

**“STAMPED WITH THE AUTHORITY OF MORE  
ENLIGHTENED PATRONS OF LIBERTY”: JUSTICE  
SCALIA’S *FEDERALIST***

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I. INTRODUCTION<sup>2</sup>

Since its first appearance in 1798 in Supreme Court jurisprudence,<sup>3</sup> Publius' *The Federalist* has been cited in Supreme Court opinions hundreds of times.<sup>4</sup> The frequency of citations has increased in the last half century, with a marked jump in *Federalist* citations through the 1970s and into the 1980s.<sup>5</sup> The Burger and Rehnquist Courts cited *The Federalist* more extensively than any of the Courts that preceded them, with the Rehnquist Court citing *The Federalist* even more frequently than the Burger Court.<sup>6</sup> The Roberts Court continues to cite frequently to *The Federalist*, as demonstrated by the 2014–2015 term, during which no fewer than eleven cases (and even more individual opinions) cited it.<sup>7</sup>

There is some disagreement among scholars as to the importance of *The Federalist* in Supreme Court decisions. Durchslag, for one, is skeptical of its importance to cases' outcomes.<sup>8</sup> Melton disagrees, noting that Durchslag's is the minority view.<sup>9</sup> What is clear, however, is that citations to *The Federalist* have increased dramatically over the last forty years. And even Durchslag concludes his paper with the caveat that:

[O]ne cannot dismiss citations to *The Federalist* as window-dressing even when they might appear to be so. . . . The *Federalist* might lend credibility to the Court, to the particular opinion, or to the author of a particular opinion. . . . Citing

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<sup>2</sup> THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (quotation marks omitted). In its proper context, the word "more" in the title attaches to "patrons," and refers to a greater number. As excerpted in my title, "more" gains the impression of attaching to "enlightened," which changes the phrase's meaning. The altered meaning renders the phrase a fitting pun for this paper's title, both because of the meaning of the manipulated phrase and because in using the excerpt, I do the very thing for which I criticize Justice Scalia in this paper: taking portions of *The Federalist* out of context. Though I am critical in this paper, my time spent parsing Justice Scalia's writing has deepened my admiration for his captivating writing style and his passion in rendering patriotic service. I posit he would have taken no offense at the playful suggestion in my title that Hamilton and Madison are "more enlightened patrons of liberty" than he, as I imagine he might question if there are any "more enlightened" with respect to political liberty than the two principle authors of *The Federalist*.

<sup>3</sup> See *Calder v. Bull*, 3 U.S. 386, 391 (1798).

<sup>4</sup> Buckner F. Melton, Jr., *The Supreme Court and The Federalist: A Citation List and Analysis, 1789-1996*, 85 KY. L.J. 243, 251 (1997).

<sup>5</sup> Buckner F. Melton, Jr. & Jennifer J. Miller, *The Supreme Court and The Federalist: A Supplement, 1996-2001*, 90 KY. L.J. 415, 416 (2002).

<sup>6</sup> Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 312 (2005).

<sup>7</sup> Eleven cases represents just over one-seventh (11/76) of the Supreme Court's caseload from that year. See *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015); *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Young v. UPS*, 135 S. Ct. 1338 (2015); *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *King v. Burwell*, 135 S. Ct. 2480 (2015); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

<sup>8</sup> Durchslag, *supra* note 6, at 313 (stating, "[I]t is hard to come up with more than a small handful of cases where *The Federalist* even arguably played a decisive role in the Court's decision.>").

<sup>9</sup> Buckner F. Melton, Jr. & Carol Willcox Melton, *The Supreme Court and the Federalist: A Supplement, 2001-2006*, 95 KY. L.J. 749, 751–52 (2007).

“the Framers” generally and *The Federalist Papers* particularly is the secular equivalent to citing the Bible. It is an appeal to a higher and more revered authority. It not only establishes an ethos of objectivity but the perception of infallibility.<sup>10</sup>

This Article will provide close readings of a number of Supreme Court decisions that cite to *The Federalist*, juxtaposed with close attention to *The Federalist* itself. A comprehensive close reading of the Supreme Court's use of *The Federalist* is a task for a long book, so this Article has a limiting factor: it will focus specifically on Justice Scalia's use of *The Federalist* throughout his tenure on the Supreme Court. There are a number of reasons to focus on Justice Scalia. Foremost is the sheer number of times Justice Scalia has cited *The Federalist*. As of the end of the 2001 term, Justice Scalia was “among the heaviest users of *The Federalist* in the Court's entire history.”<sup>11</sup> After the 2006 term, Melton noted that, “Scalia and Clarence Thomas continue to be among those who cite to *the essays* most heavily.”<sup>12</sup> Justice Scalia's several uses of *The Federalist* in *Canning* in 2014, and his citations to it in five cases from the 2014–2015 term,<sup>13</sup> demonstrate that Publius' influence endured in his jurisprudence throughout his tenure on the Court.<sup>14</sup>

Justice Scalia's judicial philosophy is a second reason he was chosen for this close reading of his *Federalist* citations. In declaring himself an adherent of “originalism,” Justice Scalia argued that “[t]he purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable.”<sup>15</sup> Since *The Federalist* is historical material that could help understand “the society [that] adopt[ed] the Constitution[,]” it seems to be particularly useful for an originalist constitutional interpreter.<sup>16</sup> In interviews, Justice Scalia has made clear that he indeed does have a reverential attitude toward *The Federalist*, and considers them crucial to understanding the Constitution and its formative period.<sup>17</sup> In an interview with C-SPAN, he was asked, “[H]ow would you

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<sup>10</sup> Durchslag, *supra* note 6, at 315.

<sup>11</sup> Melton, Jr. & Miller, *supra* note 5, at 417.

<sup>12</sup> Melton, Jr. & Melton, *supra* note 9, at 749 (emphasis added).

<sup>13</sup> See *Young v. UPS*, 135 S. Ct. 1338 (2015); *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *King v. Burwell*, 135 S. Ct. 2480 (2015); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In all of these cases except *Zivotofsky*, Justice Scalia only cited *The Federalist* once. Perhaps a sequel to this Article will discuss *Zivotofsky* and any other cases not addressed herein.

<sup>14</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2258 (2013); *NLRB v. Canning*, 134 S. Ct. 2550, 2595 (2014).

<sup>15</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., C-SPAN, *Q&A with Justice Antonin Scalia*, YOUTUBE (July 19, 2012), <https://www.youtube.com/watch?v=sXynIZOtKkg>.

want the constitution taught in high schools?”<sup>18</sup> He responded: “Well, first of all, I am appalled that Americans get out of high school, get out of college, even get out of law school without ever having read the [F]ederalist [P]apers.”<sup>19</sup> He continued:

[T]hing number one, if - if you want to have the proper respect, and indeed awe that you ought to have for the United States Constitution - thing number one is to realize how brilliant were the men who put that piece of work together and that shines through in the Federalist Papers.<sup>20</sup>

To be sure, Justices of all judicial persuasions cite to *The Federalist*.<sup>21</sup> Melton’s study also noted that Justice Stevens, not an originalist and traditionally thought to be among the Court’s liberal wing, was “among the heaviest users of *The Federalist* in the Court’s entire history.”<sup>22</sup> Indeed, during the Rehnquist Court, Justice Stevens seems to have cited *The Federalist* in even more opinions than Justice Scalia.<sup>23</sup> Intriguingly, however, Justice Stevens only cited *The Federalist* in one opinion during his ten terms on the Burger Court<sup>24</sup> (i.e. before Justice Scalia joined the Court), providing some evidence that his increased use of *The Federalist* was due to a changed tenor in the Court, and the addition of a particular Justice who acknowledges *The Federalist* as a key to understanding the Constitution.<sup>25</sup>

These factors explain why this Article will focus particularly on Justice Scalia’s use of *The Federalist*. In doing so, the paper may also attend to other Justices’ uses of *The Federalist* in cases in which Justice Scalia cites to it. In some cases, such as *Printz*, Justices openly debate the meaning and significance of a number of the papers in *The Federalist*.<sup>26</sup>

A note about method: this Article will generally eschew delving into other sources from the founding period, or historical work on the persons Alexander Hamilton and James Madison. The paper will focus primarily on the text of *The Federalist* itself, and will generally assess the work—in its entire context and with caveats—as the work of “Publius.” Most Supreme Court opinions cite *The Federalist* in this way—i.e. without much regard to the actual author. This comports with what seems to be a clear reason why *The Federalist* has endured: that in part because of the later disagreements

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Matthew J. Festa, *Dueling Federalists: Supreme Court Decisions with Multiple Opinions Citing the Federalist, 1986-2007*, 31 SEATTLE U. L. REV. 75, 78 (2007). “[T]he frequency of multiple citations to *The Federalist* is not linked to any one ideological persuasion, liberal or conservative, among the Justices.” *Id.* at 99.

<sup>22</sup> Melton, Jr. & Miller, *supra* note 5, at 417.

<sup>23</sup> Durchslag, *supra* note 6, at 307.

<sup>24</sup> *Id.*

<sup>25</sup> Melton, Jr. & Melton, *supra* note 9, at 749.

<sup>26</sup> *Printz v. United States*, 521 U.S. 898, 911–13 (1997).

between Hamilton and Madison, their work on *The Federalist* (despite some potential internal inconsistencies) reflects a unified understanding of the fundamentals of the Constitution, which may be viewed as deeper and more lasting than attitudes to particularized and temporary political issues. This Article may, however, briefly refer to Hamilton and Madison, the persons, when dealing with the *Printz* case—where the distinction between the two becomes relevant.

This Article will focus on eleven cases in which Justice Scalia has cited to *The Federalist* (the actual number of such cases is much greater, but in most instances, *The Federalist* plays no significant role).<sup>27</sup> The cases are divided into three parts. Part II discusses six cases that deal with the separation of powers. This is the area in which Justice Scalia has most extensively cited *The Federalist*, and this Part will take up the greatest portion of the Article. Part III discusses two cases that deal with issues of federalism, or the relationship between the federal and state governments. Part IV deals with three miscellaneous cases that fall into neither the separation of powers nor the federalism umbrella. Part V will offer brief summary thoughts.

Though this Article critically analyzes Justice Scalia's use of *The Federalist* in particular, there are other related themes. The piece will provide some context for the use of *The Federalist* in general in the Supreme Court, highlight passages from *The Federalist* that may have been relevant but overlooked in recent Supreme Court cases, and offer a window into some aspects of the Court's separation of powers and federalism jurisprudences and their relations to *The Federalist*. With respect to the principle inquiry, the Article concludes that Justice Scalia has often plucked portions of *The Federalist* out of context in order to support a particular view of the Constitution's original meaning and intent. He also avoids passages from *The Federalist* that cut against his views. I do not mean to suggest that Justice Scalia does this intentionally or maliciously. *The Federalist*'s eighty-four papers comprise a long work, and the originalist judge's job of ascertaining original meaning is, to quote Justice Scalia himself, "exceedingly difficult[.]" because "[p]roperly done, the task requires the consideration of an enormous mass of material -- in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states."<sup>28</sup> But whether it is improper contextualization of an elegant phrase, or ignorance of or inattention to conflicting material, Justice Scalia's

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<sup>27</sup> Durchslag, *supra* note 6, at 297. Indeed, Durchslag thinks that *The Federalist* was significant in only six of Justice Scalia's opinions as of 2005. *Id.* I think the number may be a little higher through 2005, and certainly more so through the present day.

<sup>28</sup> Scalia, *supra* note 15, at 856–57 ("Even beyond that, it requires an evaluation of the reliability of that material --many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time -- somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.").

use of *The Federalist* demonstrates that his own professed “principle defect” of originalism—“that historical research is always difficult and sometimes inconclusive”—is the conduit through which originalism, like any other theory of constitutional interpretation, can provide for “[t]he inevitable tendency of judges to think that the law is what they would like it to be . . . .”<sup>29</sup> But unlike any other interpretive theory that, to Justice Scalia, might “come[] as a wolf[,]”<sup>30</sup> originalism wears the sheep’s clothing of “establish[ing] a historical criterion that is conceptually quite separate from the preferences of the judge himself.”<sup>31</sup> As Justice Scalia’s use of *The Federalist* demonstrates, historical criteria are not always so removed from a judge’s preferences.

## II. SEPARATION OF POWERS

### A. *Young v. United States ex rel. Vuitton et Fils S.A.*

During Justice Scalia’s first term on the Court, he presaged his famous lone-dissent a year later in *Morrison v. Olson*.<sup>32</sup> In *Young*, the Court faced the following issue: the petitioners had been enjoined by a district court from using Louis Vuitton’s trademarks belonging to the respondent.<sup>33</sup> After finding probable cause that the petitioners were violating the injunction, the respondent’s attorney asked the court for a special appointment to prosecute contempt of court on behalf of the United States, pursuant to Federal Rule 42(a)(2).<sup>34</sup> The district court appointed the respondent’s attorney, and the petitioners were eventually convicted of criminal contempt.<sup>35</sup> They appealed to the Second Circuit, arguing that the appointment of Louis Vuitton’s attorney as prosecutor violated their right to be prosecuted by an impartial prosecutor.<sup>36</sup> The Second Circuit affirmed the convictions.<sup>37</sup>

Four members of the Supreme Court found that the appointment was invalid *per se* because of the appointment of an interested party’s attorney,<sup>38</sup> while three members agreed that the appointment raised suspicions, but disagreed with a *per se* rule and wanted to remand the case to see if the appointment was “harmless error.”<sup>39</sup> Justice White, in a one-paragraph dissent, noted the “district court’s well-established authority to appoint

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<sup>29</sup> *Id.* at 864.

<sup>30</sup> *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

<sup>31</sup> Scalia, *supra* note 15, at 864.

<sup>32</sup> *Morrison*, 487 U.S. at 697–99 (Scalia, J., dissenting).

<sup>33</sup> *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 789 (1987).

<sup>34</sup> FED. R. CRIM. P. 42(a)(2) (“The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.”).

<sup>35</sup> *Young*, 481 U.S. at 790.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 793.

<sup>38</sup> *Id.* at 814.

<sup>39</sup> *Id.* at 825–27 (Powell, J., concurring in part and dissenting in part).

private counsel to prosecute should be exercised only after [the United States Attorney] declines to prosecute[.]” and also noted that he would prefer courts not to appoint interested attorneys.<sup>40</sup> He nonetheless thought that Federal Rule 42(a)(2) authorized such an appointment, and he preferred to leave necessary amendments to the rulemaking process.<sup>41</sup> Ultimately, Justice White agreed with the Court of Appeals that there was “no error, constitutional or otherwise, in the appointments made in this action . . . .”<sup>42</sup>

Justice Scalia, concurring in the judgment, wrote separately to disagree on constitutional grounds with the plurality, the three-member concurrence, and Justice White’s dissent.<sup>43</sup> Justice Scalia thought that appointing a prosecutor is not part of the “judicial power” of Article III, and hence thought the appointments were constitutionally invalid.<sup>44</sup> Justice Scalia took issue with the rest of the Court, which found uncontroversial the ability of a court to initiate contempt proceedings.<sup>45</sup> The majority explained its reasoning for this traditionally-executive power (on this point the three-member concurrence joined the plurality): “The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority . . . .”<sup>46</sup> Justice Scalia disagreed, arguing that having the judiciary depend on the executive for the efficacy of its judgments was not absurd as the majority would have it, but in fact “a carefully designed and critical element of our system of Government.”<sup>47</sup> Justice Scalia went on to discuss how the executive and legislature depend on each other, and then asked “[w]hy, one must wonder, are the courts alone immune from this interdependence?”<sup>48</sup> Immediately after posing this question, Justice Scalia answered, “[t]he Founding Fathers, of a certainty, thought that they were not.”<sup>49</sup>

As his sole piece of evidence for the attitudes of the Founding Fathers, Justice Scalia then cited a block quote from No. 78 of *The Federalist*<sup>50</sup>—the section that includes the line that the judiciary “must

<sup>40</sup> *Id.* at 827 (White, J., dissenting).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 815–16 (Scalia, J., concurring).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 795 (majority opinion). “The Rule’s assumption that private attorneys may be used to prosecute contempt actions reflects the longstanding acknowledgment that the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function.” *Id.*

<sup>46</sup> *Id.* at 796.

<sup>47</sup> *Id.* at 817 (Scalia, J., concurring).

<sup>48</sup> *Id.* at 817–18.

<sup>49</sup> *Id.* at 818.

<sup>50</sup> *Id.*; THE FEDERALIST NO. 78, *supra* note 2, at 465 (Alexander Hamilton) (“[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”) (emphasis added).

ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”<sup>51</sup> Justice Scalia ended the first part of his opinion one paragraph later, and went on to his refutation of the majority’s case law analysis in Parts II and III of his opinion.<sup>52</sup> Ultimately, it seems that Justice Scalia’s view in this case was driven by his sense of the nature of the separation of powers; he apparently could not abide the judiciary having the power to prosecute, even if limited to contempt.

Though Justice Scalia only cited one of *The Federalist* papers, and provided little discussion of it, that paper played a prominent role in *Young* in that Justice Scalia used it as the only piece of evidence that the original understanding of the Constitution’s separation of powers would oppose the judiciary initiating contempt proceedings.<sup>53</sup> But Justice Scalia may have taken this quote from No. 78 out of context. In the larger section that contains the portion quoted by Justice Scalia, Publius defends the notion of life tenure for federal judges.<sup>54</sup> His audience is one that fears judicial power being abused; Publius’ purpose in this passage is to placate those fears. It makes sense rhetorically, then, for Publius to use language denigrating the judicial power. By taking a portion of this defense of life tenure out of context, Justice Scalia used the passage to speak on a completely different, and much more narrow issue—whether judges can appoint prosecutors for criminal contempt actions.<sup>55</sup>

Ironically, in the paragraph that immediately followed his *Federalist* quotation, Justice Scalia undercut his very argument that the judiciary in this instance is using too much executive power. Responding to the Court’s defense of the practice at issue on the grounds that it helps a court preserve authority, Justice Scalia wrote:

If the courts must be able to investigate and prosecute contempt of their judgments, why must they not also be able to arrest and punish those whom they have adjudicated to be in contempt? Surely the Executive’s refusal to enforce a judgment of contempt would impair the efficacy of the court’s acts at least as much as its failure to investigate and prosecute a contempt. Yet no one has ever supposed that the Judiciary has an inherent power to arrest and incarcerate.<sup>56</sup>

By noting that a court, even after appointing a prosecutor and delivering a guilty judgment on criminal contempt, is still dependent on the executive to “arrest and punish” those guilty of contempt, Justice Scalia himself

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<sup>51</sup> THE FEDERALIST NO. 78, *supra* note 2, at 465 (Alexander Hamilton).

<sup>52</sup> *Young*, 481 U.S. at 818–19 (Scalia, J., concurring).

<sup>53</sup> *Id.* at 818.

<sup>54</sup> THE FEDERALIST NO. 78, *supra* note 2, at 465 (Alexander Hamilton).

<sup>55</sup> *Young*, 481 U.S. at 817–18 (Scalia, J., concurring).

<sup>56</sup> *Id.* at 818.

demonstrated that a court still “ultimately depend[s] upon the aid of the executive arm . . . for the efficacy of its judgments[.]”<sup>57</sup> even if it can appoint a prosecutor in contempt proceedings. Trying to trip up the majority, Justice Scalia tripped himself.

Indeed, further exploration of No. 78 reveals that it might better be read as supporting the narrow leeway the majority gives to judges. Immediately after the portion Justice Scalia quoted, Publius begins the next paragraph by stating that, “[t]his *simple view* of the matter suggests several important consequences.”<sup>58</sup> At first blush, this description of the very text Justice Scalia quoted, demonstrates that Publius thought it vague and incomplete. And indeed Publius continues, describing one of the consequences of “this simple view” of the judiciary: “It proves . . . that the judiciary is beyond comparison the weakest of the three departments . . . and that all possible care is requisite to enable it to defend itself against their attacks.”<sup>59</sup> At the end of the same paragraph Publius writes that, “from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches . . . .”<sup>60</sup>

Though these portions of No. 78 are intended to defend life tenure and cannot speak conclusively to the issue before the Court in *Young*, they certainly seem to be consistent with the power of a court to appoint a prosecutor for criminal contempt. The power could be seen as one of defense, in that it gives a court power over those involved in litigation in instances in which the executive does not or cannot (maybe because of a towering caseload) come to the court’s aid. Surely litigants would be at least somewhat deterred by such a power in the court, not wishing to rely on the mercy of the executive after a judgment. Indeed, this power in the court is consistent with the portion of No. 78 quoted by Justice Scalia, since, as Justice Scalia conceded, appointing a prosecutor cannot ultimately effectuate any judgment.<sup>61</sup> In any case, such a power might not even disrupt the power relations between the branches at all, as the executive might appreciate the benefit of allowing a court—in a narrow set of cases—to take some of its load.

In sum, *Young* reveals Justice Scalia citing *The Federalist* for a broad claim about the views of the Founding Fathers as a whole. The Founding Fathers’ views in this case are crucial for Justice Scalia, as his opinion rests on the fact that the judiciary as originally understood in the founding period cannot exercise executive powers. But, as Justice Scalia himself inadvertently helped to demonstrate, the power at issue did not actually conflict with the

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<sup>57</sup> THE FEDERALIST NO. 78, *supra* note 2, at 465 (Alexander Hamilton).

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> *Id.* at 465–66.

<sup>60</sup> *Id.* at 466.

<sup>61</sup> *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 818 (1987) (Scalia, J., concurring).

text of *The Federalist* that he quoted and italicized. Indeed, the broader context in No. 78 might even support the opposite conclusion.<sup>62</sup>

### B. *Morrison v. Olson*

A year after *Young*, the Court decided *Morrison*.<sup>63</sup> Justice Scalia dissented alone.<sup>64</sup> A quarter-century later, in the fall of 2013, Justice Scalia called this the most “wrenching” case during his time on the Court.<sup>65</sup> Scholars have noted the case’s importance,<sup>66</sup> a notion supported by the number of citations to it in recent Supreme Court cases on the Appointments Clause and separation of powers.<sup>67</sup>

In *Morrison*, the Court was faced with Appointments Clause and separation of powers challenges to the office of “independent counsel.”<sup>68</sup> The Act authorizing the independent counsel<sup>69</sup> requires the Attorney General to conduct a preliminary investigation upon receiving information that certain federal officials might have violated federal criminal law.<sup>70</sup> If the Attorney General determines that “there are no reasonable grounds to believe that further investigation is warranted,” he must simply notify the Special Division court, thereby ending the matter.<sup>71</sup> If, however, the Attorney General cannot make that determination, then he must submit the relevant information to the Special Division, after which the Division must appoint an independent counsel to investigate the potential criminal violations.<sup>72</sup> The independent counsel is granted “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice[] . . . .”<sup>73</sup> The independent counsel can be removed by impeachment,

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<sup>62</sup> THE FEDERALIST NO. 78, *supra* note 2, at 465 (Alexander Hamilton); *see* Planned Parenthood v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., concurring in part and dissenting in part). Justice Scalia quoted the same passage from No. 78 in his dissent in *Casey*. *Id.* In that case, Justice Scalia uses No. 78 to make a different point, which is that the Court was substituting its own views for that of the legislature. *Id.* Really, however, Justice Scalia had a problem with the Court’s interpretation of the due process clause and application of *stare decisis*. *Id.* In any case, the “FORCE” and “WILL” of No. 78 refer more to the force of executive power, and the will of legislating along with the “purse.” THE FEDERALIST NO. 78, *supra* note 2, at 465 (Alexander Hamilton). With respect to *Casey*, the Court still needed the “executive arm . . . for the efficacy of its judgments.” *Id.*

<sup>63</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>64</sup> *Id.* at 697 (Scalia, J., dissenting).

<sup>65</sup> Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAGAZINE (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/index5.html>.

<sup>66</sup> Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 515 (1996) (“*Morrison v. Olson* [is] perhaps the most important case on the removal power in the past decade.”).

<sup>67</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (citing *Morrison* upwards of twenty times).

<sup>68</sup> *Morrison*, 487 U.S. at 660.

<sup>69</sup> 28 U.S.C. § 599 (2012) (explaining that the Act expired in 1999 pursuant to its own terms); H.R. 4603, 113th Cong. (2nd Sess. 2013) (discussing that a bill was introduced in the House of Representatives in 2014 to reauthorize it).

<sup>70</sup> *Morrison*, 487 U.S. at 660.

<sup>71</sup> *Id.* at 661.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 662.

or by the Attorney General “for good cause.”<sup>74</sup>

The Court dismissed the Appointments Clause challenge (on the grounds that the independent counsel is not appointed by the President) by finding the independent counsel to be an “inferior officer,” and therefore amenable to appointment by “Courts of Law.”<sup>75</sup> The Court offered three reasons for inferior officer status: the independent counsel is subject to removal by a higher officer;<sup>76</sup> the independent counsel can only perform “certain, limited duties[;]”<sup>77</sup> and the office is “limited in jurisdiction . . . to certain federal officials suspected of certain serious federal crimes[] . . .”<sup>78</sup> The Court dismissed a further challenge that having the Special Division define the jurisdiction of the independent counsel is an improper exercise of power by the judiciary, by holding that in all, the Special Division does “not impermissibly trespass upon the authority of the Executive Branch[.]” in part because the Special Division has no supervisory power over the independent counsel.<sup>79</sup> The Court dismissed a challenge to the “good cause” limitation on the Attorney General’s removal power, noting that it does not “interfere impermissibly with [the President’s] constitutional obligation to ensure the faithful execution of the laws.”<sup>80</sup> The Court also dismissed a separation of powers challenge to the entire law on the grounds that Congress did not try to increase its own power, nor did it give the judiciary executive power, since the Special Division can only appoint the counsel upon request of the Attorney General, and cannot review a decision to not request appointment.<sup>81</sup> Finally, the Court held that since the counsel can only be appointed after a request by the Attorney General, and the facts submitted by the Attorney General help define the counsel’s jurisdiction, the Executive Branch retains “sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”<sup>82</sup>

Before delving into Justice Scalia’s use of *The Federalist*, it is worth briefly summarizing his main points of disagreement. Strongly affirming his premise that “all of the executive power” must be vested in the President, Justice Scalia responded to the portions of the majority that found sufficient executive control over the independent counsel.<sup>83</sup> He argued that practically, the Attorney General has no choice but to seek the counsel’s appointment, because he would be unable to defend the proposition that there are “no reasonable grounds to believe that further investigation or prosecution is

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<sup>74</sup> *Id.* at 663.

<sup>75</sup> *Id.* at 676; *see also* U.S. CONST. art. II, § 2, cl. 2.

<sup>76</sup> *Morrison*, 487 U.S. at 671.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 672.

<sup>79</sup> *Id.* at 680–81.

<sup>80</sup> *Id.* at 693.

<sup>81</sup> *Id.* at 694–95.

<sup>82</sup> *Id.* at 696.

<sup>83</sup> *Id.* at 705 (Scalia, J., dissenting).

warranted.”<sup>84</sup> Justice Scalia pointed to the facts of the case before the Court, and noted that in the face of a 3,000 page indictment from Congress, the Attorney General really has no choice, even though the Special Division cannot review his decision, since “*Congress* is not prevented from reviewing it[]” and “[t]he context of this statute is acrid with the smell of threatened impeachment.”<sup>85</sup>

Having disputed the notion of executive control prior to the appointment, Justice Scalia also disputed the Court’s view that the Attorney General (and thereby the President) has control over the counsel.<sup>86</sup> He noted that, “limiting removal power to ‘good cause’ is an impediment to, not an effective grant of, Presidential control.”<sup>87</sup> Justice Scalia ultimately found that the Act “weaken[s] the Presidency by reducing the zeal of his staff[]” and “enfeebles [the President] more directly in his constant confrontations with Congress, by eroding his public support[]” through engulfing his staff in criminal suspicion.<sup>88</sup>

In *Morrison*, Justice Scalia cited seven papers for a total of twelve citations to *The Federalist*.<sup>89</sup> Five of these citations appear in his prologue, a paean to the separation of powers.<sup>90</sup> After quoting the Massachusetts Constitution of 1780, Justice Scalia wrote that “[t]he Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government.”<sup>91</sup> He then cited No. 47 of *The Federalist* for support, quoting Publius’s line that “[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.”<sup>92</sup> But this selection seems puzzling, for Publius continues: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands[] . . . may justly be pronounced the very definition of tyranny.”<sup>93</sup> That political truth of the greatest intrinsic value, then, is not any particular arrangement of powers, nor does it proscribe the sharing of some power. The point is that no one entity should have all the power. Surely Justice Scalia knew this to be No. 47’s true meaning. Nonetheless, he quotes this citation as an out-of-context rhetorical flourish.

Justice Scalia, after noting that the separation of powers is expressed in the first sections of the Constitution’s first three Articles, then quoted Nos. 73 and 51 to the effect that the Framers recognized the need for checks to

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<sup>84</sup> *Id.* at 701.

<sup>85</sup> *Id.* at 702.

<sup>86</sup> *Id.* at 706.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 713.

<sup>89</sup> *Id.* at 697–729.

<sup>90</sup> *Id.* at 697–700.

<sup>91</sup> *Id.* at 697.

<sup>92</sup> THE FEDERALIST NO. 47, *supra* note 2, at 301 (James Madison).

<sup>93</sup> *Id.*

keep the separation.<sup>94</sup> He ended a sizeable block quote from No. 51 with Publius's line that "[a]s the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified."<sup>95</sup> Justice Scalia then argued that the major "fortification" is the veto power, but that the unity of the executive is another.<sup>96</sup> Justice Scalia's point here is that by inserting an officer into the executive branch, who (according to Justice Scalia) is not subject to the President, Congress has thereby removed one of the President's fortifications, and usurped power for itself.

Two points come to mind initially. The first is, if the "major fortification" for the President is the veto power, then why not rely on the President to veto this legislation in the first place? The Court cannot exercise his checking and balancing powers for him. Secondly, after multiple citations to *The Federalist*, including a long block quote, it seems suspicious that Justice Scalia provided no support (from *The Federalist* or elsewhere) for the point that unity in the executive serves separation of powers interests. The reasons for unity in the executive, as explained in No. 70 of *The Federalist*, are to provide the necessary energy and responsibility for the executive branch.<sup>97</sup> Though these factors might in turn fortify the separation of powers, this chain of reasoning demonstrates that should a small incursion into the executive's unity not interfere with the requisite energy or responsibility to the people, then, at least according to the reasons given in *The Federalist*, such an incursion would not undermine the interests served by unity.

More problematic, however, was Justice Scalia's decision to leave out a line from his block quote of No. 51. In the opinion, he left in the portion that notes that the "remedy" for the "inconveniency" of the dominance of the legislature is bicameralism.<sup>98</sup> Justice Scalia then inserted an ellipsis to replace the following line: "It may even be necessary to guard against dangerous encroachments by still further precautions."<sup>99</sup> If Justice Scalia read *The Federalist* like he does statutes, then he cannot avoid the interpretation that this passage says that bicameralism is the essential check on the legislature, while further precautions "may" be necessary.<sup>100</sup> To his credit, Justice Scalia left in the line that "the weakness of the executive may require[] . . . that it should be fortified[,]""<sup>101</sup> though he ignores the word "may" again. Publius goes on to describe the "further precaution" that "may" be necessary—the

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<sup>94</sup> *Morrison*, 487 U.S. at 698 (Scalia, J., dissenting).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> THE FEDERALIST NO. 70, at 403 (Alexander Hamilton) (Kathleen M. Sullivan ed., 2009).

<sup>98</sup> *Morrison*, 487 U.S. at 698 (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 51, *supra* note 2, at 322–23 (James Madison)).

<sup>99</sup> THE FEDERALIST NO. 51, *supra* note 2, at 322–23 (James Madison).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

veto.<sup>102</sup> He says nothing about the unity of the executive. All in all, it seems fair to say that Justice Scalia strained in his effort to find support in *The Federalist* for the essential nature of an absolutely unitary executive to the separation of powers.

Later in his opinion, explaining that Congress is not entitled to the benefit of the doubt as to the constitutionality of its work, Justice Scalia noted that where Congress and the executive disagree, neither gets the presumption of constitutionality.<sup>103</sup> In support of this point, Justice Scalia cited the portion of No. 49 of *The Federalist* where Publius writes that “[t]he several departments being perfectly co-ordinate . . . [none] can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . . .”<sup>104</sup> It is notable that Justice Scalia did not explain why the judiciary is not bound to this line, but ultimately there is no point to, since the quoted portion is part of a hypothesis Publius entertains from Jefferson’s *Notes on the State of Virginia*.<sup>105</sup> It takes the line out of context to apply it as if it were Publius’s (or Madison’s, as Scalia stated) studied view. In fact, when Publius goes on to reject Jefferson’s argument for regular appeals to the people, it might even be that Publius rejects the Jeffersonian premise about the perfect coordination of the departments.

After rejecting the office of independent counsel on general separation of powers grounds, Justice Scalia argued that the appointment was invalid anyway, since the counsel is not an “inferior” officer, and thereby needs to be appointed by the President and approved by the Senate.<sup>106</sup> In this discussion, Justice Scalia used *The Federalist*, not for broad, grand proclamations of support, but in order to ascertain the original meaning of the word “inferior.” Justice Scalia used No. 81, where Publius describes “inferior” federal courts as “subordinate” to the Supreme Court, as evidence that “inferior” officers must be subordinate to another executive officer.<sup>107</sup> Though it is not clear that “subordinate” in the sense of subject-to-being-fired and “subordinate” in the sense of subject-to-appellate-review are necessarily the same thing, this instance nonetheless demonstrates Justice Scalia using *The Federalist* as a low-key, textual interpretation device, rather than as a store of vague tribute to the separation of powers.

Justice Scalia’s final use of *The Federalist* in *Morrison* is No. 70, which he quoted to demonstrate that unity in the executive helps the people determine responsibility.<sup>108</sup> This is important for Justice Scalia in *Morrison* because as long as the President retains control of prosecutors, there is a

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<sup>102</sup> *Id.*

<sup>103</sup> *Morrison*, 487 U.S. at 704–05 (Scalia, J., dissenting).

<sup>104</sup> *Id.* at 705; THE FEDERALIST NO. 49, *supra* note 2, at 314 (James Madison).

<sup>105</sup> THE FEDERALIST NO. 49, *supra* note 2, at 313–14 (James Madison).

<sup>106</sup> *Morrison*, 487 U.S. at 723 (Scalia, J., dissenting).

<sup>107</sup> *Id.* at 720; *see also* THE FEDERALIST NO. 81, *supra* note 2, at 481 (Alexander Hamilton).

<sup>108</sup> *Morrison*, 487 U.S. at 729 (Scalia, J., dissenting).

mechanism to keep prosecutors in check—as Scalia says, “the unfairness will come home to roost in the Oval Office.”<sup>109</sup> These considerations apply more acutely to a first-term president, and would be of more force in a presidency without term-limits, which is what *The Federalist* assumed.<sup>110</sup> In any case, the issue of responsibility is slightly different in the *Morrison* context. Objection to a plural executive on the grounds “that it tends to conceal faults and destroy responsibility[.]”<sup>111</sup> is premised on the notion that it is hard to tell who to blame when multiple people are involved in making the same decision. It is a different situation, however, when there is simply a small carve-out of executive decision-making. In the *Morrison* situation, for example, if the independent counsel did something objectionable, the public would know who was responsible because of the specified and limited nature of the office (and could then hold Congress responsible for the independent counsel’s authorization). Similarly, in any context outside of investigating particular executive officers, the public would still be able to hold the President accountable. *Morrison* does not present a situation in which Congress tried to multiply the number of people sharing responsibility with the President for a broad range of executive decisions. No one would blame the independent counsel for a foreign policy gaffe. So Justice Scalia’s citations to No. 70 demonstrated at least a temporary misapprehension of the accountability problem with a plural executive.

In *Morrison*, Justice Scalia used a number of papers from *The Federalist* in a few different ways: he used them as evidence of the importance of the separation of powers to the Framers, as a textualist tool, and as a gloss on the purpose of unity in the executive. Unfortunately, he misapplied these papers in a number of ways as well: he took a quote out of its context, replaced unhelpful language with an ellipsis, made a strained parallel between different kinds of subordination, and simply misunderstood *The Federalist*’s point about a plural executive.

### C. *Mistretta v. United States*

In *Mistretta*, the Court found that separation of powers did not prevent Congress from delegating the formation of sentencing guidelines, consistent with statutory guidance, to a body of judges within the Judicial Branch.<sup>112</sup> Once again, Justice Scalia dissented alone.<sup>113</sup> Justice Scalia did not make affirmative use of *The Federalist* in this opinion, though he did cite to it once in order to respond to the majority. The majority quoted No. 47 to highlight that separation of powers is not rigid, excerpting the selection that

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<sup>109</sup> *Id.*

<sup>110</sup> THE FEDERALIST NO. 72, *supra* note 2, at 436–37 (Alexander Hamilton).

<sup>111</sup> *Morrison*, 487 U.S. at 729 (Scalia, J., dissenting); *see also* THE FEDERALIST NO. 72, *supra* note 2, at 426 (Alexander Hamilton).

<sup>112</sup> *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

<sup>113</sup> *Id.* at 413 (Scalia, J., dissenting).

separation of powers “d[oes] not mean that these [three] departments ought to have no *partial agency* in, or no *controul* [sic] over the acts of each other[] . . .”<sup>114</sup> Justice Scalia responded to this use by arguing that Publius’s

point was that the commingling specifically provided for in the structure that he and his colleagues had designed -- the Presidential veto over legislation, the Senate’s confirmation of executive and judicial officers, the Senate’s ratification of treaties, the Congress’ power to impeach and remove executive and judicial officers -- did not violate a proper understanding of separation of powers.<sup>115</sup>

This interpretation is a stretch. The entire context surrounding that quote about “partial agency” is a discussion of Montesquieu and theory.<sup>116</sup> None of the specific powers that Justice Scalia mentioned are discussed in Nos. 47 through 50, with the Presidential veto finally discussed in No. 51.<sup>117</sup> Victoria Nourse, in a thorough and well-considered analysis of Nos. 47 through 51, demonstrates convincingly that these portions of *The Federalist*, contra Justice Scalia, are not about “supplying opposite and rival departmental powers[,]” but supplying “opposite and rival interests . . . .”<sup>118</sup> Does Justice Scalia really think, as he stated in *Mistretta*, that Publius was wedded to particular mechanisms of separation, rather than to a fundamental notion of using whatever mechanisms happen to be necessary to keep the various branches in their functional places? Given his deep reverence for the Framers, it is strange that Justice Scalia, at least in *Mistretta*, seemed to think they were more concerned with the structural particulars of their Constitution, rather than the values those particulars served then and now.

#### D. *Freytag v. C.I.R.*

In *Freytag*, the Court held that Congress’s grant of authority to the Chief Judge of the United States Tax Court to appoint special trial judges comported with the Constitution’s separation of powers.<sup>119</sup> Justice Scalia, joined by three other Justices in this case, concurred, writing:

I agree with the Court that a special trial judge is an “inferior Officer” within the meaning of this Clause, with the result that, absent Presidential appointment, he must be appointed by a court of law or the head of a department. I do not agree, however, with the Court’s conclusion that the Tax Court is a “Court of Law” within the meaning of this provision. I would

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<sup>114</sup> *Id.* at 380–81 (majority opinion).

<sup>115</sup> *Id.* at 426 (Scalia, J., dissenting).

<sup>116</sup> See THE FEDERALIST NO. 47, *supra* note 2, at 302–03 (James Madison).

<sup>117</sup> THE FEDERALIST NO. 51, *supra* note 2, at 321 (James Madison).

<sup>118</sup> Nourse, *supra* note 66, at 481.

<sup>119</sup> *Freytag v. Comm’r*, 501 U.S. 868, 870 (1991).

find the appointment valid because the Tax Court is a “Department” and the Chief Judge is its head.<sup>120</sup>

Justice Scalia, therefore, devoted the majority of his concurrence to explaining why the Tax Court is a “Department” and not a “Court of Law,” though the distinction was irrelevant to the outcome in *Freytag* itself.

In his opinion, Justice Scalia cited seven papers from *The Federalist*.<sup>121</sup> The first citation was to No. 78, in order to show that “Courts of Law” in the Appointments Clause can only refer to Article III courts, and not Article I courts.<sup>122</sup> Justice Scalia noted that the Framers only contemplated Article III courts, and cited as evidence the portion in No. 78 where Publius writes that “all judges who may be appointed by the United States are to hold their offices *during good behavior*[ . . . ]”<sup>123</sup> Since Article I judges do not have life tenure and permanent salary, argued Justice Scalia, they cannot be the “Courts of Law” comprehended by the Appointments Clause.<sup>124</sup>

Justice Scalia went on to provide a concise intellectual history of the purpose of separating the power to make offices from the power to appoint the holders of those offices.<sup>125</sup> In doing so, Justice Scalia enlisted Nos. 76, 49, 48, 73, 51, 78, and 79 of *The Federalist*.<sup>126</sup> After quoting the scarier passages about the legislature from Nos. 48 and 49, Justice Scalia explained that permanent salary for both the President and the Judiciary was an essential aspect of the separation of powers, in that it provided independence from the legislature.<sup>127</sup> This independence is crucial in the appointment context so that Congress cannot influence the appointers, thereby controlling both the creation of, and the appointment to, an office.<sup>128</sup> Justice Scalia called the majority’s disposition destructive of this “carefully constructed scheme” by theoretically allowing Article I judges to appoint officers without the protections from Congress’s influence of life tenure and permanent salary.<sup>129</sup> Ultimately, Justice Scalia still found the Tax Court to be a Department within the Executive Branch, with a Head (the Chief Judge) removable by the President.<sup>130</sup> A crucial feature of his disposition here is that the Chief Judge of the Tax Court is removable for “inefficiency,” a leeway that Justice Scalia

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<sup>120</sup> *Id.* at 901 (Scalia, J., concurring).

<sup>121</sup> *Id.* at 903–08.

<sup>122</sup> *Id.* at 903.

<sup>123</sup> *Id.*; THE FEDERALIST NO. 78, *supra* note 2, at 465 (Alexander Hamilton).

<sup>124</sup> *Freytag*, 501 U.S. at 901–02 (Scalia, J., concurring).

<sup>125</sup> *Id.* at 904.

<sup>126</sup> *Id.* at 905–07.

<sup>127</sup> *Id.* at 906–07.

<sup>128</sup> *Id.* at 905–06.

<sup>129</sup> *Id.* at 908. The majority, for its part, did not hold back either: “Treating the Tax Court as a ‘Department’ and its Chief Judge as its ‘Head’ would defy the purpose of the Appointments Clause, the meaning of the Constitution’s text, and the clear intent of Congress . . .” *Id.* at 888 (majority opinion).

<sup>130</sup> *Id.* at 915 (Scalia, J., concurring).

described as “very broad[,]” allowing the President, rather than Congress, to maintain control over the Chief Judge (and hence his appointments).<sup>131</sup>

It is interesting to see such combative words between concurrences on an issue that seems to be a mere technicality. After all, why should it matter too much whether we categorize the Tax Court as a “Department” or a “Court of Law,” when all agree the appointment is valid? Justice Scalia’s point was to warn against Congress vesting appointment power in Article I courts, and then being able to influence those appointments through the ability to raise or lower the judges’ salaries.<sup>132</sup> The majority, on the other hand, opined that “[g]iven the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint.”<sup>133</sup>

What does *The Federalist* have to say about this difference? Justice Scalia marshaled a number of papers in his exposition of the nature of appointing, and the necessity of independence. The quotations are used rather modestly and unobjectionably, and taken together, do make the reader hesitate at the notion of an Article I judge having the power to appoint, with Congress simultaneously having the power over that judge’s salary. The majority seemed to miss this point when it concluded that the Tax Court is independent of Congress because Congress cannot review its decisions.<sup>134</sup> Justice Scalia, on the other hand, ably used *The Federalist* as an historical source to demonstrate the nature of appointment power during the founding period, and to explain that the necessary independence in this context refers to salary, not reviewability. In addition to using *The Federalist* to connect the concept of separation of powers with permanent salary, Justice Scalia used No. 78 as an interpretive piece in his originalist reading of the term “Courts of Law,” to push back at the majority’s view that “[t]he Tax Court exercises judicial power to the exclusion of any other function.”<sup>135</sup> Even those who oppose such originalist interpretations in general might appreciate the connection between the textual point about “Courts of Law” and the deeper, more important argument that Justice Scalia made about the necessity of permanent salary (or for “heads of departments[,]” being “directly answerable to the President[]”<sup>136</sup>) for the power of appointment.

Though Justice Scalia made good use of *The Federalist* in *Freytag*, he opted for a block quote from James Wilson about the problems with bodies of people making appointments, instead of the similar discussion from No. 76 of *The Federalist*, though Justice Scalia cited No. 76 (without discussion) as

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<sup>131</sup> *Id.* at 912.

<sup>132</sup> *Id.* at 906–07.

<sup>133</sup> *Id.* at 885 (majority opinion).

<sup>134</sup> *Id.* at 891.

<sup>135</sup> *Id.* at 891.

<sup>136</sup> *Id.* at 907 (Scalia, J., concurring).

additional support for Wilson's comments.<sup>137</sup> The majority seemed to have misunderstood this rationale for the Appointments Clause. Immediately before expressing its fear of too many administrative bodies having appointment power, the majority noted that the "Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government."<sup>138</sup> But the majority misunderstood the distribution problem (in much the same way Justice Scalia misapprehended the plural executive problem in *Morrison*).<sup>139</sup> The problem is not having too many individuals with their own individual appointments to make; rather, the Appointments Clause takes away the ability for multiple individuals jointly to make appointments. Justice Scalia made this point through Wilson, though it can be made well through No. 76 of *The Federalist*.<sup>140</sup>

Though one might characterize Justice Scalia's *Freytag* concurrence as a bit pedantic, he did make strong points undercutting the majority's reasoning. The majority seemed to have common sense (the "Tax Court") on its side, but Justice Scalia, through multiple citations to *The Federalist*, demonstrated not just that his interpretation comports with the Founders' understanding, but also why it makes sense for us to see it his way today too.

#### E. *Plaut v. Spendthrift Farm, Inc.*

*Plaut* is the first case discussed in this Article where we find Justice Scalia writing for the Court.<sup>141</sup> The circumstances that birthed the case are rather interesting. On June 20, 1991, the Court rendered two decisions—*Lampf* and *Beam*—which together had an unfortunate result. *Lampf* established a statute of limitations for actions brought under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission.<sup>142</sup> *Beam* held "that a new rule of federal law that is applied to the parties in the case announcing the rule must be applied as well to all cases pending on direct review."<sup>143</sup> Because of these two holdings, a certain class of people with pending securities' claims that were timely filed before June 20, 1991—the standard beforehand depending on state law—now found their claims barred due to the new statute of limitations announced by *Lampf*, and immediately employed to pending cases because of *Beam*.<sup>144</sup> Congress and the President acted to rectify this situation, and in December of 1991 passed a statute allowing those deprived of their cases in this way to

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<sup>137</sup> *Id.* at 905.

<sup>138</sup> *Id.* at 885 (majority opinion).

<sup>139</sup> See *supra* notes 96–99 and accompanying text.

<sup>140</sup> THE FEDERALIST NO. 76, *supra* note 2, at 455 (Alexander Hamilton).

<sup>141</sup> *Plaut v. Spendthrift Farm*, 514 U.S. 211, 213 (1995).

<sup>142</sup> *Id.* at 213; see also *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991).

<sup>143</sup> *Plaut*, 514 U.S. at 214 (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)).

<sup>144</sup> *Id.* at 213–14.

have them re-instated.<sup>145</sup>

*Plaut* invalidated this statute on the grounds that it violated separation of powers because the legislature passed retroactive legislation that re-opened final judicial judgments.<sup>146</sup> As part of a long, historical account of American opposition to legislative judgments, Justice Scalia invoked Nos. 48, 81, and 78 of *The Federalist*.<sup>147</sup> Ultimately, the decision was based on the separation of powers principle as espoused in Justice Scalia's history—"Section 27A(b) effects a clear violation of the separation-of-powers principle we have just discussed[]"<sup>148</sup>—and though there were many sources, *The Federalist* was nonetheless one of the main sources for establishing the notion of a strict rule against legislative undoing of judicial decisions.

Justice Scalia first cited to No. 48 for its examples from Virginia and Pennsylvania of legislative interference with judgments, to demonstrate that this concern underlies the establishment of a separate judiciary.<sup>149</sup> He then provided a block quote from No. 81, ostensibly to demonstrate "the principle effect" of the separate branches: that "[a] legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases."<sup>150</sup> But Justice Scalia included a few sentences from No. 81 before the one just quoted, and seemed to miss, or misread, a portion of it.<sup>151</sup> There, Publius writes: "It is not true, in the second place, that the Parliament of Great Britain, or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States."<sup>152</sup> One clause of that sentence—"than might be done"<sup>153</sup>—demonstrates that Publius in this paper clearly conceived that there are some (even if rare) circumstances where legislatures *can* rectify decisions.

Justice Scalia then provided some miscellaneous quotations from No. 78 attesting to the weakness of the Judiciary. He wrote, quoting No. 78: "The Judiciary would be, 'from the nature of its functions, . . . the [department] least dangerous to the political rights of the constitution,' not because its acts were subject to legislative correction, but because the binding effect of its acts was limited to particular cases and controversies."<sup>154</sup> This characterization takes the quote from No. 78 somewhat out of context. In this passage, as discussed above, Publius notes that the weakness of the Judiciary stems from

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<sup>145</sup> *Id.* at 214.

<sup>146</sup> *Id.* at 240.

<sup>147</sup> *Id.* at 222–23.

<sup>148</sup> *Id.* at 225.

<sup>149</sup> *Id.* at 221–22.

<sup>150</sup> *Id.* at 222.

<sup>151</sup> *Id.*

<sup>152</sup> THE FEDERALIST NO. 81, *supra* note 2, at 484 (Alexander Hamilton).

<sup>153</sup> *Id.*

<sup>154</sup> *Plaut*, 514 U.S. at 223.

its having “no influence over either the sword or the purse[]” (or the army and the government’s money).<sup>155</sup> Though this is not unrelated to the limitation of the judiciary to cases and controversies, this citation again shows Justice Scalia taking a helpful phrase out of its particular context in *The Federalist*.

In any case, it is hard to avoid the notion that the Judiciary is not always just deciding a single case. The effect of its combined judgments on June 20, 1991 robbed a “[a] large class of investors [who] reasonably and in good faith thought they possessed rights of action” of those rights.<sup>156</sup> Congress simply wanted to restore these rights. Justice Stevens, in his dissent, noted the uniqueness and rigidity of the Court’s approach to the case, highlighting that the Court had “never invalidated such a law on separation-of-powers grounds until today[]” and that “only last Term we recognized Congress’ ample power to enact a law that ‘in effect ‘restored’ rights . . . .”<sup>157</sup> Justice Breyer, concurring in the judgment, wrote separately because he disagreed with a *per se* rule against retroactive legislation, noting, right before citing No. 48 of *The Federalist*, that “the unnecessary building of such walls is, in itself, dangerous, because the Constitution blends, as well as separates, powers in its effort to create a government that will work for, as well as protect the liberties of, its citizens.”<sup>158</sup> Justice Breyer ultimately concurred, not simply because the statute at issue was retroactive, but because it also lacked what Justice Breyer called “the liberty-protecting assurances that prospectivity and greater generality would have provided[] . . . .”<sup>159</sup> Justice Breyer found the statute problematic because it was under-inclusive: it failed to account for those who were in good faith relying on pre-*Lampf* limitations, but had not yet filed an action.<sup>160</sup> Justice Breyer might ultimately have struck the right balance in this instance—respecting the separation of powers but not participating in the “unnecessary building of . . . walls” that the Court, through Justice Scalia, undertook.<sup>161</sup>

#### F. *NLRB v. Canning*

Separation of powers and *The Federalist* again took center stage in the final decision published by the Supreme Court in the 2013–2014 term, *Canning*, which was the first time the Supreme Court ever interpreted the Recess Appointments Clause.<sup>162</sup> Though all nine justices concurred in the judgment rejecting several of President Obama’s appointments to the National Labor Relations Board (“NLRB”), the Court split into two opinions

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<sup>155</sup> THE FEDERALIST NO. 78, *supra* note 2, at 465 (Alexander Hamilton).

<sup>156</sup> *Plaut*, 514 U.S. at 248 (Stevens, J., dissenting).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 245.

<sup>159</sup> *Id.* at 244.

<sup>160</sup> *Id.* at 243.

<sup>161</sup> *Id.* at 245.

<sup>162</sup> *NLRB v. Canning*, 134 S. Ct. 2550, 2560 (2014).

along familiar political lines, with Justice Breyer writing for the liberal-plus-Justice Kennedy majority, and Justice Scalia writing for the conservative-minus-Justice Kennedy minority concurrence. Both opinions supplemented traditional constitutional analysis tools, such as close textual reading and discussion of the Framers' intent, with extensive reviews of the use of recess appointments throughout American history. Because of the first-impression interpretation of the Constitution and the myriad of interpretive debates that arise between the two opinions, the case is particularly ripe for discussion and analysis from a variety of angles. Leaving much of this work for a different day or other writers, this section will first summarize the central views of both opinions, and then address the role *The Federalist* plays in them.

Justice Breyer's majority opinion divided the case into three inquiries. The first was whether "the recess" in the Recess Appointments Clause refers to just inter-session recesses (that is, formal recesses between two separate congressional sessions), or both inter- and intra-session recesses (that is, informal recesses that pop up within a particular congressional session).<sup>163</sup> The second was whether the words of the Clause "vacancies that may happen during the recess" comprehend only vacancies that arise during the recess itself, or whether they also comprehend vacancies that existed prior to the recess.<sup>164</sup> The majority's third inquiry was into the particular length of the recess at issue in the case, and whether that length is sufficient to trigger the recess appointment power.<sup>165</sup>

The majority found the text ambiguous as to whether it encompasses intra-session recesses. It then held that "the Clause's purpose demands the broader interpretation[.]" explaining that since the Clause empowers the President to "ensure the continued functioning of the Federal Government when the Senate is away[.]" and "[t]he Senate is equally away during . . . an intra-session recess," the broader interpretation makes more sense.<sup>166</sup> The majority opinion then marshaled evidence that past practice vindicates this interpretation.<sup>167</sup> This holding, however, contained a caveat that intra-session recesses shorter than three days are not long enough to trigger the power, drawn from language in "[t]he Adjournments Clause [that] reflects the fact that a 3-day break is not a significant interruption of legislative business."<sup>168</sup> Additionally, since the majority had found no historical examples of an appointment in an intra-session recess of fewer than ten days, it held that appointments during recesses of three through ten days are "presumptively too short [as well]."<sup>169</sup> This holding would eventually resolve the third

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<sup>163</sup> *Id.* at 2556.

<sup>164</sup> *Id.* at 2567.

<sup>165</sup> *Id.* at 2573.

<sup>166</sup> *Id.* at 2561.

<sup>167</sup> *Id.* at 2561–64.

<sup>168</sup> *Id.* at 2566.

<sup>169</sup> *Id.* at 2554.

inquiry, after the majority examined the necessary formal requirements that constitute the Senate being in session for purposes of the Clause.<sup>170</sup> Finding *pro forma* sessions to qualify, the majority invalidated President Obama's appointments that came during a recess of only three days between two *pro forma* sessions.<sup>171</sup> The Solicitor General had urged the Court to adopt the view that *pro forma* sessions, during which there would be "no business . . . transacted," should be treated as periods of recess.<sup>172</sup>

Between its holding defining "recess," and its application of that holding, the majority also held that the Clause's purpose "strongly supports" the broader interpretation of vacancies that happen to arise—namely that the Clause empowers the President to fill vacancies that arise prior to a recess in addition to those that arise during the recess itself.<sup>173</sup> The majority acknowledged the *reductio ad absurdum* weaknesses of both positions.<sup>174</sup> It noted that if the Clause covered only those vacancies that occur during a recess, it would hamstring the President from filling an office that was vacated immediately before the recess, when the President had no chance to find out about the vacancy or find a replacement.<sup>175</sup> The majority saw this as a clear frustration of the purpose of the Clause, as it would undercut government functioning solely because a vacancy may have happened a minute before the recess started, rather than a minute afterward.<sup>176</sup> At the same time, the majority recognized a point later raised by Justice Scalia,<sup>177</sup> that the "broad interpretation might permit a President to avoid Senate confirmations as a matter of course."<sup>178</sup> The majority ultimately chose to live with the latter problem, explaining that reputational interests and the Senate's "political resources" would help keep the President in check.<sup>179</sup> As a last resort, the Senate could "remain in session, preventing recess appointments by refusing to take a recess."<sup>180</sup> As with the first inquiry, the majority supported its reasoning by reference to historical evidence, noting that "we think it is a fair inference that a large proportion of the recess appointments in the history of the Nation have filled pre-existing vacancies."<sup>181</sup>

Justice Scalia concurred in invalidating the specific appointments at

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<sup>170</sup> *Id.* at 2567–77.

<sup>171</sup> *Id.* at 2573–75.

<sup>172</sup> *Id.* at 2573–74.

<sup>173</sup> *Id.* at 2567–68.

<sup>174</sup> *Id.* at 2566.

<sup>175</sup> *Id.* at 2568.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 2607 (Scalia, J., concurring).

<sup>178</sup> *Id.* at 2569 (majority opinion).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 2571. "The upshot is that the President has consistently and frequently interpreted the Recess Appointments Clause to apply to vacancies that initially occur before, but continue to exist during, a recess of the Senate. The Senate as a body has not encountered this practice for nearly three-quarters of a century, perhaps longer." *Id.* at 2573.

issue, but strongly disagreed with the majority's method and holdings.<sup>182</sup> As to method, Justice Scalia disagreed that past practice should play a role in the court's decision, as "a necessary corollary of the principle that the political branches cannot by agreement alter the constitutional structure."<sup>183</sup> Justice Scalia did end up discussing historical practice at length, but only to rebuff the majority's historical discussion.<sup>184</sup> With respect to the Court's twin holdings that "Recess" comprehends intra-session recesses, and that the Clause empowers the President to fill vacancies that arise prior to a recess, Justice Scalia noted that they are "inconsistent with the Constitution's text and structure[] . . . ."<sup>185</sup>

Justice Scalia began his textual analysis of the first issue by raising a basic linguistic problem that the majority left unaddressed.<sup>186</sup> He looked at the whole Clause, which ends by providing that the recess appointees' commissions "shall expire at the End of their next Session[,]” and noted that “the Clause uses the term ‘Recess’ in contradistinction to the term ‘Session.’”<sup>187</sup> Justice Scalia then pointed out that the majority never claimed that the word “Session” in the Clause is used informally as well, and argues that “[i]t is linguistically implausible to suppose—as the majority does—that the Clause uses one of those terms (‘Recess’) informally and the other (‘Session’) formally in a single sentence, with the result that an event can occur during *both* the ‘Recess’ *and* the ‘Session.’”<sup>188</sup> The majority attempted to placate the practical worries that this would allow for recess appointees to serve for over a year (because they serve until the end of Congress’ “*next session*”),<sup>189</sup> but it did not address the logical and linguistic problem raised by Justice Scalia. Indeed, it does seem strange for one word in the Clause to be interpreted informally and the other formally.<sup>190</sup>

Justice Scalia’s linguistic point can be inferred from the plain text of the Clause itself. However, he chose to cite to No. 67 of *The Federalist* immediately after noting that the words “Recess” and “Session” are used “in contradistinction.”<sup>191</sup> Justice Scalia continued: “As Alexander Hamilton wrote: ‘The time within which the power is to operate “during the recess of

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<sup>182</sup> *Id.* at 2617 (Scalia, J., concurring) (stating, “The real tragedy of today’s decision . . . is the damage done to our separation-of-powers jurisprudence more generally.”).

<sup>183</sup> *Id.* at 2594.

<sup>184</sup> *Id.* at 2600–17.

<sup>185</sup> *Id.* at 2595–606.

<sup>186</sup> *Id.* at 2595–97.

<sup>187</sup> *Id.* at 2592–95.

<sup>188</sup> *Id.* at 2597.

<sup>189</sup> *Id.* at 2565 (majority opinion).

<sup>190</sup> If “session” were also read informally, recess appointments would only last the short duration of the intra-session recess, which would curtail the effect of the recess appointment power. Though Justice Scalia noted that reading both informally “would be more linguistically defensible than the majority’s [reading,]” he nonetheless objected to both terms being read informally because it would leave “the recess-appointment power without a textually grounded principle limiting the time of its exercise.” *Id.* at 2597 (Scalia, J., concurring).

<sup>191</sup> *Id.* at 2595.

the Senate” and the duration of the appointments “to the end of the next session” of that body, conspire to elucidate the sense of the provision.”<sup>192</sup> But it is not immediately clear that these words from *The Federalist* support Justice Scalia’s contradistinction point about “Recess” and “Session.” Does the “sense of the provision” to which Publius refers mean that “Recess” and “Session” are mutually exclusive states? It turns out that is not what Publius was referring to at all. In fact, Publius devotes the entire No. 67 to refuting a claim of the anti-Federalists that the Constitution would give the President power to fill vacancies in the Senate itself.<sup>193</sup> Publius rebuts “this instance of misrepresentation [ ] to place it in a clear and strong light, as an unequivocal proof of the unwarrantable arts which are practised [sic] to prevent a fair and impartial judgment of the real merits of the Constitution . . . .”<sup>194</sup>

Publius’s elucidation of the recess appointment power in No. 67 is therefore catered to show that it does not empower Presidents to appoint Senators. It does not elaborate on the full extent or nature of the power itself, and never addresses the issue of informal recesses. Moreover, the very sentence that Justice Scalia quoted clearly refers to the main issue actually under discussion in No. 67. The “sense of the provision” does not refer to the contradistinction between “Recess” and “Session,” but rather to the fact that the Clause does not empower the President to appoint Senators.<sup>195</sup> As Publius explains, the time and duration portions of the Clause (“*during the recess of the Senate*” and “to the end of the next session”)<sup>196</sup>

conspire to elucidate the sense of the provision which, if it had been intended to comprehend senators, would naturally have referred the temporary power of filling vacancies to the recess of the State legislatures, who are to make the permanent appointments, and not to the recess of the national Senate, who are to have no concern in those appointments; and would have extended the duration in office of the temporary senators to the next session of the legislature of the State . . . .<sup>197</sup>

It is puzzling that Justice Scalia would pluck these words out of context for the opening paragraph of his textual analysis of “Recess,” particularly when he cited another section from No. 67 to make the same point later on, but did so in a parenthetical citation rather than in the introductory sentences of his central analysis.<sup>198</sup> Perhaps he thought “conspire to elucidate the sense of the

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<sup>192</sup> *Id.* (quoting THE FEDERALIST NO. 67, *supra* note 2, at 410 (Alexander Hamilton)).

<sup>193</sup> THE FEDERALIST NO. 67, *supra* note 2, at 407 (Alexander Hamilton).

<sup>194</sup> *Id.* at 411.

<sup>195</sup> *Id.* at 410.

<sup>196</sup> *Id.* (emphasis added). Here, Publius (or Hamilton) had a slightly different wording than the Clause, which states “at the End of their next Session.” *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> NLRB v. Canning, 134 S. Ct. 2550, 2596 (2014) (Scalia, J. concurring).

provision[]” would be a stylish way to begin his textual analysis.<sup>199</sup> Whatever the reason, Justice Scalia should have gone with the less flashy quote from No. 67 that he later did use. That way, when attempting to hew closely to the plain meaning of the Constitution by calling upon the understanding of one of its Framers, he would not simultaneously veer from the context of that understanding.

Justice Scalia made the same general mistake when he used No. 67 to elucidate the words “*that may happen* during the recess . . . .”<sup>200</sup> Disagreeing with the majority that this phrase comprehends vacancies that arise prior to the relevant recess, he noted that if that were the case, the President could avoid Senate confirmation for all appointments by simply waiting to fill any vacancy until the next recess.<sup>201</sup> Justice Scalia argued that this reading “distorts [the Clause’s] constitutional role, which was meant to be subordinate.”<sup>202</sup> His source for the proposition that the Clause’s role is subordinate is once again No. 67 from *The Federalist*. Justice Scalia explained, incorporating quotes from No. 67, that “appointment with the advice and consent of the Senate was to be ‘the general mode of appointing officers of the United States’” and that “the Recess Appointments Clause was therefore understood to be ‘nothing more than a supplement’ to the ‘general method’ of advice and consent.”<sup>203</sup>

Though these words on their face support Justice Scalia’s propositions, they are once again taken from their original context. As noted above, Publius in No. 67 is simply demonstrating that the recess appointment power does not include the ability to appoint Senators. One of the reasons why anti-Federalists could make this argument at all is because unlike the general Appointments Clause, which empowers the President to appoint those officers “whose appointments are *not . . . otherwise provided* for [in the Constitution,]” the Recess Appointments Clause contains no such limitation in its own sentence.<sup>204</sup> This left some small room for those trying “to disfigure” or “to metamorphose” the Constitution to claim that the Clause empowers the President to fill *any* vacancy, including those officers whose appointment *is* provided for in the Constitution, such as Senators.<sup>205</sup> Publius, disproving the anti-Federalists, explains:

The last of these two clauses, it is equally clear, cannot be understood to comprehend the power of filling vacancies in the Senate, for the following reasons:—*First*. The relation in

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<sup>199</sup> *Id.* at 2595.

<sup>200</sup> *Id.* at 2567 (majority opinion).

<sup>201</sup> *Id.* at 2607 (Scalia, J. concurring).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> THE FEDERALIST NO. 67, *supra* note 2, at 409 (Alexander Hamilton); *see also* U.S. CONST. art. II, § 2, cl. 3.

<sup>205</sup> THE FEDERALIST NO. 67, *supra* note 2, at 408 (Alexander Hamilton).

which that clause stands to the other, which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.<sup>206</sup>

Publius' point here, therefore, is to *connect* the two Clauses—to show that the general appointment power and the recess appointment power work on the same objects, if lacking the same form. Though he does use the words “supplement” and “auxiliary,” and would likely not deny Justice Scalia's point that the recess appointment power should not be used as a matter of common course, Publius is not concerned in No. 67 with delineating the lines between the “general” and “auxiliary” methods of appointment. His goal was to unite the Clauses such that the powers they authorize are understood to contain the same objects—namely officers “whose appointments are not in the Constitution *otherwise provided for*.”<sup>207</sup>

Perhaps as striking as Justice Scalia's out-of-context quotations from No. 67 is his lack of attention to No. 76, which is the paper that elaborates on the nature of the appointment power and the Senatorial check on nominations.<sup>208</sup> Indeed the majority quoted a portion from No. 76 to note both the reason for a unitary nominator, as well the purpose for the Senate's check.<sup>209</sup> But rather than call upon *The Federalist* to discuss these underlying “originalist” purposes, Justice Scalia selectively culled language from a separate discussion in No. 67, which did not actually “elucidate the sense of the provision[.]” in the way Justice Scalia was attempting.<sup>210</sup> The majority outdrew Justice Scalia by at least citing the main points from No. 76, and likely maddened him with perhaps the quirkiest and most charming use of a *Federalist* citation in Supreme Court jurisprudence: the majority cited Publius's reference in No. 18 to “the recess of the Senate [of an ancient Achaean league]”<sup>211</sup> to show that the word “the” does not necessarily refer to “a particular thing[.]” but may refer “to a term used generically or universally[.]”<sup>212</sup> in order to demonstrate that the plain meaning of “the Recess” in the Recess Appointments Clause need not refer to a particular—and therefore the formal, annual—recess of the Senate. One might have expected Justice Scalia to produce such a careful textualist argument. But alas, he is the Justice who misappropriated an originalist source in *Canning*.

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<sup>206</sup> *Id.* at 409.

<sup>207</sup> *Id.*

<sup>208</sup> THE FEDERALIST NO. 76, *supra* note 2, at 454–57 (Alexander Hamilton).

<sup>209</sup> NLRB v. *Canning*, 134 S. Ct. 2550, 2558–59 (2014).

<sup>210</sup> *Id.* at 2596 (Scalia, J., concurring).

<sup>211</sup> *Id.* at 2561 (majority opinion).

<sup>212</sup> *Id.*

*G. Justice Scalia's Federalist on Separation-of-Powers: Form Over Function and Words Out of Context*

Taken together, the cases discussed in this Part show Justice Scalia repeatedly excerpting *The Federalist* to demand strict adherence to an ostensibly originalist understanding of particular separation of powers structures. At the same time, he seemed to overlook many other passages that undercut the notion that the original understanding of separation of powers was more concerned with the formal minutiae than the functional purpose of properly separated and fortified branches. For example, in No. 51, after the articulation of the separation of powers principle itself, Publius proclaims, "Justice is the end of government. It is the end of civil society."<sup>213</sup> In No. 40, he writes, "the means should be sacrificed to the end, rather than the end to the means."<sup>214</sup> In more words in No. 31, he explains, that "[a] government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care . . . free from every other control but a regard to the public good and to the sense of the people."<sup>215</sup> And again, in No. 45, Publius writes that "the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object."<sup>216</sup> But more concerning than Justice Scalia's overemphasis on particulars at the expense of these broader themes is his repeated mistake of taking originalist sources out of context. Though Justice Scalia gives a useful history lesson in *Freytag*, his contextual errors or omissions with respect to his *Federalist* citations in *Young*, *Morrison*, *Plaut*, and *Canning* are a useful reminder that a self-professed originalist should not and does not have a monopoly on the Framers' understanding.

### III. FEDERALISM

*A. Tyler Pipe Indus., Inc., v. Wash. State Dep't of Revenue*

In *Tyler Pipe*, the Court faced a challenge to a Washington State manufacturing tax exemption for any person subject to the state's wholesale tax on that same item.<sup>217</sup> The Court found that this tax impermissibly interfered with interstate commerce, because it burdened Washington manufacturers who sell interstate to the benefit of Washington manufacturers who sell locally.<sup>218</sup> The Court phrased its conclusion in those terms, although

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<sup>213</sup> THE FEDERALIST NO. 51, *supra* note 2, at 324 (James Madison).

<sup>214</sup> THE FEDERALIST NO. 40, *supra* note 2, at 216 (James Madison); *see also* THE FEDERALIST NO. 23, *supra* note 2, at 153 (Alexander Hamilton) ("[T]he persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained.").

<sup>215</sup> THE FEDERALIST NO. 31, *supra* note 2 (Alexander Hamilton).

<sup>216</sup> THE FEDERALIST NO. 45, *supra* note 2, at 289 (James Madison).

<sup>217</sup> *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 234 (1987).

<sup>218</sup> *Id.* at 253.

such a tax exemption also burdened out-of-state manufacturers subject to manufacturing taxes elsewhere, who are then also taxed on wholesale in Washington. Justice Scalia dissented from this aspect of the Court's holding, noting that in his view the Commerce Clause only gives power to Congress to pass regulations, and does not authorize the Supreme Court to invalidate a statute.<sup>219</sup> He noted that previous decisions striking down state tax schemes that discriminated against out-of-state citizens did so under the Privileges and Immunities Clause.<sup>220</sup>

Part of Justice Scalia's argument is that the Commerce Clause was understood at the time of the founding only to grant Congress power, not to authorize the Court to invalidate state law. His evidence included No. 45 of *The Federalist*, which says that the Commerce Clause was one "which few oppose and from which no apprehensions are entertained."<sup>221</sup> Justice Scalia inferred from this line, and a few other sources stating that the Commerce Clause was uncontroversial, that the understanding then must have excluded Supreme Court review under the Clause, because if it included it, then there would have been controversy. It is a roundabout argument, but coherent to some extent.

To be sure, Justice Scalia admitted that *The Federalist* extols "the virtues of free trade and the need for uniformity and national control of commercial regulation[]" and cited, without discussion, Nos. 7, 11, 22, 42, and 53.<sup>222</sup> He argued however, that these papers said little of substance about the Clause itself, and therefore went on to make the assumption he does based on No. 45.<sup>223</sup>

But No. 42 does refer to the Commerce Clause, and it actually seems to provide some positive support for Justice Scalia. Publius, in the middle of the paper, gets to the "third class" of federal government powers, "which provide for the harmony and proper intercourse among the States."<sup>224</sup> He continues:

Under this head might be included the particular restraints imposed on the authority of the States and certain powers of the judicial department; [but] the former are reserved for a distinct class and the latter will be particularly examined when we arrive at the structure and organization of the government. I shall confine myself to a cursory review of the remaining powers . . . to wit: to regulate commerce among

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<sup>219</sup> *Id.* at 263–64 (Scalia, J., dissenting).

<sup>220</sup> *Id.* at 265.

<sup>221</sup> *Id.* at 264.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> THE FEDERALIST NO. 42, *supra* note 2, at 267 (James Madison).

the several States . . . .<sup>225</sup>

After listing more powers such as naturalization and bankruptcy, Publius devotes the next paragraph to a discussion of the Commerce Clause, though without referring to it as such.<sup>226</sup> Since Publius explicitly reserved discussion of “particular restraints imposed on the authority of the States and certain powers of the judicial department[.]”<sup>227</sup> and then goes on to discuss the Commerce Clause, it would seem natural to conclude that Publius did not view the Commerce Clause itself as endowing judicially imposed restrictions on States, though it still seems such restrictions, according to Publius, might otherwise be viable.

While potentially missing his best originalist source in *The Federalist* No. 42, Justice Scalia simultaneously downplayed a number of passages he cited without discussion from *The Federalist* in an effort to quickly bypass their federally oriented attitudes toward regulation of commerce. One paper he did not cite, No. 23, lists “regulation of commerce” as one of the “principal purposes to be answered by union . . . .”<sup>228</sup> In No. 23, Publius argues that the government “must be empowered to pass all laws, and to make all regulations which have relation to” national defense.<sup>229</sup> In the next sentence, Publius writes that “[t]he same must be the case in respect to commerce[] . . . .”<sup>230</sup> Certainly this passage, which did not limit its language to the legislature, and similar ones throughout *The Federalist* should give one pause before grounding in *The Federalist* a limit to what the federal government can do with respect to interstate commerce.

#### B. *Printz v. United States*

*Printz* is arguably the Supreme Court opinion in which *The Federalist* plays the most prominent role.<sup>231</sup> *The Federalist* is cited by all four opinions, and for a total of over fifty citations.<sup>232</sup> Dissenting, Justice Souter went so far as to state: “In deciding these cases, which I have found closer than I had anticipated, it is *The Federalist* that finally determines my position.”<sup>233</sup>

The basic issue at stake in *Printz* was a question of federalism: could the federal government enlist state officials in the application of a federal law?<sup>234</sup> In *Printz*, the specific issue was whether the federal government could

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 267–68.

<sup>227</sup> *Id.* at 267.

<sup>228</sup> THE FEDERALIST NO. 23, *supra* note 2, at 153 (Alexander Hamilton).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 155.

<sup>231</sup> *See generally* *Printz v. United States*, 521 U.S. 898 (1997).

<sup>232</sup> Melton, Jr. & Miller, *supra* note 5, at 425–28.

<sup>233</sup> *Printz*, 521 U.S. at 971 (Souter, J., dissenting).

<sup>234</sup> *Id.* at 902 (majority opinion).

require state officials to do a background check on gun purchasers.<sup>235</sup>

Justice Scalia wrote the majority opinion striking down the provisions that required state officials to do background checks.<sup>236</sup> In doing so, Justice Scalia simply relied on a generalized “principle” of federalism: “It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.”<sup>237</sup> In applying this principle, Justice Scalia noted that “[b]ecause there is no constitutional text speaking to this precise question, the answer to the . . . challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”<sup>238</sup>

Much of the “historical understanding” portion of the opinion discussed Nos. 27, 36, and 44 of *The Federalist*. In discussing these papers, Justice Scalia was responding to arguments put forth by the government and Justice Souter in his dissent. Justice Souter thought the selections demonstrate that Hamilton (in 27 and 36) and Madison (in 44) both thought that the federal government could employ the state executive to enforce federal law.<sup>239</sup> Justice Scalia disagreed, and thought Nos. 27 and 36 were best reconciled with his view, and found No. 44 to be very strong proof that the federal government could not, according to Madison, employ the state executive.<sup>240</sup>

The debate between the two Justices over these portions was overly academic, and I will not replay the entire bout here. Overall, a careful reading shows that Justice Souter had the more reasonable case,<sup>241</sup> although the back-and-forth between the two Justices seems to have gilded the lily more than anything else. Justice Scalia revealed some weakness in a footnote, where he conceded that even if Justice Souter were right about No. 27, and hence Hamilton’s views, those views should not be relied upon because “[t]hat would be crediting the most expansive view of federal authority ever expressed, and from the pen of the most expansive expositor of federal power.”<sup>242</sup> Justice Scalia continued in his footnote that

[t]o choose Hamilton’s view . . . is to turn a blind eye to the fact that it was Madison’s--not Hamilton’s--that prevailed, not only at the Constitutional Convention and in popular sentiment, . . . but in the subsequent struggle to fix the

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 932.

<sup>238</sup> *Id.* at 905.

<sup>239</sup> *Id.* at 971–75 (Souter, J., dissenting).

<sup>240</sup> *Id.* at 911–15 (majority opinion).

<sup>241</sup> *Id.* at 973 n.2.

<sup>242</sup> *Id.* at 915 n.9.

meaning of the Constitution by early congressional practice[]

...<sup>243</sup>

It is quite striking to see Justice Scalia, a proclaimed devotee and one of the most frequent citers of *The Federalist*, disclaim Hamilton's views in these terms.

In the second portion of his opinion on constitutional structure, Justice Scalia twice cited to No. 15, including for the proposition that “[t]he Framers’ experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict.”<sup>244</sup> Justice Stevens properly rebuffed Justice Scalia’s misconstrued interpretation of No. 15:

The basic change in the character of the government that the Framers conceived was designed to enhance the power of the national government, not to provide some new, unmentioned immunity for state officers. Because indirect control over individual citizens (“the only proper objects of government”) was ineffectual under the Articles of Confederation, Alexander Hamilton explained that “we must *extend* the authority of the Union to the persons of the citizens.”<sup>245</sup>

Throughout the section on constitutional structure, Justice Scalia used small excerpts from a number of the other papers. He cited No. 39 for its reference to the States’ “residuary and inviolable sovereignty,” as evidence of the Constitution’s conferral of dual sovereignty.<sup>246</sup> He even snuck in a separation of powers point, citing No. 70 to argue that the ability to employ state executives would undercut the President’s power.<sup>247</sup>

All in all, Justice Scalia used *The Federalist* quite extensively in *Printz* to support his view that the historical understanding at the time of the founding, as well as the constitutional structure itself, called for the invalidation of the federal background check requirement. In doing so, however, Justice Scalia was challenged strongly on his interpretation of *The Federalist*, and he ultimately gave some ground by dismissing the views of the very author (Hamilton) he so frequently cites and continued to cite in the rest of his *Printz* opinion. I wonder if Justice Scalia would have disclaimed all of Publius’s *The Federalist* had Justice Stevens or Souter quoted the following passage from Madison’s No. 45:

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 919.

<sup>245</sup> *Id.* at 945 (Souter, J., dissenting) (quoting THE FEDERALIST NO. 15, *supra* note 2, at 109 (Alexander Hamilton)).

<sup>246</sup> *Id.* at 918–19 (majority opinion) (quoting THE FEDERALIST NO. 39, *supra* note 2, at 245 (James Madison)).

<sup>247</sup> *Id.* at 922–23.

[I]f, in a word, the Union be essential to the happiness of the people of America, is it not preposterous to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty?<sup>248</sup>

### C. Justice Scalia's *Federalist* on Federalism

Justice Scalia's use of *The Federalist* in federalism cases has some of the same problems as his citations to it in separation of powers cases. He excerpts helpful nuggets (e.g., the "inviolable sovereignty" of the states), while ignoring passages that cut strongly against his views (e.g., the block quote from No. 45 at the end of the previous section). He is also prone, as his error with respect to No. 15 in *Printz* demonstrates, to take sections of *The Federalist* out of context to make a point distinct from Publius's. Justice Scalia's use of *The Federalist* in these two cases demonstrates not only that originalist sources can be misused, but also that there can be rigorous disagreement over the meaning of originalist sources. And so as with the separation of powers cases, these federalism cases call into question the notion of a particular and discernable original understanding.

## IV. MISCELLANEOUS

### A. *Norman v. Reed*

In *Norman*, the Court took issue with certain requirements for establishing political parties and running new party candidates in Cook County, Illinois.<sup>249</sup> One of the central flaws was that Illinois required more signatures in order to field new candidates within Cook County itself than it required for statewide elections.<sup>250</sup> In a short and lone dissent, Justice Scalia, citing No. 10 of *The Federalist*, speculated that a potential reason for such a distinction might be that the dangers of factionalism are more acute in a

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<sup>248</sup> THE FEDERALIST NO. 45, *supra* note 2, at 288–89 (James Madison).

<sup>249</sup> *Norman v. Reed*, 502 U.S. 279, 294 (1992).

<sup>250</sup> *Id.* at 293.

smaller political body.<sup>251</sup> Justice Scalia’s justifying rationale for making it more difficult to field new-party candidates in a county than in the entire state was that

[t]here is not much chance the State as a whole will be hamstrung by a multitude of so-called “parties,” each of which represents the sectional interest of only one or a few districts; there is a real possibility that the Cook County Board will be stalemated by an equal division between “City Party” and “County Party” members.<sup>252</sup>

But while Justice Scalia was right that the dangers of factionalism increase in a smaller body, he was wrong in characterizing the problem of factionalism. That problem is not that the government “will be hamstrung” or “stalemated.”<sup>253</sup> Quite the opposite: that is the *benefit* of having more factions. No. 10 of *The Federalist* idealized stalemate as protective of minority classes:

Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.<sup>254</sup>

In short, because smaller political units—such as counties—naturally tend to have fewer factions, it is precisely in those units where great factional diversity should be facilitated, rather than in states which—because of their “[e]xtend[ed] . . . sphere” inherently “take in a greater variety of parties and interests[] . . . .”<sup>255</sup> Justice Scalia’s understanding in *Norman* had Publius’s famous No. 10 backwards.

### B. *United States v. Hatter*

*Hatter* found the Court analyzing the Compensation Clause. At issue was the constitutionality of two taxes—Medicare and Social Security—that Congress extended to federal judges (along with the rest of federal

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<sup>251</sup> *Id.* at 299–300.

<sup>252</sup> *Id.* at 300.

<sup>253</sup> *Id.*

<sup>254</sup> THE FEDERALIST NO. 10, *supra* note 2, at 83 (James Madison).

<sup>255</sup> *Id.*

employees).<sup>256</sup> Both the majority and Justice Scalia (though not Justice Thomas) agreed that Congress can levy taxes on federal judges during their tenure, so long as those taxes were general taxes levied on the public at large.<sup>257</sup> But since the judges were formerly exempt from the two taxes at issue here, the Court had to assess whether losing exemptions counted as reductions in compensation.

The majority accurately cited Nos. 78 and 79 of *The Federalist* to demonstrate that the purpose of the Compensation Clause was to provide judges with the requisite independence from Congress.<sup>258</sup> In this light, the majority found the extension of the Medicare tax constitutional because Congress extended it to all federal employees, and “[i]n practice, the likelihood that a nondiscriminatory tax represents a disguised legislative effort to influence the judicial will is virtually nonexistent. Hence the potential threats to judicial independence that underlie the Constitution’s compensation guarantee cannot justify a special judicial exemption from a commonly shared tax[] . . . .”<sup>259</sup> However, because of a particular exemption procedure for the Social Security tax, “[t]he practical upshot [was] that the law permitted nearly every current federal employee, but not federal judges, to avoid the newly imposed financial obligation.”<sup>260</sup> Because the Social Security tax was effectively extended only to federal judges, and not federal employees generally, the majority found it to violate the purpose of the Compensation Clause.<sup>261</sup>

Justice Scalia did not delve into the purpose of the Compensation Clause, and instead focused on the difference between the terms of compensation, and the value of compensation. Through a reading of two portions of No. 79, Justice Scalia deduced that Publius (or Hamilton, as the opinion noted) did not think that inflation diminishes compensation itself (i.e. its terms), though it obviously diminishes the value of the terms of compensation.<sup>262</sup> The upshot of this point is that Congress does not have to raise judges’ nominal salaries to keep pace with inflation. In line with this formal analysis of the difference between the terms and value of compensation, Justice Scalia concluded that both taxes were unconstitutional because any “tax-free status conditioned on federal employment is compensation, and its elimination a reduction.”<sup>263</sup> Whether there was specific targeting of judges was irrelevant. The only relevant fact for Justice Scalia was that the terms of compensation, not just the value of compensation, was

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<sup>256</sup> *United States v. Hatter*, 532 U.S. 557, 560–61 (2001).

<sup>257</sup> *Id.* at 569–70; *see id.* at 582 (Scalia, J., concurring in part and dissenting in part); *see also id.* at 586–87 (Thomas, J., concurring in part and dissenting in part).

<sup>258</sup> *Id.* at 567–68 (majority opinion).

<sup>259</sup> *Id.* at 571.

<sup>260</sup> *Id.* at 573.

<sup>261</sup> *Id.* at 560.

<sup>262</sup> *Id.* at 583–84 (Scalia, J., concurring in part and dissenting in part).

<sup>263</sup> *Id.* at 584.

reduced—a reduction that is *per se* unconstitutional.

In many ways, *Hatter* is predictable: Justice Breyer, writing for the Court, dove into the purpose of the Compensation Clause, while Justice Scalia abided by a stricter textualist interpretation, without consideration of the Clause's purpose. But both Justices cited to *The Federalist* for support, highlighting that the original understanding of a Clause's function, and the original definitions of a Clause's words, can yield different interpretive results.

### C. *Hamdi v. Rumsfeld*

This Article ends with a relatively unique case. In *Hamdi*, Justices Scalia and Stevens—usually sparring partners, as in *Printz*—dissented together in a decision written by Justice Scalia.<sup>264</sup> The plurality held that Congress, through the Authorization for Use of Military Force, authorized petitioner Hamdi's detention, and did not reach the government's argument that “the Executive possesses plenary authority to detain pursuant to Article II of the Constitution.”<sup>265</sup>

Justice Scalia, at the outset of his dissent, cited No. 84 twice and No. 83 as evidence of the importance of habeas corpus to the Founders.<sup>266</sup> Later in the opinion, he reflected on “the Founders' general mistrust of military power permanently at the Executive's disposal[,]” and went on to cite No. 45.<sup>267</sup> He added, without citation, that at least ten papers in *The Federalist* were devoted in part to assuaging fears about standing armies during peacetime.<sup>268</sup> He also quoted from No. 69, where Publius describes the President's military power as inferior to the British King's power, and lacking in the ability to declare war.<sup>269</sup> Justice Scalia summed up his reflections on these portions of *The Federalist*, stating: “A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions.”<sup>270</sup> And finally, in his penultimate paragraph, Justice Scalia offered a block quote from No. 8 of *The Federalist*, in which Publius forebodes how people will be willing to give up liberty for security.<sup>271</sup> Throughout the opinion, Justice Scalia argued that the Constitution, as illuminated by the Framers and particularly through *The Federalist*, has a manifest tenor that is suspicious of unchecked military power, and protective

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<sup>264</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J. dissenting).

<sup>265</sup> *Id.* at 516–17 (majority opinion).

<sup>266</sup> *Id.* at 555, 558 (Scalia, J. dissenting).

<sup>267</sup> *Id.* at 568.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 569.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 578 (quoting THE FEDERALIST NO. 8, *supra* note 2, at 67 (Alexander Hamilton)).

of the individual through habeas corpus.

Justice Scalia's arguments were fair and even noble. And yet Justice Thomas, who dissented separately on the ground that "detention falls squarely within the Federal Government's war powers, and [the Court] lack[s] the expertise and capacity to second-guess that decision[.]"<sup>272</sup> marshaled his own support from *The Federalist*. He quoted from No. 23, which provides that defense powers

ought to exist without limitation . . . [b]ecause it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.<sup>273</sup>

Justice Thomas also cited (without quoting) to No. 34, which explains that "[t]here ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity,"<sup>274</sup> and to No. 41, which concludes that "[i]t is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power . . . ."<sup>275</sup>

The question is: how to respond to these unlimited grants of power to preserve the nation? The natural response in the context of 2004 might be to question whether the United States was really at war for its self-preservation. Through that perspective, it seems questionable to apply the passages Justice Thomas cited, which emanate from the experience of a nation living in the aftermath of a more immediate and destructive war. Nonetheless, Justice Scalia's opinion does not dismiss the threat facing the United States, and seems on its terms to apply to any sort of war. So while Justice Scalia's portrait of *The Federalist's* skepticism of the military rings true with respect to recent American military excursions, it might just be that in the face of a greater, more destructive threat, Justice Thomas's portrait of *The Federalist's* military attitude would be more compelling. Once again, originalist arguments diverge.

#### D. Justice Scalia's *Federalist*: Patterns endure

Analysis of some of the remainder cases that fall outside of the separation of powers and federalism umbrellas supports the conclusions of

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<sup>272</sup> *Id.* at 579 (Thomas, J. dissenting).

<sup>273</sup> *Id.* at 580 (quoting THE FEDERALIST NO. 23, at 147 (Alexander Hamilton) (J. Cooke ed., 1961)).

<sup>274</sup> THE FEDERALIST NO. 34, *supra* note 2, at 207 (Alexander Hamilton).

<sup>275</sup> THE FEDERALIST NO. 41, *supra* note 2, at 257 (James Madison).

the previous Parts of this Article. *Norman v. Reed* once again demonstrates that even a Supreme Court Justice, and perhaps the most influential originalist in the country, can misunderstand the lessons of the Framers. *Hatter* and *Hamdi*, though free of manifest error in *Federalist* usage, demonstrate an inevitable consequence of mining originalist understanding: further disagreement. The varying opinions in *Hatter* highlight that an originalist inquiry could yield different results depending on whether one focuses on original understanding of the purpose of a particular constitutional feature, or on the original understanding of the form that feature took at the time of the founding. And *Hamdi* displays how two originalists could come to diametrically opposing views in mining the same constitutional question, and through use of the same constitutional gloss.

#### V. CONCLUSION

This Article has shown that Justice Scalia tended to marshal select passages from *The Federalist* in order to advance a rigid doctrine of separation of powers, and a view of federalism that gives a certain prominence to state sovereignty. At the same time, he neglected to mention those passages that stress the ends over the means, and the function over the form, and he downplayed the strong federal sentiment that infuses the entirety of *The Federalist*. Justice Scalia did use *The Federalist* in a variety of ways—as tools for textual analysis of the Constitution's original meaning, and as glosses on the purpose of various constitutional provisions. But other Justices have employed *The Federalist* as well, and this Article has shown that a particular original understanding of the Constitution is elusive, even through the lens of a single and most influential gloss. Justice Scalia has at times exacerbated the tension between varying interpretations of *The Federalist* by making more than the occasional blunder in his use of it. One would expect a bit better from such an admirer of Publius, or James Madison and Alexander Hamilton.