higher than when the case is decided by a wider margin, holding all other variables constant at their means. That this effect is evident only for concurring opinions serves to emphasize the non-attitudi-
nal and strategic character of concurring opinions and votes on the Supreme Court. Justices are more likely to cite the Federalist Papers in their concurrences for close cases, as they seek to justify their presence on the majority, or seek to maintain the votes of the rest of the members of the majority or obtain additional votes from the minority. Alternatively, given that the independent variable we use does not tell us if a vote switched because of the authoritative

citation, it may be that close cases require greater demonstrations of legitimacy to the public and the other institutions of government. Justices are also more likely to cite a Federalist Paper in a strategic fashion to bolster the legitimacy of the court when opinions assert judicial power. Decisions that rest on consti-
tutional grounds or which depart from the legal and societal norm of stare decisis are significantly more likely to generate citations in the majority opinion to those key founding fathers: Hamilton, Jay and Madison. The marginal effects estimates demonstrate that these statistically significant find-
ings are substantively large effects as well. Setting and hold-
ing all other variables constant at their mean values, if a case formally alters precedent, the relative odds of the majority opinion referencing the Federalist Papers is 315 percent higher than if the case does not clearly depart from stare deci-
sis. If a case declares a federal, state, local law or action unconstitutional, the majority opinion is 297 percent more likely to employ the intent of the framers, as expressed in the Federalist Papers, in support of the Court's judgment.

After controlling for the other attitudinal and strategic factors in the model, it remains true that some issue types are more prone to generation of Federalist citations. Eco-
nomic cases serve as the baseline for our tripartite categori-
zation of issue type. Government power cases appear slightly more likely than economic activity cases to generate references to the Federalist Papers, but the effects are nei-
ther consistent across opinion types nor distinguishable from zero. Civil liberties and civil rights cases are consist-
tently less likely than economic activity cases to generate Federalist Paper citations, and the effect is statistically sig-
nificant for majority opinions.

Finally, there is very strong evidence of deputizing citations to the Federalist Papers in Supreme Court opinions. The relative odds of citing a Federalist Paper in majority opinion are six-
teen and twenty-fold higher if a dissenting or concurring opinion also cited the Federalist Papers. The fact that the effects of the deputizing citation indicators are differential for dis-
senting and concurring opinions suggests that Federalist Paper citation behavior of Supreme Court justices is strongly anticipatory and tactical, and not the result of some cases merely lending themselves to a discussion of the Federalist Papers. A dissenting opinion is significantly more likely to refer-
ience a Federalist Paper if a majority or concurring opinion discusses the Papers (a fourteen-fold increase in the relative odds), but is not significantly more likely to do so if a com-
plementary dissenting opinion cited the Federalists. Concur-
ring opinions also exhibit precisely the opposite pattern—cita-
tions are sensitive to the content of the majority opinion, but are insensitive to the content of dissenting opinions.

The picture that emerges from our analysis of deputizing citations is that dissenting and concurring opinions employ
the Federalist Papers to bolster their position vis-à-vis the majority opinion and only the majority opinion. Majority opinions are crafted to anticipate and respond to both dissenting and concurrence opinions, but appear most sensitive to the arguments presented in concerning opinions. That is, majority opinions serve as the anchors around which Supreme Court justices craft their arguments and compete for legitimacy, and so their implications to the Federalist Papers presents clear evidence of this phenomenon. Thus, the evidence points to more strategic and antituald considerations rather than legal considerations.

The model diagnostics and controls indicate that our conclusions are not artifacts of technical failures. By using robust standard error estimates, we controlled for the most likely technical violation of probit model assumptions: that observations are completely independents from one another. Our results assume only that observations generated by opinions of one justice are independent of opinions written by other justices, after controlling for the primary cross-opinion relationship (namely, dueling citations).

Disagreement and the Rise of the Federalist Papers

To provide an additional facet to our assertions that vote strategies and disagreement are key elements in citations to authority, we constructed a time series analysis that demonstrated that increased disagreement on the court is a cause of the rise of the use of the Federalist Papers. We assembled a dataset of one observation for each term of the Court, beginning with the 1801 term of Chief Justice John Marshall, and ending with the 1995 term under Chief Justice William Rehnquist, giving us a dataset of 192 separate observations. For our references to the Federalist Paper citations, we again used the citation list that appears in Buchanan E. Melhorn, Jr. 3 "The Supreme Court and the Federalist: A Citation List and Analysis, 1789-1996" (1997). From that list, we assembled a dataset of observations, using information from the Spash dataset and information from the Supreme Court Compendium. Each term is identified by the year in which it began.

Our dependent variable is the number of cases citing a Federalist Paper each term. We include seven independent variables to test our hypotheses. Our primary independent variables are based on two measures of dissent. The first is the proportion of cases with a written dissent plus the proportion of cases with a written concurrence. The second measure is the proportion of cases with minimum winning, or one-vote majority opinions per term (i.e., 5-4 or 4-3 votes). Each factor has grown significantly over time and is plausibly responsible for the modern emergence of the Federalist Papers in Supreme Court opinions.

We also include in the model a constellation of control variables, so as to present the most conservative environment for testing our dissent hypotheses. For example, we follow Haynie’s (1992) approach to modeling dissent, by including 12 dummy variables representing the terms of each Chief Justice during the period of our analysis (omitting Marshall, who serves as the baseline). These factors control for variation in the leadership style of Chiefs, which has been shown to have consequences for many aspects of judicial behavior. In addition, we include a dummy variable for the post-1960 legal environment. Rosenthal’s edition of the Federalist Papers, published in 1961, was widely hailed and printed in large volume. Its availability plausibly stirred interest in, and therefore citation of, the Federalist Papers across the profession. As Melhorn (1997) notes, briefly submitted to the Court have cited the Federalist Papers thousands of times in recent decades.

Finally, we control for the non-disagreement aspects of opportunity to cite the Federalist Papers, by including a measure of the number of pages written in opinions of the Court each term. Aside from the inducement to cite the Federalist Papers in conflicting opinions, justices may simply cite the Federalist Papers more often because their opinions are longer or because more opinions are authored that term. Page volume, produced by the Court each term is not entirely distinct from the number or proportion of non-citation opinions, of course, but its presence as a control guarantees that our estimates for the effects of disagreement are conservative ones, not driven merely by the opportunity for citation that comes along with longer opinions and a larger number of concurring or dissenting opinions.

We model the dependent variable as an event count regression. A negative binomial regression tests and controls for overdispersion, which is possible in our aggregated model because justices might engage in “dualing citations,” or because there may remain case-specific heterogeneity in citations likelihood not accounted for in our specification. We include a log of our dependent variable to control for error autocorrelation, making the testing environment even more conservative. Because the total number of cases each term theologically serves as the upper bound on the dependent variable, it is included as an offset in the likelihood equation. We present our results in Table 4.

Variations in the independent variables of an event count model have a proportional (multiplying) effect on the predicted values for the dependent variable. The impact of a one-unit increase in an independent variable is defined by the exponential of the coefficient. The “Impact” columns of Table 4 report the expected change in the number of citations to the Federalist Papers in a term, for the specified

An alternative measure of vote closeness might include 4-2 and 5-3 reversals, since the outcome in such cases also hinges on a single vote. However, this data is not reliably available prior to 1990 (see Epstein et al. 2003).
### Table 4: Negative Binomial Regression of Federalist Citations, 1801-1995

<table>
<thead>
<tr>
<th>Variable</th>
<th>B (se)</th>
<th>Prob (b = 0)</th>
<th>Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-4.8 (32)</td>
<td>.00</td>
<td></td>
</tr>
<tr>
<td>Rosseter Edition availability</td>
<td>.34 (.43)</td>
<td>.43</td>
<td>+40%</td>
</tr>
<tr>
<td>Timey</td>
<td>-.09 (.39)</td>
<td>.82</td>
<td>-9.3%</td>
</tr>
<tr>
<td>Chase</td>
<td>-64 (.51)</td>
<td>.21</td>
<td>-47%</td>
</tr>
<tr>
<td>Waitte</td>
<td>-.97 (.40)</td>
<td>.04</td>
<td>-62%</td>
</tr>
<tr>
<td>Fuller</td>
<td>-.1.3 (.52)</td>
<td>.01</td>
<td>-72%</td>
</tr>
<tr>
<td>White</td>
<td>-1.1 (.64)</td>
<td>.05</td>
<td>-67%</td>
</tr>
<tr>
<td>Tafal</td>
<td>-1.4 (.61)</td>
<td>.03</td>
<td>-76%</td>
</tr>
<tr>
<td>Hughes</td>
<td>-.7 (.47)</td>
<td>.14</td>
<td>-51%</td>
</tr>
<tr>
<td>Stone</td>
<td>-1.2 (.68)</td>
<td>.06</td>
<td>-70%</td>
</tr>
<tr>
<td>Vinson</td>
<td>-1.4 (.83)</td>
<td>.08</td>
<td>-77%</td>
</tr>
<tr>
<td>Warren</td>
<td>-1.5 (.77)</td>
<td>.05</td>
<td>-78%</td>
</tr>
<tr>
<td>Burger</td>
<td>-.7 (.92)</td>
<td>.07</td>
<td>-81%</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>-1.1 (.92)</td>
<td>.24</td>
<td>-67%</td>
</tr>
<tr>
<td>lagged DV</td>
<td>.06 (.03)</td>
<td>.05</td>
<td>+6.5%</td>
</tr>
<tr>
<td>Cases Generating Separate Written Opinions (proportion)</td>
<td>2.3 (.83)</td>
<td>.01</td>
<td>+110%</td>
</tr>
<tr>
<td>Cases Decided by One Vote (proportion)</td>
<td>.81 (1.4)</td>
<td>.57</td>
<td>+12.4%</td>
</tr>
<tr>
<td>Opportunity to Cite (pages written)</td>
<td>-.00005 (.0001)</td>
<td>.73</td>
<td>-1.3%</td>
</tr>
<tr>
<td>alpha (dispersion)</td>
<td>.003 (.05)</td>
<td>.47</td>
<td></td>
</tr>
</tbody>
</table>

N = 191
chi-squared = 149.04, p < .001

Opportunity to cite (number of cases) factored into the likelihood directly as an offset.

Impact for Rossetter availability describes the expected change in the number of annual citations after 1960, holding all other factors constant. Impact for the dependent variable measures the expected change in the number of annual citations, relative to the baseline Chief Justice of Marshall. The impact for the lagged DV indicates the expected change in the number of annual citations in the following year, for each additional citation in a current year.

Reasonable changes in the independent variables. Thus, all other things being equal, 40 percent more cases cited the Federalist Papers following the more widespread availability engendered by publication of Rossetter's edition of those documents.

Ultimately, the disagreement indicators appear to drive the increase in citations over time. The dramatic increase in disorses and concurrences (documented by Wallace, Epstein and Dixon, 1988; and analyzed by Haynie 1992) is a significant component of the modern explosion of citations of the Federalist Papers. Indeed, it is the largest contributor, among all these independent effects, and appears so even in the presence of very highly collinear controls (proportion of cases decided by one vote and total number of pages published by the Court). One standard deviation increase in the proportion of cases generating separate opinions more than doubles the predicted number of Federalist citations over the previous term (impact +110 percent). Incidentally, if one treats close cases and separate opinions as one case, then the rejection of the null hypothesis for this bloc of variables is resonating (LR 17.82, prob (null) = .00002).

In comparison, one cannot attribute the modern increase in Federalist citations to the management style of any particular Chief Justice. After controlling for other factors, Federalist Paper citations were significantly less likely than Marshall between the Chief Justiceships of Waitte and Tafal, and between Burger and Rehnquist's direction. No other Chief effects are statistically distinguishable from zero, by two-tailed tests, and no other estimated effects of leadership by the Chiefs can be statistically distinguished from each other.

**Conclusion**

The evidence presented through our examination of citations to the Federalist Papers indicates that the use of the disorses or concurrences and pages published by the Court is .58. Both correlations are significant at p < .001.
original soxness in Supreme Court opinions is tactical, and to a more limited degree attitudinal, rather than a use based solely on the need for important legal authority. The results demonstrate that a minimum winning coalition vote, formal alterations of precedent, the exercise of judicial review, and dueing citations all lead to an increased probability of a citation to the Federalist, and that strategy differs in the citation patterns of justices crafting majority, dissenting and concurring opinions.

What these factors have in common is a heightened need to assert legitimacy to the other justices, or to the other institutions of government and the public. Dissent, whether in the form of one vote majorities or increases in concurrences and dissents, means greater dispute and debate over the meaning and proper interpretation of the Constitution. More dispute and debate means that each side in the debate needs to demonstrate that the interpretation of the Constitution they assert is correct. In short, each side needs to add legitimacy to their opinion. Strategically it makes sense to cite authoritative sources and the Federalist Papers.

When justices advocate alteration of precedent or overturning existing law, they are活性炭, and perhaps the most vulnerable to charges that they are engaging in policymak ing rather than in legal analysis and interpretation. There is no better way to provide persuasive "cover" for policy preferences than to assert the authority of a text widely considered the definitive assertion of the meaning and intent of the Constitution. The use of the Federalist Papers portrays institutional legitimacy.

Given these dissent and activist conditions, and given the increasing conservatism on the Court, perhaps it is not surprising that citations to the Federalist Papers have markedly increased over the later half of the twentieth century. A conservative activist Court can use the original authority of the Federalist Papers to legitimize its overturning of precedent and law by citing originalist doctrine as the reason for its actions, and this need is most acute when the decision rests on a slim one-to-one vote majority. Moderate and liberal justices, in providing crucial concurring votes, might need to cite the Federalist Papers to justify joining the majority decision or to justify a dissent.

References

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pmccreley@yahoo.com
dtinore@gsu.edu
poltrb@angate.gsu.edu